

**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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ALLEGATIONS OF CORRUPTION, MALADMINISTRATION OR MISUSE OF PUBLIC FUNDS BY SENIOR AND EXECUTIVE GOVERNMENT OFFICIALS FROM THE MBIZANA LOCAL MUNICIPALITY AND EASTERN CAPE PROVINCIAL GOVERNMENT DEPARTMENT(S). “

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF CORRUPTION,
MALADMINISTRATION OR MISUSE OF PUBLIC FUNDS BY SENIOR AND
EXECUTIVE GOVERNMENT OFFICIALS FROM THE MBIZANA LOCAL
MUNICIPALITY AND EASTERN CAPE PROVINCIAL GOVERNMENT
DEPARTMENT(S).**

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EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector 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, 1994 (Public Protector Act).
- (ii) The report communicates the findings and appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of corruption, maladministration or misuse of public funds by senior and executive government officials from the Mbizana Local Municipality (the MLM) and Eastern Cape Provincial Government Departments (ECPG).
- (iii) The complaint was lodged on 01 July 2019, at Eastern Cape Bhisho office of the Public Protector South Africa (herein referred to as PPSA) by Mr Xolile Mashukuca (Complainant), a resident of the Buffalo City Metropolitan Municipality.
- (iv) The complaint was based on a newspaper article that was published in *The Herald* newspaper, on 20 May 2019, under the heading: “*Bhisho Bosses R2 million piggy bank*”, alleging that amounts of R2 million and R1 million, were misappropriated by the Department(s) and the MLM respectively, with the assistance of Mr L E Bam (Mr Bam), a local businessman.
- (v) Based on the analysis of the allegations made and information obtained, the following issues were identified for investigation:
 - (a) Whether an amount of R 1, 100 000.00 (One million one hundred thousand rand), in respect of the memorial service of Ms Winnie Madikizela-Mandela was

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- irregularly deposited into the bank account of Mthombeni Project (Pty) Ltd by Mbizana Local Municipality and subsequently misappropriated to improperly benefit certain government officials and/or private persons and if yes, whether such amounted to improper conduct and maladministration; and
- (b) Whether an amount of R 2, 2 million (Two million, two hundred thousand rand) which originated from the ECPG was paid into the account of Mthombeni Project (Pty) Ltd by Key Spirit Trading 218 and subsequently misappropriated to improperly benefit certain government officials and/or private individuals and if the answer is yes, whether such amounted to maladministration or improper conduct.
- (vi) The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act. It included interviews with the Complainant(s), exchange of correspondence with the relevant government officials, obtaining of affidavits from various witnesses, correspondence with other organs of state, analysis of all relevant documents and information obtained as well as application of all relevant laws, policies and related prescripts.
- (vii) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- (a) **Whether an amount of R 1, 100 000.00 (One million one hundred thousand rand), in respect of the memorial service of Ms Winnie Madikizela-Mandela was irregularly deposited into the bank account of Mthombeni Project (Pty) Ltd by Mbizana Local Municipality and subsequently misappropriated to improperly benefit certain government officials and/or private persons and if yes, whether such amounted to improper conduct and maladministration**
- (aa) The allegations that an amount of R 1, 100 000.00 (One million one hundred thousand rand), in respect of the memorial service of Ms Winnie Madikizela-

Mandela was irregularly deposited into the account of Mthombeni Project (Pty) Ltd by the MLM and subsequently misappropriated to improperly benefit certain government officials and/or private persons is substantiated.

- (bb) On a conspectus of all the evidence there is, in the Public Protector's view, only one reasonable and ineluctable finding to be drawn on a balance of probability is that the MLM did not comply with the relevant legal prescripts during the procurement of the services of Mbizana Local Taxi Association and/or Koo Construction and Projects (Koo Construction).
- (cc) Evidence placed in front of the Public Protector revealed that the MLM allowed a government or state funded event namely, the Memorial Service of Ms Winnie Madikizela-Mandela to be taken over by private persons and politicians who were not in the employ of government and it was subsequently done improperly and outside any identifiable Supply Chain Management processes.
- (dd) As a result, Mbizana Local Taxi Association and/or Koo Construction and Projects rendered the transport service for the memorial service following informal negotiations between the African National Congress (ANC) leaders in Mbizana and Local Taxi Associations, improperly and outside the MLM's SCM processes, thereby also breaching the MoA between the MLM and DSRAC.
- (ee) The amount of R 1, 100 000.00 (One million one hundred thousand rand), was thereafter irregularly and improperly deposited into the account of Mthombeni Project (Pty) Ltd (Mthombeni Projects), by Mr Luvuyo Mahlaka (Mr Mahlaka): Municipal Manager of MLM, without procurement process or contractual basis and same was subsequently misappropriated to benefit Mr Oscar Mabuyane (Mr Mabuyane), Mr Babalo Madikizela (Mr Madikizela) and the ANC as shown in the evidence above.
- (ff) Mr Mabuyane personally benefitted R450, 000 (Four hundred and fifty thousand rand) from the amount of R1, 1 million which were certainly public funds that went into the Nedbank account of Allan Morran Design Architectural Services (Allan

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- Morran Design) which is a private company that carried out renovations at his private house as set out in evidence.
- (gg) Whereas Mr Mabuyane denied the knowledge of arrangements between Mr Bam and Mr Madikizela, evidence revealed that his wife, Ms Siyasanga Mabuyane (Ms Mabuyane) advised the business owner of Allan Morran Design: Mr Allan Morran (Mr Morran) through an email that the deposit of R450, 000 was to be used for renovations of their private house, when this payment was queried by Mr Morran.
- (hh) Mr Madikizela personally benefitted R350 000.00 (Three hundred and fifty thousand rand) from the amount of R1, 1 million which were certainly public funds that went into the FNB account of IPM Plant Hire CC, which is a private company owned by his wife Ms Zona Zetu Siyazithanda Madikizela (Ms Madikizela) as set out in evidence.
- (ii) The ANC benefitted R 280, 000.00 (Two hundred and eighty thousand rand) from the amount of R1, 1 million which were certainly public funds that went into its FNB fundraising account, as set out in evidence.
- (jj) The financial benefits that accrued to Mr Mabuyane, Mr Madikizela and the ANC raise a suspicion of a commission of criminal conduct in terms of the Prevention of Organised Crime Act 121 of 1998 and/or Prevention and Combatting of Corrupt Activities Act 12 of 2004, accordingly this part of the investigation has been referred to the Directorate for Priority Crimes Investigation of the South African Police Service (DPCI).
- (kk) The evidence further shows that in an effort to legitimize the whole unlawful SCM process which had already unfolded, the MLM, in particular Mr Mahlaka proceeded to concoct or fabricate letters whereby the whole process would appear to be an *agreement of cession* amongst Maikenjo Trading CC, Koo Construction and Mthombeni Projects, when in actual fact there was no such valid agreement amongst these parties.

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- (ll) Mr Mahlaka had no basis to pay Mthombeni Projects or to refund any person from the public funds since the MLM did not appoint Koo Construction or Mbizana Local Taxi Association to render the transport service for the memorial service of Ms Winnie Madikizela Mandela.
- (mm) The conduct of Mr Mahlaka as the Municipal Manager of MLM, was therefore not only to the detriment of MLM but also at variance with the standard required by section 217 and 195 of the Constitution, sections 61, 62, 171, 173 of MFMA and paragraph 53 of the MLM SCM Policy as shown by his conduct in the evidence.
- (nn) Accordingly the conduct of the Municipal Manager of the MLM, Mr Mahlaka constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (b) Whether an amount of R 2, 2 million (Two million, two hundred thousand rand) which originated from ECPG was paid into the account of Mthombeni Project (Pty) Ltd by Key Spirit Trading 218 and subsequently misappropriated to improperly benefit certain government officials and/or private individuals and if the answer is yes, whether such amounted to maladministration or improper conduct.**
- (aa) The allegation that an amount of R 2, 2 million (Two million, two hundred thousand rand) that originated from ECPG was paid into the account of Mthombeni Project (Pty) Ltd by Key Spirit Trading 218 is substantiated. However, due to the private nature of the subsequent transactions by Mthombeni Project (Pty) Ltd it was not possible to conclude within the mandate of the Public Protector, whether the money was misappropriated or whether any person improperly benefitted from it.
- (bb) The origin of the R2, 2 million paid into the account of Mthombeni Projects by Key Spirit Trading 218 CC originated from ECPG.

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- (cc) The weight of evidence placed before the Public Protector in a form of Financial Intelligence Centre (FIC) reports and bank records indicate that these were public funds which originated from Eastern Cape Department of Transport (ECDoT).
- (dd) The manner, pattern and the short succession in which this amount was subsequently disbursed raise a suspicion of a commission of criminal conduct in terms of the Prevention of Organised Crime Act 121 of 1998 and/or Prevention and Combatting of Corrupt Activities Act 12 of 2004, accordingly this part of the investigation has been referred to the Directorate for Priority Crimes Investigation (DPCI) for criminal investigation.
- (viii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:**
- (a) To the Head of the DPCI:**
- (aa) The investigation has undeniably proven that the nature of the allegations and complaints referred to above are largely of criminal nature and may not be executed fully by the Public Protector, without bringing them to the attention or notice of the relevant public authorities charged with criminal investigation and prosecution. The issues investigated and the evidence obtained are accordingly, in terms of section 6(4)(c)(ii) of the Public Protector Act, referred to the Head of DPCI/Hawks of the South African Police Service for consideration of criminal investigation, with a view to prosecution.
- (b) The Speaker of the Council of Mbizana Local Municipality (MLM) to:**
- (aa) Take urgent steps to ensure that the MLM take the appropriate action, including the institution of disciplinary proceedings in respect of the financial misconduct by the Municipal Manager: Mr Mahlaka in connection with and that of any other

official involved in the procurement of transportation services for the memorial service of the late Ms Winnie Madikizela, as contemplated by section 171(4) of the MFMA, within sixty (60) days of the issuing of this report;

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF CORRUPTION, MALADMINISTRATION OR MISUSE OF PUBLIC FUNDS BY SENIOR AND EXECUTIVE GOVERNMENT OFFICIALS FROM THE MBIZANA LOCAL MUNICIPALITY AND EASTERN CAPE PROVINCIAL GOVERNMENT DEPARTMENT(S)

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and published in terms of section 8(1) of the Public Protector Act 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 investigation and the remedial action taken:
- 1.2.1 The President of the Republic of South Africa, Mr Cyril Ramaphosa;
- 1.2.2 The Premier of the Province of the Eastern Cape, Mr Oscar Mabuyane;
- 1.2.3 The Member of the Executive Council of the Eastern Cape Provincial Government (MEC) for Public Works and Infrastructure, Mr Babalo Madikizela;
- 1.2.4 The Member of the Executive Council of the Eastern Cape Provincial Government for Transport, Safety and Liaison , Ms Weziwe Tikana-Gxotiwe;
- 1.2.5 The Member of the Executive Council of the Eastern Cape Provincial Government for Cooperative Government and Traditional Affairs (COGTA), Mr X Nqatha;

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- 1.2.6 The Mayor of Mbizana Local Municipality (MLM) (now the Winnie Madikizela-Mandela Local Municipality), Ms Daniswa Mafumbatha;
- 1.2.7 The Speaker of the Council of the MLM, Mr Simphiwe Magini;
- 1.2.8 The National Head of the Directorate of Priority Crimes Investigations (DPCI), General Godfrey Lebeya and
- 1.3 A copy of the report is also provided to Mr Xolile Mashukuca who lodged the complaint, to inform him about the outcome of the investigation.

2. THE COMPLAINT

- 2.1 The complaint was lodged on 01 July 2019, at Eastern Cape Provincial office of the Public Protector South Africa (hereafter referred to as PPSA) in Bhisho by Mr Xolile Mashukuca (Complainant), a resident of the Buffalo City Metropolitan Municipality.
- 2.2 The complaint was based on a newspaper article that was published in *The Herald* newspaper, on 20 May 2019, under the heading: “*Bhisho Bosses R2 million piggy bank*”, alleging that amounts of R2 million and R1 million, were misappropriated by Department(s) of the Eastern Cape Provincial Government and the MLM respectively, with the assistance of Mr Lonwabo Bam, a local businessman.
- 2.3 In the main, the following was alleged:**
- 2.3.1 That the current Premier of the Eastern Cape, Mr L Mabuyane (Mr Mabuyane), who at the time was the Eastern Cape MEC for Economic Development, Environmental Affairs and Tourism, the Eastern Cape MEC for Transport, Safety and Liaison, Ms W Tikana Gxotiwe (Ms Gxotiwe) and the former Eastern Cape

MEC for Human Settlements, Mr B Madikizela (Mr Madikizela) (now the MEC for Public Works), improperly benefitted from the alleged misuse of public funds.

- 2.3.2 The said newspaper article further alleged that a Mthatha businessman, Mr Lonwabo Bam (Mr Bam) made an affidavit at the Butterworth Police Station on 27 April 2019, stating that Mr Mabuyane and the MECs referred to above received hundreds of thousands of Rands from a deal that was made with Eastern Cape Provincial Government Departments, the MLM and various other service providers or private companies and individuals.
- 2.3.3 The article was further corroborated by Mr Bam's two affidavits (1st and 2nd affidavit), in which he deposed under oath, amongst other things, that he received an instruction by way of a phone call from Mr B Madikizela, a high ranking executive official in the employ of Eastern Cape Provincial Government (ECPG) to submit a fake invoice to the Municipal Manager of the MLM: Mr Luvuyo Mahlaka (Mr Mahlaka) to the amount of R 1 100 000.00 (One million and one hundred thousand rand).
- 2.3.4 According to Mr Bam's 1st affidavit, an amount of R 1, 100 000.00 (One million one hundred thousand rand), was deposited into his First National Bank (FNB) account, which is a business account for his company called Mthombeni Project (Pty) Ltd, on the 01st August 2018 from the MLM's FNB, account.
- 2.3.5 The 1st affidavit of Mr Bam also alleged that the money was paid after hours into his account by Mr Luvuyo Mahlaka, the Municipal Manager of the MLM (Mr Mahlaka) for nothing (gratuitously so) as Mr Bam had not done anything or rendered any service to the MLM, to warrant this payment.
- 2.3.6 Further in terms of Mr Bam's 2nd affidavit, on 11 August 2018, an amount of R 2, 2 million was also paid into Mr Bam's business account by Mr Masilo Phala, a Director of Key Spirit Trading 218 (Mr Phala) for nothing (gratuitously so), except only to redistribute the money to officials of ECPG.

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- 2.3.7 After the payments of the above stated money/deposits into Mr Bam's account, he was then instructed by an executive official currently in the employ of ECPG namely, MEC Babalo Madikizela (Mr Madikizela), to transfer the same money to various proxy bank accounts in order to benefit certain government officials.
- 2.3.8 A number of deposits and transactions or disbursements were subsequently made by Mr Bam towards various proxy bank accounts linked to senior and executive government officials, as instructed by Mr Madikizela.

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 powers to resolve

disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the matter of 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.¹ The Constitutional Court further held that:

“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”²

3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated amongst other things the following, when confirming the powers of the Public Protector:

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

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

3.6.3 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

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

² *Supra* at para [73].

empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

- 3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.6.6 The Public Protector’s power to take 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);
- 3.6.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));
- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.6.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).

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- 3.7 In the matter of the *President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)*, the court held as follows, when confirming the powers of the Public Protector:
- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the constitution (para 71);
- 3.7.2 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);
- 3.7.3 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 (para 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct and
 - c) To take remedial action;
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);
- 3.7.5 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 (para 105);
- 3.7.6 The fact that there are 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 (para 107 and 108); and

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- 3.7.7 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).
- 3.8 The MLM and ECDoT are organs of state and their conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector's mandate.
- 3.6 The jurisdiction of the Public Protector was not disputed by the MLM, ECDoT or ECPG in this matter.

4 THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of sections 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

- 4.2.1 The investigation was approached using an enquiry process that seeks to find out:
- 4.2.1.1 What happened?
- 4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong and what action should be taken?

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.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the organs of state and officials involved to prevent improper conduct and/or maladministration as well as prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration, where possible and appropriate.

4.3 On analysis of the complaint and the available information, the following issue was identified and investigated:

4.3.1 Whether an amount of R 1, 100 000.00 (One million one hundred thousand rand), in respect of the memorial service of Ms Winnie Madikizela-Mandela was irregularly deposited into the bank account of Mthombeni Project (Pty) Ltd by Mbizana Local Municipality and subsequently misappropriated to improperly benefit certain government officials and/or private persons and if yes, whether such amounted to improper conduct and maladministration.

4.3.2 Whether an amount of R 2, 2 million (Two million, two hundred thousand rand) which originated from ECPG was paid into the account of Mthombeni Project

(Pty) Ltd by Key Spirit Trading 218 CC and subsequently misappropriated to improperly benefit certain government officials and/or private individuals and if the answer is yes, whether such amounted to maladministration or improper conduct.

4.4 The Key Sources of information

4.4.1 E-mail correspondence sent and received.

- 4.4.1.1 Copy of the original complaint with attachments by Mr X Mashukuca (the Complainant) dated 01 July 2019;
- 4.4.1.2 E-mail sent by the PPSA to the Complainant dated 19 July 2019;
- 4.4.1.3 E-mail received by PPSA from the Complainant dated 22 July 2019;
- 4.4.1.4 E-mail sent by the PPSA to Ms I Mpolweni, the Head of Department of Transport, dated 13 August 2019;
- 4.4.1.5 E-mail sent by the PPSA to the Complainant, dated 13 August 2019;
- 4.4.1.6 An acknowledgement e-mail received from Ms Angie Majongile, the Executive Assistant to Head of Department dated 13 August 2019;
- 4.4.1.7 E-mail sent by the PPSA to Mr Luvuyo Mahlaka, the Municipal Manager of the MLM dated 16 August 2019;
- 4.4.1.8 An acknowledgement e-mail received from Mr L Mahlaka dated 16 August 2019;
- 4.4.1.9 E-mail received by PPSA from Mr Sakhumzi Tshaka, the Manager: Security Management, Transport dated 05 September 2019;
- 4.4.1.10 E-mail sent by the PPSA to Mr Sakhumzi Tshaka dated 05 September 2019;
- 4.4.1.11 E-mail sent by the PPSA to the Complainant dated 13 September 2019;
- 4.4.1.12 E-mail received by PPSA from the Complainant dated 13 September 2019;
- 4.4.1.13 E-mail received by PPSA from Mr Mahlaka dated 21 August 2019 and 10 September 2019, respectively;
- 4.4.1.14 E-mail received by PPSA from the Complainant dated 17 September 2019;
- 4.4.1.15 E-mail sent by PPSA to Mr Lonwabo Bam dated 17 September 2019;
- 4.4.1.16 E-mail received by PPSA from Mr L Bam dated 17 September 2019;
- 4.4.1.17 E-mail sent by PPSA dated 19 November 2019;
- 4.4.1.18 E-mail received by PPSA from the Complainant dated 19 December 2019;

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- 4.4.1.19 E-mail sent by PPSA to the Complainant dated 19 December 2019;
 - 4.4.1.20 E-mail received by PPSA from Ms Weziwe Tikana, the Member of the Executive Council (MEC), Transport, Safety and Liaison dated 20 December 2019;
 - 4.4.1.21 E-mail received by PPSA from Mr Babalo Madikizela, member of the Executive Council (MEC), for Public Works dated 20 December 2019;
 - 4.4.1.22 E-mail received by PPSA from the Complainant dated 20 January 2020;
 - 4.4.1.23 E-mail sent by PPSA to the Complainant dated 20 January 2020;
 - 4.4.1.24 E-mail received by PPSA from Mr L Bam dated 03 February 2020;
 - 4.4.1.25 E-mail received by PPSA from Brigadier Nico Gerber, the Provincial Commander, Serious Corruption Investigations, Directorate for Priority Crime Investigation (DPCI) dated 04 February 2020;
 - 4.4.1.26 E-mail sent by PPSA to Brigadier Gerber dated 05 February 2020;
 - 4.4.1.27 E-mail received by PPSA from Mr L Mahlaka dated 07 February 2020;
 - 4.4.1.28 E-mail sent by PPSA to Mr L Mahlaka dated 11 February 2020;
 - 4.4.1.29 E-mail received by PPSA from the Complainant dated 12 February 2020;
 - 4.4.1.30 E-mail sent by PPSA to Mr L Mahlaka dated 13 March 2020;
 - 4.4.1.31 E-mail received by PPSA from Mr L Bam dated 16 March 2020;
 - 4.4.1.32 E-mail sent by PPSA to Mr L Bam dated 16 March 2020;
 - 4.4.1.33 E-mail sent by PPSA to Mr Masilo Phala, Director for Key Spirit Trading 281 cc dated 17 March 2020;
 - 4.4.1.34 E-mail sent by PPSA to Mr Ntsikelelo Mzamane (Mr Mzamane), the Director for Songo Consulting dated 17 March 2020;
 - 4.4.1.35 E-mail sent by PPSA to Mr Khwalo, the Director for Red Step Investment 29 cc dated 17 March 2020;
 - 4.4.1.36 E-mail received by PPSA from Mr Ashley, the FNB Legal Advisor dated 17 March 2020;
 - 4.4.1.37 E-mail received by PPSA from Mr L Mahlaka dated 17 March 2020;
 - 4.4.1.38 E-mail sent by PPSA to Mr L Mahlaka dated 17 March 2020;
 - 4.4.1.39 E-mail received by PPSA from Mr L Mahlaka dated 26 March 2020;
 - 4.4.1.40 E-mail sent by PPSA to Mr L.Mahlaka dated 26 March 2020;

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- 4.4.1.41 E-mail received by PPSA from Ms Tandile Mtiki, the Private Secretary to the Premier of Eastern Cape Province dated 26 March 2020;
 - 4.4.1.42 E-mail sent by PPSA to Mr B Mhlaba, the Chief of Staff to Premier, dated 07 May 2020;
 - 4.4.1.43 E-mail sent by PPSA to Mr Mzamane dated 07 July 2020;
 - 4.4.1.44 E-mail sent by PPSA to Mr Khwalo dated 07 July 2020;
 - 4.4.1.45 E-mail sent by PPSA to Mr B Mhlaba dated 07 July 2020;
 - 4.4.1.46 E-mail sent by PPSA to Mr D Chuene, Attorneys representing Mr M Phala dated 07 July 2020;
 - 4.4.1.47 E-mail sent by PPSA to the Financial Intelligence Centre (FIC) dated 16 July 2020;
 - 4.4.1.48 An acknowledgement e-mail received by PPSA from the FIC dated 16 July 2020;
 - 4.4.1.49 E-mail received by PPSA from Mr B.Mhlaba dated 17 July 2020.
 - 4.4.1.50 E-mail received by PPSA from Ms Anna Nkosi, FIC dated 20 July 2020;
 - 4.4.1.51 E-mail received by PPSA from Mr B Mhlaba, with no attachments dated 27 July 2020;
 - 4.4.1.52 E-mail sent by PPSA to Mr B Mhlaba dated 27 July 2020;
 - 4.4.1.53 E-mail sent by PPSA to Mr B Mhlaba dated 31 July 2020;
 - 4.4.1.54 E-mail received by PPSA from Mr B Mhlaba dated 31 July 2020;
 - 4.4.1.55 E-mail received by PPSA from Mr D Chuene dated 12 August 2020;
 - 4.4.1.56 E-mail sent by PPSA to Mr D Chuene dated 12 August 2020;
 - 4.4.1.57 E-mail sent by PPSA to Mr Allan Morran, the Director for Cordinia Valley (Pty) Ltd dated 26 August 2020;
 - 4.4.1.58 E-mail sent by PPSA to Ms Zona Zethu Siyazithanda Madikizela dated 26 August 2020;
 - 4.4.1.59 E-mail sent by PPSA to Mr Mzamane dated 26 August 2020;
 - 4.4.1.60 E-mail sent by PPSA to Mr Ngam dated 26 August 2020;
 - 4.4.1.61 E-mail sent by PPSA to Mr Mandla Sibongile dated 26 August 2020;
 - 4.4.1.62 E-mail received by PPSA from Mr L Bam dated 26 August 2020;
 - 4.4.1.63 E-mail sent by PPSA to Mr Zolile Mngqongwa, the Director for Koo-Construction dated 04 September 2020;

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- 4.4.1.64 E-mail sent by PPSA to Mr TL Leohla, the Director for Maikenjo Trading cc dated 04 September 2020;
 - 4.4.1.65 E-mail received by PPSA from Mr Allan Morran dated 04 September 2020;
 - 4.4.1.66 E-mail sent by PPSA to Mr Dyala, the General Manager, African National Congress (ANC) dated 04 September 2020;
 - 4.4.1.67 E-mail sent by PPSA to Mr Morran dated 10 September 2020;
 - 4.4.1.68 E-mail received by PPSA from Mr Morran dated 14 September 2020;
 - 4.4.1.69 E-mail sent by PPSA to Mr L Mahlaka dated 25 September 2020;
 - 4.4.1.70 E-mail received by PPSA from Mr L Mahlaka dated 25 September 2020;
 - 4.4.1.71 E-mail sent by PPSA to Mr M Mafani, the Head of Department, Transport dated 25 September 2020;
 - 4.4.1.72 E-mail received by PPSA from Mr Elias Makhanya (Mr Makhanya) dated 30 September 2020;
 - 4.4.1.73 E-mail received by PPSA from Mr Makhanya dated 02 October 2020;
 - 4.4.1.74 E-mail received by PPSA from Mr Makhanya dated 02 October 2020;
 - 4.4.1.75 E-mail sent by PPSA to Ms Tandile Mtiki, Premiers office dated 08 January 2021;
 - 4.4.1.76 E-mail received by PPSA from Ms T Mtiki dated 09 January 2021;
 - 4.4.1.77 E-mail sent by PPSA to Mr B Madikizela dated 09 January 2021;
 - 4.4.1.78 E-mail received by PPSA from Mr L Mahlaka dated 12 January 2021;
 - 4.4.1.79 E-mail sent by PPSA to Mr Madikizela dated 09 January 2021;
 - 4.4.1.80 E-mail sent by PPSA to Mr Jack McKay, the Acting Director General of the Department of Home Affairs dated 15 January 2021;
 - 4.4.1.81 E-mail received by PPSA from Ms Ntebeng Mokoditsoa, Home Affairs dated 19 January 2021;
 - 4.4.1.82 E-mail received by PPSA from Ms Mokoditsoa dated 20 January 2021;
 - 4.4.1.83 E-mail received by PPSA from Ms Nandipha Kili, the Manager Office of the Head of Department Eastern Cape Department of Sports Recreation Arts and Culture (DSRAC) dated 18 February 2021;
 - 4.4.1.84 E-mail sent by PPSA to Mr L Mahlaka dated 18 February 2021;
 - 4.4.1.85 E-mail received by PPSA from Ms Xoliswa Tshetsha, the Assistant Manager, DSRAC dated 18 February 2021;

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- 4.4.1.86 E-mail received by PPSA from Ms Noncedo Livi, MLM dated 19 February 2021;
 - 4.4.1.87 E-mail received by PPSA from Ms T Cekeshe, Department of Public Works dated 23 February 2021;
 - 4.4.1.88 E-mail received by PPSA from Mr L Bam dated 27 February 2021;
 - 4.4.1.89 E-mail sent by PPSA to Ms Tsakani Maluleke, Auditor General of South Africa dated 04 March 2021;
 - 4.4.1.90 Acknowledgement received by PPSA from Ms Tiny, AGSA dated 05 March 2021;
 - 4.4.1.91 E-mail sent by PPSA to Mr Mafani dated 05 March 2021;
 - 4.4.1.92 Acknowledgement e-mail received by PPSA from Ms Majongile, the Executive Assistant, of the HoD Transport dated 08 March 2021;
 - 4.4.1.93 E-mail received by PPSA from Ms T Cekeshe, the Personal Assistant, of the MEC for Public Works dated 09 March 2021;
 - 4.4.1.94 E-mail received by PPSA from Ms Kili, Office Manager, DSRAC dated 10 March 2021;
 - 4.4.1.95 E-mail received by PPSA from Ms Cekeshe, Public Works dated 10 March 2021;
 - 4.4.1.96 E-mail sent by PPSA to Ms Mpofo, HOD, DSRAC dated 11 March 2021
 - 4.4.1.97 E-mail received by PPSA from Ms Tiny, AGSA dated 15 March 2021;
 - 4.4.1.98 E-mail received by PPSA from Ms Tiny, AGSA dated 15 March 2021;
 - 4.4.1.99 E-mail received by PPSA from Ms Kili, DSRAC dated 19 March 2021;
 - 4.4.1.100 E-mail sent by PPSA to Mr Matutu, former Head of Department DSRAC dated 24 March 2021;
 - 4.4.1.101 E-mail received by PPSA from Mr Matutu dated 26 March 2021;
 - 4.4.1.102 E-mail received by PPSA from Mr Makhanya, dated 19 April 2021;
 - 4.4.1.103 E-mail sent by PPSA to Mr Rataza, Director legal Service, Transport dated 04 May 2021;
 - 4.4.1.104 E-mail received by PPSA from Mr MC Mafani, HOD Transport dated 07 May 2021;
 - 4.4.1.105 E-mail received by PPSA from Mr Rataza, Transport dated 11 May 2021;

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- 4.4.1.106 E-mail sent by PPSA to Mr Danton Webber, Branch Manager Bell Equipment Company dated 20 May 2021;
- 4.4.1.107 E-mail received by PPSA from Mr Webber dated 20 May 2021;
- 4.4.1.108 Acknowledgement received by PPSA from Mr Bruce Ndlela dated 20 May 2021;
- 4.4.1.109 E-mail received by PPSA from Mr Wim Steyn, from ENSafrica dated 26 May 2021;
- 4.4.1.110 E-mail sent by PPSA to Mr Steyn dated 26 May 2021;
- 4.4.1.111 E-mail received by PPSA from Ms Steyn dated 26 May 2021;
- 4.4.1.112 E-mail received by PPSA from Mr L Bam dated 26 May 2021;
- 4.4.1.113 E-mail received by PPSA from Mr Steyn dated 26 May 2021;
- 4.4.1.114 E-mail received by PPSA from Mr L Bam dated 28 May 2021;
- 4.4.1.115 E-mail received by PPSA from Mr L Bam dated 29 May 2021;
- 4.4.1.116 E-mail received by PPSA from Mr Steyn dated 11 June 2021;
- 4.4.1.117 E-mail sent by PPSA to Mr Steyn dated 11 June 2021;
- 4.4.1.118 E-mail or acknowledgement received by PPSA from Ms Kili dated 17 June 2021;
- 4.4.1.119 E-mail or referral sent by PPSA to Lt General G Lebeya, the National Head of DPCI dated 16 June 2021;
- 4.4.1.120 E-mail sent by PPSA to Mr X Mashukuca dated 18 June 2021;
- 4.4.1.121 E-mail received by PPSA from Mr X Mashukuca dated 18 June 2021;
- 4.4.1.122 E-mail received by PPSA from Mr Mongezi Dyala dated 21 June 2021;
- 4.4.1.123 E-mail received by PPSA from Mr Godfrey Howes, Persal data dated 24 June 2021.
- 4.4.1.124 E-mail received by PPSA from Mr N Sakhele, attorneys representing Mr Mabuyane dated 24 June 2021;
- 4.4.1.125 E-mail sent by PPSA to Mr Godfrey Howes: ECPT dated 24 June 2021;
- 4.4.1.126 E-mail sent by PPSA to Mr Sakhele, dated 24 June 2021;
- 4.4.1.127 E-mail sent by PPSA to Mr Morran dated 28 June 2021;
- 4.4.1.128 E-mail received by PPSA from Mr Godfrey Howes dated 28 June 2021;
- 4.4.1.129 E-mail received by PPSA from Mr Morran dated 29 June 2021;
- 4.4.1.130 E-mail received by PPSA from FIC dated 29 June 2021;

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- 4.4.1.131 E-mail received by PPSA from Mr Rataza, Transport dated 01 July 2021;
 - 4.4.1.132 E-mail sent by PPSA to Mr Rataza dated 01 July 2021;
 - 4.4.1.133 E-mail sent by PPSA to Mr M Mugwambane, FIC dated 03 July 2021;
 - 4.4.1.134 E-mail sent by PPSA to FIC dated 08 July 2021;
 - 4.4.1.135 E-mail sent by PPSA to Ms Thembisa Cekeshe, Public Works dated 09 July 2021;
 - 4.4.1.136 E-mail sent by PPSA to Mr Mugwambane FIC dated 09 July 2021;

4.4.2 **Documents, subpoenas, letters and bank statements sent and received**

- 4.4.2.1 Subpoena sent by PPSA to Mr L Bam dated 03 February 2020;
- 4.4.2.2 Two affidavits received by PPSA from Mr L Bam dated 06 June 2019 and 03 July 2019 respectively;
- 4.4.2.3 A letter, hand-delivered by the PPSA to Mr Oscar Mabuyane, Premier of the Eastern Cape Province dated 16 March 2020;
- 4.4.2.4 A letter hand-delivered by the PPSA to Mr Baphelele Mhlaba, Chief of Staff, Premiers Office, dated 16 March 2020;
- 4.4.2.5 Subpoena sent by PPSA to Mr Wilson Ashley, FNB Legal Advisor dated 17 March 2020;
- 4.4.2.6 Subpoena sent by PPSA to Mr Mpho Sadiki, Nedbank Legal Advisor dated 17 March 2020;
- 4.4.2.7 Copies of CIPC report and bank statements received by PPSA for Red Step Investment CC dated 26 March 2020;
- 4.4.2.8 Copies of CIPC report and bank statements received by PPSA for Mandla Limitless Trading dated 26 March 2020;

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- 4.4.2.9 Copies of CIPC report and bank statements received by PPSA for Cuntu Business Advisory dated 26 March 2020;
- 4.4.2.10 Copies of CIPC report and bank statements received by PPSA for Ms T.P.Madikizela dated 26 March 2020;
- 4.4.2.11 Copies of CIPC report and bank statements received by PPSA for IPM Plant Hire dated 26 March 2020;
- 4.4.2.12 Copies of CIPC report and bank statements received by PPSA for Songo Aluminum (Pty) Ltd dated 26 March 2020;
- 4.4.2.13 A copy of an affidavit received by PPSA from FNB dated 26 March 2020.
- 4.4.2.14 A letter hand-delivered by PPSA to Mr B Madikizela dated 17 February 2021;
- 4.4.2.15 A letter hand-delivered by the PPSA to Ms Sibongile Mpofo, Head of Department, Eastern Cape Department of Sports, Recreation, Arts and Culture dated 18 February 2021;
- 4.4.2.16 A copy of an affidavit received by PPSA from Mr Z Mngqongwa, Director Koo Construction and Projects dated 24 February 2021;
- 4.4.2.17 Copy of an affidavit received by PPSA from Mr Henry Mluleki Cwele, Taxi Owner dated 24 February 2021;
- 4.4.2.18 Copy of an affidavit received by PPSA from Mr Tefelo Lawrence Leohla, Director for Maikenjo Trading cc dated 25 February 2021;
- 4.4.3 **Meetings/Interviews**
- 4.4.3.1 Meeting with Mr L Bam (recorded oral submission) which took place 07 June 2020;
- 4.4.3.2 Meeting with Mr L Mahlaka, the Municipal Manager of the MLM dated 25 February 2021;

4.4.4 **Legislation and other legal prescripts**

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

4.4.4.2 The Public Protector Act, 23 of 1994;

4.4.4.3 The Municipal Finance Management Act 56 of 2003;

4.4.4.4 The Public Finance Management Act 1 of 1999 (PFMA)

4.4.4.5 Treasury Regulations issued under the PFMA, March 2005;

4.4.4.6 The Supply Chain Management (SCM) Policy of the MLM;

4.4.4.7 Prevention of Organised Crime Act 121 of 1998;

4.4.4.8 Prevention and Combating of Corrupt Activities Act 12 of 2004;

4.4.5 **Case law considered**

4.4.5.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);*

4.4.5.2 *President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);*

4.4.5.3 *Eyssen v S (746/2007) [2008] ZA SCA 97;*

4.4.5.4 *Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A);*

4.4.5.5 *Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A);*

4.4.5.6 *Eke v Parsons [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC);*

4.4.5.7 *Glenister v President of the Republic of South Africa [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC);*

4.4.5.8 *Botha v Fick 1995 (2) SA 750;*

4.4.6 **Books and Articles consulted**

4.4.6.1 Van der Merwe SWJ and *et al Contract General Principles Article*, Eighth edition, Juta 2002 (Published by Nicolene Schoeman – Schoeman Attorneys 2012);

4.4.6.2 Scott S *The Law of Cession* (Juta & Co, Ltd 1980);

4.4.6.3 Williams HE *Investigating White Collar Crimes* by Charles C Thomas 1997;

4.4.6.4 Oriol Amat *Detecting Accounting Fraud Before It's Too Late* (John Wiley & Sons Incorporated 2019);

4.4.6.5 Burden K and *etal Cyber Crime- A New Breed of Criminal Computer Law and Security Report* (Vol 19 no3 2003);

4.4.6.6 United Nations Convention Against Corruption (General Assembly resolution 58/4);

4.4.6.7 Williams R *Explaining Corruption* (Edward Elgar Publishing Limited 2000);

4.4.6.8 Snyman CR *Criminal Law* (LexisNexis SA 2008);

4.4.6.9 *Strategy Document to Improve the Quality of Information on PERSAL*, 2010;

4.4.7 **Websites visited**

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- 4.4.7.1 <https://www.gov.za/FreedomDay2020> accessed on 25 June 2021;
- 4.4.7.2 <https://www.lawinsider.com/dictionary/public-money> accessed on 02 July 2021;
- 4.4.8 **Notices issued in terms of section 7(9) of the Public Protector Act, 23 of 1994**
- 4.4.8.1 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Mr L Bam on 16 June 2021. He responded on 18 June 2021;
- 4.4.8.2 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Ms Sibongile Mpofo, Head of Department, and DSRAC on 16 June 2021. She responded on 02 July 2021;
- 4.4.8.3 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Ms Weziwe Tikana-Gxotiwe, MEC for Transport, Safety and Liaison on 16 June 2021. She responded on 12 July 2021;
- 4.4.8.4 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Mr Babalo Madikizela, MEC for the Department of Public Works on 16 June 2021. He responded on 13 July 2021;
- 4.4.8.5 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Mr Lubabalo Oscar Mabuyane, the Premier of Eastern Cape province on 17 June 2021. He responded on 23 June 2021;
- 4.4.8.6 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Mr Luvuyo Mahlaka, Municipal Manager, Mbizana Local Municipality dated 16 June 2021. He responded as per letter dated 22 July 2021;

- 4.4.8.7 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Mr Baphelele Mhlaba, the Chief of Staff, Premiers Office dated 16 June 2021. He did not respond;
- 4.4.8.8 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act, 1994 to Mr Dyala, General Manager ANC Eastern Cape on 16 June 2021. He did not respond;
- 4.4.8.9 A notice and a referral was issued by the Public Protector in terms of section 6(4)(c)(ii) the Public Protector Act, 1994 to Lt General G Lebeya, the National Head DPCI dated 16 June 2021. He responded on 22 June and 02 July 2021 respectively.

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

- 5.1 Regarding whether an amount of R 1, 100 000.00 (One million one hundred thousand rand), in respect of the memorial service of Ms Winnie Madikizela-Mandela was irregularly deposited into the bank account of Mthombeni Project (Pty) Ltd by Mbizana Local Municipality and subsequently misappropriated to improperly benefit certain government officials and/or private persons and if yes, whether such amounted to improper conduct and maladministration**

Common cause or undisputed facts

- 5.1.1 Mthombeni Projects (Pty) Ltd (Mthombeni Projects) is a private company registered with Companies and Intellectual Property Commission of the Republic of South Africa (CIPC) on 18 January 2018, with registration number 2018/024301/07. It is also registered on the National Treasury Central Supplier Database (CSD).

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- 5.1.2 The only current active Director of Mthombeni Projects is Mr Edgar Lonwabo Bam (Mr Bam) and it is rendering services of building and civil construction, tendering for government departments and municipalities.³
- 5.1.3 Mr Bam deposed two sets of affidavits in connection with this matter, namely in respect of R1, 1 million paid for the memorial service of Ms Winnie Madikizela-Mandela and secondly, in respect of the payment of R 2, 2 million.⁴
- 5.1.4 The MLM is a duly constituted municipality in terms of the Local Government: Municipal Structures Act⁵, as amended (Municipal Structures Act).
- 5.1.5 On 02 April 2018, the struggle stalwart in the fight against apartheid and a leader for liberation of South Africa, Ms Winnie Madikizela- Mandela (Ms Madikizela-Mandela), passed away. The ECPG, under the leadership of former Premier P Masualle, authorised a provincial memorial service in honour of the late Ms Madikizela-Mandela to be held in Mbizana, on 10 April 2018.
- 5.1.6 The MLM and the Eastern Cape Department of Sports Recreation Arts and Culture (DSRAC)⁶ entered into a Memorandum of Agreement (MoA)⁷ with a view to collaborate and coordinate efforts geared at the successful hosting of the memorial service of Ms Madikizela-Mandela in the area of the MLM. In terms of the MoA, the DSRAC and the MLM resolved to work together as partners to host the memorial service.
- 5.1.7 **The undertakings, duties, obligations and responsibilities of the DSRAC in terms of the MoA were:**

³ Mr Bam's 1st affidavit at paragraph 1 and 2.

⁴ For ease of reference these affidavits are referred to as 1st and/or 2nd affidavit in this report.

⁵ Act 117 of 1998.

⁶ DSRAC is provincial department established in terms of schedule 2 and 3 to the Public Service Act 103 of 1994.

⁷ Commencement date being 06 April 2018, notwithstanding the date of signature of the parties.

8.1.1 *“To provide the Municipality with the funding in the amount of R1 100 000.00 (One Million One Hundred Rand Only) for transportation of public to memorial service;*

8.1.2 *To provide the Municipality with the details of memorial service and any relevant information for the execution of its duties;*

8.2 *To provide the Municipality with the details of its personnel to serve in the project steering committee”.*

5.1.8 **The undertakings, duties, obligations and responsibilities of the MLM in terms of the MoA were:**

9.1.1 *To comply with the terms and conditions as stipulated in this Agreement;*

9.1.2 *be responsible for the procurement of transport service providers to transport the public to the memorial service of the late Winnie Madikizela Mandela;(own emphasis)*

9.1.3 *the payment of the appointed service providers for services rendered on the day of the memorial service upon documentary proof of service delivery;*

9.1.4 *guarantee the presence of senior management in charge of the project in the field of work throughout the duration of the project that are suitable and capable to complete the project;*

9.1.5 *indemnify the Department against claim by third parties arising out of the execution of the obligations of this agreement;*

9.1.6 *keep record of all funding and payment details effected arising out of the execution of the obligations of this agreement;*

9.1.7 *allow Department to inspect the books of account in relations to the funds for the project;*

9.1.8 *Inform the Department in writing of any challenges that will warrant deviation from approved plans.*

9.2 *The Municipality shall:*

9.2.1 *provide the Department with such financial reporting information required by it to enable it to comply with the statutory and ancillary reporting obligations applicable to it, and to enable it to properly account for payment of any amount;*

9.2.2 *comply with any reasonable written requests issued by the head of Department;*

9.2.3 *immediately notify the Department in writing of any failure on its part to achieve any of its obligations set out in this agreement; and*

9.2.4 *Ensure that:-*

9.2.4.1 *In its execution of this agreement and in the performance of its duties in terms of this agreement, the Municipality does not cause a breach of any other agreement to which it is a party; and*

9.2.4.2 *Any other agreement that the Municipality may enter into with such other parties as may be necessary to fulfil its obligations to the Department in terms of this Agreement, shall not in any way be in conflict or cause a conflict with the provisions of this Agreement”.*

5.1.9 The MoA was signed on 15 May 2018, which was a period exceeding a month after the memorial service had actually taken place on 10 April 2018.⁸ The transfer of money by DSRAC namely, R 1 100 000.00 (One million one hundred thousand rand only) for the transportation of members of the community to the memorial service venue was made to MLM on the 23 May 2018.⁹

Issues in Dispute

5.1.10 Mr Bam submitted in his 1st affidavit dated 06 June 2019 which he submitted to the Public Protector, that on 24 July 2018 at about 12:00 midday, he received an instruction from his friend, Mr Madikizela, who was the Provincial Treasurer of the African National Congress (ANC), Eastern Cape Division at the time, that Mr Bam should submit an invoice to the MLM to the amount of R 1, 100 000.00 (One Million One Hundred thousand rand).¹⁰

5.1.11 According to Mr Bam, Mr Madikizela further informed him that he must contact Mr Mongezi Dyala (Mr Dyala), who is the Office Manager at Calata House, which is the ANC provincial office in the Eastern Cape. Mr Bam further alleged that he did contact Mr Dyala who drafted the invoice and gave it to Mr Bam to only fill in the particulars of his company, Mthombeni Projects. The invoice was then emailed by Mr Bam to Mr Mahlaka, the Municipal Manager of the MLM.¹¹

5.1.12 After filling in his company particulars on the draft invoice, Mr Bam sent the invoice to Mr Mahlaka's email, at LMahlaka@mbizana.org.za. On the following day, Mr Dyala phoned Mr Bam and informed him that Mr Mahlaka did not receive the email and that Mr Bam should enquire from Mr Mahlaka if the email address was correct. Mr Mahlaka then gave Mr Bam the following email address:

⁸ As indicated in the letter dated 08 March 2021 from HoD for DSRAC: Ms Mpofu.

⁹ As per Tax Invoice furnished to PPSA by HoD for DSRAC: Ms Mpofu as part of transaction documents attached in her letter dated 08 March 2021.

¹⁰ Mr Bam's 1st affidavit at paragraph 3.

¹¹ Mr Bam's 1st affidavit at paragraph 3 and 4.

livin@mbizana.gov.za Mr Bam then sent the said invoice to this email address and Mr Mahlaka confirmed receipt of the email with a response by stating: “sure”.¹²

5.1.13 Mr Dyala was engaged by the PPSA instigation team to reply to his alleged involvement in the alleged misappropriation of public funds and/or fraudulent invoice submitted to the MLM as per letter, dated 19 April 2021. Despite an undertaking to reply, Mr Dyala did not do so.

5.1.14 Mr Bam furnished the PPSA with a copy of the invoice, dated 24 July 2018 from Mthombeni Projects, which he sent to the MLM with a total value of R 1, 100 000.00. The said invoice, depicted the following quantity and description of goods:

MTHOMBENI PROJECTS

To: The Manager

Date: 2018/07/24

Name: Mbizana Local Municipality

Address: 51 Main Street

City: Bizana: 4800

Phone: 039 251 0230

Qty	Description	Unit Price
4	TLB	R340 000.00
1	Watercart	R243 000.00
2	Vibrator Roller	R172 000.00
2	Excavator	R 345 000.00
	Sub Total	R 1 100 000.00

¹² Mr Bam’s 1st affidavit at paragraph 4 and 5.

- 5.1.15 According to Mr Bam, he was told by Mr Mahlaka on 25 July 2018 over the phone to redraft the above invoice to indicate that he rendered transport services to several wards of Mbizana. Mr Mahlaka allegedly told Mr Bam that the TLB, Watercart, Vibrator Roller and Excavator hire as shown on the above invoice would be suspicious since that was not related to transportation or ferrying of passengers to a memorial service.
- 5.1.16 Mr Bam then redrafted the invoice to the MLM as advised by Mr Mahlaka, which he then re-sent to Mr Mahlaka, indicating transportation or ferrying of passenger services with the details of Maikenjo Trading CC. Mr Bam had to insert the banking details of his company, Mthombeni Projects on the invoice.¹³
- 5.1.17 Mr Bam further stated that on 01 August 2018, an amount of R 1 100 000.00 was paid into his First National Bank (FNB) account.¹⁴ The amount was paid after hours at about 19:45 and he further received a message from Mr Mahlaka informing him that payment had been made and Mr Bam confirmed receipt. Mr Bam indicated that he was not entitled to this payment as his company had never done any job or work for the MLM.¹⁵
- 5.1.18 It was further indicated in Mr Bam's 1st affidavit that on 01 August 2018, after the payment was made into his FNB bank account, Mr Madikizela called and instructed him to deposit R450,000.00 (Four hundred and fifty thousand rand) into the Nedbank account of *Allan Morran Design*. Mr Bam then asked Mr Madikizela what should be the reference and Mr Madikizela replied that it should be "*Mr Mabuyane*".¹⁶

¹³ As per Audio Recording of an interview held by the Public Protector with Mr Bam on Sunday 07 June 2020 at Minute 25:00 to 27:00 of the Audio record. Further reference is made to the letter of Mr Bam to the Public Protector dated 26 February 2021.

¹⁴ The FNB account number was furnished to the Public Protector and it is withheld for security reasons.

¹⁵ Mr Bam's 1st affidavit at paragraph 7.

¹⁶ Mr Bam's 1st affidavit at paragraph 8.

- 5.1.19 Mr Bam then made the above payment as instructed by Mr Madikizela. Mr Bam further indicated that Mr Madikizela informed him that the deposit of R450 000.00 was to assist Mr Oscar Mabuyane, who is the current Premier of Eastern Cape, with his house since he needed financial assistance.¹⁷
- 5.1.20 On the very same day of 01 August 2018, Mr Madikizela further instructed Mr Bam to deposit a sum of R350 000.00 (Three hundred and fifty thousand rand) into the FNB account of IPM Plant Hire. Mr Bam deposited the said amount into two payments, one was made the same day in an amount of R250 000.00 and R 100 000.00 (One hundred thousand rand) was made on 02 August 2018, as the bank limits did not allow all transaction on the same day.¹⁸
- 5.1.21 Mr Bam further attached proof in the form of a FNB Notification of Payment receipt of the above payments and his *WhatsApp* communication with Mr Madikizela, where the latter apparently replied, saying “*Moja Moja*”.¹⁹
- 5.1.22 On 26 August 2020, the Public Protector wrote a letter to the registered Director of IPM Plant Hire CC, Ms Zona Zetu Siyazithanda Madikizela (Ms Madikizela) in order to afford her an opportunity to explain the above deposit into her business account. However, Ms Madikizela did not respond to the letter from the Public Protector. The deposits of both R250 000.00 and R100 000.00 from Mr Bam can be noted on the banks statements of IPM Plant Hire on 01 and 02 August 2018. The bank statements were requested and received by the Public Protector from FNB.
- 5.1.23 On 15 January 2021, the Public Protector wrote to Department of Home Affairs (DHA) to verify the relationship between Ms Madikizela and Mr Madikizela and the DHA confirmed, as per email dated 19 January from Ms Ntebeng Mokoditsoa that according to the National Population Register, Mr Babalo Madikizela (Mr

¹⁷ Mr Bam’s 1st affidavit at paragraph 9.

¹⁸ Mr Bam’s 1st affidavit at paragraph 10.

¹⁹ Mr Bam’s 1st affidavit at paragraph 11.

Madikizela) has been married to Ms Zona Zethu Siyazithanda Madikizela (Ms Madikizela) since 12 December 2006.

5.1.24 According to Mr Bam, Mr Madikizela further called him on 02 August 2018 and instructed him to deposit R280 000.00 (Two hundred and eighty thousand rand) into the ANC fundraising account, the details of which were supplied to Mr Bam by Mr Madikizela. Mr Bam further submitted the FNB Notification of Payment.²⁰

5.1.25 In conclusion, Mr Bam submitted that he, Mr Madikizela, Mr Dyala, Mr Mahlaka and Mr Mabuyane were all aware that the money was just paid for nothing as there was no work or service done by Mr Bam or Mthombeni Projects at the MLM. There was no letter of appointment of Mthombeni Projects from the MLM and Mr Bam accepts that he was wrong to participate in these unlawful transactions.²¹

5.1.26 According to Mr Bam, he knew that one day these events would be questioned and that is why he decided to come forward and divulge this information, before it is investigated by government.²²

5.1.27 The PPSA investigation team wrote to Mr Mahlaka of the MLM and requested his response to the above allegations of making payment of R1 100 000.00 to Mthombeni Projects for doing nothing. Mr Mahlaka replied to the PPSA as per submission accompanied by annexures, dated 10 September 2020 and indicated, *inter alia*, that:

“The Provincial Department of Sport, Recreation, Arts and Culture (DSRAC) or “The Department” was responsible for organising the Provincial Memorial Service which was to be held at Mbizana.

²⁰ Mr Bam’s 1st affidavit at paragraph 12.

²¹ Mr Bam’s 1st affidavit at paragraph 13 and 14.

²² Mr Bam’s 1st affidavit at paragraph 14.

The people were to be transported from all over Alfred Nzo District Municipality by means of taxis and or buses.

To facilitate such transportation Maikenjo Trading CC under the directorship of Mr T Leohla was contracted by the Department to do such transportation.

The money to be paid to the service provider, Maikenjo Trading CC by the department was a sum of R 1 100, 000.00 (One million One Hundred Thousand Rand Only) as Maikenjo Trading CC had a tender to render transport service for the Department for a period of three (3) years.

The Mbizana Transport Industry involving bus operators and Taxi operators rejected Maikenjo Trading CC as it was not a local supplier. Maikenjo Trading CC upon talks with the transport industry agreed to cede the transportation service to Koo Construction and Projects under the directorship of Mr Zolile Mngqongwa. Koo Construction is a local company.

To speed service delivery the above money was paid into the bank account of Mbizana Local Municipality by the Department pursuant to a Memorandum of Agreement.

Koo Construction and Projects rendered services as per agreement with Maikenjo and all went well.

Maikenjo ceded all his rights to Koo, however Koo could not be paid directly as he had fears of Tax implications and bank charges as the entire amount was to be distributed to different transport owners/operators.

Payment to Koo could not be facilitated on time due to DSRAC delaying in transferring funds to the Municipality as per Memorandum of Agreement between DSRAC and Mbizana Local Municipality.

Koo ceded the payment to Mthombeni Projects and payment was accordingly paid to Mthombeni Projects for payment distribution to all the operators.

Mthombeni Projects was asked by Mbizana Local Municipality to submit all relevant documents that would lead to him receiving money, thus Tax clearances, bank accounts, central supplier data base numbers etc.

Legal and correctly the money was paid to Mthombeni Projects to which Mthombeni Projects was to give the money to all the operators. No complaint was received by any operator and we understand this to mean that all the beneficiaries were paid by Mthombeni Projects.

Accordingly it is submitted on behalf of the Municipality that no fraud or crime was committed by Mbizana Local Municipality in respect of the memorial service of the late Mrs Winnie Madikizela-Mandela”

5.1.28 Amongst the annexures attached by Mr Mahlaka in support of the above submissions is the invoice drafted in the following terms which he used to pay Mthombeni Projects:

MTHOMBENI PROJECTS

CK No. 2018/024301/07

To: The Manager Date: 2018/04/16
Name: Maikenjo Trading CC
Address: 14 Raimond Rogers
City: Matatiele 4730
Phone: 078 2905397

Qty	Description	Unit Price
	Transportation of 25000 people from wards of Mbizana Local Municipality to the Winnie Mandela memorial service. (10/04/2018)	R 1 100 000.00

Sub Total R 1 100 000.00

- 5.1.29 The above invoice was used by Mr Mahlaka to pay Mthombeni Projects the amount of R 1 100 000.00, as indicated in the invoice. However, this invoice is not directed or addressed to the MLM and this is stark contrast with the initial invoice submitted by Mr Bam as indicated above under paragraph 5.1.14.
- 5.1.30 Mr Mahlaka further annexed in support of his submission the following letter or *supposed cession* from Maikenjo Trading CC, drafted in the following terms:

MAIKENJO TRADING CC

*The Municipal Manager
Bizana Local Municipality
Eastern Cape*

Date: 24.05.2018

Sir/Madam

I Tefelo Leohla, the director of the above trading company does not object the payment of any company which transported people to the memorial service of Mama Winnie Madikizela-Madikizela, to mention "Koo Construction and Projects" as told by the Municipal Manager in the conversation we had on the 24.05.2018.

*Yours
TL Leohla*

- 5.1.31 On 25 February 2021, the Public Protector conducted a face to face interview with Mr TL Leohla (Mr Leohla) of Maikenjo Trading CC at Matatiele and further took a statement under oath from him. Mr Leohla confirmed that indeed he was appointed by the DSRAC on 21 November 2017 as per contract number: SCMU14-17/18-0001 to provide and manage transport services for DSRAC in the Alfred Nzo and OR Tambo Districts and that this contract was valid until April 2021.²³

²³ Mr Leohla's statement at paragraph 3. Reference is also made to copy of appointment letter and Service Level Agreement between DSRAC and Mr Leohla.

- 5.1.32 The MLM falls under the Alfred Nzo District Municipality and it is therefore covered by the contract awarded by DSRAC to Maikenjo Trading CC. According to Mr Leohla, he received a Transport Specification and request for quotation from DSRAC on 06 April 2018, to transport mourners from 31 wards of the MLM to the venue of the Memorial Service for Ms Winnie Madikizela-Mandela.²⁴
- 5.1.33 In terms of the copy of Transport Specification submitted to the Public Protector by Mr Leohla, the purpose was to seek an experienced transport coordinator to organise and coordinate transport to ferry people to the memorial service of Ms Winnie Madikizela Mandela that was to be held on 10 April 2018 at Mbhongweni Village in Mbizana.²⁵
- 5.1.34 It was also indicated by Mr Leohla that he submitted his full and first quotation to DSRAC with a total amount of **R 425, 322. 68** (Four hundred and twenty five thousand, three hundred and twenty two rand, sixty eight cent) to do the whole job of transporting mourners to the memorial service venue at Mbizana.²⁶ Mr Leohla further furnished the Public Protector with a copy of the specification from DSRAC and the quotation he gave to DSRAC for the service.
- 5.1.35 According to Mr Leohla, the specification was changed with more pick up points being added again later by DSRAC and he was requested to change the first quote and he gave the second quotation with an amount of **R 1, 519 713.12** (One million, five hundred and nineteen thousand, seven hundred and thirteen rand).
- 5.1.36 Mr Leohla indicated that while he was preparing transport for the memorial service and organising for subcontracting in other areas, he was informed by Mbizana Taxi Association members that he cannot do the job since he is from Matatiele, which is outside Mbizana. According to Mr Leohla, the Mbizana Local Taxi Association members started to negotiate directly with some officials from

²⁴ Mr Leohla's statement at paragraph 4.

²⁵ Copy of Transport Specifications dated 06 April 2018 from DSRAC at paragraph 2.

²⁶ Mr Leohla's statement at paragraph 5.

the MLM, DSRAC and leaders of the ANC for the same job. As a result Mr Leohla was prohibited and he withdrew from the matter, out of fear for his life since taxi industry is notorious for violence.²⁷

- 5.1.37 It was also submitted by Mr Leohla that he was not happy with the manner in which he was excluded, so much so, that he went to the provincial offices of the DSRAC in Bisho on 12 April 2018 to register in writing his grievance and concerns, indicating why he could not do the job to the Head of Supply Chain Management. Mr Leohla furnished Public Protector with this letter where his grievance was recorded.²⁸
- 5.1.38 It was also clarified by Mr Leohla that his transport contract with DSRAC was still valid and only expired in April 2021 and that he never ceded it to anybody as alleged.
- 5.1.39 Mr Leohla submitted further to the Public Protector that he does not know Koo Construction, Mthombeni Projects or any of its directors and that he has never spoken with them or entered into any cession agreements with them.
- 5.1.40 He vehemently disputed that he entered into any cession agreement with Koo Construction and Projects as well as Mthombeni Projects directors as they have not met before.
- 5.1.41 Mr Leohla further clarified that he wrote the *purported letter of cession* after he was coached or guided telephonically by a lady (name unknown to Mr Leohla) from the office of Municipal Manager of MLM: Mr Mahlaka to do so on 24 May 2018 and that he has never requested DSRAC or MLM to cede his rights under his contract.²⁹

²⁷ Mr Leohla's statement at paragraph 5.

²⁸ Mr Leohla's statement at paragraph 9. Reference is also made to a letter of Mr Leohla to DSRAC dated 12 April 2018.

²⁹ Mr Leohla's statement at paragraph 10.

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- 5.1.42 Mr Leohla further informed the PPSA that his company, Maikenjo Trading CC, never rendered any transport services in connection with the memorial service of Ms Winnie Madikizela-Mandela and that he never got any payment either.
- 5.1.43 Similarly, the Public Protector conducted a telephonic interview with Mr Bam of Mthombeni Projects on 08 January 2021 to establish whether he had entered into any cession agreement with Maikenjo Trading CC to render any transport service and receive payments. Mr Bam replied to the Public Protector as per letter dated 26 February 2021, insisting that he does not know Maikenjo Trading CC or any of its director(s) and that he never entered into any cession with it.³⁰
- 5.1.44 Mr Bam further indicated in the same letter to the Public Protector that he also does not know Koo Construction Projects or any of its director(s) and has never entered into any cession or other agreement with them.³¹
- 5.1.45 According to Mr Bam, he only got to know about Koo Construction on the 24th of July 2018, after he received an email from Mr Dyala, who asked Mr Bam to put the details of Mthombeni Projects on the invoice, as directed by Mr Babalo Madikizela. Mr Bam further clarified that he also got to know about Maikenjo Trading CC on the 25th of July 2018 during a telephone conversation with Mr Mahlaka, who instructed Mr Bam on how to prepare the invoice.³²
- 5.1.46 Mr Mahlaka further attached, in support of his submission, a letter or *supposed cession agreement* from Koo Construction and Projects hand-drafted in the following terms:

³⁰ Mr Bam's letter to the Public Protector dated 26 February 2021 at paragraph 3.

³¹ Mr Bam's letter to the Public Protector dated 26 February 2021 at paragraph 2.

³² Mr Bam's letter to the Public Protector dated 26 February 2021.

Koo Construction + Projects

Box 136

Bizana

4800

Mbizana LM

PO Box 12

Bizana

4800

Dear Municipal Manager

Koo Construction and Projects provided transportation services on the 10th April 2018 for the memorial service of Winnie Madikizela-Mandela in accordance with an agreement with Maikenjo Trading CC.

I hereby authorise you to make the entire payment of 1, 1 million for services rendered in favour of Mthombeni Projects.

Director (Mr Zolile Mngqongwa)

(Koo Construction and Projects) signed by ZW...hand-signatureand stamped: Koo Construction & Projects (undated)

Tel.....

5.1.47 On 23 February 2021, the Public Protector held a face to face interview with the director of Koo Construction: Mr Zolile Mngqongwa (Mr Mngqongwa) at Mbizana Police Station and further took a statement under oath from Mr Mngqongwa, in order to get clarity on the above letter. This followed after Mr Mngqongwa failed to respond to an email/letter sent by Public Protector to him on 04 September 2020.

5.1.48 Mr Mngqongwa indicated in his statement that they did provide the transport to the MLM for the memorial service of Ms Winnie Madikizela-Mandela, as a local

taxi association, namely the Mbizana Taxi Association following rejection of Maikenjo Trading CC by the local taxi association.

- 5.1.49 According to Mr Mngqongwa, there were negotiations in April 2018 held by Mbizana Taxi Association and ANC leaders that eventually led to the Mbizana Local Taxi Association taking over the job of transporting people to the memorial service.
- 5.1.50 When asked by PPSA as to whether he is in possession of an appointment letter from the MLM or DSRAC to render transport, Mr Mngqongwa clarified that he did not have any appointment letter as they were approached by MLM officials and ANC leaders to render transport services. Further, that they did not bid for any tender as Mbizana Local Taxi Association. Mr Mngqongwa further conceded that he does not know Maikenjo Trading CC and Mthombeni Projects or any of its directors, neither did he personally enter into any cession agreement or subcontract with them.
- 5.1.51 The PPSA requested clarity from Mr Mngqongwa as to why he mentioned Maikenjo Trading CC and Mthombeni Projects or claimed having cession agreements with them, as indicated in his letter above under paragraph 5.1.46. Mr Mngqongwa indicated in his statement to the PPSA that he was called by some officials of the MLM in the office of the Municipal Manager who presented him with an already drafted hand-written letter and merely asked him to sign it, which he simply did.³³
- 5.1.52 According to Mr Mngqongwa, they had already been paid through Mr Cwele as Mbizana Taxi Association at the time of signing this said cession letter in the office of the Municipal Manager: Mr Mahlaka. Mr Mngqongwa further indicated that he personally received R4, 500 (Four thousand five hundred rand) as his own share of money, which was few weeks after the memorial service had taken place. Mr Mngqongwa submitted that he did not recall the names of the

³³ Mr Mngqongwa's statement at paragraph 10, 11 and 12.

municipal officials who asked him to sign the cession letter in the office of Mr Mahlaka.

- 5.1.53 On 25 February 2021, the Public Protector held a meeting with Mr Mahlaka at his office at the MLM. Mr Mahlaka could not address the crucial question of how and which process was followed to appoint Koo Construction and/or Mbizana Taxi Association to render transport services for the Winnie Madikizela-Mandela memorial service held by the MLM.
- 5.1.54 Mr Mahlaka denied during this meeting that the MLM appointed Koo Construction and Projects and/or Bizana Taxi Association and insisted that the MLM never appointed any company, except to effect payment afterwards.
- 5.1.55 On 01 March 2021, the Public Protector received a letter through email³⁴ signed off by Mr Mahlaka in which he was indicating that the MLM does not have copy of an invoice and /or a quotation of Koo Construction as it was withdrawn on the strength of an instruction by Koo Construction ceding payment to Mthombeni Projects, hence the MLM kept the invoice that was paid to Mthombeni Projects.
- 5.1.56 Instead, Mr Mahlaka provided the Public Protector with a purported *cession agreements or letters* by parties namely, (Maikenjo Trading CC, Koo Construction and Mthombeni Projects). However, as indicated above, all these entities/and/or directors thereof denied having entered or negotiated any cession agreements with one another since they do not even know each other.
- 5.1.57 All the purported *cession letters* were organised or facilitated in the office of Mr Mahlaka, who did not deny that his office was involved in assisting to draft these purported *cession letters*.
- 5.1.58 As can be seen from all four corners of the statements by Mr Leohla, Mr Mngqongwa and Mr Bam, they all deny entering into any cession with each other

³⁴ Email received on 1 March 2021 from Ms Noncedo Livi: Personal Assistant to Mr Mahlaka's office.

in connection with rendering a transport service and payments for the memorial service of Ms Winnie Madikizela Mandela.

- 5.1.59 In response to the Notice issued in terms of section 7(9) of the Public Protector Act,³⁵ Mr Mahlaka sought to argue that the “*preliminary report*” of the Public Protector was compiled in a manner that believes only the version of other people and undermines/disregards all that was presented by him.³⁶
- 5.1.60 Mr Mahlaka repeated again in his response to the Notice that the MLM never appointed Koo Construction, but rather honoured a written instruction from Maikenjo Trading CC.³⁷ This time, Mr Mahlaka immediately qualified this averment by arguing that the MLM utilised Regulation 32(1)(a) issued in terms of Municipal Finance Management Act, 2003 (MFMA)³⁸ and the MLM SCM policy clause 46. According to Mr Mahlaka, this procurement strategy was the only available strategy option as Maikenjo Trading CC was already awarded the same services by DSRAC and there was no time available for MLM to conduct a competitive procurement process.³⁹
- 5.1.61 It was conceded by Mr Mahlaka that he did play an advisory role by assisting Maikenjo Trading CC with the wording of in the letters of the cession. Further that he always encourages his office staff as a Municipal Manager to advise emerging service providers on what to do when asking for help.⁴⁰ However, Mr Mahlaka disputed the conclusion that helping to write letters of cession was not an act of fabrication or fraud as these letters were known and owned by the writers.⁴¹ Mr Mahlaka insisted that he acted within the law and rejected all conclusions related to maladministration in the Public Protector’s Notice.

³⁵ As per letter dated 22 July 2021 signed off by Mr Mahlaka.

³⁶ Page 1 of Mr Mahlaka’s response to the Notice.

³⁷ Page 3 of Mr Mahlaka’s response to the Notice.

³⁸ Regulation 32 of the MFMA is titled “Procurement of goods and services under contracts secured by other organs of state”

³⁹ Page 3 of Mr Mahlaka’s response to the Notice.

⁴⁰ Page 3-4 of Mr Mahlaka’s response to the Notice.

⁴¹ Page 4 of Mr Mahlaka’s response to the Notice.

5.1.62 Mr Mahlaka further concluded that DSRAC as the funder/budget holder never complained about this transaction.⁴² Surprisingly, this conclusion by Mr Mahlaka stands diametrically opposed to what was submitted by Ms Mpofu, the Head of Department for DSRAC in response to the Public Protector's Notice which reads, *inter alia*, as follows:

*"The irregular expenditure has already been declared and the application to have the amount condoned is underway"*⁴³

5.1.63 The application for condonation of irregular expenditure referred to above by Ms Mpofu relates to the same amount of R1, 1 million transferred on 23 May 2018 by DSRAC to MLM for the memorial service of Ms Winnie Mandela as per MoA.

5.1.64 In sum, the Public Protector is of the view that all substantive or essential submissions made by Mr Mahlaka in response to this investigation were taken into consideration with an impartial mind, which is open to all possibilities. Same was further analysed against independent evidence received from other parties/sources with a view to make a determination as to which version is more probable in the circumstances.

5.1.65 In the end, the substratum of Mr Mahlaka's contentions are not to be adjudicated upon in isolation, but rather within the context of the totality and the weight of overall evidence placed before the Public Protector pertaining to this issue.

5.1.66 The PPSA investigation team had further engagements with DSRAC with a view to solicit their side of the story and involvement in this matter. DSRAC responded as per letter dated 08 March 2021⁴⁴ and indicated *inter alia*:

⁴² Page 3-4 of Mr Mahlaka's response to the Notice.

⁴³ *Infra* at footnote 49.

⁴⁴ Signed off by Head of Department: Ms Sibongile Mpofu.

“The Eastern Cape Department of Sport, Recreation, Arts and Culture denies that it was involved in the maladministration and misuse of public funds as alleged in your correspondence.

I hereby respond to the contents of your correspondence as follows: - It is confirmed that DSRAC concluded a Memorandum of Agreement with Mbizana Local Municipality (“MLM”).

It is correct that Mrs. Winnie Madikizela-Mandela, (‘Mrs. Madikizela Mandel’) a stalwart in the fight against apartheid and a leader for liberation and emancipation of the people of South Africa, passed away on 02 April 2018, and that the honourable President of the Republic of South Africa, Mr, Cyril Ramaphosa, declared her funeral to be state funeral.

It is also correct that the Provincial Government under the leadership of the former Premier of the Eastern Cape Province, Mr. Masualle, authorised a Provincial Memorial Service in honour of Mrs. Winnie Madikizela Mandela on the 10 April 2018.

A Memorandum of Agreement was signed between the Department and MLM on 15 May 2018 to coordinate and facilitate payment to Mbizana based transport service providers who had transported the public to and from Mafumbatha Stadium who attended the memorial service on 10 April 2018.

*DSRAC-appointed the service provider had experienced challenges with the local stakeholders which resulted in the MLM taking responsibility and thus coordinating transportation of local communities to and from the stadium on 10 April 2018.*⁴⁵

⁴⁵ Our underlining.

The Municipality was mandated to organize transport for 100 000 community members that were planned to attend the memorial service. R1.1m was subsequently transferred to the MLM to pay transport services.⁴⁶

DSRAC was responsible for the procurement of transport service provider to the late Mrs. Winnie Madikizela Mandela memorial service and EDSRAC utilised one of its transport service providers who had already been appointed on a three year contract basis.

Maikenjo Trading was appointed to render transport services to the late Mrs. Winnie Madikizela Mandela's memorial service".⁴⁷ (emphasis added)

5.1.67 Further attached as annexure(s) to the response by DSRAC was the proof of transfer of an amount R1, 1 million from the DSRAC to the MLM and a letter by the former Head of Department of the DSRAC, Mr Mzolisi Matatu wherein the latter told the Municipal Manager of the MLM to pay the transport industry R1, 1 million and claim same amount from DSRAC as telephonically agreed by Mr Matatu and Mr Mahlaka on 08 May 2018.⁴⁸

5.1.68 The PPSA further received a letter, dated 19 March 2021 signed by Ms Sibongile Mpfungu the HoD of the DSRAC (Ms Mpfungu) with the following copies or attachments namely:

5.1.68.1 *A copy of quotation in the amount of R 1, 519 713.12 from Maikenjo Trading CC and*

5.1.68.2 *A copy of an invoice from MLM in the amount of R1, 1 million*⁴⁹

⁴⁶ Our underlining.

⁴⁷ Response letter from DSRAC dated 08 March 2021 at paragraph 4.

⁴⁸ Letter by former HoD of DSRAC: Mr Mzolisi Matatu at paragraph 4.

⁴⁹ Dated 29 June 2018.

- 5.1.69 Ms Mpofo submitted that the DSRAC committed to pay R1, 1 million out of R1, 5 million that was quoted, as it had budgeted and could only afford that amount and the MLM organisers of the event were made aware of that fact, hence they invoiced the DSRAC as such.
- 5.1.70 The copy of the invoice referred to above from the MLM to DSRAC does not disclose the name of the service provider, but only the description of service which indicates that it is *Transport Winnie Madikizela Mandela Memorial Service* and the amount of R1, 1million.
- 5.1.71 On 24 March 2021, the PPSA engaged⁵⁰ the former HoD of the DSRAC, Mr Mzolisi Matutu (Mr Matutu) to seek clarity on the procurement of transport services and the subsequent payment made by the DSRAC to the MLM. Mr Matutu replied as per email, dated 26 March 2021 and stated the following:

“When Mrs Winnie Madikizela-Mandela passed on in April 2018, the President of the country afforded her a Special Official funeral at Category One level. On the announcement of this type of funeral category, Eastern Cape like all other provinces had to organise a memorial service.

Mbizana which is Mrs Mandela’s birth place was named as the host to such an event. In our province all activities of this nature are coordinated and organised through the Department of Sport, Recreation, Arts and Culture (DSRAC). The Premier of the Province would normally write to inform the Department accordingly about its role regarding the hosting of the event on behalf of the Province and the amount the cabinet agreed to be used for such an event. The Department would then use its budget to coordinate the event for it to be reimbursed during the adjustment period by the Provincial Treasury.

Indeed the Premier approved an amount of R3.1m and of this amount, R1.1m was allocated to transportation of people. In short, Maikenjo Trading CC who had a 3

⁵⁰ As per letter dated 24 March 2021.

year contract with DSRAC was then required to coordinate the transportation of people from pick up points as agreed in the preparatory meetings before the event.

After the event, Maikenjo called me as the Accounting Officer to report that he has not been able to ferry people from pick up points due to an instruction by certain politicians who prohibited him from coordinating the transportation of people. He claimed that he was instructed to leave this to a list of taxi operators from Mbizana. In all honesty he confessed that he did not participate in the transportation.

I then requested him to please give me this report in writing and I also communicated to him that according to Public Finance Management Act, I'm unable to make any payment to him because he has not performed his part of the contract. He was clearly not happy but nonetheless he made his submission in writing.

The discussion on how to make transport payment within PFMA parameters ensued internally in the department. The management understood that services have been rendered despite the fact that they were rendered by wrongful service providers, i.e. service providers not appointed through the departmental SCM processes.⁵¹

This quagmire necessitated that we as the Department solicit technical advice from people in Provincial Treasury so that we can resolve the matter within PFMA and legal jurisdiction.

After rigorous discussion we resolved that Mbizana Local Municipality would be the appropriate entity to make the payment to. We further agreed to enter into a Service Level Agreement (SLA) with Mbizana Local Municipality, the salient features of which should specify what the amount to be transferred must be used for. In a nutshell an amount of R1.1 m was transferred to Mbizana local Municipality.

This transfer took place after a sit in was staged at Municipal offices, specifically Municipal Manager's office and threats were also made about occupying our offices

⁵¹ Our Underlining.

as well. We did not give in to those threats because in the final analysis we are the ones who were accountable". (Emphases added)

- 5.1.72 The nub of Mr Matutu' s submission seems to acknowledge that the transport to the memorial service of Ms Winnie Madikizela-Mandela was rendered by service providers not appointed through the departmental Supply Chain Management (SCM) processes. Further that the DSRAC transferred the amount of R1, 1 million to the MLM in terms of their "SLA" (MoA).
- 5.1.73 In a letter dated 30 June 2021, Ms Mpfu further indicated that the DSRAC has noted the Public Protector's provisional report (Section 7(9) Notice) and that there is no action required from the DSRAC, therefore the report is well received. Further that the irregular expenditure on the part of DSRAC has already been declared and the application to have the amount condoned is underway.⁵²

ENGAGEMENTS WITH ALLAN MORRAN DESIGN ARCHITECTURAL SERVICES

- 5.1.74 On 26 August 2020, the Public Protector approached Mr Allan Morran who is the owner of Allan Morran Design Architectural Services now called Cordinia Valley Trading (Pty) Ltd (Mr Morran), in writing to enquire about the reason for a payment of R450 000.00 into his Nedbank account by Mr Bam of Mthombeni Projects.
- 5.1.75 Mr Morran replied on 04 September 2020 through an email accompanied by annexures and indicated the following:

"In response to your correspondence of 26/08/2020 I wish to clarify what services I provided to the Mabuyane family in 2018.

⁵² Ms Mpfu's letter dated 30 June 2021, response to a Notice issued in terms of section 7(9)(a) of the Public Protector Act, 1994.

Some time prior to 21/06/2018 I was introduced to Mrs. Siya Mabuyane who advised that they were in the process of purchasing a new home in Muirfield Road, Bunkers Hill, and wished to renovate and create a “better flow” to the living areas.

I inspected the premises, made some suggestions, and estimated renovation costs.

I then submitted my fee structure.

The fee structure was for my services, to prepare drawings and specifications, go out to tender for the required work, and oversee the renovations. My service fee was in the region of R60, 000.00 based on my estimated cost of renovations at R450, 000.00.

I attach correspondence, including fee structure, and tender document advising scope of work to be undertaken.

In August an amount of R450, 000.00 was paid into my account. The payment notification was in the name “Mabuyane”

I queried this payment, thinking there may have been a misunderstanding based on my estimate and my actual fee structure.

I was advised by Siya that my fee was to be paid separately and that this payment was money to be used for the renovations. I was to manage the R450, 000.00, purchase materials, and record payments to contractors.

This I undertook and I managed the contract, reporting to Siya with regular updates on disbursements. Attached are details of disbursements.

My fee was paid separately.

I met Oscar Mabuyane only once, in passing, during a meeting with Siya Mabuyane at their previous home in Clarendon. No aspects of the projects were discussed directly with Mr. Mabuyane.

My estimate was fairly accurate, but finishes increased the contract value to approximately R500, 000.00. All contractors and suppliers were paid and monies accounted for.

I have records of all transactions and correspondence should the attachments require further clarification (sic).

I trust this is of assistance.

Yours sincerely”

5.1.76 The above response from Mr Morran was accompanied by distinct proof of price quotations and drawings for work to be done in the Mabuyane house as well as email conversations between Mr Morran⁵³ and Ms Siyasanga Mabuyane⁵⁴ who is the wife of the Premier, Mr Oscar Mabuyane.

5.1.77 One of the notable email communication between Mr Morran and Ms Siya Mabuyane appeared as follows:

“From: Siyasanga Mabuyane [mailto:siya.mabuyane80@gmail.com]

Sent: Sunday, June 24, 2018 3:59 PM

To: amorrان@mweb.co.za

Subject: Re: 6 Muirfield Road

⁵³ Email **From:** Allan Morran [<mailto:amorrان@mweb.co.za>]

Sent: Monday, June 25, 2018 4:16 PM

To: 'Siyasanga Mabuyane'

Subject: RE: 6 Muirfield Road

⁵⁴ Email **From:** Siyasanga Mabuyane [<mailto:siya.mabuyane80@gmail.com>]

Sent: Sunday, June 24, 2018 3:59 PM

To: amorrان@mweb.co.za

Subject: Re: 6 Muirfield Road

Hello Allan

If you don't mind my husband would like you to break it down your quote .He would like to know what informs the quote, seeing you have not received any quote from the service provider that we going to use.

Please break it down for me so that I can get the money to start the project.(sic)

Regards

Siya

Sent from my iPhone”

5.1.78 Mr Morran replied to the above email from Ms Siya Mabuyane as follows:

“From: Allan Morran [mailto:amorran@mweb.co.za]

Sent: Monday, June 25, 2018 4:16 PM

To: 'Siyasanga Mabuyane'

Subject: RE: 6 Muirfield Road

Hello Siya.

My quote (Fee structure) is based on an informed estimation of costs of the project. The R 450,000.00 is not a quote, but an estimate from one contractor, and I anticipate savings, but we need a figure to work with to establish my fee.

I can't break down the costs until we have completed the drawings and gone out to tender for the required work.

Attached is the rough sketch of the outcome of our previous discussions. I have other concepts that we can discuss.

Also attached is a quote for information from Bacalum, regarding stacker doors. Again, these are for information only and we would seek additional quotes. My banking details are as follows.

Allan Morran Design.

Nedbank. Beacon Bay.

Branch code; 198765

Account Number: 1121300995

As discussed today, the main objective is to establish an office and create a better entrance. We can additional options with a view to cost saving (sic).

Regards,

Allan”

5.1.79 Furthermore, in an email dated 14 September 2020 from Mr Morran to the investigation team of the Public Protector, he stated that:

“As previously noted, the R450, 000 was an unsolicited payment. There was never an invoice for that amount. Upon seeking clarification I was advised by Siya that the payment was for me to disburse during the renovation process. I was introduced to Siya Mabuyane as the wife of Oscar Mabuyane. Siya referred to him as her husband”.

5.1.80 A courtesy letter dated 01 July 2021 was sent to Ms Mabuyane by the PPSA, affording her an opportunity to clarify her e-mail conversation with Mr Morran in respect of the payment, source and the purpose of R450, 000 which was referenced *Mabuyane* by Mthombeni Projects. Ms Mabuyane did not reply to the clarity seeking letter from the PPSA at the date of this report.

5.1.81 On 30 March 2020, the PPSA further received official bank statements from Nedbank in King William’s Town, confirming that an amount of R 450, 000.00

was indeed paid, as alleged by Mr Bam into the bank account of Mr Morran's company: Cordinia Valley Trading (Pty) Ltd on 02 August 2018 with reference 'Mabuyane'.

- 5.1.82 On 13 March 2020, the PPSA wrote to the Premier, Mr Oscar Mabuyane (Mr Mabuyane) and requested clarity on the allegations of an amount of R450,000.00 paid by Mr Bam to Mr Morran's company in order to renovate his house. Mr Mabuyane replied as per letter, dated 26 March 2020 and refuted the allegations as follows:

"In or about August 2018, I renovated my house and I negotiated a loan with Mr Madikizela to cover the material changes thereto. A copy of the loan agreement is attached herewith. The loan was for a sum of R450 000 and was to be paid in instalments of R 50 000 per year. I had arranged with Mr Madikizela to pay the sum of R450 000 directly to Allan Morran Designs, who was the architect responsible for the renovations to my house.

I had advised Mr Morran that the money would be paid directly into his account.

I have no knowledge of the alleged arrangements between Mr Madikizela and Mr Bam and deny that I requested Mr Bam to pay the money into the account of Allan Morran Designs.

I repaid the entire sum of R450 000 to Mr Madikizela. Attached is a proof of payment".

- 5.1.83 The Loan Agreement referred to by Mr Mabuyane above was drafted and worded in the following terms:

LOAN AGREEMENT

Entered into and between

BABALO MADIKIZELA

(ID NO: 76...)

Hereinafter referred to as the “Lender”

and

LUBABALO OSCAR MABUYANE

(ID No: 74....)

Hereinafter referred to as the “Borrower”

WHEREAS:

1. *The borrower has approached the lender for a fixed loan amount.*
2. *The lender has accepted the loan request from the borrower for the sum of R 450 000.00 (Four hundred and fifty thousand Rands).*
3. *The lender and the borrower (parties) to the loan agreement have agreed that the loan amount mentioned in paragraph 2 above shall be paid in full on or before 8 August 2023.*

NOW THEREFORE:

4. *The parties have agreed that their agreement shall be governed by the following terms and conditions:*
 - 4.1 *That the loan amount shall be paid by the lender to the borrower or his identified agent on or before 8 August 2018;*

And

4.2 *That the borrower shall pay to the lender a minimum sum of R 50 000.00 (Fifty thousand Rands) per year until the full loan amount is paid in full, the first instalment thereof being due on or before 8 August 2019.*

DATED AT EAST LONDON ON THIS **23** DAY OF **July 2018**

Lender: _____ signed _____

B.MADIKIZELA

BORROWER: _____ signed _____

L.O. MABUYANE

5.1.84 The crux of Mr Mabuyane's submission is that he requested a loan from Mr Madikizela, however he had no knowledge of the alleged arrangements between Mr Madikizela and Mr Bam and denies that he requested Mr Bam to pay the money into the account of Allan Morran Designs.

5.1.85 The submission by Mr Mabuyane appears to indicate that, without the knowledge of the arrangements between Mr Bam and Mr Madikizela, he (Mr Mabuyane) could not have known that the money came from the DSRAC via the MLM.

5.1.86 Mr Mabuyane further responded to a Notice issued in terms of section 7(9) of the Public Protector Act⁵⁵ (the Notice) through his legal representative: Mr N Sakhela of Sakhela Inc. Attorneys (Mr Sakhela) as per letter dated 23 June 2021. The nub of the contention submitted by Mr Sakhela was that the PPSA has no jurisdiction over Mr Mabuyane (his client) since no public funds came to

⁵⁵ Section 7(9) of Public Protector Act stipulates that:

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

his client. Mr Sakhela contended that the loan agreed to between his client and Mr Madikizela did not include public funds.

- 5.1.87 It was submitted by Mr Sakhela that his client was not involved in any dealing with the MLM whatsoever. Mr Sakhela further argued that events narrated in the Notice took place before his client assumed any public office, either as MEC or Premier.
- 5.1.88 The PPSA is thus compelled to dispose of this argument by Sakhela, at this earliest opportunity to clarify that this investigation followed and remained fixated on the movement of public money. It is quite perspicuous that the MLM unlawfully deposited public money into the account of Mthombeni Projects and immediately thereafter and on the instruction of Mr Madikizela, part of same money was transferred to Allan Morran Design for renovations at Mr Mabuyane's private house.
- 5.1.89 Most importantly, it is also clear that at the time of receipt of the payment of R1, 1 million, which is public money from the MLM, Mthombeni Projects only had a meagre balance of R 6, 458 (six thousand, four hundred and fifty eight rand) in its bank account.⁵⁶ As a result, it could neither have been practical nor technically possible to transfer R450, 000 to Allan Morran Design given the bank balance of Mthombeni Projects at the time. Therefore, it stands to reason that a deposit of the said public money by the MLM to Mthombeni Projects made the financial transaction to Allan Morran possible, who in turn renovated Mr Mabuyane's house, using the same money.
- 5.1.90 Interestingly and noteworthy is fact that, after the payment of R1,1 million (public money) to Mthombeni Projects on 01 August 2018 by the MLM, same was immediately disbursed or spent within three days, so much so that by 04th

⁵⁶ As Mthombeni Project's FNB account as at 01 August 2018.

August 2018, the Mthombeni Project account was completely depleted and had a balance of only 0.24 cents.⁵⁷

5.1.91 Save for pursuing the expenditure of public money, the PPSA’s investigation was not really concerned about private individuals, private loans and private arrangements between Mr Mabuyane and Mr Madikizela, including whether Mr Mabuyane was aware of illegality or not. PPSA has already referred this part to Directorate for Priority Crime Investigation of the South African Police Service (DPCI), who indicated that they are investigating it.

5.1.92 According to electronic records of PERSAL⁵⁸ obtained by the PPSA on 28 June 2021 from Forensic Audit Unit of the Eastern Cape Provincial Treasury, in respect of the service record or employment history of Mr Mabuyane as contained in the “*Enquiry Service Record*” reflects the following:

A	B	C
Ref	DATE	EVENT
1	19 February 2018	Appointed as a Member of the Provincial Legislature
2	1 April 2018	Appointed as a Chairperson of a Standing Committee in the Provincial Legislature
3	01 June 2018	Appointed as the Member of the Executive Council: Finance & Economic Development & Environmental Affairs
4	01 July 2019	Appointed as the Premier

5.1.93 The above information was sourced in order to verify the time periods against the events that took place on this matter and in relation to Mr Mabuyane’s official capacity at the time. Based on the above infographic table, it is quite clear that Mr Mabuyane has been an employee of the state and holding public office⁵⁹ from 19 February 2018, in various capacities as shown in the table.

⁵⁷ As per FNB bank statements of Mthombeni Projects for a period 01- 04 August 2018.

⁵⁸ PERSAL being an acronym for **Personal and Salary Administration System**.

⁵⁹ This impugned transaction involving public money from MLM happened on 01 August 2018 which is period when Mr Mabuyane was the MEC for Finance & Economic Development & Environmental Affairs.

5.1.94 The PERSAL system is used by all the National and Provincial government departments and it was originally specified by the Office of the Public Service Commission as a personnel and salary system. The implementation of the system was done by National Treasury. National Treasury is the owner of the PERSAL which system has been in a production environment since 1990.⁶⁰

5.1.95 In terms of a response furnished to the Public Protector on 20 December 2019 by Mr Madikizela during the course of investigation, the following was indicated amongst other things:

“I further confirm that I have known Mr Lonwabo Bam and our relationship dates back years whilst I was already in business owning Wimpy shop in Mthatha. He has been a friend quite close to me and subsequently we have been involved in many business partnerships. I must also hasten to state that categorically that our relations have soured over time and specifically before I sworn into office as a member of Eastern Cape Legislature or Member of Executive Committee. Thus, I view the allegations as smear campaign as they deliberately twist issues to feed into a narrative only he understands.

I am aware of an amount totalling to R 1.1 million which was transferred by Department of Sport, Recreation Arts and Culture to Mbizana Local Municipality in terms of MOA concluded by the two parties. This money was for the transportation of people to the Memorial Service of the late Mama Winnie Madikizela-Mandela.

It is important to highlight that the ANC in the province took a decision to host a memorial service for the late Mama Winnie. We went ahead to negotiate with local taxi association and secured discounted fares. However the funeral was soon to be declared by the President a state funeral and as the ANC we abandoned our plans to host the memorial which was taken over by government.

⁶⁰ 2010 Strategy Document to Improve the Quality of Information on PERSAL at page 3.

After allegations of misappropriating funds I took the liberty to request information from Mbizana Municipality which I was to present to the Internal Integrity Committee. The Documentary evidence elucidated the following:

Maikenjo Trading CC who was in the Departments supplier database was appointed but soon ceded the work to the Local Association as quarrels ensued with a clear indication and declaration by the local association that no one will be allowed to transport people as they possess the permits to operate public transport in all routes in Mbizana.

The work to transport the people was undertaken by Koo Construction and Projects a company owned and utilised by the Local Taxi Association. They performed the work on the 10th of April 2019 and the memorial service was a resounding success.

While the MOA was concluded on the 15th of May 2018 days after the people had been actually transported, the transfer of money was actually made to Mbizana Municipality on the 10th of July 2018 exactly three months after the performance.

The delays in payment resulted in the Taxi Association threatening to make the situation bad as they felt no reasonable explanation of the delay in payment was given save to say monies had not been received from the provincial department.

It is at this stage that they (local taxi association) again approached us and claiming that the discounted fee was for the ANC not the government.

I saw the matter with a potential to deteriorate. I thus engaged the leadership of the ANC to allow me to pay the sum of R1, 1 million to Mr Cwele of Koo Construction and Projects as evident in the proof of payment.

Koo simultaneously had to repudiate their claim against the Municipality and thus had to write a letter to nominate to whom the money must ultimately be paid. This is where Mthombeni Projects Construction (Lonwabo Bam) comes in. He invoiced for work done (transporting people). It is absurd that he purports a legitimate transaction to be a misappropriation.

At the time of solving the issue the ANC was due to pay me monies owed to me however I sacrificed that we pay the taxi owners and I can wait. It is at that point where I asked a friend and a colleague to whom I had requested the money to be made in favour to invoice the Municipality”.

- 5.1.96 The Public Protector received further clarity from Mr Madikizela, as per letter dated 05 March 2021. Mr Madikizela submitted that the payment to Mr Cwele was made by the ANC, for which Mr Madikizela is the Provincial Treasurer and responsible for its overall financial affairs.⁶¹ Mr Madikizela further attached proof of payment of R1, 1 million to Mr Cwele.⁶²
- 5.1.97 However, this part remains awkward and was not explained by Mr Madikizela as to how did the ANC get involved in government business and on what basis they were allowed to do so and after the payment of the R1, 1 million by the ANC to Mr Cwele, why did Koo Construction not cede their claim to the ANC. It also does not appear from the evidence of Mr Madikizela that the ANC agreed that their R1.1 million can be paid to Mthombeni Projects/Mr Bam and be further dispersed by him as he did.
- 5.1.98 Mr Madikizela further clarified that in his position as Treasurer of the ANC, he had no oversight responsibility over the SCM processes of the MLM or any other provincial government. Mr Madikizela submitted that he had no role play in the appointment of Koo Construction and Projects.⁶³

⁶¹ Response Letter from Mr Madikizela dated 05 March 2021 at Paragraph 3.

⁶² First National Bank notification with Tale Trace ID: VODSWXR4BS4D.

⁶³ Response Letter from Mr Madikizela dated 05 March 2021 at Paragraph 3.

5.1.99 Mr Madikizela agreed that the services were rendered by taxi association to transport people to a memorial services of the late Ms Winnie Madikizela-Mandela and that R1, 1 million paid by the MLM was in lieu of the services rendered.⁶⁴

5.1.100 On 13 July 2021, Mr Madikizela further replied to a notice issued in terms of section 7(9) of the Public Protector Act. In his response, Mr Madikizela argued that this matter occurred before he became MEC for Public Works and Infrastructure, therefore the Public Protector does not have powers to investigate the matter as he was a private person at the time. In support of his argument, Madikizela cited the recent Constitutional Court case between *Public Protector and Others v President of the Republic of South Africa and Others*.⁶⁵

5.1.101 However, the above contention by Mr Madikizela stands to be rejected on the basis that the case he cited above is completely distinguishable from the facts at hand. The case cited by Mr Madikizela, concerned the so-called *CR-17 campaign funds* which were sourced privately whereas this case concerns public money coming directly from the municipality (MLM), the disbursement of which was duly investigated by the Public Protector, in line with her mandate as custodian of public money. The Public Protector was at all material times acutely aware that Mr Madikizela was a private person at the time, however the focus of her investigation was on the expenditure of public money, notwithstanding individual's capacity.

5.1.102 Evidence at hand further disclosed that R350 000.00 (Three hundred and fifty thousand rand) which originated from MLM's public funds was deposited into the FNB account of IPM Plant Hire CC which is company owned by Ms Zona Zetu Siyazithanda Madikizela, who is the wife of Mr Madikizela.

⁶⁴ Response Letter from Mr Madikizela dated 05 March 2021 at Paragraph 4.

⁶⁵ [2021] ZACC [19].

5.1.103 Throughout the course of this investigation, the PPSA stumbled across Mr Madikizela, as his name became increasingly and unavoidably became infused with public money, which was the focus of the PPSA's investigation. It was therefore not open to the Public Protector as a guardian of a public purse to simply overlook or omit any person while evidence at hand points to a possible unlawful benefit or enrichment from public money.⁶⁶

5.1.104 On 25 February 2021, the PPSA investigation team held a face to face interview with Mr Mluleki Cwele (Mr Cwele) and further took a statement under oath from him at Mzamba, in order to get clarity on how they were appointed as Mbizana Local Taxi Association to transport mourners to the memorial service of Ms Winnie Madikizela-Mandela.

5.1.105 Mr Cwele submitted in his statement that they were appointed through negotiations between MLM, Mbizana Local Taxi Association and the local ANC leaders who were also in consultation with Mr Madikizela.⁶⁷ Mr Cwele further denied that he is a director of Koo Construction and submitted that he has no stake in Koo Construction, save to say that he is just a taxi operator/owner and a member of the Mbizana/Mzamba Local Taxi Association(s).

5.1.106 According to Mr Cwele an amount of R1, 100 000.00 was paid into his private or personal FNB account by Mr Madikizela on 24 May 2018.⁶⁸ Mr Cwele indicated that the said amount was then shared by all members of Mbizana/Mzamba Local Taxi Associations who had transported mourners to the memorial service of Ms Winnie Madikizela-Mandela.⁶⁹

5.1.107 Mr Cwele indicated that they never applied or bid for a tender. The transport service was all done through negotiations, mainly with ANC leaders. Mr Cwele

⁶⁶ Section 6(4)(iii-iv) of the PPA.

⁶⁷ Mr Cwele's statement at paragraph 3.

⁶⁸ The Public Protector is in possession of the account number and proof of payment to Mr Cwele's FNB account as deposited on 24 May 2018, with reference number ANC.

⁶⁹ Mr Cwele's statement at paragraph 5.

conceded that they were not prepared to allow taxis or buses from outside Mbizana to take over their licenced routes. According to Mr Cwele, it is a normal practice within the taxi industry not to allow other taxis from outside areas to take over other association’s transport routes.

5.1.108 In terms of a letter, dated 15 March 2021 received from the Auditor General of South Africa (AGSA), Ms T Maluleke, the DSRAC disclosed this contract (payment of R1, 1 million to MLM as per MoA) as irregular and the AGSA simply confirmed that it was entered into without any procurement process followed.⁷⁰ The DSRAC disclosed the amount of R1, 1 million to AGSA and the related irregular expenditure in their financial statements.

5.1.109 In a bid to further interrogate or pursue allegations of misappropriation of public money, the PPSA engaged the services Financial Intelligence Centre (FIC) for a commercial intelligent analysis of financial transaction related to this matter and subsequently received a summation of Reactive Financial Intelligence Report (RFIR) dated 28 June 2021, signed off by Director of FIC: Adv XJ Khanyile.

5.1.110 The following was highlighted in the RFIR submitted to the PPSA, after a credit amount of R1 100 000.00 referenced “*FNB OB Pmt Mbizana Local Municipality*” on 2018-08-01. The amount was observed credited from FNB Account in the name of MBIZANA LOCAL MUNICIPALITY⁷¹ to FNB account in the name of Mthombeni Projects. From the ensuing credit of R1 100 000.00, the following debit transactions were observed bearing reflected references:

From Acct	To Acct	To Acct Name	Debit Reference	Credit Reference	Amount	Tran Date	Tran Time
		Allan Moran Design	ALLAN MORAN DESIGN	MABUYANE	R 450 000,00	2018-08-01	20:55:45
		IPM Plant Hire	MADIKIZELA	LONWABO BAM	R 250 000,00	2018-08-01	20:56:33

⁷⁰ Letter dated 15 March 2021 from AGSA at Paragraph 10.

⁷¹ Account bank numbers are known but withheld/blacked out by PPSA for security reasons, in compliance with Protection of Personal Information Act 4 of 2013.

	IPM Plant Hire	MADIKIZELA	LONWABO BAM	R 250 000,00	2018-08-01	20:56:33
	TRANSFER	MTHOMBENI LTD	MTHOMBENI LTD	R 7 000,00	2018-08-02	08:28:04
	IPM Plant Hire	MADIKIZELA	LONWABO BAM	R 100 000,00	2018-08-02	08:29:09
	IPM Plant Hire	MADIKIZELA	LONWABO BAM	R 100 000,00	2018-08-02	08:29:09
	TRANSFER	MT PROJECTS	MT PROJECTS	R 5 300,00	2018-08-02	08:47:17
	Lonwabo Bam	LONWABO BAM	ZAMADUNGA ENTERPRISE	R 125 000,00	2018-08-02	15:31:17
	ANC Fundraising	ANC (DONATION)	MTHOMBENI PROJECTS	R 280 000,00	2018-08-04	07:06:49

5.1.111 The following related information was observed as per contracts/records against the said account/s:

- (a) Nedbank account in the name of *CORDINIA VALLEY TRADING PTY LTD*, registration number 2015/400297/07;
- (b) First National Bank account in the name of *IPM PLANT HIRE CC*, registration number 2006/130908/23;
- (c) First National Bank account in the name of *Edgar BAM* and
- (d) First National Bank account in the name of *ANC PROVINCE OF EASTERN CAPE*.⁷²

Application of the relevant legal framework

5.1.112 In terms of section 239 of the Constitution of the Republic of South Africa,(the Constitution) 1996 an ‘*organ of state*’ means—

- (a) “Any department of state or administration in the national, provincial or local sphere of government; or
- (b) Any other functionary or institution—
 - (i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) Exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

⁷² All bank account numbers are known to PPSA but are withheld for security reasons.

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- 5.1.113 Based on the afore-going constitutional provisions, it is submitted that the MLM is an organ of state, constituted at a local sphere of government.
- 5.1.114 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 national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
- 5.1.115 Section 133(3)(a) prescribes that MEC's must act in accordance with the Constitution;
- 5.1.116 Section 136(2)(b) prohibits conduct by MEC's which is in any way inconsistent with their office, or conduct which could expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests;
- 5.1.117 Section 136 (2)(c) prohibits the use of their position by MEC's entrusted to them, to enrich themselves or improperly benefit any other person.
- 5.1.118 The provisions of Schedule 2 of the Municipal Systems Act, 2000 (MSA) which deals with the Code of Conduct of municipal staff members provides that, staff members must act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.
- 5.1.119 The relevant provision of the Constitution that relates to MLM's accountability in the public administration is section 195(1), which provides that the *"public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics which must be promoted and maintained; efficient, economic and effective use of resources which must be promoted as well as a public administration which must be accountable"*.

5.1.120 Section 60 of the Municipal Finance Management Act 56 of 2003 (MFMA) provides *inter alia* that: “*the municipal manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must—*

- (a) *exercise the functions and powers assigned to an accounting officer in terms of this Act; and*
- (b) *provide guidance and advice on compliance with this Act to*
 - (i) *the political structures, political office-bearers and officials of the municipality;*
 - (ii) *.....*

5.1.121 Section 61(1) of the MFMA provides that “*the accounting officer of a municipality must—*

- (a) *act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;*

5.1.122 In terms of section 62(1)(d) of the MFMA, the Accounting Officer is responsible for managing the financial administration of the Municipality and must for this purpose take all reasonable steps to ensure that unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented.

5.1.123 The MLM is a municipality in the local sphere of government and thus it is subject to the provisions of the MFMA. Undeniably, the MLM also receives allocation from public funds in terms of the relevant provisions of Division of Revenue Act.⁷³

⁷³ Act 2 of 2013.

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

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

5.1.125 In terms of section 173(1) of the MFMA, “*the accounting officer of a municipality is guilty of an offence if that accounting officer—*

- (a) *deliberately or in a grossly negligent way—*
- (iii) *fails to take all reasonable steps to prevent unauthorised, irregular fruitless and wasteful expenditure;”*

5.1.126 In terms of section 1 of MFMA, **irregular expenditure** is defined as follows:

“**irregular expenditure**”, in relation to a municipality or municipal entity, means—

- (a) *Expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of this Act, and which has not been condoned in terms of section 170;*
- (b) *Expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the Municipal Systems Act, and which has not been condoned in terms of that Act;*
- (c) *Expenditure incurred by a municipality in contravention of, or that is not in accordance with, a requirement of the Public Office-Bearers Act, 1998 (Act No. 20 of 1998); or*
- (d) *expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality’s by-laws giving effect to such policy, and which has not been condoned in*

terms of such policy or by-law, but excludes expenditure by unauthorised expenditure.”

5.1.127 Section 32 of MFMA provides, *inter alia* that:

“(1) Without limiting liability in terms of the common law or other legislation—

(a) ...;

(e) the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3);

(f); or

(g);

(2) A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure—

(a)...—

(i)...; or

(ii) ...; and

(b)... in the case of irregular or fruitless and wasteful expenditure is after investigation by a council committee, certified by the council as irrecoverable and written off by the council.

(3)...

(4) The accounting officer must promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of—

(a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;

(b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and

(c) the steps that have been taken—

(i) to recover or rectify such expenditure; and

(ii) to prevent a recurrence of such expenditure.”

5.1.128 The Municipal Supply Chain Management (SCM) process of procuring goods and services by means of public advertisement, including its publication, gives effect to the provisions of section 217 of the Constitution that all potential suppliers should be afforded the right to compete for public sector business through competitive bidding.

5.1.129 Section 112 (1) of the MFMA provides that the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost – effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:

- (a) “the range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions, and other types of competitive bidding;*
- (b) when a municipality or municipal entity may or must use a particular type of process;*
- (c) procedures and mechanisms for each type of process;*
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;*
- (e) open and transparent pre-qualification processes for tenders or bids;*
- (f) competitive bidding processes in which only pre-qualified persons may participate;*
- (g) bid documentation, advertising of and invitations for contracts;*
- (h) procedures and mechanisms for-*
 - (i) the opening, registering and recording of bids in the presence of interested persons*
 - (ii) the evaluation of bids to ensure best value for money;*
 - (iii) negotiating the final terms of contracts; and*
 - (iv) the approval of bids;*
- (i) screening processes and security clearances for prospective contractors*

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- on tenders or other bids above a prescribed value;*
- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion such prospective contractors from those tenders or bids;*
 - (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117;*
 - (l) the barring of persons from participating in tendering or other bidding processes, including persons-*
 - (i) who were convicted for fraud or corruption during the past five years:*
 - (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years or*
 - (iii) whose tax matters are not cleared by South African Revenue Service:*
 - (m) measures for-*
 - (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management*
 - (ii) promoting ethics of officials and other role players involved in municipal supply chain management;*
 - (n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by-*
 - (i) councillors in contravention of item 5 or 6 of the Code of Conduct of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or*
 - (ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act:*
 - (o)*;
 - (p)*;
 - (q).....;"*

5.1.130 In compliance with the MFMA, the MLM developed its own Supply Chain Management Policy ⁷⁴ (SCM Policy). The purpose of the SCM Policy is to ensure that the MLM procures goods and services in a manner that is efficient, timely

⁷⁴ Approved on 01 July 2017.

and cost effective, ensures customer satisfaction, pursues socio-economic objectives through a preference system and demonstrates compliance with the Constitution and all relevant legislation.

5.1.131 Paragraph 53 of the SCM Policy deals with the deviation and ratification of minor breaches of procurement processes and states the following:

“53.1 *The accounting officer may-*

- a) *Dispense with the official procurement processes established by this policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only-*
 - (i) *In an emergency;*
 - (ii) *If such goods or services are produced or available from a single provider only;*
 - (iii) *For the acquisition of special works of art or historical objects where specifications are difficult to compile;*
 - (iv) *Acquisition of animals for zoos, nature reserves or game reserves; or*
 - (v) *In any other exceptional case where it is impractical or impossible to follow the official procurement processes such as when a project that has fairly advanced towards completion requires additional funding to complete and the accounting officer deems it impractical and undesirable to initiate another procurement process to enable the completion of such project. In such a case the accounting officer is allowed to authorise additional funding to the project, on a once off –basis, provided that such funding required to complete the project does not exceed 20% of the original tender amount tendered by the relevant service provider or contractor; and*
- b) *Ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.*

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- 53.2 The accounting officer must record the reasons for any deviations in terms of subsections (1)(a) and(b) of this policy and report them to the next meeting of the council and include as a note to the annual financial statements (sic).
- 53.3 *Subsection (2) does not apply to the procurement of goods and services contemplated in section 11(2) of this policy (sic).” (emphasis added)*
- 5.1.132 Section 38 of the Public Finance Management Act⁷⁵ (PFMA) places certain obligations on the accounting officers of government departments⁷⁶
- 5.1.133 Section 38(1)(a)(iii) of PFMA requires of the accounting officer to implement an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- 5.1.134 Section 38(1)(c)(ii) of PFMA requires of the accounting officer to take effective and appropriate steps to prevent unauthorized, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct.
- 5.1.135 Section 38(n) stipulates that the accounting officer must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act (PFMA).
- 5.1.136 Section 44(2)(d) of the PFMA provides that a delegation or instruction to an official in terms of subsection (1), does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.
- 5.1.137 The Eastern Cape DSRAC is a provincial government department under direct control of the Eastern Provincial Government and thus falls within the PFMA and Treasury framework outlined herein.

⁷⁵ Act 1 of 1999.

⁷⁶Accounting Officer means a person mentioned in section 36 of PFMA, in this instance a Head of Department.

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- 5.1.138 The National Treasury may make regulations or issue instructions (Practice Notes) in terms of section 76(4)(c) of the PFMA, applicable to all institutions to which the PFMA applies.
- 5.1.139 In terms of Treasury Regulation 16A promulgated in Government Gazette number 27388, which came into effect on 15 March 2005 and read with Treasury Regulation 16A2.1 (a), this framework applies to all Departments.
- 5.1.140 In terms of Treasury Regulation 16A6.3(c), the Accounting Officer (the Head of the Department) must ensure that bids to supply services/goods are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer may determine.
- 5.1.141 In terms of Treasury Regulation 16A6.3 (d), which also came into effect on 15 March 2005, the accounting officer must ensure that awards of contracts/tenders made subsequent to advertising are published in the Government Tender Bulletin and in the media where the bids were originally advertised.
- 5.1.142 Treasury Regulation 16A.8 sets out the ethical standards, which must be complied with by all officials and other role players in the Supply Chain Management System. *Inter alia*, the regulation requires that conflicts of interests be disclosed, that all suppliers be treated equally and that official positions are not to be used for private gain or to improperly benefit other persons.
- 5.1.143 Treasury Regulation 16A9.1 (a) provides that the accounting officer or accounting authority must take all reasonable steps to prevent abuse of the supply chain management System.

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- 5.1.144 Treasury Regulation 16A6.4 provides that, if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.
- 5.1.145 In this matter, both the DSRAC and MLM denied being involved in the procurement process of the transportation services of Koo Construction and/or Mbizana Local Taxi Association.
- 5.1.146 The Municipal SCM Regulations 32 of 2005 issued in terms of MFMA (Regulation 32) states that a SCM policy may allow the accounting officer to procure goods or services for the municipality under a contract secured by another organ of the state (*government department or municipality*), but only if –
- (a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;
 - (b) the municipality has no reason to believe that such contract was not validly procured;
 - (c) there are demonstrable discounts or benefits for the municipality to do so; and
 - (d) that other organ of state and the provider have consented to such procurement in writing.
- 5.1.147 In response to the Notice, Mr Mahlaka sought to argue that the MLM utilised Regulation 32(1)(a) and the MLM SCM Policy paragraph 46. According to Mr Mahlaka, this procurement strategy was the only available option as Maikenjo Trading CC was already awarded the same services by DSRAC and there was no time available for the MLM to conduct a competitive procurement process. However, this argument falls to be rejected as Mr Leohla who is the owner of Maikenjo Trading CC never rendered any transport service for MLM and further disputed that he ceded his rights to Mthombeni.

5.1.148 Section 6(4)(c)(i)(ii) of the Public Protector Act provides that the Public Protector shall be competent at any time prior to, during or after an investigation if he or she is of the opinion that facts disclose commission of an offence by any person to bring the matter to the notice of the relevant authority charged with prosecutions or if he or she deems it advisable to refer any matter which has a bearing on an investigation to the appropriate public body or authority affected by it or to make appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

5.1.149 It should therefore be readily acceptable that, if the nature of the facts obtained during the course of investigation of matters falling within the mandate of the Public Protector as referred to in section 182 of the Constitution and section 6(4) of the Public Protector Act, seek to disclose the commission of a criminal offence(s), a referral to a relevant authority is triggered.

5.1.150 Accordingly, a brief application and discussion but not necessarily an investigation⁷⁷ of the following relevant criminal legal framework, becomes appropriate in this matter in order to underpin or support the PPSA's referral to the DPCI.

5.1.151 Section 4 of 121 of Prevention of Organised Crime Act 121 of 1998 (POCA) provides for an offence of **Money Laundering** and further describe it as follows:

*“Any person who knows or ought reasonably to have known that **property**⁷⁸ is or forms part of the proceeds of unlawful activities and—*

⁷⁷ Added emphasis.

⁷⁸ Section 1 of POCA defines “**property**” as money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof.

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- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—
- (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof;
 - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere—
 - (aa) to avoid prosecution; or
 - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence”.

5.1.152 The essence of the above provisions is that the person must know (or ought reasonably to have known) that the “*property is or forms part of the proceeds of unlawful activities*”.⁷⁹

5.1.153 For the purposes of this matter, the relevant question shall be *whether or not Mr Mabuyane knew or ought reasonably to have known* that the payment of R450 000 to Allan Morran Design for the renovation of his house illegally came from the MLM through Mthombeni Projects or Mr Bam. Same question would also apply to any other natural or legal person(s) such Mr Madikizela and ANC who all received this public money which originated from MLM. Knowledge, not participation in the unlawful activity, is required.⁸⁰

⁷⁹ Section 1 of POCA defines “**unlawful activity**” as any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.

⁸⁰ *Eyssen v S* (746/2007) [2008] ZA SCA 97 at paragraph 5-10.

5.1.154 Section 5 of POCA prohibits assisting another to benefit from *proceeds of unlawful activities*⁸¹ and states that:

“Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby—

- (a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or*
- (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence”.*

5.1.155 The above provisions could be relevant to Mr Madikizela for the purposes of determining his liability in this matter. Mr Madikizela was the Provincial Treasurer of the ANC and not a government official at the time of this incident.

5.1.156 Section 6 of POCA prohibits acquisition, possession or use of proceeds of unlawful activities and stipulates that:

“Any person who—

- (a) acquires;*
- (b) uses; or*
- (c) has possession of property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence”.*

The Purported Cession Agreement

⁸¹ Section 1 of POCA defines ***Proceeds of Unlawful Activities*** is defined as ‘any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, an includes any property representing property so derived.

- 5.1.157 Owing to the potentially dispositive nature of the supposed *Cession Agreement* between Maikenjo Trading CC, Koo Construction and Mthombeni Projects, it is prudent to briefly consider what constitutes a valid and binding cession agreement in order to juxtapose the meaning to the facts of the case at hand.
- 5.1.158 Cession takes place by means of an agreement of transfer of personal rights between the cedent and the cessionary⁸² by virtue of a *justa causa* from which the cedent's intention⁸³ to transfer the personal right to the cessionary and the cessionary intention to become the holder of the right of action appear or may be deduced. The transfer of a right by way of a *cession* may take place without the knowledge, concurrence or co-operation of the debtor.⁸⁴
- 5.1.159 According to Van der Merwe et al 2002,⁸⁵ the following requirements must be met in order to affect a valid cession:
1. "A right inhering to the cedent,
 2. Agreement between the cedent and the cessionary to give and accept transfer of the right,
 3. Compliance with any formalities set by the law."
- 5.1.160 From the above, it can be deduced that no particular form of words or method for the purpose of effecting a complete cession agreement are required. However, what it requires is that the intention⁸⁶ to effect the cession should be clear, real and not be fictitious or simulated.⁸⁷

⁸² Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at paragraph 6.

⁸³ Botha v Fick 1995 (2) SA 750 at page 27.

⁸⁴ Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at paragraph 6.

⁸⁵ Van der Merwe SWJ and etal, *Contract General Principles Article*, Eighth edition, Juta 2002 (Published by Nicolene Schoeman – Schoeman Attorneys 2012) at page 1.

⁸⁶ Our underlining.

⁸⁷ Scott S *The Law of Cession* (Juta & Co, Ltd 1980) at page 45.

- 5.1.161 It is evident that the purported letter of cession by Maikenjo Trading CC contains no express intention and agreement of transfer of his rights to Koo Construction and Projects or to Mbizana Local Taxi Association.
- 5.1.162 The preponderance of authority justifies the conclusion that, in the absence of legislation to the contrary, a valid agreement of cession needs to display *express intention*⁸⁸ of both the cedent and the cessionary.
- 5.1.163 As far as the facts of the present case are concerned, the purported cession agreement or letters were organised and facilitated from the office of the MLM Municipal Manager (Mr Mahlaka) before being presented to the parties to sign, without explanation of the legal implications, intent and purpose. As indicated, all parties have disputed the cession and indicated that they do not even know each other.
- 5.1.164 It is apposite to mention at this point that the *imprimatur* of the Public Protector may not be given to the agreement(s) that on the face of it, appear to be tainted by fraud. In *Eke v Parsons*⁸⁹ it was indicated amongst other things that, *it does not follow that anything agreed to by the parties should be accepted by a court and made an order of court*. In a same way, the Public Protector can only accept a cession agreement that on the face of it is competent and proper.

The Common Law offence of Fraud as may possibly be triggered by the facts placed before the Public Protector

- 5.1.165 Fraud is broad category of crime that can take a multi-disciplinary approach and encompasses many different activities. However the most basic element of fraud is deceit or misrepresentation.⁹⁰ It is further asserted that fraud is based on unlawful and intentional deceit or misrepresentation of facts made with the knowledge of its falsity and with the intent that the victim act thereon

⁸⁸ Our emphasis.

⁸⁹ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 25.

⁹⁰ Williams HE *Investigating White Collar Crimes* by Charles C Thomas 1997 at page 46-47.

or in a manner apparently fitted to induce him to act thereon and the victim must act in reliance on the statement to his injury.⁹¹

5.1.166 According to the Association of Certified Fraud Examiners (ACFE) fraud can take various forms such as theft of cash, corruption, manipulation of accounting, extortion⁹² including other forms of cybercrimes as a result of an increase in the use of computers.⁹³

5.1.167 The above brief definition of a crime of fraud may be relevant in as far as to ascertain where it appears from the facts extrapolated in this matter whether or not the conduct of implicated government officials may have been tainted with fraud or simply moved beyond maladministration and/or improper conduct to a legally proscribed criminal conduct or criminality. Again this is necessary to support a referral to DPCI as already made by the Public Protector.

5.1.168 All the determination(s) with regard to whether crime(s) may have been committed or not, shall be made by the DPCI charged with criminal investigation following a referral envisaged under section 6(4)(c)(i)(ii) of the Public Protector Act.

5.1.169 **The following Clauses of the MoA between the MLM and DSRAC become more pertinent for legal obligations and duties of the MLM arising out of it:**

9.2.5 "To comply with the terms and conditions as stipulated in this Agreement;

⁹¹ Williams HE *Investigating White Collar Crimes* by Charles C Thomas 1997 at page 46-47.

⁹² Oriol Amat *Detecting Accounting Fraud Before It's Too Late* (John Wiley & Sons Incorporated 2019) at page 1.

⁹³ Burden K and etal *Cyber Crime- A New Breed of Criminal Computer Law and Security Report* (Vol 19 no3 2003) 222.

9.2.6 be responsible for the procurement of transport service providers to transport the public to the memorial service of the late Winnie Madikizela Mandela;(own emphasis)

9.2.7 the payment of the appointed service providers for services rendered on the day of the memorial service upon documentary proof of service delivery;

5.1.170 The service provider(s) for the transport arrangements for members of the public to the memorial service of Ms Winnie Madikizela-Mandela was/were as it clearly appears from the facts, arranged by individuals outside the employ of MLM and therefore not in line with the provisions and terms of MoA between DSRAC and MLM, which was legal binding document on its own.

Conclusion

5.1.171 Based on the totality of the available evidence obtained during the investigation, it can be concluded that no due SCM process in appointing Koo Construction and Projects and/or Mbizana Taxi Association to transport mourners to the memorial service of Ms Winnie Madikizela-Mandela was followed by the MLM.

5.1.172 Instead, the MLM allowed a state or a government event (Memorial Service of Ms Winnie Madikizela-Mandela) to be taken over by private individuals outside of government and it was done outside any identifiable SCM processes.

5.1.173 Evidence at hand revealed further that the Mbizana Local Taxi Association and/or Koo Construction and Projects rendered the transport services for the memorial service, following negotiations between ANC leaders in Mbizana and Local Taxi Associations, outside the MLM's SCM processes and not in accordance with the MoA between the MLM and DSRAC.

- 5.1.174 An amount of R 1, 100 000.00 (One million one hundred thousand rand), was improperly deposited into the account of Mthombeni Project (Pty) Ltd by the MLM and subsequently expended to personally benefit Mr Mabuyane, Mr Madikizela and the ANC, as shown in evidence above.
- 5.1.175 It further appears from evidence that in an effort to legitimise the whole unlawful SCM process, which had already unfolded, the MLM proceeded to engineer and/or fraudulently fabricate letters whereby the whole process would appear to be an agreement of cession amongst Maikenjo Trading CC, Koo Construction and Mthombeni Projects, when according to the evidence, this was not the case.
- 5.1.176 Accordingly, the statements/affidavits and corroborating evidence by Maikenjo Trading CC, Koo Construction and Mthombeni Projects are sufficiently persuasive and accord with a *prima facie* conclusion of maladministration and improper conduct by the MLM in connection with public funds that were meant for transportation services to attend the memorial service of the late Ms Madikizela-Mandela.
- 5.2 Regarding whether an amount of R 2, 2 million (Two million, two hundred thousand rand) which originated from the ECPG was paid to Mthombeni Project (Pty) Ltd by Key Spirit Trading 218 and subsequently misappropriated to improperly benefit certain government officials and/or private persons and if yes, whether such amounted to improper conduct and maladministration**

Common cause or undisputed facts

- 5.2.1 It is not in dispute that Mr Bam is a private individual and a Director or the owner of Mthombeni Project (Pty) Ltd, a private company with the registration number 2018/024301/07.

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- 5.2.2 Mr Masilo Phala (Mr Phala) is a private individual and a Director or the owner of Key Spirit Trading 218 CC, a private company.
- 5.2.3 On 11 August 2018 an amount of R2,2 million (Two million, two hundred thousand rand), was deposited into Mr Bam/Mthombeni Projects FNB Account number by Mr Phala/ Key Spirit Trading 218 CC.⁹⁴

Issues in Dispute

- 5.2.4 Mr Bam submitted a second affidavit dated 03 July 2019, to the PPSA in which he alleged that on 07 August 2018, around 22h25, he received a cellphone call from Mr Baphelele Mhlaba (Mr Mhlaba) who was the Chief of Staff of the current Premier of the Eastern Cape, Mr Oscar Mabuyane.
- 5.2.5 Mr Mhlaba informed Mr Bam that he was going to send him some “stuff”, after which Mr Mhlaba sent a WhatsApp message with a cellphone number of Mr Phala, who is the owner of Key Spirit Trading CC, and further instructed Mr Bam to liaise with Mr Phala in order to prepare an invoice for R2,2 million (Two million, two hundred thousand rand). Mr Mhlaba further advised Mr Bam that the invoice must be made out as if he is billing for a Coil Sheets (Coils).
- 5.2.6 On 08 August 2018, Mr Bam called Mr Phala at about 12h00 and explained that he was sent by Mr Mhlaba to prepare an invoice for Coils and that Mr Phala must elaborate to Mr Bam on how this invoice should be done as Mr Bam was not actually selling Coils.
- 5.2.7 On the 11 August 2018, Mr Bam received a draft invoice from Mr Phala through a WhatsApp message, in which he was advised by Mr Phala to complete. Mr Phala further told Mr Bam that he was coming from Polokwane and was on his way to Johannesburg and that he would send his company details in order to be put on the invoice.

⁹⁴ Transaction number being 805807FAOE-1: ABSA Online.

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- 5.2.8 On the same day at about 20h36, Mr Bam reminded Mr Phala to send his company details in order for Mr Bam to finalise the invoice. Mr Phala subsequently sent Mr Bam his company details namely, *Key Spirit Trading CC*, proof of which was furnished during the investigation.
- 5.2.9 In turn, Mr Phala requested Mr Bam to send him his banking details as well, which Mr Bam did. He also submitted supporting documents in this regard.
- 5.2.10 On 11 August 2018, Mr Phala sent Mr Bam proof of payment of R2, 2 million, confirming that he had effected the payment into Mr Bam's bank account. The copies of the relevant documents were also provided by Mr Bam during the investigation.
- 5.2.11 In terms of the FIC reactive financial intelligence report⁹⁵ dated 14 July 2021 which was submitted to the Public Protector, the following observations were recorded under paragraph 5 as part of the final analysis:

*“The FIC has observed two debits amounts of -R2 200 000.00 from **Absa Bank account** ⁹⁶ on 2018-08-09 and 2018-08-11, with one suspected to have been credited to First National Bank account number in the name of MTHOMBENI PROJECTS (PTY) LTD. The transactions appeared to have been conducted against after a payment of **R38 388672.93 referenced “NPF CREDIT TREAS/IBS 1808034442NP3981/1190/119”** was made into the Absa Bank account”.*

- 5.2.12 Furthermore, in terms of the subsequent FIC contrast and Reactive Financial Intelligence Report dated 16 July 2021 which elaborates the above financial transaction, the following was magnified:

⁹⁵Signed off by Director of FIC: Adv XJ Khanyile.

⁹⁶ In the name of *Key Spirit Trading 218 CC*.

*“A credit amount of **R38 388 672.93** referenced **“NPF CREDIT TREAS/IBS 1808034442NP3981/1190/119”** on 2018-08-03. The funds have been observed credited from **Standard Bank account**⁹⁷ believed to be in the name of **ECPG DEPT OF TRANS GOV FLEET T.***

▪ *A debit amount of -R2 200 000.00 referenced **“IBANK PAYMENT TO SETTLEMENT ABSA BANK Coils Roof Sheet”** on 2018-08-11. Please note that the amount has been observed to have been credited to First National Bank account in the name of **MTHOMBENI PROJECTS (PTY) LTD.***

5.2.13 Worthy of note from the above commercial transactional activities is the following linkage:

(a) Key Spirit Trading 218 CC's ABSA bank account was funded or received payment of (**R38 388 672.93**) directly from Eastern Cape Provincial Government Department of Transport as referenced *NPF CREDIT TREAS/IBS* on 03 August 2018.

(b) On 11 August 2018, Key Spirit Trading 218 CC, transferred R2 200 000.00, to *MTHOMBENI PROJECTS (PTY) LTD* as referenced *“Coils Roof Sheet”*

5.2.14 Mr Bam alleged further in subsequent telephonic interviews conducted with the Public Protector that he had not rendered any service to Mr Phala nor does he know Mr Phala in person and as such he was not entitled to this payment.

5.2.15 In a letter, dated 28 May 2021 from Mr Bam to the Public Protector, the following was highlighted:

*“When I put my thoughts together I remembered that I was present in East London with **Mr Mhlaba** when he phoned a certain **Mr Bruce Ndlela** who is one of the Directors of **Bell Equipment** and asked him whether he has transferred*

⁹⁷ Bank account number is known to PPSA but is withheld for security reasons.

the money into **Mr Phala's** account, as **Mr Phala** indicated that he did not receive any monies from **Bell Equipment**.

Subsequently, **Mr Mhlaba** informed me that the response from **Mr Bruce Ndlela** was that he had asked the **Finance Department of Bell Equipment** to authorise the payment for **Mr Masilo Phala's** company. As a result of such authorisation, **Mr Phala** transferred the **R2.2 million** to my business account and he told me that he transferred the other monies to the **ANC** account though I cannot say how much he transferred to the **ANC** account.

I have subsequently established that the modus operandi used by **Mr Babalo Madikizela** and **Bell Equipment** was as follows.

The origin and true value price of the equipment bought from **Bell Equipment** by the **Department of Transport** was inflated to incorporate the benefit amount that was paid into **Mr Phala's** business account for the benefit of **Mr Babalo Madikizela, Mr Oscar Mabuyane, Mrs Weziwe Tikana Gxothiwe** and the **ANC Eastern Cape**".

- 5.2.16 The gist of the above allegations by Mr Bam was understood to suggest that Mr Phala is aligned or linked to a company which is based in East London called Bell Equipment which is contracted to the Eastern Cape Department of Transport (ECDoT) and allegedly inflates prices deliberately so that it can later pay back or donate to officials within the ECPG.
- 5.2.17 The ECDoT clarified to the Public Protector, as per letter dated 07 May 2021 signed by its Head of Department: Mr MC Mafani (Mr Mafani) that it had no contract with Bell Equipment for a period of 01 January 2018 to 31 December 2019. However, Mr Mafani indicated to the Public Protector that the ECDoT bought through Bell Equipment, goods and services in terms of the RT57 contract, which were requested through the Provincial Treasury in 2018. This procurement enabled the ECDoT to buy goods from Bell Equipment that were not on contract through a standardization system.⁹⁸
- 5.2.18 Mr Mafani further submitted copies of documents and/or invoices in respect of the above procurement between Bell Equipment and the ECDoT, highlighting

⁹⁸ As per letter dated 07 May 2021 from ECDoT.

the Yellow Plant Fleet (Phase 3) that was acquired by the ECDoT from Bell Equipment as shown in the Memorandum dated 21 November 2018, approved by former Head of ECDoT, Ms I N Mpolweni.

5.2.19 On 19 May 2021, the Public Protector approached Bell Equipment Sales South Africa (Pty) Ltd (Bell Equipment) in writing, seeking clarity on the alleged involvement in the alleged misappropriation of suspected public funds. Bell Equipment was presented with a summary of a Yellow Plant Fleet alleged to have been sold by it to the ECDoT at an inflated price.

5.2.20 On 26 May 2021, Bell Equipment replied through its attorneys, ENSafrica, and requested further information before they could reply adequately to the allegations and ultimately replied as per letter dated 11 June 2021. The response by ENSafrica on behalf of Bell Equipment sought to reproduce the following table duly amended to accord with Bell Equipment's records:

Plant Items	Model	Supplier	Quantity	Unit Price	Total Price (Vat Incl)
1.Milling Equipment	BM 1000/35 and BM 1300/35	Bell Equipment	2	R6,049,000.00	R12,098,000.00
2.Graders	Bell 670G	Bell Equipment	13	R3,688,280.00	R47,947,640.00
3.Roller Pad-foot Shells	(BW211D-40)	Bell Equipment	6	R192,050.00	R1,152,300.00
4.TLB	Bell 315SK	Bell Equipment	2	R1,054,550.00	R2,109,100.00
5.Pedestrian Roller	BW65H	Bell Equipment	12	R240, 000.58.	R2, 880,006.96
TOTAL					R66,187.142.00

5.2.21 Further to the table above, ENSafrica clarified that Bell Equipment did not sell the equipment in row 5 of the above table to the ECDoT. Although this equipment was *supplied* by Bell Equipment, the ECDoT placed these orders

directly on *Key Spirit Trading 218 CC* (Key Spirit).⁹⁹ Key Spirit, in turn, placed orders for the items on Bell Equipment. Bell Equipment accordingly did not receive any money directly from the ECDOT pursuant to the order relating to the equipment in row **5**.

5.2.22 In total, therefore, the ECDOT paid Bell Equipment **R63, 307,040.00** for the equipment in rows **1 to 4**. This total amount was paid as follows to Bell Equipment:

- (a) R12,098,000.00 was paid on 15 May 2019 in respect of the equipment in **row 1**;
- (b) R50,054,740.00 was paid on 20 March 2019 in respect of the equipment in **rows 2 and 4**; and
- (c) R1, 152,300.00 was paid on 14 June 2019 in respect of equipment in **row 3**.

5.2.23 ENSafrica further attached the *Supplier's Advice (Order of Goods/Services)* and the *Tax Invoices* for the equipment in rows **1, 2, 3** and **4** as annexures in support of their response to the Public Protector. Bell Equipment denied that it had deliberately, or otherwise, inflated the price of the equipment it sold to the ECDOT, namely those in **rows 1 to 4** of the above table.¹⁰⁰

5.2.24 With regard to whether Bell Equipment ever made any payment to Mr Phala's Key Spirit private company, if yes for what purpose, when and how much was paid, the following infographic answer was proffered on behalf of Bell Equipment by ENSafrica:

When	How much	In respect of which orders
7 September 2018	R1,088,048.72	12 x BELL 315SL TLBs; and

⁹⁹ Key Spirit Trading is alleged to be an Equity Partner to Bell Equipment as per telephonic clarity given by ENSafrica to the investigation team of the Public Protector on 28 June 2021.

¹⁰⁰ As per ENSafrica's response letter dated 28 June 2021 at page 3.

		12 x BELL 670G Motor Graders;
13 December 2018	R68,540.00	1 X BELL 670G Motor Grader

- 5.2.25 ENSafrica submitted that the above payments were “*discretionary commissions*” which were made to remunerate Key Spirit for its efforts in procuring orders that were placed on Bell Equipment by the ECDoT for items indicated. The commissions were calculated as 2% of the selling price of the equipment. Bell Equipment did not inflate the prices of the equipment in order to make provision for the commissions: each equipment was sold at the prices prescribed by RT57. The RT57 pricelist was furnished to the Public Protector as an annexure for perusal.¹⁰¹
- 5.2.26 On 16 March 2020, the Public Protector wrote a letter to Mr Phala, being the director of Key Spirit Trading CC 218 and requested him to reply to the above allegations of impropriety involving state funds. Mr Phala replied through his attorneys, namely Tumi Mokoena Incorporated, as per letter dated 11 August 2020 and disputed the mandate of the Public Protector in this matter, thus not embracing an opportunity to reply to allegations of impropriety involving public funds.
- 5.2.27 Mr Phala’s attorney argued that the alleged interactions between Mr Bam and Mr Phala were private and do not fall within Public Protector’s constitutional or legislative mandate. According to Mr Phala’s attorney, Mr Phala has no obligation to provide Public Protector with any explanation regarding these allegations.
- 5.2.28 Due to objections raised relating to possible jurisdictional limitations, the PPSA could not enquire further into alleged subsequent private transactions between

¹⁰¹ RT57 full price list could be accessed here:
<http://www.treasury.gov.za/divisions/ocpo/ostb/contracts/RT57%202016%20Price%20List%20Effective%201%20October%202018-%2030%20November%202018.pdf>.

Mr Phala/Key Spirit, Bell Equipment and Mthombeni Projects since these are private persons.

- 5.2.29 However, the Public Protector, as a custodian of public purse continued to trace the source of R2,2 million to establish its origin, disbursement and destination, without being too fixated on private persons in the process save to mention their name(s) and role(s) in passing, where they appear to be inseparably entangled or intertwined to the facts at issue.
- 5.2.30 On the same day of 11 August 2018, Mr Bam then allegedly received a call from Mr Madikizela asking if the amount of R2, 2 million was deposited into his account by Mr Phala, and the answer was yes, but not yet cleared by the bank. Mr Mhlaba allegedly also called Mr Bam asking if the money was deposited by Mr Phala and again the answer was yes, but not yet cleared by the bank.
- 5.2.31 Mr Mhlaba then told Mr Bam that Mr Mabuyane was in need of R20 000.00 and that Mr Bam should make a plan. Mr Bam agreed and requested the banking details to deposit the said money for Mr Mabuyane.
- 5.2.32 Mr Mhlaba then instructed Mr Bam to deposit the R21 800.00 for Mr Mabuyane into the account of Cuntu Business Advisory Services (Pty) Ltd. Proof of this WhatsApp communication and the banking details were provided to PPSA by Mr Bam during the investigation.
- 5.2.33 As instructed, Mr Bam made the deposit of R21 800.00 and sent proof of payment to Mr Mhlaba who in turn acknowledged receipt thereof by thanking Mr Bam. Proof of this communication was also provided to PPSA by Mr Bam.
- 5.2.34 On 13 March 2020, the PPSA investigation team wrote a letter to Mr Mhlaba, requesting him to reply to the above allegations in as far as they relate to his involvement. Mr Mhlaba replied to PPSA per letter and submitted that the

Director of Cuntu Business Advisory Services: Mr Thando Cuntu (Mr Cuntu) is his friend of 20 years and has previously appointed him as his accountant.

- 5.2.35 Mr Mhlaba submitted that as part of the tasks that he had to do for the ANC, he relied on Mr Cuntu to assist. In this regard, Mr Mhlaba had asked Mr Cuntu to source blankets in East London for the elections campaign work that was coordinated in Butterworth, in August 2018.
- 5.2.36 In order to buy these blankets, Mr Mhlaba approached Mr Madikizela in his capacity as the Provincial Treasury for the funds to buy blankets for the elderly. Mr Madikizela then referred Mr Mhlaba to Mr Bam for a donation. Mr Mhlaba denied that Mr Bam was given an instruction to deposit money for Mr Mabuyane.
- 5.2.37 The PPSA has noted the payment of R21 800.00 from the bank statement of Cuntu Business Advisory Services on 11 August 2018. Mr Cuntu did not reply to allegations of his involvement in this transaction despite a letter from the PPSA addressed to him on 26 August 2020.
- 5.2.38 On 14 August 2018, the money deposited by Mr Phala was cleared by the bank and Mr Bam accordingly notified Mr Madikizela. At the time of receipt of this payment from Key Spirit Trading CC 218, Mr Bam only had a balance of R2, 64 cents (Two rand and sixty our cent only) in his Mthombeni Project FNB account.¹⁰²
- 5.2.39 Mr Bam further alleged that, he was then instructed by Mr Madikizela to book flights for both Mr Bam and Mr Madikizela from East London to Johannesburg. The departure, according to Mr Bam, was on the same day of 14 August 2018 at 09h00 and the return date was on the 15 August 2018. Proof of a Fly-Safair Boarding Pass was provided.

¹⁰² As per FNB bank statement of Mthombeni Projects as at 14 August 2018.

- 5.2.40 Mr Bam was allegedly instructed by Mr Madikizela to make a payment of R100 000.00 (One hundred thousand rand) to a Mr Khwalo (simply saved as Khwalo BCM on Mr Bam's phone). Mr Bam requested Mr Khwalo over the phone to provide the banking details for the deposit as directed by Mr Madikizela. Mr Bam then received a FNB business account number, the name of the company, being *Red Step Investment 29 CC* and paid the amount of R 100 000.00. Mr Bam further alleged that upon receipt, Mr Khwalo confirmed receipt, proof of which was provided to PPSA by Mr Bam.
- 5.2.41 On 16 March 2020, the PPSA wrote to Mr Khwalo and solicited his comments on the above allegations or reasons for retention of the money deposited by Mthombeni Projects. Mr Khwalo did not respond. According to the bank statements of *Red Step Investment 29 CC*, obtained during the investigation, a deposit of R 100 000 from Mthombeni Projects was made on 14 August 2018. In terms of the Companies and Intellectual Property Commission (CIPC), the only active director of Red Step Investment 29 CC is Mr Nqam Lunga Owen.
- 5.2.42 Mr Bam further alleged that on 14 August 2018, whilst he was in Johannesburg with Mr Madikizela, Mr Mhlaba called and asked Mr Bam to transfer R300 000.00 (three hundred thousand rand) to the account of Mr Ntsikelelo Mzamane and further gave the contact details/cellphone number of Mr Ntsikelelo Mzamane in order for Mr Bam to get the banking details. However, before Mr Bam could do anything, he asked Mr Mhlaba to first speak to Mr Madikizela as he was next to Mr Bam at the time.
- 5.2.43 Mr Mhlaba then called Mr Madikizela and they had a conversation after which Mr Madikizela instructed Mr Bam to make the payment that Mr Mhlaba requested. Mr Bam then called Mr Ntsikelelo Mzamane, but could not reach him on his cellphone, after which Mr Bam sent an SMS requesting Mr Ntsikelelo Mzamane to send his banking details to Mr Bam.

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- 5.2.44 Mr Ntsikelelo Mzamane subsequently sent the FNB banking details of Songo Aluminium (Pty) Ltd to Mr Bam. Mr Bam made a payment of R300 000.00 and Mr Ntsikelelo Mzamane confirmed receipt through a short message system (SMS), proof of which was provided.
- 5.2.45 On 26 August 2020, the PPSA investigation team wrote a to Mr Ntsikelelo Mzamane and gave him an opportunity to explain the reasons for retention of above deposit into his business account of Songo Aluminium (Pty) Ltd on 14 August 2018. Mr Ntsikelelo Mzamane did not to respond to the PPSA, yet the deposit can be noted on the bank statements received by the PPSA from FNB.
- 5.2.46 Mr Bam alleged that he also notified Mr Mhlaba that the above payment was made to Mr Ntsikelelo Mzamane and Mr Mhlaba requested proof of which Mr Bam sent to him.
- 5.2.47 Mr Bam further alleged that later on 14 August 2020, Mr Madikizela called Ms Tikana, the MEC for Department of Transport in Eastern Cape (Ms Tikana) and spoke with her in the presence of Mr Bam, informing her that the money was available and that she must send Mr Madikizela the account where the money should be deposited.
- 5.2.48 Ms Tikana allegedly sent the bank account details to Mr Madikizela, who in turn sent the details to Mr Bam's phone. The account was with FNB in the name of *Mandla Limitless*. Mr Madikizela then told Mr Bam to make a payment of R400 000.00 (Four hundred thousand rand) to *Mandla Limitless*. Mr Bam made the payment of R400 000.00 on the same day. Proof of payment was provided to PPSA by Mr Bam during the investigation.
- 5.2.49 On 17 December 2019, the PPSA wrote to Ms Tikana and solicited her comments on the above allegations. She responded on 19 December 2019. Ms Tikana denied that she received any money from any person, including Mr Bam. Ms Tikana further denied any knowledge of corruption, maladministration or

misappropriation of public funds by the Eastern Cape Provincial Department of Transport. She further denied having improperly benefitted from any public funds.

- 5.2.50 On 12 July 2021, Ms Tikana tendered her response¹⁰³ to a Notice issued in terms of section 7(9) of the Public Protector Act and insisted that she still stands by her previous response, dated 19 December 2019. Ms Tikana further supplemented her response by denying that she benefited from the misappropriation of funds as alleged in the Notice. Further that given the gravity of any possible assertion to the contrary, she can only hope that it is not based on sheer suspicion, conjecture or supposition.
- 5.2.51 Ms Tikana argued further in her response that, it is unfortunate that she cannot alter her origins from the Cala Reserve – and that such should be criminalised at every turn. Further that, the case in point is that an entity named Mandla Limitless Trading (Pty) Ltd, whose owner is based in Cala Reserve is, as has been the case with her daughter 's Mioca Lodge not so long ago, unfairly and without a scintilla of evidence, associated with her.
- 5.2.52 On 26 August 2020, the PPSA wrote to Mr Sibongile Mandla (Mr Mandla), the Director of *Mandla Limitless Trading (Pty) Ltd* and requested him to clarify the purpose for which he was entitled to R400 000.00 from Mthombeni Projects or Mr Bam. Mr Mandla failed to respond to these allegations or to give reasons for retention of this money from Mthombeni Projects.
- 5.2.53 According to the registered office address of Mandla Limitless Trading (Pty) Ltd, this company is based at Cala Reserve in Cala, which is the same area where the Mioca Lodge (Pty) Ltd which is owned by Ms Kwakhanya Tikana, the daughter of the MEC Tikana, is located.

¹⁰³ As per letter dated 12 July 2021 signed off by MEC: Ms Tikana.

5.2.54 Furthermore, according to the FNB Gold Business Account which belongs to Mandla Limitless the following relevant transactions can be observed for a *Bank Statement Period* between **November 2017 to July 2020**:

DATE	DESCRIPTION	BENEFICIARY	AMOUNT
29 Nov 2017	Internet Pmt to Mioca First National Bank account in the name of Mioca (Pty) Ltd, registration number 2015/117573/07	Mioca Lodge	R20,000.00
30 Nov 2017	Internet Pmt from FNB Account in the name of Mandla Limitless to Nedbank Account in the name of Meyers Motors Pty Ltd for Kwakhanya Tikana	Meyers Motors Pty Ltd with reference Kwakhanya Tikana	R 65,000.00
14 Aug 2018	ATM Acc Payment from FNB account in the name of Mthombeni Projects to FNB Account of Mandla Limitless	Mandla Limitless	R 400,000.00
03 Nov 2018	Rtc Credit Ukhanyo Travel	Mandla Limitless	R 100,000.00
21 Nov 2019	Magtape Credit Ukhanyo Travel	Mandla Limitless	R180,000.00

04 Dec 2019	FNB App Payment from Account of Nontobeko S Tikana referenced Mbeko Tikana to FNB Account of Mandla Limitless	Mandla Limitless from Mbeko Tikana	R 1,700.00
27 June 2020	FNB App Payment from Account of Nontobeko S Tikana referenced Mbeko Tikana to FNB Account of Mandla Limitless	Mandla Limitless from Mbeko Tikana	R1,000.00

5.2.55 The contextualization of the above financial activities on the banking records of Mandla Limitless was conducted against an allegation that R 400 000.00 was deposited to Mandla Limitless on 14 August 2018 by Mthombeni Projects in order to benefit MEC Tikana. While the PPSA does not imply wrong doing by MEC Tikana, it was observed during this investigation that the relative(s) or family member(s) of MEC Tikana exchanged regular financial transactions with Mandla Limitless as indicated in a table above.

5.2.56 Furthermore, Mr Madikizela allegedly instructed Mr Bam on 14 August 2018 to make another payment to the FNB account of *Key Step Investment 29 CC* to the amount of R 200 000.00 (Two hundred thousand rand) and Mr Bam, which he did. Mr Lunga, the owner of the company, confirmed that he received the money and asked if it was not a mistake and Mr Bam said no, it was not a mistake. Proof of this payment was submitted during the investigation.

5.2.57 According to Mr Bam, Mr Madikizela also sent him an SMS on 15 August 2018 with the account details for *LSM Distribution (Pty) Ltd t/a Bentley Johannesburg*, and requested Mr Bam to deposit an amount of R500 000.00 (Five hundred thousand rand) to the above company. Mr Madikizela allegedly indicated to Mr Bam that the reference must be his initial and surname, namely, B Madikizela. Upon this instruction, Mr Bam made the transaction and it was successful. The

reason for this payment was allegedly to secure the purchase of a Bentley Bentayaga as Mr Madikizela advised him that he wanted to pay for it in cash. Proof of this payment was also provided.

- 5.2.58 Mr Madikizela allegedly then sent Mr Bam various account numbers and different amounts that he had to make the payments to. The first one being a FNB account in the name TP Madikizela for an amount of R50 000.00 (Fifty thousand rand). Proof of communication and payment were furnished to the Public Protector.
- 5.2.59 The deposit of R50 000.00 appears on the FNB bank statement of Ms Thandokazi Phakama Madikizela as at 15 August 2018, obtained during the investigation. The latter is alleged to be the relative of Mr Madikizela. However, the exact nature of the relationship could not be confirmed by DHA when the Public Protector enquired.
- 5.2.60 Mr Madikizela allegedly further sent Mr Bam two tax invoices. The first invoice was in the amount of R136 172.50, (One hundred and thirty six thousand one hundred and seventy two rand, fifty cents) paid to Glass Aluminium for the outstanding balance for aluminium windows and doors. The invoice was dated 13 August 2018. Proof of the invoice with the name Mr B Madikizela, was provided during the investigation.
- 5.2.61 The second invoice was for R111 500.00 (One hundred and eleven thousand five hundred rand) and on the same invoice of R111 500.00, Mr Bam added R31 500 and paid to Tiger Timber. Mr Bam paid the invoice as instructed by Mr Madikizela. Proof of the invoice and payment was furnished to the Public Protector.
- 5.2.62 Mr Madikizela allegedly further sent Mr Bam an SMS with an account number for PSNP. Mr Bam then made a payment of R310 000.00 (Three hundred and ten thousand rand) to PSNP on 14 August 2018, proof of which was provided.

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- 5.2.63 Thereafter Mr Bam and Mr Madikizela allegedly went to Sandton where they bought clothing items at Gucci clothing store for an amount of R37 305.00 (Thirty seven thousand three hundred and five rand), using the same money on Mr Bam's business banking card at Gucci on 16 August 2018.
- 5.2.64 On 16 August 2018, Mr Madikizela allegedly called Mr Bam while Mr Madikizela was in Cape Town and asked him how much was left from the R2,2000 000.00. Mr Bam responded that it was only R30 000.00 (Thirty thousand rand) that was left. Mr Madikizela then instructed Mr Bam to deposit the remaining balance into Mr Madikizela's FNB account. Mr Bam made that deposit as instructed by Mr Madikizela.
- 5.2.65 On 07 June 2020, the Public Protector held a face to face interview with Mr Bam with the view to verify the authenticity of the two affidavits referred to in this matter. Mr Bam confirmed that both affidavits were deposed to under oath by him as a result of him being tired of bullying and corruption in the Eastern Cape government by officials such as Mr Madikizela, Mr Mabuyane and Ms Tikana.¹⁰⁴

Application of the relevant legal framework

- 5.2.66 Section 6(4)(a)(iii) of the Public Protector Act¹⁰⁵ (PPA) states that the Public Protector shall be competent to investigate improper or dishonest act or omission or offences referred to in Part 1 to Part 4 or section 17, 20 or 21 of Chapter 2 of Prevention and Combating of Corrupt Activities Act (PRECCA)¹⁰⁶ with respect to public money.

¹⁰⁴ As per recorded audio @minute 6 to 7 of the meeting between Mr Bam and the Public Protector held on 7 June 2020.

¹⁰⁵ Act 23 of 1994.

¹⁰⁶ Act No 12 of 2004.

5.2.67 *Public Money* is not defined by either PRECCA or Public Protector Act, however it can be understood to mean any funds or money obtained by the holder from any governmental entity.¹⁰⁷

5.2.68 The ECPG is undoubtedly an organ of state as envisaged under section 239 of the Constitution. It is common cause that the ECPG receives allocation from public funds in terms of the relevant provisions of Division of Revenue Act.¹⁰⁸

5.2.69 Section 3 of PRECCA provides that:

“Any person who, directly or indirectly –

- a) *accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*
- b) *Gives or agrees or offer to give to any another person any gratification, whether for the benefit of that other person or for the benefit of another person, In order to act, personally or by influencing another person so to act, in a manner-*
 - (i) *That amounts to the-*
 - (aa) *illegal, dishonest, unauthorised, incomplete, or biased; or*
 - (bb) *misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
 - (ii) *that amounts to-*
 - (aa) *the abuse of a position of authority;*
 - (bb) *a breach of trust; or*
 - (cc) *the violation of a legal duty or a set of rules;*
 - (iii) *designed to achieve an unjustified result; or*
 - (iv) *that amounts to any other unauthorised or improper inducement to do or not to do anything.*

¹⁰⁷ <https://www.lawinsider.com/dictionary/public-money> accessed on 02 July 2021.

¹⁰⁸ Act 2 of 2013.

is guilty of the offence of corruption.

5.2.70 Section 4 of PRECCA further provides that:

“(1) Any-

(a) *Public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*

(b) *Person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,*

In order to act, personally or by influencing another person so to act, in a manner-

(i) *That amounts to the-*

(aa) *illegal, dishonest, unauthorised, incomplete, or biased; or*

(bb) *misuse or selling of information or material acquired in the course of the, exercise, carrying out, or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*

(ii) *That amounts to-*

(aa) *the abuse of a position of authority;*

(bb) *a breach of trust; or*

(cc) *the violation of a legal duty or a set of rules;*

(iii) *designed to achieve an unjustified result; or*

(iv) *that amounts to any other unauthorised or improper inducement to do or not to do anything,*

is guilty of the offence of corrupt activities relating to public officers.

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- 5.2.71 It may be compelling to interpose and underscore, *en passant* by way of quoting from relevant and persuasive authority the devastating effect of corruption in any society, especially in a nascent and fledgling democracy like ours.
- 5.2.72 Corruption is an insidious plague that has a wide range of corrosive effects on societies and it undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime and other threats to human security to flourish.¹⁰⁹
- 5.2.73 Some of the recorded evils which widespread corruption may bring to a society are injustice, inefficiency, mistrust of government by the citizens, political instability, discouragement of investment or enterprise, particularly foreign enterprise, and waste of public resources as corruption in the government involves the ultimate transfer of public funds to the pockets of politicians or officials.¹¹⁰
- 5.2.74 Even if a country has the best possible statutes and legal rules, any attempts by its government to construct a fair and prosperous dispensation for its citizens would fail if corruption within its society was rife.¹¹¹ Corruption erodes moral values as well as the credibility of public authorities and its organs of state, undermines legal certainty and faith in the rule of law, endangers a free market economy and destroys the pillars of democracy.¹¹²
- 5.2.75 It is common cause that South Africa is a newly independent state¹¹³ and equally it has to be appreciated that her “*economic take-off and growth*” are much more necessary for social, economic and overall development. Any perception of

¹⁰⁹ United Nations Convention Against Corruption (General Assembly resolution 58/4 of 31 October 2003) iii. See also *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 166.

¹¹⁰ Williams R *Explaining Corruption* (Edward Elgar Publishing Limited 2000) at page 2.

¹¹¹ Snyman CR *Criminal Law* (LexisNexis SA 2008) 409.

¹¹² Snyman *Criminal Law* 409.

¹¹³ <https://www.gov.za/FreedomDay2020> accessed on 25 June 2021.

corruption or similar scandals would tend to stifle growth and paralyse development.

5.2.76 The provisions of Prevention of Organised Crime Act 121 of 1998 the POCA cited above under from paragraph 5.1.148 apply *mutatis mutandis* under this issue.

5.2.77 Section 6(4)(c)(i)(ii) of the Public Protector Act provides that the Public Protector shall be competent at any time prior to, during or after an investigation if he or she is of the opinion that facts disclose commission of an offence by any person to bring the matter to the notice of the relevant authority charged with prosecutions or if he or she deems it advisable to refer any matter which has a bearing on an investigation to the appropriate public body or authority affected by it or to make appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

5.2.78 The RFIR submitted to the PPSA by the FIC further records the following links that were observed through the relevant searches:

5.2.79 **Table 1: Natural Persons/Individual Warm Bodies**

Name	Surname	Identity Number
1.Lubabalo Oscar	Mabuyane	Withheld
2.Weziwe	Tikana-Gxotiwe	Withheld
3.Babalo	Madikizela	Withheld
4.Lonwabo	Bam	Withheld
5.Masilo	Phala	Withheld
6.Thando	Cuntu	Withheld
7.Sibongile	Mandla	Withheld
8.Lunga Owen	Nqam	Withheld
9.Ntsikelelo	Mzamane	Withheld

10.TP	Madikizela	Withheld
11.Zona-Zethu Siyazithanda	Madikizela	Withheld

5.2.80 Table 2: Legal Persons/Entities

Entity Name	Registration Number
IPM Plant Hire	N/A
Key Spirit Trading 218 Cc	N/A
Mandla Limitless Trading (Pty) Ltd	N/A
Cuntu Business Advisory Services	N/A
Mthombeni Projects Pty Ltd	N/A
Red Step Investments 29 Cc	N/A
Songo Aluminium Pty Ltd	N/A
Mbizana Local Municipality	N/A
Cuntu Business Advisory Services	N/A

5.2.81 To the extent that the movement or exchange of what appears to be public money amongst the above indicated natural and legal persons can be observed, same forms the basis of a reasonable suspicion of a pattern constituting of a crime and accordingly triggers a referral envisaged in terms of section 6(4)(c)(i)(ii) of the Public Protector Act.

Conclusion

5.2.82 Based on the evidence at hand and in particular FIC reports in possession of PPSA, it can be concluded that the originality or the source of the amount of R2, 2 million deposited by Key Spirit Trading CC 218 to Mthombeni Projects, which was subsequently disbursed to various accounts as shown above, ostensibly originated from ECPG.

6 FINDINGS

6.1 Regarding whether an amount of R 1, 100 000.00 (One million one hundred thousand rand), in respect of the memorial service of Ms Winnie Madikizela-Mandela was irregularly deposited into the bank account of Mthombeni Project (Pty) Ltd by the Mbizana Local Municipality and subsequently misappropriated to improperly benefit certain government officials and/or private persons and if yes, whether such amounted to improper conduct and maladministration

6.1.1 The allegations that an amount of R 1, 100 000.00 (One million one hundred thousand rand), in respect of the memorial service of Ms Winnie Madikizela-Mandela was irregularly deposited into the account of Mthombeni Project (Pty) Ltd by the MLM and subsequently misappropriated to improperly benefit certain government officials and/or private persons is substantiated.

6.1.2 On a conspectus of all the evidence there is, in the Public Protector's view, only one reasonable and ineluctable finding to be drawn on a balance of probability which is that the MLM did not comply with the relevant legal prescripts during the procurement of the services of Mbizana Local Taxi Association and/or Koo Construction and Projects (Koo Construction).

6.1.3 Evidence placed in front of the Public Protector revealed that the MLM allowed a government or state funded event namely, the Memorial Service of Ms Winnie Madikizela-Mandela to be taken over by private persons and politicians who were not in the employ of government and it was subsequently done improperly and outside any identifiable Supply Chain Management processes.

6.1.4 As a result, Mbizana Local Taxi Association and/or Koo Construction and Projects rendered the transport service for the memorial service following informal negotiations between the African National Congress (ANC) leaders in Mbizana

and Local Taxi Associations, improperly and outside the MLM's SCM processes, thereby also breaching the MoA between the MLM and DSRAC.

- 6.1.5 The amount of R 1, 100 000.00 (One million one hundred thousand rand), was thereafter irregularly and improperly deposited into the account of Mthombeni Project (Pty) Ltd (Mthombeni Projects), by Mr Luvuyo Mahlaka (Mr Mahlaka): Municipal Manager of MLM, without procurement process or contractual basis and same was and subsequently expended to benefit Mr Oscar Mabuyane (Mr Mabuyane), Mr Babalo Madikizela (Mr Madikizela) and the ANC as shown in the evidence above.
- 6.1.6 Mr Mabuyane personally benefitted R450, 000 (Four hundred and fifty thousand rand) from the amount of R1, 1 million which were certainly public funds that went into the Nedbank account of Allan Morran Design Architectural Services (Allan Morran Design) which is a private company that carried out renovations at his private house as set out in evidence.
- 6.1.7 Whereas Mr Mabuyane denied the knowledge of arrangements between Mr Bam and Mr Madikizela, evidence revealed that his wife, Ms Siyasanga Mabuyane (Ms Mabuyane) advised the business owner of Allan Morran Design: Mr Allan Morran (Mr Morran) through an email that the deposit of R450, 000 was to be used for renovations of their private house, when this payment was queried by Mr Morran.
- 6.1.8 Mr Madikizela personally benefitted R350 000.00 (Three hundred and fifty thousand rand) from the amount of R1, 1 million which were certainly public funds that went into the FNB account of IPM Plant Hire CC, which is a private company owned by his wife Ms Zona Zetu Siyazithanda Madikizela (Ms Madikizela) as set out in evidence.
- 6.1.9 The ANC benefitted R 280, 000.00 (Two hundred and eighty thousand rand) from the amount of R1, 1 million which were certainly public funds that went into its FNB fundraising account, as set out in evidence.

- 6.1.10 The financial benefits that accrued to Mr Mabuyane, Mr Madikizela and the ANC raise a suspicion of a commission of criminal conduct in terms of the Prevention of Organised Crime Act 121 of 1998 and/or Prevention and Combatting of Corrupt Activities Act 12 of 2004, accordingly this part of the investigation has been referred to the Directorate for Priority Crimes Investigation (DPCI).
- 6.1.11 The evidence further shows that in an effort to legitimize the whole unlawful SCM process which had already unfolded, the MLM, in particular Mr Mahlaka proceeded to concoct or fabricate letters whereby the whole process would appear to be an *agreement of cession* amongst Maikenjo Trading CC, Koo Construction and Mthombeni Projects, when in actual fact there was no such valid agreement amongst these parties.
- 6.1.12 Mr Mahlaka had no basis to pay Mthombeni Projects or to refund any person from the public funds since the MLM did not appoint Koo Construction or Mbizana Local Taxi Association to render the transport service for the memorial service of Ms Winnie Madikizela Mandela.
- 6.1.13 The conduct of Mr Mahlaka as the Municipal Manager of MLM, was therefore not only to the detriment of the MLM but also at variance with the standard required by section 217 and 195 of the Constitution, sections 61, 62, 171, 173 of MFMA and Paragraph 53 of the MLM SCM Policy in the evidence.
- 6.1.14 Accordingly the conduct of the Municipal Manager of the MLM, Mr Mahlaka constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- 6.2 Whether an amount of R 2, 2 million (Two million, two hundred thousand rand) which originated from ECPG was paid into the account of Mthombeni Project (Pty) Ltd by Key Spirit Trading 218 and subsequently**

misappropriated to improperly benefit certain government officials and/or private individuals and if the answer is yes, whether such amounted to maladministration or improper conduct.

- 6.2.1 The allegation that an amount of R 2, 2 million (Two million, two hundred thousand rand) that originated from ECPG was paid into the account of Mthombeni Project (Pty) Ltd by Key Spirit Trading 218 is substantiated. However, due to the private nature of the subsequent transactions by Mthombeni Project (Pty) Ltd it was not possible to conclude within the mandate of the Public Protector, whether the money was misappropriated or whether any person improperly benefitted from it.
- 6.2.2 The R2, 2 million paid into the account of Mthombeni Projects by Key Spirit Trading 218 CC, originated from the ECPG.
- 6.2.3 The weight of evidence placed before the Public Protector in the form of Financial Intelligence Centre (FIC) reports and bank records indicate that these were public funds which originated from Eastern Cape Department of Transport (ECDoT).
- 6.2.4 The manner, pattern and the short succession in which this amount was subsequently disbursed raise a suspicion of a commission of criminal conduct in terms of the Prevention of Organised Crime Act 121 of 1998 and/or Prevention and Combatting of Corrupt Activities Act 12 of 2004, accordingly this part of the investigation has been referred to the Directorate for Priority Crimes Investigation (DPCI) for criminal investigation.

7. REMEDIAL ACTION

- 7.1 The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

7.1.1 To the National Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks):

7.1.1 The investigation has undeniably proven that the nature of the allegations and complaints referred to above are largely of criminal nature and may not be executed fully by the Public Protector, without bringing them to the attention or notice of the relevant public authorities charged with criminal investigation and prosecution. The issues investigated and the evidence obtained are accordingly, in terms of section 6(4)(c)(ii) of the Public Protector Act, referred to the Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks) of the South African Police Service for consideration of criminal investigation, with a view to prosecution.

7.1.2 The Speaker of the Council of Mbizana Local Municipality (MLM) to:

7.1.2 Take urgent steps to ensure that the Municipality take the appropriate action, including the institution of disciplinary proceedings in respect of the financial misconduct by the Municipal Manager in connection with and that of any other official involved in the procurement of transportation services for the memorial service of the late Ms Winnie Madikizela, as contemplated by section 171(4) of the MFMA, within sixty (60) days of the issuing of this report;

8. MONITORING

8.1 The Speaker of the Council of MLM must submit an Implementation Plan to the Public Protector within thirty (30) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

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



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/09/2021

*Assisted by: VX Dlamini, Provincial Representative: EC
Provincial Office and SJ Mazantsi, Investigator: EC
Provincial Office.*