Report of the Public Protector on an investigation into complaints of maladministration against the Midvaal Local Municipality
truck. The approximate distance between the two properties is 5 kilometers. (It is important to note that Mr J T gave this instruction on his own accord and was never requested to do so by Mr Wenger.)

7.6.3 When Mr Wenger was informed that the trees had been moved to his property by Mr JT, he informed the private contractor that his services were no longer required. Mr Wenger paid for the damages to Mr Lombard’s roof.

7.6.4 The Executive Mayor and her husband were married out of community of property and therefore the property to which the palm trees were moved is registered in the name of Mr Wenger only. This is also in contrast with the allegations which state that the trees were moved to the Executive Mayor’s property.

7.6.5 The matter was thoroughly investigated by the then Municipal Manager, Mr B. Poggenpoel, who came to the conclusion that the only wrongdoing was that of Mr JT who, on his own accord, gave the instruction to have the trees moved to Mr Wenger’s property using the Municipality’s truck. As Mr JT left the employ of the Municipality in July 2005 the Municipal Manager could not take the matter any further.

7.6.6 The Speaker concluded that Mr Wegner never requested the Municipality to remove or transport the trees for him or that there was any wrong doing on his part. It was furthermore, clear from the affidavits that the Executive Mayor was never involved with the transaction and there is no proof of any wrongdoing by her.

7.6.7 On 20 November 2008 the Speaker presented a report to Council on the outcome of an internal investigation that was conducted into the allegations raised by the Complainants. After consideration of the report, Council resolved as follows:

*That the investigation by the Speaker, into the allegations made by Mr C.G. Pypers, as well as the attached affidavits serving as evidence, be noted.*
That the Speaker's conclusion that the Executive Mayor was never involved with the transaction and that she never benefited financially from it and therefore committed no breach of the Code of Conduct for Councilors be supported.

That the investigation and the outcome be reported to the MEC for Local Government in terms of Section 13(3) of the Code of Conduct for Councilors.”

7.7 Payment of performance bonuses

7.7.1 The Municipal Manager and the Speaker advised that a Head of Department was dismissed but no performance bonus was paid to him during his final year of employment. Two other Heads of Department ended their employment contracts based on mutual agreements between them and the Municipality. They did not receive any performance bonuses during their final year of employment.

7.7.2 Two other employees were advised that their employment contracts would not be renewed. Both ended their contracts in terms of mutual agreements signed by them and the Municipality and neither of them received any performance bonuses during their final year of employment.

7.7.3 In some cases performance bonuses that were paid out were based on performance assessments for the performance cycle that ended in the year prior to the final year of employment.

7.8 Outcome of Forensic Investigation into other alleged irregularities

7.8.1 Mecano Construction

A Superintendent at the Electrical Section of the Municipality was reportedly involved in the falsification of quotations to benefit another family member from
May to September 2006. To the value of R82 715,00. A disciplinary tribunal was held and he was subsequently dismissed. The matter was reported to the SAPS.

7.8.2 Theft of electrical cable

The theft of 120 meter paper isolated lead cable from trenches in Rothdene was reported on 7 July 2006. The value of the cable was R49 245,80. Two municipal workers were implicated in the theft. The matter was reported to the SAPS.

7.8.3 Theft of electrical cable – Ophir Estates.

The theft of 21 meter double steel belted cable to the value of R8 617, 98 from Ophir Estates was reported on 17 August 2006. Two Council officials were arrested and found guilty of theft in the Magistrates Court. One of the officials resigned and disciplinary action was taken against the other.

7.8.4 Theft of electrical cable at M1 sub-station

Cable to the value of R100,000 was robbed at gunpoint. An identikit was released and the matter is under investigation by the SAPS.

7.8.5 Theft of paint

White road marking paint to the value of R450, 00 was stolen at Boltonworld on 8 September 2006. A special workman of the Technical Team was subsequently found guilty of fraud in a disciplinary tribunal and demoted to general worker.

7.8.6 Wasteful and fruitless expenditure (PF Services)
Wasteful and fruitless expenditure as defined in section 173 of the MFMA, to the amount of R4 003 523, 52, was incurred by a Head of Department and Chief Superintendent in the purchasing of road marking paint, road traffic signs and street name signs. Disciplinary action was taken that led to the demotion of the Chief Superintendent and the dismissal of the Head of Department.

7.8.7 Fruitless and wasteful expenditure (Riverdale)

An investigation was instituted in respect of expenditure in the amount of R733 776,41 after the installation of a water reticulation system in Riverdale was found not to be functional. It was found that an official compiled the tender documents without providing for retention and an amount for surety, which left the Municipality without any protection in case of failure to perform by the service provider. The official subsequently adjudicated the tenders on his own and decided to recommend a service provider that should have been disqualified on a number of issues. The Officials subsequently failed to manage the contract properly – payments were made without verifying the work before certifying the payment certificates.

The Head of Department, Director and the Superintendent (water) resigned during the course of the investigation and the Senior Engineering Technician was dismissed. A criminal matter related to fraudulent invoices was reported to the SAPS in terms of the Municipal Finance Management Act, 2003 and National Treasury will be requested to list the service provider in the Register for Tender Defaulters in terms of section 29 of the Prevention and Combating of Corrupt Activities Act, 2004.

7.9 Alleged untrue statements on the outcome of the Public Protector’s investigation

7.9.1 The matter was reported to the Law Society of the Northern Provinces, who, after obtaining comments from the respective parties, decided not to proceed with the investigation.
7.9.2 According to the documents made available to the Public Protector Mr. Odendaal's made a submission to the Law Society in his response to the complaints to the Law Society where he, *inter alia*, stated as follows:

"Mr Hoffman has handed these same papers to the Public Protector, Mrs Hellen Zille for investigation and action. The Council and the Democratic Alliance has (sic) investigated and found no evidence to substantiate the allegations....

Mr Pypers also through the Freedom Front in parliament and Mr Spies reported the matters to the Public Protector. The Public Protector did do an investigation. I was told that they found no evidence to substantiate Pypers allegations."

7.9.3 In his replying affidavit in Alarm Concrete Products (Pty) Ltd and Adriaan Izak Odendaal and CG Pypers, case 08/20738 in the South Gauteng High Court: Johannesburg Mr Odendaal stated as follows under oath:

"I have been visited by the National Public Protector and he has confirmed to me that he regards the Respondent's complaints as being without merit and that no steps will be taken against me. In any event such investigation was irrelevant to the relief sought in these proceedings."

8. PERTINENT ISSUES IDENTIFIED AND CONSIDERED BY THE PUBLIC PROTECTOR DURING THE INVESTIGATION

8.1 Did the Municipality appoint OSI as service provider in respect of legal services, debt collecting and auctioneering for a period of 30 years?

8.2 Was the appointment of OSI improper because-
8.2.1 The Municipality failed to follow proper procurement procedures when it appointed a service provider?

8.2.2 The Municipality's procurement process was flawed due to corruption, manipulation or undue influence on the Municipality in favour of OSI?

8.2.3 The appointment of a single or sole service provider for a period of 30 years contravened the relevant statutory framework, including the MFMA and the Municipal Structures Act?

8.2.4 The appointment of OSI was motivated or influenced by party political loyalties or considerations?

8.2.5 The Municipality failed to manage, properly and effectively, the appointment of a service provider who presented an actual or perceived conflict of interest as the Constituency Chair of the ruling political party and as legal advisor and debt collector.

8.2.6 OSI benefitted substantially at the expense of the Municipality?

8.3 Did the procurement procedures followed by the Municipality when it awarded a contract to pave Loch Street, in the Meyerton CBD, to the extent that it:

8.3.1 Favoured Alarn Products or other companies own by Mr Odendaal?; and

8.3.2 Used municipal processes to promote the business interests of or anti-competitive behaviour by Mr Odendaal?

8.4 Did the sale of “donated” properties to the Municipality by property owners who were in arrears with their Municipal accounts contravene the relevant regulatory framework including the provisions of the MFMA and the MSA, which resulted in OSI or Mr Odendaal himself to benefit unlawfully from the transfer and sale of donated properties to the Municipality?

8.5 Did the Municipality comply with the relevant provisions of the MSA that required it to properly administer its debt collection policy and the sale of prepaid electricity?
8.6 Was Municipal equipment and resources used for the removal of palm trees to the house of the then Mayor, Ms M Wegner and did the Municipality appropriately investigate the matter, including alleged contraventions of the code of conduct of Councillors, in terms of the relevant provisions of the MSA?

8.7 Did the Municipality pay performance bonuses to Managers who were subsequently dismissed for poor performance and did such action/decisions amount to maladministration?

9. EVALUATION OF EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

9.1 Did the appointment of OSI as sole provider to the Municipality prior to 2006 comply with proper procurement procedures and the provisions of the Constitution, the MSA and/or the MFMA?

9.1.1. As far as the procurement process was concerned the Municipality denied that it acted improperly or in contravention of the provisions of the MSA.

9.1.2 Various statements, communications and documents indicate that while the Municipality might have outsourced some legal work on occasion to other service providers; there was a firm agreement or understanding that OSI was the preferred and primary service provider to provide legal services, debt collection services and auctioneering services to the Municipality prior to 2006. Mr Odendaal is on record to confirm that OSI was indeed appointed as attorneys for the Municipality (Council) in 2000.

9.1.3 Public procurement was afforded constitutional status for the first time in South Africa’s history by means of section 187 of the Interim Constitution, 1993. With the adoption of the final Constitution in 1996, it was a constitutional prerequisite that procurement must take place in terms of a system, which is fair, equitable, transparent, competitive and cost effective. The Constitution itself made provision for procurement policy framework legislation, which provides for categories of preference in the
allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination, which resulted in the promulgation of the PPPFA in 2000.

9.1.4 To give effect to these constitutional requirements, framework legislation was enacted by means of the Local Government Transition Act and later the PFMA and later the MFMA to regulate public procurement in national and provincial government as well as local government structures, respectively.

9.1.5 In terms of the Interim Constitution and the Constitution the Municipality or its predecessor was required to procure the services of OSI that it had reportedly obtained (from 2000) in terms of a system which was fair, equitable, transparent, competitive and cost effective.

9.1.6 The investigation did not yield any information or documentation to suggest that the appointment of OSI as a service provider to the Municipality was procured or acquired by means of a competitive bidding system as required for contracts with a duration period exceeding one year.

9.1.7 There is no indication that the Municipality recorded, motivated or reported any deviation from official procurement processes to the Council or that any note to this effect was included in the annual financial statements.

9.1.8 No evidence to indicate that this matter was interrogated by the Council in terms of its oversight responsibilities in terms of, inter alia, the Municipal Structures Act, was submitted.

9.2 Did the appointment of OSI as sole provider to the Municipality in 2006 comply with proper procurement procedures and the provisions of the Constitution and the MSA and/or the MFMA?

9.2.1 It is not in dispute that on 12 June 2006 the Municipality advertised a bid for the appointment of Council attorney to provide legal services, debt collection and auctioneering services (bid number 8/2/5/9) for a three year period running from 1 July 2006 to 30 June 2009 with a closing date of 5 July 2006.
9.2.2 Three bids were received on the closing date and two were disqualified because the bidders did not tender for the combination of all three services (legal services, debt collection and auctioneering). It means that only one acceptable tender was received.

9.2.3 In terms of statements obtained from witnesses the Municipality has come under criticism because of the fact that the tender requirements were drawn up in such a manner to group the provisioning of legal services, debt collecting and auctioneering services together as a single commodity instead of splitting it into parts of items. The Complainants and interested parties were also critical of the Municipality’s decision to award the contract for the provisioning of these services to a single service provider instead of appointing a panel of service providers for rotational purposes.

9.2.4 Even after a complaint was reportedly received by the Council, as far back as 2001, from a prospective bidder who complained about the exclusion of other legal services, service providers and the call for a “sharing system” of a panel of attorneys, and despite the fact that one of the Complainants has been raising this as a major concern since 2005, the Municipality still saw it fit to design the bid specifications calling for a single service provider for all categories of services required. (The 2009 specifications actually illustrated the wide variety of categories and services required under the legal services umbrella).

9.2.5 This creates the impression that the bid specifications were designed with the (then) existing service provider in mind and intended to retain the status quo even when the process purported to resemble an open and competitive process. The eventual result and the fact that the existing service provider was in fact the only bidder who qualified for consideration, supports the impression that the whole process was designed to re-appoint OSI as the single service provider.

9.2.6 The manner in which the bid specifications were drawn was not only insufficient in terms of ensuring compliance with the principle of competiveness required in the Constitution. More importantly, the Municipality failed to take any steps to accommodate the notion of (substantive) equality required within the framework set for procurement in
the Preferential Procurement Policy Framework Act and section 217(2) of the Constitution. The process was applied in a manner calculated to maintain exclusive control by a particular service provider and denying access to opportunities by other service providers operating in the separate fields of legal services, debt collection services and auctioneering services.

9.2.7 The obligation on organs of state to take positive action to promote equality was explained by the Constitutional Court case of *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs*\(^{20}\) where emphasis was placed on the fact that “the achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one ‘in which there is equality between men and women and people of all races’. In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that … the effects of discrimination may continue indefinitely unless there is a commitment to end it.”

9.2.8 Even if only one acceptable bid was received, the situation by nature, lends itself to abuse where there is no competition or price mechanism. A contractor that knows that it is the only source has no reason to offer competitive pricing. The main purpose for public procurement to take place in the open market is to ensure that an opportunity will be given to a sufficient number of suppliers in the open market to offer their goods or services to the procuring entity on a competitive basis.\(^{21}\)

9.2.9 It was therefore crucial that an Evaluation Committee consider the bid to determine if the tendered prices were market related, if the bidder had the ability to execute the contract and if it was necessary to re-advertise in order to solicit more offers.

\(^{20}\) *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 480 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)*

\(^{21}\) *A sufficient number of participants is necessary to ensure effective competition. See also Bolton Law of Government Procurement 131.*
9.2.10 The Courts also explained in the cases of *Entsha Henra BK v Hessequa Munisipaliteit* 22 and *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality, Intelligent Metering Systems (Pty) Ltd* 23 that the bid evaluation committee and the bid adjudication committee cannot decide to discard tenders based on disqualification as it does not have the power to disqualify tenders. The decision to disqualify bidders is the prerogative of the municipal manager and the bid evaluation committee and the bid adjudication committee could make recommendations in this regard.

9.2.11 Compared to the 2009 tender process where the tender was split into various categories and accordingly managed to solicit quite a number of responses, the manner in which the bid specifications were drawn up for the 2006 tenders was one of the important factors limiting the entry opportunities for other service providers. Competitors were not allowed to bid for an individual or combination of categories. This has effectively led to the situation where there was no competition.

9.2.12 The absence of the minutes of a Bid Evaluation Committee and Adjudication Committee to reflect any deliberation of a discussion on the merits of the tender submitted by OSI, might serve as endorsement of any allegation that the Municipality was not committed to a procurement process that complied with the principles of fairness, equity, transparency, competitiveness. In fact, the Municipality was merely extending the contract of the same service provider as it has been doing for approximately to 30 years.

9.3 Was the award of the 2009 - tender for the appointment of service providers to provide legal services to the Municipality fair, transparent, equitable and competitive?

9.3.1 Factually, it is only after the Public Protector commenced with the investigation into the complaints, including the procurement of the services of a Council attorney, that the Municipality decided to change the process

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22 2008 JDR 0455 (C).
completely by expanding on the bid specifications and dividing the services into categories that allowed bids to be split and a panel of attorneys to be appointed instead of a single service provider.

9.3.2 Having regard to the criticism levelled against the procurement processes prior to 2009, this process did on face value, seem to take into account the requirements of the MFMA, MSCM Regulations and the Municipality’s own Policy.

9.3.3 It is nevertheless noted that the Complainants stated in their affidavits to the SAPS that this tender was (also) awarded in a fraudulent manner, but they did not elaborate on this in the further consultations with them. One of their concerns did however, relate to the fact that the Municipality reportedly invested a large amount into the upgrading of the database and electronic system at OSI that were utilised for the debt collection process. This is perceived as an indication that the Municipality intended to continue with the award of the tender to OSI.

9.3.4 As far back as 1997, it was emphasised in the Green Paper on Public Sector Reform in South Africa, that there was a need for the development and implementation of a procurement system that will enable organs of state to operate policies in a targeted, transparent, visible and measurable manner through a variety of components, including breakout procurement ( unbundling). The latter concept referred to the breaking down of many tenders into smaller components to afford emerging and historically disadvantaged enterprises an opportunity to participate as service providers or suppliers.

9.3.5 Evidently, the bid specifications for the 2009 tender actually illustrates how many services, spanning almost every aspect of the administration of the Municipality, had until that time been bundled together in one prime contract with one service provider as the primary beneficiary for the past 30 years or more.

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24 Government Gazette No. 17928, 14 April 1997:50
9.3.6 Although the 2009 tender sought to unbundle the provision of legal services, debt collection and auctioneering services into smaller components to enable improved access, and resulted in the appointment of a panel of service providers, in practice the previous situation may very well continue unabated. The fact remains that the previous single service provider is still one of the primary service providers in terms of the new contract, and the allocation of work is discretionary.

9.3.7 The advantage that OSI had over its competitors is that the firm or at least one of its major partners had the benefit of uninterrupted exposure to all business aspects, administration and specific projects as a result of continuous reappointment as a single service provider of the Municipality for over 30 years.

9.3.8 The benefits of having access to inside information and the extended opportunities to build specialised skills and knowledge about the Municipal operations, make it impossible to conclude that the playing fields were level for all prospective bidders - without even taking into account the Constitutional dimension of a substantive conception of equality. It cannot be presupposed that all persons in South Africa are equal bearers of rights and that the inequalities of the past can be eliminated by simply extending the same rights and entitlements to all in accordance with the same “neutral” norms or standards. 25

9.3.9 From a governance point of view the extended use of the same service provider for the various services required by the Municipality and the resultant opportunity to influence the procurement instruments cannot be proper.

9.3.10 The failure of the Council to comply with their oversight responsibilities in this regard in terms of the MFMA is exacerbated by the allegation that Mr Hoffman raised these issues with the Executive Management and was dismissed as a Councillor because he questioned the procurement.

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processes and management of the legal services, debt collection services
and auctioneering services contract and proposed the appointment of a
panel of service providers.

9.4 Did the Municipality deal with any perceived or actual conflict of interests
arising from their contract with OSI and the appointment of one of its main
partners as the DA Constituency Chairperson for the Midvaal Region?

9.4.1 The Complainants emphasised that the DA controls the Municipal Council,
which is the political structure within a local municipality. The allegations
suggested that the actions and role of the Local Executive within the party
political structures of the DA extended beyond the provisioning of political
guidance and the monitoring of municipal performance. There are a number
of allegations about Mr Odendaal’s influence over the Municipality as
Constituency Chairperson and as attorney for the Municipality, which
suggested that the independent functioning of the municipal administration
was compromised and its resources were being exploited for the individual
benefit of certain Executive Members of the political structures.

9.4.2 The scope of this investigation does not allow the Public Protector to review
the actions of the party political structures or to offer an opinion on the
political leadership of the ruling party in the Midvaal area. However, since
the appointment of OSI is the subject of a complaint, and its relationship with
the ruling party in the Midvaal region is relevant to its conduct in state affairs,
the Public Protector proceeded to consider whether or not the objections are
justified that the appointment and utilisation of Mr Odendaal presented a
conflict of interest and should for this reason be regarded as improper.

9.4.3 The municipal administration is the organisation that delivers municipal
services to local residents and consists of officials who are employed by the
municipal council. The MFMA ensures that municipalities manage their
finances in a sustainable way that is accountable and transparent. It does
this by separating the legislative and executive powers of a municipality and by ensuring political and administrative accountability.26

9.4.4 In terms of section 53 and 52 of the MFMA the political structures and political office bearers of the Municipality -

a) "Must take all reasonable steps to ensure that the municipality performs its constitutional and statutory functions within the limits of the municipality's approved budget;

b) Must provide general political guidance over the fiscal and financial affairs of the municipality; and

c) In providing such general political guidance, may monitor and to the extent provided in this Act, oversee the exercise of responsibilities assigned in terms of this Act to the accounting officer and the CFO but may not interfere in the exercise of those responsibilities." (emphasis added)

9.4.5 This means that even though municipalities are headed by political party representatives, the internal systems for administration of a municipality must have a set of governance mechanisms that must be followed regardless of the political party in office.27 The MSA determines how a municipality should govern its activities. Requirements such as the development of Integrated Development Plans (IDP's), Performance Management Systems and the constitutional requirement for public participation are outlined in the MSA. The rights and duties of officials, councillors and residents are also covered in this Act.

9.4.6 Furthermore, section 195 of the Constitution provides that the public administration must be governed by principles, which include a high standard of professional ethics, efficient, economic and effective use of resources, and the impartial provision of services. This refers to elements of the principle of integrity which require that public officials should take

26 Handbook for Municipal Councillors, SALGA and GTZ South Africa, March 2006
27 Ibid
cognisance of the values of society and its communities and not substitute their own value choices for those of the society; in other words, they should in all respects be publicly accountable for their actions, even to the extent of their personal relationships with elected political office-bearers (their political masters), their relationships with pressure groups, their political activities and the supplementing of their incomes.

9.4.7 The code of conduct for public officials requires all public officials to be faithful and honour the Constitution in the execution of her or his daily tasks. The public service must put the public interest first and loyally execute the policies of the Government of the day, irrespective of which party is in power. Officials may not abuse his or her position to promote or prejudice the interest of any political party or interest group.

9.4.8 Ethical behaviour therefore encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust, and respect as the moral principles or values that guide officials in all aspects of their work. Ethical conduct includes avoiding conflicts of interest, and not making improper use of an individual's position.

9.4.9 The requirements and principles of ethical behaviour must also extend to government procurement as part of public administration and as it involves the expenditure of public money, and is subject to public scrutiny.

9.4.10 *Probity* is the evidence of ethical behaviour in a particular process, probity is defined as complete and confirmed integrity. Procurement must be conducted with probity in mind to enable business to be conducted fairly, reasonably and with integrity. Ethical behaviour also enables procurement to be conducted in a manner that allows all participating suppliers to compete as equally as possible. Probity entails that organs of state should not seek to benefit from supplier practices that

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28 See Australian Public Service Guidance on Ethics and Probity in Government Procurement - FMG 14- Published January 2005

29 The Ministerial Handbook for Members of the Executive and Presiding officers, approved by Cabinet in 2007 incorporates the Executive Code of Ethics, which regulates probity in public life

30 See Australian Public Service Guidance on Ethics and Probity in Government Procurement - FMG 14- Published January 2005
are objectionable, dishonest, unethical or unsafe. Procurement of services should be conducted in a way that recognises that organs of state are accountable for the delivery of services in the same way as if the organs carried out the service itself.

9.4.11 The principles of probity in public procurement include requirements relating to-

a) fairness and impartiality;

b) accountability and transparency of process;

c) confidentiality and security of information and materials; and

d) effective management of conflicts of interest.

9.4.12 A conflict of interest involves a conflict between a public official’s duty to serve the public interest, and the public official’s private interests, including—

a) An actual conflict of interest — where an official is in a position to be influenced by their private interests when doing their job.

b) A perceived conflict of interest — where an official is in a position to appear to be influenced by their interests when doing their job.

c) A potential conflict of interest — where an official is in a position where they may be influenced in the future, by their private interests when doing their job.

9.4.13 A poorly-managed perceived conflict of interest can be just as damaging as a poorly-managed actual conflict of interest. Public servants must not only behave ethically, they must also be seen to behave ethically.  

9.4.14 Submissions have also recently been made to the Parliamentary Committee for Private Members’ Legislative Proposals & Special Petitions (the Committee) relating to concerns about abuse of power by political office bearers, public representatives or political parties, who might directly or indirectly benefit from contracts with the State. The submissions

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highlighted the risk that political parties were able to fund themselves by gaining access to public resources through front companies or front individuals.

a) The Committee is currently considering legislative proposals to amend the Executive Members’ Ethics Act, 1998 to prohibit contracting between an organ of state in the national sphere of government and companies whose directors are party political office bearers or public representatives of political parties.\textsuperscript{32}

b) This intends to introduce a bill prohibiting contracts between an organ of state, in the national sphere of government, and companies or entities, whether public or private, listed or unlisted, in various circumstances. Contracts as mentioned would be prohibited where the company or entity had directors who were serving political-party public representatives, or political party office-bearers, irrespective of what sphere of government they served. Contracts would also be prohibited where any serving political party public representative or political party office-bearer individually held more than 2% of the shares of the relevant company or entity, and where a political party, directly or indirectly, held any shares in any company or entity.

c) The Committee indicated that it would invite stakeholders to comment, including the Department of Justice and Constitutional Development, since this proposal related to the constitutionality of ethical behavior of political parties. A letter had been received from the Chairperson of the Standing Committee on Finance requesting more time to review and comment on the request.

9.4.15 The involvement of political office bearers, public representatives or political parties as a service provider to provide services on behalf of an organ of state poses an ethical dilemma for the Public Administration to comply with the values and principles contained in section 195 of the Constitution. Such a situation presents a conflict between serving the

\textsuperscript{32} Legislative proposal to correct certain anomalies in the Executive Members’ Ethics Act [No. 82 of 1998]; Hon Ian Davidson, MP
public interests and serving the interests of the political party that such an
office bearer or representative represents. It also presents huge challenges
to the integrity of public procurement and supply chain management

9.5 Was Mr Odendaal's business interests unduly favoured by the Municipality
in the award of the tender for the Upgrade of Meyerton Central Business
District Project – Phase 1: Upgrade of the Truck Stop at Meyer Street and
the Construction of a new Ablution Facility at Junius Street, Meyerton?

9.5.1 The gist of the allegations relate to the conduct of Mr Odendaal and the
company that participated in the exhibition of products at the municipal offices. The evidence discussed hereafter is basically uncontested

9.5.2 Mr Odendaal confirmed that he was the sole shareholder and director of the
company concerned, ALARN Concrete Products, in his founding affidavit in
the matter of ALARN Concrete Product (Pty) Ltd and A I Odendaal vs CG
Pypers\(^3\) and responded as follows:

"None of the allegations (implicating him in) an unlawful and corrupt
scheme to acquire the alleged tender of the Midvaal Local Municipality
and having taken unlawful steps to eliminate any competition... are
remotely true. Not only has the Midvaal Local Municipality not issued
any tender in the past or at present for the upgrading of the Midvaal
Local Municipality but... (ALARN Concrete Products or Mr A I
Odendaal) has not submitted any bid for tender work issued by the
Midvaal Local Municipality. No tender has been awarded to First or
Second Applicant (ALARN Concrete Products or Mr A I Odendaal)...."

9.5.3 Mr Odendaal again denied any wrongdoing in this regard in his replying
affidavit dated 26 August 2008. He referred to an affidavit of Mr A de Klerk,
the Municipal Manager of the Municipality which confirmed that:

a) No tender for the paving of Loch Street, Meyerton has been
advertised by the Municipality;

\(^3\) Case No 20738/08 in the South Gauteng High Court, Johannesburg (formerly Witwatersrand Local Division)
b) Neither ALARN Concrete Products or Mr Odendaal has tendered for paving of Loch Street;

c) No tender has been awarded to ALARN Concrete Products, Mr Odendaal any other company in respect of the paving of Loch Street;

d) ALARN Concrete Products has not applied for and is not on the vendor list of the Municipality nor has it ever sold any products to Municipality.

9.5.4 The Municipal Manager and the (then) Speaker of the Council, Mr T Nast, confirmed the contents of Mr De Klerk’s affidavit during consultations with the Investigator of the Public Protector in July and August 2009 and subsequent and preceding correspondence to the Public Protector.

9.5.5 The only other evidence presented by the Complainants referred to statements that were allegedly made by Mr Odendaal to the effect that he wanted to be the sole supplier of certain concrete products to the Municipality and “close down” other businesses.

9.5.6 As far as the facts are concerned, the following initial allegations or suggestions are not supported by the available evidence:

b) None of the witnesses or parties that were involved in the exhibition of the products in January 2007 actually stated that they have responded to an advertisement for a bid or tender for the upgrading of the CBD, or that they have submitted a bid for such a tender.

c) This alleged suspension notice of the tender could not be traced in the Supply Chain Management Reports that were published with the bid adjudication results for the Municipality in respect of the period 2006 to 200934;

d) The impression was created that the alleged tender process was suspended in 2007 to allow Mr Odendaal’s “newly established

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company" an opportunity to participate in the bidding process, while the company, ALARN Concrete Products, had already been in business under Mr Odendaal's name for almost a year prior to the date of the first exhibition;

e) The bid adjudication results for the Municipality for the period 2006 to 2009\textsuperscript{35} were scrutinised and no reference could be found that any contract or part thereof in respect of the upgrading of the CBD or any other project, had been allocated to ALARN Concrete Products (Pty) Ltd.

9.6 Did the Municipality unlawfully promote Mr Odendaal's business interests by closing down competitors to his company

9.6.1 The Municipal Manager and the Speaker of the Municipality advised the Public Protector that it was the Municipality who took action against the company reported to be in competition with Mr Odendaal's company. The action was based on the alleged contraventions of the Town-Planning and Townships Ordinance, 1986.

9.6.2 The Public Protector had access to the statement of the Chief City Engineer as well as the founding affidavit of the Executive Director: Development and Planning of the Municipality dated 12 October 2005. At the time the Municipality had already been in communication with the relevant company since at least 15 April 2004.

9.6.3 The Notice of Motion \textsuperscript{36} and other legal documents confirmed that the Municipality, because of alleged contraventions of the Meyerton Town-Planning Scheme, initiated the legal action against the company concerned.

9.6.4 The fact remained, however, that the company against whom the Municipality

\textsuperscript{36} Case number 05/25688 in the South Gauteng High Court, Johannesburg (formerly Witwatersrand Local Division)
acted and ALARN Concrete Products were competitors in the same market. There was therefore, basis for a perceived or potential conflict of interests between Odendaal and Summerton Inc’s position as attorneys for the Municipality and Mr Odendaal’s position as director of ALARN Concrete Products.

9.6.5 As discussed earlier, the principles of probity and integrity in public administration entails that that organs of state are accountable for the delivery of services in the same way as if the organs carried out the service itself. In their responses to the objections by the Complainants the Municipality did not seem to recognise (even in hindsight) the perceived or potential conflict of interests of its service provider or its responsibility to manage the state of affairs. As indicated above, a poorly-managed perceived conflict of interest can be just as damaging as a poorly-managed actual conflict of interest.

9.6.6 As far as the conduct of the service provider (OSI) is concerned, any query on the possible contravention of the code of conduct or professional standards applicable to attorneys, has to be addressed by the relevant law society.

9.7 Did the Municipality allow or enable persons, officials or service providers to benefit unlawfully from the management or sale of properties donated or intended to be donated to the Municipality in lieu of municipal debt

9.7.1 Estate Late CC Hennop

9.7.1.1 The evidence in respect of the sale of the property stand 1491 Henley-on-Klip reflects that the donation of the property was never finalised and that the property was not transferred to the Municipality. As the Municipality did not become owner of the property, the allegation that it was unlawfully sold out of hand in contravention of section 114 of the MFMA is therefore not supported by the facts.
9.7.1.2 It is not in dispute that Mr Odendaal, acting as the service provider to collect outstanding debt owed to the Municipality by the estate Henley-on-Klip benefitted in his personal capacity from the purchase and subsequent sale of the property as he was the owner of Meyerton Opspoorders CC. The question whether or not it was proper for Mr Odendaal to use information obtained as a service provider for his personal gain, is again a question of compliance with the relevant ethical and professional standards required of an attorney and should more properly be addressed by the relevant Law society.

9.7.1.3 It is noted that the relevant Law Society earlier, took a decision not to proceed with an investigation into certain matters related to the issued dealt with in this report. It is, however, also noted that the outcome of the Public Protector’s investigation was misrepresented to the Law Society at the time when the decision was made and did not reflect the true state of affairs of the matter.

9.7.1.4 As the appropriate public body or authority dealing with compliance with the relevant ethical and professional standards required of an attorney, the matter will be referred back to the Law Society of the Northern Provinces in terms of section 6(4)(c)(ii).

9.7.1.5 Statement(s) made by Mr Odendaal under oath in matter between Alam Concrete Products (Pty) Ltd and Adriaan Izak Odendaal and CG Pypers, case 08/20738 in the South Gauteng High Court: Johannesburg that were designed to create the impression that the Public Protector has already concluded that the complaints lodged by Mr Pypers were without merits and that no action would be taken there anent, were substantially untrue.

9.7.1.6 As these facts disclose the possible commission of an offence it was decided in terms of section 6(4)(c)(i) of the Public Protector Act to bring the matter to the notice of the relevant authority charged with prosecutions.

9.7.1.7 Even though the investigation concluded that the Municipality did not suffer any financial losses in the matter of the Estate Late CC Hennop, it does not detract from the observation that the Municipality did not have any processes in place to monitor and control the intended donation. As a
result, when the service provider failed to notify the Municipality that the
donation has been withdrawn, it did not detect that that property was not
transferred to the Municipality and that the amount of R8011 15 that was
written off in lieu of the property, was not debited against the account
again. This amount was only recover after enquiries with the Attorneys.

9.7.2 The management of donated properties by the Municipality

9.7.2.1 This incident and the subsequent investigations and audit confirmed that
the provisions of the MFMA and MSCM Regulations were generally not
complied with when properties were acquired by the Municipality by
means of donation. These include:
a) The failure to record the acquisition of donated properties in the fixed
asset register;
b) The failure to maintain a management accounting and information
system that properly accounted for donated and transferred assets.

9.7.2.2 One of the major sources of concern relates to the interim conclusion by
the Auditors of the Municipality that the policies and procedures that were
in place to control and monitor the donation of properties, were
inadequate. The other major concern, in the context of the matters raised
in this report, relates to the fact that it was also found that inadequate
control was exercised over the monitoring of accounts handed over to the
Council’s attorneys.

9.7.2.3 This is aggravated by the indication in the auditor’s report, that when they
wanted to again access to the relevant records for purposes of the audit,
they had to obtain the information from the files of the attorneys.

9.7.2.4 From the results of these investigations it can be concluded that the
Municipality did not take the required steps in terms of the MFMA to
ensure that it had and maintained a management accounting and
information system that accounts for the assets and liabilities of the
municipalities; and that the municipality had and maintained a system of
control of assets and liabilities, including an asset and liabilities register.
9.7.2.5 The allegations that the parties (officials and service provider) benefitted unlawfully from the transfer and sale of donated properties to the Municipality, is one of the matters that required a full forensic investigation before adjudicating the Complainant’s allegations of corrupt and criminal conduct in respect of the sale and benefit of donated properties.

9.7.2.6 The Public Protector is of the opinion that the facts might disclose the commission of an offence. This matter is currently the subject of investigation by the SAPS, and is included in the proclamation issued to the Special Investigating Unit in terms of the Special Investigating Units and Special Tribunals Act, 1996.

9.7.2.7 The Public Protector therefore decided to bring the matter to the notice of the relevant authority charged with prosecutions in terms of section 6(4)(c)(i) of the Public Protector Act.

9.8 Did the Municipality engage in irregular debt collection practices and pursue fruitless bad debt?

9.8.1 The Municipality has a strict debt collection policy in terms of section 96 of the MSA which provided that debts be pursued including.

9.8.2 On 25 June 2009 Council approved a report from the Financial Services Department: of the Municipality with proposals that an amount of R6 458 311, 72 be either written off because it had prescribed in terms of the Prescription Act, 1969 or because it could not be collected in a cost effective way.

9.8.3 No evidence existed to establish that the Municipality continued to incur legal costs in instances where the collection efforts were fruitless or that it acted in any mala fide manner.

9.8.4 From the report on an investigation into agent prepaid electricity accounts by Expert Forensic Services (Pty) Ltd it appears that the Municipality did not comply with the provisions of section 81 of the Municipal Systems Act, 2000 in
its conclusion and management of agreements with business entities to sell prepaid electricity on its behalf:

9.8.4.1 Some of the required Service Level Agreements were not signed or properly concluded.

9.8.4.2 No steps were taken to

a) Ensure that agents kept to payment terms as stipulated in the agreements;

b) Monitor guarantees held by the Municipality to limit its exposure;

c) Remove prepaid vending machines at agents that did not keep to the terms of the agreement.

9.8.4.3 There was poor oversight on the responsibilities to implement agreements and to ensure that the relevant Departments within the Municipality complied with their responsibilities.

9.8.5 In addition, the Municipality did not comply with its accounting responsibilities in terms of the MFMA or the debt collecting obligations in terms of the Municipal Systems Act. The Municipality’s month end journal to process electricity sales was not consolidated with the receipts that were processed on the electronic system (Venus) to monitor agent accounts and take timely recovery action on behalf of the Municipality when a debt remained in arrears.

9.8.6 While extensive disciplinary steps were recommended against the official(s) involved, there is no indication that such action was taken against the (then) Municipal Manager and the Chief Financial Officer to ensure that they were held accountable in terms of the MFMA for the debt that had to be written off as result of these statutory failures.

9.9 Did the use of municipal equipment and resources contravene the provisions of the MSA, including the Code of Conduct for Councillors?

9.9.1 As a public official, any councillor who directly or indirectly, accepts or agrees or offers to accept any gratification/favour from any person, whether for
benefit to himself or herself or for benefit of another person is guilty of the breach of this code of conduct for Councillors.\textsuperscript{37}

9.9.2 The conclusion that the then Executive Mayor did not benefit directly or indirectly from the use of the Council equipment and services was based on the fact that she and her husband were married out of community of property and therefore the property to which the palm trees were moved, was registered in the name of Mr Wenger only. This is however, a very technical approach and does not serve as an indication whether or not she benefitted indirectly or even directly as it was not disputed that she was staying at the property in a common household with her husband.

9.9.3 As the matter was reported by the Council to the MEC for Local Government and Housing of the Executive Council of the Gauteng Provincial Government in terms of Schedule 1 of the Municipal Systems Act.

10. THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

10.1 Section 7(9) of the Public Protector Act provides that:

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

10.2 The Public Protector issued a Provisional Report with provisional adverse findings to the persons who may have been implicated in the matter in accordance with section 7(9) of the Public Protector Act. The Provisional

\textsuperscript{37} Handbook for Municipal Councillors SALGA and GTZ South Africa, March 2006
Report was distributed on the basis of confidentiality to provide the recipients thereof and the individuals implicated therein an opportunity to respond to its contents.

11. RESPONSES TO THE PROVISIONAL REPORT

11.1 Introduction

11.1.1 This part of the report deals with the responses received from all the parties concerned as well as an analysis of the responses and any additional evidence that might have been submitted.

11.2 The response of the Municipal Manager: Midvaal Local Municipality

11.2.1 The Municipal Manager pointed out that when the allegations were handed to the Council by the Public Protector early in 2009, he sought independent advice from recognised experts in the fields of administrative and constitutional law on how to best deal with the submission. The allegations were strictly dealt with according to such advice, i.e. by fully cooperating with the Public Protector, the Law Society, SAPS and/or any other authorised agency dealing with the matter. The Municipality also appointed an auditing firm and a labour law expert to investigate and advise on the internal aspects of the allegations “from their perspectives”. He also submitted the allegations and subsequent outcomes to Council’s independent Audit Committee.

11.2.2 The Municipal Manager furthermore, advised that he was of the opinion that the actions of one of the complainants is based on animosity towards him as a result of an incident where the Executive Director: Development and Planning a complainant in his capacity as a property developer, for the development of a property on a proclaimed provincial route.
11.2.3 In respect of the legal framework it is confirmed that the MFMA in general came into operation on 1 July 2004, but different provisions were phased in at later dates. Further, in terms of the National Treasury guidelines, the provisions in respect of supply chain management only came into effect on 1 July 2006 for medium capacity municipalities (Midvaal local Municipality was declared a medium capacity municipality). The Municipal Manager also noted that the National Treasury guidelines emphasised the need for a phased and roll-out approach in view of the huge implications.

11.2.4 The Midvaal Local Municipality’s Supply Chain Management Policy of 2005 was applicable prior to the latest policy of 2010. The appointment of attorneys in 2006 was dealt with in terms of the provisions thereof in respect of consultants. The Municipal Supply Chain Management Regulations only came into operation on 1 July 2006.

11.2.5 It must be pointed out that Mr. Hoffman did not initiate the question on the use of only one firm of attorneys, nor to move towards utilising a panel of attorneys when the contract under the 2006 bid award was to expire. That was done by the newly appointed Executive Director: Corporate Services, Mr. T. Peeters, who assumed office on 1 January 2008. Mr. Peeters raised it with the Municipal Manager, who agreed with him and requested him to discuss it with his political head, the relevant Member of the Mayoral Committee, who was Mr. Hoffman at the time.

11.2.6 The then — Municipal Manager had the specifications drawn up and made the appointment in 2006 in terms of the Supply Chain Management Policy of 2005 in respect of consultants as it applied at that time. The then — Municipal Manager with the Bid Adjudication Committee approved the appointment.

11.2.7 In terms of sect 117 of the MFMA, Councillors are barred from being involved in the awarding of tenders. In Midvaal and since the Bid Adjudication Committee has been established in terms of the MFMA, Councillors are not involved in the awarding of tenders. Tenders are generally awarded on the basis of highest point scoring by qualifying tenderers, except if there is a
legislatively permissible deviation. The policy that applied in regard to for example, the 2006 attorney tender, was the 2005 Supply Chain Policy, with specific reference to the appointment of Consultants as provided for therein.

11.2.8 The practice existed and still exists in some local authorities to make use of the services of only one firm of attorneys. This is based on the needs of the municipality and the fact that a relationship with attorneys requires trust and confidentiality. The fact that only one firm of attorneys is used, is not per se unusual or untoward.

11.2.9 The 2006 appointment of the attorneys was reported to the Executive Mayor, Section 80 multi-party Committee on Finance and the Mayoral Committee. The outcome of this process was submitted to Council for information. This is reflected in the bid adjudication documents handed in.

11.2.10 The specifications were drawn up for a single service provider. This was advertised as such and attorneys from all over were at liberty to tender. The criticism is based on opinion and personal preference, but advertising and awarding it as such does not per se constitute anything untoward. The municipality is entitled to draw up specifications for goods or services according to its own needs as it deems appropriate. These specifications were advertised and anyone who qualified could have submitted a tender. It may very possibly be that only 3 firms of attorneys tendered in 2006 because Midvaal may not have been perceived to be large enough to justify a separate account with resultant allocation of resources by larger firms in the district. Although this is in itself speculation, it serves to illustrate that the drawing of a conclusion based on an assumption may not be justifiable. There is no legislative requirement that existed at the time prohibiting Midvaal from appointing a single service provider in 2006 in this regard. Even today there is no such requirement.

11.2.11 The clause “lends itself to abuse where there is no competition or price mechanism” is not accurate. An attorney’s account can be submitted to a taxing consultant, because attorney fees should be based on the applicable court rules. The evaluation was done by the Bid Adjudication Committee. Secondly, attorney fees are regulated
11.2.12 It is important to note that the 2009 tender identified categories of legal work. The number of attorneys to be appointed per category was based on our anticipation of work volume. In addition, the tender stipulated that the fees that could be charged by any attorney would be based on court tariffs. Tenderers could acquire additional scoring points if they provided for a discount on such tariffs. Depending on the amount of the discount, a tenderer could acquire the specified scoring points.

11.2.13 The reference to “the previous situation may very well continue unabated” is wrong and the following sentence “. . .” is not accurate. Odendaal and Summerton have not been appointed in all categories. The Council can be taken to task by an attorney on the panel on the basis of an appointment outside the approved category or if there is an inequitable distribution of work within any category. The discretionary allocation of work is therefore limited.

11.2.14 The conclusion that there is an opportunity to influence the procurement instruments is unsubstantiated and incorrect. The statement that it is consequently not “proper” is therefore also wrong. The bid process was duly followed, a panel of attorneys was duly constituted and work is duly allocated administratively.

11.2.15 The allegation that resources were being exploited for the individual benefit of certain Executive Members of the political structures’ is unsubstantiated and denied.

11.2.16 The adoption of a framework to prohibit contracts between an organ of state and political party representatives or office bearers will provide clarity on the issue. However, this paragraph confirms that currently there is no clear framework guiding this issue. The dilemma posed in this situation is specific. There is no legislative prohibition against a political office bearer from submitting a tender in cases such as the legal services contract, nor can council refuse a tender submitted by such a person if he/she otherwise qualifies. If a binding contract is concluded with such a person, such a person can enforce the contract and Council will be bound to honour it. Although the matter has been reported to all possible
agencies and functionaries, there is still no definitive finding of wrongdoing by an authorised agency or functionary against Mr. Odendaal. The framework mentioned above is still in process.

11.2.17 According to the available information, the statement that “the company against whom the Municipality acted and ALARN Concrete Products were competitors in the same market” is not correct. The two companies sell different products and do not compete in the same market. I have also been made aware that the action against INCA Bricks commenced before ALARN Concrete Products was incorporated.

11.2.18 The Municipality concur wholeheartedly and re-confirm its support for and cooperation with any authorised agency’s investigation to bring this matter to a close, including the relevant law society.

11.2.19 The Executors of the late CCC Hennop did write to Council to offer the stand as a donation to Council in lieu of outstanding rates. However, this offer did not meet the requirements of the donation policy of Council. The item that served before the Executive Committee M (Exco) 451/33/2002 stated and recommended that “cost of transfer to Council will be for the owners account”. Since the estate was insolvent, the property was not transferred to Council. The property did not meet the requirements of the municipality, as Council did not pay transfer costs in terms of its policy and custom. The approval of the then-CFO was provisional and this “donation” was never transferred to Council. The donation of stand 1491 Henley on Klip (Estate late Hennop) was considered by the CEO on or during 21 October 2003. This as well as correspondence of Odendaal and Summerton dated 13 August 2003 confirm that these activities related to a period before the effective date of the MFMA. This Act was implemented from 1 July 2004. The donation and related activities have fallen outside the phasing in of the MEMA as per Gazette Number 26511, No. 773, 1 July 2004.

11.2.20 The observation “that the Municipality did not have any processes in place to monitor and control the intended donation”, is not correct. The Municipality did have procedures and controls in place to monitor transferred and donated properties. This is evident in that the Sub-
Accountant could see from the system that the transferred property was, according to Council’s records, a donated property. The subsequent letter from the Accountant confirms that the process and procedures within the finance section were indeed in place.

11.2.21 The internal auditors confirmed that a separate register was kept and maintained of donated property. It is important to note that this type of asset is regarded by the Auditor General and NT as (stock) inventory and not fixed assets. The reporting and accounting is therefore different to fixed assets. The statement is incorrect since Council did have an accounting and information system for assets. Found that only 1 property was not on the property register (please refer to document. All the relevant information from the municipality was available for auditing and inspection. The staff did ask the Auditors to also engage with the Attorneys of Council to verify the detail and information of Council.

11.2.22 The conclusion that the Municipality did not take the required steps in terms of the MFMA to ensure that it had and maintained and managed accounting and information system that accounts for the assets and liabilities of the Municipality” is not correct. The Auditor General has audited the records of assets and liabilities of Council for the financial years and gave positive reports on these. The proposed donation of Estate Late CCC Hennop does not meet the requirements of a donation and was never an asset of Council.

11.2.23 It is submitted that sect 81 of the Municipal Systems Act does not apply (to the appointment of a service provider for the purpose of debt collection).

Debt collection is not a municipal service to the public, such as the removal of waste, provision of water, etc. It is an internal function, similar to legal services for or to the municipality to enforce its rights or obligations/functions.

11.2.24 The amount of R 733 776.41 represents the portion that is deemed to be fruitless and wasteful expenditure. The total value of the contract was R5 458 181.04. The contract also related to a sewer reticulation system, not water. The tender did provide for a 12 month guarantee period (par 15 of the General Conditions of contract). The matter is the subject of
criminal case under reference CAS 331/06/2007, which is still in process. A civil process to endeavour to recover monies is also still in process.

11.2.25 The word “systemic” with reference to financial misconduct is inappropriate and excessive. Systemic is defined as being relevant to the system as a whole. Misconduct in specific identified issues does not justify the conclusion that the whole organisation is permeated by misconduct and maladministration.

11.2.26 There is no evidence to justify the statement that the service provider gained an unfair advantage over other prospective service providers by having access to information and influence over the procurement instruments. Consequently, the conclusion that this aspect amounts to maladministration is not correct.

11.2.27 It is denied that the Municipality acted in a manner calculated to maintain exclusive control by a particular service provider. The 2006 legal services tender was an open process. The 2009 legal services tender went further and was a due and proper process as highlighted hereinbefore.

11.2.28 The supply chain Management regulations under the MFMA did not apply prior to 1 July 2006. The appointment of Odendaal and Summerton in 2006 was done in terms of Council’s policy of 2005 and in respect of its provisions relevant to consultants (documents 3 and 4 of 4 July 2011).

11.2.29 It is not correct that the Municipality appointed a panel of attorneys pursuant to the Public Protector’s investigation. There was nothing untoward in the constitution or appointment of the panel of attorneys in 2009 and these recommendations should be deleted.

11.2.30 It is submitted that sections 80 and 81 of the MSA are not applicable, as legal services are internal to the Council and do not constitute a municipal service to the public as contemplated in the said sections. Consequently, it is requested that the words “on behalf of the Municipality” in the first two lines and the words “in terms of section 80 and 81 of the MSA and take appropriate steps” in the second and third lines be deleted. It is also
requested that the word "suspension" be amended to read "management" to ensure that no incorrect inferences can be drawn from the recommendation.

11.2.31 The Public Protector is kindly requested to change the period for the required report. To do so within 10 days will unfortunately not be practically possible given the applicable municipal processes. A period of 60 days is more feasible.

11.3 Response of the Executive Mayor

11.3.1 The assumption is made (throughout the report) that Andre Odendaal was the constituency chairman for the DA for the entire period under investigation and that caused his position to gain influence over the procurement instruments and that he also had an unfair advantage due to his continuous appointment. Whilst the argument is made for him having an advantage the Mayor does not agree with the statement that he gained influence over the procurement instruments. Andre Odendaal was only elected as chairperson of the constituency in 2007 and so therefore the argument of influence his appointment in 2000 and 2006 is unsubstantiated. As chairperson of the constituency since 2007, Andre Odendaal may have had political influence over Councillors but this did not in any way afford him influence over the procurement instruments within the municipality for the 2009 tender. Midvaal complies with the MFMA with regards to the involvement of Councilors in the procurement process and it is denied that any Councillor ever tried to influence either the 2006 or the 2009 tender processes.

11.3.2 Councillors exercise their policy setting and oversight roles by:

- Setting the direction for municipal activities;
- Setting policy parameters to guide the municipal directives;
- Setting strategic objectives and priorities stating what outcomes and outputs are to be achieved
• Monitoring the implementation of policies and priorities

11.3.3 The Mayor also recorded that

a) Certain provisions of the MFMA, including procurement, only became applicable to Midvaal in July 2006.

b) In preparation for the introduction of these new procurement regulations the Council approved Municipal Supply Chain Management Policies in November 2005.

c) As Councillors were specifically barred from sitting on tender committees the administration was instructed to report all tenders awarded to the Sec 80 Committee for Finance as well as to the Mayoral Committee.

d) Councillors on either the Sec 80 Committee for Finance (multiparty committee) as well as members of the mayoral committee could therefore exercise oversight by interrogating tenders awarded and requesting information on them,

e) Councillors on the Sec 80 Committee for Finance as well as the mayoral committee could also exercise oversight on the performance of Odendaal and Summerton as information on payment of rates and debt collection are also reported to both committees. Paragraphs (d) and (e) above allow for Councillors to monitor the implementation of policies and priorities (oversight) as required by the MFMA.

g) As an individual councillor he requested the tender documents and further information on both the 2006 and the 2009 legal tenders. He asked questions to the administration regarding the awarding of the tenders and that I was satisfied that in both cases they complied with the Municipal Supply Chain Management Policies that were applicable at that time. He also confirmed that he exercised my oversight responsibilities on the performance of Odendaal and Summerton by carefully scrutinising payment rates and debt
collection information on a monthly basis and by raising my concerns with the relevant officials when I was not satisfied with the reports.

h) It cannot be confirmed whether similar oversight was conducted by other councillors as he was not always a member of the Sec 80 Finance Committee or the Mayoral Committee. However, it is clear that the municipality and Council structures did allow councillors to fulfill their oversight roles.

11.3.4 The Mayor stated that he rejected any statement that the Municipality and the Council failed to take diligent action to establish controls to eliminate even the perception of fraud or abuse. The Municipality has, as approved by the Council established:

- A Fraud and Corruption Policy supported by a fraud reporting hotline that is widely advertised in the municipality's newsletter that is sent to residents,
- A Supply Chain Management Policy that is compliant with relevant legislation,
- A fully functional internal audit function that is outsourced to an independent and highly respected audit firm,
- An independent Audit Committee consisting of highly skilled and respected members of the public which include a qualified CA and a former CEO of a multi-national organisation,
- A Risk Management Policy
- An Municipal Public Accounts (and Oversight) Committee that is chaired by a member of the ANC. Midvaal is the only municipality in Gauteng that has appointed a member of the opposition as chairperson of such a committee.
- All tenders that are awarded are reported to the Sec 80 Finance Committee as well as the Mayoral Committee and any Councillor is welcome to obtain the relevant procurement documents once a specific tender has been awarded, Furthermore, the municipality reports all
tenders awarded to National Treasury and lists them on the website for any member of the public to see.

- The Intends procurement system was designed and piloted in Midvaal. It has proven to be such a success that the system is now being implemented throughout the Sedibeng District.
- All policies are annually reviewed for relevance and effectiveness and updated where necessary.
- Since its inception in December 2000 Midvaal has received 8 unqualified audit reports.
- The Auditor General's Office undertakes an annual review of internal controls and the results of this review are reported to the Municipal Manager and Executive Mayor. Since being elected as Mayor I have received two such reports and both of them indicated that Midvaal controls were adequate.

11.3.5 The most important role players for any municipality are its residents and the ultimate indication of the way in which residents perceive a municipality's performance is expressed in election results. It is a fact that municipalities operate in a highly political environment and that the Complainants continued to pursue their allegations from a political platform. The allegations were widely published in local as well as national media. The results of both of these elections speak for themselves and are clear evidence that the majority of Midvaal's voters do not share the perception that the DA has governed Midvaal in a fraudulent or abusive manner.

11.3.6 OSI (and the firm's predecessors) have performed legal work for various municipalities including municipalities governed by the ANC. It cannot be assumed that the firm's appointment in Midvaal was simply due to the fact that one of the partners was the Chairperson of the local DA Constituency. As earlier stated, Andre Odendaal only assumed the position of constituency chairperson in 2007. The firm was appointed in terms of the Municipal Supply Chain Management Policies that were applicable at the time.
11.3.7 The allegation that the constituency chairperson had access to all decision making processes including the awarding of tenders is denied as the awarding of tenders takes place according to Municipal Supply Chain Policies as well as in accordance with the MFMA in that Councillors are prohibited from being members of the tender committee. Therefore any political influence which the constituency chairperson may have over council cannot be exerted on the awarding of tenders. There is no evidence to substantiate the conclusion that OSI influenced the procurement instruments of the municipality.

11.3.8 There is no evidence to suggest that the independent functioning of the municipal administration was compromised and its resources ward. being exploited for the individual benefit of certain Executive Members of the political structures.

11.3.9 The property Stand 1491 Henley-on-Klip: Estate Late CCC Hennop was not “donated” to the municipality. The offer for donation was provisionally accepted by the then CFO. The donation did not proceed as no deed of donation was signed. It was later established that the donation could not proceed. The payment of a consideration for the property did not fall within the ambit of the donations policy and therefore the donation did not proceed. It is furthermore noted that the MEMA was not applicable at the time when the property was offered for donation.

11.3.10 Midvaal writes off debt that has prescribed as well as debt relating to insolvent estates on an annual basis. The Auditor General is satisfied with the provision for bad debt that is made on an annual basis and is satisfied that the remaining balance is collectable. It should be noted that Midvaal has the highest payment rate in Gauteng and one of the highest in the country and has very regularly averaged 100% over the past 10 years. The municipality does not apologise for collecting revenue for services rendered.

11.3.11 The Mayor states that that the accountability of the (then) Municipal Manager and the Chief Financial Officer was indeed investigated or considered in terms of the MFMA for the debt that had to be written off as result of these
failures. The audit reports were referred to the Audit Committee for interrogation and for the committee to make recommendations to the Council. The Council accepted the findings of the Audit Committee. Another recommendation made by the audit committee, that was accepted by the Council, was that it would not be “feasible, cost effective and fair.” to pursue disciplinary action. This decision included any possible action against the former Municipal Manager and former CFO.

11.4 Response from Mr Odendaal

11.4.1 Mr Odendaal submitted that he was not afforded any procedural fairness in the matter and that the copies of the documents and allegations leveled by the Complaints have not been submitted to him.

11.4.2 He made the following observations on the contents of the provisional report:

11.4.2.1 The statements of Mr McLean make no mention that he received monies to ensure Mr Odendaal’s re- appointment. He denied ever having paid Mr McLean or any other person ever to be appointed as attorney. The statement of McLean did provide support for the allegation of the Complainants that the tender under discussion was awarded in an irregular manner. The alleged incident took place when Mr McLean was no longer a Councillor.

11.4.2.2 The arrangement about “competitive pricing” holds no water when it comes to attorneys. Attorneys’ fees are regulated. The bulk of work is collections which certainly are regulated. Competitive pricing is not possible in the case of collections.

11.4.2.3 The statement relating to the opportunity to influence the procurement instruments cannot be made unless there were proof that influence did in fact take place. In the absence of any proof the statement is not true, and should be withdrawn. It will not hold up in a Court of Law where the Rule of Law is applied.
11.4.2.4 He did not agree with alleged failure of the Council to comply with the oversight.

11.4.2.5 He was not the Chairman of the DA Constituency in 2006 when the tender was awarded to him.

11.4.2.6 Midvaal was only established in 2000. By 2006 he has supplied them legal services for 6 years. Mr Odendaal offered to furnish the names of suppliers in every town in South Africa who supplied services pre-1994 and are still supplying services to councils.

11.4.2.7 In every sphere of government people and companies who belong to political parties enter into contracts. There is no provision in law that a member of a political party may not do business with a Municipality.

12. ANALYSIS OF RESPONSES AND FURTHER EVIDENCE SUBMITTED TO THE PUBLIC PROTECTOR

12.1. Introduction

12.1.1 The Public Protector considered the submissions by all the parties and evidentiary matters were incorporated in the final report where appropriate.

12.1.2 The Public Protector noted where disputes were raised relating to the interpretation of the law and her eventual findings. While the provisional report was also intended to seek verification of the relevant facts with the parties concerned, the process is however, not intended to subject the Public Protector’s intended findings and remedial action to the consensus or approval of the parties. The public body concerned or complainant is not expected to “review” the Public Protector’s investigation nor to provide a critique on the Public Protector’s adjudication of the complaint.

12.1.3 Section 182(1) of the Constitution outlines the matters on which the Public Protector must form an opinion before making a finding and taking remedial action in terms of the Public Protector Act the Public Protector is the sole,
independent adjudicator of the complaint or matter reported to him/ her and has to deal with the matter to his/ her satisfaction and in accordance with the equity and ethical standards and expected by law – without fear, favour or prejudice.

12.1.3 The question of the sufficiency of evidence to support an opinion of the Public Protector requires some assessment of weight and reliability. In making that assessment, the standard of proof, appropriate to the opinions required to be formed, needs to be applied. The criminal standard requires proof beyond reasonable doubt. The civil standard requires proof on the balance of probabilities. The civil standard of proof applies in investigations conducted by an Ombudsman. 39 'Balance of probabilities' essentially means that, to prove an allegation, the evidence must establish that it is more probable than not that the allegation is true. The Supreme Court of Appeal confirmed that the "Public Protector is not there to determine whether an onus has been discharged. He or she must be satisfied that the truth has or has not been told."40

12.1.4 All the matters and issues raised by the parties were properly considered in terms of its relevance to the findings and remedial action of the Public Protector, including the following:

12.2 Procedural fairness

12.2.1 The Constitution together with the Public Protector Act requires the Public Protector to perform her duties functions in a fair, unbiased and proper manner and comply with the principle that persons who are the subject of adverse comment should be provided with an opportunity of being heard about a matter before a final opinion is formed.

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38 Equity is includes:

39 If the Australian case of Briginshaw v Briginshaw (1938) 50 CLR 336, Dixon J remarked that: The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved.

40 The Public Protector v Mail & Guardian Ltd and Others [2011] ZASCA 108; 422/10;2011 (4) SA 420 (SCA) (1 June 2011)
12.2.2 To satisfy this obligation, the Public Protector provided a proposed report and invited the response of all the affected persons to afford them a reasonable opportunity to have knowledge of any information or evidence obtained during the course of the investigation, relating to them or which may be likely to affect the decisions of the Public Protector. The parties were advised that any person who may be affected by such a decision may bring any evidence or matter of substance and importance, having the potential to influence the outcome of the investigation, to the Public Protector’s attention.

12.2.3 The persons responded and their responses are referred to throughout the report.

12.2.4 It should also be recorded that the complaints and allegations in this matter have been in the public sphere since at least 2005 and have been raised in the media, as well as various forums prior to and during the Public Protector’s investigation. The affected parties have individually or collectively responded to these allegations in the media. These matters have also been the subject of legal action and were comprehensively dealt with by the affidavits of all the parties concerned.

12.3 Possible animosity between the parties

12.3.1 During the course of the information as well as in the responses, the Public Protector was provided with personal information about the Complainants that was clearly intended to attack their character, integrity or credibility and to convince the Public Protector that the complaints and allegations were lodged with an ulterior motive in order to harass, intimidate, embarrass, annoy the implicated officials and office bearers.

12.3.2 It is often intimated that if a complaint might be linked to questionable motives, it should be automatically dismissed. However, the Public Protector was established to strengthen constitutional democracy terms of upholding the underlying and fundamental principles of the Constitution, such as public interest, public trust, rule of law and good governance. If a complaint
appears to have substance, it should be investigated irrespective of the motives of the complainant.

12.3.3 Complaints of maladministration and human rights questions that arise daily are of great consequences to many South Africans. The Public Protector has an important role in remedying government’s administrative injustices or failures and reconciling the people with the state. People know and appreciate they have a protected right to complain against public institutions. “the right to complain, when securely embedded, is surely one of the most significant human rights activities that we can strive for” (Michelle Falardus-Ramsay – Canadian Human Rights Commissioner).

12.3.4 In addition the Court confirmed that the conduct of a public authority in state affairs is not a “private process” but open to public scrutiny the case of Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & others\textsuperscript{41}:

\textit{The constitutional imperative of transparency in the process cuts both ways: not only is the general public entitled to insist on an open transparent procurement process in order to hold the public authority accountable, but the members of the public who want to avail themselves of the opportunity to take part in the process should know that by doing so they too become subject to public security. They should know that they cannot obtain these benefits in a private process not open to public scrutiny. The process of the procurement and award of tenders is not something that an organ of state such as the municipality may legitimately hide from the public, or from those participating in the process. Section 217 of the Constitution and the legislation passed to give effect to its terms allows the public and participants in the procurement process to insist on transparency and fairness.}

12.4 The Constitutional imperatives in terms of the procurement processes and relevance of the MFMA

\textsuperscript{41} [2007] JOL 20448 (SE)
12.4.1 The Municipal Manager, the Executive Mayor and Mr Odendaal reiterated that the MFMA was not yet applicable to the Municipality prior to 2006 or at the time when the 2006 tender for the provision of Legal Service, Debt Collection and Auctioneering services was awarded.

12.4.2 It was however, not a situation that public procurement and supply chain management operated in a vacuum on local government level prior to the implementation of the MFMA. The values and principles underlying public procurement, were established in the Interim Constitution, 1993 and in particular, section 217 of the Constitution, including value for money, open and effective competition, ethics and fairness, accountability and reporting, and equity.

12.4.3 The Constitution was supported by a legislative framework provided by inter alia, the Local Government Transition Act, 1993, the Local Government: MSA, the Preferential Procurement Policy Framework Act, 2000 and the Promotion of Administrative Justice Act, 2000.\footnote{42 Applied by the Courts in cases such as Metro Projects CC and another v Klerksdorp Local Municipality and others [2004] 1 All SA 504 (SCA); Tedcor Women in Waste v City Council of Cape Town & another [2005] JOL 16260 (C); Nelson Mandela Bay Municipality v Afrisoc Strategic Solutions (Pty) Ltd & others [2007] JOL 20448 (SE)}

12.4.4 The supply chain management system introduced by the MFMA and the SCM Regulations for municipalities and municipal entities during 2005 and 2006 intended to strengthen the existing regulatory framework and governance principles, by inter alia, separating the roles and responsibilities of key players in supply chain. The matters prescribed by section 112 of the MFMA include principles and values that have already been established in terms of the Constitution and supplementary legislation. This includes procedures and mechanisms for tenders, open and transparent pre-qualification processes for tenders or other bids, competitive bidding processes in which only pre-qualified persons may participate, bid documentation, advertising of and invitations for contracts, procedures and mechanisms for the evaluation of
bids to ensure best value for money, procedures and mechanisms for the approval of bids, and procedures and

12.4.5 The diagram below reflects the linkage between the Constitution and the other key acts, of which the MFMA is one, affecting Local Government and Municipal Supply Chain Management specifically:

12.4.6 The MFMA was promulgated in 2003 and even though it implementation was phased in, Municipalities were expected to develop management arrangements to implement the MFMA and to maintain sustainable financial management practices. The Municipal Supply Chain Management Policy and Procedures were for instance adopted by the Council on 10 November 2005 in terms of section 111 of the MFMA. In terms of the Policy officials and other role players in the supply chain management system of the municipality was required to implement this Policy in a way that it gave effect to section 217 of the Constitution; and Part I of Chapter 11 and other applicable provisions of the Act. (MFMA);

43 Copy right: National Treasury
12.4.7 Both the Municipal Manager and the Executive Mayor stated in their responses that this policy was applicable at the time when the 2006 tender was awarded.

12.4.8 As reflected in the report, the focus of the Public Protector’s investigation goes beyond the question whether or not there was compliance with the letter of the law. The determine whether or not an organ of state acted lawfully, rationally and in a manner consistent with the Constitution the Public Protector’s considerations Include the basic principles or conceptual trilogy of administrative justice: lawfulness, reasonableness and fairness. Jurisprudence pre-dating the Constitution confirmed that lawful conduct does not necessarily amount to fair conduct. Consequently, administrative practices can only be regarded as fair, from a constitutional perspective if they are both lawful and reasonable. The Courts have emphasized that “it is not strictly a question of law, but also calls for a moral or value judgment”

12.4.9 Section 217, 33 and 195 of the Constitutions create basis for a public procurement framework aimed at ensuring equity, good governance and administration, fair dealing in administrative context, enhancing protection of the individual against abuse of state power, promoting public participation in decision-making, and strengthening the notion that public officials are answerable and accountable to the public they are meant to serve.

12.4.10 The Municipality emphasized that the interests of the Municipality were paramount in the appointment of the service provider(s).

12.4.11 However, a local government has a duty to exercise their powers and use their resources in the best interests of the local community; provide, without favour or prejudice, democratic and accountable government, and to

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45 See SACCAWU v Irvin & Johnson Ltd 1999 (8) BCLR 741 (LAC) at 751; Sidumo v Rustenburg Platinum Mines Ltd 2007 (12) BCLR 1097 (CC)

46 Devenish, Govender and Hulme Administrative Law 14-16.
• ensure that municipal services are provided to the local community in an equitable, and financially and environmentally sustainable manner;
• promote development in the municipality;
• promote gender equity; and
• Contribute to the progressive realization of the fundamental rights contained in the Constitution.

12.4.12 The objects of local government as set out in section 152 of the Constitution are:

"(a) to provide democratic and accountable government for local communities;
(b) to ensure the provision of services to communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in the matters of local government."

12.5 The conflict of interests between Mr Odendaal’s position as Chairperson of the DA Constituency and service provider to the Municipality

12.5.1 The Mayor and Mr Odendaal denied that there is anything improper in his relationship with the Municipality as local Political Head of the governing Political Party and service provider on behalf of the Municipality. Mr Odendaal stated that such a conflict did not exist in the absence of actual incidents or evidence thereof.

12.5.2 On the other hand the Mayor conceded Mr Odendaal’s actual or perceived influence over the Council’s but maintains that such an influence did not exist over the administration.

12.5.3 The factual situation, irrespective of when Mr Odendaal became Constituency Chairperson, he is currently a service provider on behalf of
the Municipality and has been in this position since his appointment as Chairperson.

12.5.4 The Public Protector’s view on the competing interests between the two positions is dealt with extensively in the report above, including the notion that the integrity of the Municipal administration may be compromised even when the conflict did not have an actual impact but could only have been perceived as having such an effect. As Michael Josephson said: “When it comes to public trust, perception is reality. It is not enough that we do no wrong, we must also try to assure that others believe we have done no wrong.” 47

13. REFERRALS IN TERMS OF SECTION 6 OF THE PUBLIC PROTECTOR ACT.

13.1 Allegations that parties (officials and service provider) benefitted unlawfully from the transfer and sale of donated properties to the Municipality, is one of the matters that required a full forensic investigation before adjudicating the complainant’s allegations of corrupt and criminal conduct in respect of the sale and benefit of donated properties.

13.1.1. This matter is currently the subject of investigation by the SAPS, and was included in the proclamation issued to the Special Investigating Unit in terms of the Special Investigating Units and Special Tribunals Act, 1996.

13.1.2. In the light of this no specific referral is required in Public Protector Act.

13.2 Allegations relating to the unethical or unprofessional conduct of the partners in the law firm of Odendaal and Summerton, are referred to the Law Society of the Northern Provinces, in terms section 6(4)(c)(ii) of the Public Protector Act, as the appropriate public body and authority to deal with matters emanating

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47 Quoted by the NC Board of Ethics, Volume 4 Issue 6, July 2001
from this report relating to the conduct of a legal practitioner in terms of Attorneys Act, 1979 and the relevant Rules.

13.3 A copy of the report is referred to the Parliamentary Committee for Private Members' Legislative Proposals & Special Petitions (the Committee) which is considering legislative proposals to amend the Executive Members' Ethics Act, 1998 to prohibit contracting between an organ of state in the national sphere of government and companies whose directors are party political office bearers or public representatives of political parties.

13.4 A further copy of the Report is referred to the Minister of Cooperative Governance and Traditional Affairs to consider whether any action is required to regulate the offering, donation, management and disposal of residential properties to and by local authorities, in lieu of arrear or outstanding municipal debt; including:

13.4.1 The appropriateness of such a practice in terms of the relevant accounting policies as well as Constitutional framework, including the obligation on government in terms of section 26 relating to access to housing to land.

13.4.2 The basis for the recognition of such properties as revenue or assets as well as the determination of the value of the recognition vis-a-vis the value of the municipal debt

14. KEY FINDINGS

The Public Protector’s key findings are the following:

14.1 Did the Municipality appoint OSI as a sole provider to the Municipality for the past 30 years without following proper procurement procedures and in terms of the MSA and/or the MFMA?:

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14.1.1 OSI have been the Attorneys for the Municipality for the past 29 years, and has been acting as attorney for the former Meyerton Town Council since 1979.48

14.1.2 In 2000 OSI was appointed to render all legal services to the Municipality, including conveyance services, debt collections, legal opinions on labour matters and Magistrate and Supreme Court matters.

14.1.3 OSI was only appointed on the basis of a tender for the first time in 2006, to provide legal services, debt collection services, and auctioneering services. The Municipality’s procurement practice prior to 2006 was in violation of the Preferential Procurement Policy Framework Act, 1999, section 217 of the Constitution, the Local Government Transition Act, 1993, and the MSA.

14.1.4 The procurement processes by the Municipality in 2006, in respect of legal services, debt collecting services and auctioneering services, was formally competitive but not substantively competitive and therefore failed to comply with the principles of fairness and competitiveness as provided for by section 217 of the Constitution, the Local Government Transition Act, 1993 and the Municipal Structures Act. The relevant provisions of the MFMA was not applicable at the time.

14.1.5 The continuous and deliberate extension of OSI’s contract by the relevant Municipal Managers, in circumstances where OSI gained an unfair advantage over other prospective service providers by having access to information and influence over the procurement instruments, exhibited a failure or lack of commitment to promote the Constitutional obligation of equity in its public procurement processes in accordance with section 217 of the Constitution and the Preferential Procurement Policy Framework Act. This amounts to maladministration.

48Odendaal & Summerton Incorporated, which changed names over the years and which had an exclusive attorney contract with the Municipality.
14.1.6 The failure by the relevant Municipal Managers to have reasonably foreseen and managed the perceived or actual conflict of interests with Mr Odendaal’s position as attorney and debt collector and his 2007 appointment as Constituency Chair, fostered a substantial personal benefit at the expense of the public purse, constitutes maladministration.

14.2 Did the Municipality allow OSI to auction properties to the value of R30 million and earned commission/transfer fees in contravention of the MSA/MFMA?:

14.2.1 OSI earned commission and fees in respect of the sale and transfer of properties on behalf of the Municipality.

14.2.2 No finding can be made on the complaint that fees and commission were paid by the Municipality in an irregular manner as this matter was referred to the SIU.

14.3 Was the Municipality responsible for irregularities in the tender for paving services and alleged efforts to restrict or limit competitive bidders?

14.3.1 No tender for the paving of Loch Street, Meyerton, was awarded to ALARN Concrete Products or any other company owned by Mr Odendaal.

14.3.2 The action taken against the company by the Municipality, through OSI as its attorneys, was done based on the company’s alleged contraventions of the Town-Planning and Townships Ordinance, 1986.

14.3.2 There were accordingly no irregularities in terms the MSA and the MFMA in the award of the relevant tender, or the legal action taken by the Municipality.
14.4 Did the Municipality enable Mr Odendaal to benefit improperly from the sale of properties donated to the Municipality?:

14.4.1 Eighty five (85) properties were released by owners, through the intervention of OSI, as donations to the Municipality between 2003 and 2005, mainly from residents who were in arrears with their municipal accounts.

14.4.2 The donations in respect of some of these properties were not finalised. Some properties, including Stand 1491 Henley-on-Klip were intercepted, and were not transferred to the Municipality. Those properties that were transferred were not all sold by means of public auction.

14.4.2 Stand 1491 Henley-on-Klip was offered for donation to the Municipality in 2003 by the Executrix of Estate Late CCC Hennop in settlement of a municipal debt of R5240, 98. On acceptance of the donation by the Municipal Manager the municipal debt was written off and the Municipal Manager requested OSI to transfer the property to the Municipality, but the process was not concluded by OSI.

14.4.3 Instead, the property, which was valued at R118 000, 00 was bought from the estate for R 10 000 by Meyerton Opspoorders, owned by Mr Odendaal, who subsequently sold it for R 180 000.

14.4.5 Mr Odendaal, being responsible for the collection of outstanding debt owed to the Municipality by the Estate Late CCC Hennop, benefitted in his personal capacity from the purchase and subsequent sale of the property.

14.4.6 The Municipality did not have any processes in place to monitor and control the intended donation of Stand 1491 Henley -on-Klip.

14.4.7 The management and sale of properties donated to or intended to be donated to the Municipality by property owners who were in arrears with their municipal accounts, contravened the MFMA for the following reasons.
(i) The then Accounting Officer failed to maintain a management accounting and information system that accounted for the assets and liabilities of the Municipality, and a system of control of assets and liabilities, including an asset and liabilities register.

(ii) The acquisition and disposal of donated properties to the Municipality was not dealt with by the then Accounting Officer in terms of the duties and responsibilities of the Accounting Officer found in section 62 and 64 of the MFMA.

(iii) The handling of donated houses was irregular as the Municipality failed to ensure legal compliance to prevent financial loss to the state.

14.5 Did the use of equipment and resources of the Municipality to remove and transport trees to the Mayor’s residence in December 2004 constitute improper conduct and maladministration?:

14.5.1 Municipal equipment and resources were used for private purposes for the removal and transport of palm trees to the house of the former Mayor, Mrs Wegner, in 2004. Ms Wegner reimbursed the municipality for the expenditure incurred in this respect.

14.5.2 Allegations on the breach of the Code of Conduct for Councilors were dealt with by the Council in terms of the provisions of the Municipal Structures and Systems Act, 2000.

14.5.3 The matter was reported to the Member responsible for Local Government and Housing of the Gauteng Provincial Government (MEC) in terms of Schedule 1 of the MSA.

14.5.4 The Municipality’s conduct in this instance was improper and constituted maladministration.
14.6 Were there irregular debt collection practices, including the complaint that the Municipality pursued fruitless bad debt?:

14.6.1 The Municipality has a strict debt collection policy in terms of section 96 of the MSA which provided that debts be pursued.

14.6.2 On 25 June 2009 Council approved a report from the Financial Services Department of the Municipality with proposals that an amount of R 6 458 311, 72 be either written off because it had prescribed in terms of the Prescription Act, 1969 or because it could not be collected in a cost effective way.

14.6.3 No evidence existed to establish that the Municipality continued to incur legal costs in instances where the collection efforts were fruitless or that it acted in any *mala fide* manner. As a result no maladministration could be found in this regard.

14.7 Did the Municipality fail to collect debt owed to it by a vendor who acted as an agent for the Municipality for the sale of prepaid electricity and fail to collect rates and taxes owed by a son of former DA Councilor?:

14.7.1 The then Accounting Officer failed to take timeous action against the vendor who owed the Municipality an amount of approximately R706 961, 03, which escalated to an amount of R 869 281, 29, in respect of pre-paid electricity it sold.

14.7.2 The then Accounting Officer did not comply with section 81 of the MSA in the Municipality’s conclusion and management of agreements with vendors to sell prepaid electricity.
14.7.3 The then Municipal Manager failed to appropriately manage the implementation of vendor agreements and failed to ensure that relevant Departments within the Municipality complied with their responsibilities.

14.7.4 The then Accounting Officer did not comply with his accounting responsibilities in terms of section 62 and 64 of the MFMA or the debt collecting obligations in terms of Chapter 9 of the MSA.

14.7.5 Despite the recommendations of an internal audit to take disciplinary action against the official(s) involved, including the (then) Municipal Manager and the Chief Financial Officer, the Council decided not to proceed with disciplinary steps.

14.7.6 The Municipality's failure to pursue the debt was improper and unfair and constituted maladministration, particularly as it was a more favourable treatment of this debtor, who owed the Municipality R869 261 as opposed to the Henley-on-Klip estate which was forced to donate its property in settlement of a municipal debt of R 5 240.98.

14.8 Did the Municipality pay performance bonuses, in an irregular manner, for certain employees who were shortly thereafter dismissed as a result of misconduct?:

14.8.1 The officials concerned did receive bonuses based on performance assessments for the performance cycle that ended in the year prior to the final year of employment.

14.8.2 One was dismissed, two Heads of Department ended their employment contracts based on mutual agreements with the Municipality and the contracts of two other employees were renewed.
14.8.3 No evidence supports the allegation that the Municipality paid performance bonuses irregularly to those employees whose services were terminated under suspicious circumstances.

14.9 Did the Municipal manager fail to consult the Complainants and to provide them with copies of the outcome of a forensic investigation that was conducted in respect of the sale of certain properties?:

14.9.1 The relevant Municipal Managers initiated investigations into and submitted reports to the Council on:

(i) Agent Prepaid Electricity by Messrs Connaughton Miller Smith.
(ii) Agent Prepaid Electricity by Expert Forensic Services dated 15 March 2007; and
(iii) Alleged irregularity with disposal of donated property: Stand 1491 Henley-on-Klip: Estate Late CCC Hennop and other donated properties by Messrs Connaughton Miller Smith and Prof H Pienaar.

14.9.2 The Complainants were neither interviewed nor provided with copies of the reports.

14.10 Did Mr Odendaal make statements to the Law Society that the complaints lodged by the Complainants were without merit and that no action would be taken:

14.10.1 The following submission to the Law Society of the Northern Provinces by Mr Odendaal, in which he stated that: "The Public Protector did do an investigation. I was told that they found no evidence to substantiate Pypers allegations," was untrue investigation had not yet been concluded at the time.
14.10.2 The statement made by Mr Odendaal in his replying affidavit in Alam Concrete Products (Pty) Ltd and Adriaan Izak Odendaal and CG Pypers, case 08/20738 in the South Gauteng High Court: Johannesburg, that "I have been visited by the National Public Protector and he has confirmed to me that he regards the Respondent’s complaints as being without merit and that no steps will be taken against me", was untrue as Mr Odendaal was consulted by an investigator and not the National Public Protector, and the Public Protector had not made or communicated any findings or views on the outcome of the investigation to any of the parties.

15. REMEDIAL ACTION

15.1 General

15.1.1 The Municipal Manager must within 60 days of the receipt of the Public Protector’s report, provide the Council, the MEC and the Public Protector with a progress report on the status of the implementation by the Municipality, of remedial action, including the following reports, as accepted and adopted by the Internal Audit Committee:

a) Report on Agent Prepaid Electricity by Messrs Connaughton Miller Smith

b) Report on Agent Prepaid Electricity by Expert Forensic Services dated 15 March 2007;

c) Report(s) on alleged irregularity with disposal of donated property: Stand 1491, Henley -on-Klip: Estate Late CCC Hennop and other donated properties by Messrs Connaughton Miller Smith and Prof H Pienaar.

15.1.2 The Municipal Manager must provide, the Council, the MEC and the Public Protector with a report to indicate what steps were take since the promulgation of the Preferential Procurement Policy Frame Work Act, 2000 as well as the MFMA to ensure that the Municipality’s supply chain management framework and practices was aligned to the provisions of this Legislation as well as section 217 of the Constitution.
15.1.3 The Municipal Manager must provide the Council, the MEC and the Public Protector with a report on the control measures that are in place to address and prevent the situation where one primary service provider is utilised for all the legal services, debt collection and auctioneering work, during the current contracts that were awarded from 2009 until 2012, as well as in future.

15.2 Award of contracts to provide Legal Services, Debt Collection and Auctioneering Services

15.2.1 Remedial action taken

15.2.1.1 During the course of the Public Protector's investigation the Municipality appointed a panel of attorneys in 2009, and introduced a segregation of the various functions performed by the Council's attorney.

15.2.1.2 A condition was included in the in the contract with the service providers to provide that "information may not be used for personal gain by the Attorney, his business, any employee, sub-contractor or any agent of the Attorney or any person, body or organisation receiving information or data through the Attorney, or any of their employees or agents." Failure to observe these conditions would constitute a breach of contract, which could result in termination of the contract.

15.2.1.3 In addition, certain key performance indicators were also included in the Performance Management System for External Service Providers rendering legal Services: Debt Collection

15.2.2 Remedial action required

15.2.2.1 The Accounting Officer must, within 60 days of the receipt of this report, submit a report to the Midvaal Municipal Council in accordance with the Midvaal Municipal Supply Chain Management Policy And Procedures
(January 2010) to enable the Council to deal with the non compliance with the Constitution.

15.2.2.2 The report must be made public in accordance with section 21A of the MSA, 2000.

15.2.2.3 The Council must in terms of section 171 of the MFMA investigate the conduct the accounting officer, chief financial officer and officials involved.

15.2.2.4 If the investigation warrants such a step, disciplinary proceedings must be instituted against the accounting officer, chief financial officer or the senior manager or other official in accordance with systems and procedures referred to in section 67 of the MSA, read with Schedule 2 of that Act.

15.2.2.5 The Accounting Officer must review the services performed on behalf of the Municipality by Odendaal and Summerton in terms of section 80 and 81 of the MSA and take appropriate steps to ensure that these services comply with section 195 of the Constitution, including the consideration of suspension of duties and responsibilities that are incompatible with the political activities of the service provider.

15.3 The management and sale of Stand 1491 Henley -on-Klip: Estate Late CCC Hennop and other donated properties

15.3.1 Remedial action taken

15.3.1.1 The following recommendations were adopted by the Municipality's Internal Audit Committee:

a) All future contracts with the Council's attorneys should stipulate that any interests of the attorneys in transactions should be disclosed in writing to Council;

b) The progress of attorneys on handed over accounts should be properly monitored and reported on; and.
c) Policies and procedures should be considered in respect of the follow up of handed over accounts, control over properties donated to the municipality: information recorded in the register for donated land.

15.3.2 Remedial Action to be taken

15.3.2.1 The Council must investigate the deficiencies and non-compliance with the policies and control mechanisms in respect of Stand 1491 Henley-on-Klip: Estate Late CCC Hennop and other donated properties by the officials involved and responsible for the management of the acquisition and disposal of donated property in terms of section 171 of the MFMA.

15.3.2.2 The outcome of the current investigation by the SAPS, any investigation by the Special Investigating Unit, must be reported to the Council within 60 days of the receipt thereof.

15.3.2.3 The Law Society of the Northern Provinces, as the appropriate public body and authority to deal with allegations relating to the professional conduct of a legal practitioner in terms of Attorneys Act, 1979 and the relevant Rules, is requested in terms section 6(4) (c) (ii) of the Public Protector Act to deal with matters emanating from this report relating to the professional conduct of the partners in the law firm of Odendaal and Summerton.

15.4 Debt collecting practices relating to the management of agent prepaid electricity accounts

15.4.1 Remedial Action taken

15.4.1.1 Deficiencies were identified in respect of the management of agent prepaid electricity accounts and recommendations were made to the Council to improve and correct current systems and procedures.

15.4.1.2 Measures were also proposed to monitor and control debt collection activities by the Council's Attorneys and to follow up on handed over accounts at regular intervals.
15.4.2 Remedial Action required

15.4.2.1 The Council must investigate the deficiencies and non compliance with the policies and control mechanisms by the officials involved and responsible for the management of the debt collection policy of the Municipality in terms of chapter 9 of the MSA, as well as the management of the provision of service through external mechanisms in terms of section 80 of the MSA.

15.4.2.2 The Council must in terms of section 171 of the MFMA investigate allegations of financial misconduct against the accounting officer, chief financial officer and officials involved and determine accountability for the irregular expenditure incurred by the Council because of the debt that had to be written off.

16.  MONITORING

16.1 The Municipal Manager and the Speaker of the Midvaal Municipal Council must acknowledge receipt and advise on the acceptance of the Public Protector’s report within 30 days of the receipt thereof.

16.2 The Municipal Manager must present an action plan on the implementation of the Public Protector’s report within 60 days of the receipt thereof, and thereafter submit bi-monthly reports on the progress made with the implementation of the above-mentioned corrective measures.

16.3 A copy of this Report is provided to the Office of the Auditor-General to monitor the implementation of the resolutions proposed by the Internal Audit Committee in respect of the policies and procedures for the acquisition and disposal of capital assets by the Municipality, as well as the electricity prepaid vending system, and in particular, whether the necessary action was taken in terms of the MFMA in respect of the amount of R869 261, 29 that was regarded as irrecoverable and written off.

16.4 The referral of the report to the National Prosecuting Authority in terms of section 6(4)(c)(i) will be monitored on a bi-monthly basis.
16.5 A copy of the report is also made available to the Gauteng Provincial MEC for Local Government and Housing as well as to the National Treasury to assist the Public Protector with monitoring in terms of the MFMA and the MSA.

17. ACKNOWLEDGEMENTS
The Public Protector wishes to acknowledge the assistance of the Complainants, the co-operation of the Executive Mayor, the Municipal Manager and Municipal staff members of the Midvaal Local Municipality during the course of the investigation, as well as the steps that were taken by the Municipality to attend to the allegations and complaints during the course of the investigation in terms of its internal governance structures.

[Signature]
ADV TN MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA

DATE: 07 November 2011

Assisted by: Adv M Shai, the Deputy Public Protector
Adv N van der Merwe (Senior Investigator)
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Executive summary

i) THE COMPLAINTS

a) *It can’t be right: Remediying self-interest in Midvaal* is Public Protector Report number 15 of 2011/2012. The Report presents the findings of the Public Protector following complaints by Messrs C G Pypers and K Hoffman. Mr Pypers is a resident and businessman from the Midvaal area and Mr Hoffman is a former Councilor for the Democratic Alliance (DA) and former Member of the Mayoral Committee (MMC) responsible for Finance. In 2008 and 2009 they approached the Public Protector with allegations on a number of irregularities by the Midvaal Local Municipality (the Municipality) relating to the following:

aa) The appointment of Odendaal and Summerton Inc. (OSI), as the sole provider of legal services, including general legal services to the Municipality for the last 30 years without proper procurement procedures being followed in accordance with the Local Government: Municipal Structures Act, 2000 (MSA) and the Municipal Finance Management Act, 2003 (MFMA);

bb) When the Municipality eventually followed procurement procedures in 2006 and advertised a tender, OSI’s contract for legal services was extended and in addition it was awarded a tender for debt collecting services and auctioneering services in contravention of section 217 of the Constitution of the Republic of South Africa, 1998 (the Constitution) and the Local Government Transition Act, 1993, and the MSA;

cc) The Municipality continuously and deliberately extended OSI’s contract which allowed it to gain an unfair advantage over other prospective service providers as it had access to information and influence over procurement procedures and permitted Mr Odendaal to gain a substantial personal benefit at the expense of the Municipality. The allegation went further to state that OSI auctioned properties to the
value of R30 million and earned commission/transfer fees in contravention of the MSA/MFMA;

dd) The contract for paving services to Loch Street in the Meyerton CBD was not done properly and in accordance with the relevant prescripts;

ee) The use of the Municipality’s equipment to remove trees from the former Mayor, Mrs Wegner’s residence, in December 2004 was improper;

ff) The debt collection practice/policy of the Municipality relating to its reluctance to write off bad debt was fruitless to pursue and thus irregular;

gg) The Municipality failed to collect debt owed to it by a vendor who acted as an agent for the Municipality for the sale of prepaid electricity and failed to collect rates and taxes owed by a son of a former DA Councillor;

hh) Performance bonuses were improperly paid to certain employees who were shortly thereafter dismissed as a result of misconduct; and

ii) The Municipal Manager at the time failed to release the outcome of a forensic investigation that was conducted in respect of the sale of certain properties that were attached by the Midvaal Municipal Council (the Council), and to consult the complainants as witnesses.

b) In the process of the investigation further allegations were brought to the Public Protector. These included -

aa) Complaints that Mr Odendaal made certain representations to a court of law and the Law Society indicating that the Public Protector had already concluded the investigation into the complaints with a finding that they (the complaints) were without merit; and

bb) Allegations relating to fraud and corruption relating to the Municipality’s role in the development of the Uitvlugt Country Estate, a project allegedly worth in excess of R200 million, which were not pursued by the Public
Protector because they surfaced when the investigation was at an advanced stage and were already being investigated by the SAPS and later the SIU.

ii) KEY FINDINGS

The Public Protector’s key findings are the following:

a) Did the Municipality appoint OSI as a sole provider to the Municipality for the past 30 years without following proper procurement procedures and in terms of the MSA and/or the MFMA?:

aa) OSI have been the Attorneys for the Municipality for the past 29 years, and has been acting as attorney for the former Meyerton Town Council since 1979;¹

bb) In 2000 OSI was appointed to render all legal services to the Municipality, including conveyance services, debt collections, legal opinions on labour matters and Magistrate and Supreme Court matters;

cc) OSI was only appointed on the basis of a tender for the first time in 2006, to provide legal services, debt collection services, and auctioneering services. The Municipality’s procurement practice prior to 2006 was in violation of the Preferential Procurement Policy Framework Act, 1999, section 217 of the Constitution, the Local Government Transition Act, 1993, and the MSA;

dd) The procurement processes by the Municipality in 2006, in respect of legal services, debt collecting services and auctioneering services, was formally competitive but not substantively competitive and therefore failed to comply with the principles of fairness and competitiveness as provided for by section 217 of the Constitution, the Local Government Transition Act, 1993 and the Municipal

¹Odendaal & Summerton Incorporated, which changed names over the years and which had an exclusive attorney contract with the Municipality.
Structures Act. The relevant provisions of the MFMA were not applicable at the time;

ee) The continuous and deliberate extension of OSI’s contract by the relevant Municipal Managers, in circumstances where OSI gained an unfair advantage over other prospective service providers by having access to information and influence over the procurement instruments, exhibited a failure or lack of commitment to promote the Constitutional obligation of equity in its public procurement processes in accordance with section 217 of the Constitution and the Preferential Procurement Policy Framework Act. This amounts to maladministration; and

ff) The failure by the relevant Municipal Managers to have reasonably foreseen and managed the perceived or actual conflict of interests with Mr Odendaal’s position as attorney and debt collector and his 2007 appointment as Constituency Chair, fostered a substantial personal benefit at the expense of the public purse, constitutes maladministration.

b) Did the Municipality allow OSI to auction properties to the value of R30 million and earned commission/transfer fees in contravention of the MSA/MFMA?:

aa) OSI earned commission and fees in respect of the sale and transfer of properties on behalf of the Municipality; and

bb) No finding can be made on the complaint that fees and commission were paid by the Municipality in an irregular manner as this matter was referred to the SIU.

c) Was the Municipality responsible for irregularities in the tender for paving services and alleged efforts to restrict or limit competitive bidders?

aa) No tender for the paving of Loch Street, Meyerton, was awarded to ALARN Concrete Products or any other company owned by Mr Odendaal;
bb) The action taken against the company by the Municipality, through OSI as its attorneys, was done based on the company’s alleged contraventions of the Town-Planning and Townships Ordinance, 1986; and

c) There were accordingly no irregularities in terms the MSA and the MFMA in the award of the relevant tender, or the legal action taken by the Municipality.

d) Did the Municipality enable Mr Odendaal to benefit improperly from the sale of properties donated to the Municipality?

aa) Eighty five (85) properties were released by owners, through the intervention of OSI, as donations to the Municipality between 2003 and 2005, mainly from residents who were in arrears with their municipal accounts;

bb) The donations in respect of some of these properties were not finalised. Some properties, including Stand 1491 Henley-on-Klip were intercepted, and were not transferred to the Municipality. Those properties that were transferred were not all sold by means of public auction;

c) Stand 1491 Henley-on-Klip was offered for donation to the Municipality in 2003 by the Executrix of Estate Late CCC Hennop in settlement of a municipal debt of R5240, 98. On acceptance of the donation by the Municipal Manager the municipal debt was written off and the Municipal Manager requested OSI to transfer the property to the Municipality, but the process was not concluded by OSI;

d) Instead, the property, which was valued at R118 000, 00 was bought from the estate for R 10 000 by Meyerton Opspoorders, owned by Mr Odendaal, who subsequently sold it for R 180 000;

e) Mr Odendaal, being responsible for the collection of outstanding debt owed to the Municipality by the Estate Late CC Hennop, benefitted in his personal capacity from the purchase and subsequent sale of the property;
ff) The Municipality did not have any processes in place to monitor and control the intended donation of Stand 1491 Henley-on-Klip; and

gg) The management and sale of properties donated to or intended to be donated to the Municipality by property owners who were in arrears with their municipal accounts, contravened the MFMA for the following reasons.

1. The then Accounting Officer failed to maintain a management accounting and information system that accounted for the assets and liabilities of the Municipality, and a system of control of assets and liabilities, including an asset and liabilities register.

2. The acquisition and disposal of donated properties to the Municipality was not dealt with by the then Accounting Officer in terms of the duties and responsibilities of the Accounting Officer found in section 62 and 64 of the MFMA.

3. The handling of donated houses was irregular as the Municipality failed to ensure legal compliance to prevent financial loss to the state.

e) Did the use of equipment and resources of the Municipality to remove and transport trees to the Mayor’s residence in December 2004 constitute improper conduct and maladministration?:

aa) Municipal equipment and resources were used for private purposes for the removal and transport of palm trees to the house of the former Mayor, Mrs Wegner, in 2004. The municipality was reimbursed for the expenditure incurred in this respect;

bb) Allegations on the breach of the Code of Conduct for Councillors were dealt with by the Council in terms of the provisions of the Municipal Structures and Systems Act, 2000;
cc) The matter was reported to the Member responsible for Local Government and Housing of the Gauteng Provincial Government (MEC) in terms of Schedule 1 of the MSA; and 

dd) The Municipality’s conduct in this instance was improper and constituted maladministration.

f) Were there irregular debt collection practices, including the complaint that the Municipality pursued fruitless bad debt?:

aa) The Municipality has a strict debt collection policy in terms of section 96 of the MSA which provided that debts be pursued;

bb) On 25 June 2009, after the Public Protector’s investigation had commenced, Council approved a report from the Financial Services Department of the Municipality with proposals that an amount of R 6 458 311, 72 be either written off because it had prescribed in terms of the Prescription Act, 1969 or because it could not be collected in a cost effective way; and

cc) No evidence existed to establish that the Municipality continued to incur legal costs in instances where the collection efforts were fruitless or that it acted in any *mala fide* manner. As a result no maladministration could be found in this regard.

g) Did the Municipality fail to collect debt owed to it by a vendor who acted as an agent for the Municipality for the sale of prepaid electricity and fail to collect rates and taxes owed by a son of former DA Councillor?:

aa) The then Accounting Officer failed to take timeous action against the vendor who owed the Municipality an amount of approximately R706 961, 03, which escalated to an amount of R 869 261, 29, in respect of pre-paid electricity it sold;
bb) The then Accounting Officer did not comply with section 81 of the MSA in the Municipality’s conclusion and management of agreements with vendors to sell prepaid electricity;

c) The then Municipal Manager failed to appropriately manage the implementation of vendor agreements and failed to ensure that relevant Departments within the Municipality complied with their responsibilities;

d) The then Accounting Officer did not comply with his accounting responsibilities in terms of section 62 and 64 of the MFMA or the debt collecting obligations in terms of Chapter 9 of the MSA;

e) Despite the recommendations of an internal audit to take disciplinary action against the official(s) involved, including the (then) Municipal Manager and the Chief Financial Officer, the Council decided not to proceed with disciplinary steps; and

ff) The Municipality’s failure to pursue the debt was improper and unfair and constituted maladministration, particularly as it was a more favourable treatment of this debtor, who owed the Municipality R869 261 as opposed to the Henley-on-Klip estate which was forced to donate its property in settlement of a municipal debt of R 5 240.98.

h) Did the Municipality pay performance bonuses, in an irregular manner, for certain employees who were shortly thereafter dismissed as a result of misconduct?:

aa) The officials concerned did receive bonuses based on performance assessments for the performance cycle that ended in the year prior to the final year of employment;

bb) One was dismissed, two Heads of Department ended their employment contracts based on mutual agreements with the Municipality and the contracts of two other employees were renewed; and
cc) No evidence supports the allegation that the Municipality paid performance bonuses irregularly to those employees whose services were terminated under suspicious circumstances.

i) Did the Municipal manager fail to consult the Complainants and to provide them with copies of the outcome of a forensic investigation that was conducted in respect of the sale of certain properties?:

aa) The relevant Municipal Managers initiated investigations into and submitted reports to the Council on:

1. Agent Prepaid Electricity by Messrs Connaughton Miller Smith.
2. Agent Prepaid Electricity by Expert Forensic Services dated 15 March 2007; and
3. Alleged irregularity with disposal of donated property: Stand 1491 Henley-on-Klip: Estate Late CCC Hennop and other donated properties by Messrs Connaughton Miller Smith and Prof H Pienaar.

bb) The Complainants were neither interviewed nor provided with copies of the reports.

b) Did Mr Odendaal make statements to the Law Society that the complaints lodged by the Complainants were without merit and that no action would be taken:

aa) The following submission to the Law Society of the Northern Provinces by Mr Odendaal, in which he stated that: ... “The Public Protector did do an investigation. I was told that they found no evidence to substantiate Pypers allegations,” was untrue investigation had not yet been concluded at the time; and

bb) The statement made by Mr Odendaal in his replying affidavit in Alarm Concrete Products (Pty) Ltd and Adriaan Izak Odendaal and CG Pypers, case 08/20738 in the South Gauteng High Court: Johannesburg, that ...“I have been visited by the National Public Protector and he has confirmed to me that he regards the Respondent’s complaints as being without merit and that no steps will be taken against me”, was untrue as Mr Odendaal
was consulted by an investigator and not the National Public Protector, and the Public Protector had not made or communicated any findings or views on the outcome of the investigation to any of the parties.

iii) REMEDIAL ACTION

a) General

aa) The Municipal Manager must within 60 days of the receipt of the Public Protector’s report, provide the Council, the MEC and the Public Protector with a progress report on the status of the implementation by the Municipality, of remedial action, including the following reports, as accepted and adopted by the Internal Audit Committee:

1. Report on Agent Prepaid Electricity by Messrs Connaughton Miller Smith
3. Report(s) on alleged irregularity with disposal of donated property: Stand 1491 Henley -on-Klip: Estate Late CCC Hennop and other donated properties by Messrs Connaughton Miller Smith and Prof H Pienaar.

bb) The Municipal Manager must provide the Council, the MEC and the Public Protector with a report to indicate what steps were take since the promulgation of the Preferential Procurement Policy Frame Work Act, 2000 as well as the MFMA to ensure that the Municipality’s supply chain management framework and practices was aligned to the provisions of this Legislation as well as section 217 of the Constitution.

cc) The Municipal Manager must provide the Council, the MEC and the Public Protector with a report on the control measures that are in place to address and prevent the situation where one primary service provider is utilised for all the legal services, debt collection and auctioneering work, during the current contracts that were awarded from 2009 until 2012, as well as in future.
b) Award of contracts to provide Legal Services, Debt Collection and Auctioneering Services

aa) Remedial action taken

1. During the course of the Public Protector’s investigation the Municipality appointed a panel of attorneys in 2009, and introduced a segregation of the various functions performed by the Council’s attorney.

2. A condition was included in the in the contract with the service providers to provide that “information may not be used for personal gain by the Attorney, his business, any employee, sub-contractor or any agent of the Attorney or any person, body or organisation receiving information or data through the Attorney, or any of their employees or agents.” Failure to observe these conditions would constitute a breach of contract, which could result in termination of the contract.

3. In addition, certain key performance indicators were also included in the Performance Management System for External Service Providers rendering legal Services: Debt Collection

bb) Remedial action required

1. The Accounting Officer must, within 60 days of the receipt of this report, submit a report to the Midvaal Municipal Council in accordance with the Midvaal Municipal Supply Chain Management Policy And Procedures (January 2010) to enable the Council to deal with the non compliance with the Constitution.

2. The report must be made public in accordance with section 21A of the MSA

3. The Council must in terms of section 171 of the MFMA investigate the conduct the accounting officer, chief financial officer and officials involved.
4. If the investigation warrants such a step, disciplinary proceedings must be instituted against the accounting officer, chief financial officer or the senior manager or other official in accordance with systems and procedures referred to in section 67 of the MSA, read with Schedule 2 of that Act.

5. The Accounting Officer must review the services performed on behalf of the Municipality by Odendaal and Summerton in terms of section 80 and 81 of the MSA and take appropriate steps to ensure that these services comply with section 195 of the Constitution, including the consideration of suspension of duties and responsibilities that are incompatible with the political activities of the service provider.

c) The management and sale of Stand 1491 Henley -on-Klip: Estate Late CCC Hennop and other donated properties

aa) Remedial action taken

1. The following recommendations were adopted by the Municipality’s Internal Audit Committee:

   i. All future contracts with the Council’s attorneys should stipulate that any interests of the attorneys in transactions should be disclosed in writing to Council;

   ii. The progress of attorneys on handed over accounts should be properly monitored and reported on; and.

   iii. Policies and procedures should be considered in respect of the follow up of handed over accounts, control over properties donated to the municipality: information recorded in the register for donated land.

bb) Remedial Action to be taken

1. The Council must investigate the deficiencies and non-compliance with the policies and control mechanisms in respect of Stand 1491 Henley -on-Klip:
Estate Late CCC Hennop and other donated properties by the officials involved and responsible for the management of the acquisition and disposal of donated property in terms of section 171 of the MFMA.

2. The outcome of the current investigation by the SAPS, any investigation by the Special Investigating Unit, must be reported to the Council within 60 days of the receipt thereof.

3. The Law Society of the Northern Provinces, as the appropriate public body and authority to deal with allegations relating to the professional conduct of a legal practitioner in terms of Attorneys Act, 1979 and the relevant Rules, is requested in terms section 6(4) (c) (ii) of the Public Protector Act to deal with matters emanating from this report relating to the professional conduct of the partners in the law firm of Odendaal and Summerton.

d) Debt collecting practices relating to the management of agent prepaid electricity accounts

aa) Remedial Action taken

1. Deficiencies were identified in respect of the management of agent prepaid electricity accounts and recommendations were made to the Council to improve and correct current systems and procedures.

2. Measures were also proposed to monitor and control debt collection activities by the Council’s Attorneys and to follow up on handed over accounts at regular intervals.

bb) Remedial Action required

1. The Council must investigate the deficiencies and non compliance with the policies and control mechanisms by the officials involved and responsible for the management of the debt collection policy of the Municipality in terms of chapter 9 of the MSA, as well as the management of the provision of service through external mechanisms in terms of section 80 of the MSA.
2. The Council must in terms of section 171 of the MFMA investigate allegations of financial misconduct against the accounting officer, chief financial officer and officials involved and determine accountability for the irregular expenditure incurred by the Council because of the debt that had to be written off.

iv) REFERRALS

aa) Allegations that parties (officials and service provider) benefitted unlawfully from the transfer and sale of donated properties to the Municipality, is one of the matters that required a full forensic investigation before adjudicating the complainant’s allegations of corrupt and criminal conduct in respect of the sale and benefit of donated properties.

bb) This matter is currently the subject of investigation by the SAPS, and was included in the proclamation issued to the Special Investigating Unit in terms of the Special Investigating Units and Special Tribunals Act, 1996.

cc) In the light of this no specific referral is required in Public Protector Act.

dd) Allegations relating to the unethical or unprofessional conduct of the partners in the law firm of Odendaal and Summerton, are referred to the Law Society of the Northern Provinces, in terms section 6(4)(c)(ii) of the Public Protector Act, as the appropriate public body and authority to deal with matters emanating from this report relating to the conduct of a legal practitioner in terms of Attorneys Act, 1979 and the relevant Rules.

ee) A copy of the report is referred to the Parliamentary Committee for Private Members’ Legislative Proposals & Special Petitions (the Committee) which is considering legislative proposals to amend the Executive Members’ Ethics Act, 1998 to prohibit contracting between an organ of state in the national sphere of government and companies whose directors are party political office bearers or public representatives of political parties.

ff) A further copy of the Report is referred to the Minister of Cooperative Governance and Traditional Affairs to consider whether any action is
required to regulate the offering, donation, management and disposal of residential properties to and by local authorities, in lieu of arrear or outstanding municipal debt; including:

1. The appropriateness of such a practice in terms of the relevant accounting policies as well as Constitutional framework, including the obligation on government in terms of section 26 of the Constitution relating to access to housing to land.

2. The basis for the recognition of such properties as revenue or assets as well as the determination of the value of the recognition vis-a-vis the value of the municipal debt
REPORT ON AN INVESTIGATION INTO COMPLAINTS OF MALADMINISTRATION AGAINST THE MIDVAAL MUNICIPALITY

1. INTRODUCTION

1.1 *It can't be right: Remediying self-Interest in Midvaal* is Public Protector Report number 15 of 2011/2012 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).

1.2 It is submitted to –

1.2.1 the Member responsible for Local Government and Housing of the Executive Council of the Gauteng Provincial Government (the MEC);

1.2.2 the Executive Mayor of the Midvaal Local Municipality;

1.2.3 the Speaker of the Municipal Council of the Midvaal Local Municipality;

1.2.4 the Municipal Manager of the Midvaal Local Municipality;

1.2.5 the Auditor General of the Republic of South Africa; and

1.2.6 the National Director of Public Prosecutions.

1.3 A copy is provided to the Complainants in terms of section 8(3) of the Public Protector Act, to the Speaker of the National Assembly and the Minister of Cooperative Governance and Traditional Affairs.

1.4 The report relates to complaints of maladministration by the Midvaal Local Municipality.

2. THE COMPLAINTS

The Complainants in this matter are Messrs C G Pypers and JJ Hoffman (the Complainants). Mr Pypers is a resident and businessman from the Midvaal area and Mr Hoffman is a former Councillor for the Democratic Alliance (DA) and former Member of the Mayoral Committee responsible for Finance. In 2008 and 2009 they approached the Public Protector with a number of
allegations regarding irregularities by the Midvaal Local Municipality (the Municipality). A summary of the allegations follow.

2.1. The Utilisation of one firm of Attorneys as Sole Provider of Legal Services, Debt Collection and Auctioneering Services to the Municipality

2.1.1 The Complainants stated that the Municipality had appointed the same single service provider, Odendaal & Summerton Incorporated (OSI)^2, as its attorneys for the last 30 years for the provision of legal services, including debt collection, sale of properties in execution, and transport of properties.

2.1.2 It was alleged that the appointment of OSI was improper because:

2.1.2.1 The Municipality initially selected and used OSI as the official attorneys for the Midvaal Municipal Council (the Council) for a lengthy period without following proper procurement procedures;

2.1.2.2 When tenders were advertised for the appointment of a service provider for legal services, debt collection and auctioneering services to the Municipality, the subsequent procurement processes were flawed due to alleged corruption, manipulation of or undue influence on the Municipality to favour OSI and to unfairly exclude other lawyers or law firms from providing legal services. In statements to the SAPS, the Complainants alleged, *inter alia*, that a former Councillor, Mr Mclean, was paid to ensure the re-appointment of OSI as service provider in 2006 and that another tender was awarded in a corruptive and fraudulent manner in 2009.

2.1.2.3 The appointment of a single service provider as the Council’s attorney to provide legal services, debt collection services and auctioneering services was in contravention of the MFMA as well as the Municipal Structures Act.

2.1.2.4 Mr Odendaal, one of the partners in the appointed firm, was the Chairperson of the DA for the Midvaal region, who, by majority

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^2 Including Mr Odendaal’s previous law firms
representation in the Council, appointed Councillors and Senior Managers of the Municipality. It was therefore alleged that the appointment of the Chairperson as service provider to the Municipality was motivated or influenced by party-political loyalties or considerations, and the Executive Management and Municipal Management have applied and utilised the structures and resources of the Municipality to promote Mr Odendaal’s interests.

2.1.3 It was further alleged in the statements made to the SAPS that, Mr Odendaal, though not a political office bearer in the Council, had direct access to all decision-making processes by the Council and the Municipality, including the award of tenders. In addition, through his relationship with the Executive Authority and Senior Management of the Municipality, he was able to manipulate systems and procedures and victimise those who opposed them. According to the Complainants, Mr Odendaal, has over the years, benefited substantially at the expense of the Municipality.

2.1.4 The Complainant, Mr Hoffman alleged that he had started an investigation, when he was a Councillor and Member of the Mayoral Committee (MMC), to determine the reasons why OSI has been the only attorney for the Municipality over the last 30 years. He subsequently instructed the relevant Head of Department at the Municipality to draft a new tender proposal to provide for the appointment of a panel of attorneys instead of a single service provider. He further alleged that he was called in by the then Mayor, Ms Wegner, who rebuked him for his actions and dismissed him as MMC (allegedly on the instructions of the Chairperson).

2.1.5 It is also alleged that as sole provider of auctioneering services to the Council, Mr Odendaal’s company auctioned properties to the value of R30 million and allegedly earned commission/transfer fees in contravention of the MSA/MFMA.
2.2 Paving Tender - Upgrading of the Main Road (Loch Street) in the Meyerton CBD and alleged efforts to restrict or limit competitive tenderers

2.2.1 The Complainants alleged that during January 2007 a landscape architect appointed by the Municipality invited a number of brick and paving manufacturers to attend to an exhibition of their products at the Municipal premises for an intended project, estimated at R8 million, relating to the upgrading of the main road (Loch Street) in the Meyerton CBD.

2.2.2 They further allege that the tender was withdrawn and the suppliers were again invited to exhibit their products in November 2007. According to an employee of one of the suppliers, new suppliers were also invited, and while they were instructed not to mark their products, one of the suppliers, a newly established company owned by Mr Odendaal, continued to mark its products.

2.2.3 The tender was allegedly re-advertised but the specifications provided for a certain type of brick that was only stocked by the said newly established company. It is implied that it withdrew the tender and changed the specifications to favour this particular prospective tenderer.

2.2.4 It was also alleged that the Municipality was influenced to take action against opposition brick manufacturers (competitors) to prevent them from continuing with their operations. A certain company was for instance notified to close down its operations for reasons relating to environmental dust.

2.3 Alleged Irregularities relating to the sale of Donated Municipal Properties

2.3.1 The Complainants alleged that Mr Odendaal had benefitted improperly from the sale of properties donated to the Municipality, which he purchased from the Municipality at a nominal amount and sold at a huge profit.

2.1.2 According to the Complainants resident land owners who were in arrears with Municipal rates and taxes, would often offer to donate the properties to the Municipality because they were unable to pay.
2.3.3 In practice the arrear amount would be written off and the property transferred would be into the name of the Municipality when the donation was accepted by the Municipal Manager. The Municipality was supposed to sell any redundant property or assets by public auction for the best possible market related price in accordance with section 14 of the MFMA.

2.3.4 It was alleged that once the donation was accepted, the properties were not transferred into the name of the Municipality, but sold directly to Mr Odendaal and transferred into his name, or that of a close corporation where he was a member, or into the name of a friend, for a nominal amount. Such purchases were reportedly not done in a meeting open to the public, or with the consent of the Council. It was further alleged that these properties were subsequently sold by Mr Odendaal, who made a huge profit at the expense of the Municipality.

2.3.5 One such matter related to the offer to donate a stand to the Municipality from the Estate Late CCC Hennop, in exchange for outstanding rates and taxes owing to the Municipality in the amount of R 5240, 99. The property was not transferred to the Municipality but purchased by Mr Odendaal directly from the estate, for an amount of R 10 000, 00, who then sold it for R 180 000, 00. This occurred after the debt had already been written off by the Municipality in exchange for the property.

2.3.6 Erven belonging to the Municipality have reportedly been sold by public auction in transactions to the value of R 30 million. Mr Odendaal allegedly did not only receive all the commissions payable in respect of the transactions, but also received the transfer fees in respect of the transfer of the properties.

2.4 Alleged irregularities relating to the Municipality’s debt collecting processes and system

2.4.1 The debt collecting system of the Municipality was allegedly not properly administered as no provision was made to write off bad debt. This led to a situation where legal action was repeatedly taken against debtors for the same bad debt. It was contended that such actions resulted in the
Municipality incurring fruitless expenditure and Mr Odendaal was the only party that benefited because OSI earned the legal fees.

2.4.2 Debt collection practices and policies were allegedly applied in an inconsistent manner. Reference was for instance, made to a family member of a Councilor, who allegedly owed the Municipality large sums of money for electricity. It was also alleged that the Municipality failed to take action against a vendor who was contracted to sell prepaid electricity on behalf of the Municipality and did not pay the proceeds, which amounted to more than R700 000, 00, to the Council. However, no legal action was taken against this person or the business in question (which was subsequently liquidated.)

2.5 Allegations that Council equipment was used to remove trees from the Mayor’s residence in December 2004;

2.5.1 In December 2004, equipment of the Municipality was allegedly used to relocate palm trees from a private property to the private residence of the Mayor, Ms Wegner, at a cost of approximately R 20 000, 00.

2.6 The irregular payment of performance bonuses for certain employees

2.6.1 It was alleged that performance bonuses were awarded to the Heads of four departments within the Municipality, who were shortly afterwards dismissed for “poor performance and related issues”

2.7 The failure to release the outcome of a forensic investigation

2.7.1 It is alleged that the Municipality appointed a company to conduct a forensic investigation into a number of irregularities but the Complainants were not afforded any opportunity to provide evidence/information in this process. They were also not furnished with a copy of the forensic report submitted to the Municipality.

2.8 Ancillary complaints

During the investigation additional complaints surfaced.
2.8.1 The Complainants submitted that Mr Odendaal made certain representations to a court of law and the Law Society indicating that the Public Protector’s investigation into the complaints had been concluded with a finding that they (the complaints) were without merit.

2.8.2 Certain ancillary complaints were not pursued, such as allegations of fraud and corruption relating to the Municipality’s role in the development of the Uitvlugt Country Estate, a project allegedly worth in excess of R200 million. The reason for this was that they surfaced at an advanced stage of the investigation and were already being investigated by the SAPS and later the SIU.

3. BACKGROUND

3.1 Certain matters dated back to October 2005 when Mr Pypers listed a number of serious concerns to a national office bearer of the Democratic Alliance (DA) in a letter on behalf of a number of local residents and businessmen from the Midvaal local community. These concerns included issues of maladministration, alleged fraud, alleged corruption, conflict of interest and intimidation and victimization by the Senior Management of the Municipality as well the procurement of the services of the law firm of Odendaal and Summerton as the attorneys for the Municipality.

3.2 At the time the Midvaal Local Municipality was managed by the then Executive Mayor, Marti Wenger, the then Municipal Manager, Mr. Barry Poggenpoel, the then Chief Financial Officer, Mr. A.S.A de Klerk (who is the current Municipal Manager), the then Speaker, Mr. Timothy Nast (who is the current Executive Mayor). Mr A Odendaal, a partner in the attorneys for the Council, became the Chairperson of the Democratic Alliance for the Midvaal area.

3.3 The then Municipal Manager and the Speaker initiated certain investigations into the issues raised by Mr Pypers. As he was not satisfied with the outcome, he approached Mr Hoffman, who at the time was the Member of the Mayoral Council (MMC) for Finance.
3.4 Mr Hoffman allegedly took certain action in relation to the issues raised by Mr Pypers, including bringing the matters to the attention of the relevant party leadership, submitted an affidavit on 29 January 2009 to the Public Protector, and initiating a motion of no confidence in the Midvaal DA as well as Municipal leadership. Mr Hoffman allegedly also interacted with Mr Pypers and the media regarding the allegations of impropriety by the said leadership and approached the SAPS, and the Law Society of South Africa.

3.5 Mr Pypers successfully opposed a High Court application for an interdict brought by Mr Odendaal under case number 08/20738 in the South Gauteng High Court.

3.6 In February 2009 Mr Hoffman was suspended from two Party caucus meetings allegedly due to non-payment or irregular payment of rates and taxes.

3.7 In March 2009 Mr Odendaal, in his capacity as Midvaal Constituency Chair, Ms Wegner as Executive Mayor and Mr Nast as Speaker, lodged formal charges with the DA structures relating to Mr Hofmann’s conduct after his suspension, for pursuing these matters outside the internal structures of the Party.

3.8 Mr Hoffman was disciplined and later suspended by the DA, for inter alia, acting in a way that impacted negatively on the image or performance of the Party, acting in a manner that is unreasonable and detrimental to internal cooperation within the Party and not following internal structures.

3.9 The complaints or parts thereof were raised in different forums since approximately 2005 and new allegations continued to be raised even during the course of the investigation.

3.10 One of the key challenges confronted during the investigation related to the management of the needs, requests and wishes of the various affected and interested parties.

3.10.1.1 The interested parties included the-

a) Complainants
b) Political parties (Freedom Front Plus, Democratic Alliance and African National Congress)
c) Public from Midvaal
d) Public in general
e) Media
f) Public Institutions

4. JURISDICTION OF THE PUBLIC PROTECTOR

4.1 Section 182(1) of the Constitution provides as follows:

"The Public Protector has the powers as regulated by national legislation-

- to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

- to report on that conduct; and

- to take appropriate remedial action."

4.2 Section 6(4)(a)(ii) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function.

4.3 Improper conduct includes allegations of maladministration, the abuse or unjustifiable exercise of power, an improper or dishonest act with respect to public monies, improper or unlawful enrichment, improper prejudice or complaints of undue delay.

4.4 Remedial action that the Public Protector can take rests on the following principles:
4.4.1 Rectify the identified improper conduct and conduct resulting in improprieties;

4.4.2 Identify the intended and unintended consequences and prejudice caused by such conduct;

4.4.3 Take appropriate steps to put the complainants or any persons affected by the impropriety, in the position they would have been had the administrative deficiencies not taken place;

4.4.4 Take responsibility by acknowledging the administrative errors and make amends, and

4.4.5 Seek improvement of the public administration to the benefit of the individual, as well as the citizens to prevent recurrence

4.5 The complaints relate to the management of the affairs of an organ of state and therefore constitute conduct in state affairs. The Public Protector accordingly has jurisdiction to investigate the allegations.

5. THE INVESTIGATION

5.1 Key Sources of information

5.1.1 The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act:

5.1.1.1 Meetings and or interviews were conducted with the following persons or authorities:

- The Complainants, Messrs Hoffman and Pypers, who were at one meeting accompanied by Mr D Manoeli from the ANC, Midvaal.
- Representatives of the Municipality
- The SAPS
- The Special Investigations Unit
- The MEC for Gauteng Local Government and Housing
- Mr Odendaal
• A delegation from the DA which included Mr Trollip and Mr Schaffer
• Mr W Spies of the Freedom Front Plus

5.1.1.2 The following documents were scrutinised and analysed:

  a) The minutes of Council meetings;
  b) The minutes and reports of the Audit Committee;
  c) Special Internal Audit Report: Alleged irregularity with disposal of donated property: Stand 1491 Henley-on-Klip: Estate Late CCC Hennop;
  d) Forensic Report and Audit Committee Report: Legal Matters: Investigation into Agent Prepaid Electricity Accounts; and
  f) Evidence bearing files submitted by the Complainants, with the assistance of Mr D Manoeli from the ANC, Midvaal
  g) Court Affidavits
  h) Correspondence with the Law Society
  i) Correspondence with the Municipality
  j) Responses to the Public Protector’s provisional report from the Executive Mayor Mr T Nast, the Municipal Manager, Mr A De Klerk, Mr A Odendaal on behalf of OSI, as well as the Complainants.

5.1.1.3 The following legislation, policies and literature were considered and applied:

  a) The Constitution;
  b) The Public Protector Act;
  c) Local Government: Municipal Finance Management Act, 2003 (MFMA)\(^3\);
  d) Preferential Procurement Policy Framework Act, 2000 (PPPFA)

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3 The Municipality emphasized that Implementation was phased to accommodate the diverse capacity of municipalities. While municipalities with high capacity were required to have fully implemented the provisions of the MFMA by 1 July 2005, medium capacity municipalities such as the Municipality in question were given extra time to comply with certain aspects of the MFMA by 1 July 2006 and Municipalities with low capacity by 1 July 2007
e) The Municipal Structures Act, 1998;

f) The Municipal Systems Act; 2000

g) The Local Government Transition, 1993

h) The Promotion of Administrative Justice Act, 2000

i) The (Midvaal) Municipal Supply Chain Management Policies of 2005 and 2010; and

j) The Municipal Supply Chain Management Regulations (MSCM Regulations)\(^4\).

5.1.1.4 In the course of the investigation the Investigators considered and analysed the results of the following forensic investigations and audits:

a) Investigation into Agent Prepaid Electricity by Messrs Connaughton Miller Smith;

b) Investigation into Agent Prepaid Electricity by Expert Forensic Services dated 15 March 2007;

c) Investigation into Alleged irregularity with disposal of donated property: Stand 1491 Henley -on-Klip: Estate Late CCC Hennop and other donated properties by Connaughton Miller Smith and Prof H Pienaar.

d) The internal records and correspondence relating to these matters; and

e) Minutes of the relevant Audit committee meetings as well as Council meetings where the reports served.

5.2 Scope of the investigation

5.2.1 The investigation initially focused on the original allegations. As the investigation progressed further complaints surfaced. Some of these were investigated whereas others were referred to the competent authorities such as the SIU and the SAPS.

\(^4\) Municipal Supply Chain Management Regulations GG 27636 of 30 May 2005 implemented 1 July 2006.
5.2.2 The investigation revealed that identical complaints were being dealt with by the SAPS, the National Prosecuting Authority (Director of Public Prosecutions), the Gauteng Provincial Government of Housing and Local Government and the Minister of Co-operative Governance (who in turn requested the SIU to investigate the matter).

5.2.2.1 While these institutions were expected to attend to aspects of the complaints in terms of their respective functions and mandates, there was a general impression that the Public Protector investigation had to be finalised before any other action would be considered by the other institutions concerned.

5.2.2.2 Other agencies were engaged to clarify issues relating to overlapping mandates and inter-agency assistance and availability of resources to, for instance, attend to issues that might require forensic expertise. The objective was to isolate the issues falling strictly under the Public Protector's mandate to avoid a duplication of efforts.

6. REGULATORY FRAMEWORK

6.1 Public procurement on local government level

6.1.1 The Constitution

6.1.1.1 Section 217 of the Constitution provides that organs of state (and this includes municipalities and municipal entities) must contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

6.1.1.2 Municipalities and municipal entities may, however, implement a procurement policy that provides for categories of preference in the award of contracts and the advancement of persons or categories of persons disadvantaged by unfair discrimination. Such preferential procurement policy

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5 See s 217(1) which refers to organs of state in the national, provincial and local sphere of government. See also s 239 of the Constitution for the definition of an organ of state.
must be in accordance with national legislation that provides a framework for
its implementation.

6.1.1.3 The objects of local government as set out in section 152 of the
Constitution are:

(a) to provide democratic and accountable government for local
communities;

(b) to ensure the provision of services to communities in a
sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community
organisations in the matters of local government.”

6.1.2 The Preferential Procurement Policy Framework Act, 2000 and Regulations

6.1.2.1 The PPPFA and Regulations⁶ have been enacted to provide a framework
for the use of procurement as a policy tool as required by section 217 of
the Constitution. The Act applies to a list of organs of state, which includes
municipalities.

6.1.2.2 The PPPFA and Regulations create a point system for the evaluation and
adjudication of bids in terms of which points are awarded on the basis of
price and functionality and the attainment of two specific goals for
preference purposes. Preference may be afforded to persons or
categories of persons historically disadvantaged by unfair discrimination
on the basis of race, gender or disability, as well as for the implementation
of the Government's Reconstruction and Development Programme (RDP).

6.1.2.3 For contracts between R30 000 and R500 000 the points are divided on a
80/20 split in terms of which bidders are awarded points out of 80 for

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⁶ Preferential Procurement Regulations GG 22549 of 10 August 2001
price and functionality and points out of 20 for preference. For contracts above R500 000 the points are divided on a 90/10 split, with points out of 90 for price and points out of 10 for preference. A contract must be awarded to the bidder scoring the highest points in terms of the relevant point system unless there are objective criteria that justify the award of the contract to another bidder.\textsuperscript{7}

6.1.3 The Local Government Transition Act, 1993 \textsuperscript{8}

6.1.3.1 As trustees of public funds, Councillors and officials of a Municipality have an obligation to ensure that resources are managed in the most efficient and effective manner possible. A determining factor in meeting this obligation is ensuring that when an organ of State, including Municipalities, procures goods and services, it does so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.\textsuperscript{9}

6.1.3.2 Notwithstanding the preceding paragraph, a Municipality may, in accordance with a framework prescribed by national legislation, in awarding contracts, give preference to the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, and shall make the granting of such preferences public in the manner determined by the Council.\textsuperscript{10}

6.1.4 Local Government: Municipal Finance Management Act, 2003 and Municipal Supply Chain Management Regulations

6.1.4.1 A new supply chain management system was introduced for municipalities and municipal entities during 2005 and 2006 with the view to strengthen

\textsuperscript{7} See discussion in "The committee system for competitive BIDS in local government". P Bolton Associate Professor of Law, University of the Western Cape, South Africa. PER: Potchefstroomse Elektroniese Registreer. PER vol 12 no 2 Potchefstroom, 2009

\textsuperscript{8} As amended and later repealed in 2008

\textsuperscript{9} Section 10G(5)(a)

\textsuperscript{10} Section 10G(5)(b)
governance principles, by separating the roles and responsibilities of key players in supply chain management.

6.1.4.2 They were assisted with the development of appropriate policies, plans and processes; setting up structures for clear roles and responsibilities; and key threshold values. This was supported by sample bid documentation, a procurement manual and training for bid committee members. National Treasury provided a model supply chain management policy to assist municipalities and municipal entities, which is supported by National Treasury MFMA circular number 22 of 2005. Once the municipal council or the board of directors of a municipal entity has adopted a supply chain management policy, the municipal manager/accounting officer was responsible for implementing it.

6.1.4.3 Implementation was phased to accommodate the diverse capacity of municipalities by National Treasury while municipalities with high capacity were required to implement the Act more rapidly and were expected to have fully implemented the provisions of the MFMA by 1 July 2005. Medium capacity municipalities need to implement by 1 July 2006 and Municipalities with low capacity were given extra time to comply with certain aspects of the MFMA by 1 July 2007. The allocation of status of high, medium and low capacity status to municipalities was published in the Government Gazette.

6.1.4.4 The MFMA provides that organs of state falling within the ambit of the Act must have and implement a supply chain management policy which is ‘fair, equitable, transparent, competitive and cost-effective’.\(^{11}\) A supply chain management policy must also comply with a prescribed regulatory framework which complies with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness.\(^{12}\)

6.1.4.5 In terms of sections 62 and 95 of the MFMA, accounting officers are fully responsible and should be held accountable for any expenditures relating to Supply Chain Management (SCM) within their line of responsibility. Any

\(^{11}\) S 111 read with s 112(1).

\(^{12}\) S 112(2).
expenditure incurred should be subject to appropriate regulations and accounting officers’ directives and procedures. Guidelines issued by the National Treasury will provide the necessary parameters. It is the responsibility of each accounting officer to implement the SCM policy adopted by council. The accounting officer may develop an implementation plan to assist with managing the implementation of the SCM policy.

6.1.4.6 The Municipal Council has an oversight role in ensuring that the accounting officer executes council’s policy. The council is empowered to make supply chain policy within the ambit of the applicable legislation, such as the prescripts contained in the MFMA, the PPPFA and the Broad-Based Black Economic Empowerment Act, 2003. The accounting officer should on a monthly basis report to the Executive Mayor/Exco and, on at least a quarterly basis, to Council on implementation of the supply chain management policy. In terms of section 117 of the MFMA, Councillors are not allowed to be members of a municipal bid committee or any other committee evaluating or approving bids, quotations, contracts or other bids, nor attend any such meeting as an observer. 13

6.1.4.7 In terms of the Municipality Supply Chain Management Regulations (MSCM) a supply chain management policy must make provision for effective systems for demand management, acquisition management, logistics management, disposal management, risk management, and performance management. The Supply Chain Management Policy must provide for four types of acquisition / procurement:

i) Petty cash purchases;

ii) Written or verbal quotations;

iii) Formal written price quotations; and

iv) Competitive bidding should be used for contracts over a certain value and for contracts with a duration period exceeding one year.

13 MFMA Circular No. 2 of 2004 Municipal Finance Management Act No. 55 of 2003
6.1.4.8 Regulation 26 of the MSCM Regulations provides that a supply chain management policy must provide for a committee system for competitive bids consisting of a bid specification committee, a bid evaluation committee and a bid adjudication committee:

a) The bid Specification Committee has responsibility for compiling the specifications for each bid for the procurement of goods or services.

b) The Bid Evaluation Committee must evaluate bids in accordance with the specifications for a specific procurement and the points system as may be set out in the SCM policy of the municipality as prescribed in the specifications and in terms of the PPPFA. It is also required to evaluate each tender to execute the contract. Thereafter the evaluation committee must submit their report to the adjudication committee including its recommendations regarding the award of the bid.

c) The Bid Adjudication Committee must consider the report and recommendations of the bid evaluation committee and either make a final award or a recommendation to the accounting officer (in this case the municipal manager) to make the final award.

6.1.4.9 Regulation 2(3) provides that no municipality may act otherwise than in accordance with its supply chain management policy when procuring goods or services.

6.1.4.10 At local government level, organs of state may however, dispense with official procurement processes, and these include public tender procedures, and procure goods or services “through any convenient process, which may include direct negotiations”. This may, however, only be done in case of an emergency; if the goods or services are only available from a single provider; or in any other exceptional case where it is impractical or impossible to follow official procurement procedures. The reasons for any deviations must be recorded and reported to the next meeting of the council, or board of directors in the case of a municipal

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14 MSCM reg 36(1)(a).
15 MSCM reg 36(1)(a)(j), 36(1)(a)(f) and 36(1)(a)(v).
entity, and a note to this effect must be included in the annual financial statements.\(^\text{1}\)

6.1.5 **Midvaal Municipal Supply Chain Management Policy and Procedures**

6.1.5.1 The Municipal Supply Chain Management Policy and Procedures were adopted by the Council in terms of section 111 of the MFMA on 10 November 2005.

"Supply chain management policy"

(1) A officials and other role players in the supply chain management system of the municipality must implement this Policy in a way that —

(a) gives effect to -

(i) section 217 of the Constitution; and

(ii) Part I of Chapter 11 and other applicable provisions of the Act;

(b) is fair, equitable, transparent, competitive and cost effective

(c) complies with

(i) the Regulations; and

(ii) any minimum norms and standards that may be prescribed in terms of section 168 of the Act;

(d) is consistent with other applicable legislation;

(e) does not undermine the objective for uniformity in supply chain management systems between organs of state in a spheres; and

(f) is consistent with national economic Policy concerning the promotion of investments and doing business with the public sector.

(2) This Policy applies when the municipality

— (a) procures goods or services;
(b) disposes goods no longer needed;

(c) selects contractors to provide assistance in the provision of municipal services otherwise than in circumstances where Chapter 8 of the MSA applies; or

(d) selects external mechanisms referred to in section 80 (1) (b) of the Municipal Systems Act for the provision of municipal services in circumstances contemplated in section 83 of that Act.

6.1.5.2 The legal service were reportedly procured in terms of paragraph 35 of the Policy, which provides for the appointment of consultants:

(1) The accounting officer may procure consulting services provided that any Treasury guidelines in respect of consulting services are taken into account when such procurements are made.

(2) Consultancy services must be procured through competitive bids if:

(a) the value of the contract exceeds R200 000 (VAT included); or

(b) the duration period of the contract exceeds one year.

(3) In addition to any requirements prescribed by this policy for competitive bids, bidders must furnish particulars of —

(a) all consultancy services provided to an organ of state in the last five years; and

(b) any similar consultancy services provided to an organ of state in the last five years.

(4) The accounting officer must ensure that copyright in any document produced, and the patent rights or ownership in any plant, machinery, thing, system or process designed or devised, by a consultant in the course of the consultancy service is vested in the municipality.

6.1.5.3 The Municipality's current Procurement Policy (the Policy) is contained in a document called "Municipal Supply Chain Management Policy Local

6.2 Town-Planning

6.2.1 The Town-Planning and Townships Ordinance, 1986

6.2.1.1 Section 56. Application by owner of land for amendment of town-planning scheme (Rezoning for residential, business or industrial purposes)

(1) An owner of land who wishes to have a provision of a town-planning scheme relating to his land amended may, in such manner as may be prescribed, apply in writing to the authorised local authority, and at the same time—

(a) he shall pay to the local authority such fees as may be levied by that local authority; and

(b) he shall give notice of the application

6.2.1.2 Section 56(8)

(8) After the provisions of subsection (7) have been complied with, the authorised local authority shall consider the application with due regard to every objection lodged and all representations made, and may for that purpose—

(a) carry out an inspection or institute any investigation;

(b) request any person to furnish such information, as it may deem expedient.

(9) Having considered the application in terms of subsection (8) the authorised local authority may—

(a) approve the application subject to any amendment which it may, after consultation with the applicant, deem fit or refuse it;

(b) postpone a decision on the application, either wholly or in part.
6.3. The acquisition of land

6.3.1 Section 63 of the MFMA states that the accounting officer of a municipality must take all reasonable steps to ensure,

(a) that the municipality has and maintains a management accounting and information system that accounts for the assets and liabilities of the municipalities;

(b) that the municipality has and maintains a system of control of assets and liabilities, including an asset and liabilities register as may be prescribed.

6.3.2 In compliance with the requirements of the National Treasury, the chief financial officer must ensure that all fixed assets are classified under the following headings in the fixed assets register:

a) PROPERTY, PLANT AND EQUIPMENT

- land (not held as investment assets)
- infrastructure assets (assets which are part of a network of similar assets)
- community assets (resources contributing to the general well-being of the community)
- heritage assets (culturally significant resources)
- other assets (ordinary operational resources)

b) INVENTORY

- housing (rental stock or housing stock not held for capital gain)

c) INVESTMENT PROPERTY

- investment assets (resources held for capital or operational gain)

6.3.3 Any land or buildings owned or acquired by the municipality with the intention of selling such property in the ordinary course of business, or any land or
buildings owned or acquired by the municipality with the intention of developing such property for the purpose of selling it in the ordinary course of business, shall be accounted for as inventory.

6.3.4 Where a fixed asset is donated to the municipality, or a fixed asset is acquired by means of an exchange of assets between the municipality and one or more other parties, the asset concerned shall be recorded in the fixed asset register at its fair value, as determined by the chief financial officer.17

6.4 The disposal of land

6.4.1 Sections 14 and 90 of the MFMA state, respectively, that municipalities and municipal entities may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

6.4.2 A municipality may transfer ownership or otherwise dispose of a capital asset after the municipal council, or the council of its parent municipality (in the instance of a municipal entity) in a meeting open to the public-

a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

6.4.3 Any transfer of ownership of a capital asset must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality or municipal entity must have.

6.4.4 In terms of regulation 40(1) of the MSCM Regulations a "supply chain management policy must provide for the effective system of disposal management for the disposal or letting of assets.”
6.4.5 Regulation 40(2)(b)(i) provides that “immovable property may only be sold at market related prices except when the public interest or the plight of the poor demands otherwise”.

6.5 Credit control

6.5.1 Section 153 (a) of the Constitution provides that a municipality must structure its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community;

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

a) The promotion of the efficient, economic and effective use of resources;

b) The provision of services impartially, fairly, equitably and without bias; and

c) The fact that people’s needs must be responded to.

6.5.3 In terms of section 4(1)(c) of the MSA, the Council of a municipality has the right to finance the affairs of the municipality by charging fees for services, imposing surcharges on fees, rates on property and, to the extent authorised by national legislation, other taxes, levies and duties;

6.5.4 Section 5 (1) (g), read with subsection (2) (b), of the MSA provides that members of the local community have the right to have access to municipal services which the municipality provides provided that they, where applicable and subject to the policy for indigent debtors, pay promptly for services fees, surcharges on fees, other taxes, levies and duties imposed by the municipality;

6.5.5 Section 6(2)(c), (e), and (f) of the Systems Act provides that the administration of a municipality must take measures to prevent corruption; give members of a local community full and accurate information about the level and standard of municipal services that they are entitled to receive; and
inform the local community about how the municipality is managed, of the costs involved and the persons in charge;

6.5.6 Chapter 9, sections 95, 96, 97, 98, 99 and 100, of the MSA provides for Customer Care Management, Debt Collection Responsibility of the Municipality, Contents of the Policy, Bylaws that give effect to the Policy, Supervisory authority and Implementing Authority.

6.6 Duties of Municipal Accounting Officer in terms of the MFMA

6.6.1 Section 32(6) of the (MFMA) determines as follows:

"(6) The accounting officer must report to the South African Police Service all cases of alleged –

(a) irregular expenditure that constitute a criminal offence; and

(b) theft and fraud that occurred in the municipality."

6.6.2 Section 62 of the MFMA furthermore stipulates the following:

"62. General financial management functions. –

(1) The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure-

(a) that the resources of the municipality are used effectively, efficiently and economically;

(b) that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards;

(c) that the municipality has and maintains effective, efficient and transparent systems -

(i) of financial and risk management and internal control; and
(ii) of internal audit operating in accordance with any prescribed norms and standards;

(d) that unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented;

(e) that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15; and

(f) that the municipality has an implements -
   i) a tariff policy referred to in section 74 of the MSA;
   ii) a rates policy as may be required in terms of any applicable national legislation;
   iii) a credit control and debt collection policy referred to in section 96(b) of the MSA; and
   iv) a supply chain management policy in accordance with Chapter 11."

6.6.3 Section 64 also determines as follows:

"64. Revenue Management.

(1) The accounting officer of a municipality is responsible for the management of the revenue of the municipality.

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

(a) that the municipality has an effective revenue collection system consistent with section 95 of the Municipal System Act and the municipality's credit control and debt collection policy;

(b) that revenue due to the municipality is calculated on a monthly basis;

(c) that accounts for municipal tax and charges for municipal services are prepared on a monthly basis, or
6.7 Provisions of the MSA

6.7.1 In terms of section 76 of the MSA a Municipality may provide a municipal service in its area or a part of its area through an external mechanism by entering into a service delivery agreement with any other institution, entity or person legally competent to operate a business activity.

6.7.2 If a municipal service is provided through a service delivery agreement in terms of section 76 (b), the municipality remains responsible for ensuring that that service is provided to the local community in terms of the provisions of this Act\(^{18}\), and accordingly must—

(a) regulate the provision of the service, in accordance with section 41;

(b) monitor and assess the implementation of the agreement, including the performance of the service provider in accordance with section 41;

(c) perform its functions and exercise its powers in terms of Chapters 5 and 6 if the municipal service in question falls within a development priority or objective in terms of the municipality’s integrated development plan;

(d) within a tariff policy determined by the municipal council in terms of section 74, control the setting and adjustment of tariffs by the service provider for the municipal service in question; and

(e) generally exercise its service authority so as to ensure uninterrupted delivery of the service in the best interest of the local community.

6.7.3 In terms of section 81(2) of the MSA a municipality, through a service delivery agreement—

(a) may assign to a service provider responsibility for—

(i) developing and implementing detailed service delivery plans within the framework of the municipality’s integrated development plan;

\(^{18}\) Section 81
(ii) the operational planning, management and provision of the municipal service;

(iii) undertaking social and economic development that is directly related to the provision of the service;

(iv) customer management;

(v) managing its own accounting, financial management, budgeting, investment and borrowing activities within a framework of transparency, accountability, reporting and financial control determined by the municipality, subject to applicable municipal finance management legislation;

(vi) the collection of service fees for its own account from users of services in accordance with the municipal council’s tariff policy in accordance with the credit control measures established in terms of Chapter 9;

6.7.4 Chapter 9 of the MSA

a) In terms of section 96 a duty is placed on the Municipality to collect all money that is due and payable to it and for this purpose to adopt, maintain and implement a credit control and debt collection policy consistent with its rules and tariff policies and which complies with the provisions of the Act. Section 97 provides for the contents of the credit control and debt collection policy and provides, inter alia, in section 97(1)(g) that the policy must provide for the termination of services or the restriction of the provision of services when payments are in arrears.

b) Section 102 provides for certain powers of the municipality to deal with accounts. It reads as follows:

"102 Accounts

(1) A municipality may—

(a) consolidate any separate accounts of persons liable for payments to the municipality;
(b) credit a payment by such a person against any account of that person; and

(c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.

(2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the

6.7.5 Chapter 10 of the MSA: Provincial and National Monitoring and Standard Setting

In terms of section 105 the MEC for local government in a province must establish mechanisms, processes and procedures in terms of section 155 (6) of the Constitution to-

(a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;

(b) monitor the development of local government capacity in the province; and

(c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.

(2) The MEC for local government in a province may by notice in the Provincial Gazette require municipalities of any category or type specified in the notice or of any other kind described in the notice, to submit to a specified provincial organ of state such information as may be required in the notice, either at regular intervals or within a period as may be specified.

(3) When exercising their powers in terms of subsection (1) MECs for local government-

(a) must rely as far as is possible on annual reports in terms of section 46 and information submitted by municipalities in terms of subsection (2); and
(b) may make reasonable requests to municipalities for additional information after taking into account-

(i) the administrative burden on municipalities to furnish the information;

(ii) the cost involved; and

(iii) existing performance monitoring mechanisms, systems and processes in the municipality.

6.8 The conduct of councillors

6.8.1 Councillors are bound by the Code of Conduct set out in Schedule 5 of the Municipal Structures Act, 1998. In terms of paragraph 2 of the Code a councillor must –

“(a) perform the functions of the office in good faith, honestly and a transparent manner, and

(b) at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.”

6.8.2 Paragraph 6 (1) of the Code provides that “a councillor may not use the position or privileges of a councillor, or confidential information obtained as a councillor, for private gain or to improperly benefit another person.

(2) Except with the prior consent of the municipal council, a councillor may not-

(a) be a party to or beneficiary under a contract for

(i) the provision of goods or services to the municipality; or

(ii) the performance of any work otherwise than as a councillor for the municipality;

(b) obtain a financial interest in any business of the municipality; or
(c) for a fee or other consideration appears on behalf any other person before the council or a committee."

6.8.3 In terms of Paragraph 12 of the Code a councillor may not "use, take, acquire or benefit from any property or asset owned, controlled or managed by the municipality to which that councillor has no right".

6.8.4 If the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of this Code has been breached, the chairperson deal with the matter in accordance with the provisions of paragraph 13 of the Code, and -

"(a) authorize an investigation of the facts and circumstances of the alleged breach;
(b) give the councillor a reasonable opportunity to reply in writing regarding the alleged breach; and
(c) report the matter to a meeting of the municipal after paragraphs (a) and (b) have been complied with.
(2) A report in terms of sub item (1)(c) is open to the public.
(3) The chairperson must report the outcome of the investigation to the MEC for local government in the province concerned."

6.8.5 The MEC for Local Government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation on whether the councillor should be suspended or removed from office.

6.8.6 The Prevention and Combating of Corrupt Activities Act, 2003 defines a public officer as any person receiving remuneration from public funds. A councillor is therefore subject to the laws that govern all other public officers as the Act defines the municipality as a public body.¹⁹

6.9 Conduct of Municipal Staff Members

6.9.1 Schedule 2 of the MSA provides for the Code of Conduct in respect of municipal staff members.

6.9.1.1 A staff member of a municipality must at all times :-

(a) *loyally execute the lawful policies of the municipal council;*

(b) *perform the functions of office in good faith, diligently, honestly and in a transparent manner;*

(c) *act in such a way that the spirit, purpose and objects of section 50 are promoted;*

(d) *act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and*

(e) *act impartially and treat all people, including other staff members, equally without favour or prejudice.*

6.9.1.2 Commitment to serving the public interest. A staff member of a municipality is a public servant in a developmental local system, and must accordingly:-

(a) *foster a culture of commitment to serving the public and a collective sense of responsibility for performance in terms of standards and targets; and*

(b) *promote and seek to implement the basic values and principles of public administration described in section 195 (1) of the Constitution;*

6.9.2 In terms of section 195 of the Constitution the public administration, in every sphere of government must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

7. EVIDENCE OBTAINED DURING THE INVESTIGATION
7.1 Evidence obtained in relation to the appointment of a service provider to provide legal services, debt collection services and auctioneering services

7.1.1 General

7.1.1.1 The Municipality confirmed that Mr A Odendaal, the DA Constituency Chairperson for the Midvaal Region, is a partner in the law firm OSI. According to affidavits filed in the South Gauteng High Court, Johannesburg, OSI have been the Attorneys for the Municipality (while under the control of a number of different political parties, as well as for other Municipalities) for the past 29 years.

7.1.1.2 It was established that OSI was appointed as the attorney for the Municipality in 2006 for the provision of legal services, debt collection services and auctioneering services to the Municipality.

7.1.1.3 It was also established that OSI was appointed as a service provider (attorney for the Municipality) prior to 2006.

7.1.1.4 The Municipality denied the allegation that OSI was the sole service provider for legal services to the Municipality. It submitted a list with the names of 17 lawyers and advocates who have on occasion been contracted by the Municipality to render specific legal services in addition to that rendered by OSI.

7.1.1.5 The Executive Mayor reiterated that OSI (and the firm's predecessors) have performed legal work for various municipalities including municipalities governed by other political parties. He disputed the allegation that the firm's appointment was simply because one of the partners was the Chairperson of the local DA Constituency. He stated that Mr Odendaal only assumed the position of constituency chairperson in 2007. He furthermore submitted that the firm was appointed in terms of the Municipal Supply Chain Management Policies that were applicable at the time.

7.1.2 The rendering of services to the Municipality by Odendaal and Summerton prior to 2006
7.1.2.1 According to affidavits filed in July 2008 in the South Gauteng High Court, Johannesburg, Mr Odendaal (from OSI) stated that he had been the Meyerton (Midvaal) Council's attorney "for the past 29 years".

7.1.2.2 In bid documents submitted in 2006 Mr Odendaal further stated that he has been acting as attorney for the former Meyerton Town Council since 1979. In 2000 his firm OSI was appointed to render all legal services to the Municipality, including conveyancing, collections of debt, legal opinions, labour matters and Magistrate and Supreme Court matters.

7.1.2.3 The Municipality confirmed that a tender for the appointment of a Council Attorney that would provide legal services, debt collection services and auctioneering services on a three (3) year contract was issued for the first time in 2006.

7.1.3 2006 - Tender for the appointment of a Council Attorney

7.1.3.1 On 12 June 2006 the Municipality advertised a bid for the appointment of Council Attorney to provide legal services, debt collection services and auctioneering services (bid number 8/2/5/9) for a three year period running from 1 July 2006 to 30 June 2009 with a closing date of 5 July 2006.

7.1.3.2 According to the Municipality, the Municipal Manager had the specifications drawn up and made the appointment in 2006 in terms of the Supply Chain Management Policy of 2005 in respect of consultants as it applied at that time.

7.1.3.3 The bid specifications called for legal assistance to the Municipality by a practicing legal firm in the following disciplines:

   a) Written and/or oral legal opinions to Council and its Departments covering the whole of the spectrum of Local Government and other matters entrusted to the Council from time to time;
   b) Drafting of agreements;
   c) Examine agreements;
d) Examine all enactments applicable to Council from time to time with the necessary comments;
e) Investigations;
f) Attends to labour disputes and provide Council with the necessary advice;
g) All administrative aspects of disciplinary committees, i.e. drafting of charge sheets, prosecuting and the like;
h) Attends to all legal aspects of Town Planning, Building Control and Municipal Health issues;
i) Attends to debt collection in terms of Council’s Policy;
j) Drafting of correspondence on behalf of Council in matters requiring legal expertise;
k) Negotiate with officials of the Council with outside institutions in complex matters;
l) Attends to all conveyance matters, notarial, labour- magistrates- and Supreme Court litigation matters and all magistrate- and Supreme Court debt collection matters;
m) Attending to execution sales of properties sold for outstanding rates & taxes;
n) Conveyance of properties donated to council, sold in execution, sold on auction; and;
o) Public Auction of Council Property

7.1.3.4 The report of the Bid Evaluation Committee to the Council reflected that three bids were received on the closing date. It is reported that two of the bids were not considered by the Bid Evaluation Committee because they did not meet the bid requirements, as they only submitted a tender for one of the three services required:

7.1.3.5 The Bid Adjudication Committee recommended that OSI be appointed as the Municipality’s attorney to provide legal services, debt collection services and auctioneering services for the financial years 2006 to 2009.

7.1.3.6 The Municipal Manager approved the appointment on 8 August 2006.
7.1.3.7 A statement by a former Councillor and Mayor, Mr Mclean, presented as support for the allegation that the tender in question was awarded in an irregular manner, was scrutinised. In the statement Mr Mclean -

a) Referred to an incident where Mr Odendaal allegedly offered to write off an amount owed to him by Mr McLean in exchange for his withdrawal from the local government municipal elections as an independent candidate;

b) Noted that the Council never attended to a complaint received from an attorney in 2001 that there had been undue influence on the Municipality to exclude other attorneys from doing legal work for the Municipality, or even to share the work as part of a panel of attorneys;

c) Stated that “there is no doubt that councilors would collude … to ensure that a transparent tender process would not be followed for the allocation of legal work and property transactions on behalf of the Municipality”; and

d) Stated that he was no longer prepared to be associated with the open manner in which the Council was being manipulated.

7.1.3.8 The Municipality and the successful bidder “emphatically” denied taking any action to prevent any other firm of attorneys from filing a competing bid or from being appointed for legal services. The Municipal Manager stated that the awarding of tenders took place according to Municipal Supply Chain Policies as well as in accordance with the MFMA in terms of which Councillors are prohibited from being members of the tender committee. The Municipal Manager further stated as follows:

“In terms of sect 117 of the MFMA, Councillors are barred from being involved in the awarding of tenders. In Midvaal and since the Bid Adjudication Committee has been established in terms of the MFMA, Councillors are not involved in the awarding of tenders. Tenders are generally awarded on the basis of highest point scoring by qualifying tenderers, except if there is a legislatively permissible deviation.”

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7.1.3.9 In addition, Mr Odendaal *inter alia*, submitted that:

a) The alleged incident took place when Mr McLean was no longer a Councillor and would in any event not have been in any position to influence proceedings in the Municipality, and

b) Mr Mclean applied to be a candidate Councillor of the DA. It was only after his application failed that he "stated that he was no longer prepared to be associated with the open manner in which the Council was being manipulated";

7.1.4 **The 2009 — Tender for the appointment of a Council Attorney**

7.1.4.1 The Executive Mayor stated that it was decided to move towards utilising a panel of attorneys when the contract under the 2006-bid award was to expire. That was done by the newly appointed Executive Director: Corporate Services, Mr. T. Peeters, who assumed office on 1 January 2008. Mr. Peeters raised it with him; he agreed with him and requested him to discuss it with his political head, the relevant Member of the Mayoral Committee, who was Mr. Hoffman at the time.

7.1.4.2 On 18 May 2009 the Municipality advertised a new tender (Bid 8/2/5/9) for the rendering of legal services to the Municipality.

7.1.4.3 The tender specifications provided for the appointment of a panel of attorneys to perform services in accordance with different categories, including:

a) *Conveyancing and Notarial*;

b) *Commercial Contracts*;

c) *Advice on, and Representation in law and civil and Criminal Litigation*;

d) *Labour*;

e) *General Legal Services*; and

f) *Debt Collection*. 
7.1.4.4 The nature of the services required was broken down in the following manner:

a) **Conveyancing and Notarial;**
   - Conveyancing
     - Transfer of properties alienated/acquired by the Council including but not limited to housing transfers;
     - Registration, acquisition and cancellation of servitudes;
     - Opening of township register and all processes related thereto;
     - Cancellation/registration of mortgage bonds;
     - Drafting of Powers of Attorney;
     - Excision of holdings;
     - Conversion from Leasehold to freehold;
     - All other conveyancing work not listed above.
   - Expropriations;
   - Valuations, Rates and Taxes; and
   - Mining and Mineral Laws.

b) **Commercial Contracts;**

c) **Advice on, and Representation in law and civil and Criminal Litigation;**
   - General
   - Magistrate’s Court Litigation
   - High Court Litigation;
   - Arbitration
   - Fields of expertise
     - Intellectual property
     - Information technology
     - Access to information and Administrative Justice
     - Environmental Law
     - Evictions
     - Town Planning
o Prosecution of Contravention of National Building Regulations and Building Standards Act, 1977
o Tenders/ Bids and Contracts
  o Debt Collection (attorney will be responsible to obtain all data necessary to be able to perform required duties)

d) Labour;
  • Including
    o Appointment as presiding and representing officers in disciplinary enquiries and disciplinary appeals;
    o Opinions and advice on processes;
    o Representing the Municipality in the CCMA and Bargaining Council;
    o Representing the Municipality in the Labour Courts and High Court Applications; and
    o Handling of strikes.

e) General Legal Services;
  • Including
    o Legal opinions related to all aspects involving local government;
    o Drafting and vetting By-laws, policies and procedures for legal compliance; and
    o In general any kind of legal service not specified elsewhere.

7.1.4.5 Prospective bidders were invited to bid for any individual or combination of the fields.

7.1.4.6 Bids were received from 22 service providers. A Bid Evaluation Committee was constituted to evaluate the bids and to draft a recommendation to the Bid Award Committee. Six tenders were disqualified on the basis that it failed to comply with the requirements relating to the submission of a tax clearance certificate and the pricing schedule.

7.1.4.7 The rest of the tenders were evaluated and scored according to price, rebate offered, HDI (preference points) and functionality. The bids were evaluated
in terms of the main categories of services for which the bidders tendered, namely:

a) Conveyancing and notarial (13 bids were evaluated and scored);

b) Commercial contracts (11 bids were evaluated and scored)

c) Advice on, and representation in law and civil and criminal litigation (11 bids were evaluated and scored);

d) Labour (11 bids were evaluated and scored);

e) General Legal Services (11 bids were evaluated and scored);

f) Debt collection (13 bids were evaluated and scored).

7.1.4.8 The Bid Evaluation Committee recommended that the tender for the rendering of legal services be split amongst the highest-ranking bidders in the six categories whereby a panel of legal service providers will be utilised throughout Council for the various legal services required.

7.1.4.9 The recommendations were considered by the Bid Adjudication Committee and the Committee decided on 23 June 2009 to award the tender to a panel of five law firms.

7.1.4.10 The previous service provider, OSI, was appointed to perform debt collecting services and was appointed with two other firms to provide “advice on and representation in law and civil and Criminal Litigation.”

7.2 Award of tender for the Upgrade of Meyerton Central Business District Project – Phase 1: Upgrade of the Truck Stop at Meyer Street and the Construction of a new Ablution Facility at Junius Street, Meyerton

7.2.1 One of the Complainants, Mr Pypers, declared, in his opposing affidavit dated 11 August 2008, in the High Court matter between him and Mr Odendaal, that:

a) “During January 2007 a landscape architect appointed by the Midvaal Local Municipality made an invitation to a number of local brick
and paving manufactures to attend an exhibition of their products in the Mayoral Committee Room on 30 January 2007 for the intended upgrading of the main road (Loch Street) in the CBD of Meyerton.

b) On 30 January 2007 the exhibition was postponed to 6 February 2007 when 3 local manufactures Simstone, Mimosa and Stonehaus, exhibited their products.

c) After this exhibition, Buela Venter, employed by Simstone, telephoned the Municipality on numerous occasions to establish … the successful bidder would be, but the Midvaal Municipality did not respond.

d) The 1st applicant, ALARN Concrete Products according to a CIPRO search was registered on 3 October 2005 and the 2nd applicant (Mr Odendaal) was appointed a Director and Shareholder on 15 March 2006. According to the CIPRO search, the first applicant is involved in the manufacturing of concrete products such as cobblestone …

e) The 2nd applicant bought a company, Erf 232 (Pty) Ltd, on 7 July 2006, which company owns Erf 33 Pendale, agricultural holdings, from where the 1st applicant trades.”

7.2.2 The Public Protector also had access to the supporting affidavit of Ms B Venter dated 8 August 2008, confirming the events as described by Mr Pypers. She added that when the exhibition was postponed from 9 to 12 November 2007, the exhibitors were advised that they would not be allowed to display any signs with their names, or brochures. She also stated that she contacted an official of the Municipality on 7 April 2008 to enquire about the allocation of the tender. The official reportedly advised her that she was no longer involved but that the first phase had already started and that a “councillor who was involved in the manufacturing of bricks was probably going to supply the brick for the upgrading of the CBD”. (translation)

7.2.3 The Municipality confirmed that an exhibition was held at the Municipal offices. The exhibition was an invitation by suppliers to display their wares. It
was not an invitation to tender. No tender for the paving of Loch Street, Meyerton, has been advertised by the Municipality and neither Mr Odendaal, ACP (Pty) Ltd, or any other businesses have tendered for the paving of Loch Street. Consequently, no tender has been awarded by the Municipality to Mr Odendaal or ACP (Pty) Ltd or any other person or company for paving in Loch Street, Meyerton.

7.2.4 The Municipal Manager advised that a contract to upgrade the Meyerton CBD was awarded to Lichenry Construction (Pty) Ltd – a long standing contractor in the area who was in no way associated with Mr Odendaal or the “newly established” company ACP (Pty) Ltd.

7.2.5 Documentary evidence confirmed that the bid was advertised on 10 March 2008 for the Upgrade of Meyerton Central Business District Project – Phase 1: Upgrade of the Truck Stop at Meyer Street and the Construction of a new Ablution Facility at Junius Street, Meyerton. The tender documents were available from 10 March 2008 and a compulsory site meeting took place on 19 March 2008.

7.2.6 Three tenders were received in respect of the construction of the truck stop and ablution block and two tenders were received in respect of the electrical works. The tenders were evaluated by professional consulting engineers and considered by a Bid Evaluation Committee on 11 April 2008. The tenders were evaluated in terms of price (including functionality and experience) and preference points claimed, in terms of the Municipality’s Procurement Policy for Small Projects.

7.2.7 The Bid Evaluation Committee found that the tender with the highest points on price was not recommendable because he priced all his items very low and some of the measured items were priced 15% below the market rate. The evaluation concluded that there was a risk that the project would not be completed due to a lack of funds. The bidder with the highest points also did not have any experience in the building of houses, schools or construction blocks. The recommendation to the Bid Adjudication Committee was for the appointment of the bidder with the second highest points. Their tender price
was within the estimated price range and they had extensive relevant experience.

7.2.8 The Bid Adjudication Committee considered the recommendations of the Bid Evaluation Committee on 22 April 2008 and recommended the appointment of Lichenry/Mariri JV for the truck stop and ablution block. The tender for the electrical works was not awarded because of budgetary constraints.

7.2.9 It could not be established whether some of the other companies contracted to the Municipality have procured any materials from ACP (Pty) ltd. The Municipal Manager confirmed however, that the company has not applied, and is not on its vendor list, nor have they ever sold any products to the Municipality.

7.3 Alleged action by Municipality against Mr Odendaal’s competitors

7.3.2 The Municipal Manager and the Speaker of the Municipality stated that it was in fact the Municipality, and not Mr Odendaal personally, who had taken action against the company which was regarded as a competitor to Mr Odendaal’s company.

7.3.2 The legal action by the Municipality was based on alleged contraventions of the Town-Planning and Townships Ordinance, 1986. In 2001 the company concerned applied with the Municipality for the amendment of the town-planning scheme in operation, for the rezoning of the property "residential" to "industrial" for the purposes of operating a brick manufacturing plant. The application was approved, subject to conditions that the surface of the plant be paved, that sufficient dust and pollution prevention measures be introduced and that the street granting access to the plant be upgraded within 6 months.

7.3.2 Shortly after the approval of the above-mentioned application for the rezoning of the property to 'industrial the Municipality started receiving complaints from members of the public regarding dust pollution and the state of the road. The matter was pursued with the company, but apart from manual sweeping and occasional spraying of the surface, no satisfactory dust and pollution
control measures were implemented by the operator as per the conditions of the town-planning scheme.

7.3.2 According to the statement of the Chief City Engineer, a considerable “amount of correspondence, threats and notices have been exchanged with the Respondent (company) all of which were to no avail. To date the above three conditions have not been complied with despite numerous requests by the (Municipality)… to the, Respondent to act in terms of the conditions or to, stop its activities on the stand”.

7.3.2 The Municipality subsequently proceeded with legal action in the South Gauteng High Court, Johannesburg, following the company’s failure to comply with the conditions of the Town-Planning Scheme.

7.4 The sale of donated Municipal properties

7.4.1 Estate Late Hennop

7.4.1.1 The perusal of the records of the Finance Department of the Municipality and internal memoranda and correspondence between the various officials and with the Council attorneys, revealed the following facts relating to the Estate Late Hennop:

a) Stand 1491 Henley-on-Klip was offered for donation to the Municipality in 2003 by the Executrix of Estate Late CC Hennop in settlement of a municipal debt of R5240, 98.

b) In accordance with the Council’s delegation of power the former Chief Financial Officer accepted the offer. The attorneys (OSI) were informed accordingly and instructed to proceed to transfer the property into the name of the Municipality.

c) During March 2004 and July 2004 the attorneys requested clearance in favour of Council and the amount of R8011, 15 was written off by the Municipality. The attorneys did not, however, finalise the transfer of ownership to the Municipality and in November 2008 a clearance certificate was requested for the transfer of the property from Meyerton
Opsoorders CC (owned by Mr Odendaal), to Galindo Properties CC. This was queried with the attorneys as the donation was never withdrawn and there was no record of an earlier transfer of the property from the Municipality to Meyerton Opsoorders CC.

d) An amount of R10216, 12 was paid by the attorneys for the clearance certificate, but this did not include the amount of R8011, 15 which had been written off earlier.

e) Enquiries by the Finance Department of the Municipality revealed that the transfer of ownership to the Municipality never took place. The donation reportedly had to be cancelled because of an interdict against the property. Instead it was purchased from the estate by Meyerton Opsoorders at a purchase price of R10 000, 00. In December 2008 it was sold to a third party at a selling price of R180 000, 00.

f) As the Municipality did not receive any notice that the donation was withdrawn, the amount of R8011, 15 that was written off, was not debited against the account again. The amount was also not claimed with the clearance. After this was queried with the attorneys, they subsequently offered to settle the debt of R8011, 15 that had initially been written off.

7.4.1.2 A special internal audit was subsequently commissioned by the Municipal Manager to investigate the matter and to determine if the Municipality did indeed acquire an asset in the form of the property itself or the right to acquire it and the implications thereof in view of the fact that it did not benefit from the sale of the stand, which was in 2008 valued at R118 000.

7.4.1.3 In January 2009, when the Executive Director: Finance reported to the Municipal Manager on the outcome of the internal investigation, it was concluded that the council did not lose any money in respect of the sale of Stand 1491 Henley-on-Klip. The Executive Director did however, request that all the transactions relating to the donation of land be followed up and a report be furnished in respect of every transaction. It was furthermore,
proposed that additional controls be put in place to ensure that a contract was signed between the Municipality and the purchaser before any clearances were issued on these stands.

7.4.1.4 In March 2009 one of the Complainants, Mr Pypers wrote to the Executive Mayor, the Speaker of the Council as well as the Municipal Manager relating to the outcome of the internal enquiries regarding Stand 1491, Henley-on-Klip. The Complainant raised a number of concerns about the actions of the attorneys, suggesting that this was not an isolated incident and that they were able to acquire donated properties and sell them at a profit for their personal benefit, and at the expense of the Municipality. It was also alleged that in these circumstances the Municipality did not comply with the requirements of section 14 of the MFMA for the disposal of capital assets as the properties were not disposed of in a meeting open to the public or against fair market value.

7.4.1.5 As indicated, the Investigator of the Public Protector scrutinised the internal records and correspondence of the Municipality. This matter was also raised with the Municipal Manager and the Executive Director: Corporate Services during a meeting held in May 2009 and communications in the course of the Public Protector’s investigation.

7.4.2 Special internal audit on the sale of donated properties

7.4.2.1 A special internal audit was subsequently commissioned by the Municipal Manager to investigate alleged irregularities in respect of Stand 1491 Henley-on-Klip and other identified donated properties, and to determine if the Municipality did indeed acquire an asset in the form of the property itself, or the right to acquire it and the implications thereof in view of the fact that it did not benefit from the sale of the stand, which was in 2008 valued at R118 000.

7.4.2.2 The scope of the special internal audit included the following:

a) To determine whether or not the matters (disposal of Stand 1491 Henley-on-Klip and other donated properties) were internally handled satisfactorily and correctly by the relevant staff of the Municipality;
b) To determine whether the relevant policies and procedures or statutory requirements were in place; and

c) If so, whether they were adequate and appropriate and if they were complied with.

7.4.2.3 The following internal procedure applied within the Municipality to the donation of property in exchange for arrear rates and taxes:

a) The authority to accept donated land on behalf of the Municipality was delegated to the then Chief Financial Officer (CFO), Mr A de Klerk;

b) The CFO scrutinised lists of properties intended to be donated to Council;

c) If he was satisfied that debts could be recovered upon sale of the land, he approved these lists;

d) The lists would then be handed over to the Council’s attorneys to start with the legal proceedings to transfer to property to the Municipality;

e) These lists were used by the Finance Department to write off the amounts outstanding to a vote in the General Ledger: Township Establishment Fund (vote L9203033200001) The debtor account would therefore reflect a nil balance;

f) At the same time a Midvaal Local Municipality debtor account would be created;

g) The property would be transferred to that account; and

h) No further charges would be levied to the account.

7.4.2.4 The audit covered 85 properties that were reflected on an approved list of intended donations to the Municipality between 2003 and 2005. The investigation revealed that –

a) The Municipality only acquired 52 of these of the 85 properties as fixed assets by means of a deed of donation and subsequent transfer;
b) The balance of the properties that were supposed to be donated to the Municipality (33), were either sold to third parties (17), or retained by the original owner (17). These properties were therefore not acquired by the Municipality;

c) Of the 52 properties acquired by the Municipality, 30 properties have subsequently been sold on auction and the proceeds have been received by the Municipality.

d) Of the 85 properties that were initially reflected on the list of approved donations, the debt for 71 properties’ was written off by the Municipality. The debt was recovered in respect of 37 properties when they were sold on auction or to a third party. 21 Properties were still registered in the name of the Municipality and the debt will be recovered upon the sale thereof.

e) After the “Hennop situation” was identified, the balance of the journals were reversed in respect of the properties that were eventually not acquired by the Municipality, to reflect the original debt on the debtor account and will be recovered in due course (or when the property is sold).

f) In certain cases, however, where the debt was written off and the properties were not transferred to the Municipality but sold to a third party, the assessment rates had not been reinstated on the date of sale, with the result that the Municipality forfeited assessment rate income and interest income on certain accounts.

7.4.2.5 The special internal audit furthermore revealed that-

a) The policies and procedures that were in place for the period under review to control and monitor the donation of properties to the Municipality, were inadequate; and

b) “Inadequate control was exercised over the monitoring of accounts handed over to the Council’s Attorneys in respect of land donated to the Council".
7.4.2.6 The allegations were also investigated that Mr Odendaal has sold 46
stands on behalf of the Municipality during the period 2004 to 2007 as the
auctioneer, but failed to account for the purchase price deposited or the
final price that was payable to the Municipality on the date of registration.
30 Auctioned properties were selected for testing. The audit confirmed that
proceeds for all 30 auctioned properties were received by Council.

7.5 Debt collection

7.5.1 The Municipal Manager reported that the Municipality was not aware of any
cases in which the Council continued to incur legal costs for the collection of
debts which were fruitless. He emphasised that the Council executed their
“debt collection responsibilities” in strict adherence to section 96 of the MSA.

7.5.2 It was also emphasised that the Municipality is annually audited by the
Auditor General and that the internal audit function is performed by an outside
audit firm. The alleged fruitless debt collecting practices had never been
raised as an audit concern. The Municipality, in fact, received favourable
audit opinions for the last two financial years.

7.5.3 The Municipal Manager disputed allegations that the Council failed to take
action against a debtor who owed the Municipality an amount of approximately
R 700 000, 00 in respect of pre-paid electricity that it sold on behalf of the
Municipality but failed to pay over the moneys collected.

7.5.3.1 According to documents provided by the Municipality, it was noted in
December 2005, “during general enquiries in terms of debt collection” that the
particular debtor was in arrears for approximately two months’ sales of prepaid
electricity. The debt was handed over to the Council attorneys for collection in
August 2006, by which time the outstanding debt amounted to R706 961, 03.

7.5.3.2 It was established that the Engineering and Finance Department of the
Municipality allowed the debtor to continue to disburse electricity until the end
7.5.3.3 An internal investigation revealed that the provisions of the contract were not followed and that the initial contract was apparently not properly signed. It was concluded that the municipality ran a risk of not being able to collect the arrears. The matter was subsequently referred to Internal Audit "to establish the non following of Council procedures for the signing of Contracts".

7.5.4 The relevant municipal records and internal correspondence, including legal correspondence and the results of an investigation by the internal auditors, Connaughton Miller Smith and a forensic investigation by an external service provider, Expert Forensic Services (Pty) Ltd, were scrutinized. These documents reflected a number of deficiencies that were identified in the relevant systems, which, together with the actions of certain municipal staff members, led to a situation where outstanding monies could not be recovered by the Municipality.

7.5.5 The results of the investigation were reported to Council and recommendations were made to address the deficiencies and to deal with the conduct of the official(s) concerned. It was inter alia, found that:

7.5.5.1 The control sheet signed by department heads approving the agreement to be entered into was not attached to one of the vendor agreements and was not signed in respect of another agreement by all relevant departments. Both these vendor's accounts went into arrears and as at 30 June 2006 the true balances on the respective accounts were R468 295.06 and R748 758.72. An agreement was entered into with one of the vendors to repay on the outstanding balance, and was subsequently reduced to R91 945.48 at 17 January 2007, but the full balance in respect of the other remained outstanding and was handed over to the Council attorneys for collection;

7.5.5.2 In terms of the agreements with these agents, they were supposed to make daily deposits with the Council, which were not adhered to;

7.5.5.3 In terms of the agreements, the Council had to obtain guarantees of R7950, 00 from each agent which was based on an estimated 3 day's sales. The official concerned indicated that the Council did not hold any
guarantees of any agents as far as he was aware, and he had not had sight of agent agreements prior to the audit.

7.5.5.4 Having regard to the long period the agent balances were in arrears by an excessive amount, it is apparent that no one assumed overall responsibility:

a) to ensure agents kept to payment terms as stipulated in agreements entered by following up daily with agents as soon as agent balances went into arrears;

b) to monitor guarantees held by the Council to limit the Council's exposure; and

c) to limit the Council's exposure by removing prepaid vending machines at agents who did not keep to the terms of the agreement.

7.5.5.5 According to the debt collection department they only had computer programs in place to detect arrears on water and electricity accounts for purposes of generating cutting lists as well as a program to detect arrears on rates and taxes account only. They did not have a program in place to detect arrears on other accounts and did not have a detailed debtor's age analysis in place where these balances would have been detected either.

7.5.5.6 It appeared that the official responsible to raise sales against the agent accounts would have been the only person that had knowledge that the agent balances were incorrect. This official might have been negligent by failing to process monthly prepaid electricity sales journals at the correct values, resulting in agent balances to be incorrect and at times be negative. Even if management reviewed month end balances, the balances would have been understated and they would not have been alerted to a problem looming timeously. The official did not inform his superiors:

a) Of the growing outstanding agent balances he became aware of after processing the month end journal entry to raise prepaid electricity sales;
b) That one of the the vendors failed to keep to their commitment to repay R100 000 as they undertook in their letter addressed to the Council; and
c) Of other growing outstanding agent balances he became aware of after processing the month end journal entries to raise prepaid electricity sales.

7.5.5.7 As the debt did not arise from services delivered, the debt collection section of the Municipality was not aware of the increase in the outstanding balance "in the absence of a signed and disseminated contract." The Municipality reported charges of theft and fraud to the SAPS and the matter was under investigation.

7.5.5.8 On 14 August 2008 the Municipal Performance and Audit Committee considered the forensic report and the involvement of the Departments: Engineering Services, Corporate Services, Finance Services and the former Chief Financial Officer. The Committee noted the circumstances which led to the arrears, as well as the "prevailing conflict that existed in management at the time and the contribution such circumstances had on the situation".

7.5.5.9 It was resolved that the outstanding balance to the amount of R869 261, 29, owed to the Council, be regarded as irrecoverable and written off subject thereto that if the SAPS investigation presented any opportunity for recovery of money, such opportunity be pursued and reported. The Audit Committee noted and approved the fact that measures were taken to comply with the provisions of sections 32(6), 62 and 64 of the MFMA.

7.5.6 In his responses and reports to the Public Protector the Municipal Manager furthermore, denied the allegation that the Municipality failed to take debt collection action against a family member of a Councilor in respect of arrear payment of rates and taxes. Copies of the legal documents where civil
actions were instituted against this particular debtor to recover the arrear rates and taxes, were provided.

7.5.7  On 25 June 2009 Council considered a report from the Department: Financial Services of the Municipality with proposals that an amount of R6 458 311, 72 be written off in terms of the Prescription Act, 1969.

7.5.7.1  It was noted that while Council was responsible to collect all collectable money in terms of section 96(a) of the MSA, 2000, there “may be legislation or circumstances that result in outstanding debt/levies that cannot be collected in a cost effective way”.

7.5.7.2  It was furthermore, noted that the Prescription Act, 1969 is “relevant to levies raised by Council. In terms of the said Act all balance, except on property rates, older than 3 years lapse. Should Council attempt to collect it by following the debt collection program, a claim will not stand in a court of law. Fruitless expenditure will develop in terms of legal fees.”

7.6  The use of Council equipment to remove palm trees

7.6.1  Mr L, a private resident, stated that there were palm trees next to his house that had to be removed as they were causing damage to a wall and sewerage pipes. In December 2004 he subsequently contacted the Head of the Municipality’s Parks Department, Mr J T to assist him with the removal of the trees.

7.6.1.1  Mr JT contacted Mr Wenger, the husband of the former Executive Mayor, and enquired if he was interested in taking the trees. Mr Wenger agreed to take two of the trees and he organised his own labour at his own cost to remove the trees as is confirmed by Mr JT.

7.6.2  While the trees were being removed, one of them fell on the roof of Mr L’s home. Mr Wenger then approached a private contractor to remove the trees. While Mr Wenger was making arrangements with the private contractor, Mr J T gave an instruction to his colleagues to remove the trees from Mr L’s property and to take them to Mr Wenger’s property using the Municipality’s