FREE MONEY FOR ALL

Report on an investigation into allegations of maladministration and poor governance by the Ehlanzeni District Municipality in the Mpumalanga Province

Report No: 13 of 2012/13
Free Money for All: A Report of the Public Protector on an investigation
Into allegations of maladministration and poor governance
by the Ehlanzeni District Municipality in the Mpumalanga Province

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Executive summary

(i) Free for All is a Report of the Public Protector on an investigation of a complaint lodged by the Ehlanzeni District Municipality Local Branch of the South African Municipal Workers’ Union (SAMWU) regarding allegations of maladministration and poor governance by the Ehlanzeni District Municipality in the Mpumalanga Province (the Municipality).
(ii) The complaint was originally lodged with the Parliamentary Standing Committee on Public Accounts (SCOPA), who forwarded it to the Public Protector for investigation.

(iii) Following an analysis of the complaints, it was decided to investigate the following allegations:

(a) Procurement Irregularities

The Municipal Manager:

(aa) Procured the services of legal firms and advisers for the Municipality without complying with the relevant provisions of the Local Government: Municipal Finance Management Act, 2003 (MFMA) and the Municipal Supply Chain Management Regulations. The individuals appointed included friends of the Municipal Manager and one successful bidder failed to submit a valid Tax Clearance Certificate, as required.

(bb) Appointed a service provider to construct new offices for the Municipality that was not recommended by the Bid Adjudication Committee (BAC) of the Municipality during the Supply Chain Management process.

(cc) Irregularly awarded contracts to certain service providers for the construction of training venues and fan parks for the FIFA 2010 World Cup;

(dd) Awarded a contract to a service provider, DVS Marketing & Communications (DVS), for “tourism promotion, branding and marketing” in the amount of R6 million. The amount was not budgeted for by the Municipality and the owner of DVS is a family relative of the Municipal Manager. Another service provider, Elements, was also awarded a contract for the promotion of tourism in the amount of R8 million. An advance of R1 million was paid to this enterprise, but it failed to render any service.

(ee) Awarded a contract for the upgrading of the road between Green Valley and Salique to a service provider that was not recommended by the Bid Evaluation Committee (BEC) during the Supply Chain Management process.
The appointed service provider failed to complete the project in time, but was not penalized in terms of the contract. The Municipal Manager furthermore paid the service provider much more than the contract amount, by means of variation orders and failed to terminate the contract when the service provider was in default.

(ff) Appointed a service provider to construct a Disaster Management Centre for the Municipality without following a proper Supply Chain Management process.

(gg) Failed to investigate concerns raised in respect of the implementation of the Pelgrim’s Rest Reservoir Project.

(b) Human Resources Irregularities

The Municipal Manager:

(aa) Approved the irregular awarding of a bursary in 2010 and the payment of a “salary” to Ms Hlatswayo, who worked as a volunteer at the Municipality at the time. He subsequently approved her appointment, which was irregular.

(bb) Irregularly appointed appointment Ms E Mthembu as Senior Records Clerk.

(c) Financial Irregularities

(aa) The Municipal Manager entered into a long term loan agreement with the Development Bank of South Africa (DBSA) for an amount of R 227 million, binding the next Municipal Council, which was in violation of the MFMA. The loan was taken to construct new offices for the Municipality in the amount of approximately R205 million. The remaining R22 million was supposed to have been spent on Targeted Infrastructure Projects, which did not happen.

(bb) He furthermore reallocated approved funding of R500 000 for the training of tour operators to the mapping of tourism facilities, without the approval of the Municipal Council, which was required.
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(c) Municipal funds in the amount of R165 505 were misappropriated in respect of a visit of officials and councilors of the Municipality to Italy. It was alleged that the officials claimed that their luggage was lost and that they required additional funds as "they ran short of money". The said amount was paid into the credit card account of one of the officials. On their return, the officials concerned failed to account for the expenditure incurred.

(dd) The Municipal Council did not approve a trip undertaken by a delegation of the Municipality that visited Brazil in March 2009, at the expense of the Municipality.

(ee) The electronic financial management system of the Municipality was deliberately incapacitated on 20 September 2009, which resulted in the loss of vital financial data.

(d) Irregularities relating to disciplinary action

(aa) The Mpumalanga Department of Cooperative Governance and Traditional Affairs (formerly the Mpumalanga Department of Local Government and Housing) and the Municipal Council of the Municipality allowed the Municipal Manager to remain in office despite the fact that criminal charges were brought against him, in respect of which a court hearing was pending.

(bb) The Municipal Council failed to implement the recommendations of the former Member responsible for Local Government and Housing of the Executive Council of the Mpumalanga Provincial Government (the MEC), based on a forensic investigation that was conducted, that the Municipal Manager should be held accountable for irregularities and maladministration that occurred within the Municipality.

(iv) The investigation included:

(a) The perusal of the relevant records of the Municipality;
(b) Interviews conducted with the Municipal Manager, Councillors and officials of the Municipality and the complainant;

(c) Correspondence with the Municipality and other role players;

(d) Site visits and;

(e) Consideration and application of the relevant legislation and municipal policies.

(v) The Public Protector issued a Provisional Report on the investigation on 30 October 2012. It was presented for comments to the Ehlanzeni Branch of the South African Municipal Workers Union that lodged the complaints, the Speaker of the Ehlanzeni Municipal Council, the Executive Mayor and the Municipal Manager of the Municipality. The Municipal Manager provided a comprehensive response to the Provisional Report, which was considered, and, where applicable incorporated into the final report.

(vi) An analysis of the evidence and information obtained during the investigation concluded that:

(a) Procurement irregularities

(aa) The submission of a valid Tax Clearance Certificate is a matter that has to be considered by the BEC, as it relates directly to whether or not a bid qualifies for consideration. By overruling the decision of the BEC in this regard when the bids for the Panel of Legal Advisers of the Municipality were considered, the BAC placed itself in a position where it had to evaluate whether or not Mculu Incorporated complied with the other requirements of the bid and qualified to be considered in terms of the listing criteria. Under the circumstances where the BAC did not agree with the BEC, it should have requested the Municipal Manager to refer the matter back to it in terms of paragraph 29(6) of the Municipality's Supply Chain Management Policy.
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(bb) The listing by the Municipal Manager on the Panel of Legal Advisers of the Municipality of a bidder who failed to comply with the stipulated criteria of submitting an original valid Tax Clearance Certificate was inconsistent and did not conform to the standard required by the Municipal Supply Chain Management Regulations.

(cc) No evidence could be found that any of the service providers listed were friends of the Municipal Manager.

(dd) The decision of the Municipal Manager not to appoint the contractor recommended by the BAC for the construction of the new offices of the Municipality was based on valid motivations focusing on the interests of the Municipality and his consideration of all the relevant factors impacting on a procurement of more than R160 million, as was expected of him by virtue of his responsibilities as the accounting officer of the Municipality in terms of section 61 of the MFMA.

(ee) The Municipality was not involved in the awarding of the contracts for the construction of training venues and fan parks for the FIFA 2010 World Cup. It was the responsibility of the Mbombela Local Municipality.

(ff) There were sufficient funds budgeted for by the Municipality for the appointment of DVS and Elements as service providers. No evidence could be found that an advance of R1 million was paid to Elements, as was alleged.

(gg) The Municipal Manager’s decision not to appoint the service provider recommended by the BEC for the upgrading of the road between Green Valley and Salique was informed by the recommendation of the BAC, which was based on valid considerations. Variation orders in terms of additional expenses were approved by the Municipal Manager in terms of his responsibility to act in the best interests of the Municipality and to ensure that the resources of the Municipality are used effectively, efficiently and economically, as contemplated by the provisions of section 61 of the MFMA.

(hh) The deviation from the normal prescribed procurement process in respect of the construction of the Disaster Management Centre was the result of
not finding a suitable bidder during the formal tender process that was followed and the time frames of the FIFA 2010 World Cup that required that the centre should be operational when the event started in June 2010. It was done in accordance the provisions of Paragraph 36 of the Supply Chain Management Policy of the Municipality.

(ii) The evidence did not support the allegation that the Municipal Manager failed to respond to complaints relating to the Pelgrim’s Rest Reeservoir Project. It was in any event completed in February 2009.

(b) Human Resources Irregularities

(aa) The evidence and information obtained during the investigation does not support the allegations that Ms Hlatswayo was paid a salary and that her appointment as Secretary was irregular. The awarding of a bursary to her at the time when she was still a volunteer was a violation of the provisions of the Municipality’s Bursary Policy, in terms of which only employees of the Municipality qualified.

(bb) The employment of Ms Mthembu was in accordance with the Employment Equity Plan of the Municipality.

(c) Financial Irregularities

(aa) The long term loan entered into by the Municipal Manager on behalf of the Municipality with the DBSA was in accordance with the provisions of section 46 of the MFMA as it was obtained for capital expenditure projects and approved by the Municipal Council. By approving the loan agreement, the Municipal Council bound the Municipality to it for the duration of the agreement, irrespective of whether the Municipal Council may be replaced. The loan agreement is not between the Municipal Council and the DBSA, but between the Municipality, as a legal entity and the DBSA. The allegation that it was unlawful for the Municipal Manager to bind future Municipal Councils by entering into a long term loan agreement, is not in accordance with the relevant provisions of the MFMA and the Municipal Systems Act.
The Municipality had a project in 2010/11 for the training of tour guides, and not tour operators. However, the amount budgeted for this project was moved to another programme in terms of a virement. Although the Auditor-General did not regard the virement as improper, the Municipality has to develop a Virement Policy to regulate such instances, as required by National Treasury.

Neither the MFMA nor the applicable policy of the Municipality provide for a situation where municipal funds can be transferred to the account of an employee for distribution amongst delegates on a trip abroad, as happened in the case of the trip to Italy.

It also does not provide for a ‘top-up” payment and for dividing the balance of such a payment left at the end of the trip to be divided equally amongst the delegates, without at proof of the expenditure that they incurred. This is a classic case of the mentality that sees public funds as what Adv George Bizos SC refers to as “orphaned money”. These men literally decided that the change from the trip was orphaned money that they were entitled to “provide with a home” in their private pockets. The attitude also informed giving a bursary to the intern referred to above.

The trip to Brazil was not approved by the Municipal Council in advance, as required by Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business.

The malfunctioning financial management system of the Municipality was the result of hardware failure. No critical information was lost and the Municipality has implemented an extensive financial recovery system, as required by section 141 of the MFMA.

Irregularities relating to disciplinary action

The Municipal Council did take action against the Municipal Manager, by suspending him. However, his suspension was overturned by the Labour
Court due to procedural deficiencies. The criminal charges against the Municipal Manager were eventually withdrawn.

(bb) The evidence obtained during the investigation indicates that a disciplinary enquiry was held which found no wrongdoing on the part of the Municipal Manager.

(vii) The Public Protector's findings are that:

Finding 1: The appointment by the Municipal Manager of Mculu Incorporated to the Panel of Legal Advisers of the Municipality was improper and amounted to maladministration

(a) In terms of the provisions of Regulation 14 of the Municipal Supply Chain Regulations, only prospective service providers that complied with the set criteria for accreditation could be listed on the database of the Municipality.

(b) The approving of the listing of Mculu Incorporated despite the fact that its proposal did not comply with the requirement of a valid original Tax Clearance Certificate was inconsistent, did not conform to the standard required by the Municipal Supply Chain Management Regulations and therefore constituted improper conduct and maladministration.

Finding 2: The awarding by the Municipal Manager of a bursary to Ms T Hlatswayo was improper and amounted to maladministration

(c) Ms Hlatswayo was not an employee of the Municipality at the time when a bursary was awarded to her by the Municipal Manager on 2 February 2010. His awarding of the bursary to her was in violation of Municipality's Bursary Policy, in terms of which only employees of the Municipality qualified. His conduct in this regard was therefore improper and constituted maladministration.

Finding 3: The conduct of the Municipal Manager in respect of instructing the transfer of municipal funds to the credit card account of an employee to cover expenses incurred by a delegation that visited Italy, was improper and amounted to maladministration.
(d) As the accounting officer, the Municipal Manager is compelled by section 61 of the MFMA to act with fidelity, honesty, integrity and in the best interests of the Municipality in managing its financial affairs.

(e) The instruction given by the Municipal Manager during the visit of a delegation to Italy that an amount of Euro 14 000 should be transferred to Mr Makwakwa’s credit card account, was reckless and irresponsible as it:

(aa) Compromised Mr Makwakwa who was suddenly in possession of a large amount of public funds in his personal account that he was supposed to manage, divide amongst the delegates and account for;

(bb) Was not authorized by the MFMA or any policy of the Municipality;

(cc) Was not based on any proper calculation of the amount that was required and that could be approved in terms of the Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business; and

(dd) Did not require of the delegates that received any of the funds to account for their expenditure on their return to South Africa.

(f) The conduct of the Municipal Manager in this regard was not authorized by the MFMA or the applicable policy of the Municipality. It displayed a reckless attitude towards the expending of municipal funds, was improper and amounted to maladministration.

Finding 4: The dividing by the Municipal Manager of the balance of the advance transferred to Mr Makwakwa’s credit card account on the return of the delegates from Italy to South Africa was unlawful, improper and amounted to maladministration. It may also have constituted theft of municipal funds.

(g) By dividing the balance of R120 000 amongst the delegates, the Municipal Manager misappropriated municipal funds. He did not act with honesty, fidelity and in the best interest of the Municipality, as is required of him by the provisions of the MFMA.
(h) The conduct of the Municipal Manager in respect of dividing the balance was unlawful improper and amounted to maladministration. Under the circumstances it may also have constituted theft of municipal funds.

Finding 5: The failure by the Municipal Manager to obtain the approval of the Municipal Council for the official trip of Councillors and officials to Brazil in March 2009 was improper and amounted to maladministration

(i) The delegation that visited Brazil in March 2009 included former Councillors and officials of the Municipality. The expenditure was approved by the Municipal Manager, without the approval of the Municipal Council, which was required in advance, in terms of the Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business. His conduct in this regard was improper and constituted maladministration.

(j) No reasonable explanation was provided during the investigation as to why the matter was only brought before the Council in August 2009.

(viii) The remedial action taken, as envisaged by section 182(1)(c) of the Constitution, is the following:

(a) The Municipal Council of the Municipality to:

(aa) Investigate and, if warranted, take disciplinary action against the Municipal Manager in respect of his conduct referred to in the findings made in paragraph 10 above, in terms of the provisions of section 171(4) of the MFMA;

(bb) Take urgent steps to recover the amount referred to in Finding 4 of paragraph (vii) above from the Councillors, former Councillors and the officials amongst whom it was divided, in terms of the provisions of section 32(2) of the MFMA;

(cc) Report the unlawful conduct of the Municipal Manager in respect of the dividing of the balance of R120 000 referred to in Finding 4 above to the South African Police Service, to investigate a charge of theft; and

(dd) Take urgent steps to develop, adopt and implement a Virement Policy for the Municipality.
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1. INTRODUCTION

1.1 *Free for All* is a Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act), on an investigation of a complaint lodged by the Ehlanzeni District Municipality Local Branch of the South African Municipal Workers Union (SAMWU) regarding allegations of maladministration and poor governance by the Ehlanzeni District Municipality in the Mpumalanga Province.

1.2 The Report is submitted:

1.2.1 The Speaker of the Municipal Council of the Ehlanzeni District Municipality (the Municipality); and

1.2.2 The Executive Mayor of the Municipality.

1.3 Copies of the report are also distributed to:

1.3.1 The Member responsible for Cooperative Governance and Traditional Affairs of the Executive Council of the Mpumalanga Provincial Government;

1.3.1 The Municipal Manager of the Municipality; and

1.3.2 The Chairperson of the Ehlanzeni District Municipality Local Branch of SAMWU (the Complainant).

2. THE COMPLAINTS AND ISSUES RAISED WITH THE PUBLIC PROTECTOR

2.1 Early in 2010, the Complainant lodged a number of complaints against the Municipality with the Parliamentary Standing Committee on Public Accounts (SCOPA). The complaints included allegations of the irregular appointment by the Municipal Manager of service providers and staff, the misappropriation of municipal funds by councilors and staff, failure of the Municipal Manager to account to the
Municipal Council for funds used during an official visit to Italy as well as approval by Municipal Manager of the expenditure relating to an official trip to Brazil, without following the relevant applicable municipal policy.

2.2 SCOPA forwarded the complaints to the Public Protector on 24 May 2010. On the basis of an analysis of the matters raised by the Complainant, it was decided to investigate the following allegations:

2.2.1 Procurement Irregularities

The Municipal Manager:

2.2.1.1 Procured the services of legal firms and advisers for the Municipality without complying with the relevant provisions of the Local Government: Municipal Finance Management Act, 2003 (MFMA) and the Municipal Supply Chain Management Regulations. The individuals appointed included friends of the Municipal Manager and one successful bidder failed to submit a valid original Tax Clearance Certificate, as required.

2.2.1.2 Appointed a service provider to construct new offices for the Municipality that was not recommended by the Bid Adjudication Committee (BAC) of the Municipality during the Supply Chain Management process.

2.2.1.3 Irregularly awarded contracts to certain service providers for the construction of training venues and fan parks for the FIFA 2010 World Cup;

2.2.1.4 Awarded a contract to a service provider, DVS Marketing & Communications (DVS,) for “tourism promotion, branding and marketing” in the amount of R6 million. The amount was not budgeted for by the Municipality and the owner of DVS is a family relative of the Municipal Manager. Another service provider, Elements, was also awarded a contract for the promotion of tourism in the amount of R8 million. An advance of R1 million was paid to this enterprise, but it failed to render any service.

2.2.1.5 Awarded a contract for the upgrading of the road between Green Valley and Salique to a service provider that was not recommended by the Bid Evaluation Committee
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(BEC) during the Supply Chain Management process. The appointed service
provider failed to complete the project in time, but was not penalized in terms of the
contract. The Municipal Manager furthermore paid the service provider much more
than the contract amount, by means of variation orders and failed to terminate the
contract when the service provider was in default.

2.2.1.6 Appointed a service provider to construct a Disaster Management Centre for the
Municipality without following a proper Supply Chain Management process.

2.2.1.7 Failed to investigate concerns raised in respect of the implementation of the Pilgrim’s
Rest Reservoir Project.

2.2 Human Resources Irregularities

The Municipal Manager:

2.2.2.1 Approved the irregular awarding of a bursary in 2010 and the payment of a “salary” to
Ms Hlatswayo, who worked as a volunteer at the Municipality. He subsequently
approved her appointment, which was irregular.

2.2.2.2 Irregularly appointed appointment Ms E Mthembu as Senior Records Clerk.

2.2.3 Financial Irregularities

2.2.3.1 The Municipal Manager entered into a long term loan agreement with the
Development Bank of South Africa for an amount of R 227 million binding the next
Municipal Council, which was in violation of the MFMA. The loan was taken to
construct new offices for the Municipality in the amount of approximately R205
million. The remaining R22 million was supposed to have been spent on Targeted
Infrastructure Projects, which did not happen.

2.2.3.2 He furthermore reallocated approved funding of R500 000 for the training of tour
operators to the mapping of tourism facilities, without the approval of the Municipal
Council, which was required.
2.2.3.3 Municipal funds in the amount of R165 505 were misappropriated in respect of a visit of officials and councilors of the Municipality to Italy. It was alleged that the officials claimed that their luggage was lost and that they required additional funds as “they ran short of money”. The said amount was paid into the credit card account of one of the officials. On their return, the delegation failed to account for the expenditure incurred.

2.2.3.4 The Municipal Council did not approve a trip undertaken by a delegation of the Municipality that visited Brazil in March 2009, at the expense of the Municipality.

2.2.3.5 The electronic financial management system of the Municipality was deliberately incapacitated on 20 September 2009, which resulted in the loss of vital financial data.

2.2.4 Irregularities relating to disciplinary action

2.2.4.1 The Mpumalanga Department of Cooperative Governance and Traditional Affairs (formerly the Mpumalanga Department of Local Government and Housing) and the Municipal Council of the Municipality allowed the Municipal Manager to remain in office despite the fact that criminal charges were brought against him, in respect of which a court hearing was pending.

2.2.4.2 The Municipal Council failed to implement the recommendations of the former Member responsible for Local Government and Housing of the Executive Council of the Mpumalanga Provincial Government (the MEC), based on a forensic investigation that was conducted, that the Municipal Manager should be held accountable for irregularities and maladministration that occurred within the Municipality.

3 THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR
3.1 Mandate of the Public Protector

3.1.1 The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. Section 182(1)(a) of the Constitution provides that the Public Protector has the power to:

3.1.1.1 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 improvidence or prejudice;

3.1.1.2 Report on that conduct; and

3.1.1.3 Take appropriate remedial action.

3.1.2 In terms of section 6(4) of the Public Protector Act, the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged maladministration in connection with the affairs of government at any level.

3.1.3 The allegations listed in paragraph 2.2 above were investigated in terms of the mandate and powers of the Public Protector.

3.2 Approach to the investigation

3.2.1 In terms of the mandate given to the Public Protector, his/her investigations and findings transcend lawfulness. The focus is on good administration and proper conduct. Such enquiry has three components:

3.2.1.1 What happened?

3.2.1.2 What should have happened; and

3.2.1.3 Is there a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, abuse of power,
improper enrichment or conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act?

3.2.2 In determining whether conduct was improper or constituted maladministration or any of the violations referred to above, the Public Protector compares the conduct of government entities and officials complained of against the relevant legislation and other prescripts, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, transparency, ethical standards and local and international best practices.

3.3 The obligation of the Public Protector to follow due process

3.3.1 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, in terms of section 7(9)(a) of the Public Protector Act, afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

3.3.2 Due process was complied with during the course of the investigation referred to in this report.

3.3.3 The Public Protector issued a Provisional Report on the investigation on 30 October 2012. It was presented for comments to the Complainant, the Speaker of the Ehlanzeni Municipal Council, the Executive Mayor and the Municipal Manager of the Municipality. The Municipal Manager provided a comprehensive response to the Provisional Report, which was considered, and, where applicable incorporated into the final report.

4 THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
4.1 THE SCOPE OF THE INVESTIGATION

The scope of the investigation was restricted from the date of the appointment of the Municipal Manager, i.e. 1 May 2006 to the conclusion of the investigation in August 2012.

4.2 METHOD OF GATHERING EVIDENCE

The following methods of gathering evidence and analysing information were employed:

4.2.1 Interviews conducted

Interviews were conducted with:

4.2.1.1 Eight officials of the Municipality;

4.2.1.2 Five Councilor’s of the former Municipal Council;

4.2.1.3 The Municipal Manager of the Municipality, Adv H M Mbhata; and

4.2.1.4 The Complainant.

4.2.2 Correspondence

Correspondence between the Public Protector and:

4.2.2.1 The Head of the Mpumalanga Department of Co-operative Governance and Traditional Affairs;

4.2.2.2 The Municipal Manager of the Municipality;

4.2.2.3 The former Executive Mayor of the Municipality;

4.2.2.4 The former Speaker of the Municipal Council;
4.2.2.5 The Municipal Managers of the Nkomazi, Thaba Chweu, and Umjindi Local Municipalities;

4.2.2.6 Sure Lowveld Travel, the travel agent contracted by the Municipality;

4.2.2.7 The Auditor-General of South Africa; and

4.2.2.8 The Companies and Intellectual Property Commission.

4.2.3 Relevant sites visited

Visits were undertaken to the:

4.2.3.1 Green Valley to Salique Road site, and

4.2.3.2 The Pilgrim’s Rest Reservoir Project.

4.2.4 Analyses of documentation and/or information

The following documents were analysed and perused:

4.2.4.1 Supply Chain Management documents relating to:

(a) The procurement of the services of legal firms and advisers for the Municipality;

(b) The appointment of a construction company for the building of new offices for the Municipality;

(c) The procurement of service providers for the promotion, branding and marketing of tourism, for social entertainment activities and the staging of events;

(d) The procurement of a service provider for the construction of the Green Valley to Salique Road; and

(e) The procurement of a service provider for the construction of training venues and fan parks for the 2010 FIFA World Cup.

4.2.4.2 Relevant resolutions of the Municipal Council.
4.2.5 **Legislation and other prescripts**

The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

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

4.2.5.2 The Public Protector 1994;

4.2.5.3 The Municipal Finance Management Act, 2003;

4.2.5.4 The Municipal Supply Chain Management Regulations issued by National Treasury;

4.2.5.5 The Local Government: Municipal Systems Act, 2000 (the Municipal Systems Act);

4.2.5.6 The Local Government: Municipal Structures Act, 1998;

4.2.5.7 The Supply Chain Management Policy of the Municipality;

4.2.5.8 The Bursary Policy of the Municipality;

4.2.5.9 The Recruitment and Appointment of Personnel Policy of the Municipality; and

4.2.5.10 The Policy on Privileges and Allowances in respect of Councilors traveling on Official Business, of the Municipality.

5  **EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION RELATING TO THE ALLEGATIONS INVESTIGATED**

5.1 **Procurement Irregularities**

5.1.1 **The establishment of a Panel of Legal Advisers for the Municipality**
According to the Supply Chain Management records of the Municipality, it advertised a “REQUEST FOR THE EXPRESSION OF INTEREST” on 24 April 2008, in terms of which legal firms and qualified individuals were invited to serve on the Panel of Legal Advisers of the Municipality.

It was a stated requirement that proposals were to be accompanied by, *inter alia*, an original Tax Clearance Certificate.

During its consideration on 21 July 2008 of the bids received, the BEC noted that one of the bidders, *Mchunu Mokoena Attorneys*, had submitted a copy of a Tax Clearance Certificate. Another bidder, *Mculu Incorporated*, had submitted a Tax Clearance Certificate that had already expired.

The BEC resolved that both the said bids should be regarded as “unresponsive” and therefore as disqualified.

When the matter served before the BAC of the Municipality on 25 July 2008, it decided to disagree with the view of the BEC in respect of *Mculu Incorporated* on the basis of a letter signed by Mr D N Mculu, stating that:

“A tax clearance certificate will be provided as soon as it becomes available, the existing one expired in January 2008. We attach a copy hereof (sic) for reference.

There were queries by the SARS in respect of certain portions of the tax return which were not completed by our auditors Khwinana & Associates. It has been attended to and we are awaiting the final determination so that we can obtain our tax clearance certificate.”

The BAC recommended that *Mculu Incorporated* be included in the Panel of Legal Advisers, which was accepted and approved by the Municipal Manager.

No indication could be found from the records of the Municipality during the investigation that Mculu Incorporated subsequently submitted a valid original Tax Clearance Certificate or that the Municipal Manager verified whether *Mculu Incorporated’s* tax matters were in order before he appointed the firm to the Municipality’s Panel of Legal Advisers.
5.1.1.8 No evidence or information was presented or could be found during the investigation that the appointed Panel included friends of the Municipal Manager.

5.1.2 The construction of new offices for the Municipality

5.1.2.1 According to the Complainant, one of the bidders who tendered for the construction of the new offices of the Municipality, Ho Hup Corporation Joint Venture was not considered during the adjudication process, even though “the Evaluation Committee indicated that they were one of the recommendable bidders”.

5.1.2.2 The Supply Chain Management records of the Municipality show that it advertised an invitation for tenders for the construction of new offices in Nelspruit, on 2 March 2008.

5.1.2.3 Five bids were received, including that of Ho Hup Corporation Joint Venture, and served before the BEC on 16 April 2008. Only three of the bids, that of Concor Building, MCC 17 Rea Dira Joint Venture and Ho Hup Corporation Joint Venture were regarded as responsive. Of the three, the BEC scored Ho Hup Corporation Joint Venture the highest.

5.1.2.4 However, it was noted in the Minutes of the meeting that the BEC, under its recommendation in respect of Ho Hup Corporation Joint Venture stated that the joint venture would “…pose a high risk for the Municipality because of the large calculation error.”

5.1.2.5 The BEC also raised concerns about the non-compliance with certain technical arithmetical requirements of the tender by the other two bidders.

5.1.2.6 From the contents of a Memorandum dated 4 July 2008, addressed to the Chairperson of the BAC by the Municipal Manager, it appears that the latter raised concerns about the slow pace of the procurement process and the failure of the tender committees to finalise their deliberations and recommendations. The Municipal Manager commissioned legal opinions and also appointed four experts, i.e. a member of the Audit Committee of the Municipality, Technical Advisers from two Consulting Engineers companies and a Chartered Accountant to assist the tender committees in evaluating and adjudicating the bids, which were fairly complex.
5.1.2.7 The BAC eventually resolved, on 15 July 2008, to recommend the appointment of Concor Building as the preferred bidder, subject to certain conditions and ranked MCC 17/Rea Dira Joint Venture as its second choice.

5.1.2.8 However, based on the advice obtained from the specialists referred to in paragraph 5.1.2.6 above (and for the reasons referred to below), the Municipal Manager decided to award the contract to MCC 17/Rea Dira Joint Venture.

5.1.2.9 On 11 August 2008, the Municipal Manager addressed a letter to the Director-General of the National Treasury in terms of section 114 of the MFMA relating to the reasons why he decided to deviate from the recommendation of the BAC in respect of the preferred bidder. He emphasized the following concerns in respect of Concor Building’s bid:

(a) As Concor Building’s offer was not a fixed amount, the Municipality would not be in a position to determine the value of the contract;

(b) Concor Building offered services on condition that the Municipality relax terms and conditions of the contract; which was not acceptable, and

(c) “A recommendation by the Adjudication Committee that negotiations should be entered into with Concor Building would not have produced certainty regarding the price offer…”

5.1.2.10 The Municipal Manager concluded that:

“I had then approved the appointment MCC 17 Rea Dira JV, who was recommended as an alternative on the following grounds:

- The price offer being R168 547 947-64 (VAT inclusive) was fixed, together with escalations for the duration of the project, as a result there will be no risk factor.

- The terms and conditions of our contract were accepted by the said contractor as they are.

It is therefore against this background that MCC 17 Rea Dira JV was approved, though recommended as an alternative preferred builder.”
5.1.2.11 The records of the Municipality do not contain any response from the National Treasury, and according to the Municipal Manager none was received and the project went ahead.

5.1.3 **Contracts for the construction of training venues and fan parks for the FIFA 2010 World Cup**

5.1.3.1 It was established from the records of the Municipality and the evidence of the Municipal Manager, that during the FIFA 2010 World Cup preparations, the Mbombela Local Municipality in Nelspruit, was tasked with the building of fan parks and the upgrading of certain stadia that were to be utilised as training venues, in compliance with the FIFA requirements.

5.1.3.2 The Mbombela Local Municipality awarded contracts to two service providers in respect of the scoping of the said projects, early in 2009.

5.1.3.3 In October 2009, it transpired that the implementation of the projects was lacking behind its set target dates and the Municipality was requested to assist with supervision and funding of the projects.

5.1.3.4 It was agreed that the contracts that were awarded by the Mbombela Local Municipality would be extended to include consulting services in order to expedite the process.

5.1.3.5 The records of the Municipality further show that at a meeting of the joint 2010 Technical Team of the two municipalities it was resolved to amend the terms of reference of the appointed companies to include the actual construction of the projects. The amendment of the terms of reference was duly deliberated at BEC and BAC level and both forums agreed to this and reported their views to the respective municipal councils.

5.1.4 **The contracts awarded to DVS Marketing & Communications (DVS) and Elements Consolidated Investments (Elements)**
5.1.4.1 It was established from the Supply Chain Management records of the Municipality that it advertised an invitation for service providers to express an interest to render services as Events Manager, on 3 and 7 April 2009. The terms of reference for this bid included the management, performance monitoring and evaluation of other service providers involved in organised events of the Municipality.

5.1.4.2 During the supply chain management process, the Bid Adjudication Committee recommended to the Municipal Manager, on 14 May 2009, that the bid be awarded to DVS in the amount of R3,7 million for the 2008/9 financial year. It further commented that “the scope of the work would increase on condition that the new budget is approved by Council for the financial year 2009/2010, and the budget should not exceed the maximum of R2,299 515.20.

5.1.4.3 The Municipal Manager appointed DVS on 15 May 2009. The total amount relating to the appointment was stated as R6,839 447,33. No period was specified. He also indicated that the amount would be divided and that R3,7 million would be available until the end of June 2009 and that the balance would be made available from July 2009, once the Municipal Council had approved the 2009/10 budget. From the letter of DVS accepting the appointment on 20 May 2009, it appeared that the contract awarded was for a period of 18 months.

5.1.4.4 According to the Municipal Manager, the appointment of an Events Manager was budgeted for under the Tourism Vote in the 2008/9 Budget of the Municipality.

5.1.4.5 The Municipality also advertised a bid for “the provision of tourism promotion within the Ehlanzeni Municipal area”. Following the Supply Chain Management process, the Municipal Manager awarded the bid to Elements Consolidated Investments (Elements) for an amount of R8,5 million, on 15 May 2009.

5.1.4.6 In his letter of appointment, the Municipal Manager stated that R3 million was available until the end of June 2009 for the implementation of the project by Elements and that the remainder of R5,5 million of the project budget would available with effect from 1 July 2009, once the Municipal Budget had been approved by the Municipal Council.
5.1.4.7 From the financial records of the Municipality it was established that the original approved budget of the Municipality in respect of Tourism for the 2008/9 financial year amounted to R500 000. However, an additional amount of R4.5 million was added to this program in February 2009, after the adjustment budget was approved.

5.1.4.8 The records of the Municipality show that the amount of R5,7 million budgeted for in the 2009/10 Budget in respect of Tourism was reduced by R350 983 due to the adjustment budget, which resulted in a total budgeted amount of R5 349 017.

5.1.4.9 In his explanation provided in this regard, the Municipal Manager also stated that:

“When budgets are tabled in Council, they are tabled in a multiyear format (MTEF) in terms of the Treasury Guidelines on budgeting i.e. when Council approves a budget, it also approves the outer year budgets of which figures thereof are obtained from the Division of Revenue Act, in terms of the MTEF budgeting framework. When service providers are appointed, it is at that stage known what would be the indicative budgets for the outer years hence the appointments were a multiyear (sic) appointments.”

5.1.4.10 According to the records of the Companies and Intellectual Property Commission (CIPC), Mr G D Leatswe is the sole Director of DVS. No evidence was found or presented during the investigation that there is a family relationship between the Municipal Manager and Mr Leatswe or that the Municipal Manager improperly influenced the evaluation and adjudication process on respect of the bid concerned. The Municipal Manager also denied any relationship with Mr Leatswe.

5.1.4.11 No evidence or information could be found during the investigation that an advance payment was made to Elements, as was alleged by the Complainant.

5.1.5 The contract for the upgrading of the road between Green Valley and Salique

5.1.5.1 According to the Supply Chain Management records of the Municipality, the BEC, at a meeting held on 28 July 2008 in respect of the bid for the upgrading of the road between Green Valley and Salique, recommended the appointment of Gabi Construction. However, when the matter served before the BAC on 31 July 2008, it was resolved to recommend Faiaud Transport Services on the basis that Gabi
Construction’s bid did not display competence in terms of capacity and key personnel, which posed a risk.

5.1.5.2 The Municipal Manager accepted the recommendation of the BAC and awarded the contract to Faiaud Transport Services on 31 July 2008.

5.1.5.3 The Municipal Manager explained during the investigation that the project experienced a number of difficulties, since its inception until about November 2009. He stated during the investigation, inter alia, that:

“Indecisiveness, lack of attention to details by the Project Manager and our Manager: Technical Services, as well as financial viability by the contractor were some of the issues I picked up during my interactions with all the necessary stakeholders.

During May 2009, the contractor experienced heavy rainfalls of which (sic) from the reports I got, affected the smooth running of the project.

For a period of approximately four months the project was at a standstill precisely because the contractor had submitted 3 variation orders one of which was in relation to heavy rains and no decision was made whether such variation orders should be allowed or not.”

5.1.5.4 In a letter addressed to the Municipal Manager on 15 May 2009, the Managing Director of Faiaud Transport Services stated that:

“We have had a number of consultations between ourselves with the Resident Engineer for African (Pty)Ltd, Mr Karabo Mashego. All this is regarding the smooth operation of the project, so we are bringing this for (sic) your attention since the meetings has no veil. The attached documents refer the (sic) anticipated problems of payments since the scope of work issued by the Engineer is not stipulated in the Contract Document. Without taking this into consideration it will eventually result in the cutting scope of work as the contingencies are not enough to render all the services required.

Also we would like to be compensated on the cost encountered on our plant, during rainy season (sic) as the cost encountered calculated to 7, 86% of the contract amount.”
5.1.5.5 Three requests for variation orders were attached to this letter, two of which were based on claims of “work scheduled on the project but not stipulated in the document” (contract) in the amounts of R1 283 515 and R6 030 514, respectively.

5.1.5.6 The third request for a variation order was based on cost escalation due to heavy rains and amounted to R1 083 738.

5.1.5.7 The Municipal Manager further explained during the investigation that he discovered several deficiencies in the management of the project to the extent that he had to involve the Manager: Corporate Services in the supervision thereof and decided to withdraw the Project Manager of the Municipality assigned to it.

5.1.5.8 The records of the Municipality also indicate that the Manager: Technical Services considered the requests of the contractor for variation orders and submitted an internal memorandum to the Municipal Manager on 20 May 2009, in which he concluded that:

“I have made a thorough assessment of the issues contained in the letter from Faiaud Transport Services dated 15 May 2009 and the attached letters to the Consultant. However, I need your advice in this matter, particularly where the contract document is dead silence (sic) on the processes regarding variation orders.”

5.1.5.9 After having considered the information at his disposal, including the substantial delay of the project and indications that the soil structure of the areas where construction was to take place was destroyed due to heavy rains, the Municipal Manager approved the following on 20 May 2009:

(a) A variation order of R 1 283 515 in respect of work that had already commenced; and

(b) Escalation costs of R 1083 738 and R 173 000 due to heavy rains.

5.1.5.10 The request for a variation order of R6 030 514 was not approved.

5.1.5.11 Disciplinary action was taken against the Project Manager in respect of failures of the project and several other projects were she was involved.
5.1.5.12 The project was completed in October 2011.

5.1.6 The contract for the construction of the Disaster Management Centre

5.1.6.1 According to the Supply Chain Management records of the Municipality, the invitation for bids for the construction of a Disaster Management Centre was advertised in the City Press newspaper of 27 November 2009. The closing date for the bid was 21 December 2009. No suitable bidder could be found during the evaluation process.

5.1.6.2 In an internal Memorandum from the Municipal Manager to the former Executive Mayor, dated 20 January 2010, he reported a deviation from the normal procurement process, in terms of paragraph 36 of the Municipality’s Supply Chain Management Policy, on the basis thereof that the construction of the Disaster Management Centre was urgent as it had to be completed before 31 March 2010, in terms of the requirements relating to the hosting of the FIFA 2010 World Cup.

5.1.6.3 The Executive Mayor noted the report of the Municipal Manager on 20 January 2010.

5.1.7 The Pelgrim’s Rest Reservoir Project

5.1.7.1 During the investigation it transpired from the records of the Municipal Council that a former Councillor raised a concern with the former Chairperson of the Technical Services, Finance and Supply Chain Portfolio Committee of the Municipal Council, on 15 August 2008, about the slow progress made in connection with a “pipeline project” relating to the Pelgrim’s Rest Reservoir contract. The Municipal Manager indicated during the investigation that he was not aware of the concern raised with the Chairperson of the Committee as it was not brought to his attention. No evidence indicating that he was indeed informed could be found during the investigation.

5.1.7.2 According to the records of the Municipality and the information provided by the Municipal Manager, the Thaba Chweu Local Municipality approached the Municipality in connection with the construction of a new water reservoir in December 2008. A consultant was appointed by Municipality to advise on the feasibility of the project as a result of which it was eventually decided that all that was required was the installation of two dedicated pumps. A contractor was appointed to install the
pumps and a drainage system at an amount of R2,1 million, which was funded by the Municipality. The project was completed on 3 February 2009.

5.2 Human Resources Irregularities

5.2.1 The awarding of a bursary and payment of a salary to and the appointment of Ms T Hlatshwayo

5.2.1.1 It was established from the personnel records of the Municipality and the evidence of the Municipal Manager that Ms T Hlatshwayo was appointed to act in the position of the Personal Assistant of the Municipal Manager, who went on leave during the December 2009 festive season. At the time, she had already been working as a volunteer for the Municipality for more than a year.

5.2.1.2 On 11 December 2009, the Manager: Corporate Services of the Municipality addressed an internal memorandum to the Municipal Manager in which he stated that:

“The Personal Assistant of the Municipal Manager (Ms Yalezwa Witbooi) will be going on vacation leave today (11/12/2009) and will resume work on 18 January 2010. There is presently no one internally from permanent staff that will be available to sit in for the duration of her leave (sic).

We therefore have to consider other options.

Instead of going the labour brokers’ route, I will recommend that we use our volunteer in the Human Resources Office Ms Thobile Hlatshwayo to act in the Municipal Manager’s Personal Assistant position. She has been assisting in the Human Resource (sic) without any reward for the past year.” (emphasis added)

5.2.1.3 The Municipal Manager approved the request of the Manager: Corporate Services on 14 December 2009, directing that arrangements should be made to reward Ms Hlatshwayo for the period that she would act in the position of Personal Assistant and
that the vacant post of Secretary in the office of the Municipal Manager should be advertised.

5.2.1.4 The records of the Municipality further show that Ms Hlatshwayo was paid a stipend for a period of three months when she was working in the office of the Municipal Manager as a volunteer. No indication could be found that she was paid a salary (similar to what she would have earned as an employee) or that any back payments were made to her. However, it was also noticed that she was rewarded for a period of three months, despite the fact that she only acted as the Personal Assistant for a period of approximately one month. When this was raised with the Municipal Manager during the investigation, he did not provide any response.

5.2.1.5 Ms T Hlatshwayo applied for a study bursary from the Municipality early in February 2010. At the time she was still working as a volunteer and was not permanently employed by the Municipality.

5.2.1.6 According to an internal memorandum addressed to the Municipal Manager on 17 June 2010 by the Manager: Corporate Services, Ms Hlatshwayo’s application did not form part of the original schedule of bursary applications that was submitted to the Municipal Manager on 21 January 2010. It was submitted separately and was approved by the Municipal Manager, who signed a bursary contract with her on 2 February 2010. The total amount of the bursary was R12 000.

5.2.1.7 When the matter was raised with the Municipal Manager during the investigation, he was requested to explain how a bursary could have been awarded to a person who was not a permanent employee of the Municipality. His response was that the bursary was “fraudulently” obtained.

5.2.1.8 He could not provide any satisfactory explanation during the investigation as to why he signed a bursary contract with a person whom he was aware was not a permanent employee of the Municipality and therefore did not qualify to be considered in terms of its Bursary Policy.

See paragraph 6.6 below
5.2.1.9 Ms Hlatswayo subsequently succeeded in her application for the position of Secretary in the Municipal Manager's office.

5.2.1.10 The bursary awarded to Ms Hlatshwayo was terminated in March 2011 and she agreed to refund the Municipality. In an internal memorandum from the Municipal Manager to the Acting Chief Financial Officer, dated 5 April 2011, the latter was instructed to deduct an amount of R250 per month from the salary of Ms Hlatshwayo until the total amount paid to her in terms of the bursary had been recovered.

5.2.2 The appointment of Ms E Mthembu

5.2.2.1 The records of the Municipality show that interviews for the advertised position of Senior Records Clerk in the Municipality were held on 19 June 2008.

5.2.2.2 Ms Mthembu scored the second highest total during the interviews. The third highest score was awarded to Ms Mkhonto, who was already employed by the Registry Unit at the time. The highest score was awarded to a male candidate.

5.2.2.3 Representatives of SAMWU observed the selection process and suggested that Ms Mkhonto should be appointed, as she was already based at the Registry Unit and as it would amount to career progression for her.

5.2.2.4 The Municipal Manager explained during the investigation in this regard that:

"The then approved employment equity plan provided that vacant positions at post level 8 should be offered to female persons and or people with disability. Based on the plan I then took a decision to comply as such by appointing Ms E Mthembu a female person against Mr Thabiso Nkosi a male person."

5.2.2.5 The Employment Equity Plan that was provided by the Municipality during the investigation indicates that as far as Post Level 8 was concerned, preference should have been given to the appointment of females and people with disability.

5.2.2.6 However, it transpired during the investigation that at the time of Ms Mthembu's appointment, there was an over representation of females in the Municipality as a whole and in the Registry Unit, in particular. In this regard the Municipal Manager explained that:
“... the Employment Equity Plan of the municipality does not focus on individual units, but the institution as a whole. Therefore the municipality in its entirety had to comply with its Employment Equity Plan which required the municipality to appoint more females in vacant positions, regardless of whether there was an oversupply of females in a unit or not.”

5.3 Financial Irregularities

5.3.1 The long term loan from the Development Bank of South Africa

5.3.1.1 It was established from the financial records of the Municipality that in 2008 it invited First National Bank (FNB), ABSA Bank and the Development Bank of South Africa (DBSA) to forward proposals for the financing of certain capital expenditure projects, which included the construction of a new office complex. Two proposals were received from FNB and the DBSA, respectively. FNB submitted a proposal for R20 million, instead of the R200 million that was required.

5.3.1.2 The DBSA proposed a long term facility program, totaling R488.5 million which would be implemented by means of a two phased approach, subject to the ability of the Municipality to repay the amount. Phase one would consist of a loan of R227 million. The DBSA proposal had advantages, including low interest rates and no requirement for any security to be provided by the Municipality.

5.3.1.3 The Municipal Council approved the entering by the Municipal Manager into a long term loan agreement with the DBSA, on 24 June 2009.

5.3.1.4 On 08 September 2009 a loan contract was duly entered into between the Municipality and the DBSA, amounting to R227 million. Loan funding of R205 million was identified for the construction of the new office complex, while R22 million would be used for the establishment of steering committees, appointment of service providers and contractors, upgrading of dams, canals and boreholes, replacement of water circulation equipment, water pipes and other aging infrastructure, purchase of Information Technology equipment, vehicles and other replacement stock, and submission of monitoring reports.
5.3.1.5 The records of the Municipality that were perused during the investigation show that the following projects were implemented from the R22 million rand reserved for Targeted Infrastructure Programmes:

<table>
<thead>
<tr>
<th>Project Description</th>
<th>Budget</th>
<th>Project Manager</th>
<th>Appointed Contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Malelane Water Treatment Works</td>
<td>R 1,005,101.06</td>
<td>Zithi-IN &amp; Ass</td>
<td>Crystal Sparkle</td>
</tr>
<tr>
<td>Madadeni Water Treatment Works</td>
<td>R2,632,271.40</td>
<td>Zithi-IN &amp; Ass</td>
<td>Ibuthu Business</td>
</tr>
<tr>
<td>Kaapmuiden, Hectospruit &amp; Langeloop Water Treatment Works</td>
<td>R1,477,776.30</td>
<td>Zithi-IN &amp; Ass</td>
<td>Crystal Sparkle</td>
</tr>
<tr>
<td>Hectospruit Water Treatment Works</td>
<td>R700,00,00</td>
<td>Zithi-IN &amp; Ass</td>
<td>Crystal Sparkle</td>
</tr>
<tr>
<td>Marloth Park Water Treatment Works</td>
<td>R1,452,896.94</td>
<td>Zithi-IN &amp; Ass</td>
<td>Crystal Sparkle</td>
</tr>
<tr>
<td>Refurbishment at Sabie, Graskop, Lydenburg and Corendele water treatment plants.</td>
<td>R1,847,455.50</td>
<td></td>
<td>Ibuthu Business Enterprise</td>
</tr>
</tbody>
</table>
5.3.2 The alleged reallocation of approved funding for the training of tour operators

5.3.2.1 During the investigation, the Municipal Manager explained in this regard that the Municipality did not have a project for the training of tour operators. The relevant project was for the training of tour guides.

5.3.2.2 The Municipality decided to amend the scope of the project to the mapping of tourism facilities, as it was established that the training of tour guides is the responsibility of the Mpumalanga Tourism and Parks Agency.

5.3.2.3 According to the financial records of the Municipality, the amount budgeted for in the 2009/10 financial year for the training of tour guides was R300 000 and not R500 000 as alleged by the Complainant. The budget was moved from the programme it was originally allocated to, to the tourism programme, in terms of a virement approved by the Municipal Manager.

5.3.2.4 As no provision is made for the virement of funds by the MFMA, the Auditor-General South Africa was approached during the investigation to advise on the regularity of the decision taken by the Municipal Manager in this regard. The advice received confirmed that the Municipal Manager acted within his authority when he decided to

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2 Project was withdrawn and payment relates to work done by the appointed service provider

<table>
<thead>
<tr>
<th>Project Description</th>
<th>Amount</th>
<th>Service Provider</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leroro Water Supply (Project later cancelled and service provider paid for work done)</td>
<td>R 147 237,00</td>
<td>Monde Consulting Engineers</td>
</tr>
<tr>
<td>Barberton Water Inlet Structure</td>
<td>R180.00.00</td>
<td>Tumber Fourie Consulting Engineers CC</td>
</tr>
<tr>
<td>Barberton Waste Water Treatment Plant</td>
<td>R1,547,038.48</td>
<td>Caledon River Properties CC</td>
</tr>
</tbody>
</table>
transfer the funds concerned from one programme to another. It was also indicated
that the National Treasury expects of a municipality to adopt its own policy on the
virement of funding to make the management of the budget more flexible and to
enable accounting officers to address the needs of the community, as and when it
arises.

5.3.2.5 It was established during the investigation from the financial and policy records of the
Municipality that it has not adopted a virement policy.

5.3.3 The alleged misappropriation of municipal funds in connection with the trip to Italy

5.3.3.1 According to the records of the Municipality and the evidence of the Municipal
Manager, a delegation of the Municipality consisting of:

(a) The former Executive Mayor, Ms C N Mkhonto;
(b) The current Executive Mayor, Ms L Shongwe;
(c) A former member of the Municipal Council, Mr J Sithole;
(d) The Municipal Manager, Adv H M Mbhata;
(e) The former Manager: Corporate Services, Mr E Moukangwe; and
(f) The Deputy Manager: Intergovernmental Relations, Mr R Mmakwakwa.

visited Italy from 2 to 12 May 2008.

5.3.3.2 A report submitted to the Municipal Council by the Deputy Manager: Intergovernmental Relations, dated 28 May 2008, stated that the purpose of the visit was “to share experiences on municipal administration and governance as well as to
deepen knowledge of local government administration through interacting with global
stakeholders.”

5.3.3.3 The Municipal Manager explained during the investigation that the delegation
required a “top up” for their “out of pocket expenses” during the course of the visit.
5.3.3.4 He contacted Mr T Khubeka, who was acting as the accounting officer at the time in the absence of the Municipal Manager, and instructed him to transfer an amount of Euro 14000 (R165 505) from the account of the Municipality to the credit card account of Mr Makwakwa, one of the officials of the Municipality that was part of the delegation.

5.3.3.5 The said amount was transferred as directed. The Municipal Manager stated that his instruction for additional funding had nothing to do with lost luggage, as alleged by the Complainant. It related to the daily allowance of the delegates. No receipts of the expenses incurred by the delegates were kept and presented to the Municipality on their return.

5.3.3.6 However, it appeared from a report submitted by the Manager: Finance and Supply Chain Management to the Finance Portfolio Committee of the Municipal Council, on 9 September 2008 that:

“During the stay of the delegation in Italy a request was received from the Municipal Manager to transfer Euro 14 000 to the credit card account of Mr R S Makwakwa, the reason being that some of the delegates lost their luggage and that there is a problem with the provision of food, including delegates from the other municipalities.”

5.3.3.7 According to this report, numerous requests were made to those involved to obtain the details and proof of expenses relating to how the amount transferred was spent, but without success. It further stated that if the amount transferred was regarded as an extension of the daily allowances of the delegates, it exceeded the amount prescribed by the relevant policy of the Municipality. No documentation relating to the expenditure incurred during this trip could be found in the records of the Municipality during the investigation.

5.3.3.8 When interviewed during the investigation, Mr Makwakwa stated that only R45 505 of the money transferred to his credit card account was used by the delegation. On their return, he was instructed by the Municipal Manager to withdraw the balance of approximately R120 000 and to hand it over to him. He did so after which the Municipal Manager gave him R20 000 as his share of what was left.
5.3.3.9 The Municipal Manager explained during the investigation that the former Executive Mayor suggested that he divides the balance of R120 000 amongst the delegates, which he did. He did not question this suggestion of the Executive Mayor. In his view, “It would only be fair if each of the said officials should be held to account for their share of the R120 000-00.”

5.3.3.10 Ms Shongwe and Mr Sithole confirmed in telephonic interviews conducted during the investigation that they each received R20 000 in cash from the Municipal Manager. However, the former Executive Mayor denied any knowledge of the balance that was left in Mr Makwakwa’s account and that it was divided amongst the delegates.

5.3.3.11 Mr Moukangwe also denied during the investigation that he received any payment in respect of the balance that was left in the credit card account of Mr Makwakwa.

5.3.3.12 The evidence and information obtained during the investigation indicate that the additional amount of R 165 505 authorised by the Municipal Manager for the expenses of the delegation could not be accounted for. No records were kept in this regard. No evidence justifying dividing the balance of R120 000 amongst the delegates on their return, was presented or could be found during the investigation.

5.3.4 The trip to Brazil at the expense of the Municipality

5.3.4.1 In 2009 the Municipality was invited to participate in the Soccerex Brasila Forum 2009 which took place in Brazil, in preparation for the FIFA 2010 World Cup.

5.3.4.2 The records of the Municipality show that 14 Delegates of the Municipality, including the Municipal Manager and Councillors, accordingly visited Brazil in March 2009. The expenditure incurred by the Municipality for the trip was R1 057 696.50, which was approved by the Municipal Manager.

5.3.4.3 According to the information obtained from the records of the Municipality during the investigation, the Municipal Council only considered and condoned the visit by the delegation of the Municipality on 12 August 2009.
5.3.4.4 The Municipal Manager could not provide any explanation why the undertaking of the trip was not submitted to the Municipal Council for its consideration in advance, as is required by the Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business.\(^3\)

5.3.3 The malfunctioning of the financial management system of the Municipality

5.3.3.1 The Municipal Manager explained during the investigation that the electronic financial management system of the Municipality was infiltrated by software viruses on 20 September 2009. It affected the central server as well as individual workstations.

5.3.3.2 His explanation was supported by the contents of a report on the incident, submitted by the Corporate Services Department of the Municipality to the Municipal Council, on 25 November 2009.

5.3.3.3 On the same day (20 September 2009), the central server of the system suffered a complete malfunction and had to be removed for repairs. It was discovered that the malfunction was due to it being exposed to extreme temperatures when the air conditioning system in the server room was affected by power failures.

5.3.3.4 The source of the viruses could not be determined. The Municipality upgraded its virus protection software to prevent a recurrence of the incident referred to above.

5.3.3.5 No evidence was presented or could be found during the investigation that the electronic financial management system was deliberately sabotaged or that critical data was lost. According to information obtained from the Manager: Finance and samples of the financial data drawn during the investigation, the critical information was recovered and reinstated in the electronic financial management system of the Municipality.

5.3.3.6 It was also found that the Municipality has implemented an extensive financial recovery system, as required by section 141 of the MFMA.

\(^3\) See paragraph 6.7 below
5.4 Irregularities relating to disciplinary action

5.4.1 The alleged failure of the Mpumalanga Department of Cooperative Governance and Traditional Affairs and the Municipal Council to take action in respect of criminal charges brought against the Municipal Manager

5.4.1.1 The personnel records of the Municipality indicate that Adv H M Mbatha was appointed by the Municipal Council as the Municipal Manager of the Municipality, on 1 May 2006.

5.4.1.2 According to a letter addressed to the Municipal Manager by the former Executive Mayor on 7 November 2007, the Municipal Council was not informed of criminal charges brought against him in respect of which a trial was set down to commence on 9 April 2008.

5.4.1.3 The criminal charges against the Municipal Manager related to incidents that occurred in 2005 when he was employed by the Mpumalanga Department of Local Government and Housing and seconded to the Municipality as the Acting Municipal Manager. He was charged with two counts of fraud and one count of the violation of provisions of the MFMA, which were laid by a former employee of the Municipality.

5.4.1.4 When he was interviewed during the investigation, the Municipal Manager stated that he was not asked by the Municipal Council when he was interviewed for the position of Municipal Manager in 2006, whether there were any criminal charges pending against him.

5.4.1.5 The former Speaker of the Municipal Council stated in his interview during the investigation that Adv Mbatha would in all probability not have been appointed if the Council was aware of the fact that criminal charges were pending against him at the time when his permanent appointment as Municipal Manager was considered.

5.4.1.6 The records of the Municipality indicate that the Municipal Manager was suspended by the Municipal Council when it became aware of the criminal charges against him,
Free Money for All: A Report of the Public Protector on an investigation
Into allegations of maladministration and poor governance
by the Ehlanzeni District Municipality in the Mpumalanga Province

on 7 May 2007. He challenged the suspension in the Labor Court, which ruled that he had to be reinstated due to a material procedural deficiency in the process.

5.4.1.7 The National Prosecuting Authority informed the Public Protector in September 2011 that it stayed prosecution against the Municipal Manager, due to a lack of evidence and that he was acquitted on all charges.

5.4.2 The alleged failure by the Municipal Council to implement the recommendations of the former MEC for Local Government and Housing to hold the Municipal Manager accountable for irregularities and maladministration.

5.4.2.1 According to the records of the Municipality in this regard, the former Member responsible for Local Government and Housing of the Mpumalanga Provincial Government (the MEC) investigated allegations of fraud and corruption made against the Municipal Manager.

5.4.2.2 The report on the investigation was presented to the former Municipal Council on 27 May 2009, recommending that Adv Mbatha be held liable for certain irregularities.

5.4.2.3 The Speaker of the former Municipal Council indicated during the investigation that a disciplinary hearing was held in May 2009 in response to the irregularities referred to in the report of the former MEC and Adv Mbatha was acquitted on all charges. No wrongdoing on his part was found.

6 EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Procurement irregularities

6.1.1 The establishment of a Panel of Legal Advisers for the Municipality
6.1.1.1 The evidence and information considered during the investigation in this regard show that the Municipality intended to establish a list of accredited legal service providers. One of the requirements stated by the REQUEST FOR THE EXPRESSION OF INTEREST, advertised on 24 April 2008, was that proposals had to be accompanied by an original Tax Clearance Certificate. Despite the fact that one of the bidders, Mculu Incorporated, failed to comply with this requirement, it was appointed to the Panel of Legal Advisers of the Municipality.

6.1.1.2 No evidence was presented or could be found from enquiries made during the investigation to substantiate the allegations that the individuals appointed to the Panel included friends of the Municipal Manager.

6.1.2 The construction of new offices for the Municipality

6.1.2.1 The allegation that the Municipal Manager appointed a contractor for the construction of the new office complex of the Municipality that was not recommended by the BAC, is supported by the evidence and information obtained during the investigation.

6.1.2.2 However, the Supply Chain Management records of the Municipality also show that the Municipal Manager’s decision was informed by the advice of technical specialists and that his considerations and the reasons for deviating from the recommendations were reported to the National Treasury.

6.1.3 Contracts for the construction of training venues and fan parks for the FIFA 2010 World Cup

6.1.3.1 The allegation that the Municipal Manager irregularly awarded contracts for the construction of training venues and fan parks is not supported by the information and evidence obtained during the investigation, which indicate that the procurement of the service providers involved was the responsibility of the Mbombela Local Municipality, and that the Municipality only assisted with the supervision and funding of the projects.

6.1.4 The contracts awarded to DVS and Elements
6.1.4.1 The evidence and information obtained during the investigation show that sufficient budgetary provision was made for the appointment of DVS and Elements.

6.1.4.2 No evidence was presented or found during the investigation that “the owner” of DVS Marketing and Communications, to which a contract was awarded by the Municipal Manager in May 2009, is related to him or that the Municipal Manager improperly influenced the awarding of the contract to DVS in any manner.

6.1.4.3 The evidence also does not support the allegation that an advance payment of R1 million was made by the Municipal Manager to Elements Consolidated Investments.

6.1.5 The contract for the upgrading of the road between Green Valley and Salique

6.1.5.1 The evidence and information obtained during the investigation in this regard indicate that the decision of the Municipal Manager not to appoint the contractor recommended by the BEC, was based on the recommendation of the BAC.

6.1.5.2 The delay in the completion of the project was mainly due to a lack of proper management thereof by the Municipality, which was addressed by the Municipal Manager, and exceptionally heavy rains. The variation orders, in terms of which the contractor was paid for additional expenses, were approved by the Municipal Manager.

6.1.6 The contract for the construction of the Disaster Management Centre

6.1.6.1 According to the evidence and information obtained during the investigation in this regard, the deviation by the Municipal Manager from the normal tender process in this case was due to the fact that no suitable bidder could be found during the formal procurement process and that the construction of the centre became a matter of urgency, as it was required for the forthcoming FIFA 2010 World Cup.

6.1.7 The Pelgrim’s Rest Reservoir Project

6.1.7.1 No evidence was found during the investigation indicating that the Municipal Manager was informed about the concerns raised by a Councillor with the
6.1.7.2 However, the evidence and information obtained during the investigation indicated that the project was funded and completed by the Municipality in February 2009.

6.2 Human Resources Irregularities

6.2.1 The awarding of a bursary and payment of a salary to and the appointment of Ms T Hlatswayo

6.2.1.1 According to the evidence and information obtained during the investigation, Ms Hlatswayo, worked as a volunteer in the office of the Municipal Manager and acted as his Personal Assistant during December 2009. She was rewarded for her services for an extended period of three months, but was not paid a “salary” as if she was an employee, as was alleged.

6.2.1.2 No evidence was presented or found during the investigation that her subsequent appointment as Secretary in the office of the Municipal Manager was irregular, as alleged.

6.2.1.3 As Ms Hlatswayo was not an employee of the Municipality at the time when the bursary was awarded to her by the Municipal Manager.

6.2.2 The appointment of Ms E Mthembu

6.2.2.1 The explanation in respect of this matter provided by the Municipal Manager in this regard that he was obliged to appoint a lady in the position concerned, despite the overrepresentation of females in the Registry Section, is consistent with the provisions of the Employment Equity Plan of the Municipality.

6.3 Financial Irregularities

6.3.1 The long term loan from the Development Bank of South Africa
6.3.1.1 The information and the evidence obtained during the investigation in this regard confirmed the allegation that the Municipal Manager entered into a loan agreement on behalf of the Municipality with the DBSA for R227 million.

6.3.1.2 The loan agreement was deliberated by the Municipal Council and approved on 24 June 2009.

6.3.1.3 Furthermore, the evidence and information obtained during the investigation confirmed that the balance of the loan, i.e. the amount exceeding the costs of the construction of the new office complex, was, contrary to what was alleged, spent on Targeted Infrastructure Projects.

6.3.2 The alleged reallocation of approved funding for the training of tour operators

6.3.2.1 The Municipality had no project in the 2009/10 year for the training of tour operators as was alleged, but for the training of tour guides. The records of the Municipality further indicate that the budgeted amount was R300 000 and not R500 000, as was alleged.

6.3.2.2 When it transpired that the training of tour guides is the responsibility of another organ of state, the amount was moved to another programme in terms of a virement, approved by the Municipal Manager, which, according to the Auditor-General South Africa, was proper and regular.

6.3.2.3 The Municipality has not developed and adopted a virement policy, as required by National Treasury.

6.3.3 The alleged misappropriation of municipal funds in connection with the trip to Italy

6.3.3.1 The evidence and information obtained in connection with the trip to Italy indicate that the Municipal Manager requested an amount of R165 505 to be transferred to the credit card account of an employee in respect of what was referred to as “out of pocket expenses” during this trip.

6.3.3.2 The said amount exceeded the daily allowances to which the delegates from the Municipality was entitled in terms of the Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business.
6.3.3.3 No evidence could be found during the investigation that the delegates of the Municipality submitted any invoices of the expenditure incurred during the trip on their return, despite being asked to do so.

6.3.3.4 The Municipal Manager authorized the equal distribution of the balance of the amount transferred between the delegates on their return.

6.3.4 The trip to Brazil at the expense of the Municipality

6.3.4.1 The Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business provides that the Municipal Council has to approve official journeys of councilors at least two months in advance.

6.3.4.2 The evidence obtained in regard to the 2009 trip to Brazil indicates that it was only condoned by the Municipal Council on 12 August 2009, i.e. 5 months later. No explanation for the failure to comply with the Policy was provided during the investigation.

6.3.5 The malfunctioning of the financial management system of the Municipality

6.3.5.1 No evidence was presented or could be found during the investigation that the electronic financial management system of the Municipality was deliberately incapacitated on 20 September 2009, and that it resulted in the loss of vital data.

6.3.5.2 The evidence and information obtained during the investigation show that the malfunction of the system was due to the infiltration of software viruses and the breakdown of the server. It was repaired and no critical data was lost.

6.4 Irregularities relating to disciplinary action
6.4.1 The alleged failure of the Mpumalanga Department of Cooperative Governance and Traditional Affairs and the Municipal Council to take action in respect of criminal charges brought against the Municipal Manager

6.4.1.1 From the evidence and the information obtained during the investigation, it was established that the Municipal Council suspended the Municipal Manager on 7 May 2007, when it became aware of criminal charges brought against him.

6.4.1.2 However, his suspension was overturned by the Labour Court due to a procedural deficiency. The prosecution of the Municipal Manager was eventually stayed by the National Prosecuting Authority, due to a lack of evidence.

6.4.1.3 The allegation that no action was taken against the Municipal Manager is therefore not supported by the evidence.

6.4.2 The alleged failure by the Municipal Council to implement the recommendations of the former MEC for Local Government and Housing to hold the Municipal Manager accountable for irregularities and maladministration

6.4.2.1 According to the evidence and information obtained during the investigation in this regard, the report on an investigation initiated by the former MEC of Local Government and Housing against the Municipal Manager into allegations of fraud and corruption was submitted to the Municipal Council on 27 May 2009. It resulted in the holding of a disciplinary enquiry against the Municipal Manager, which found no wrongdoing on his part.

6.4.2.2 The allegation that the Municipal Council failed to take action against the Municipal Manager, as recommended by the former MEC, is therefore not supported by the evidence.

7 LEGAL FRAMEWORK AND ANALYSIS
7.1 The Municipal Systems Act, 2000

7.1.1 In terms of section 2, a municipality has a separate legal personality.

7.1.2 Section 55(2) provides that as the accounting officer of the municipality, the municipal manager is responsible and accountable for:

7.1.2.1 All income and expenditure of the municipality;

7.1.2.2 All assets and the discharge of all liabilities of the municipality; and

7.1.2.3 Proper and diligent compliance with the Municipal Finance Management Act.

7.2 The Municipal Finance Management Act, 2003

7.2.1 Section 60 of this Act provides that the municipal manager of a municipality is the accounting officer of the municipality.

7.2.2 The municipal manager must, in terms of section 61:

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

(b) ....

(c) seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality.”

7.2.3 He/she may not act in way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of this Act or use the position or privileges of, or confidential information obtained as accounting officer for personal gain or to improperly benefit another person.

7.2.4 As part of his/her general financial management functions in terms of section 62, the accounting officer must take all reasonable steps to ensure that:

7.2.4.1 The resources of the municipality are used effectively, efficiently and economically;
7.2.4.2 Full and proper records of the financial affairs of the municipality are kept;

7.2.4.3 Unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented; and

7.2.4.4 The municipality has and implements a supply chain management policy.

7.2.4.5 As far as the incurring of expenditure is concerned, section 15 provides that a municipality may only do so in terms of an approved budget and within the limits of the amounts appropriated for the different votes.

7.2.4.6 The accounting officer is, in terms of section 69 responsible for the implementation of the budget and to take all reasonable steps to ensure that the spending of funds is in accordance therewith.

7.2.4.7 In terms of section 32, the accounting officer is liable for unauthorized expenditure deliberately or negligently incurred by him/her.

7.2.4.8 Section 32 also provides that a municipality must recover unauthorized, irregular or fruitless and wasteful expenditure from the person liable for that expenditure.

7.2.5 Sections 111 and 112 provide that each municipality must have and implement a supply chain management policy, which must be fair, equitable, transparent, competitive and cost effective. It must also comply with a prescribed regulatory framework.

7.2.6 Section 46 of the Act regulates the incurring of long terms debts by a municipality. It provides that it can only be obtained for the purposes of capital expenditure on, inter alia, property, plant or equipment and the re-financing of existing long term debts.

7.2.7 In order for the Municipality to incur long terms debt there must, in terms of section 46(2) be a resolution of the municipal council approving the loan and a signed loan agreement.
7.2.8 Section 171(1) provides that the accounting officer of a municipality commits an act of financial misconduct if he/she, *inter alia*:

7.2.8.1 Deliberately or negligently contravenes a provision of this Act;

7.2.8.2 Fails to comply with a duty imposed by a provision of this Act on the accounting officer; or

7.2.8.3 Makes or permits, or instructs another official of the municipality to make an unauthorized, irregular or fruitless and wasteful expenditure.

7.2.9 "*Fruitless and wasteful expenditure*" means, according to section 1: “*expenditure that was made in vain and would have been avoided had reasonable care been exercised.*”

7.2.10 A municipality must, in terms of section 171(4) of this Act, investigate allegations of financial misconduct against the accounting officer, and if the investigation warrants such a step, institute disciplinary proceedings against him/her.

7.2.11 Section 114 provides that if a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury, of the reasons for deviating from such recommendation.

7.3 **The Municipal Supply Chain Management Regulations**

7.3.1 Regulation 14 provides that the accounting officer of a municipality must keep a list of accredited service providers of goods and services that must be used for the procurement requirements of the municipality through written or verbal quotations and formal written price quotations.
7.3.2 The accounting officer must in this regard at least once a year invite prospective providers of goods and services to apply for evaluation and listing as accredited prospective providers and specify the listing criteria.

7.3.3 In terms of Regulation 43, the supply chain management policy of a municipality must contain a prohibition on the awarding of a bid above R 15 000 to a person whose tax matters have not been declared by the SARS to be in order.

7.4 The Supply Chain Management Policy of the Municipality

7.4.1 The Supply Chain Management Policy of the Municipality (the Policy) was adopted by the Municipal Council on 28 September 2005.

7.4.2 The accounting officer is, in terms of paragraph 29(6), entitled to at any stage of the bidding process refer any recommendation made by the Bid Evaluation Committee or the Bid Adjudication Committee back to that Committee for reconsideration.

7.4.3 Paragraph 43 provides that:

“(1) The accounting officer must ensure that, irrespective of the procurement process followed, no award above R15 000 is given to a person whose tax matters have not been declared by the South African Revenue Service to be in order.

(2) Before making an award to a person, the accounting person (sic) must first check with SARS (sic) whether that person's tax matters are in order.”

7.4.4 In terms of paragraph 36, the accounting officer may deviate from the normal prescribed procurement process in exceptional cases where it would be impractical or impossible to follow it. He/she must report the reasons for the deviation through the office of the Executive Mayor to the Municipal Council.

7.5 The Bursary Policy of the Municipality
7.5.1 The Bursary Policy of the Municipality was adopted by the Municipal Council on 6 October 2004.

7.5.2 Paragraph 1 of this Policy provides that a bursary can only be awarded to employees of the Municipality.

7.6 The Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business

7.6.1 The relevant provision of this Policy, dated 25 September 2008, is paragraph 5(a), which provides that the Municipal Council has to approve motivated plans with costed budgets for official journeys at least two months prior to the planned departure of Councilors traveling abroad.

7.6.2 In terms of paragraph 5(c), a daily allowance equal to US $215 shall be paid to a Councilor traveling abroad to defray the cost of meals and incidental costs.

8 ANALYSIS OF THE EVIDENCE AND INFORMATION OBTAINED DURING AND CONCLUSIONS MADE FROM THE INVESTIGATION

8.1 Procurement irregularities

8.1.1 The listing of a Panel of Legal Advisers for the Municipality

8.1.1.1 The resolution taken by the BEC that the bid of Mculu Incorporated was regarded as unresponsive as no valid Tax Clearance Certificate was submitted, complied with the requirements of the Municipal Supply Chain Management Regulations and the Supply Chain Management Policy of the Municipality. According to the letter of Mr Mculu, the “existing” Tax Clearance Certificate expired in January 2008. However, by
21 July 2008, i.e. seven months later, he was still not in a position to submit a certificate from SARS that the tax affairs of Mculu Incorporated were in order.

8.1.1.2 The submission of a valid Tax Clearance Certificate is a matter that has to be considered by the BEC, as it relates directly to whether or not a bid qualifies for consideration. By overruling the decision of the BEC in this regard, the BAC placed itself in a position, where it had to evaluate whether or not Mculu Incorporated complied with the other requirements of the bid and qualified to be considered in terms of the listing criteria. Under the circumstances where the BAC did not agree with the BEC, it should have requested the Municipal Manager to refer the matter back to it in terms of paragraph 29(6) of the Municipality’s Supply Chain Management Policy.

8.1.1.3 No evidence could be found during the investigation that a valid Tax Clearance Certificate was submitted to the Municipality by Mculu Incorporated, before it was listed on the Panel by the Municipal Manager.

8.1.1.4 In terms of the provisions of Regulation 14 of the Municipal Supply Chain Regulations, only prospective service providers that complied with the set criteria for accreditation could be listed on the database of the Municipality.

8.1.1.5 There was no indication in the evidence and information obtained during the investigation that the Municipal Manager verified whether Mculu Incorporated’s tax matters were in order before it was listed as an accredited service provider, as contemplated by Regulation 14 of the Municipal Supply Chain Management Regulations.

8.1.1.6 The approving of the listing of Mculu Incorporated despite the fact that its proposal did not comply with the requirement of a valid original Tax Clearance Certificate was inconsistent and did not conform to the standard required by the Municipal Supply Chain Management Regulations.

8.1.2 The construction of new offices for the Municipality

8.1.2.1 The decision of the Municipal Manager not to appoint the contractor recommended by the BAC was based on valid motivations focusing on the interests of the
Municipality and his consideration of all the relevant factors impacting on a procurement of more than R160 million, as was expected of him by virtue of his responsibilities as the accounting officer of the Municipality in terms of section 61 of the MFMA.

8.1.2.2 The reasons for his decision to deviate from the recommendations of the BAC were reported to the National Treasury, as required by section 114 of the MFMA.

8.1.3 Contracts for the construction of training venues and fan parks for the FIFA 2010 World Cup

8.1.3.1 As indicated in paragraph 6.1.3 above, the Municipality was not involved in the procurement process as was alleged by the Complainant. It was the responsibility of the Mbombela Local Municipality.

8.1.4 The contracts awarded to DVS and Elements

8.1.4.1 In terms of sections 15, read with section 69 of the MFMA, it was expected of the Municipal Manager to ensure that there were sufficient funds available to enable the Municipality to fulfill its commitments in terms of the contracts entered into between the Municipality and Elements and DVS, respectively.

8.1.4.2 The financial records of the Municipality indicate that the Municipal Manager complied with his responsibilities in this regard.

8.1.5 The contracts for the upgrading of the road between Green Valey and Salique

8.1.5.1 The Municipal Manager’s decision not to appoint the service provider recommended by the BEC was informed by the recommendation of the BAC, which was based on valid considerations.
8.1.5.2 The variation orders in terms of additional expenses were approved by the Municipal Manager in terms of his responsibility to act in the best interests of the Municipality and to ensure that the resources of the Municipality are used effectively, efficiently and economically, as contemplated by the provisions of section 61 of the MFMA.

8.1.6 The contract for the construction of the Disaster Management Centre

8.1.6.1 The deviation from the normal prescribed procurement process in this regard was provided for by the provisions of Paragraph 36 of the Supply Chain Management Policy of the Municipality.

8.1.6.2 Due to the fact that the formal procurement process delivered no result and the time frames relevant to the requirements relating to the FIFA 2010 World Cup, it would have been impractical to follow the formal process for a second time.

8.1.7 The Pelgrim's Rest Reservoir Project

8.1.7.1 The evidence did not support the allegation that the Municipal Manager failed to respond to complaints relating to this project. It was in any event completed in February 2009.

8.2 Human Resources Irregularities

8.2.1 The awarding of a bursary and the payment of a salary to and the appointment of Ms T Hlatswayo

8.2.1.1 As indicated in paragraph 6.2.1 above, the evidence and information obtained during the investigation does not support the allegations that Ms Hlatswayo was paid a salary and that her appointment as Secretary was irregular.

8.2.1.2 The awarding of a bursary to her at the time when she was still a volunteer was a violation of the provisions of the Municipality's Bursary Policy in terms of which only employees of the Municipality qualified.
8.2.2 The employment of Ms Mthembu

8.2.2.1 The employment of Ms Mthembu was in accordance with the Employment Equity Plan of the Municipality.

8.3 Financial Irregularities

8.3.1 The long term loan from the Development Bank of South Africa

8.3.1.1 The long term loan entered into by the Municipal Manager on behalf of the Municipality was in accordance with the provisions of section 46 of the MFMA as it was obtained for capital expenditure projects and approved by the Municipal Council.

8.3.1.2 By approving the loan agreement, the Municipal Council bound the Municipality to it for the duration of the agreement, irrespective of whether the Municipal Council may be replaced. The loan agreement is not between the Municipal Council and the DBSA, but between the Municipality, as a legal entity and the DBSA. The allegation that it was unlawful for the Municipal Manager to bind future Municipal Councils by entering into a long term loan agreement, is not in accordance with the relevant provisions of the MFMA and the Municipal Systems Act.

8.3.2 The alleged reallocation of approved funding for the training of tour operators

8.3.2.1 As indicated in paragraph 6.3.2 above, the Municipality had a project in 2010/11 for the training of tour guides, and not tour operators. The amount budgeted for this project was however moved to another programme in terms of a virement. Although the Auditor-General did not regard the virement as improper, the Municipality has to develop a Virement Policy to regulate such instances, as required by National Treasury.

8.3.3 The misappropriation of public funds in connection with the trip to Italy

8.3.3.1 Neither the MFMA nor the applicable policy of the Municipality provide for a situation where municipal funds can be transferred to the account of an employee for
distribution amongst delegates on a trip abroad. It also does not provide for a ‘top-up’ payment and for dividing the balance of such a payment left at the end of the trip to be divided equally amongst the delegates without at proof of the expenditure that they incurred.

8.3.3.2 No evidence was presented or could be found for the justification of exceeding the allowance prescribed by the Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business.

8.3.3.3 This is a classic case of the mentality that sees public funds as what Adv George Bizos SC refers to as "orphaned money". These men literally decided that the change from the trip was orphaned money that they were entitled to “provide with a home” in their private pockets. The attitude also informed giving a bursary to the intern, referred to above.

8.3.4 The trip to Brazil at the expense of the Municipality

8.3.4.1 The trip to Brazil was not approved by the Municipal Council in advance, as required by Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business.

8.3.5 The malfunctioning of the financial management system of the Municipality

8.3.5.1 The malfunctioning financial management system of the Municipality was the result of hardware failure. No information critical was lost and the Municipality has implemented an extensive financial recovery system, as required by section 141 of the MFMA.

8.4 Irregularities relating to disciplinary action

8.4.1 The alleged failure of the Mpumalanga Department of Cooperative Governance and Traditional Affairs and the Municipal Council to take action in respect of criminal charges brought against the Municipal Manager

8.4.1.1 As indicated in paragraph 6.4.1, the Municipal Council did take action against the Municipal Manager, by suspending him. However, his suspension was overturned by
the Labour Court due to procedural deficiencies. The criminal charges against the Municipal Manager were eventually withdrawn.

8.4.2 The alleged failure by the Municipal Council to implement the recommendations of the former MEC for Local Government and Housing to hold the Municipal Manager accountable for irregularities and maladministration.

8.4.2.1 The evidence obtained during the investigation indicates that a disciplinary enquiry was held which found no wrongdoing on the part of the Municipal Manager.

9 RESPONSES TO THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

9.1 The response of the Municipal Manager

The response of the Municipal Manager included additional information, which was not made available during the investigation. Some of this information was incorporated in the relevant paragraphs above. The references to the response below relate only to issues that were specifically disputed.

9.1.1 Procurement irregularities: The establishment of a Panel of Legal Advisers for the Municipality

9.1.1.1 The response stated in this regard that:

“The idea (with the procurement) was therefore that legal firms should be placed on the municipal data base (sic), and only when there is work for them, then the financial procurement processes e.g. discussing rates, checking on their tax matters, fidelity fund certificates, etc unfolds. In as much as that information was requested during the request for proposals, the identified firms were not necessarily appointed in the literal sense of the word, instead they were placed on the municipal database.”

9.1.1.2 Attached to the response were two affidavits deposed by the Expenditure Management Officer and the Deputy Manager: Supply Chain Management of the Municipality respectively, stating that the purpose of the database referred to in the
response “is primarily to have a list of accredited service providers to provide specific goods or services required and simplifying the processes of obtaining services.”

9.1.1.3 As far as the requirement in respect of the submission of a valid original Tax Clearance Certificate is concerned, the affidavit of the Expenditure Management Officer stated that: “Upon receipt of an invoice (in respect of work done) from a Service Provider, a valid tax clearance certificate, banking details… are verified and captured on the payment system.”

9.1.1.4-Both affidavits confirmed that Mculu Incorporated had submitted a valid Tax Clearance Certificate “by the time that they were given formal instructions to render work for the municipality.”

9.1.2 Human Resources Irregularities: The awarding of a bursary to Ms T Hlatswayo

9.1.2.1 In this regard the response stated that:

“Ms T Hlatswayo indeed received a bursary from the municipality when she was not entitled to it. Upon discovering that she had obtained a bursary which she was not entitled to receive, I then instituted an enquiry which found that she misrepresented herself on the application form (sic) as being employed in the office of the Municipal Manager.

9.1.2.2 Attached to the response was a financial statement indicating that the bursary amount is being recovered from Ms Hlatswayo by the Municipality.

9.1.2.3 Also attached was a copy of a letter from Ms Hlatswayo to the Manager: Corporate Services of the Municipality, dated 18 June 2010 in which she stated that she had consulted the Human Resource Department that advised that, despite the fact that she was not an employee of the municipality, she was eligible to apply for a bursary. On the basis of this advice, she submitted an application, which was approved by the Municipal Manager.

9.1.3 The alleged misappropriation of municipal funds in connection with the trip to Italy

9.1.3.1 The Municipal Manager denied in his response that he had instructed the transfer of municipal funds to the credit card account of an employee. According to him the then Acting Executive Mayor (Mr J Mnisi) and the then Acting Municipal Manager (Mr T
Kubheka) were responsible for the transfer of the “Top-Up Fund to Mr Makwakwa’s account.”

9.1.3.2 Attached to the response was an affidavit of Mr Mnisi, who is currently a councilor of the Municipal Council in which he, in the main stated that:

“On or about 06 May 2008 I received a call from the then Executive Mayor, Councillor Constance Mkhonto who indicated to me that the delegation in Italy encountered a challenge regarding their allowances they received (sic) and that they needed to be assisted in that regard.

Subsequent to that call, I reported the matter to the then Acting Municipal Manager, Mr Tebogo Kubeka to assist the delegation.

I further wish to confirm that the Executive Mayor, indicated to me that the reason for the allowances was that they had overlooked the fact that the delegates had to provide themselves with lunch and supper.”

9.1.3.3 As far as the dividing of the balance of the money transferred on the return of the delegation is concerned, the response referred to a resolution of the Municipal Council dated 28 May 2008 stating:

“That Council approves the Top up funding of R 165 505 for the delegation that went to Italy, and that a report be submitted to Council for noting.”

9.1.3.4 The Municipal Manager further explained that:

“It must however be indicated that by the time that the money was transferred, the delegation had already used their own money to pay for food and other out of pocket expenses, unfortunately, no receipts were kept by kept by either of these delegates as such was never a practice in the municipality not an issue of policy, hence the reimbursements”

9.1.4 The trip to Brazil at the expense of the Municipality

9.1.4.1 According to the response, the trip to Brazil was “sanctioned” by the Mayoral Committee on 9 March 2009 due to its “urgency” and as the Municipal Council was scheduled to sit at the end of March 2009. Attached to the response in this regard was a copy of the Minutes of a special meeting of the Mayoral Committee held on 9 March 2009. Under the heading “Non-Delegated Powers” appears the item “TRIP TO
9.2 Evaluation of the response of the Municipal Manager

9.2.1 Procurement irregularities: The establishment of a Panel of Legal Advisers for the Municipality

9.2.1.1 As indicated above, Regulation 14(1)(a) of the Municipal Supply Chain Regulations provides that an accounting officer of a municipality must keep a list of accredited service providers of goods and services that must be used for the procurement requirements of the municipality.

9.2.1.2 In terms of Regulation 14(1)(b) the Municipal Manager must specify the listing criteria that prospective service providers had to comply with. A prospective service provider would therefore only qualify for accreditation once it has been established that it complies with the said criteria.

9.2.1.3 The REQUEST FOR THE EXPRESSION OF INTEREST to serve on the panel of legal advisors of the Municipality stated, inter alia, that:

“Proposals must be accompanied by supporting documents which are Original Tax Clearance Certificate, a copy of the company registration certificate…” (emphasis added)

9.2.1.4 The listing criteria therefore clearly included that a respondent would only qualify for listing as an accredited service provider if its proposal included an original and valid Tax Clearance Certificate.

9.2.1.5 Paragraph 4.5.2.9 of the Supply Chain Management: A Guide for Accounting Officers of Municipalities and Municipal Entities states, inter alia, the following in this regard:
"It is Government’s policy not to enter into business arrangements with any supplier whose tax affairs are not in order, or who has not made satisfactory arrangements with SARS to meet any outstanding obligations”

9.2.1.6 It is accordingly immaterial that Mculu Incorporated submitted a Tax Clearance Certificate before it was briefed to provide a service and payment was made to it. Mculu Incorporated simply did not qualify to have been considered for listing at the time as it did not meet the criteria for accreditation, as was stipulated in the Request for the Expression of Interest.

9.2.2 Human Resources Irregularities: The awarding of a bursary to Ms T Hlatswayo

9.2.2.1 According to the response of the Municipal Manager, Ms Hlatswayo indicated in her application form that she was employed by the Municipality, which was not true as she was an intern.

9.2.2.2 Ms Hlatswayo on her part stated that she was advised by the Human Resources Department that she qualified to apply, which is not disputed by the Municipal Manager.

9.2.2.3 The impression created by the Municipal Manager that he was not aware of Ms Hlatswayo’s status as a volunteer at the time when he approved her application on 2 February 2010, is inconsistent with the contents of the memorandum submitted to him two months earlier, on 11 December 2009 by the Manager Corporate Services.

9.2.2.4 On 11 December 2009, the Manager: Corporate Services of the Municipality addressed an internal memorandum to the Municipal Manager in which he referred to the fact that Ms Hlatswayo was a volunteer, requested that she be allowed to act in the position of the Personal Assistant of the Municipal Manager for a period. The Municipal Manager approved the memorandum. Moreover, at the time when he approved Ms Hlatswayo’s bursary application, she worked in his office. He was therefore clearly aware that she was not an employee of the Municipality and that she therefore did not qualify to be awarded a bursary.

4 See paragraph 5.2.1.2 above
9.2.3 The misappropriation of municipal funds in connection with the trip to Italy

9.2.3.1 The Municipal Manager’s denial in the response that he had instructed the transfer of municipal funds to the credit card account of an employee is inconsistent with his evidence during the investigation. (See paragraph 5.3.3.4 above) it is also inconsistent with the evidence of the CFO who stated that he received a call from the Municipal Manager instructing him to transfer the money concerned to Mr Makwakwa’s account and the contents of the memorandum submitted by the Manager: Finance and Supply Chain Management to the Finance Portfolio Committee of the Municipal Council, on 9 September 2008. (see paragraph 5.3.3.6 above)

9.2.3.2 Mr Makwakwa further confirmed in his evidence that the Municipal Manager requested that his credit card account be used for the transfer. He furthermore stated that the money was expended on various items, including a cell phone.

9.2.3.3 The affidavit of Mr Mnisi submitted by the Municipal Manager is of no consequence in this regard as it does not support the Municipal Manager’s denial.

9.2.3.4 In the light of the evidence in this regard, including the Municipal Manager’s original version, his denial cannot be accepted.

9.2.3.5 The “approval” by the Municipal Council of the so called “Top-Up Funding” cannot exonerate the Municipal Manager form his responsibilities as the accounting officer in terms of the MFMA to act with fidelity, honesty, integrity and in the best interests of the Municipality, to prevent any prejudice to the financial interests of the Municipality and to prevent irregular, fruitless and wasteful expenditure.

9.2.3.6 It was also noted that the Municipal Council did not approve the dividing amongst the delegates of the balance of the money transferred on their return. The Municipal Manager conceded that this was done with is approval, despite the fact that there was no documentation available to determine which of the delegates were entitled to disbursement, and if so, to what extent.

9.2.4 The trip to Brazil at the expense of the Municipality
9.2.4.1 The Municipal Manager failed to provide any explanation in his response for the “urgency” which required that the Mayoral Committee had to approve the trip to Brazil.

9.2.4.2 A Mayoral Committee is appointed in terms of section 60 of the Local Government: Municipal Structures Act, 1998 to assist the Executive Mayor of a Municipality. It can only perform functions delegated to it by the Executive Mayor and has no authority to usurp the authority, functions and powers of the Municipal Council.

9.2.4.3 The Mayoral Committee therefore had no authority to consider the approval of the trip to Brazil, as the Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business specifically provides for approval in advance by the Council and not the Executive Mayor.

9.2.4.4 It was also noted that the matter was only presented to the Council five months after the trip was undertaken, and no explanation was provided for the delay.

9.3 The response of the Ehlanzeni District Municipality Local Branch of the South African Municipal Workers’ Union (SAMWU)

9.3.1 The Ehlanzeni District Municipality Local Branch of SAMWU that lodged the complaints responded to the Provisional Report on 19 November 2012, merely stated that it was in agreement with the contents thereof.
Free Money for All: A Report of the Public Protector on an investigation
Into allegations of maladministration and poor governance
by the Ehlanzeni District Municipality in the Mpumalanga Province

The Public Protector’s findings are that:

**Finding 1: The appointment by the Municipal Manager of Mculu Incorporated to the Panel of Legal Advisers of the Municipality was improper and amounted to maladministration**

10.1 In terms of the provisions of Regulation 14 of the Municipal Supply Chain Regulations, only prospective service providers that complied with the set criteria for accreditation could be listed on the database of the Municipality.

10.2 The approving of the listing of Mculu Incorporated despite the fact that its proposal did not comply with the requirement of a valid original Tax Clearance Certificate was inconsistent, did not conform to the standard required by the Municipal Supply Chain Management Regulations and therefore constituted improper conduct and maladministration.

**Finding 2: The awarding by the Municipal Manager of a bursary to Ms T Hlatshwayo was improper and amounted to maladministration**

10.3 Ms Hlatshwayo was not an employee of the Municipality at the time when a bursary was awarded to her by the Municipal Manager on 2 February 2010. His awarding of the bursary to her was in violation of Municipality's Bursary Policy, in terms of which only employees of the Municipality qualified. His conduct in this regard was therefore improper and constituted maladministration.

**Finding 3: The conduct of the Municipal Manager in respect of instructing the transfer of municipal funds to the credit card account of an employee to cover expenses incurred by a delegation that visited Italy, was improper and amounted to maladministration.**

10.4 As the accounting officer, the Municipal Manager is compelled by section 61 of the MFMA to act with fidelity, honesty, integrity and in the best interests of the Municipality in managing its financial affairs.

10.5 The instruction given by the Municipal Manager during the visit of a delegation to Italy that an amount of Euro 14 000 should be transferred to Mr Makwakwa’s credit card account, was reckless and irresponsible as it:
10.5.1 Compromised Mr Makwakwa who was suddenly in possession of a large amount of public funds in his personal account that he was supposed to manage, divide amongst the delegates and account for;

10.5.2 Was not authorized by the MFMA or any policy of the Municipality;

10.5.3 Was not based on any proper calculation of the amount that was required and that could be approved in terms of the Municipality’s Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business; and

10.5.4 Did not require of the delegates that received any of the funds to account for their expenditure on their return to South Africa.

10.6 The conduct of the Municipal Manager in this regard was not authorized by the MFMA or the applicable policy of the Municipality. It displayed a reckless attitude towards the expending of municipal funds, was improper and amounted to maladministration.

Finding 4: The dividing by the Municipal Manager of the balance of the advance transferred to Mr Makwakwa’s credit card account on the return of the delegates from Italy to South Africa was unlawful, improper and amounted to maladministration. It may also have constituted theft of municipal funds.

10.7 By dividing the balance of R120 000 amongst the delegates, the Municipal Manager misappropriated municipal funds. He did not act with honesty, fidelity and in the best interest of the Municipality, as is required of him by the provisions of the MFMA.

10.8 The conduct of the Municipal Manager in respect of dividing the balance was unlawful improper and amounted to maladministration. Under the circumstances it may also have constituted theft of municipal funds.

Finding 5: The failure by the Municipal Manager to obtain the approval of the Municipal Council for the official trip of Councillors and officials to Brazil in March 2009 was improper and amounted to maladministration

10.9 The delegation that visited Brazil in March 2009 included former Councillors and officials of the Municipality. The expenditure was approved by the Municipal Manager, without the approval of the Municipal Council, which was required in
advance, in terms of the Policy on Privileges and Allowances in respect of Councillors Travelling on Official Business. His conduct in this regard was improper and constituted maladministration.

10.10 No reasonable explanation was provided during the investigation as to why the matter was only brought before the Council in August 2009.

11. REMEDIAL ACTION

The remedial action taken, as envisaged by section 182(1)(c) of the Constitution, is the following:

11.1 The Municipal Council of the Municipality to:

11.1.1 Investigate and, if warranted, take disciplinary action against the Municipal Manager in respect of his conduct referred to in the findings made in paragraph 10 above, in terms of the provisions of section 171(4) of the MFMA;

11.1.2 Take urgent steps to recover the amount referred to in Finding 4 of paragraph 10 above from the Councillors, former Councillors and the officials amongst whom it was divided, in terms of the provisions of section 32(2) of the MFMA;

11.1.3 Report the unlawful conduct of the Municipal Manager in respect of the dividing of the balance of R120 000 referred to in Finding 4 above to the South African Police Service, to investigate a charge of theft; and

11.1.3 Take urgent steps to develop, adopt and implement a Virement Policy for the Municipality.

12. MONITORING

12.1 The Speaker of the Municipal Council of the Municipality to:

12.1.1 Submit to the Public Protector an implementation plan in respect of the remedial action taken in paragraph 11 above, within 30 days from the date of this report.
12.1.2 Submit a report on the progress made with the implementation of the remedial action taken in paragraph 11 above, within 60 days from the date of this report.

26 November 2012