REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b)
OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND
SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION RELATING TO IRREGULAR APPOINTMENTS,
IRREGULAR SALARY INCREASES, FINANCIAL MISMANAGEMENT,
PROCUREMENT IRREGULARITIES AND CONFLICT OF INTERESTS IN THE
CITY OF JOHANNESBURG.
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EXECUTIVE SUMMARY

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration relating to irregular appointments, irregular salary increases, financial mismanagement, procurement irregularities and conflict of interests in the City of Johannesburg (CoJ).

(iii) The complaint was lodged with my office on 08 March 2018 by an anonymous person (Complainant).

(iv) The investigation was conducted in terms of section 182(1)(a) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(v) In Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.\(^1\) The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For

\(^1\) [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”.

(vi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether CoJ improperly or irregularly appointed Mr Moses Metileni to the position of Executive Director: Housing, without following due processes.

(b) Whether CoJ improperly or irregularly appointed Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts without following due processes.

(c) Whether CoJ improperly or irregularly appointed Dr Ndivhoniswani Lukhwareni to the position of City Manager without following due processes.

(d) Whether the establishment of Group Forensic Investigation Services (GFIS) and the subsequent appointment of General Shadrack Sibiya as its Executive Head by the CoJ were improper and irregular.

(e) Whether CoJ improperly or irregularly appointed Mr David Tembe to the position of Chief of Johannesburg Metro Police (JMPD) without following due processes.

(f) Whether CoJ irregularly increased the Chief of Staff: Mr Michael Beaumont’s salary and further allocated him the vehicle and Very Important Person (VIP) protection services without conducting security risk assessment.

(g) Whether CoJ returned nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017, which money was meant for the provision of basic services to the residents of

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2 Supra at para [73].
CoJ including water and sanitation, roads, housing, electricity and waste amongst others and if so, whether this was an indication of non-compliance, mismanagement and poor oversight by the CoJ.

(h) Whether CoJ improperly or irregularly appointed KPMG to conduct investigations in various departments within CoJ for clearly different assignments which would require different expertise, without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management (SCM) regulations.

(i) Whether the former Executive Mayor of CoJ: Mr Herman Mashaba unlawfully and irregularly entered the procurement space and solicited free services from Lephatsi Financial Services and whether such amounted to a conflict of interests.

(j) Whether the former Executive Mayor of CoJ: Mr Herman Mashaba allegedly interfered or influenced the CoJ to use funding allocation of youth drug rehabilitation and support programme to fund Field Band Foundation (FBF) which is a Non-Governmental Organisation (NGO).

(k) Whether the Complainant, CoJ or any other party suffered improper prejudice in the circumstances.

(vii) The investigation process included an exchange of correspondence and an analysis of all relevant documents and application of all relevant laws, policies and related prescripts. Interviews were also conducted with the Complainant in person, through emails and telephone. Relevant officials of the CoJ and other institutions were also interviewed.

(viii) Key laws and policies taken into account to determine if there had been maladministration relating to irregular appointments, irregular salary increases, purging of employees, financial mismanagement,
procurement irregularities and conflict of interests in the CoJ. Those are the following:

(a) Constitution of the Republic of South Africa, 1996 (the Constitution);
(b) Promotion of Administrative Justice Act 3 of 2000;
(c) The Public Protector Act, 23 of 1994 (the PPA);
(d) The Municipal Finance Management Act, 56 of 2003 (MFMA);
(e) Public Administration Management Act 11 of 2014;
(f) Local Government: Municipal Systems Act 32 of 2000;
(g) National Road Traffic Act 93 of 1996;
(h) Transvaal Local Government Ordinance 17 of 1939;
(i) Local Government Regulations on Appointment and Conditions of Appointment of Senior Managers promulgated in the Government Gazette on 17 January 2017;
(j) Policy Document for Traffic Training Centres (Rustenburg Document);
(k) CoJ’s Recruitment and Selection Policy is titled Group Talent Acquisition Policy Framework (GTAPF);
(l) CoJ’s Job Evaluation Policy and
(m) Circulars Issued under MFMA

(ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether CoJ improperly or irregularly appointed Mr Moses Metileni to the position of Executive Director Housing without following due processes:

(aa) The allegation that the CoJ improperly or irregularly appointed Mr Moses Metileni to the position of an Executive Director Housing without following due processes, is substantiated.
Based on the summary of the interview score sheet in my possession in relation to this appointment, my finding is that Mr Moses Metileni who was recommended and appointed by CoJ to a position of Executive Director of Housing did not rank the highest during the interview process.

Instead, evidence at my disposal reveals that Mr Moses Metileni ranked fifth (5th) during the interview process.

My further finding, having considered the totality of factual evidence as shown in the appointment of Executive Director Housing: Mr Moses Metileni, a conclusion that I have drawn on a balance of probability is that, the CoJ’s Council did not fully comply with section 195 of the Constitution, sections 17(1-4) and 15 (1-6) of MSA: Local Government Appointment Regulations for Senior Managers and Clause 8.3.4 of the GTAPF during this appointment.

Accordingly, this conduct by CoJ’s Council constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Regarding whether CoJ improperly or irregularly appointed Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts without following due processes:

The allegation that CoJ improperly or irregularly appointed Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts without following due processes, is not substantiated.

My finding is that, as it stands, this matter is res judicata, having been heard and adjudicated upon by a court of law as shown in evidence. It
stands to reason therefore that the current court decision literally settled this matter.

(cc) For further clarity on this issue, the court categorically held as per “Mbulelo Allan Ruda vs City of Johannesburg and Others”, that the threshold requirements of section 56 of the MSA had been met during the appointment of Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts.

(dd) In the light of the above court decision, I submit that the decision of the court should prevail as far as this issue is concerned.

(ee) Based on this court judgment I am therefore legally precluded from pronouncing myself on this issue.

(c) Regarding whether CoJ improperly or irregularly appointed Dr Ndivhoniswani Lukhwareni to the position of City Manager without following due processes:

(aa) The allegation that CoJ improperly or irregularly appointed Dr Ndivhoniswani Lukhwareni to the position of City Manager without following due processes, is not substantiated.

(bb) Based on the exposition of the factual and legal evidence discussed under this issue, it is submitted that CoJ did not act improperly or irregularly in appointing Dr Ndivhoniswani Lukhwareni to the position of City Manager.

(cc) My finding is that, all due processes have been visibly followed and no identifiable legal or policy framework was flouted or violated by CoJ during the process of appointing Dr Lukhwareni.

(dd) Accordingly, the conduct of CoJ in the circumstances, did not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and
maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(d) Regarding whether the establishment of Group Forensic Investigation Services (GFIS) and the subsequent appointment of General Shadrack Sibiya as its Executive Head by the CoJ were improper and irregular:

(aa) The allegation that the establishment of Group Forensic Investigation Services (GFIS) and the subsequent appointment of General Shadrack Sibiya as its Executive Head by the CoJ were improper and irregular, is not substantiated.

(bb) My finding, having examined the relevant legal framework, including the applicable policies of CoJ and its concomitant Group Human Capital Management processes, is that the appointment of General Sibiya and his subsequent salary grading was in compliance with all CoJ’s applicable legal framework.

(cc) On the strength of the evidence currently available at my disposal, I could not find justifiable reason, both in law and on facts to fault the process followed by CoJ to appoint and subsequently upgrade General Sibiya’s salary.

(dd) Accordingly, the conduct of CoJ in the circumstances, did not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(e) Regarding whether CoJ improperly or irregularly appointed Mr David Tembe to the position of Chief of Johannesburg Metro Police (JMPD) without following due processes:

(aa) The allegation that CoJ improperly or irregularly appointed Mr David Tembe to the position of Chief of Johannesburg Metro Police (JMPD) without following due processes, is substantiated.
Based on the totality of objective evidence considered, as a mosaic of pieces of proof, I am persuaded to find on a balance of probability that, the appointment of Mr Tembe was ostensibly vitiated by various factual, legal, administrative and procedural irregularities. Those can be recorded as follows:

(a) Mr Tembe attended the Traffic or Metropolitan Police Diploma’s course on a part time basis, which entailed not being in a class with other learners, attending on weekends, after hours and sometimes instructors had to teach him in his office or at home.

(b) There was no written application by CoJ to RTMC or to such other authority to exempt or indemnify Mr Tembe from attending the course on a full time basis like all other leaners.

(c) Similarly, there was no authorization or permission granted by RTMC or such other responsible authority to allow Mr Tembe to attend the course on a part time basis as he did.

(d) No class attendance register could be provided by CoJ to my office and to RTMC as proof of actual attendance of lessons by Mr Tembe in respect of the course in traffic Diploma, despite numerous requests for same.

(e) An incomplete Portfolio of Evidence (PoE) file was submitted by CoJ to my office which did not reflect all the standard units and all assessments that had to be complied with by Mr Tembe before he could satisfy all the requirements to be issued with the Traffic or Metropolitan Officers Diploma as shown in terms of RTMC Policy Document and SAPS Conversion modules as per table in evidence.

(f) It was also conceded by Mr Ben Mashigo: Director at JMPD Academy during an interview with my team that Mr Tembe was attending training on weekends, sometimes at seven and eight at night, on a part time basis because he was already Director, operational and functioning. The only
ineluctable inference to be drawn from this statement by Mr Ben Mashigo is that Mr Tembe was already operational and performing traffic and metropolitan officer's functions while he was still under training, which I find to be rather irregular and an abuse of power by JMPD.

(g) The issuing of the Traffic or Metropolitan Police Diploma to Mr Tembe on **30 June 2007**, preceded some of his summative and formative assessments which were only done on **04 October 2007**, as shown in evidence. This discrepancy was not explained by CoJ.

(h) In 2017, CoJ shortlisted and subsequently appointed Mr Tembe to the position of Chief of JMPD, notwithstanding the fact that the advertisement for the post required a minimum qualification of a “*B degree or equivalent qualification in an appropriate field, such as Policing and/or Management*, which Mr Tembe does not possess.

(i) Evidence at my disposal has revealed that Mr Tembe only possesses a three year Diploma in Personnel Management from Mentor Business College. SAQA has advised my office that for the purposes of the NQF, a three year Diploma in Personnel Management is not comparable to a Bachelor's degree, since the two are rated differently in terms of NQF ratings/levels. As such, I find that Mr Tembe did not meet the minimum academic requirements for this post, as framed in the job advertisement.

(j) By parity of reasoning, I further find it inconceivable to figure out how JMPD academy issued Mr Tembe with a Traffic or Metropolitan Diploma before assessments could be finalised. With that apparent irregularity in mind, I must immediately record that on the basis of evidence before me, this question was not addressed by CoJ in accordance with this taxonomy. I submit that this was particularly improper and amounted to maladministration.

(cc) My ultimate finding is that the appointment of Mr Tembe by CoJ was irregular and made in gross violation of section 33 of the Constitution, section 3 of PAJA, section 3D of NRTA, section 3E of the NRTA, clause 1.11 of Policy

(dd) I am therefore unable to countenance or endorse a qualification/Traffic or Metropolitan Officer’s Diploma awarded in the manner that was not only characterised by capriciousness, but which also lacked transparency. My office would be failing in its duty if it does not send out a clear and unequivocal pronouncement that South Africa is committed to the promotion of sound and robust legal principles that seek to inculcate a culture of good and clean governance within the public administration.

(ee) Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(f) Regarding whether CoJ irregularly increased the Chief of Staff: Mr Michael Beaumont’s salary and further allocated him the vehicle and Very Important Person (VIP) protection services without conducting security risk assessment:

(aa) The allegation that CoJ irregularly increased the Chief of Staff: Mr Michael Beaumont’s salary and further allocated him the vehicle and Very Important Person (VIP) protection services without conducting security risk assessment, is not substantiated.

(bb) My finding on this issue, based on the evidence at my disposal, is that the position of Chief of Staff held by Mr Beaumont was graded in line with CoJ’s Job Evaluation Policy and the remuneration paid to the incumbent was in line with the job evaluation outcomes.

(cc) Most importantly, when comparing salary scales of the previous incumbents with that of Mr Beaumont, it should be noted that, historically all his
predecessors were remunerated at the minimum salary level 2B or to a maximum of salary level 2C, which is equal to a minimum of 2B. It would therefore be unfair for Mr Beaumont to be paid less than others for the work of equal and same value.

(dd) With regard to allegations of VIP protection services given to Mr Beaumont, my finding is that Mr Beaumont was attacked and his laptop and phone were stolen on his way home after work. As a result, a safety arrangement was made by CoJ whereby he would be picked-up at home and dropped off again after work by JMPD for only a month.

(ee) Mr Beaumont stopped this arrangement as in his view the incident was just a crime and not politically motivated. No transportation or security services were then provided to Mr Beaumont.

(ff) I am therefore persuaded to conclude and further find that CoJ adhered to all the provisions of MSA, LRA, EEA and Job Evaluation Policy in the salary adjustment of Mr Beaumont as the Chief of Staff.

(gg) Accordingly, the conduct of CoJ in the circumstances, did not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(g) Regarding whether CoJ returned nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017, which money was meant for the provision of basic services to the residents of CoJ including water and sanitation, roads, housing, electricity and waste amongst others and if the answer is Yes, whether this was an indication of non-compliance, mismanagement and poor oversight by the CoJ:

(aa) The allegation that CoJ returned nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017, which
money was meant for the provision of basic services to the residents of CoJ including water and sanitation, roads, housing, electricity and waste amongst others and if the answer is Yes, whether this was an indication of non-compliance, mismanagement and poor oversight by the CoJ, is not substantiated.

(bb) Coming to a finding on this particular issue, I first had to grapple with a factual and a legal question of whether or not the fact that the CoJ was unable to spend all the monies allocated as conditional grants was in itself, an indication of financial mismanagement, maladministration or non-performance.

(cc) Based on the exposition of the valid and lawful reasons given by CoJ in respect of each project, as to why those funds could not be spent during that particular financial year ending in June 2017, I was persuaded to conclude that the mere returning of unspent funds to Treasury is not on its own, an indication of financial mismanagement or non-compliance with the MFMA, MSA or Constitution.

(dd) Evidence at my disposal has revealed that projects were completed, however in some instances the actual expenditure incurred was less than the allocation received. This resulted in the unspent amounts as indicated in evidence.

(ee) Further evidence at my disposal revealed that some projects such as housing were halted by discovery of dolomitic conditions which necessitated changes in township layout hence the delay on expenditure. Such unforeseen events cannot be classified as mismanagement or poor oversight.

(ff) Accordingly, the conduct of CoJ in the circumstances, did not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
Regarding whether CoJ improperly or irregularly appointed KPMG to conduct investigations in various departments within CoJ for clearly different assignments which would require different expertise without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management (SCM) regulations:

(aa) The allegation that CoJ improperly or irregularly appointed KPMG to conduct investigations in various departments within CoJ for clearly different assignments which would require different expertise without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management (SCM) regulations, is substantiated.

(bb) CoJ appointed KMPG Services (Pty) Ltd (KPMG) from a panel of Service Providers for Group Risk and Assurance functions in the CoJ’s Core Administration and Municipal Entities under contract number A528/13 for a period of three years namely, 21 May 2014 to 20 May 2017.

(cc) The contract value of R30 million per annum was allocated to six categories of services identified in terms of the Frame Work Contract A528/13 and KPMG was to provide the CoJ with the following services:

a) Risk Management Advisory Services;
b) Compliance Advisory and Monitoring Services;
c) Internal Audit Services;
d) Forensic Investigation;
e) Combined Assurance and
f) Probity Services.

(dd) The aforementioned contract was extended by CoJ for a period of six months when CoJ further tasked KPMG in June 2017 to investigate credit balance transfers and rate category changes raised by a Whistle Blower, after City Power had brought to the attention of the CoJ a modus operandi which created false/fraudulent account balances in the billing system.
This tasking clearly took place after contract/A528/13 between CoJ and KPMG had lapsed in May 2017. CoJ could not furnish my office with KPMG’s contract variation/expansion addendum commencing from 21 May 2017 to 21 November 2017 despite conceding that such expansion/variation exceeded the 15% threshold.

Although it became clear from the report approved by Dr Lukhwareni that a request for KPMG’s contract extension was recommended for three months at a total value not exceeding 12, 4 million, the KPMG’s contract with CoJ continued to a total of six months, notwithstanding the condition/limitation set by Dr Lukhwareni, thereby exceeding 15% of the original contract.

CoJ failed to indicate if these expansion/variations were dealt with in terms of the provisions of section 116(3) of the MFMA which will be regarded as an amendment to the contract and whether they were reported to the Council and National Treasury.

Based, on this apparent contract expansion, I find that CoJ irregularly and improperly concluded a contract with KPMG post May 2017. In concluding this contract/expansion/amendment or variation in favour of KPMG, CoJ failed to comply with section 217 of the constitution, section 62 of the MFMA, Circular No: 62 of MFMA, Clause 2, 4, 10.1, 10.6 and 17 of the CoJ’s SCM Policy.

I further find that, a contractual engagement between CoJ and KPMG post May 2017 was at odds with the Constitution, MFMA and CoJ’s SCM policy insofar as it may be uncompetitive, less transparent, unfair and/or not reported to Council or Treasury as required by regulatory framework.

It is my further finding that, lack of full and proper records of the financial affairs of the municipality (especially those relating to expansion or variation of this contract) is in direct violation of the MFMA, insofar as they were not kept in accordance with any prescribed norms and standards, as required by regulatory framework.
Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Regarding whether the former Executive Mayor of CoJ: Mr Herman Mashaba unlawfully and irregularly entered the procurement space and solicited free services from Lephatsi Financial Services and whether such amounted to a conflict of interests:

The allegation that the former Executive Mayor of CoJ: Mr Herman Mashaba (Mr Mashaba) unlawfully and irregularly entered the procurement space and solicited free services from Lephatsi Financial Services (LFS) and whether such amounted to a conflict of interests, is substantiated.

In early 2017, which is the period leading towards the insourcing of security personnel in the CoJ, Mr Mashaba contacted a friend and a former business partner or associate from LFS namely, Mr Deshmukh Akhter Alli (Mr Deshmukh) and requested his assistance to advise CoJ on the financial modelling for insourcing of security personnel.

Mr Deshmukh subsequently offered this assistance, service and/or advice to CoJ, following Mr Mashaba’s request.

The totality of the evidence sets out facts which points to an agreement or contract based on bias and/or conflict of interest on the part of Mr Mashaba.

The conduct or decision of CoJ to procure or source the services of Mr Deshmukh, did not accord with the principles and validity of a procurement standards determined in terms of the legislative framework creating the system that section 217(1) of the Constitution, section 195(1)(a), section 8 and 9 of PAMA and Clause 4 of CoJ’s SCM policy call for in each particular case.
Similarly, the conduct of Mr Mashaba as a councillor and a Mayor (as he was then), of directly approaching, handpicking and recommending to CoJ his former business partner namely Mr Deshmukh who still work directly with his wife at LFS, was irreconcilable with clause 11, 2, 5.1 and 5.2 of the Code of Councillors embedded in MSA.

Mr Mashaba (the Mayor of CoJ as he was then) had direct power and influence over those who reported to him, especially the members of the Mayoral Committee. As a result, any involvement or influence of Mr Mashaba in securing the services of Mr Deshmukh was unwarranted.

The fact that Mr Deshmukh was willing to render his service free of charge to CoJ, was indeed a noble, commendable and philanthropic gesture. However, I find it extremely difficult to deny that this gesture would not have potential to enhance the profile and add value to Mr Deshmukh as an individual and by extension to LFS, in which as said, Mr Mashaba’s wife is still a co-director.

Any other individuals or service providers could also have made an offer on a pro bono basis had they been afforded an opportunity to do so. However, in this instance, this was not the case, as this offer was only made specifically to Mr Deshmukh who is a co-director of LFS.

I am therefore persuaded to find that, this created an impression of impropriety and risk upon which the public could assume that Mr Deshmukh or LFS was given access to CoJ due to proximity with Mr Mashaba.

Although the security guards may have benefitted from the services of Mr Deshmukh, the potential or perceived conflict of interests to LFS and Deshmukh was sufficient to erode the public trust that benefiting poor families and improving the lives of security guards was the only motivation for this exercise.

Accordingly, the conduct of Mr Mashaba and CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the
Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(j) **Regarding whether the former Executive Mayor of CoJ: Mr Herman Mashaba allegedly interfered or influenced the CoJ to use funding allocation of youth drug rehabilitation and support programme to fund Field Band Foundation (FBF) which is a Non-Governmental Organisation (NGO):**

(aa) The allegation that the Executive Mayor of CoJ: Mr Herman Mashaba interfered or influenced the CoJ to use funding allocation of youth drug rehabilitation and support programme to fund Field Band Foundation (FBF) which is Non-Governmental Organisation (NGO) by the CoJ, is substantiated.

(bb) Based on the exposition of evidence considered, I find that Mr Mashaba unduly and improperly influenced the grant or funding of FBF to the tune of R 11, 1 million over three years beginning in the 2017/2018 to 2019/2020 financial year, when he proposed during the mayoral Lekgotla at Magaliesburg on 17 February 2017, that CoJ’s Department for Health and Social Development consider the value of partnering with FBF.

(cc) It is further apparent from Mr Mashaba’s own evidence/affidavit that FBF is an organisation in which Mr Mashaba once held directorship shortly before he took the mayoral position within CoJ. This on its own makes Mr Mashaba’s proposal to CoJ, to consider partnering with FBF wholly unwarranted and undesirable.

(dd) Given the obvious and palpable conflict of interest on Mr Mashaba’s part, it is improper that Mr Mashaba made this kind of a proposal to CoJ, considering his long-standing and continued association with FBF.

(ee) The very fact that Mr Mashaba terminated his directorship with FBF and further disclosed the issue, suggests that Mr Mashaba was acutely aware of the
difficulties he may face in presiding or making suggestion over matters involving FBF.

(ff) Although Mr Mashaba was not directly involved in the FBF funding process, he improperly proposed/suggested and/or initiated the idea of partnering with FBF to CoJ’s employees over whom he wielded direct power, authority and influence as the executive Mayor of CoJ at the time.

(gg) Therefore, I find that the grant of funding to FBF by CoJ, did not follow an assessment or evaluation process that is in accordance with a system that is fair, transparent and competitive.

(hh) The conduct of Mr Mashaba was at variance and did not conform with the standard contemplated in Clause 2 and 11 of Code of Councillors embedded in the MSA which regulates Intervention in Administration.

(ii) Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(k) **Regarding whether the Complainant, CoJ or any other party suffered improper prejudice in the circumstances:**

(aa) The allegation that the Complainant, CoJ or any other party suffered improper prejudice in the circumstances, is substantiated.

(bb) Based on objective evidence which underpins all issues that are corroborated/substantiated in this matter, my finding is that, processes followed by CoJ in connection with the recruitment of Mr Metileni, Mr Tembe, procurement of Mr Deshmukh/LFS, extension of KPMG’S contract and the grant funding of FBF were improper and not executed in accordance with the Constitution, MSA, MFMA, SCM, GTAPF and other relevant legal prescripts as shown in evidence.
Accordingly, the outcomes of the above administrative processes amounted to gross improper prejudice to those potential service providers and job applicants who also qualified to be considered for these opportunities.

It is my further finding that, the non-compliance by CoJ with SCM and Recruitment processes in this matter had the following negative impact on the City’s finances:

(a) Due to the fact that some procurement and recruitments as shown in evidence were done in contravention of applicable regulatory framework, this would have an inevitable corollary effect of “irregular expenditure” and prejudice to the South African tax payers.

(b) Salaries paid by CoJ to Mr Moses Metileni, Mr David Tembe and payments made to services rendered by KPMG, all fall into the category of irregular expenditure, since processes leading up to these appointments were made in contravention of regulatory or legal framework.

(c) Loss of public confidence in the CoJ and organs of state in general, in relation to an open and transparent procurement and recruitment processes.

(d) The perception by potential service providers and job applicants that they cannot expect a fair and equal treatment from organs of state.

Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

The appropriate remedial actions that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:
The City Manager of CoJ must take appropriate steps to ensure that:

(aa) Within sixty (60) working days from the date of this report, disclose all irregular expenditure incurred in connection with irregular appointments of Mr Metileni, Mr Tembe and irregular extension of a contract of KPMG to the Council and Treasury.

(bb) Directs the Chief Financial Officer (CFO) of CoJ to amend the closing balance of the current financial statements to accordingly include the irregular expenditure in the previous financial statements.

(cc) Within sixty (60) working days of the issue of this report; all CoJ's officials who are involved in the SCM and Recruitment processes, including all the senior management, attend a workshop on the SCM, Recruitment and Selection procedures and processes.

(dd) Within thirty (30) working days from the date of this report, present this report to the current Executive Mayor of the CoJ, for disciplinary action to be taken against all current CoJ employees who are responsible for the flouting of Recruitment processes, SCM processes or any other form of maladministration or improper conduct highlighted in this report.

The Speaker of Council of CoJ

(aa) Within sixty (60) working days from the date of this report, ensures that the Council develops a policy regulating the exercise of discretionary power delegated to the Executive Mayor in relation to Grants for Funding or Donations to institutions or organisations which promotes public health, social welfare, art, culture and education within the jurisdiction of the CoJ as contemplated in Section 79(16)(a) of the Transvaal Local Government Ordinance 17 of 1939.
(bb) Within sixty (60) working days of the issue of this report; all CoJ’s councillors attend a workshop on Management of Conflict of Interests and on Policies related to mandatory Disclosure of Conflict of Interests.

(cc) Within thirty (30) working days from the date of this report, present this report to the MEC for Cooperative Governance and Traditional Affairs in the Gauteng province for a decision to address all irregular expenditure incurred as a result of maladministration and improper conduct highlighted in this report.

The CEO of RTMC must take appropriate steps to ensure that:

(aa) Within sixty (60) working days from the date of this report, engage in the necessary process to nullify the Metropolitan/ Traffic Police Diploma issued to Mr Tembe by JMPD on 30 June 2007 and further disclose or communicate the outcome of the nullification process to the HoD for Gauteng Department of Roads and Transport.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION RELATING TO IRREGULAR APPOINTMENTS, IRREGULAR SALARY INCREASES, FINANCIAL MISMANAGEMENT, PROCUREMENT IRREGULARITIES AND CONFLICT OF INTERESTS IN THE CoJ.

1. INTRODUCTION

1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation and implement remedial action:

1.2.1 The Premier of Gauteng: Mr David Makhura;

1.2.2 The Speaker of Council in the CoJ: Ms Nonceba Molwele;

1.2.3 The MEC for COGTA in Gauteng: Mr Lebogang Maile;

1.2.4 The Executive Mayor in the CoJ: Mr Geoff Makhubo;

1.2.5 The HoD in the GDRT: Makhukhu Mampuru

1.2.6 The CEO of RTMC: Adv Makhosini Msibi

1.2.7 A copy of the report is also provided to the Complainants to inform them about the outcome of the investigation.

2. THE COMPLAINT
2.1 The complaint was lodged with my office on 08 March 2018 by an anonymous person (Complainant), alleging irregular appointments, irregular salary increases, financial mismanagement and conflict of interests in the CoJ.

2.2 The Complainant alleged *inter alia*:

**Irregular Appointments:**

2.2.1 The composition of the panel members for the **Executive Director of Housing** position did not promote strategic intent of section 12 of the Local Government regulations appointment and conditions of employment of Senior Managers Council policy. On 08 June 2017, the City Manager of Johannesburg, Dr Ndivhoniswani Lukhwareni (Dr Lukhwareni) laid an urgent report in relation to the appointment of the Executive Director for Housing. This five (5) page report contains a number of irregularities and has resulted the exploration undertaken by the African National Congress (ANC) which demonstrates that the Council of Johannesburg was misled by the Democratic Alliance (DA) led administration. According to this 5 page report, panel members comprised of:

a) Two members of the Mayoral Committee (MMC’s). A councillor designated by the municipal council was not included in the panel  
b) City Manager  
c) External expert- has no experience or expertise in the area of the advertised post  
d) Group Human Capital Management Secretariat

2.2.2 In order to demonstrate irregularities in the appointment of senior managers, the ANC released a statement on 12 July 2017 and reflected on this issue briefly as follows:

2.2.3 *‘We, the ANC: Greater Johannesburg Region, are concerned that section 17 (resolution of municipal council on appointment of senior managers) of*
the Local Government Regulations and appointment and conditions of employment of Senior Managers Council policy was grossly undermined.

2.2.4 The **Group Head Legal shares the same fate as the appointment of Executive Housing.** A panel member influenced scores.

2.2.5 Both the establishment of **Group Forensic Investigation Services (GFIS) and the appointment of its Executive Head were irregular.** The Executive Mayor tabled a report in Council that established GFIS and appointed the Executive Head of Forensic General Shadrack Sibiya. General Shadrack Sibiya was appointed as a Deputy Director, nonetheless Sibiya was elevated to the Group Executive function and his salary increased without following due processes. The GIFS was already part of an existing department in the City namely, Group Risk and Advisory Services.

2.2.6 The **Chief of Johannesburg Metro Police (JMPD) Mr David Tembe** was recommended for appointment although he ranked 5th out of 9 candidates. This has disadvantaged more competent candidates. At the subsequent Council meeting a different report was tabled, which recommended the appointment of Mr David Tembe. The report was revised to facilitate the appointment of Mr David Tembe. It is also alleged that Mr Tembe’s qualifications are not in order and that the Public Protector should investigate this appointment including Mr Tembe’s qualifications.

2.2.7 **The current City Manager’s appointment (Dr Lukhwareni) has concerns that were raised about it not being the most suitable candidate.** It is alleged that his competency results and security clearance status is still to be provided. Moreover, it was further alleged that there is too much maladministration taking place under Dr Lukhwareni’s watch and that he was not the most suitable candidate.
Irregular Salary Increases

2.2.8 The former Executive Mayor had a prerogative to appoint his Chief of Staff. Whilst the former Executive Mayor had this prerogative, due processes must always be followed, including salary increases. The Chief of Staff, Mr Michael Beaumont’s salary was irregularly increased with full knowledge and consent of the former Executive Mayor. When the same concern was raised in Council, the Executive Mayor acknowledged same and committed to reversing the salary increment. To date this has not been done. Over and above the salary increase, the Chief of Staff who is an official has been allocated the use of a state vehicle, which he is not entitled to. No security assessment was done in allocating him the vehicle and VIP protection services.

Financial Mismanagement

2.2.9 Complainant has learnt with great concern that the City of Johannesburg will return nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in 30 June 2017. National Treasury has served the City with a letter of demand in October 2017 to recover this money which was not spent by the City. According to the letter of demand seen by the Complainant, the reason for rejecting the rollover request is that the CoJ failed to submit its pre-audited annual financial statement by 31 August 2017 as required by Regulations. The City, due to poor performance failed to spend the conditional grants in 2016/17. This money was meant for provision of basic services to the residents including water and sanitation, roads, housing, electricity and waste amongst others. This is an indication of non-compliance, mismanagement and poor oversight by the DA-led administration.

2.2.10 The City appointed KPMG to conduct investigations in various departments including the Revenue Unit in 2016. In 2017 the services of KPMG were retained to perform analysis of the customer accounts in the
City’s database and develop strategies to improve the City’s revenue collection. These were clearly different assignments which would require different expertise. Whilst the first appointment was made via a panel of forensic service providers, which KPMG belong to, the second did not fall under the expertise for which the panel was appointed. KPMG was appointed without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management regulations. The basis of this appointment was through unsolicited bid procedures. This is believed to be an irregular appointment which denied other service providers an equal opportunity to offer same services on similar terms.

**Conflict of Interests**

2.2.11 On the 10\textsuperscript{th} of December 2012, South Africans welcomed the progressive announcement by Grant Thornton Capital to partner with Lephatsi Financial Services. Lephatsi Financial Services acquired a 35% stake which would bring substantial skills and additional BEE credentials to Grant Thornton Capital. To date Grant Thornton Capital was awarded a lucrative multi-million tender to undertake forensic investigations in the City with a direct benefit to Lephatsi Financial Services. \textbf{Lephatsi Financial Services is a company owned by the Executive Mayor’s wife Connie Mashaba.} Mr Mashaba in the mist of his frustration with the City Manager’s report unlawfully and irregularly enters the procurement space and solicit \textbf{free} services from Lephatsi Financial Services.

2.2.12 That Mr Mashaba is also alleged to have had a \textbf{breakdown with Setheo Engineering Company (Setheo) appointed by the City due to personal vendetta against them since} Setheo is in the same business as CONCO which is a company associated with the Mayor.

2.2.13 On 23 November 2018, my office further received another comprehensive complaint straight from the directors of Setheo alleging administrative
irregularities in the termination of the NEC 3 contract, failure to respond to communication, bad publicity, abuse of power by Mr Mashaba and maladministration around sub-contractors by City Power and/or CoJ. Following the lodgement of a separate complaint by directors of Setheo, this issue was then separated from this investigation and it is being investigated by my office on its own as a stand-alone matter.

2.2.14 It was further alleged that Mr Mashaba allegedly interfered in the funding allocation by CoJ of a youth drug rehabilitation and support programme to fund a Non-Governmental Organisation (NGO) known as Field Band Foundation (FBF) which he claims as a personal project.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

3.2 Section 182(1) of the Constitution provides that: “The Public Protector has the power as regulated by national legislation:

(a) To investigate any conduct in state affairs, or in the Public Administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) To report on that conduct; and

(c) To take appropriate remedial action”.

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.
3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others, the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”.

3.6 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68).

3.7 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69).

3.8 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine
the legal effect it has on the person, body or institution it is addressed to (paragraph 70).

3.9 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71).

3.10 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (paragraph 71(a)).

3.11 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).

3.12 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).

3.13 In the matter of the President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.14 The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the constitution (para 71);

3.15 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on him under
the Constitution if that is required to remedy the harm in question (para 82);

3.16 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):

a) Conduct an investigation;
b) Report on that conduct and
c) To take remedial action;

3.17 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

3.18 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105);

3.19 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108); and

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

3.21 The CoJ is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector's mandate.

3.22 The jurisdiction of the Public Protector was not disputed by the CoJ in this matter.
3.23 Regarding the exercise of my discretion in terms of section 6(9) of the Public Protector Act to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, include the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident (s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of the Constitution; whether my remedial action will redress the imbalances of the past. What constitute ‘special circumstances’ depends on the merits of the each case.

3.24 In terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly both the interests of justice and public interests that dictate whether I should investigate the matter or not. It is axiomatic that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is a huge public interest in the public administration or in the governing of public affairs.

3.25 Appointment of public officials in a municipality as big as CoJ would inordinately generate a huge public interest and scrutiny. The community, other applicants and public servants themselves would be
keen to know or enquire into the just, fairness or transparency of the processes followed in filling of positions within the CoJ.

3.26 Realising the importance of promoting accountability and openness which lie at the core of the founding provisions of our Constitution. Mindful of the need to strengthen constitutional democracy and driven by an inclination towards promoting basic values and principles governing public administration as envisaged 195 of our Constitution. Appreciating the importance of advancing Promotion of Administrative Justice Act\(^3\) (PAJA) and its corresponding section 33 of our Constitution, I duly decided to exercise my discretion in favour of this complaint. Alive to all these reasons, I concluded that it was in the interests of justice to investigate and determine the merits or demerits of this complaint.

4 THE INVESTIGATION

4.1 Methodology

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

4.2 Approach to the investigation

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

\(^3\) Act 3 of 2000.
4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal\textsuperscript{4} (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.3 In this particular case, the factual enquiry primarily focused on whether or not there was maladministration relating to irregular appointments, irregular salary increases, purging of employees, financial mismanagement, procurement irregularities and conflict of interests in the CoJ.

4.2.4 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the CoJ to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and
policies taken into account to determine if there had been maladministration relating to irregular appointments, irregular salary increases, purging of employees, financial mismanagement, procurement irregularities and conflict of interests within the CoJ were principally those imposing administrative standards that should have been complied with by the CoJ or its officials.

4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration relating to irregular appointments, irregular salary increases, purging of employees, financial mismanagement, procurement irregularities and conflict of interests in the CoJ.

4.2.6 Where a complainant has suffered prejudice, the idea is to place him/her as close as possible to where he/she would have been had the CoJ complied with the regulatory framework setting the applicable standards for good administration.

4.2.7 In the case of conduct failure as was the case in this matter, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

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

4.3 **On analysis of the complaint, the following issues were identified and investigated:**

4.3.1 Whether CoJ improperly or irregularly appointed Mr Moses Metileni to the position of Executive Director of Housing without following due processes.

4.3.2 Whether CoJ improperly or irregularly appointed Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts without following due processes.
4.3.3 Whether CoJ improperly or irregularly appointed Dr Ndivhoniswani Lukhwareni to the position of City Manager without following due processes.

4.3.4 Whether the establishment of Group Forensic Investigation Services (GFIS) and the subsequent appointment of General Shadrack Sibiya as its Executive Head by the CoJ were improper and irregular.

4.3.5 Whether CoJ improperly or irregularly appointed Mr David Tembe to the position of Chief of Johannesburg Metro Police (JMPD) without following due processes.

4.3.6 Whether CoJ irregularly increased the Chief of Staff: Mr Michael Beaumont’s salary and further allocated him the vehicle and Very Important Person (VIP) protection services without conducting security risk assessment.

4.3.7 Whether CoJ returned nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017, which money was meant for provision of basic services to the residents of CoJ including water and sanitation, roads, housing, electricity and waste amongst others and if so, whether this was an indication of non-compliance, mismanagement and poor oversight by the CoJ.

4.3.8 Whether CoJ improperly or irregularly appointed KPMG to conduct investigations in various departments within CoJ for clearly different assignments which would require different expertise without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management (SCM) regulations.

4.3.9 Whether the former Executive Mayor of CoJ: Mr Herman Mashaba unlawfully and irregularly entered the procurement space and solicited free
services from Lephatsi Financial Services and whether such amounted to a conflict of interests.

4.3.10 Whether the former Executive Mayor of CoJ: Mr Herman Mashaba allegedly interfered or influenced the CoJ to use funding allocation of youth drug rehabilitation and support programme to fund Field Band Foundation (FBF) which is a Non-Governmental Organisation (NGO).

4.3.11 Whether the Complainant, CoJ or any other party suffered improper prejudice in the circumstances.

4.4 The Key Sources of information

Documents:

Correspondence sent and received

4.4.1 A complaint from the Complainant dated 08 March 2018;

4.4.2 Allegations letter dated 29 March 2018 from the Public Protector addressed to the Dr Ndivhoniswani Lukhwareni City Manager of CoJ;

4.4.3 Response letter dated 04 May 2018 with supporting documents from the City Manager of the CoJ to the Public Protector;

4.4.4 Letter of request for information dated 25 June 2018 from the Public Protector addressed to the Prof C De la Rey of the University of Pretoria (UP);

4.4.5 Letter of request for information dated 25 June 2018 from the Public Protector addressed to Ms Eunice Sebaso of Lyceum College;

4.4.6 Letter of request for information dated 25 June 2018 from the Public Protector addressed to Mr John Mokgoka of the Department of Basic Education;
4.4.7 An email correspondence from Eliza Gardiner, Legal Advisor at University of Pretoria to the Public Protector dated 03 July 2018.

4.4.8 Response from Mr J Samuels of SAQA dated 05 July 2018;

4.4.9 Response from Lyceum, signed by Principal Benjamin Van Rooyen dated 09 July 2018.

4.4.10 Letter of request for information dated 09 July 2018 from the Public Protector addressed to Mr J Samuels the Chief Executive Officer (CEO) of the South African Qualifications Authority (SAQA).

4.4.11 Response from Mr J Mokgoka of the Department of Basic Education stamped 10 July 2018.

4.4.12 Interview request letter dated 31 August 2018 from the Public Protector addressed to the City Manager Dr Ndivhoniswa Lukhwareni of the City of Johannesburg (CoJ) to request Grant Thornton Advisory Services (GT) and Grant Thornton Capital (GTC) to avail themselves for a meeting;

4.4.13 Interview request letter dated 31 August 2018 from the Public Protector addressed to the City Manager Dr Ndivhoniswa Lukhwareni of the City of Johannesburg (CoJ) to request Lephatsi Financial Services to avail themselves for a meeting;

4.4.14 Response letter from CoJ dated 06 September 2018 signed by City Manager;

4.4.15 Email correspondence from the Public Protector to the officials of CoJ dated 13 September 2018;

4.4.16 Letter of request for information dated 14 September 2018 from the Public Protector addressed to Mr A A Deshmukh: Director at Lephatsi Financial Services;
4.4.17 Letter of request for information dated 14 September 2018 from the Public Protector addressed to Ms C M Mashaba the Director at Lephatsi Financial Services;

4.4.18 Response from Ms CM Mashaba of Lephatsi Financial Services dated 18 September 2018;

4.4.19 Email correspondence from Mr A A Deshmukh of Lephatsi Financial Services to the Public Protector dated 18 September 2018;

4.4.20 Allegations letter dated 13 December 2018 from the Public Protector to the City Manager of CoJ;

4.4.21 Email correspondence from Adv GD Baloyi, Deputy Director of Public Prosecutions to the Public Protector dated 15 January 2019;

4.4.22 Letter of request for further information dated 01 March 2019 from the Public Protector addressed to Dr Ndivhoniswa Lukhwareni City Manager of CoJ;

4.4.23 Letter signed by Dr Ndivhoniswa Lukhwareni City Manager of CoJ to the Public Protector dated 12 March 2019;

4.4.24 Response from CoJ dated 29 March 2019 signed by City Manager;

4.4.25 Interview request letters dated 07 May 2019 from the Public Protector addressed to the City Manager Dr Ndivhoniswa Lukhwareni of the City of Johannesburg (CoJ) to request Mr David Sony Tembe to avail himself for a meeting;

4.4.26 Letter of request for information dated 07 May 2019 from the Public Protector addressed to Adv Makhosini Msibi Chief Executive Officer (CEO) at Road Traffic Management Corporation (RTMC);
4.4.27  Response from Adv M Msibi dated 21 May 2019;

4.4.28  Email correspondence from Public Protector to Alistair Shaw CoJ dated 29 May 2019;

4.4.29  Letter of request for information dated 18 June 2019 from the Public Protector addressed to Mr Willie Mathebula: Acting Chief Procurement Officer at National Treasury;

4.4.30  Letter from Mr Willie Mathebula of National Treasury to the Public Protector dated 03 July 2019 requesting an extension to reply;

4.4.31  Letter of further request for information dated 12 July 2019 from the Public Protector addressed to Dr Ndivhoniswani Lukhwareni City Manager of CoJ;

4.4.32  Undated letter from City Power addressed to Public Protector signed by Mr Mashudu Monyai, General Manager Legal Services;

4.4.33  Letter of request for information dated 17 July 2019 from the Public Protector addressed to Chief Executive Officer of Umalusi Dr Mafu Rakometsi;

4.4.34  Response from the Department of Basic Education verifying Senior certificate dated 18 July 2019 signed by MR T E Nene Deputy Director: Certification and Historical Records;

4.4.35  Email correspondence from Public Protector to Lebelo Maloka dated 22 August 2019;

4.4.36  Letter of further request for information dated 03 October 2019 from the Public Protector addressed to Dr Ndivhoniswani Lukhwareni City Manager of CoJ;
4.4.37 Response from Mr Willie Mathebula of National Treasury to the Public Protector dated 10 October 2019;

4.4.38 Letter of request for further information dated 14 October 2019 from the Public Protector addressed to Mr J Samuels the Chief Executive Officer (CEO) of the South African Qualifications Authority (SAQA);

4.4.39 Response letter from CoJ dated 30 September 2019 signed by Group Legal and Contracts with supporting documents (Council minutes, Clearance Certificate and Affidavits deposed to by Mankopo Mashoeshoe etc);

4.4.40 Interview request letters dated 10 October 2019 from the Public Protector addressed to the City Manager Dr Ndivhoniswani Lukhwareni of the City of Johannesburg (CoJ) to request Mr Mankopo Moshoeshoe to avail himself for a meeting;

4.4.41 Affidavit from Mr Abraham Pitso stamped 29 October 2019;

4.4.42 Response from SAQA signed Mr Joe Samuels dated 06 December 2019;

4.4.43 Allegations letter dated 03 October 2019 from the Public Protector addressed to the City Manager of CoJ;

4.4.44 Email correspondence from Ms Nicole Dasneves of CoJ to the Public Protector dated 15 April 2020, wherein the City requests an extension;

4.4.45 Email correspondence from Mr Alistair Shaw (Mr Herman Mashaba) to the Public Protector dated 15 April 2020, wherein he requests an extension;

4.4.46 Request for extension letter from the City Manager of CoJ dated 16 April 2020 sent through email;
Email correspondence from Mr Alistair Shaw to the Public Protector dated 20 April 2020;

Email correspondence from the Public Protector to Mr Alistair Shaw dated 23 April 2020;

Letter from Adv. M Msibi of RTMC to the Public Protector requesting for extension to reply to a Notice dated 24 April 2020;

Letter from the Complainant to the Public Protector requesting for extension to reply to a Notice dated 28 April 2020;

Letter from the Public Protector granting an extension to RTMC signed 19 May 2020;

Letter from the Public Protector granting an extension to Former Chief of Police Mr Tembe signed 19 May 2020;

Letter from the Public Protector granting an extension to the Complainant signed 19 May 2020;

Letter from the Public Protector granting an extension to Mr Herman Mashaba signed 19 May 2020;

Letter from Power Singh Incorporated representing Mr Herman Mashaba addressed to the Public Protector dated 27 May 2020 requesting another extension;

Response from Adv. M Msibi of RTMC replying to a Notice dated 02 June 2020;

Email correspondence from Martin Henning Attorneys representing Mr David Tembe to the Public Protector dated 08 June 2020;
4.4.58 Letter from Power Singh Incorporated representing Mr Herman Mashaba addressed to the Public Protector dated 19 June 2020 requesting another extension;

4.4.59 Email correspondence from the Public Protector to Mr Power of Power Singh Incorporated dated 19 June 2020;

4.4.60 Letter from Power Singh Incorporated representing Mr Herman Mashaba addressed to the Public Protector dated 29 June 2020 providing response;

4.4.61 Email correspondence from Martin Henning Attorneys representing Mr David Tembe addressed to the Public Protector dated 30 June 2020 providing response to the Notice with annexures;

4.5 **Legislation and other legal prescripts**

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

4.5.2 Promotion of Administrative Justice Act 3 of 2000;

4.5.3 The Public Protector Act, 23 of 1994 (the PPA);

4.5.4 The Municipal Finance Management Act, 56 of 2003 (MFMA);

4.5.5 Local Government: Municipal Systems Act 32 of 2000;

4.5.6 Public Administration Management Act 11 of 2014;

4.5.7 National Road Traffic Act 93 of 1996;

4.5.8 Transvaal Local Government Ordinance 17 of 1939;

4.5.9 Local Government Regulations on Appointment and Conditions of Appointment of Senior Managers promulgated in the Government Gazette on 17 January 2017;
4.5.10 Policy Document for Traffic Training Centres (Rustenburg Document);

4.5.11 CoJ’s Recruitment and Selection Policy is titled Group Talent Acquisition Policy Framework (GTAPF);

4.5.13 CoJ’s Job Evaluation Policy and Circulars Issued under MFMA.

4.6 Case law

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

4.6.2 Gamede MA vs The Public Protector (992646/2015) [2018] ZAGPPHC 865;2019(1) SA 491(GP);

4.6.3 Protekon (Pty) Ltd vs Commission for Conciliation, Mediation & Arbitration and Others (2005) 26 ILJ 1105 (LC);

4.6.4 Western Cape Gambling & Racing Board vs Commission for Conciliation, Mediation & Arbitration and Others (2015) 9BLLR 966 (LC);

4.6.5 Sanyathi Civil Engineering & Construction (Pty) Ltd vs eThekwini Municipality 2012 (1) BCLR 45 (KZP);

4.6.6 Inyameko Trading 189 CC t/a Masiyakhe Industries vs Minister of Education (2007) ZAWCHC;

4.6.7 Allpay Consolidated Investment Holdings and Others vs Chief Executive Officer of the South African Social Security Agency and Others(2013) ZACC;
4.6.8 Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another;

4.6.9 Principal Immigration Officer vs Hawabu 1936 AD 26);

4.6.10 Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others (1306/18) [2020] ZASCA;

4.6.11 Steenkamp NO v Provincial Tender Board of the Eastern Cape [2006] ZACC 16; 2007 (3) SA 121 and


Books and Articles

4.6.13 Botha C Statutory Interpretation 3rd Edition (1998 Juta & Company);


Touch Stone(s)

4.6.15 Report No. 22 of 2013/14 (Unsolicited Donation) of the Public Protector South Africa.

4.7 Interviews/Meetings conducted

4.7.1 A meeting between the Public Protector and the Complainant, held on 23 January 2019.

4.7.2 A copy of the attendance register of the meeting between the Public Protector and the Complainant, held on 23 January 2019;
4.7.3 A meeting between the Public Protector and Adv. M Msibi of RTMC, held on 17 July 2019.

4.7.4 A copy of the attendance register of the meeting between the Public Protector and Adv. M Msibi of RTMC, held on 17 July 2019.

4.7.5 A meeting between the Public Protector and City Manager of CoJ and two Legal Advisors, held on 07 August 2019.

4.7.6 A copy of the attendance register of the meeting between the Public Protector and City Manager of CoJ and his officials, held on 07 August 2019.

4.7.7 A meeting between the Public Protector and CoJ officials, held on 15 August 2019.

4.7.8 A copy of the attendance register of the meeting between the Public Protector and CoJ officials, held on 15 August 2019.

4.7.9 A meeting between the Public Protector and Gauteng Department of Transport official (Mr Lebelo Maloka), held on 06 September 2019;

4.7.10 A copy of the attendance register of the meeting between the Public Protector and Lebelo Maloka, held on 06 September 2019;

4.7.11 A meeting between the Public Protector and Superintendent Abraham Pitso of JMPD, held on 24 October 2019;

4.7.12 A copy of the attendance register of the meeting between the Public Protector and Superintendent Abraham Pitso, held on 24 October 2019;

4.7.13 A meeting between the Public Protector and Mr Mashoeshoe of CoJ, held on 30 October 2019;

4.7.14 A copy of the attendance register of the meeting between the Public Protector and Mr Mashoeshoe of CoJ, held on 30 October 2019;
4.8 Notices issued in terms of section 7(9) of the Public Protector Act and responses thereto.

4.8.1 A notice was issued to the City Manager of CoJ: Dr Lukhwarieni on 14 April 2020;

4.8.2 A notice was issued to the CEO of RTMC: Adv M Msibi on 14 April 2020;

4.8.3 A notice was issued to the Speaker of Council of CoJ on 14 April 2020;

4.8.4 A notice was issued to the current Executive Mayor of CoJ: Mr G Makhubo on 14 April 2020;

4.8.5 A notice was issued to the Head of Department of Gauteng Department of Transport on 14 April 2020;

4.8.6 A notice was issued to the Premier of Gauteng on 14 April 2020;

4.8.7 A notice was issued to Mr Mashaba on 14 April 2020;

4.8.8 A notice was issued to Mr Tembe on 14 April 2020;

4.8.9 A notice was issued to the Member of Executive Council of COGTA on 14 April 2020;

4.8.10 Responses to section 7(9) notice dated 30 June 2020, signed by Dr Ndivhoniswa Lukhwarieni of CoJ

4.8.11 Responses to section 7(9) notice received from Mr Mashaba on 30 June 2020;
4.8.12 Responses to section 7(9) notice received from Mr Tembe on 30 June 2020 and

4.8.13 Responses to section 7(9) notice received from RTMC on 02 June 2020.

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

5.1 Whether CoJ improperly or irregularly appointed Mr Moses Metileni to the position of an Executive Director of Housing without following due processes.

Common Cause Issues

5.1.1 On 26 January 2017, the City of Johannesburg Metropolitan Municipal Council (Council) resolved that the CoJ should embark on a recruitment process to fill the position of Executive Director: Housing. The Council further designated the following persons to be part of the Selection and Interviewing Panel for the position:

(a) City Manager (Dr Ndivhoniswa Lukhwareni/Chairperson)
(b) External Expert: Ms Peta Mashinini (as appointed by City Manager)
(c) Member of the Mayoral Committee (MMC) M Ntuli (Housing portfolio head) and
(d) Councillor MMC VN Khumalo

5.1.2 In terms of the appointment recommendation report dated 07 June 2017, which also served before Council on 08 June 2017, the following process was followed in the appointment of the Executive Director: Housing:

5 Note that at the time of interviews MMC Khumalo was not available due to family commitments and MMC Cllr Ngobeni was acting in the capacity of MMC Corporate and Shared Services.
5.1.2.1 **Advertising:**

The position was circularised in the Vacancy Circular number 004/2017 and advertised simultaneously on Sunday Times newspaper of 12 February 2017, with a closing date of 28 February 2017. The requirements for the position in terms of the advertisement were the following:

"B Science degree in Building Sciences/NQF level 7. Post graduate qualification is a must. Must be a registered member of the relevant professional bodies. Comprehensive understanding of housing role in local government. At least five years extensive experience in senior management related to housing and within a public sector organisation or in local government. The incumbent should meet the standard set out in the core competency requirements as per regulations. Good knowledge of performance management systems. Good governance. Good knowledge of supply chain management regulations and Preferential Procurement Policy Framework Act 2000 (Act No 5 of 2000)."

5.1.2.2 **Responses:**

A total of seventy six (76) applications were received for the position. Sixty nine (69) of the applications did not meet the minimum requirements stated in the advertisement and only seven (7) met the criteria and requirements of the position.

5.1.2.3 **Shortlist:**

The following seven (7) candidates were shortlisted:

(i) Ms Amolemo Mothoagae
(ii) Mr Walter Melato
(iii) Mr Patrick Phophi
(iv) Mr Moses Metileni
5.1.2.4 **Interviews:**

5.1.2.4.1 The interviews were held on the 4th of May 2017, at the CoJ offices in Braamfontein, City Manager’s Boardroom and all the above shortlisted candidates were interviewed.

5.1.2.4.2 The panel consisted of:

(a) Dr Ndivhoniswani Lukhwareni, City Manager (Chairperson)
(b) Cllr MMC Mzobanzi Ntuli, MMC: Housing
(c) Cllr Funzela Ngobeni, Acting MMC: Corporate and Shared Services
(d) Ms Peta Mashinini, External Expert
(e) Ms Mbali Mchunu, Group Human Capital Management (Secretariat)

5.1.2.5 **The outcome of the Interview Process and the Summary of the Score Sheet is illustrated in the table below:**

<table>
<thead>
<tr>
<th>Serial No.</th>
<th>Name of the Applicant</th>
<th>Scores</th>
<th>Overall Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Amolemo Mothoagae</td>
<td>131</td>
<td>1</td>
</tr>
<tr>
<td>2.</td>
<td>Patrick Phophi</td>
<td>126,5</td>
<td>2</td>
</tr>
<tr>
<td>3.</td>
<td>Walter Melato</td>
<td>121,5</td>
<td>3</td>
</tr>
<tr>
<td>4.</td>
<td>Emanuel Sotomi</td>
<td>118,5</td>
<td>4</td>
</tr>
<tr>
<td>5.</td>
<td>Moses Metileni</td>
<td>113,5</td>
<td>5</td>
</tr>
<tr>
<td>6.</td>
<td>Amos Mboweni</td>
<td>103,5</td>
<td>6</td>
</tr>
<tr>
<td>7.</td>
<td>Bradley Rathumbai</td>
<td>62,5</td>
<td>7</td>
</tr>
</tbody>
</table>
5.1.2.6 **Competency Assessment:**

5.1.2.6.1 The recruitment process also included competency assessments of the five (5) highest ranked candidates in terms of the interview scores as agreed upon by the interview panel members. The tailor-made reference checks and credibility assessments (identity number, qualifications and credit and criminal record checks were also conducted. The outcome of the assessment was that the preferred candidate would be suitable for this position.

5.1.2.7 **Final Recommendations by the Interview Panel:**

5.1.2.7.1 After the panel had carefully considered all the inputs of the recruitment process, **Mr Moses Metileni** was recommended as the most suitable for the position. Mr Metileni holds the following qualifications and experience:

i. Master’s Degrees in Development Economics
ii. Master of Science in Town and Regional Planning
iii. Master of Arts in Creative Writing
iv. Vast experience in local government and public sector
v. He has been acting as Director: Human Settlement since July 2016

5.1.2.7.2 The interview panel was confident that Mr Moses Metileni could handle the Executive Director Housing portfolio with ease. Mr Walter Melato was identified and recommended as the second preferred candidate for the position.

**Issues in Dispute**

5.1.3 The crux of the dispute raised by the Complainant with regard to this appointment was that, the composition of the panel members for the Executive Director of Housing position did not promote strategic intent of section 12 of the Local
Government regulations appointment and conditions of employment of Senior Managers Council policy.

5.1.4 The Complainant submitted that a councillor designated by the municipal council was not included in the panel. Further that an external expert (Ms Peta Mashinini) had no experience or expertise in the area of the advertised post, namely housing.

5.1.5 The Complainant also strongly argued that the report tabled by the City Manager: Dr Lukhwareni in relation to the appointment of the Executive Director for Housing contained a number of administrative and procedural irregularities. An example provided by Complainant in this regard was that the appointed candidate did not attain the highest score or even placed second during the interview process.

5.1.6 Complainant further contended that these irregularities resulted to the exploration undertaken by the African National Congress (ANC) to demonstrate that the Council of Johannesburg was misled by the Democratic Alliance (DA) led administration during the course of this appointment.

5.1.7 In order to demonstrate the alleged irregularities in the appointment of senior managers, the ANC released a statement on 12 July 2017 and highlighted the procedural guidelines that should have been followed in terms of section 17 (resolution of the municipal council on appointment of senior managers and reporting) of the Local Government.

5.1.8 The CoJ responded to the above allegations as per letter dated 04 May 2018, signed off by its City Manager: Dr Ndlovu Lukhwareni (Dr Lukhwareni).

5.1.9 In its response, which was accompanied by distinct annexures, CoJ submitted to my office an appointment report for the Executive Director Housing that was dealt with in Council on 08 June 2017.
5.1.10 CoJ further contended and remained adamant in its response that the composition of the interview panel members as shown in the appointment report was in compliance with section 12(4) of the Regulations on Appointment of Senior Managers of Local Government (Appointment Regulations).

5.1.11 In response to the allegation that Ms Peta Mashinini had no experience or expertise in the area of the advertised post, CoJ attached her abridged resume which adequately showed her expertise in the field of housing at the Gauteng Government: Department of Local Government and Housing July 2012 to March 2013.

5.1.12 On 29 March 2019, CoJ further furnished my office with an additional response\(^6\) to this issue after my office requested same.

5.1.13 With regard to the allegation that the appointed candidate did not score number one or even number two during the interview, CoJ admitted that the appointed candidate had the fifth (5\(^{th}\)) highest score out of seven shortlisted candidates. Despite admitting that the appointed candidate scored fifth (5\(^{th}\)), CoJ denied that the interview scores rendered his appointment irregular.

5.1.14 CoJ further argued that there is no legal requirement for the City Council to appoint the candidate with the highest interview score.

5.1.15 CoJ also furnished my office with the copy of the interview scores for the Executive Director Housing post as part of its response and annexures. Upon perusal of the same record, I observed that, indeed the appointed candidate, Mr Moses Metileni was ranked number fifth (5\(^{th}\)) with a total score of 113, 5 during the interview process.

\(^6\) As per letter dated 29 March 2019, signed off by Dr Lukhwareni.
My office was not furnished with the minutes of the interview panel by CoJ, despite a request for same. CoJ indicated in its response that it could not locate the minutes of the interview for Executive Director Housing despite a diligent search for this record.

The CoJ indicated as per memorandum dated 20 March 2019, signed off by the Acting Group Head Human Capital Development: Ms Serena Pienaar, that the supporting documents regarding the decisions taken by panel members could not be found and that the person who kept this information namely, Group Executive Director Corporate and Shared Services: Mr Molodi Khutsoane resigned from the employ of CoJ.

In the absence of supporting documentation regarding decisions taken by the panel members, considerations, notes, etc., I could not establish the rationale or reasons advanced by the panel for selecting a candidate that scored fifth during the interview.

In essence, CoJ denied all the allegations of irregularity made by the Complainants with regard to the appointment of the Executive Director Housing.

Application of the relevant legal prescripts

The Constitution

Section 151 of the Constitution of the Republic of South Africa\(^7\) (Constitution) states *inter alia*:

(1) “The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

\(^7\) Constitution of the Republic of South Africa, 1996.
(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

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

(4) …………………………………….”

5.1.21 In terms of section 239 of the Constitution an ‘organ of state’ means—

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

5.1.22 Based on the foregoing constitutional provisions, it is submitted that CoJ is an organ of state and a municipality constituted at a local sphere of government as contemplated above.

5.1.23 Section 195(1) of the Constitution provides, amongst others, that:

“Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained;
(b) …;
(c) Services must be provided impartially, fairly, equitably and without bias;
(d) …;
(e) Public administration must be accountable; and
(f) Transparency must be fostered.”

5.1.24 It goes without saying that CoJ’s employees are public servants who are expected to maintain a high standard of professional ethics, foster transparency and to be accountable and impartial when engaging administrative processes such as recruitment and selection process of its senior managers.

5.1.25 The principle of legality in South African law is enshrined in section 2 of the Constitution, which provides that:

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

5.1.26 The constitutional principle of legality requires that a decision maker exercises the power conferred upon her/him lawfully, rationally and in good faith. To this end, it is submitted that CoJ as an organ of state is bound by the above constitutional obligations and by the principle of legality.

Legislation

5.1.27 Section 56(a)(b) of the Local Government: Municipal Systems Act\(^8\) (MSA) regulates the Appointment of managers directly accountable to municipal managers and provides as follows:

(a) “A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.

\(^8\) Act 32 of 2000.
(b) A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination”.

Regulation(s)

5.1.28 Section 12(4)(a-c) and (8) of the Appointment Regulations promulgated in the Government Gazette under Notice 21 dated 17 January 2014 (Appointment Regulations), provides as follows:

12(1) A municipal council must appoint a selection panel to make recommendations for the appointment of candidates to vacant senior manager post.

(4) The selection panel for the appointment of a manager directly accountable to a municipal manager must consist of at least three and not more than five members, constituted as follows:

(a) The municipal manager, who will be the chairperson;

(b) The member of the mayoral committee or councillor who is the portfolio head of the relevant portfolio and

(c) At least one other person, who is not a councillor or staff member of the municipality and who has expertise or experience in the area of the advertised post.

(8) A staff member may provide secretarial or advisory services during the selection process but may not form part of the selection panel”. 
5.1.29 In line and in compliance with the above Appointment Regulation, the Municipal Council of CoJ (Council) appointed the following persons\(^9\) to form part of the selection panel:

(a) Dr Ndiphoniswani Lukhwareni  City Manager (Chairperson)
(b) Cllr MMC Mzobanzi Ntuli  MMC: Housing
(c) Cllr Funzela Ngobeni  Acting MMC: Corporate and Shared Services
(d) Ms Peta Mashinini  External Expert
(e) Ms Mbali Mchunu  Group Human Capital Management Secretariat

5.1.30 In terms of the appointment report submitted by Dr Lukhwareni to Council on 26 June 2017, interviews were held on 4\(^{th}\) May 2017 at CoJ offices in Braamfontein in the City Manager’s boardroom.

5.1.31 Mr Moses Metileni was recommended unanimously as the most suitable candidate for appointment as an Executive Director for Housing in the CoJ for a fixed term period of five years from 01 August 2017 or as soon as possible thereafter.

5.1.32 Section 17(1-4) of the Appointment Regulations makes the following important pronouncements and guidelines:

(1) *Before making a decision on an appointment, a municipal council must satisfy itself that:*

(a) *The candidate meets the relevant competency requirements for the post, as set out in Annexure A and B to these regulations;*
(b) *Screening of the candidates has been conducted in terms of regulation 14 and*

\(^9\) As per minutes of the City of Johannesburg Council dated 2017-01-26.
(c) The candidate does not appear on the record of staff member’s dismissal for misconduct as set out in Schedule 2 to these regulations.

(2) A municipal council must subject to sub-regulation (1), take a decision on the appointment of a suitable candidate.

(3) A municipal council must-

(a) inform all interviewed candidates including applicants who were unsuccessful of the outcome of the interview; and
(b) within 14 (fourteen) days of the decision referred to in sub-regulation (2), submit a written report to MEC for local government regarding the appointment process and outcome.

(4) The report contemplated in sub regulation (3)(b) must contain:

(a) Details of the advertisement;
(b) A list of all applicants;
(c) A report contemplated in regulation 14(2) on the screening process and outcome thereof;
(d) The municipal council’s resolution approving the selection panel and the shortlisted candidates;
(e) Competency assessment results;
(f) The minutes of the shortlisting meeting;
(g) The minutes of interviews including scoring;
(h) The recommendations of the selection panel submitted to the municipal council;
(i) The details of the executive committee members and recommendations, if the selection panel comprised of all of the executive committee;
(j) The recommendations of the executive committee or executive mayor to the municipal council; if any
(k) The municipal council resolution approving the appointment of the successful candidate;
(l) The application form, curriculum vitae, of qualifications and other supporting documentation of the successful candidate;

(m) A written confirmation by the successful candidate that he or she does not hold political office as contemplated in section 56A of the Act, as at the date of appointment;

(n) The letter of appointment outlining the term of contract, remuneration, and conditions of employment of senior manager and any other information relevant to the appointment and

(o) Any other information relevant to the appointment.

5.1.33 Not all of the above regulations were fully complied with by Council members on the appointment of the Executive Director of Housing.

5.1.34 Notably missing from the procedural requirements in terms of Section 17(3) of the Appointment Regulations were the *inter alia*:

(a) A written report to MEC for local government regarding the appointment process and outcome.

(b) The minutes of interviews including scoring;

(c) The municipal council resolution approving the appointment of the successful candidate;

(d) A written confirmation by the successful candidate that he or she does not hold political office as contemplated in section 56A of the Act, as at the date of appointment;

(e) The letter of appointment outlining the term of contract, remuneration, and conditions of employment of senior manager.

5.1.35 When the available evidence in respect of this appointment is objectively analysed against applicable regulations as shown above, it stands to reason that the appointment of Mr Moses Metileni to the position of Executive Director Housing by the CoJ, should have been made in full compliance with the requirements in terms of section 17 of the Appointment Regulations.
5.1.36 Section 15(1-6) of the Appointment Regulations deals with Interviews and stipulates that:

(1) “………………………….;

(2) The selection panel for a specific post must remain the same throughout the screening and interviewing process;

(3) The selection panel must keep records of every panel member’s individual assessment of the interviewed candidates;

(4) ………………………….;

(5) ………………………….;

(6) The selection panel must recommend the second and third suitable candidates to minimise delays that may arise in the filling of the post if the first choice candidate declines or does not accept the offer of employment”.

5.1.37 With regard to this appointment, CoJ failed to furnish my office with the records of every panel member’s individual assessment of the interviewed candidates for perusal or inspection. This record could have enabled me to assess the fairness, rationality and the basis of the panel’s decision.

5.1.38 Equally, the panel recommended the 5th ranked candidate to the post of the Executive Director Housing, thereby eliminating 1st, 2nd, 3rd and 4th ranked candidates in favour of Mr Moses Metileni who had scored fifth in the interview process.

Policies

5.1.39 At this juncture, I find it compelling to interpose and underscore, en passant that, customarily organs of state operate within certain regulatory Policy Framework which guides their day to day procedural operations and administrative activities. Of particular note is that, although organisational policies such as Recruitment Policies cannot be exalted to
a strict legal code such as an Act of parliament or legislation, these policies are invariably crafted to mirror the objects of the main legislation.

5.1.40 Policies are duly adopted by organisations as guiding documents and are normally binding on its employees. I am therefore highly inclined to apply and consider organisational policies during the course of my investigation to determine the extent to which policies have been complied with by government officials in execution of their official administrative duties.

5.1.41 CoJ’s Recruitment and Selection Policy is titled *Group Talent Acquisition Policy Framework* (GTAPF). It was adopted and approved by Council Resolution with effect from 01 October 2014, with Policy Number GCSS-GHCM-20141001.

i. Clause 1 of the GTAPF sets out the purpose of this policy and states as follows:

“The intention of the Talent Acquisition Policy is to set norms, measures and guidelines that will allow the City of Johannesburg to select the right people and quality with necessary competencies to satisfy the current and future needs of the organisation”.

5.1.42 Clause 5 of the GTAPF outlines the scope of application of this policy as being *inter alia*:

“This policy framework applies to all employees and job categories in the City. The Policy framework applies to the City of Johannesburg Metropolitan Municipality”

5.1.43 It is submitted that the above cited policy provisions set out the rules, guiding principles and procedures that had to be followed by CoJ or its employees when recruiting staff. It is further clear from the scope of its application that the provisions of this policy are binding on the CoJ and its employees.
5.1.44 On the other hand, Clause 15 of the GTAPF is titled CONTRAVENTIONS and stipulates the following:

“Any person who contravenes or fails to comply with any provisions of this policy should be subjected to a Disciplinary Action.”

5.1.45 Given the binding effect of this policy as is clearly discernible from the phrasing of sub Clause 15, it is submitted that compliance with it, is not optional and the CoJ staff members/Panel cannot ignore it without any legal or disciplinary consequences/implications.

5.1.46 Clause 8.3.4 of the GTAPF regulates the Finalisation of Recommendation by interview panel and states *inter alia*:

(a) “When all the candidates on the shortlist have been interviewed, unless for whatsoever reason one or some of them were unable to attend and this did not materially affect the quality of the process or the opportunity to meet EE targets, the interviewing Panel will deliberate and recommend a suitable candidate based in interview/s and assessments (if appropriate).

(b) The Panel should also finalise a second recommended candidate, provided such a candidate attained on aggregate 75% on the tests and interview questions ratings, in the event that the first candidate does not accept the offer.

(c) Should the Panel be unable to recommend a second candidate due to the fact that no other candidate met competencies with at least a 75% result and the successful candidate does not accept, the process will have to commence either with new round of interviews if suitable candidates are available to be shortlisted or re-advertisement for circularisation in the appropriate form as outlined in the paragraph dealing with it.
(d) The deliberations of the Panel must only focus strictly on the core selection criteria of the job and the extent to which each applicant meets or does not meet those requirements and will avoid all elements of discrimination.

(e) ……………………………………………………"

5.1.47 The interview scores which were furnished by CoJ to my office on 29 March 2019 as per letter signed off by Dr Lukhwareni, indicate that Mr Moses Metileni was not recommended based on the interview scores.

5.1.48 It follows therefore that, in recommending Mr Moses Metileni to a position of Executive Director Housing, the CoJ Panel had to follow the guidelines in terms of its GTAPF.

5.1.49 Clause 8.3.4 (a) of the GTAPF states that the interviewing Panel will deliberate and recommend a suitable candidate based on interview/s and assessments (if appropriate). In this instance, it is not clear why the GTAPF guidelines were ignored by the interview panel.

5.1.50 Further, the basis on which the fifth ranked candidate was recommended for appointment ahead of Mr Amolemo Mothoagae who had ranked first during the interviews remain unclear due to lack of record of the interview minutes, which CoJ could not furnish to my office. Minutes of the interview would have assisted my office to assess rationality of reasons given for deviation from provisions of GTAPF policy framework.

5.1.51 Equally, it remains unexplained as to why the Panel did not recommend the second highest scoring candidate namely, Mr Patrick Phophi, as provided for by the guidelines in terms of Clause 8.3.4 (b) and (c) of the GTAPF. These Clauses demand that the Panel should finalise a second recommended candidate, provided such a candidate attained on aggregate 75% on the tests and interview questions ratings or to commence the process with a new round of interviews of or re-advertisement if no other
candidate met competencies with at least a 75% result and the successful candidate does not accept.

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

5.1.52 On 14 April 2020, I issued all implicated parties and those with direct interest on this matter with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond to the allegations against them, particularly in relation to the role each played in this matter. Section 7(9)(a) of the Public Protector Act provides that:

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

5.1.53 I now turn to consider the responses submitted regarding the section 7(9) notices (hereinafter referred to as notice/s). I have made an effort to deal with each and every aspect raised in the responses but where it appears that I have not done so, that should not be misconstrued as an admission of any kind of the averments contained therein.

5.1.54 A response was received by my office on the 02 July 2020 from Dr Lukhwareni: City Manager CoJ.

5.1.55 Replying to my Notice, CoJ merely sought to argue that, the City Manager cannot be accused of non-compliance with Regulation 17 of the
Appointment Regulations which provides amongst other things that the Council must:

“Within 14 (fourteen) days of the decision referred to in sub-regulation (2), submit a written report to MEC for local government regarding the appointment process and outcome”.

5.1.56 While I readily accept the submission in respect of the fact that compliance with Regulation 17(1-4) of the Appointment Regulations lies with the Council, nothing in the response itself seeks to dispute my finding of non-compliance with Regulation 17(1-4) of the Appointment Regulations by CoJ on this appointment.

5.1.57 CoJ further sought to argue that it retains a reasonable discretion to elect any shortlisted candidates, with the prescribed skills, expertise, competencies or qualifications for the position. It submitted by CoJ that is therefore surprising for my office to then conclude, as it intends to, that the appointment of an individual who has the necessary prescribed skills, expertise, competencies and qualifications was irregular, simply because he didn’t have the highest interview score.

5.1.58 It is common cause that other candidates too, who scored higher than Mr Moses Metileni during the interview also possessed the prescribed skills, expertise, competencies or qualifications for the position.

5.1.59 I am of the view that if a particular situation is clearly regulated by a written Policy Document, the guidelines provided for in that applicable policy should be the course to follow.

5.1.60 In this case, my office could not find any reason why Clause 8.3.4 of the GTAPF policy which regulates the manner in which finalisation of interview recommendations should be done, was not followed based on interview scores and assessments.
5.1.61 While CoJ may possibly have discretion to appoint any shortlisted candidates, such discretion has to be exercised reasonably, fairly and openly.

5.1.62 Lastly, my office has been advised by CoJ that Mr Moses Metileni tragically passed away in July 2019.

Conclusion

5.1.63 Based on the summary of the interview score sheet in my possession in respect of this appointment, it can be observed that Mr Moses Metileni who was recommended and appointed by CoJ to the position of Executive Director: Housing, did not rank first or second. Instead, Mr Moses Metileni ranked fifth during the interview process.

5.1.64 Having considered the totality of factual evidence as shown in the recommendation report for appointment of Executive Director: Housing submitted by Dr Lukhwareni to Council to consider for appointment, a conclusion to be drawn on a balance of probability is that the CoJ did not fully comply with the provisions of the Constitution, MSA: Local Government Appointment Regulations for Senior Managers and GTAPF during this appointment.

5.2 Whether CoJ improperly or irregularly appointed Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts without following due processes.

Common Cause Issues

5.2.1 On 26 January 2017, Council also resolved that the CoJ should embark on a recruitment process to fill the position of Group Head: Legal and Contracts. Council further designated the following persons to be part of the Selection and Interviewing Panel for the position:
(a) City Manager (Dr Ndivhoniswani Lukhwareni/Chairperson);
(b) Cllr MMC Rabelani Dagada (portfolio head for governance under which legal function resorted);
(c) Cllr Sharon Peetz (on behalf of Cllr MMC Ntombi Khumalo/MMC for Group Corporate and Shared Services);
(d) Advocate Fatima Salijee (external business expert who is an admitted attorney) and
(e) Mbali Mchunu (secretariat)

5.2.2 In terms of the appointment recommendation report, which also served before Council on 29 June 2017, the following process was followed in the appointment of Group Head: Legal and Contracts:

The process undertaken in the recruitment and selection included the following:

Advertising:

The position was circularised in the Vacancy Circular number 004/2017 and advertised simultaneously on Sunday Time newspaper of 12 February 2017 with a closing date of 28 February 2017. The requirements for the position in terms of the advertisement were the following:

“B degree in Law/NQF level 7. A post graduate qualification is a must. Comprehensive understanding of local government. A registered member of the relevant professional bodies. At least five years extensive experience in Senior Management related to law and within a public sector organisation or in local government. Law and relevant legislation. Strong business acumen in the management fields. Good knowledge of performance management systems. Good governance. Good knowledge of supply chain management regulations and Preferential Procurement Policy Framework Act 2000 (Act No 5 of 2000). The incumbent should meet the standard set out in the core competency as per regulations.”
(a) Responses:

A total of eighty three (83) applications were received for the position. Seventy seven (77) of the applications did not meet the minimum requirements as stated in the advertisement and only six (6) met the requirements of the position.

(b) Shortlist:

The following six (6) candidates were shortlisted:

(i) Mr Caleb Mokopo  
(ii) Mr Mafoane Mogasho  
(iii) Mr Mbulelo Ruda  
(iv) Mr Moeketsi Motsapi  
(v) Mr Mpho Mokopo  
(vi) Mr Peter Segala

(c) Panel Interviews:

The interviews were held on 8th May 2017 at the CoJ offices in Braamfontein, City Manager’s Boardroom and all the above shortlisted candidates were interviewed. The panel consisted of:

(a) City Manager (Dr Ndlovhuqishani Lukhwareni/chairperson)  
(b) Cllr MMC Rabelani Dagada  
(c) Cllr Sharon Peetz (on behalf of Cllr MMC Ntombi Khumalo)  
(d) Advocate Fatima Salijee (external business expert who is an admitted attorney) and  
(e) Mbali Mchunu (secretariat)

(d) Competency Assessment:

The recruitment process also included competency assessments of the four (4) highest ranked candidates in terms of the interview scores as agreed upon by the interview panel members. The tailor made reference
checks and credibility assessments (identity number, qualifications and credit and criminal record checks were also conducted. The outcome of the assessment was that the preferred candidate would be suitable for this position.

(e) Outcome of the Interview process and Final Recommendations:

After the panel had carefully considered all the inputs of the recruitment process, the following candidate was considered the most suitable for the position:

**Mr Mafoane Mogashoa**

Mr Mafoane Mogashoa is an admitted attorney

He holds a post graduate Diploma in investigative and forensic accounting and a post graduate Diploma in drafting and interpretation of contracts.

Advanced Diploma in Labour Law

He has experience in local government, private and public sector.

He is currently a Chief Director: Regulatory and Compliance Services for the Department of Co-Operative Governance, Human Settlements and Traditional Affairs.

Holds a certificate in Advanced Municipal Finance programme.

With his experience and following his competency assessment, the interview panel was confident that Mr Mafoane Mogashoa is deemed fully competent to successfully execute the functions of the Group Head: Legal and Contracts. The unanimous recommendation was that Mr Mafoane Mogashoa is the most suitable candidate and should be recommended for appointment subject to his obtaining the security clearance.

Mr Caleb Makopo was identified and recommended as the second choice for the position.
Issues in Dispute

5.2.3 In the main, the Complainant argued that the panel member namely, Cllr Rabaleni Dagada (Cllr Dagada) influenced the scores during the interviews for the post of Group Head: Legal and Contracts. It was submitted by Complainant that candidate Mr Mbulelo Ruda was scored the highest by all panel members except by Cllr Dagada who was allegedly advancing the political agenda during the interviews.

5.2.4 Complainant further alleged that the external expert namely Fatima Salijee, had no relevant experience in the field of the post and that as a result, this appointment shared the same fate as Executive Director: Housing.

5.2.5 In response to the allegation that the external expert had no experience or expertise in the area of the advertised post: CoJ attached an abridged resume of Fatima Salijee which shows that she is an admitted lawyer with relevant experience in the field of the post.

5.2.6 CoJ further replied to an allegation that the panel member (Cllr Dagada) influenced the scores in as far as the appointment of the Group Head: Legal and Contracts is concerned by indicating that: This issue has been a subject of court litigation.

5.2.7 Further that the Labour Court in its judgment dated 30 August 2017, stated that all the requirements of section 56 of the Local Government and Municipal Systems Act 32 of 2000 have been satisfied (appointment of senior municipal managers), the decision was rational and did not infringe on the principle of legality nor did the procedure adopted amount to an infringement of that principle. CoJ further furnished my office with the copy of this court judgement.
**Application of the relevant legal prescripts**

5.2.8 Section 56(a)(b) of the Local Government: Municipal Systems Act\(^\text{10}\) (MSA) regulates the Appointment of managers directly accountable to municipal managers and provides as follows:

(a) “A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.

(b) A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination”.

5.2.9 The CoJ was obliged in terms of the above legal provisions to ensure consultation between the municipal council and municipal manager before appointing a manager directly accountable to the municipal manager.

5.2.10 In this instance, CoJ indicated that all the requirements of section 56 of the MSA were satisfied. The Council expressed a preference for an external candidate who would bring fresh ideas on how to address the challenges facing the CoJ. The Council expressed preference for Mr Mafoane Mogashoa.

5.2.11 To this end, I interpose to cite section 182(3) of the Constitution of the Republic of South Africa which regulates and sets out the functions and powers of Public Protector *inter alia*:

“(3) The Public Protector may not investigate court decisions”. (my emphasis)

\(^{10}\) Act 32 of 2000.
5.2.12 It is common cause that this matter served before a court of law namely, the Labour Court of South Africa, Johannesburg under case number: J1781/17.¹¹

5.2.13 In this matter, *Mbulelo Allan Ruda vs City of Johannesburg and Others*, the court held that the threshold requirements of section 56 of the MSA had been met. Further that, in the absence of any contention that Mr Mafoane Mogashoa lacked the prescribed skills, expertise, competencies and qualifications, it cannot be said that the City acted irrationally in overlooking the applicant/ Mbulelo Allan Ruda and in appointing the fourth respondent/Mafoane Mogashoa.

5.2.14 Informed and guided by the above cited constitutional provision¹² in the main, I am not inclined to pursue or enquire into a matter in which a court of law has categorically pronounced itself, as is currently the case in the circumstances. Any attempt on my part to resuscitate or further enquire into this matter would amount to questioning a court decision, which by law I am not competent to do.

**Conclusion**

5.2.15 As it stands, this matter is *res judicata*, having been heard and adjudicated upon by a court of law as shown in evidence. It stands to reason therefore that the current court decision literally settled this matter.

5.2.16 It is submitted that the current court decision/judgement should prevail as far as this issue is concerned. Based on this court judgment, I am precluded from pronouncing on this issue.

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¹¹ Mbulelo Allan Ruda vs City of Johannesburg and others, 2017.

¹² Section 182(3) of the Constitution of the Republic of South Africa, 1996.
5.3 Whether CoJ improperly or irregularly appointed Dr Ndivhoniswani Lukhwareni to the position of a City Manager without following due processes.

Common Cause Issues

5.3.1 In terms of the report dated 27 October 2016 which was submitted by CoJ to my office, the Council resolved at its meeting on 13 September 2016 that the CoJ should embark on a recruitment process to fill the position for the Municipal City Manager of the CoJ.

5.3.2 The Council further designated Cllr Musa Novela to be part of the Selection and Interviewing Panel comprising of:

(a) Cllr Herman Mashaba
(b) External Expert: Mr Martin Hopkins
(c) Cllr Meshack van Wyk and
(d) Cllr Ntombi Khumalo

5.3.3 A service provider Pinpoint One Human Resources (Pty) Ltd was appointed on 30 September 2016 utilising Johannesburg Water Contract JWO 16/15CHR in terms of Regulation 32\(^{13}\) to assist the Executive Mayor with the response handling and screening of candidates for the position of City Manager.

5.3.4 The Recruitment Process entailed the following:

5.3.4.1 Advertising

5.3.4.1.1 The position was circularised in the Vacancy Circular number 038/2016 and advertised in the Sunday Time newspaper on 18 September 2016 with

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\(^{13}\) Regulation 32 of the Municipal Supply Chain Management Regulations published in the Government Gazette on 30 May 2005 provides for the procurement of goods and services under contracts secured by other organs of state.
the closing date for the applications being 01 October 2016. The requirements for the position in terms of the advertisement were the following:

“A Bachelor’s degree in Public Management, Political Science, Social Science, Law or equivalent qualification. Comply with MFMA unit standards as prescribed by Regulation 493 of 15 June 2007 as published in Government Gazette 29967 of 15 June 2007. A Master’s degree in management sciences will be an added advantage. Twelve (12) years’ experience of which at least five (5) years must be at senior management level. Proven experience in successful institutional transformation within public or private sector. Advanced knowledge and understanding of relevant policy and legislation. Advanced understanding of institutional governance systems and performance management. Advanced understanding of Council operations and delegation of powers. Good governance. Audit and Risk Management establishment and functionality. Budget and finance management. Ability in making high risk decisions of a long term and strategic nature. The applicant shall undergo competency assessment in terms of competency framework for Senior Manager. The applicant shall undergo security vetting. Computer literate”.

5.3.4.2 Responses

5.3.4.2.1 The CoJ received all applications and supporting documentation which were provided to Pinpoint One Human Resources (Pty) Ltd on 4 October 2016. A total of one hundred and thirteen (113) applications were received. The demographic ratio of applicants was as follows:

(a) African females - 18
(b) African males - 68
(c) Coloured males - 8
(d) Indian females - 2
(e) Indian males - 8
5.3.4.2.2 No applications were received from any other designated group. Only one person reflected a disability in the information provided.

5.3.4.3 Shortlist

5.3.4.3.1 As an outcome of the CVs submitted and the preliminary screenings and further vigorous elimination conducted by Pinpoint One Human Resources (Pty) Ltd and after consultation with the Selection and Interviewing Panel, the recommended final shortlist consisted of the following six (6) candidates, on 08 October 2016:

(i) Gisela Noelle Kaiser
(ii) Louis Scheepers
(iii) Lungile Townsend Dhlamini
(iv) Ndivhoniswani Lukhwareni
(v) Vuyo Mlokoti
(vi) Sarah Manthase Mashabela

5.3.4.4 Panel Interviews:

5.3.4.4.1 He panel held interviews of the first three (3) candidates on Thursday, 20 October 2016 and the remaining three (3) candidates were interviewed on 21 October 2016 on the 16th Floor, A Block Civic Centre, and Braamfontein. The following candidates were interviewed on Thursday, 20 October 2016:

(i) Lungile Townsend Dhlamini
(ii) Gisela Noelle Kaiser
(iii) Ndivhoniswani Lukhwareni
The following candidates were interviewed on Thursday, 21 October 2016:

(iv) Vuyo Mlokoti  
(v) Sarah Manthase Mashabela  
(vi) Louis Scheepers

5.3.4.5 Competency Assessment

5.3.4.5.1 The Department of Cooperative Governance established a panel of service providers who have capacity to do the competencies based on industrial psychology and competency assessments. One of the service providers on the panel namely, Landelhani Assessments (Pty) Ltd, undertook the assessment of the candidates.

5.3.4.5.2 The assessment included cognitive assessment, personality assessment, workplace behaviour assessment and simulation exercises. The results of the competency assessments were presented to the interview panel as additional input to the recruitment process on 24 October 2016.

5.3.4.6 Outcome of the Interview process and Final Recommendations

5.3.4.6.1 The panel was unanimous on the decision to recommend Ndivhoniswani Lukhwareni as the most suitable candidate for the position of City Manager. The panel was also unanimous that Vuyo Mlokoti would be the second and Lungile Dhlamini the third most suitable candidates recommended, respectively.

5.3.4.6.2 After the panel had carefully considered all the inputs of the recruitment process, Dr Ndivhoniswani Lukhwareni was recommended as the most suitable for appointment. Dr Lukhwareni’s qualifications include:

(i) BSc Electrical Engineering (Heavy Current) University of Durban Westville (Now University of Natal), 1992;
(ii) Diploma in Datametrics (IT), University of South Africa, 1997;
(iii) Master's in Business Leadership (MBL), University of South Africa, 2000;
(iv) Doctor in Business Leadership (DBL), University of South Africa, 2005; and
(v) Competence in Municipal Finance Management Program (MFMP) 15 units, University of Pretoria, 2015.

Issues in Dispute

5.3.5 With regard to the City Manager’s appointment, Complainant raised concerns that the appointed candidate namely Dr Lukhwareni was not the most suitable candidate and further that his competency results and security clearance status are still to be provided.

5.3.6 Complainant argued that there is a suspicious discrepancy between the date of competency assessment and the date of interviews for the appointment of the City Manager and that the competency results might have been forged by CoJ.

5.3.7 It was also disputed by Complainant that the Council report regarding the Commencement Process for the Recruitment of the City Manager was not available and that as a result there was no prior Council approval for commencement of this recruitment process.

5.3.8 CoJ responded to the above allegations as per letter dated 04 May 2018. In this response, CoJ disputed the above and submitted that the Appointment Regulations provides for 4 levels of competency namely, basic, competent, advanced and superior.

5.3.9 In support of their rebuttal, CoJ furnished my office with the report of the competency assessment dated 17 October 2016, which was done by an accredited service provider14 specified by the Department of Cooperative Governance. According to the assessment report, the assessment date for

14 Landelahni Assessments (Pty) Ltd.
Dr Lukhwareni was on 12 October 2016 and the assessor was Dilnaaz Karim. The competency assessment report can briefly be captured in the following table:

**Scoring Criteria and Proficiency Levels**

<table>
<thead>
<tr>
<th>Score</th>
<th>Descriptor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic</td>
<td>Marginal/basic demonstration of competency, basic understanding of concepts and methodologies; responses lack detail and integration.</td>
</tr>
<tr>
<td>Competent</td>
<td>Good demonstration of competency; proficient in understanding of concepts and methodologies; responses are suitably detailed and integrated.</td>
</tr>
<tr>
<td>Advanced</td>
<td>Elevated demonstration of competency; advanced understanding of concepts and methodologies; responses are well integrated and detailed.</td>
</tr>
<tr>
<td>Superior</td>
<td>Outstanding and comprehensive demonstration of competency; superior understanding of concepts and methodologies; responses are detailed and integrated in a logical and meaningful manner.</td>
</tr>
</tbody>
</table>

**Summary of the Results**

<table>
<thead>
<tr>
<th>COMPETENCY PROFICIENCY MATRIX</th>
<th>ACHIEVEMENT LEVEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEADERSHIP COMPETENCIES</td>
<td></td>
</tr>
<tr>
<td>Strategic Direction and Leadership</td>
<td>Competent</td>
</tr>
<tr>
<td>People Management</td>
<td>Competent</td>
</tr>
<tr>
<td>Program and Project Management</td>
<td>Competent</td>
</tr>
<tr>
<td>Financial Management</td>
<td>Basic</td>
</tr>
<tr>
<td>Change Management</td>
<td>Basic</td>
</tr>
<tr>
<td>Governance Leadership</td>
<td>Competent</td>
</tr>
<tr>
<td>CORE COMPETENCIES</td>
<td></td>
</tr>
<tr>
<td>Moral Competency</td>
<td>Competent</td>
</tr>
</tbody>
</table>
Viewed holistically, Dr Lukhwareni performed at a competent level. He achieved a rating of competency in 7 of the 12 competencies and a rating of advanced on one of the competencies that were measured.

The CoJ also furnished my office with a copy of the summary of interview score sheet for the position of the City Manager which is dated 21 October 2016. According to the summary of the interview score sheet, Dr Lukhwareni scored number 1 (one) with a total percentage of 83, 45%.

**Application of the relevant legal prescripts**

**Legislation**

Section 54A of the MSA, provides for the appointment of municipal managers and acting municipal managers, and provides inter alia as follows:

1. “The municipal council must appoint-
   (a) A municipal manager as head of the administration of the municipal council; or
   (b) .............................................
2. A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies\(^{15}\) and qualifications as prescribed.

\(^{15}\) Own emphasis.
A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if:

(a) The person appointed does not have the prescribed skills, expertise, **competencies** or qualifications; or

(b) The appointment was otherwise made in contravention of this Act.

The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.

From the aforesaid section, it is clear that the position of a municipal manager must be filled with a person that had the required skills, expertise, qualifications and **competencies** required for the position and as prescribed by way of Regulation. If no suitable candidates apply for the position, it must be re-advertised. This position is also in line with both SALGA’s Guidelines for the Appointment of the Municipal Manager and the CoJ’s GTAPF.

Section 168(1)(a) of Municipal Finance Management Act 56 of 2003 (MFMA) stipulates amongst other things the following:

“The minister, acting with the concurrence of the Cabinet member responsible for local government, may make regulations or guidelines applicable to municipalities and municipal entities, regarding any matter that may be prescribed in terms of this Act”.

Annexure A of the Appointment Regulations outlines the competency framework for senior managers across all levels of work in the municipality.
Annexure A, Section 6 of Appointment Regulations indicates the Levels of Achievements for Competency to serve as the benchmark for appointments and states *inter alia*:

6.1 “Individuals falling within the Basic range are deemed unsuitable for the role a senior manager and caution should be applied in promoting and appointing such persons”.

Based on the above summary of the competency level conducted by Landelhani Assessments (Pty) Ltd, it can be observed that Dr Lukhwareni’s overall achievement level is Competent, and it is above Basic range.

However, Chapter 2, section 3 of the Municipal Regulations of Minimum Competency Levels\(^\text{16}\) (Regulation 493) provides amongst other things that the accounting officer of the municipality or municipal entity must comply with the minimum competency levels required for higher education qualification, work related experience, core managerial and occupational competencies and be competent in the unit standards prescribed for financial and supply chain management competency areas as set out in table below:

### MINIMUM COMPETENCY LEVELS FOR ACCOUNTING OFFICERS

<table>
<thead>
<tr>
<th>Description</th>
<th>All municipalities and municipal entities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higher Education Qualification</td>
<td>At least NQF Level 6 or Certificate in Municipal Financial Management (SAQA Qualification ID No. 48965)</td>
</tr>
<tr>
<td>Work-Related Experience</td>
<td>Minimum of 5 years at senior management level</td>
</tr>
</tbody>
</table>

| Core Managerial and Occupational Competencies | As described in the performance regulations |
| Financial and Supply Chain Management Competency Areas: | Required Minimum Competency Level in Unit Standards |
| Strategic leadership and management | 116358 |
| Strategic financial management | 116361; 116342; 116362 |
| Operational financial management | 116345; 119352; 119341; 119331; 116364; |
| Governance, ethics and values in financial management | 116343 |
| Financial and performance reporting | 116363; 119350; 119348; 116341 |
| Risk and change management | 116339 |
| Legislation, policy and implementation | 119334 |
| Stakeholder relations | 116348 |
| Supply Chain Management | 116353 |

5.3.18 Section 18 of Regulation 493 prohibits the employment of new financial and supply chain management officials not meeting minimum competency levels and provides as follows:

18(1) “No municipality or municipal entity may with effect from 1 January 2013, employ a person as a financial official or supply chain management official if that person does not meet the competency levels prescribed for relevant position in terms of these Regulations”.
5.3.19 Dr Lukhwareni did not have or meet the minimum unit standards prescribed by Regulation 493 which as applicant for the position of a City Manager, he ought to have completed to be shortlisted and considered for appointment.

5.3.20 Dr Lukhwareni was appointed with effect from 1 January 2017 to the position of a City Manager by CoJ, without meeting the requirements relating to competency level as prescribed. According to information at my disposal there are twenty one (21) unit standards required for this post and Dr Lukhwareni only had eighteen (18).

5.3.21 However Circular 60 of the MFMA (Circular 60)\(^\text{17}\) which was issued pursuant to Regulation 493 created a special dispensation in terms of which municipalities could apply to National Treasury to defer the enforcement of the Regulations on minimum competency levels of financial officials in instances of Special Merit Cases (SMC) and stipulates inter alia:

“The municipality must write to the National Treasury seeking its consideration and concurrence to delay the enforcement of the Minimum Competency Regulations by providing advice of its intention to appoint an official not in possession of the minimum competency requirements. However, that person must have already attained the following requirements relevant to the position being filled:

a. Higher education qualification
b. Work related experience
c. Core managerial and occupational competencies”.

5.3.22 According to Circular 60, this application must be accompanied by information which outlines why the municipality was unable to appoint a duly qualified person in terms of the Regulations, and a commitment from

\(^{17}\)Minimum Competency Levels Regulations, Gazette 29967 April 2012.
the Council that all required training will be completed within eighteen months of the deadline of 1 January 2013, thereby ensuring the affected official is qualified and compliant in terms of the regulations.

5.3.23 **Circular 60** further provides that in the case of SMC, municipalities must demonstrate that they have taken reasonable steps toward compliance e.g. officials registered for the relevant training who have attended and completed part of the planned training but who may still need time to complete the remaining training, post the deadline date, may be considered. The National Treasury/Minister of Finance will consider each case individually based on the application provided by the municipality for all affected officials.

5.3.24 The MFMA therefore makes provision for the CoJ to apply for waiver of the requirements relating to skills, expertise, competencies and qualifications of the candidate considered for appointment as municipal manager. CoJ duly applied for this relaxation to the relevant Department on 24 October 2016. There was no response to the CoJ’s application by the Minister. The appointment of Dr Lukhwareni was made subject to the Minister granting the exemption.

5.3.25 The Minister of Finance published a Notice on 3 February 2017 exempting municipalities from compliance with minimum competency levels subject to affected employees obtaining such unit standards within the prescribed time-frames. The appointment of Dr Lukhwareni was conditional upon the Minister of Finance granting the exemption. The exemption was subsequently granted by virtue of the aforesaid Notice.

**Arbitration Award**

5.3.26 CoJ further indicated that, a grievance was lodged against the appointment process of the City Manager with the South African Local Government Bargaining Council. This grievance was lodged by Mr E
Adams (the applicant), who was amongst the candidates who applied for the post of the City Manager.

5.3.27 The purpose of this arbitration was to determine whether the CoJ (cited as respondent in the award/decision) committed unfair labour practice in its failure to shortlist the applicant for an interview for the position of City Manager. Subsequent to a hearing, an Arbitration Award as per case number JMD 111606\(^{18}\) dated 26 February 2017 was made. A copy of this award was also furnished to my office. Paragraph 45 of this Arbitration Award confirms that the *CoJ did not commit an unfair labour practice in respect of the applicant.*\(^{19}\)

**Conclusion**

5.3.28 Based on the exposition of the factual and legal evidence discussed above, it is submitted that the CoJ did not act improperly or irregularly in appointing Dr Ndivhoniswani Lukhwareni to the position of City Manager.

5.3.29 All due processes appear to have been followed and no identifiable legal or policy framework was flouted during the process of appointing Dr Lukhwareni.

5.4 **Whether the establishment of Group Forensic Investigation Services (GFIS) and the subsequent appointment of General Shadrack Sibiya as its Executive Head by the CoJ were improper and irregular.**

**Common Cause Issues**

5.4.4 In terms of the report approved by the Council on 26 April 2017, Council resolved that the office of Forensics and Investigations be established as

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\(^{18}\) Signed off by Council Commissioner: I Williams.

separate Organisational Units reporting administratively to the City Manager and functionally to the Group Audit Committee.

5.4.5 Paragraph 3(1) of the said Council report states the name change from Group Security and Investigation to Group Forensics and Investigation Services (GFIS). The newly proposed GFIS unit structure was designed adopting a *sui generis* approach which means a unit of its own character/type or kind.

5.4.6 Due to the *sui generis* nature of GFIS office or unit, the delegation to the Executive Mayor was not used to approve the special character of this GFIS but it was presented to Council for approval and elevation to being an independent office to ensure the CoJ commitment of ensuring clean governance and promotion of ethics.

5.4.7 According the said Council report, the mandate of GFIS is to facilitate the prevention, detection and investigation of economic crimes more particularly corruption, solely responsible for all aspects of security and resilience of the CoJ regardless of the kind of threat.

5.4.8 The functions of GFIS include the following responsibilities:

(a) Forensic Investigation and Data Analytics  
(b) Fraud and Corruption  
(c) Cyber Crime  
(d) Minimum Information Security Standards (MISS)  
(e) All Municipal Finance Management Act matters and  
(f) Hijacked buildings

5.4.9 The position of the Unit Head: Group Security and Investigations was advertised by the CoJ’s Department of Group Risk and assurance Services (GRAS) on the Star newspaper/Workplace of 05 October 2016. The requirements for the position in terms of the advertisement were the following:
“Educational requirements and experience: At least one of the following-GIA,CIA,CA(SA) CFE NQF level 8, Bachelor's degree in law accounting, finance, auditing, or policing/NQF level 7. An advanced or postgraduate degree will be an advantage. Forensics audit. At least fifteen (15) years in security risk management and forensic investigation in government (e.g. MISS0 or private sector. Of these a minimum of 8 years' experience at a senior management in complex financial, commercial, crime investigation or closely related field is required”.

5.4.10 According to the Curriculum Vitae (CV) of General Sibiya which was submitted to my office by CoJ, General Sibiya has the following formal academic qualifications:

“National Diploma: Police Administration (1996) and B-Tech Degree: Policing (2008), including a number of courses/training in the field of investigation and security”

5.4.11 The CV of General Sibiya further revealed a vast experience of 29 years in the field of investigation of which 27 of those years were spent in the management of investigation.

5.4.12 In terms of the appointment letter dated 8 November 201620 General Shadrack Sibiya (General Sibiya) was appointed into the position of Unit Head: Group Security and Investigations: Group Risk and Assurance Services (GRAS).

5.4.13 According to the said appointment letter, General Sibiya was offered a gross annual salary of R 1 200 000.00 (One million Two Hundred Thousand Rand Only).

5.4.14 It was further stated in the same appointment letter that the appointment of General Sibiya was subject to him obtaining a successful Top Secret

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20 Signed off by Mr Trevor Fowler (then City Manager).
security clearance certificate issued by State Security Agency (SSA) failing which would render his offer of employment unenforceable, invalid and void ab initio. General Sibiya's employment was furthermore subject to him legally and successfully challenging his dismissal from previous employer, failing which CoJ reserved its rights to render his employment void ab initio.

5.4.15 Subsequent to his appointment as aforesaid, General Sibiya's position was graded in terms of the City's Job Evaluation Systems-TASK. The position of General Sibiya was graded on TASK Level 21 which equate to the CoJ’s salary system 2B.

5.4.16 As a result of the above grading and re-evaluation of General Sibiya's position, his salary adjustments as reflected on SAP Payroll System\(^{21}\) changed from R 1\,200\,000.00 to R 1,841,095 per annum with effect from 01 July 2017.

5.4.17 The amount of R 1, 841,095 is the minimum of the Band which is the principle expressed in Clause 6.9.1.9 of the CoJ's approved remuneration policy dated 12 December 2008 which was provided to my team by CoJ.

Issues in Dispute

5.4.18 Complainant argued that both the establishment of GFIS and the appointment of its Head General Sibiya were irregular.

5.4.19 Complainant submitted that General Sibiya was appointed as a Deputy Director, but subsequently Sibiya was elevated to the Group Executive function and his salary increased without following due processes. The GIFS was already part of an existing department in the CoJ namely, Group Risk and Advisory Services.

\(^{21}\) As per computer screen shot provided to my office by CoJ, dated 09 April 2018.
5.4.20 It was further contended by Complainant that after the grading, the post should have been advertised since the grading was for the position and not the person holding the post. Complainant argued that this grading technically elevated General Sibiya to a section 56 executive appointment.  

5.4.21 Further, that persons appointed under section 56 of MSA are expected to possess postgraduate academic qualifications something which General Sibiya does not possess. Complainant further submitted such appointments follow a particular prescribed and a strict procedure, which CoJ never did in the case of General Sibiya.  

5.4.22 It was also the Complainant's argument that General Sibiya was appointed by CoJ while he was still attending trial in a criminal matter and while his dismissal from the public service had not yet been overturned by a court of law. This was allegedly seen as an act nepotism by CoJ, since the CoJ is not ordinarily inclined to appoint persons who still have cases pending against them.  

5.4.23 In response to the above as per letter dated 18 May 2018, signed off by Dr Lukhwareni, CoJ disputed the above allegations. CoJ submitted that General Sibiya was appointed into a position of Unit Head: Group Security and Investigations (GRAS) and that he was therefore not appointed as Deputy Director as alleged by Complainant. CoJ further furnished my office with General Sibiya’s appointment letter which evinces as such the title of his job at appointment stage, in support of their contention.  

5.4.24 In another separate response dated 19 March 2019 which was submitted by CoJ to my office, it was disputed that the position of General Sibiya is a section 56 appointment as envisaged in MSA. It was argued that General Sibiya functionally reports to the Audit Committee and not to the City Manager. Further that the GFIS is required *inter alia* to carry out

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22 Section 56(a)(b) of the Local Government: Municipal Systems Act (MSA) regulates the Appointment of managers directly accountable to municipal managers (supra).

23 Signed off by Dr Lukhwareni.
investigations into administrative non-compliance and this may result in investigations into the conduct of the City Manager. Therefore, it would make little sense for such position to report directly to the very office GFIS may be investigating.

5.4.25 CoJ further furnished my office with a report which duly served and was approved by Council on 26 April 2017 where it was resolved that the Office of the Forensic and Investigations be established as a separate organisational unit and reporting administratively to the City Manager and functionally to Group Audit Committee. This Council report also states the name change from Group Security and Investigations to GFIS.

5.4.26 With regard to the allegation of irregular salary increase of General Sibiya, CoJ submitted to my team that the position was graded on Task Level 21 which equates to the CoJ’s salary system 2B, following all the applicable legal and policy framework. CoJ further contended that the grading or increase in salary level (in this instance specifically 2B) of a position did not necessarily indicate seniority, reporting level or authority of the official in question. It cannot therefore be concluded that the mere re-grading of a salary level automatically converts a position into a section 56 MSA appointment. CoJ argued that not all senior positions within the CoJ are classified as section 56 MSA appointment. General Sibiya is not the only employee that is non-section 56 employee on the salary level 2B.

5.4.27 CoJ also disputed that the incumbent of the position ought to have had a post graduate degree qualification. It was submitted by CoJ that neither the City nor the Department of Cooperative Governance requires this for any specific post. However, for certain positions of a strategic specialist nature, a post graduate degree is considered as being advantageous to an applicant, it is not a requirement. In this particular instance, the post advertisement indicated that a post graduate would be advantageous.

5.4.28 With regard to the appointment of General Sibiya, while his dismissal from public service had not yet been finalised, and had a pending criminal case, CoJ contended that the appointment of a person with a pending criminal
matter is not prohibited in the CoJ. Further that it is not unlawful to do so, especially as our country’s laws consider a person innocent until proven guilty. CoJ further submitted that General Sibiya was later found not guilty on all charges and therefore is fully qualified for the position he currently holds.

5.4.29 According to a submission received by my team from the Independent Police Investigative Directorate (IPID) as per hand of Mr Innocent Khuba, prosecution on criminal cases investigated by IPID against General Sibiya, was declined. Only one case was prosecuted but subsequently withdrawn as well.

5.4.30 Advocate George Baloyi of the National Prosecuting Authority (NPA) also confirmed to my team\(^{24}\) that General Sibiya is a former accused in the rendition matter involving Zimbabwean nationals, and further furnished my office with a copy of the indictment. The charges were mainly kidnapping, defeating the ends of justice and contravention of the Immigration Act, as fully set out in the attached indictment.

5.4.31 However, the charges against General Sibiya and Mr Anwa Dramat were provisionally withdrawn on 8 October 2018 when they appeared in court. At the moment there are no charges pending against General Sibiya and Mr Anwa Dramat.

5.4.32 Regarding the security clearance, CoJ indicated that such is issued by SSA and the CoJ applies to SSA for such clearances to be provided. Application for all relevant positions have been made but no results have been provided as yet. No security clearances were therefore available at this stage.

Application of the relevant legal prescripts

5.4.33 The Local Government Regulations on Appointment and Conditions of Appointment of Senior Managers promulgated in the Government

\(^{24}\) As per email dated 15 January 2019.
Gazette on 17 January 2017 provides the process to be followed in terms of a staff establishment Regulation 4(4) to 4(8) is reflected below:

(4) "The staff establishment must provide for –

a) Permanent posts and
b) Fixed terms posts.

(5) In the case of fixed term posts, the municipal manager must have due regard to the following:

a) The financial implication of such post to the municipality:
b) Any existing contractual obligations of the incumbent manager and the financial implications thereof on the budget of the municipality:
c) The need of the municipality to retrain institutional memory and scarce skills, and to promote stability and continuity within the municipality and
d) The sustainability of the municipality.

(6) The municipal manager must within 14 days of finalizing the staff establishment, submit the staff establishment, a detailed report and recommendation on the staff establishment to the municipal council for approval.

(7) The report contemplated in sub regulation (6) must outline the process followed in developing the staff establishment, which must include:

a) A summary of the mandate and service delivery priorities of the municipality and how the proposed staff establishment addresses these.
b) A summary of the proposed posts that are envisaged to –

i. Materially changed
ii. Change to a limited or non-material degree:
iii. Be abolished: and
iv. Not be affected by the changes:
c) A motivation of the proposed changes, including an analysis of the strengths, weaknesses and limitations of the current staff establishment;
d) Job descriptions, duties, functions, competency requirements and responsibilities and according to which one or more posts of the same grade are established, including the grading or relative size and value of a job;
e) details of the financial implications of the changes including, but not limited to the outcomes of job evaluations processes,
remuneration costs for senior managers, costs for relocation, new facilities and equipment, if any.
f) Non-financial implications of the changes, including the impact on the existing staff, key stakeholders and other processes within the municipality;
g) A project plan specifies the timeframes within which the implementations is envisaged to the place; and
h) The stakeholders and change management requirements.

(8) The municipal council must at its next meeting following receipt of the staff establishment, approve the staff establishment, with or without amendments, as proposed by the municipal manager”.

5.4.34 In this instance, CoJ indicated that Council has delegated authority to the Executive Mayor to deal with structures. At a meeting of the Mayoral Committee held on 24 April 2012, it was resolved to recommend that the Council delegates the authority in terms of section 59 of the MSA to approve levels 3 and below of the staff establishment developed by the City Manager in terms of MSA to Executive Mayor, subject to a policy framework.

5.4.35 Furthermore, at a meeting of the Mayoral Committee held on 21 June 2012, it was resolved that the Council delegated the approval of the staff development to the Executive Mayor. This power was to be exercised together with the Mayoral Committee as a power designated in terms of section 60(3) of the Municipal Structures Act.

5.4.36 It was further highlighted by CoJ that the position of General Sibiya: Group Forensic and Investigation Services is a permanent position. Further, that the salary scales for a permanent position that is on level 2B is kept in line with the total package of fixed term contract/section 56 positions so that discrepancies in salary levels of such senior positions are prevented.

25 As per report authored by Christo Marais: Acting Group Executive Director: Group Corporate and Shared Services. Same report was approved by Dr Lukhwareni and it was submitted to my office.
27 Section 56 of MSA.
Job Evaluation Policy approved by Council on 12 December 2008, reflects the following:

“7.1 THE DEVELOPMENT AND MAINTENANCE OF JOB DESCRIPTIONS

7.1.1 It is the responsibility of Management to develop and update a job description in collaboration with his/her employee in accordance with the guidelines and format(s) developed by the Human Resources Shared Services (HRSS).

7.1.2 In developing job descriptions, the Management must ensure that individual jobs link to the strategic objectives of the CoJ and are aligned to the CoJ’s approved organisational structure.

7.1.3 It is the prerogative of the Management to design the work responsibilities to ensure that the objectives of the CoJ are met. This should be done in consultation with the employee before finalising the job description and every effort should be made to gain agreement from the employee.

7.1.4 Both the job holder and Management must be involved in finalising the job description and there must be mutual agreement on the content thereof.

7.1.5 The prescribed Job Description Format must include job content (job details, purpose and key performance responsibilities) and job specification, skill experience and knowledge).

7.2.2 INITIATING THE JOB EVALUATION PROCESS.

7.2.2.1 It is mandatory for job evaluations to be performed in the following instances:

a) Before a post for any newly defined job is filled
b) Before filling any vacant post unless the specific job has been evaluated previously.

7.2.2.2 In addition to the mandatory evaluations, jobs may also be evaluated emanating from requests from one of the following role players, Management/ Individual employee.

7.2.2.3 Requests for the evaluation of jobs should in all cases be directed to the Job Evaluation Manager.

7.2.2.4 Before the Job Evaluation Committee is to requested to perform a mandatory evaluation, the Head of Department must confirm the relevant post is required to meet the CoJ’s objectives and sufficient funds are available for filling the post:

7.2.2.5 With regard to request from individual employees and Management for evaluations, the following applies:

a) An employee should have the right to request that his/her job be evaluated.

b) A request should not be denied without good reason- there might be cases where it could be justified not to comply with the requests for evaluations.

c) It must be pointed out to the employees that the evaluation of a job could result in its upgrading or downgrading or remaining the same.

d) As a general guideline, once an existing post has been evaluated, at least two (2) years should expire before it is evaluated again unless the is clear evidence that the job contents of a post have changed to such an extent that an evaluation could lead to a regarding of a post.

e) The request by individual employees should be in writing indicating the reasons for the request to the line manager for approval.
f) Request should be submitted to the Job Evaluation Unit through the Head of their Department (at least on Director Level) and in consultation with Human Resources Field Services.

g) The Head of the Department should indicate whether he/she supports the request for evaluation.

h) Request should be in the prescribed Job Evaluation FORM submitted via the Head of relevant Unit.

i) All requests for evaluation should be fully motivated and possible reasons could include:

   I. A significant change in the contents of a job and
   II. Similar jobs (or more or less the same job) are graded / evaluated at different levels.

7.2.2.6 The Head of Department is required to respond to job evaluation request within thirty (30) days.

7.2.2.7 If a request is refused the employee has the right to pursue the matter further through the grievance process”.

7.2.3 THE IMPLEMENTATION OF JOB EVALUATION RESULTS

7.2.3.1 Job evaluation should ideally be conducted and finalised within sixty days (60) period.

7.2.3.2 The result of the job evaluation are implemented on the first day of the month following the sixty (60) days period.

7.2.3.3 In the event of job evaluation results are not finalised within the prescribed sixty (60) day period, the implementation date should be retrospective with reference to paragraph (6.2.3.2).
7.2.3.4 The job evaluation result shall be implemented unless any party concerned lodges a dispute to the Appeal Committee.

7.2.3.5 The job evaluation results shall be presented in a correlation table that compares different job evaluation system approved in the City”.

5.4.38 The Remuneration Policy approved by Council on 12 December 2008, provides as follows on its Clause 6.9:

6.9 “The grading and determining of salary scales.

6.9.1 THE GRADING AND DETERMINATION OF SALARY SCALES OF POSITIONS OCCUPIED IN THE NON- SALGBC EMPLOYEES.

6.9.1.1 The salary scale for non- SALGBC employees shall be developed using the median total cost-to-company package figures taken from Government and Parastatals Salary Survey Information commissioned by SALGA or the CoJ on a four(4) year basis.

6.9.1.2 Based on the market salary information, the CoJ shall develop the salary scales that suits its needs and requirements.

6.9.1.3 A ten percent (10%) spread between the salary midpoint and salary maximum and between the salary midpoint and salary maximum shall be used.

6.9.1.4 The salary midpoint of a grade shows the pay level that should be applied to an employee is performing a fully competent level.

6.9.1.5 The pay range for that grade is reflected in the ten percent (10%) spread above or below the midpoint

6.9.1.6 An employee salary should be positioned within the pay range of the grade as a result of value (job weight) and contribution the applicable grade as a result of value (job weight) and contribution of the position to the City.
6.9.1.7 Salaries on appointment are to be made at either one of the three points of the salary scales, no salary/pay offers may be made in between the three (3) points. Deviations of salary/pay offers from the three points of the salary scale should be accompanied by a motivation for authorization by the approved delegated authority.

6.9.1.8 Only in the exceptional circumstances should employees be appointed above the salary mid-point and this must be authorized by the Mayoral Committee.

6.9.1.9 When an employee is appointed to higher grade he/she should receive an increase that moves his/her salary to at least the minimum of the new grade. The increase must not situate the employee higher than the salary mid-point for the grade. Deviations of salary/pay offers a motivation for authorization by the approved delegated authority.

6.9.1.10 In cases where employees are earning below the minimum for their grade their salaries be revised and brought in line with the applicable salary band/grade.

5.4.39 The table below was reflected in the report approved by the Mayoral Committee on 21 July 2016 and it equates the TASK of grade 21 to level 2B:

<table>
<thead>
<tr>
<th>CURENT COJ SALARY LEVELS</th>
<th>TASK LEVELS</th>
<th>HAY POINTS</th>
<th>Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2c</td>
<td>20</td>
<td>951-1200</td>
<td>EXECUTIVE HEAD /GROUP HEAD</td>
</tr>
<tr>
<td>2B</td>
<td>21</td>
<td>1200-1800</td>
<td>EXECUTIVE DIRECTOR</td>
</tr>
</tbody>
</table>
CoJ indicated that the upper Limit on Remuneration for Municipal Managers and Managers reporting directly to Municipal Managers was promulgated by the Minister of Cooperative Governance and Traditional Affairs (CoGTA) on the 04 July 2016. A report was approved by the Mayoral Committee on the 21 July 2016 reflecting the above remuneration scales of the City for levels 2A and 2C with effect from 1 July 2016 based on the scales promulgated by the Minister. Further that the position of General Sibiya: Group Forensic and Investigation Services is not an exception to the norm. The City’s grading policy allows for employees to request for positions to be regraded.

Clause 8 of GTAPF provides for the procedure to be followed during recruitment, selection and appointment and states _inter alia_:

8.1 “The need to fill a Vacancy or Position.

8.1.1 Before a position can be considered for the process, HR has to ensure that all relevant approvals are in place and that the position has been approved as per the Organizational structures design and has been through the job evaluation process (refer to the Job Evaluation Policy for further information) be funded and have a key role description (KRD).

8.1.2 The HR Practitioner assisting the relevant Line Manager must ensure that they have ascertained what the EE requirements are for the Department and for the position and/ or level and these will form part of the specification for the position.

8.2 Recruiting

8.2.1 Advertisements.
a) The recruitment Department/ Manager must request the circularizing/ advertising of the vacant post as per the Guidelines on Circularizing / Advertising Vacant Positions.

b) All adverts and/or circulars shall be in a standard format and Group Human Capital Management Center of Excellence is responsible for maintaining and reviewing the format on an on-going basis to improve thereupon.

c) Level 1 -3 and below vacant post shall be circularized within the service in such a manner. If thereafter, the Department is of the opinion that the vacant post may not be suitably filled from within the services, such position may then be advertised externally in addition to being circularized internally.

d) Special targeted vacancies shall be published in the City’s “Local Media” to attract targeted candidates in the area in line with the job inherit.

e) Vacant posts on Level 3 and below may be considered for simultaneous advertising and circularizing, subject to a motivation, signed by the respective Group Head: GHCM or his nominee, for consideration and approval.

f) Advertisements shall be in as wide a range of National and Local media as possible and so placed as to reach, as effectively as possible the entire pool of potential applicants, especially persons historically disadvantaged and person.

g) The City Manager and his direct reports and MD/CEO of ME’s will be subjected a security screening process by authorized Government Security Structures prior to report directly to the City Manager.

h) If any internal advert is to be circulated, HR Central will ensure it is circulated within CoJ.

i) Any advert, regardless if internal or external, must be informed by the approved job description signed and approved by the relevant HOD in conjunction with the Job Evaluation Policy (Annexure C the Criteria used for the Advertisement).

j) Once the advert has been finalized, it should run for at least ten (10) working days or a shorter period approved by the Director Talent Acquisition, Remuneration Performances and Transformation.

k) If a post has been advertised/circularized and a similar post on the same level, grading and designation becomes vacant during the period
of validity of the circular/advert, a motivation may approved by the HOD to fill the filling of that additional vacancy from the pool of applications received, must be submitted to the Group Head: HCM for approval.

l) If a headhunting or recruitment agencies are used, it can only be used in conjunction with the normal advertising of vacancies i.e an identified suitable candidate should be request to apply for the requested position and thereafter the normal recruitment process will apply.

m) Appointments in the advertised/circularized positions must be made within the four(4) months of the closing date of the advert/circular, which may be extended for a further period of 2 months in justifiable extenuation circumstances and approved by the Group Head HCM or his nominee if this is not met the position/s must be re-advertised/re-circularized.

n) If the post was circularized internally and it is found that the applicants do not comply with the appointment requirements, it will be again circularized internally and advertised externally.

o) The recruitment and selection of Senior Managers (Section 56 and 57) in respect of the High Level Design must be done in line with the Regulations promulgated on 17 January 2013”.

5.4.42 It is submitted as already shown above that the the position of the Unit Head: Group Security and Investigations was advertised by the CoJ’s Department of Group Risk and assurance Services (GRAS) in the Star newspaper/Workplace of 05 October 2016 in line with above policy directives.

Conclusion

5.4.43 Based on the exposition of the above discussed policies of the CoJ’s and its concomitant Group Human Capital Management processes, it can be concluded that the appointment of General Sibiya and his subsequent salary grading was in compliance with all the CoJ’s policies.

5.5 Whether CoJ improperly or irregularly appointed Mr David Tembe to the position of a Chief of Johannesburg Metro Police (JMPD) without following due processes.
5.5.1 On 26 January 2017, the Council also resolved that the CoJ should embark on a recruitment process to fill the position of Chief of Johannesburg Metro Police Department (JMPD) and also approved the interviewing panel to consist of:

(a) City Manager (Dr Ndivhoniswa Lukhwareni/chairperson);
(b) MMC: Public Safety; Cllr Michael Sun
(c) Head of Department: Public Safety Mr Hlula Msimang
(d) External expert: Mr Jean Berdou and
(e) Secretariat: Ms Lauren Jonas

5.5.2 The following process was followed in the appointment of Chief of Police:

(f) Advertising:

The position was circularised in the Vacancy Circular number 019/2017 and advertised simultaneously on Sunday Times newspaper of 09 July 2017 with a closing date of 21 July 2017. The requirements for the position in terms of the advertisement were the following:

“B degree or equivalent qualification in an appropriate field, such as Policing and/or Management, etc. Must be qualified member of Metro Police Service. A minimum of 5 years’ experience in a Senior Management position in a large enterprise. The ability to work with political representatives and work under highly stressful conditions. High decision making ability. The ability to manage strategic behaviours, including but not limited to managing change, people, resources, interfaces, achieving results, managing relationships and self as a leader”
(g) Responses:

A total of eighty five (85) applications were received for the position. Twenty (20) were shortlisted in the preliminary shortlisting.

(h) Shortlist:

The following nine (9) candidates were shortlisted:

(i) Mr Zwelibanzi Nyanda (this candidate did not show up for interviews)
(ii) Harold Zungu
(iii) Vineshkumar Moonoo
(iv) Eric Gela
(v) Jody Pillay
(vi) Nzame Ntsasa
(vii) Maria Mathabethe
(viii) Sipho Dlepu
(ix) David Tembe

(i) Panel Interviews:

The interviews were held on 21 August 2017, at the CoJ offices in Braamfontein, City Manager’s Boardroom. The following candidates were interviewed:

(i) Harold Zungu
(ii) Vineshkumar Moonoo
(iii) Eric Gela
(iv) Jody Pillay
(v) Nzame Ntsasa
(vi) Maria Mathabethe
(vii) Sipho Dlepu
(viii) David Tembe
(j) **Competency Assessment:**

The recruitment process also included competency assessments of the three (3) highest ranked candidates in terms of the interview scores as agreed upon by the interview panel members. The tailor made reference checks and credibility assessments (identity number, qualifications and credit and criminal record checks were also made. The outcome of the assessment was that the preferred candidate would be suitable for this position.

(k) **Outcome of the Interview process:**

The *Summary of the Interview Score Sheet* provided to my office by CoJ for the position of JMPD Chief of Police can be reflected in the following table:

<table>
<thead>
<tr>
<th>NO</th>
<th>Name of Applicant</th>
<th>Score of Panel</th>
<th>Total Scores</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Member 1</td>
<td>Member 2</td>
</tr>
<tr>
<td>1</td>
<td>Zwelibanzi Nyanda</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2</td>
<td>Harold Zungu</td>
<td>30</td>
<td>18</td>
</tr>
<tr>
<td>3</td>
<td>Vinesh Kumar Moonoo</td>
<td>38</td>
<td>38</td>
</tr>
<tr>
<td>4</td>
<td>Eric Gela</td>
<td>42</td>
<td>46.2</td>
</tr>
<tr>
<td>5</td>
<td>Jody Pillay</td>
<td>38</td>
<td>42.5</td>
</tr>
<tr>
<td>6</td>
<td>Owen Ntsasa</td>
<td>24</td>
<td>28</td>
</tr>
<tr>
<td>7</td>
<td>Maria Mathabethe</td>
<td>30</td>
<td>32</td>
</tr>
<tr>
<td>8</td>
<td>Sipho Dlepu</td>
<td>34</td>
<td>37</td>
</tr>
<tr>
<td>9</td>
<td>David Tembe</td>
<td>34</td>
<td>36.5</td>
</tr>
</tbody>
</table>

(l) **Mr Tembe holds the following academic qualifications:**

(a) Matric/Senior Certificate issued on 01 January 1990.
(b) Traffic Officer’s Diploma (now called Metropolitan Police Diploma) issued by JMPD on 30 June 2007.
(c) Diploma in Personnel Management issued by Mentor Business College on 30 November 1999.


(e) Mr Tembe is also a Traffic Police Officer as of 12 July 2010 as per certificate issued by Gauteng Department of Transport.

(f) Mr Tembe also holds a number of various short course certificates and training programmes.

(m) **Experience of Mr Tembe as recommended on Council report dated 29-11-2017**

Mr Tembe comes with substantial Local Government, private sector experience as well as the relevant exposure required for this position. He displayed a very good understanding of the role. Given his experience, qualifications and knowledge, the interview panel was confident that Mr Tembe is deemed competent to successfully execute the functions of the Chief of Police.

(n) **FINAL RECOMMENDATIONS BY THE RECRUITMENT PANEL**

After the panel had carefully considered all the inputs of the recruitment process, they unanimous agreed that Mr David Sony Tembe was the most suitable candidate and should be recommended for appointment subject to him obtaining the necessary security clearance required by CoJ. It was further noted that Mr Tembe was the fifth (5th) most suitable candidate based on interviewing process by the panel.²⁸ The reason for recommending the fifth candidate was that this is a critical position and CoJ prefers the candidate being able to take-up the position immediately. The advantage of Mr Tembe was that he meets the requirements of being a registered member of a Municipal Police Service

²⁸ Own emphasis.
and the process of ensuring the necessary training and registration would take several months to conclude.\textsuperscript{29}

**Issues in Dispute**

5.5.3 The Complainant argued that Mr Tembe was unfairly recommended for appointment although he ranked 5th out of nine (9) candidates. Complainant contended that this has disadvantaged or prejudiced more competent candidates.

5.5.4 Complainant further averred that a properly processed report by Dr Lukhwareni as the Chairperson of the interviews was tabled before Council but it was subsequently withdrawn by the Executive Mayor of CoJ: Mr Herman Mashaba (Mr Mashaba) without proffering any reason for such withdrawal. There was an allegation that Mr Mashaba was under political pressure from the Economic Freedom Fighters (EFF) to appoint Mr Tembe.

5.5.5 It was also argued by Complainants that Mr Tembe’s qualifications are not in order and my office should subject Mr Tembe’s qualifications into investigative scrutiny in order to establish their authenticity.

5.5.6 With regard to the allegation that CoJ unfairly recommended Mr Tembe for appointment although he ranked 5th out of nine (9) candidates, CoJ refuted this allegation as per letter dated 29 March 2019 signed off by Dr Lukhwareni and contended amongst other things the following:

“The process of interviewing, shortlisting and recommendation should be distinguished from the process of appointment. There is no legal requirement for the City to appoint the candidate with the highest interview score. The City Council has a reasonable discretion to elect any shortlisted candidate with prescribed skills, expertise, competencies or qualifications for the position as determined through the interviewing process. Tembe

\textsuperscript{29} Own emphasis.
met the required standards for the position and was duly shortlisted with eight other candidates”.

5.5.7 CoJ further refuted in a same letter signed by Dr Lukhwareni and argued that there is no requirement in law or in the standing rules of Council for reasons to be provided for the withdrawal of a report. CoJ contended that reports and/or motions are withdrawn all the time in council, this is not a unique occurrence.

5.5.8 In the normal course of events a report is withdrawn by the Speaker of Council or the Member of Mayoral Committee (MMC) of the department presenting the report, in this case, the MMC for Public Safety. There is no record or minute indicating that Mr Mashaba withdrew the report recommending Eric Gela, therefore the allegation is denied.

5.5.9 Furthermore, it was denied by CoJ that Mr Mashaba was under political pressure to appoint Mr Tembe. CoJ argued that Mr Mashaba does not have the requisite authority to appoint any official and indicated that the appointment of Mr Tembe was approved by the City Council, not Mr Mashaba.

5.5.10 On 07 August 2019, my team held an investigative interview with Dr Lukhwareni in order to get the reasoning for recommending Mr Tembe, regardless of the fact that Mr Tembe scored number five (5) during the interviews.

5.5.11 During this interview, Dr Lukhwareni indicated that at the end of the interview process, he as a chairperson recommended Eric Gela as number one (1) scorer for appointment and presented his report to the Mayoral Committee.

30 As per Council report dated 2017-11-29 which was furnished to my office by CoJ.
31 On his role as Chairperson of interviews for Chief of the Police/JMPD.
32 As per audio at minute 32-33 (recorded interview with Dr Lukhwareni).
5.5.12 According the Dr Lukhwareni the Mayoral Committee, deliberated on his report/recommendations and decided to substitute Eric Gela with Mr Tembe on the basis that Mr Tembe has a Traffic Officer’s Diploma and did not have to undergo this training as Eric Gela would have been expected to do.

5.5.13 In pursuit of vetting the academic qualifications of Mr Tembe as impugned by Complainants, my office engaged in an intensive forensic investigation and the following transpired:

(a) **Mr Tembe’s Matric or Senior Certificate:**

5.5.14 My office received a report/submission dated 18 July 2019 signed off by the Deputy Director: Certification and Historical Records: Mr TE Nene from the Department of Basic Education (Umalusi). In terms of this report, the findings as they relate to the verification of the Senior Certificate (STD 10) of Mr Tembe were as follows:

1. “Mr David Sony Tembe registered and sat for his Full Time matric at Giyani High School in 1974 November and according to the records, he failed to satisfy the pass requirements for matric.

2. Mr David Tembe registered and sat for his Part Time matric at Kagiso Adult Centre in 1989 November and passed the subject written.

3. The combination certificate for 1974 and 1989 results was then issued after qualifying for a Senior Certificate with effect from 01/01/1990, with Document No: 20044503T”.

5.5.15 In terms of the report contemplated above from Umalusi, it was also confirmed that a copy of the Senior Certificate (STD 10) of Mr Tembe is AUTHENTIC and VALID.

5.5.16 Similarly, a report dated 10 July 2018, signed off by Mr JR Makgoka: Chief Director: National Examinations, Assessment and Measurement from the
Department of Basic Education also confirmed that the Senior Certificate of Mr Tembe is authentic and valid.

(b) **Diploma in Personnel Management issued by Mentor Business College:**

5.5.17 In terms of the submission made by South African Qualification Authority (SAQA) to my office as per letter dated 5 July 2018, signed off by JS Samuel: Chief Executive Officer of SAQA, the following was articulated:

> “SAQA verified the Diploma in Personnel Management obtained from Mentor Business College (1999) on 12 September 2013 as **authentic** for the Department Community Service-Gauteng”.

5.5.18 On 06 December 2019, my office received a further submission from SAQA\(^{33}\) which sought to give clarity as to whether this Diploma can be regarded as being equivalent to a degree as envisaged in the advertisement of the post or in terms of the SAQA National Qualification Framework (NQF) ratings.

5.5.19 SAQA advised my office that for the purposes of the NQF, a three year Diploma in Personnel Management\(^{34}\) is not comparable to a Bachelor’s degree, since the two are rated differently in terms of NQF ratings/levels as further illustrated by the attached SAQA infographic table:

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\(^{33}\) As per letter signed off by CEO of SAQA: Mr J Samuels.

\(^{34}\) This Diploma only had six modules and it is a three year Diploma and marked as such on its face.
# NATIONAL QUALIFICATIONS FRAMEWORK

**SUB-FRAMEWORKS AND QUALIFICATION TYPES**

<table>
<thead>
<tr>
<th>LEVEL</th>
<th>Qualification Type</th>
<th>CHE</th>
<th>UMALUSI</th>
<th>QCTO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>General Certificate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Elementary Certificate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Intermediate Certificate</td>
<td></td>
<td></td>
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<tr>
<td>4</td>
<td>National Certificate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Higher Certificate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Diploma Advanced Certificate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Bachelor’s Degree Advanced Diploma</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Bachelor’s Degree</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Master’s Degree</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Master’s Degree (Professional)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Doctoral Degree</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Doctoral Degree (Professional)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Key:**
- CHE: Higher Education Qualifications Sub-Framework
- UMALUSI: General and Further Education and Training Qualifications Sub-Framework
- QCTO: Occupational Qualifications Sub-Framework
(c) **Traffic or Metropolitan Police Officer’s Diploma issued by JMPD on 30 June 2007:**

5.5.20 It is sufficient to record at the outset that during this investigation I interviewed a number of officials whom I thought were useful or had information that will have a bearing on this investigation. In other words, I interviewed people/officials whom I thought their submissions would serve to assist my office to arrive at a proper and just outcome in the matter and not to serve or bolster a sectarian or partisan interest against any of the parties who are the subject of my investigation.

5.5.21 On 11 June 2019, my investigation team conducted an interview with Mr Tembe (who was accompanied by his legal representative: Mr Hloni Mokoena of Moodie and Robertson Attorneys) in order to get clarity on his academic qualifications.

5.5.22 During this interview, Mr Tembe indicated that he was laterally transferred from CoJ’s Emergency Services (EMS) to JMPD as a Director. According to him, he attended what was then called a *Bridging Course* and did not sit in a communal class with other students for his Traffic Officer’s Diploma. Mr Tembe indicated that he only attended individual sessions on a part time basis, twice or thrice a week, per arrangements with different instructors.

5.5.23 Further, on 06 May 2019 my office wrote to the CEO of Road Traffic Management Corporation (RTMC): Advocate Makhosini Msibi (Adv Msibi) in order to get a proper record or Portfolio of Evidence (PoE) relating to the training of Mr Tembe in Traffic Officer’s Diploma.

5.5.24 In a response dated 15 July 2019 by RTMC, it was indicated by Adv. Msibi that RTMC is the custodian of training of all Traffic Personnel in the country and that JMPD Academy has been duly approved as a Traffic Training Centre. Adv. Msibi also indicated that the training and quality assurance

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35 As per recorded audio at minute 30-40 (interview with Mr Tembe).
of traffic officers is solemnly monitored, moderated and approved by the RTMC.

5.5.25 Adv. Msibi further asserted that RTMC as the custodian of all traffic affairs in the country is by law compelled to be transparent and accountable to all Chapter 9 institutions\(^{36}\) as well as government institutions in tandem with the approval granted by then Minister of Transport Abdullah Omar on 07 October 2002 subject to annual evaluation and renewal.

5.5.26 According to Adv Msibi, various communications inclusive of emails, letters and personal visits by RTMC staff to JMPD Academy in order to source and collect documentation and files pertaining to the record or PoE for Mr Tembe’s Traffic training drew a blank, despite undertakings and commitments by the JMPD Academy staff to oblige.

5.5.27 On 17 July 2019, my team further held an investigative interview with Adv Msibi to get more clarity on Mr Tembe’s training for his Traffic Officer’s Diploma. Adv Msibi acknowledged during this interview that the Heads of traffic training centres may seek or request deviance from RTMC to excuse a particular learner from attending full-time class due to the learner having acquired certain credits.

5.5.28 However, according to Adv. Msibi, RTMC has no record of an application or request seeking deviation to excuse Mr Tembe from doing the traffic training on a full time basis for twelve (12) months like any other learner. Adv Msibi further indicated that RTMC never authorised part time training for Mr Tembe and that such exception had to be authorised by RTMC.\(^{37}\)

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\(^{36}\) Chapter 9 of the Constitution of the Republic of South Africa establishes the following state institutions to support constitutional democracy in the Republic:
(a) The Public Protector.
(b) The South African Human Rights Commission.
(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
(d) The Commission for Gender Equality.
(e) The Auditor-General.
(f) The Electoral Commission.

\(^{37}\) As per audio record at minute 24-32 (interview with Adv Msibi).
On 15 August 2019, my team held an investigative meeting with Mr Ben Mashigo (Mr Mashigo) who is a Director and the Head of JMPD Academy in order to understand how Mr Tembe attended his course for Traffic or Metropolitan Police Officer’s Diploma. Mr Mashigo submitted during this meeting that Mr Tembe was attending training on weekends, sometimes at seven and eight at night on a part time basis because he was already Director, operational and functioning.\footnote{As per audio record at minute 1-29 (interview with Mr Mashigo).}

Mr Mashigo further indicated to my team that he approved the special training programme for Mr Tembe on a part time basis and as a result Mr Tembe would receive some lessons in his office without having to come to the academy.

According to Mr Mashigo, the only time Mr Tembe was compelled to come to the academy was when he was writing exams. During this meeting, Ms Nicole Das Neves (Ms Das Neves) who is the CoJ’s Legal Advisor submitted that due to lapse of time, the CoJ had challenges locating the PoE relating to Mr Tembe’s traffic training but Ms Das Neves promised to reconstruct the record or get people who trained Mr Tembe to make affidavits and submit same to my office by end of August 2019.

On 30 August 2019, Ms Das Neves hand-delivered copies of some of Mr Tembe’s marked formative assessment documents relating to his attendance at JMPD traffic academy. These documents were accompanied by only one affidavit deposed to by Mr Mankopo Moses Mashoeshoe (Mr Mashoeshoe).

In the said affidavit, Mr Mashoeshoe indicated amongst other things that he has been an Educator within JMPD academy since 2002. Mr Mashoeshoe further declared that during the month of January to June 2007, he provided training to Mr Tembe on legal subjects namely:

(a) Introduction to SA Law;
(b) Introduction to Criminal Law;
According to Mr Mashoeshoe’s affidavit, the training of Mr Tembe was done on a part time basis due to the fact that Mr Tembe was at a director level and the training took place mostly after 12h00 in the afternoon up to 16h00 and was held at the academy in the Basic Training Boardroom. Mr Mashoeshoe further indicated in his affidavit that due to the lapse of time, he could not find all the formative assessments for Mr Tembe.

Upon reviewing and analysing the assessment documents relating to Mr Tembe’s traffic training as submitted by Ms Dasneves to my office, my team observed that copies of formative assessments relating to legal and community policing modules furnished to my office were not signed by an assessor, observer and by moderator on the assessment pro-forma.

Some of these copies were only initialled at the right bottom corner of each page while others were not even initialled. It was further observed and noted that these copies were not dated to indicate when the assessments for legal subjects/modules were conducted.

On the copies of summative assessment relating **Systematic Examination of Motor Vehicles** for Mr Tembe which was furnished to my office, the following was observed:

<table>
<thead>
<tr>
<th>NAME/NUMBER OF STUDENT:</th>
<th>D Tembe</th>
</tr>
</thead>
<tbody>
<tr>
<td>MAXIMUM TIME:</td>
<td>45 minutes</td>
</tr>
<tr>
<td>DATE:</td>
<td>04-10-2007</td>
</tr>
<tr>
<td>TOTAL TIME DURATION:</td>
<td>__________</td>
</tr>
<tr>
<td>EXAMINER:</td>
<td>TEBEILA JP</td>
</tr>
<tr>
<td>MODERATOR:</td>
<td>__________</td>
</tr>
</tbody>
</table>
Light Motor Vehicle | 119
Heavy Motor Vehicle | |
Motor Cycle | 39
Competent | x | Not yet competent

5.5.38 From the above table, it can be noted that Mr Tembe was examined by Ms JP Tebeila on Systematic Examination of Motor Vehicles on 04 October 2007. However, it can also be observed from the above as highlighted in red background that Mr Tembe was not examined on Heavy Motor Vehicle. No marks were allocated to Mr Tembe for Heavy Motor Vehicle as can be seen on the table above.

5.5.39 Similarly, a practical evaluation checklist submitted to my office is blank and not completed at all on the systematic examination of Heavy Motor Vehicle.

5.5.40 On 24 October 2019, my team held an investigative interview with Mr Abraham Pitso (Mr Pitso): Chief Superintendent responsible for Basic Training and In-service Training within JMPD academy.

5.5.41 Mr Pitso strongly argued that JMPD academy keep traffic officer leaners files or PoE (containing all formative and summative assessment record for each student/learner). According to Mr Pitso, the PoE files that date back to the 1980’s before CoJ became a Metropolitan municipality are still kept for record purposes and are often retrieved when necessary. Mr Pitso vehemently disputed any contention that CoJ does not keep records of traffic learners/students beyond five years.39

39 As per audio record at minute 46-50 (interview with Mr Pitso).
Mr Pitso further deposed an affidavit dated 29 October 2019 and surrendered same to my office. In this affidavit, Mr Pitso outlined a number of assessments and modules which should be completed by a learner in each area to satisfy requirements for a Traffic Officer’s Diploma in terms of RTMC Policy Document and SAPS Conversion modules as per table below:

<table>
<thead>
<tr>
<th>RTMC: Theoretical Modules</th>
<th>Formative Assessment</th>
<th>Summative Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Traffic Act:</td>
<td>Four</td>
<td>One</td>
</tr>
<tr>
<td>Legal Subjects</td>
<td>Two</td>
<td>One</td>
</tr>
<tr>
<td>Transportation of Dangerous Goods and Substances</td>
<td>One</td>
<td>One</td>
</tr>
<tr>
<td>Loads on Vehicle</td>
<td>One</td>
<td>One</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RTMC: Practical Modules: (NB. Practical training and the number of occasions practiced by a recruit will precede summative assessments)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Point Duty</td>
</tr>
<tr>
<td>Administrative and Discontinue Notices</td>
</tr>
<tr>
<td>Section 56 notice</td>
</tr>
<tr>
<td>Section 341 Discontinue notice</td>
</tr>
<tr>
<td>Systematic Examination</td>
</tr>
<tr>
<td>Light Motor Vehicle</td>
</tr>
<tr>
<td>Heavy Motor Vehicle</td>
</tr>
<tr>
<td>Moto Cycle</td>
</tr>
<tr>
<td>Basic accident recording</td>
</tr>
<tr>
<td>Selected firearm skills</td>
</tr>
<tr>
<td>Tactical pursuit, stop and approach</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SAPS: Theoretical modules</th>
<th>Formative Assessment</th>
<th>Summative Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police Ethics</td>
<td>One</td>
<td>One</td>
</tr>
<tr>
<td>Community Policing</td>
<td>One</td>
<td>One</td>
</tr>
</tbody>
</table>

According to the affidavit by Mr Pitso, he was the course coordinator in 2007 and compiled results of the entire course presented at the academy, except short courses like Peace Officer Course. Mr Pitso averred in his affidavit that he never entered or captured any single results of Mr Tembe on a computer system.
5.5.44 Mr Pitso further argued that it is compulsory for the assessor to attach a signature on the appropriate space or block provided on the answer sheet pro-forma after he has completed assessing the learner. It was also asserted by Mr Pitso in the same affidavit that the answer sheet must reflect the date of the assessment to know precisely when the assessment was written.

5.5.45 On 30 October 2019, my team held an investigative interview with Mr Mashoeshoe who was accompanied by Ms Das Neves and Ms Candice Jaftha (Ms Jaftha) from CoJ’s legal division. The purpose of the interview was to get clarity from Mr Mashoeshoe regarding Mr Tembe’s training scripts/answer sheets since he is one instructor who confirmed through an affidavit that he trained Mr Tembe on legal modules at JMPD academy.

5.5.46 During this interview Mr Mashoeshoe was asked by my team as to why were the formative assessments on Criminal Procedure and Evidential Law conducted by him on Mr Tembe were not signed, moderated and dated?

5.5.47 Mr Mashoeshoe indicated that it was not a requirement but discretionary to sign and put date on assessment sheets at the time and that it only became compulsory in 2010.\(^{40}\) Ms DasNeves also concurred with Mr Mashoeshoe and insisted that there is no legal requirement to sign and put dates on assessment sheets pro-forma.

5.5.48 Mr Mashoeshoe further indicated that he could not, due to lapse of time, get other copies of assessments except the ones relating to Criminal Procedure and Evidential Law already submitted to my office. According to Mr Mashoeshoe, archiving and keeping of records is an administrative task and not his responsibility and therefore he could not answer as to the lack of other documents relating to Mr Tembe’s file or PoE.

5.5.49 Ms Dasneves could not provide my team with an explanation as to why Mr Tembe was not assessed on the Heavy Motor Vehicle as shown in the

\(^{40}\) As per audio record at minute 33-50 (interview with Mr Mashoeshoe).
table under paragraph 12.5.38 above. Instead, Ms Dasneves sought to attribute the assessment relating to Heavy Motor Vehicle to the Gauteng Department of Roads and Transport, notwithstanding the fact that the examiner Ms JP Tebeila was an employee of the CoJ and JMPD in particular.

5.5.50 Similarly, both Ms Dasneves and Mr Mashoeshoe were unable to explain to my team how Mr Tembe was issued with a Traffic Officer’s Diploma which is dated 30 June 2007, while he was still undergoing training and assessments since systematic examination of motor vehicles evaluation/assessment on Mr Tembe were conducted on 04 October 2007, which is four months after the Traffic Diploma was already signed and issued.41

5.5.51 Similarly, the evaluation/assessment of Mr Tembe on Point Duty was conducted on 09 October 2007 which is also four months after the Traffic Diploma was signed and issued to him.

(d) Certificate of Registration as a Traffic Officer issued by the Gauteng Department of Roads and Transport on 2010-07-12:

5.5.52 On 06 September 2019, my investigation team held a meeting with the Acting Deputy Director: Sean Sevell (Mr Sevell) of Gauteng Department of Roads and Transport (GDRT) in order to verify the certificate that was issued to Mr Tembe and to get clarity on the procedure on how it is issued.

5.5.53 During this meeting, Mr Sevell explained that GDRT does not take or receive PoE files from traffic training college/academy in order to register an applicant as a traffic officer. Mr Sevell submitted that GDRT only receives a copy of the Traffic Officer’s Diploma and that the PoE file remains the property of the relevant training academy/college.

41 Our emphasis.
5.5.54 Mr Sevell further confirmed to my team that GDRT received an application for registration of Mr Tembe on 05 July 2010, with a copy of his Traffic Officer’s Diploma from JMPD academy. It was approved by GDRT on 12 July 2010, and Mr Tembe was registered as a traffic officer and issued with an authentic infrastructure number 49512N22 by GDRT.

5.5.55 It was further contended by complainants that Mr Tembe subsequently left the employ of CoJ on or around 2011. Mr Tembe then became the Chief of the National Traffic Police at RTMC on 01 July 2011. On 31 January 2013, Mr Tembe resigned from the employ of RTMC and became a private person.

5.5.56 Complainant argued that Mr Tembe never performed duties as a traffic officer for a period of over twelve (12) months, yet CoJ re-appointed him as Chief of JMPD in 2017, without subjecting him to a compulsory refresher course since he was not a traffic officer for such a long time namely, 2013 to 2017.

5.5.57 Complainant asserted that Mr Tembe was supposed to have been de-registered as a traffic officer since he was out of the service but that did not happen. As result, when CoJ re-employed Mr Tembe as Chief of JMPD, he used the same certificate and infrastructure number that was previously issued to him by GDRT in 2010, which was allegedly irregular and unlawful. Complainant asserted that Mr Tembe was supposed to attend a refresher course upon being re-employed by CoJ.

Application of the relevant legal prescripts

Constitution

5.5.58 Section 2 of the Constitution⁴² lays the foundation for the control of public power. It provides that:

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⁴² Constitution of the Republic of South Africa, 1996
“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

5.5.59 In this instance, this can be understood to imply that the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law.

5.5.60 Section 33 of the Constitution provides that:

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

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

5.5.61 Section 3(1) of the Promotion Administrative Justice Act (PAJA) stipulates that:

“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”

5.5.62 If regard is had to the nature and subject matter of the power exercised by the CoJ in the circumstances, it may not be wrong to characterise the CoJ’s actions as administrative action within the meaning of section 33 of the Constitution. It was, however, the exercise of public power which had to be carried out lawfully and consistently within the provisions of the Constitution in so far as they may be applicable to the exercise of such power.

5.5.63 In Prinsloo v Van Der Linde and Another⁴³ the Court held as follows:

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⁴³ Prinsloo v Van Der Linde and another 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.
“The constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state”.

5.5.64 It follows therefore, that in filling the post of Chief of JMPD, the CoJ had to do so in a manner that is lawful, reasonable, procedurally fair and in a manner that is consistent with the rule of law as envisaged by the Constitution.

Legislation

5.5.65 Section 3D of the National Road Traffic Act\textsuperscript{44} (NRTA) stipulates the minimum requirements for registration as inspector of licences, examiner of vehicles, examiner for driving licences and traffic officer as follows:

(1) “The minimum requirements for registration as an inspector of licences, an examiner of vehicles, an examiner for driving licences or a traffic officer, as the case may be, shall be that the applicant -

- (a) has obtained an appropriate diploma at a training centre approved by the Shareholders Committee;
- (b) is a fit and proper person to be registered as such; and
- (c) in the case of a traffic officer, has undergone training in relation to the laws applicable to the transportation of dangerous goods;

Provided that a person appointed before -

- (i) 1 January 1992 in terms of a repealed ordinance or section 3 (1) of the Road Traffic Act, 1989 (Act No. 29 of 1989); or
- (ii) the commencement of this Act in terms of any road traffic law contemplated in item 2 of Schedule 6 to the Constitution of the Republic

\textsuperscript{44} Act 93 of 1996.
of South Africa, 1996 (Act No. 108 of 1996), as an inspector of licences, an examiner of vehicles, an examiner for driving licences or a traffic officer, as the case may be, shall be deemed to have complied with the provisions of this subsection”.

5.5.66 It is submitted that the above provisions fully apply to Mr Tembe since he is a registered traffic officer and further appointed on same capacity as a Chief of JMPD. It is common cause that Mr Tembe is in possession of a Traffic or Metropolitan Officer’s Diploma issued by JMPD academy in June 2007.

5.5.67 However and based on the allegations that Mr Tembe’s qualifications were fabricated, I had to grapple with a question of whether Mr Tembe’s Traffic or Metropolitan Diploma is an authentic and an appropriate Diploma as envisaged in the subsection.

5.5.68 Following a holistic and a forensic based investigation into the procedure and the manner in which Mr Tembe was awarded a Traffic or Metropolitan Diploma by JMPD academy on 30 June 2007, a number of the following anomalies and discrepancies were observed:

(a) Mr Tembe attended the traffic or metropolitan Diploma’s course on a part time basis, which entailed not being in a class with other learners, attending on weekends, after hours and sometimes instructors had to teach him in his office.

(b) There was no written application by CoJ to RTMC or to such other authority to exempt or indemnify Mr Tembe from attending the course on a full time basis like all other leaners. Similarly, there was no authorisation or permission granted by RTMC or such other responsible authority to allow Mr Tembe to attend the course on a part time basis.
(c) No class attendance register could be provided by CoJ to my office and to RTMC as proof of actual attendance of lessons by Mr Tembe in respect of the course in traffic Diploma.

(d) An incomplete PoE file was later submitted by CoJ to my office which did not reflect all the standard units and all assessments that had to be complied with before one can satisfy all the requirements to be issued with the Traffic Officers Diploma as shown in terms of RTMC Policy Document and SAPS Conversion modules as per table above at paragraph 12.5.33.

(e) It was also conceded by Mr Mashigo during an interview with my team that Mr Tembe was attending training on weekends, sometimes at seven and eight at night on a part time basis because he was already a Director, operational and functioning. The only reasonable and ineluctable inference to be drawn from this statement by Mr Mashigo could be that Mr Tembe was already operational and performing traffic officer’s function while he was still under training, which was I find to be rather bizarre.

(f) Finally, but no less important, the Traffic or Metropolitan Diploma was issued to Mr Tembe on 30 June 2007, way ahead or before some of his summative and formative assessments were done on (04 October 2007) as shown in evidence. This discrepancy is not only alarming but further fuels the allegations as made by complainants and it could not be explained or substantiated by CoJ.

5.5.69 In the light of the above highlighted anomalies and discrepancies, it is submitted that the conduct of CoJ and in particular its JMPD academy was irreconcilable and at odds with the minimum requirements set by section 3D of NRTA.

45 As per audio record at minute 1-29 (interview with Mr Mashigo).
5.5.70 These anomalies seek to point towards lacklustre and a cavalier attitude on the part of JMPD academy officials in relation to training standards and uniformity. To jettison the allegations made by complainants that Mr Tembe was merely given the Traffic or Metropolitan Diploma without attending classes, would do a grave injustice to JMPD training standards and uniformity, more so in the light of the above stated irregularities.

5.5.71 Section 3E of the NRTA regulates suspension and cancellation of registration of officer and stipulates the following:

(1) “The inspectorate of driving licence testing centres or the inspectorate of testing stations, respectively, may for the period that it deems fit and in the manner prescribed, suspend or cancel the registration of an examiner for driving licences, or an examiner of vehicles, if -
(a) ……………………………
(b) such person stopped functioning as an officer for a period of 12 successive months;
(c) such person has not attended an appropriate refresher course within the prescribed time at a training centre approved by the Shareholders Committee; or
(d) ……………………………
(2) The chief executive officer may for the period that he or she deems fit and in the manner prescribed, suspend or cancel the registration of a traffic officer or inspector of licences if any of the circumstances referred to in subsection (1) (a) to (d) exist.
(3) The registration of a person referred to in subsection (1) or (2) may only be suspended or cancelled after such person has had the opportunity to make representations in writing and to show cause, within the period determined by the chief executive officer, which period shall not be less than 21 days, why the registration should not be suspended or cancelled”.

5.5.72 It is submitted that Mr Tembe stopped functioning as a traffic officer for a period of 12 successive months. Mr Tembe resigned from RTMC in 2013 and became a private businessman and as a result, he never functioned
as a traffic officer. Mr Tembe was only appointed by JMPD in 2017 after four years of being non-functional as a traffic officer.

5.5.73 Mr Tembe was never de-registered as contemplated in subsection 1 (a), neither was he subjected to an appropriate refresher course within the prescribed time at a training centre as envisaged in subsection 1(c).

5.5.74 As matter of fact, Mr Tembe still uses the same registration certificate and infrastructure number as traffic officer which was obtained in 2010 as explained above. His status as a registered traffic officer was seen as being advantageous by the CoJ in appointing him as Chief of JMPD.

5.5.75 However, as revealed by evidence, Mr Tembe’s current status as a registered traffic officer may not be fully compliant with the provisions of section 3E of the NRTA. This may be attributable to the fact that Mr Tembe stopped functioning as a traffic officer for over twelve (12) successive months and he never attended a refresher course at an appropriate training centre.

Policies

5.5.76 The Policy Document for Traffic Training Centres dated November 2003, was submitted to my office by Ms Das Neves of CoJ on 30 September 2019. An essentially same Policy Document for Traffic Training Centres (referred to hereinafter as Rustenburg Document as it is famously known within traffic fraternity) was gazetted in May 2011 and was also provided to my office by Adv Msibi of RTMC on 17 July 2019.

5.5.77 The objective of the Rustenburg Document was to compliment the NRTA and its Regulations and to set out the national standards for traffic training centres. JMPD traffic academy is one such traffic training centre approved and monitored by RTMC under NRTA Regulations and Rustenburg Document as submitted to my office by Adv Msibi of RTMC.
Clause 1.11 of the Rustenburg Document is titled *Refresher Training* and provides the following:

“Refresher training could apply to any authorised officer who has never practiced for more than 12 months or who left the profession and desires to be re-employed”.

As indicated above, Mr Tembe stopped practicing as a traffic officer in 2013 (over twelve (12) successive months) and he never attended a refresher course at an appropriate training centre upon being re-employed by CoJ in 2017.

Clause 3.13.3 to 3.13.5 of the Rustenburg Document titled ‘*Invigilation*’ provides the following:

3.13.3 “All traffic Training Centres must comply to the requirements as set out in this Policy Document in regard to the following:

3.13.4 *Invigilators*

Invigilators should be responsible and neutral persons. Invigilators should be officially appointed by the Head of the Traffic Training Centre and be fully informed about their responsibilities, powers and duties with respect to this policy as well as Traffic Training Centre’s internal assessment policy. Irrespective of the number of learners, two invigilators must at all times be present during all assessment/examination sessions and another invigilator should be on standby.

3.13.5 *Responsibilities*

Invigilators are expected to exercise very strict supervision over leaners. They should give their undivided attention to this matter and should move around in the assessment/examination room regularly for as long as assessment/examination lasts. It is extremely important that learners should not have reasons to believe that there may be an
opportunity for them to disregard the assessment/examination regulations owing to a lack of supervision”.

5.5.81 The copies of assessment/examinations of Mr Tembe furnished to my office are not only short and incomplete but are also not signed by a moderator, and have no evidence of invigilation at all. It is submitted that lack of a signature of an invigilator/observer on Mr Tembe’s assessments may have been in direct violation of the Rustenburg Document policy provisions.

5.5.82 Clause 8.3.4 of the GTAPF regulates the Finalisation of Recommendation by interview panel and states *inter alia*:

(a) “When all the candidates on the shortlist have been interviewed, unless for whatsoever reason one or some of them were unable to attend and this did not materially affect the quality of the process or the opportunity to meet EE targets, the interviewing Panel will deliberate and recommend a suitable candidate based on interview/s and assessments (if appropriate).

(f) The Panel should also finalise a second recommended candidate, provided such a candidate attained on aggregate 75% on the tests and interview questions ratings, in the event that the first candidate does not accept the offer.

(g) Should the Panel be unable to recommend a second candidate due to the fact that no other candidate met competencies with at least a 75% result and the successful candidate does not accept, the process will have to commence either with new round of interviews if suitable candidates are available to be shortlisted or re-advertisement for circularisation in the appropriate form as outlined in the paragraph dealing with it.
(h) The deliberations of the Panel must only focus strictly on the core selection criteria of the job and the extent to which each applicant meets or does not meet those requirements and will avoid all elements of discrimination.

(i) ........................................

5.5.83 The interview scores which were furnished by CoJ to my office as shown in the interviews score table above, indicate that Mr Tembe scored number five (5) during the interviews and was therefore not recommended based on the interview scores.

5.5.84 In support of its decision to appoint candidate number five (5), CoJ sought to argue in the main that, Mr Tembe was already a registered traffic officer and did not have to undergo a Traffic Officer’s Diploma course, which now takes eighteen (18) months to complete. CoJ further sought to justify the recommendation of Mr Tembe on the basis that Mr Tembe has Federal Bureau of Investigation (FBI) training certificates.

5.5.85 However, this argument by CoJ/Dr Lukhwareni completely defied logic considering the fact that other candidates who scored higher than Mr Tembe during the interviews were also registered traffic officers with FBI certificates and other more academic qualifications than Mr Tembe. Those candidates were the following:

(a) Ms Jody Pillay who scored number two (2)
(b) Sipho Dlepu who scored number four (4)

5.5.86 It is not clear why the above two candidates were ignored by CoJ despite being suitable and having scored higher than Mr Tembe during the interviews. Clause 8.3.4 (a) of the GTAPF states that the interviewing Panel will deliberate and recommend a suitable candidate based on interview/s and assessments (if appropriate). In this instance, it is not clear why the GTAPF guidelines were ignored. It is submitted that this conduct by CoJ may have been in violation of GTAPF.
Importantly, the post advertisement for Chief of JMPD required a candidate to have a **“B degree or equivalent qualification in an appropriate field, such as Policing and/or Management.”** As shown in evidence above Mr Tembe does not have a degree. Mr Tembe only has a three year Diploma in Management from the now defunct Mentor Business College.

According to SAQA NQF rating as shown in evidence above, a three year Diploma is not equivalent to a degree. As a result, it may be submitted that CoJ did not shortlist Mr Tembe in accordance with the minimum requirements set out in the advertisement of the post.

The prescient case of Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal46 raised an important constitutional issue relating to the state’s obligation to comply with the requirements of the rule of law under section 1(c) of the Constitution in the context of public-sector employment. This case followed after the Task Team report sanctioned by MEC found that Mr Khumalo did not meet the minimum requirements relating to supervisory experience stated in the advertisement of the post he was appointed to. The MEC subsequently approached the court to set aside the appointment of Mr Khumalo.

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

A response was received by my office on the 30 June 2019 on behalf of Mr Tembe, from Mr Martin Hennig of Martin Hennig Attorneys. The response comprised of an affidavit deposed to by Mr Tembe on 29 June 2020. The said affidavit was accompanied by distinct annexures. I have perused the response as a whole and observed that no substantial new information which advances the issue any further was raised.

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46 (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013).
5.5.91 As a result, I have deliberately not dealt with each and every aspect raised in the response, but that should not be misconstrued as an admission of any kind of the averments contained therein. I have done so strictly for the sake of brevity and to avoid the risk of unnecessary repetition and prolixity.

5.5.92 In the affidavit, Mr Tembe clarified that from February 2013 when he resigned as Chief of Police: RTMC until his appointment as Chief of JMPD on January 2018, he was running his own private company known as Mandlati Trading and Projects (Pty) Ltd (Mandlati) Further that Mandlati was appointed to do moderation and quality assurance over Safety and Security Sector Training courses which included JMPD academy. As a result, Mr Tembe believes that it was not necessary for him to be subjected to a refresher course upon being reappointed by JMPD since he was still operating within the field of traffic police environment.

5.5.93 I am unable to accept this version, since running the private company as contractor is not the same as performing functions as an officer contemplated in NTRA.

5.5.94 With regard to the discrepancy relating to his Traffic or Metropolitan Diploma being issued in June 2007 while some assessments were made in October 2007, Mr Tembe sought to attribute the discrepancy to Mr Sipho Dlepu: who is currently the Acting Chief of JMPD (Mr Dlepu). According to Mr Tembe Mr Dlepu had lodged a grievance against his appointment and made known his intentions to have him ousted. Mr Tembe and alleged that Mr Dlepu and other individuals with ulterior motives against him would have had enough opportunity to access his file at JMPD academy, hence there are lacking records in his PoE file.

5.5.95 However, the above allegations levelled against Mr Dlepu were not backed up by any tangible evidence save for the proof that Mr Dlepu lodged a grievance of unfair labour practice with South African Local Government Bargaining Council (SALGBC). This grievance on its own, cannot be elevated to a conclusion that Mr Dlepu is responsible for discrepancy on
the date on which Mr Tembe’s Diploma was issued or lack of records on
Mr Tembe’s PoE file.

5.5.96 Mr Tembe further argued that Independent Police Investigative Directorate
(IPID) investigated allegations of fraud surrounding his Traffic Diploma and
appeared to be satisfied since they never came back to him.

5.5.97 In order to verify this, on 06 July 2020, my office called the investigating
officer of this case at IPID who confirmed that the investigation of fraud is
still underway as per Johannesburg Central CAS 289/05/2019 in
connection with Mr Tembe’s Traffic Diploma.47

5.5.98 A further response to my Notice on this issue was received from Adv Msibi
of RTMC on 02 June 2020. Adv Msibi stated the following on paragraph 3
of his response:

“The finding pertaining to the Training of Mr Tembe as a traffic officer on
part time basis, we wish to confirm that at no stage was such approval
sought from the RTMC and neither was such approval granted”.

5.5.99 According to Mr Tembe, the arrangement to be trained on a part time
basis was made with the then JMPD Chief of Police: Mr Chris Ngcobo, as
it was felt inappropriate that Mr Tembe as a senior officer should join the
rank in a class formation.

5.5.100 However, Adv. Msibi clarified that Heads of Traffic Training Centres may
seek or request deviance from RTMC to excuse a particular learner from
attending full-time class due to the learner having acquired certain credits.
Further that RTMC has no record of an application or request seeking
deviation to excuse Mr Tembe from doing the traffic training on a full time
basis for twelve (12) months like any other learner. Adv. Msibi further
indicated that RTMC never authorised part time training for Mr Tembe and
that such exception had to be authorised by RTMC.

47 As per IPID CCN 2019070422.
Conclusion

5.5.101 Based on the summary of evidence extrapolated above, I am persuaded to conclude on a balance of probability that the CoJ made the appointment of Mr Tembe in contravention of the relevant legal prescripts as discussed above.

5.5.102 It was not explained why JMPD academy issued Mr Tembe with a Traffic or Metropolitan Diploma on June 2007, before assessments were finalised in October 2007. I must immediately record that this discrepancy gives credence to a reasonable suspicion of fraud, maladministration and improper conduct.

5.5.103 I am unable to countenance or endorse a qualification awarded in the manner that was not only characterised by arbitrariness but also shrouded in mystery and lack of transparency. My office would be failing in its duty if it does not send out a clear and unequivocal pronouncement that South Africa is committed to developing and implementing sound and robust legal principles that seek to promote good and clean governance within the public service.

5.6 Whether CoJ irregularly increased the Chief of Staff: Mr Michael Beaumont’s salary and further allocated him the vehicle and Very Important Person (VIP) protection services without conducting security risk assessment.

Common Cause

5.6.1 The position with the name “Chief of Staff” was first established in CoJ in June 2011. The position was not graded but the individual was remunerated on a package of R 1 583 850 per annum at that time which was within the salary key-scale of level 2B. The position was initially occupied by Ms Elginah Ndlovu.
5.6.2 The second incumbent to the position, Mr Anthony Selepe was appointed on 20 August 2012. The position was then graded at level 2B and was determined as the correct level. The incumbent was remunerated at R1 795 662 per annum, as reflected on his last day of service as at 30 June 2014.

5.6.3 The third appointment, Mr Loyiso Ntshikila was appointed on 1 July 2014 and vacated the position on 31 August 2016. He did not have the necessary qualifications. He also lacked the requisite management experience required for the position reporting administratively to the City Manager. As a result, the structure was amended to reflect the position reporting to the Chief Operations Officer hence it was on the 3rd reporting level. Also some job requirements were removed and subsequently the position was re-graded to level 2C. Mr Loyiso Ntshikila was appointed on the maximum of salary level 2C band which was R 1 814 720.

5.6.4 Noteworthy, when comparing salary scales, is that the minimum remuneration of salary level 2B is equal to a maximum of level 2C.

5.6.5 Below is an extract from the CoJ’s payroll system indicating the changes in the salaries and the relevant dates of such changes of the incumbents that occupied the Chief of Staff position:

<table>
<thead>
<tr>
<th>Last Name</th>
<th>First Name</th>
<th>Position</th>
<th>Change date</th>
<th>Annual Salary</th>
<th>% increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ndlovu</td>
<td>Elginah</td>
<td>MMC</td>
<td>2010.07.01</td>
<td>R723,191</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Chief of Staff</td>
<td>2011.06.01</td>
<td>R1,500,000</td>
<td>107.41%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2012.07.01</td>
<td>R1,583,850</td>
<td>5.59%</td>
</tr>
<tr>
<td>Selepe</td>
<td>Anthony Dinake</td>
<td>Strategic Advisor: Performance Monitoring and Evaluation</td>
<td>2012.07.31</td>
<td>R1,701,243</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Chief of Staff</td>
<td>2012.08.01</td>
<td>R1,701,243</td>
<td>0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2013.07.01</td>
<td>R1,795,662</td>
<td>5.55%</td>
</tr>
<tr>
<td>Ntshikila</td>
<td>Loyiso Zukile</td>
<td>Special Project Advisor</td>
<td>2014.07.01</td>
<td>R1,281,480</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Monwabisi</td>
<td></td>
<td>2014.10.01</td>
<td>R1,600,000</td>
<td>24.86%</td>
</tr>
</tbody>
</table>
The table below reflects the report, as approved by the Mayoral Committee on 21 July 2016 and it equates to the TASK grade of 21 to level 2B:

<table>
<thead>
<tr>
<th>CURRENT COJ SALARY LEVELS</th>
<th>TASK LEVELS</th>
<th>HAY POINTS</th>
<th>DESIGNATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>2C</td>
<td>20</td>
<td>951 – 1200</td>
<td>EXECUTIVE HEAD / GROUP HEAD</td>
</tr>
<tr>
<td>2B</td>
<td>21</td>
<td>1200 – 1600</td>
<td>EXECUTIVE DIRECTOR</td>
</tr>
<tr>
<td>2A</td>
<td>22</td>
<td>1601 – 1800</td>
<td>GROUP EXECUTIVE DIRECTOR</td>
</tr>
<tr>
<td></td>
<td>23</td>
<td>1801 – 2140</td>
<td></td>
</tr>
<tr>
<td></td>
<td>24</td>
<td>2140 - 2550</td>
<td></td>
</tr>
</tbody>
</table>

On 04 May 2018, Dr Lukhwareni furnished my office with a report of the re-grading of the Chief of Staff position dated 16 October 2017, titled section 79: Group Corporate and Shared Services Office of the City Manager.

In terms of paragraph 2 of this report, the objective/purpose was to provide information on the process followed in the re-grading process for the Chief of Staff position within the private office of the Executive Mayor: Mr Mashaba. The background of this report laid out some of the following factual matrix:

Pursuant to the 03 August 2016 Local Government Elections, a new administration was elected to serve as political leadership of the CoJ. Due to this political change, the need to appoint a Chief of Staff was identified as an immediate priority. On 29 August 2016, Mr Michael Beaumont (Mr Beaumont) was appointed by CoJ as Chief of Staff reporting to the Chief
Operations Officer. The Chief of Staff position was graded on salary level 2C at the minimum of the band, that is, R1 351 690.

5.6.10 A decision was subsequently made by Mr Mashaba in November 2016 to rectify the reporting line and the functions of the Chief of Staff. The job description and functions were updated as well as adding some responsibilities required in the new office. The structure was amended to rectify the reporting line.

5.6.11 Simultaneously, the Job Evaluation was conducted by Deloitte on 15 November 2016 and the outcome of the grading level of the position was confirmed to be 2B. The outcome of this exercise was that Mr Beaumont’s remuneration was adjusted to the minimum of 2B level, which is equivalent to that of Executive Director. The change in remuneration was therefore an increase from R1 351 690 to R 1 841 094 and took effect on 1 March 2017.

5.6.12 According to the summary of this report in paragraph 3, at a Council meeting of 23 May 2017, the issue of grading and salary increase of the Chief of Staff was raised from the floor. Mr Mashaba undertook to bring a report to Council on the matter, which he did on 25 May 2017.

5.6.13 During the discussion of the report in Council on the matter, Mr Mashaba as requested by Council, reversed with immediate effect the process of Mr Beaumont’s salary re-grading/increase and undertook to refer the matter for consideration by the Section 79 Committee to enable it to exercise its oversight role on the matter and bring it back to Council after consideration by the Committee.

5.6.14 Consequently, on 25 May 2017, Mr Beaumont’s salary was reduced and reverted back to the minimum entry level of 2C (R1 351 690), which is the same amount it was in February 2017.
Issues in Dispute

5.6.15 Complainant argued that Mr Beaumont’s salary was irregularly increased with full knowledge and consent of Mr Mashaba. Further that, when the same concern was raised in Council, Mr Mashaba acknowledged same and committed to reversing the salary increment. To date this has not been done.

5.6.16 Complainant also contended that, over and above the salary increase, Mr Beaumont, who is an official has been allocated the use of a state vehicle, which he is not entitled to. No security assessment was done in allocating Mr Beaumont the vehicle and VIP protection services.

5.6.17 The CoJ responded to the above allegations through Dr Lukhwareni, as per letter dated 04 May 2018. In this letter Dr Lukhwareni submitted that Mr Mashaba, at the Council meeting of 23 May 2017 referred this matter of Mr Beaumont’s salary increase to a Section 79 Oversight Committee for consideration.

5.6.18 A comprehensive report submitted to the Section 79 Corporate and Shared Services Committee and to Council was also furnished to my office by Dr Lukhwareni.

5.6.19 Dr Lukhwareni further submitted that an external legal opinion\(^{48}\) was also sourced on this matter and it stated that the treatment of the matter was unfair to Mr Beaumont and that his salary be rectified immediately. This legal opinion/report concluded amongst other things that, the decision to reduce the salary of Mr Beaumont is tantamount to an attack on the grounds that the said conduct amounts to unilateral change of terms and conditions of employment, unfair labour practice and unfair discrimination.

\(^{48}\) As per report from BMK Attorneys dated 30 September 2017.
5.6.20 According to Dr Lukhwareni, this legal opinion was also noted by the Section 79 Committee and consequently Mr Beaumont’s salary was reinstated to the correct grading level 2B.

5.6.21 In response to allegations of VIP protection services given to Mr Beaumont, Dr Lukhwareni indicated that Mr Beaumont was attacked and his laptop and phone were stolen on his way home after work. As a result, a safety measure/arrangement was approved whereby he would be picked-up at home and dropped off again after work by JMPD while the CoJ was sourcing budget to implement the recommendations of the security risk assessment.

5.6.22 Dr Lukhwareni further furnished my office with a copy of an affidavit by GFIS Director (Mr Donavin Woodman) relating to the security assessment which indicated the level of risk that Mr Beaumont was exposed to.

5.6.23 Despite a written request by my office, the CoJ did not furnish the actual copies of the Security Risk Assessment report(s) from the State Security Agency (SSA) or as alluded to by Mr Donavin Woodman in his affidavit.

5.6.24 CoJ undertook to deliver the security Risk Assessment Report to my office within two weeks as per letter dated 29 March 2019 signed off by Dr Lukhwareni, however to date that has not happened. This would have enabled me to review and peruse the actual security risk assessment report and not only rely on the affidavit by Mr Donavin Woodman.

5.6.25 However, it was also clarified by Dr Lukhwareni that, after a month, Mr Beaumont stopped this arrangement as in his view the incident was just a crime and not politically motivated. No transportation or security services were then provided to Mr Beaumont.
Application of the relevant legal prescripts

Legislation

5.6.26 Section 186(2)(a) of Labour Relations Act\(^49\) stipulates that “unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving –

(a) “Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee”.

5.6.27 The interpretation of the term “benefits” includes the right or entitlement to which an employee is entitled (\textit{ex contractu or ex lege including rights judicially created}) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to an employer’s discretion.\(^50\)

5.6.28 From the above, it is clear that the courts have endorsed the approach that an employee has a right as created by section 186(2)(a) not to be treated unfairly in relation to promotion, demotion, training and provision of benefits. It is submitted that Mr Beaumont is sufficiently covered and protected by this legal proviso in relation to provision of benefits as an employee of the CoJ.

5.6.29 Section 6(2)(4) of Employment Equity Act\(^51\) (EEA) stipulates \textit{inter alia}:

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\(^49\) Act 66 of 1995.


\(^51\) Act 55 of 1998.
“A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the listed grounds in terms of section 6(1) or on any other ground, is unfair discrimination”.

5.6.30 In terms of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, established in terms of section 54(1) of the EEA (The Code) employers are required to examine all the aspects of their pay/remuneration policies to ensure compliance with the principles of equal pay/remuneration for work of equal value.

5.6.31 Evidence extrapolated above has already shown that Mr Beaumont was the 4th Chief of Staff within CoJ and that all his predecessors were remunerated at a minimum level of salary 2B. It is therefore not unreasonable to submit that the CoJ had no reason or valid grounds to lawfully discriminate against Mr Beaumont by paying him far less vis a vis his predecessors on the work of same and equal value.

5.6.32 Section 67(1) of the MSA states amongst other things the following:

“A municipality, in accordance with the EEA, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration including-

(a) The recruitment, selection and appointment of persons as staff members;
(b) Service conditions of staff;
(c) The supervision and management of staff;
(d) ………………………
(e) ………………………
(f) ………………………
(g) ………………………
(h) ………………………
(i) ………………………
(j) ………………………
(k) Any other matter prescribed by regulation in terms of section 72”.
“Section 72(1) of the MSA provides that the Minister responsible for local government may subject to applicable labour legislation and after consultation with the bargaining council established for municipalities for the purposes of this Chapter:

(a) Make regulations to regulate the following matters:

(i) ........................................
(ii) ........................................
(iii) The setting of uniform standards for
      (aa) municipal staff establishments;
      (bb) municipal staff systems and procedures and the matters that
           must be dealt with in such systems and procedures; and
      (cc) any other matter concerning municipal personnel administration;
(iv) ........................................
(v) ........................................
(vi) Any other matter that may facilitate the application of this Chapter:

or

(b) Issue guidelines to provide for the following matters:

(i) The establishment of job evaluation systems;
(ii) The regulation of remuneration and other conditions of service of staff members of municipalities, subject to applicable labour legislation;
(iii) The measuring and evaluation of staff performance;
(iv) The development of remuneration grading and incentive frameworks for staff members of municipalities;
(v) ........................................
(vi) Any other matter that may facilitate the implementation by a municipality of an efficient and effective system of personnel administration”.

The above cited provisions of MSA make it clear that CoJ as the municipality has the obligation to develop and maintain an efficient, fair, uniform and transparent standards concerning personnel administration. Applying different standard to Mr Beaumont would not only have been unfair but, it would also have violated sections 67 and 72 of MSA as shown above.

Policies

Job Evaluation Policy approved by Council on 12 December 2008 sets out at its clause 7.2.2 the manner of initiating the job evaluation process
within CoJ. In line with clause 7.2.2, the Job Evaluation results conducted by Deloitte on 15 November 2016, were furnished to my office by CoJ and it reflected that the Chief of Staff position equates to TASK grade of 21 to level 2B.

Conclusion

5.6.36 Based on the evidence at my disposal, the position of Chief of Staff offered to Mr Beaumont was graded in line with CoJ’s Job Evaluation Policy and the remuneration paid to the incumbent was apparently in line with the job evaluation outcomes.

5.6.37 Most importantly, when comparing salary scales of the previous incumbents with that of Mr Beaumont, it should be noted that, historically all his predecessors were remunerated at the minimum of salary level 2B or to a maximum of level 2C which is equal to a minimum of 2B. It would therefore be unfair for Mr Beaumont to be paid less than others for the work of equal and same value.

5.6.38 I am therefore persuaded to conclude that CoJ adhered to all the provisions of its MSA, LRA, EEA and Job Evaluation Policy in the salary adjustment of Mr Beaumont as the Chief of Staff.

5.7 Whether CoJ returned nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017, which money was meant for provision of basic services to the residents of CoJ including water and sanitation, roads, housing, electricity and waste amongst others and if the answer is Yes, whether this was an indication of non-compliance, mismanagement and poor oversight by the CoJ.

Common Cause

5.7.1 According to the Audited Consolidated Financial Statement (AFS) for the financial year ended on 30 June 2017, CoJ as a municipality receives
revenues from National Treasury annually as part of conditional grants, donations, funding or allocations to the extent that the CoJ has complied with any of the criteria, conditions or obligations embodied in the agreement.

5.7.2 This allocation is normally meant for provision of basic services to the residents including but not limited to water and sanitation, roads, housing, electricity and waste amongst other things.

5.7.3 A liability is recognised by National Treasury or other donor for any unfulfilled conditions, criteria, obligations and other contingencies attaching to local government grants or assistance.

Issues in dispute

5.7.4 Complainant submitted that CoJ will return nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017.

5.7.5 Further that National Treasury has served the CoJ with a letter of demand in October 2017 to recover this money which was not spent by the CoJ.

5.7.6 Complainant further averred that this money was meant for provision of basic services to the residents of CoJ including water and sanitation, roads, housing, electricity and waste amongst others.

5.7.7 It was also argued by Complainant that this is an indication of non-compliance, mismanagement and poor oversight by the DA-led administration.

5.7.8 CoJ replied to these allegations as per letter dated 29 March 2019 signed off by Dr Lukhwareni. In its response, CoJ refuted these allegations as being factually inaccurate. CoJ contended that the allegations that it will
return nearly R736 million stems from an Audited Consolidated Financial Statements (AFS) for the financial year ended in 30 June 2017.

5.7.9 It was further argued by CoJ that not all conditional grants appearing on AFS are from National Treasury since some of the money was received by the CoJ from developers as part of their Bulk Engineering Services Contributions. Some of the funds had been carried over from preceding years as it had not been spent or requested back by National Treasury.

5.7.10 CoJ submitted that on 1 November 2017, National Treasury concluded that an amount of R 346, 6 million and not R736 million in regards to conditional grants unspent for the financial year ending in June 2017 had to be returned to the National Revenue Fund. This was indicated in the letter signed off by Deputy Director-General: Intergovernmental Relations Malijeng Ngqaleni, which was furnished to my office for perusal. The balance not requested by National Treasury was kept by CoJ and used for service delivery in the subsequent financial year.

5.7.11 Additionally, CoJ vehemently refuted as being untrue, the allegations that National Treasury has served it with a letter of demand in October 2017 to recover this money which was not spent by the CoJ. According to the CoJ, the letter in question, which is alleged to be a “letter of demand” was the National Treasury’s response to the CoJ’s application for a roll over in terms of section 22(2) of the 2016 Division of Revenue Act and MFMA Circular 75.

5.7.12 CoJ argued that a letter of demand from National Treasury would be very peculiar as National Treasury does not need to demand repayment of unspent conditional grants, as it is legally empowered to simply offset the entire unspent and unreturned amount from the year’s grant allocation.

5.7.13 CoJ further submitted a graphical breakdown and explanations of unspent grants as per table below:
<table>
<thead>
<tr>
<th>Grant Recipient</th>
<th>Core</th>
<th>JOSCHO</th>
<th>CITY</th>
<th>POWER</th>
<th>PIKIT</th>
<th>UP</th>
<th>JHB</th>
<th>WATER</th>
<th>PRO</th>
<th>PCO</th>
<th>M</th>
<th>CIVIC</th>
<th>F2016/17 unspent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conditional Grant Name</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Grants:</strong></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>Provincial Grants: Capital projects</td>
<td>157,646</td>
<td></td>
<td>25,128</td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<td>182,774</td>
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<tr>
<td>Provincial Grants: Operating Projects</td>
<td></td>
<td></td>
<td></td>
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<td>Libraries Plan</td>
<td>3,899</td>
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<td>3,899</td>
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<td>Energy Efficiency Demand Side Management Grant (EEDSM)</td>
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<td>Infrastructure Skills Development Grants</td>
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<td>7,900</td>
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<td>DEA:COP17</td>
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<td>Kaalspruit Clean-Up</td>
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<td>Provincial Grant: Jozi Ihlomile (HIV/AIDS)</td>
<td>384</td>
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<td>Social Housing Grant</td>
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<td>Unspent Public Contributions and Donations</td>
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<td>56,277</td>
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Unspent Grant Explanations:

Provincial: Capital Projects

5.7.14 Of the R182 million unspent under Capital Projects, R157 million relates to Housing projects. Funds were earmarked for land acquisition in Lufhereng. However, negotiations with farmers were prolonged because they were rejecting the offers from CoJ on the settlement prices from the valuer. The CoJ then used USDG budget to purchase pockets of land as and when settlements were reached. The CoJ has since requested Gauteng Department of Human Settlements to use the unspent grant for
top structure projects. The balance of R 25 million to finance capital projects was allocated to City Power to fund the electrification of under developed areas.

**Libraries Plan**

5.7.15 SAP report indicates R 3, 762 million has been spent of the R 3,899 million, resulting in the unspent portion being R137 000.00.

**Energy Efficiency Demand Side Management Grant (EEDSM)**

5.7.16 All projects were completed, however the actual expenditure incurred was less than the allocation received. This resulted in the unspent amount of R1, 228 million.

**Shared Industry Facility**

5.7.17 The grant was received in 2010 and the funds are still within the DED. Preparatory work for implementation of the project was done and the necessary approval to proceed has been requested from province. A roll-over letter can only be acquired after the work has been started.

**Department of Environmental Affairs (DEA): COP17**

5.7.18 This grant was received from the Department of Environmental Affairs (DEA) for CoJ to host CITE COPE 17 Conference held from 24 September to 5 September 2016. The department received the payment in November 2016 after the conference and settlement of related expenditure. However revenue recognition was not done and this matter is under investigation by GFIS. Essentially the funds are spent.
Kaalspruit Clean-Up

5.7.19 The department received R1, 329 million from Gauteng Department of Agriculture and Rural Development (GDARD). By June 2016, this amount was spent. The balance of R 165 000.00 was as a result of savings on actual expenditure incurred.

Wetlands Clean-Up

5.7.20 EISD received an amount of R 8, 460 million between October 2013 and June 2015, respectively and incurred expenditure of R 5, 696 million. The unspent amount was R 2, 764 million.

Provincial Grant: Jozi Ihlomile (HIV/AIDS)

5.7.21 The rollover was rejected by Provincial Treasury, as the reason to increase stipends for the door to door program would create an expectation that would not be met in the program.

Social Housing Grant

5.7.22 The balance of R 136, 5 million is made up of receipts from Social Housing Regulatory Authority (SHRA) and interest earned on the bank account. Some of the receipts were for SHRA debtor’s account where JOSCHO used its own funds to pay the suppliers. JOSCHO receives a Restructuring Capital Grant (RCG) from SHRA. Previously SHRA used to pay out funds in advance to the Social Housing Institute (SHI).

5.7.23 Following the Auditor General’s findings that SHRA claimed performance based on payments to SHI’s prior to delivery of units, the practice stopped. Hence there were no issues with reporting on unspent funds. Now SHRA’s requirement is that units must be delivered before any payments are made to SHI. Based on the development program, JOSCHO delivers its units in the third and fourth quarter, hence the receipt of funds comes after the
adjustment budget is approved. Cash was received after the units were delivered. This was never a roll over grant and JOSCHO as well as SHRA never applied for a roll over with National Treasury.

**USDG, NDPG and EPWP Grants**

5.7.24 The roll over request for the Urban Settlements Development Grant (USDG), Neighbourhood Development Partnership Grant (NDPG) and Expanded Public Works Programme (EPWP) grants were not granted by National Treasury due to CoJ not submitting the Annual Financial Statements to National Treasury by 31 August 2017.

**Spent Local Government Grants Explanation:**

**Urban Settlements Development Grant (USDG)**

5.7.25 This grant is administered by National Human Settlement. Allocated to metropolitan municipalities to supplement their capital budgets, enabling them to better leverage their resources to develop sustainable human settlements. This grant funds the provision of basic municipal services to new housing projects and will allow municipalities to plan and budget for both services and construction of housing as they attain authorisation for human settlement function.

**Neighbourhood Development Partnership Grant (NDPG)**

5.7.26 This grant is administered by National Treasury and supports the development of community infrastructure and aims to attract private-sector investment that improves the quality of life in townships.

**Expanded Public Works Programme (EPWP)**

5.7.27 This programme is administered by the Department of Public Works. The EPWP is meant to encourage municipalities to hire more people in public works projects.
Integrated National Electrification Programme (INEP)

5.7.28 This grant is administered by the Department of Minerals and Energy to sustain the progress made in supplying electricity to poor households.

Public Transport Network Grant (PTNG)

5.7.29 This grant is administered by the Department of Transport to help cities create or improve public transport systems in line with the National Land Transport Act (2009) and the Public Transport Strategy. This includes all integrated transport network infrastructure, such as bus rapid transit systems, conventional bus services and upgrades for pedestrian and cycling infrastructure. It also subsidise the operations of these services.

Integrated Cities Development Grant (ICDG)

5.7.30 The grant provides a financial incentive for metropolitan municipalities to focus their use of infrastructure investment and regulatory instruments to achieve more compact and efficient urban spaces.

Human Settlements Development Grant (HSDG)

5.7.31 This grant is administered by Local Government and Housing to facilitate the establishment of habitable, stable and sustainable human settlements in which all citizens have access to social and economic amenities.

Other Reasons advanced by CoJ in support of Unspent Grants:

5.7.32 The CoJ steadfastly rejected the notion that returning of unspent conditional grants is an indication of no-compliance, mismanagement and poor over-sight by the DA-led administration and was therefore accordingly denied. The following reasons why some funds could not be spent in that particular year were cited as being:
(a) An amount of approximately R40 million for USDG could not be spent on Lufhereng Mixed Development Project, as the discovery of dolomitic conditions necessitated changes in township layout.

(b) An amount of approximately R11 million for USDG could not be spent on Klipspruit Project as the winning bidder for the turn key project, being a joint venture collapsed. CoJ had to restart the bidding process all over again.

(c) City Power could not spend an amount of approximately R36 million for USDG in electrifying various informal settlements as the appointed contractor ran into contractual issues with its material supplier for long lead items.

**Application of the relevant legal prescripts**

**Constitution**

5.7.33 *Section 152 of the Constitution spells out the objects of local government in the following terms:*

(1) “The objects of local government are—

(a) ..................................................
(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) ..................................................

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).
Section 153 of the Constitution provides for developmental duties of municipalities and stipulates the following:

“A municipality must—

(a) structure and manage its administration and 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; and

(b) participate in national and provincial development programmes”.

There is no doubt that the above constitutional provisions place a duty on the CoJ as a municipality to promote social and economic development as well as to ensure the provision of services to communities in a sustainable manner. It is submitted that conditional grants referred to in evidence are some of the funds by means of which CoJ had to fulfil this constitutional mandate towards its residents.

Section 73 of MSA provides that:

(1) “A municipality must give effect to the provisions of the Constitution and—

a) give priority to the basic needs of the local community;

b) promote the development of the local community; and

c) ensure that all members of the local community have access to at least the minimum level of basic municipal services”.

From the evidence at my disposal, it is submitted that CoJ did embark and undertake a number of projects as detailed above, in order to provide basic needs of the local community and to promote development of the local community, albeit with some measure of recorded underspending of conditional grants allocated for such purpose.

Section 60 of the MFMA stipulates *inter alia*:
“The Municipal Manager of a municipality is the accounting officer of the municipality for the purposes of this Act and as the accounting officer must:

(a) exercise the functions and powers assigned to an accounting officer in terms of this Act;
(b) provide guidance and advice on compliance with this Act”.

5.7.39 Section 62 of the MFMA states amongst others the following:

(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 that the resources of the municipality are used effectively, efficiently and economically”.

5.7.40 For the period relating to this issue, Dr Lukhwareni was the Municipal Manager for CoJ and the obligations contemplated in the MFMA had to be exercised by him as the accounting officer.

5.7.41 Section 65 of MFMA on the other hand stipulates inter alia:

(1) “The accounting officer of a municipality is responsible for the management of the expenditure of the municipality.
(2) The accounting officer must for the purpose of subsection (1) take all reasonable steps to ensure that-

(a) the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds”.

5.7.42 Section 30 of the MFMA regulates Unspent Funds and provides as follows:
“The appropriation of funds in an annual or adjustments budget lapses to the extent that those funds are unspent at the end of the financial year to which the budget relates except in the case of an appropriation for expenditure made for period longer than that financial year in terms of section 16(3)”.

5.7.43 CoJ conceded that the National Treasury wrote a letter and requested that an unspent amount of R 346, 6 million in regards to conditional grants for the financial year ending in June 2017, be returned to the National Revenue Fund. The balance not requested by National Treasury was kept by CoJ and used for service delivery in the subsequent financial year.

Conclusion

5.7.44 In concluding this particular issue, I first had to grapple with a factual and a legal question of whether or not the fact that the CoJ was unable to spend all the monies allocated as conditional grants was in itself, an indication of financial mismanagement, maladministration or non-performance.

5.7.45 Based on the reasons given by CoJ as to why those funds could not be spent during that particular year ending in June 2017, I am persuaded to conclude that the returning of unspent funds to Treasury is not on its own, an indication of non-compliance with the MFMA, MSA or Constitution.

5.7.46 It is further understandable as per plausible explanation given by CoJ, that unforeseen events can thwart the success of certain projects, despite all the efforts to prevent same. Such unforeseen events cannot be classified as mismanagement or poor oversight.

5.8 Whether CoJ improperly or irregularly appointed KPMG to conduct investigations in various departments within CoJ for clearly different assignments which would require different expertise, without advertising the tender as required by the Municipal Finance
Management Act (MFMA) and Supply Chain Management (SCM) regulations.

Common Cause

5.8.1 KMPG Services (Pty) Ltd (KPMG) was appointed from a Panel of Service Providers \(^{52}\) for Group Risk and Assurance functions in the CoJ’s Core Administration and Municipal Entities under contract number A528/13 for a period of three years namely, 21 May 2014 to 20 May 2017.

5.8.2 On behalf of CoJ, Executive Director: Group Risk Assurance; Mr Sinaye Nxumalo signed the said contract. On the other hand, Mr Themba Tshikovhi signed on behalf of KPMG.

5.8.3 The contract value of R30 million per annum was allocated to six categories of services identified in terms of the Frame Work Contract A528.

5.8.4 In terms of the Frame Work Contract A528, which was furnished to my office by CoJ, KPMG would provide the CoJ with the following services:

(a) Risk Management Advisory Services;
(b) Compliance Advisory and Monitoring Services;
(c) Internal Audit Services;
(d) Forensic Investigation;
(e) Combined Assurance and
(f) Probity Services.

5.8.5 The aforementioned contract was extended in May 2017 to November 2017, for a further period of six months. KPMG’s engagement was to

\(^{52}\) Other Service providers on the panel included amongst others Deloitte, SM Xulu Consulting, Grant Thornton, Sizwe Ntsaluba Gobodo, Ernest and Young, GFIA, Bowman Gilfillan and Ubucule.
investigate alleged irregularities and irregular conduct within the Billing environment based on information provided by whistle blowers.

5.8.6 KPMG’s further engagements were to investigate certain refund payments made by CoJ. This was informed by a tip off from a senior official within the Refunds Department that during 2016, CoJ’s Treasury Department identified refunds that were processed based on fraudulent supporting documents and journal transfers for which no supporting documents were available.

5.8.7 Subsequent to the execution of this investigation, KPMG was further tasked to investigate credit balance transfers and rate category changes also raised by another Whistle Blower. Again, during this period (2017), City Power had also brought to the attention of the CoJ a modus operandi which creates false/fraudulent account balances in the billing system.

5.8.8 The officials were alleged to be manually replacing actual meter readings with false/fraudulent meter readings to manipulate the amount due. City Power believed that this contributed to a significant increase in non-technical losses recorded. KPMG investigations also focused on municipal accounts on which there were potential negative price variances and abnormal credits that have been passed.

Issues in Dispute

5.8.9 Complainant argued that, CoJ appointed KPMG to conduct investigations in various departments including the Revenue Unit in 2016.

5.8.10 Furthermore, complainant contended that, in June 2017 the services of KPMG were retained or extended by CoJ to perform analysis of customer accounts in the CoJ’s database and develop strategies to improve CoJ’s revenue collection.
5.8.11 According to the complainant, these were clearly different assignments which would require different expertise. However, KPMG was appointed without advertising the tender as required by the MFMA and Supply Chain Management regulations. The basis of this appointment was through unsolicited bid procedures, so argued the complainant.

5.8.12 CoJ disputed these allegations as per letter dated 29 March 2019 signed off by Dr Lukhwareni. CoJ indicated that due to an apparent inter-relatedness of the investigations described above, CoJ appointed KPMG to perform forensic accounting advisory services engagement into Municipal Accounts for 2016/2017.

5.8.13 CoJ insisted that this task clearly fell within the context of Internal Audit, Compliance Advisory, Monitoring Services and Risk Management as provided for in the Frame Work of the original contract. CoJ vehemently denied the complainant’s allegation that CoJ instructed KPMG to carry out services that fell outside the scope of the original contract.

5.8.14 CoJ further refuted the allegation that a new tender ought to have been concluded as being simply incorrect. According to CoJ’s submission, KPMG investigations had nothing to do with improving CoJ’s revenue collection, its purpose was to investigate fraud and corruption that had resulted in the CoJ losing millions in revenue.

5.8.15 The CoJ also argued that the notion or allegation that the CoJ extended KPMG’s contract, albeit not completely inaccurate, is very mischievous due to the negative connotation the statement directly seeks to imply. The correct position is that CoJ extended its panel of service providers for Group Risk and Assurance functions under contract number A528/13 ("the Panel").
Application of the relevant legal prescripts

Constitution

5.8.16 Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

5.8.17 CoJ seems to have complied with the above constitutional provisions in acquiring the services of KPMG under contract number A528/13. No dispute was also raised by complainants in respect of the process followed in the awarding of this original contract save for the subsequent extensions thereof beyond May 2017, which is being impugned by complainants.

5.8.18 CoJ furnished my office with a report dated 19 May 2017 from Acting Executive Director: GRAS Mr Vusi Ndlovu requesting an approval to extend the contract term for tender A528/13 for six months. This proposal was approved by the Executive Adjudication Committee and by the City Manager: Dr Lukhwareni on 23 May 2017.

5.8.19 According to the request for contract extension as approved by Dr Lukhwareni, the extension was granted for a six months period commencing from 22 May 2017 to 21 November 2017, for transitional purposes while a new panel was being appointed.

5.8.20 The reasons for the request for variation of this contract was cited to be the voluminous number of investigations that were currently under way by most service providers including KPMG under this tender.
In terms of section 62(1) of the MFMA, 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 that-

(a) “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”.

This implies that there was a legal obligation on Dr Lukhwareni to ensure that resources of the municipality were used effectively, efficiently and economically. Further that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards as demanded by section 62 MFMA.

Municipal Supply Chain Regulations, MFMA Circular No. 62\textsuperscript{53} which deals with Management of Expansion or Variation of Orders against the original contract states \textit{inter alia}:

\textsuperscript{53} MFMA Circular No. 62 Municipal Finance Management Act No. 56 of 2003.
“It is recognized that, in exceptional cases, an accounting officer of a municipality or municipal entity may deem it necessary to expand or vary orders against the original contract.

The expansion or variation of orders against the original contract has, however, led to wide scale abuse of the current SCM system.

In order to mitigate such practices, accounting officers of municipalities and municipal entities are advised that, from the date of this Circular, contracts may be expanded or varied by not more than 20% for construction related goods, services and/or infrastructure projects and 15% for all other goods and/or services of the original value of the contract.

Municipal Councils and Board of Directors of municipal entities are required to amend their supply chain management policies accordingly. Furthermore, anything beyond the abovementioned thresholds must be reported to council or the board of directors.

Any expansion or variation in excess of these thresholds must be dealt with in terms of the provisions of section 116(3) of the MFMA which will be regarded as an amendment to the contract”.

5.8.24 CoJ conceded as indicated above that, it extended KPMG’s contract to audit the CoJ’s Municipal Accounts for 2016/2017 and argued that this was due to voluminous number of investigations underway. Further, that due to the inter-relatedness of the tasks, this did not need a new tender.

5.8.25 CoJ could not furnish my office with KPMG’s contract variation/expansion addendum commencing from 21 May 2017 to 21 November 2017, to enable me to assess whether such expansion/variation exceeded the 15% threshold or not.

5.8.26 Nonetheless, it remains patently clear from the report approved by Dr Lukhwareni that a request for said contract extension was recommended
and subsequently extended for a total of six months which exceeded 15% of the total value of the original contract, despite a clear condition by Dr Lukhwareni that extension should not exceed R 12.4 million expenditure.

5.8.27 Notably, CoJ failed to indicate if these expansion/variations were dealt with in terms of the provisions of section 116(3) of the MFMA which will be regarded as an amendment to the contract and whether they were reported to the Council. It is also not clear if the amendment/extension was done in writing as required by section 116(1) of the MFMA. My office was not given written copies of the amended contract with KPMG despite several requests for the same.

Policies

5.8.28 SCM Policy for the CoJ (SCM Policy) was adopted in terms of section 111 of the Municipal Finance Management Act, No 56 of 2003.

5.8.29 Clause 2 of the SCM Policy states that:

“The purpose of this Policy is to regulate all Supply Chain Management practices within the City. This Policy implements the Supply Chain Management practices as envisaged by the Act and its Regulations. All employees shall adhere, implement and observe the provisions and requirements of this Policy”.

5.8.30 Clause 4 of the SCM Policy ascribes to a procurement system which:

(a) is fair, equitable, transparent, competitive and cost effective in terms of Section 217 of the Constitution of South Africa No 108 of 1996;
(b) .................................;

54 Section 116(3) of MFMA requires that a contract or agreement procured through the supply chain management policy of the municipality or municipal entity may be amended by the parties, but only after: (a) the reasons for the proposed amendment have been tabled to the Council of the municipality.
55 Section 116(1) requires that contract or agreement procured through the supply chain management system of a municipality or municipal entity must- (a) be in writing.
56 Revision 002 July 2009.
(c) ..........................................;
(d) is consistent with the enterprise development programmes as approved by the City which are not limited to EPWP, Indigency Policy, job pathway and other policies and programmes that seeks to aggressively advance the empowerment of the SMMEs and previously disadvantaged communities;
(e) ..........................................;
(f) is consistent with the Broad Based Black Economic Empowerment Act 53 of 2000 and any Codes promulgated thereunder in the Government Gazette; and
(g) is consistent with the Preferential Procurement Policy Framework Act 5 of 2000 and its Regulations as promulgated.

5.8.31 Clause 6 of the SCM Policy indicates that it shall apply to the entire City and must be strictly adhered to when:

(a) procuring goods or services;

5.8.32 Clause 10(10.1) of the SCM Policy stipulates the REPORTING REQUIREMENTS by the City Manager to the Council through the Finance, Committee and the Mayoral Committee and provides amongst others the following:

“The City Manager must submit the following reports to the Council through established channels –

(a) Monthly reports, or as soon as it is practically possible, containing particulars of each final award made by the Adjudication Committees during that month, including:

(i) the amount of the award;
(ii) the name of the person to whom the award was made;
(iii) the reason why the award was made to that service provider;
(iv) the BEE status of the service provider; and
(v) details of the acquisition plan versus the spend for the month.

(b) ..................................................;
(c) .........................................................;
(d) Report on a monthly basis all deviations and ratifications in the implementation of this Policy and any remedial action taken or envisaged, where applicable;
(e) Reports on awards of unsolicited bids, as soon as it is practically possible after the award of such bids;
(f) .........................................................;
(g) Report on any abuses found and the remedial actions taken;
(h) .........................................................; and
(i) Report monthly or as soon as it is practically possible, the reasons for any deviations or ratifications approved by him in the preceding month in accordance with paragraph 21(4)”.

5.8.33 Clause 10.6 of the SCM Policy demands reporting by the City to National Treasury and/or Provincial Treasury *inter alia*:

(a) .........................................................;
(b) Reports on contracts and/or transaction to the value of R100 million and more;
(c) .........................................................;
(d) Reports on awards of unsolicited bids;
(e) .........................................................;
(f) .........................................................;
(g) .........................................................;
(h) Reports on abuses of Supply Chain Management and the remedial steps taken;
(i) Reports on contracts awarded that the duration extends beyond three years; and
(j) Reports on any deviation from the Model Policy or Regulations as contemplated in paragraph 7(1) above.

5.8.34 Clause 17 of the SCM Policy regulates the procurement mechanisms and states amongst others the following:

(1) “The City shall adhere to the principles of fair, equitable and transparent procurement systems whenever sourcing goods and services from the market”.

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In the circumstances, CoJ engaged the services of KPMG beyond May 2017, thereby varying or amending KPMG’s contract. It does not appear from evidence at my disposal if CoJ reported this deviation/amendment to Council and Treasury as required by this SCM policy.

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

A response to my notice in terms of section 7(9)(a) of the Public Protector Act was received by my office on the 30 June 2020 on behalf of CoJ, signed off by Dr Lukhwareni.

Notable from this response was a glaring and unqualified admission by CoJ, captured in the following terms:57

“On receipt of your Report the City Manager called for an investigation into the total expenditure incurred by the City during the 6 month extension period of the contract. Unfortunately, the City’s preliminary findings seem to indicate that the City’s expenditure for the contract extension did indeed exceed the 15% limit of Circular 62. The expenditure limit was seemingly exceeded notwithstanding the City Manager having approved the extension on the clear condition that any further expenditure for the Panel could not exceed R13.5 million in or a total contract value of R103,5 million”

Once again, CoJ did not take the opportunity to address the question of whether this contract extension which clearly exceeded the 15% legal threshold was reported to Council or not, as required by MFMA.

Instead, Dr Lukhwareni committed that once he has completed his internal investigation into the expenditure incurred for contract A528/13, follow

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57 As per paragraph 38 at page 8 of the CoJ’s response to my Notice.
inter alia, the process set out in Section 32 of the MFMA, in order to deal with this expenditure.

Conclusion

5.8.40 KPMG was tasked in June 2017 to investigate credit balance transfers and rate category changes also raised by another Whistle Blower, after City Power had also brought to the attention of CoJ a modus operandi which created false/fraudulent account balances in the billing system.

5.8.41 This assignment clearly took place after the contract/A528/13 between CoJ and KPMG had lapsed in May 2017. Based on this evidence, it can therefore be concluded that CoJ had no contract with KPMG post May 2017. Any subsequent engagement amounted to an expansion/variation/amendment of the original contract and/or deviation from SCM policy.

5.8.42 Any contractual engagement between CoJ and KPMG post May 2017, is in contravention of the Constitution and SCM policy insofar as it may be uncompetitive, less transparent, unfair and/or not reported to Council or Treasury.

5.8.43 The lack of full and proper records of the financial affairs of the municipality, especially those relating to the expansion of this contract, is in direct violation of the MFMA, insofar as they were not in accordance with any prescribed norms and standards.

5.9 Whether the former Executive Mayor of CoJ: Mr Herman Mashaba unlawfully and irregularly entered the procurement space and solicited free services from Lephatsi Financial Services and whether such amounted to a conflict of interests.
5.9.1 According to the Companies and Intellectual Property Commission (CIPC) records in my possession, Lephatsi Financial Services (Pty) Ltd (LFS) is a private company registered with the Companies and Intellectual Property Commission, Republic of South Africa (CIPC) on 10 January 2011, with a registration number 2011/000546/07.

5.9.2 The main business or object of LFS, is a holding company for subsidiaries providing various financial services. According to CIPC records, the following are current active directors of LFS:

(a) Ms Mashaba Constance Matshaga
(b) Mr Frangos Nicholas John and
(c) Mr Deshmukh Akhter Alli

5.9.3 CIPC records further indicate that amendments to LFS company information were effected, accepted and placed on file on 10 August 2016 and reflects as follows:

Change Record

Surname: Mashaba
First Names: Herman Samtseu Phillip
Status: Resigned

Add Record

Surname: Mashaba
First Names: Constance Matshaga
Status: Active

58 Dated 17 May 2018 and received from Team Manager: Records Management Section: Ms Margaret Veronica Lepule of CIPC.
5.9.4 It is also common cause that Ms Constance Matshaga Mashaba and Mr
Mashaba: Executive Mayor of CoJ are married to each other.

5.9.5 In early 2017, which is the period leading towards the insourcing of security
personnel in the CoJ, Mr Mashaba requested the assistance of a former
business associate from LFS namely, Mr Deshmukh Akhter Alli (Mr
Deshmukh) to advise on the financial modelling of this exercise. Mr
Deshmukh subsequently offered this assistance/service/advice to CoJ.

5.9.6 Mr Mashaba’s suggestion to seek advice from Mr Deshmukh was raised
in a Mayoral Committee meeting attended by the executive and
administrative leadership of the CoJ.

Issues in Dispute

5.9.7 Complainant argued that in 2012, LFS acquired a 35% stake (as an equity
partner) which would bring substantial skills and additional BEE
credentials to Grant Thornton Capital (GTC). LFS will further contribute to
GTC being a substantial contender in the financial advisory market and
serve as another step in GTC’s growth and expansion plans.

5.9.8 Complainant further averred that, to date GTC was awarded a lucrative
multi-million tender to undertake forensic investigations in the CoJ with a
direct benefit to LFS as its equity partner.

5.9.9 Further that, LFS is a company owned by the Executive Mayor’s wife
Connie Mashaba. The Executive Mayor in the mist of his frustration with
the City Manager’s report, unlawfully and irregularly entered the
procurement space and solicited free services from LFS.

5.9.10 Complainant further submitted that Job for Pals is a concept monopolised
by the DA and that whilst playing golf, Grant Thornton produced the media
tracking analysis report reflecting the return on investment for Joburg
Open Day.
5.9.11 Complainants further supplemented their dispute and argued the following:

(a) Whether the services were sourced for free or not, is immaterial, at the end of the day the Mayor entered the procurement space and procured the services of a friend and a former business associate who was not even on the data base of the CoJ.

(b) Unsolicited bids with no financial implications to the CoJ could have been used in this case but the Mayor went straight to his former business associate who is still a co-director with his wife at LFS.

(c) CoJ is allegedly also having enough internal capacity in the financing area and did not need this help.

(d) It is also a cause for concern that any person or an outsider can give financial advice to the CoJ’s finances, without such person being privy to the CoJ’s financial affairs. The Mayor has a legal duty to protect CoJ’s confidential information from outsiders. In this case the Mayor divulged the CoJ’s finances to an outsider, friend and former business associate.

(e) Code of Conduct of Councillors in terms of MSA, expressly precludes councillors from procurement activities.

5.9.12 On 04 May 2018, CoJ responded and supplied my office with an affidavit deposed to under oath by Mr Mashaba. In the said affidavit, Mr Mashaba explained that he stated publicly before he contested local government elections that he has resigned from all directorship which he held in his business career, including LFS.

5.9.13 Mr Mashaba further explained that GTC is a separate entity to Grant Thornton Advisory Services (GTAS). According to Mr Mashaba, on 03 May 2012 LFS acquired a 35% stake in GTC, however that stake was sold on 30 November 2013 and LFS never ever held a stake in GTC or GTAS.
He further indicated that the services of **GTC have not been procured by the CoJ during his term as the Executive Mayor.**

5.9.14 Mr Mashaba pointed out that in the process leading up to the insourcing of the security personnel in the CoJ, he requested the assistance of a former business associate (Mr Deshmukh) to advise CoJ on his personal capacity on the financial modelling of the exercise. This was a critical need which the CoJ had been lacking at that point in time.

5.9.15 **According to Mashaba, this service was provided free of charge** and after having determined that the individual has no interest in the CoJ. Arising from this critical work, the CoJ was able to initiate a process of insourcing an estimated 4000 security personnel.

5.9.16 Mr Mashaba, argued that this was of no benefit to Mr Deshmukh or to him but it benefited the security guards and brought them much needed dignity in the workplace. Mashaba rebutted the allegations that he has in any way sought to benefit GTC or LFS as baseless and an attempt to tarnish his good name.

5.9.17 Ms Connie Mashaba (Ms Mashaba) also explained as per letter dated 18 September 2018 to my office, that LFS has no existing business relationship with GTC or GTAS and that all these three companies are independent of each other. She further indicated that LFS has never tendered or been contracted to the CoJ to provide goods or services.

5.9.18 Ms Mashaba clarified that according to her understanding, her business associate and co-director of LFS, Mr Deshmukh provided financial advice to the CoJ free of charge, in his personal capacity. LFS is not privy to the specific details of the assistance provided by Mr Deshmukh to the CoJ.

5.9.19 Similarly, in an email dated 18 September 2018, Mr Deshmukh confirmed to my office that he provided advice to the CoJ in his personal capacity, which was properly disclosed to the Mayoral Committee before his engagement. This advice was provided free of charge with no financial
interest to Mr Deshmukh. According to Mr Deshmukh, he was not remunerated for this and had no contract with the CoJ.

5.9.20 The CoJ also responded as per letter dated 29 March 2019, signed off by Dr Lukhwareni. In this letter, CoJ categorically denied the allegations that Mr Mashaba entered the procurement space and further submitted that LFS and GTC have never rendered services to the CoJ. Rather, GTAS is a service provider to the CoJ appointed from time to time to conduct forensic investigations.

5.9.21 According to CoJ, Mr Mashaba simply contacted a friend and a former business partner, Mr Deshmukh to ascertain whether he would be willing to provide the CoJ with free advice regarding the proposed plan to insource the CoJ’s security personnel.

5.9.22 The CoJ conceded that Mr Deshmukh agreed and provided assistance to the CoJ, free of charge and in his personal capacity and not as director of LFS. Neither the CoJ nor Mr Mashaba concluded any contract with Deshmukh. Mr Mashaba did not procure goods or services.

5.9.23 CoJ further contended that procurement within the meaning of section 217 of the Constitution and section 110(1) of MFMA has two separate and distinct requirements. Firstly, procurement of goods and services by a public organ must be in terms of a contract. Secondly, there has to be price or cost associated with procurement of the goods or services. Neither one of these two critical requirements exist in the current scenario.

5.9.24 CoJ asserted that Deshmukh provided his services for free and thus this process cannot be considered as procurement. The need for an associated monetary component for procurement of goods and services is reinforced by the MFMA, which contains a number of provisions that confirm this position, namely section 112 of the MFMA.

5.9.25 It was submitted by CoJ that it considers the concept of procuring goods and services not to include services or advice obtained for free. It was
argued further that Mr Mashaba’s conduct in this matter was substantively no different from the Mayor requesting volunteers to assist the CoJ and Pikitup by picking up litter in terms of the “clean-up drive”. It was submitted that such campaigns or initiatives would not amount to the procurement of goods and services.

5.9.26 The CoJ added that Mr Mashaba’s role in this scenario was to merely enquire on whether Mr Deshmukh would be willing to assist CoJ and if so, to forward Deshmukh’s contact details to the relevant CoJ officials. Mr Mashaba was not involved in any engagements beyond this point. Pursuant to Mr Mashaba establishing his willingness to help, Deshmukh was then contacted by officials in the CoJ’s Human Resources Department, with whom he dealt with going forward.

5.9.27 CoJ argued further that even if the advice provided by Deshmukh to CoJ amounted to procurement of services, which is denied, Mr Mashaba merely introduced the two parties. It would be incumbent on the CoJ’s officials to ensure compliance with SCM policies, not Mr Mashaba. At the end, the CoJ maintained that the advice provided by Deshmukh did not fall within the perimeters of public procurement. Deshmukh assisted the CoJ on a voluntary basis.

5.9.28 The CoJ further maintained that it did not have requisite internal capacity to create a financial model that would determine the feasibility of insourcing its security personnel. CoJ submitted further that as a direct consequence of this process and the assistance of Deshmukh, CoJ has been able to improve to a large number of lives by permanently employing security guards and by paying them much better wages and providing them with better and an equitable working environment. A lot of good has come out of this process at no extra cost to rate payers. This should not be forgotten.
Application of the relevant legal prescripts

Constitution

5.9.29 Section 217(1) of the Constitution is the most obvious and immediate relevance for public procurement regulation and as such merits quoting:

“when an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive an cost effective”

5.9.30 In this instance, CoJ procured the services of Mr Deshmukh albeit without a contract and free of charge. This has been roundly conceded and submitted as an exculpatory statement by CoJ.

5.9.31 CoJ strongly contended as indicated above that services or advice rendered by Mr Deshmukh without a contract and free of charge cannot be classified as procurement within the meaning or context of section 217 of the Constitution.

5.9.32 As can be seen, section 217(1) of the Constitution clearly lays down the core constitutional requirements for public procurement in South Africa, neatly captured in the five principles of fairness, equity, transparency competitiveness and cost-effectiveness. These form the basis for public procurement in South Africa.

5.9.33 The principles set out in section 217(1) create binding legal obligations as the Constitutional Court confirmed in a ground-breaking judgment of “Allpay Consolidated Investment Holdings and Others vs Chief Executive Officer of the South African Social Security Agency and Others”.59

5.9.34 These provisions are also directly justiciable. This means that South African courts are willing to adjudicate particular instances of procurement

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59 Allpay Consolidated Investment Holdings and Others vs Chief Executive Officer of the South African Social Security Agency and Others (2013) ZACC 42 (29 November 2013) para 32.
directly against the provisions contained in section 217(1). For example in “Sanyathi Civil Engineering & Construction (Pty) Ltd vs eThekwini Municipality”\(^\text{60}\), the court stated that section 217 of the Constitution is couched in peremptory terms. A contract in breach of these peremptory provisions is invalid and will not be enforced.

5.9.35 Similarly, in “Inyameko Trading 189 CC t/a Masiyakhe Industries vs Minister of Education”\(^\text{61}\) the court declared as follows:

“In all circumstances, I am accordingly of the view that the exclusion of the applicant’s tender constituted (over technical) adoption of a process which was neither fair nor equitable nor competitive nor cost-effective and accordingly fell foul of the provisions of section 217(1) of the Constitution and should be corrected”.

5.9.36 Based on the above cited cases, it is submitted that section 217 rather informs other statutory provisions against which particular instances of procurement may be assessed.

Legislation

5.9.37 Public Administration Management Act\(^\text{62}\) (PAMA) seek to promote the values and principles governing public administration referred to in section 195(1) of the Constitution to regulate conducting business with the state, amongst other things.

5.9.38 Section 8(1) of PAMA provides that an employee includes persons contemplated in section 12A of the Public Service Act and a person performing similar functions in a municipality.

5.9.39 Section 8(2) of PAMA stipulates the following:

*An employee may not -*

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\(^{60}\) 2012 (1) BCLR 45 (KZP) para 33.
\(^{62}\) Act 11 of 2014.
(a) conduct business with the State or
(b) be a director of a public or private company conducting business with the State.

5.9.40 Section 9 of PAMA provides that-

(1) “an employee must in the prescribed manner, disclose to the relevant head of the institution all his or her financial interests and the financial interests of his or her spouse and a person living with that person as if they were married to each other, including all-
(a) shares
(b) sponsorships
(c) gifts above the prescribed value, other than gifts received from a family member;
(d) benefits and
(e) immovable property

(2) Failure by an employee to comply with obligations referred to in subsection (1) constitutes misconduct”

5.9.41 Section 111 of the MFMA calls for municipalities to develop their own SCM policies and provides that:

“Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part”.

5.9.42 In Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another63, the Constitutional Court stated the following with regard to the state’s legislative obligations:

“The state’s function is to execute its duties in terms of the relevant legislation. The failure of the state to edify its functionaries about the very legislation which governs their duties is unacceptable. It may be true that

63 (CCT 19/07) [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) (2 June 2008) at para 81.
the problem lies with the officials who do not know what their responsibilities are and, regrettably, with legal representatives who do not know who the responsible functionaries are. However, this ignorance is no justification for their failings. It may explain the cause of the problem, but it constitutes neither a good excuse nor a justification thereof and cannot serve to protect the state from being held responsible”.

5.9.43 The immediate implication of the above case, is that CoJ had to procure the services of Mr Deshmukh in terms of the relevant or applicable provisions of the constitution, legislation and all other legal prescripts, codes and policies.

Policies

5.9.44 In pursuance of section 111 of the MFMA, CoJ adopted its own SCM Policy for the CoJ.64

5.9.45 Clause 4 of the SCM Policy ascribes to a procurement system which:

(a) “Is fair, equitable, transparent, competitive and cost effective in terms of Section 217 of the Constitution of South Africa No 108 of 1996;
(b) Enhances uniformity in Supply Chain Management systems between organs of state in all spheres;

(c) …………………………………;
(d) Is consistent with the enterprise development programmes as approved by the City which are not limited to EPWP, Indigency Policy, job pathway and other policies and programmes that seeks to aggressively advance the empowerment of the SMMEs and previously disadvantaged communities;
(e) …………………………………;
(f) Is consistent with the Broad Based Black Economic Empowerment Act 53 of 2000 and any Codes promulgated thereunder in the Government Gazette; and

64 Revision 002 July 2009.
(g) Is consistent with the Preferential Procurement Policy Framework Act 5 of 2000 and its Regulations as promulgated”.

5.9.46 To this end, it is submitted that the above policy provisions mirrors the wording of section 217 of the Constitution as shown. In the main, both the Constitution and the SCM Policy require competitiveness, transparency, fairness and cost-efficiency when an organ of state procures goods or services.

5.9.47 The legal interpretation advanced by CoJ to section 217 of the Constitution seeks to argue that procurement within the context of section 217 of the Constitution means that there should be a written contract and costs involved for procurement to take place. In the absence of such a contract and costs, there is no procurement, according to CoJ.

5.9.48 Establishment and creation of the Office of the Chief Procurement Officer (OCPO) as an institutional node for National Treasury’s role in relation to public procurement, was the first tentative step to tackle concerns around public procurement in South Africa from a central and a coordinated perspective.

5.9.49 On 21 June 2019, my office wrote to the National Treasury: OCPO to seek an opinion on the issue of whether procurement as contemplated in section 217 of the Constitution entails only circumstances where goods or services were procured through a contract, involving financial costs.

5.9.50 In a letter dated 10 October 2019, signed off by the Acting Chief Procurement Officer; Mr Willie Mathebula, the following opinion was offered:

“The view of the OCPO is that the Constitution in section 217 states that when an organ of state contracts (our emphasis) for goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The obtaining of advice (albeit free) would thus fall under category of a service. Although there was no
written agreement between the municipality and the service provider, it can be deduced that there was a verbal agreement indicating the nature of the advice required and that at the very least, the period for which such advice was sought. Thus a contract was entered into between the municipality and the service provider for free advice. It therefore follows that in obtaining those services a system that is fair, equitable, transparent, competitive and cost-effective must precede the entering into contract.

The Constitution is very clear on how procurement should be handled regardless of whether or not the services to be provided are on a pro bono basis. The fact that the services are rendered on a pro bono cannot be used as the reason for not following due processes as other service providers could also make an offer on a pro bono basis had they been afforded an opportunity to do so.

Furthermore, by soliciting free advice from a service provider with whom ties are held may impede the objectivity of the service”.

5.9.51 After having had the pleasure of reading, reviewing and applying my mind to the above opinion piece written by the supreme procurement office in the country, I am inclined to agree with their reasoning and outcome.

5.9.52 There is neither legal nor normative reason that would justify the deviation from the due processes as prescribed by section 217 of the Constitution in the circumstances. I am prompted to concur with the arguments and reasoning advanced in the opinion piece from OCPO. The notion that procurement entails costs and written contract is misplaced.

5.9.53 I am further satisfied about the balance between the grammatical and overall contextual meaning as phrased in the constitutional provisions of section 217. It is the primary rule of interpretation that if the meaning of the words is clear, it should be put into effect and indeed be equated with the intention of the drafter, writer, author or legislature as the case may be.
5.9.54 Only if the so called plain meaning is ambiguous, vague or misleading or only if the strict literal interpretation would result in absurd results, then a deviation to avoid such absurdity may be justifiable. This is also known as the golden rule of interpretation.65

**Code of Conduct for Councillors**

5.9.55 The Code of Conduct for Councillors (the Code) is embedded under Schedule 1 of MSA. The Code states amongst other things in its preamble that Councillors are elected to represent local communities on municipal councils, to ensure that municipalities have structured mechanisms of accountability to local communities, and to meet the priority needs of communities by providing services equitably, effectively and sustainably within the means of the municipality.

5.9.56 Clause 2 of the Code regulates General Conduct of Councillors and states the following:

2. “A councillor must-
(a) perform the functions of office in good faith, honestly and in 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”.

5.9.57 Clause 5.1 and 5.2 of the Code deals with Disclosure of Interests as follows:

5.1 A councillor must-

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65 Botha C Statutory Interpretation 3rd Edition (1998 Juta & Company) on page 27. See also Principal Immigration Officer vs Hawabu 1936 AD 26).
(a) “disclose to the municipal council or to any committee of which that councillor is a member, any direct or indirect personal or private business interest that the councillor or any spouse, partner or business associate of that councillor may have in any matter before the council or the committee.

5.2 A councillor who or whose spouse, partner, business associate or close family member, acquired or stands to acquire any direct benefit from a contract concluded with the municipality must disclose full particulars of the benefit of which the councillor is aware at the first meeting of the municipal council at which it is possible for the councillor to make disclosure”.

5.9.58 The simple implication of this clause is that Mr Mashaba had an obligation to disclose or make known fact of his long standing business association with Mr Deshmukh as his former business associate at LFS. Further that his wife, Ms Connie Mashaba is still a co-director at LFS together with Mr Deshmukh.

5.9.59 As indicated above, Mr Mashaba’s suggestion to seek advice from Deshmukh was raised during a Mayoral Committee meeting, however there was no disclosure of a potential conflict of interests and the fact that Mr Deshmukh is a former business partner to Mr Mashaba as well as a co-director to LFS along with Mr Mashaba’s wife.

5.9.60 Clause 11 of the Code regulates **Intervention in Administration** and states the following:

11. A councillor may not, except as provided by law-

(a) interfere in the management or administration of any department of the municipal council unless mandated by council;

(b) give or purport to give any instruction to any employee of the council except when authorised to do so;
(c) obstruct or attempt to obstruct the implementation of any decision of the council or a committee by an employee of the council; or

(d) encourage or participate in any conduct which would cause or contribute to maladministration in the council.

5.9.61 In terms of section 1 of the MSA, a “councillor” means a member of a municipal council. It submitted that Mr Mashaba was the Executive Mayor of CoJ and by extension he was a councillor. As a result, the above Code applied to him. The Code is a vital instrument that must be respected by all councillors.

5.9.62 Evidence discussed above clearly reveals that Mr Mashaba literally sourced the services of Mr Deshmukh and further introduced him to the relevant officials of CoJ in order for Mr Deshmukh to advice the CoJ on the finance modelling for insourcing security guards.

5.9.63 It was similarly conceded by CoJ that Mr Mashaba’s role in this instance was to merely enquire on whether Mr Deshmukh would be willing to assist CoJ and if so, to forward Deshmukh’s contact details to the relevant CoJ officials.

5.9.64 Furthermore, it remains both doubtful and inconceivable to imagine that COJ officials would have gone directly to handpick Mr Deshmukh, had it not been through the influence/initiative/suggestion of Mr Mashaba, who was wielding power and authority as the Executive Mayor of CoJ at the time.

5.9.65 With this in mind, it is submitted that the conduct of Mr Mashaba had to be congruent with the above clauses of the Code at all times since deviation may be perceived as amounting to influencing or interfering in the management or administration of any department of the municipal council.

5.9.66 The Organisation for Economic Co-Operation and Development (OECD) is a unique forum where the governments of thirty (30) democracies work
together to address the economic, social and environmental challenges of globalisation.

5.9.67 The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, managing conflict of interests and to seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. In its report/toolkit titled “Managing Conflict of Interest in the Public Sector”, emphasis is made on the pressing need to properly manage perceived or potential conflict of interest and provides inter alia:

“A conflict of interest is not necessarily corruption, which is understood as “actual abuse of public office for private advantage”. But a conflict does have the potential for corrupt conduct. Conflicts between private interests and public duties of public officials must therefore be correctly identified, appropriately managed, and effectively resolved. Left unresolved, a conflict of interest can result in corrupt conduct, abuse of public office, misconduct, breach of trust, or unlawful action. More importantly, public confidence in the integrity of public institutions can also be seriously damaged”. 66

5.9.68 The contention that Mr Deshmukh was requested to assist CoJ in a personal capacity and not as a director of LFS, did not appear to have changed the fact that Mr Deshmukh is a co-director of LFS together with Mr Mashaba’s wife namely, Ms Connie Mashaba.

Touch Stone(s)

5.9.69 The Public Protector67 in her report titled “Unsolicited Donation” made the following finding on an issue related to potential conflict of interests, in connection with the appointment of a service provider to render event

67 Report No. 22 of 2013/14 of the Public Protector at para 10.7.
management services for the hosting of the Department of Communications (DoC) ICT Indaba (The ICT Indaba) held in Cape Town from 4-7 June 2012:

“My finding is that there was a real and not just a potential conflict of interest on the part of Hon Pule regarding her duty to act in the best interest of the DOC and her loyalty to Mr Mngqibisa on account of their relationship. Faced with divided loyalties, as is always the case in a conflict of interest situation, I am convinced that Hon Pule chose Mr Mngqibisa’s interests above those of her Department and ultimately, the State”.

5.9.70 It is submitted that the above extract share to a large extent some analogous factual issues in a sense that Mr Deshmukh is still involved in a business association with Mr Mashaba’s wife as co-directors at LFS. The exposure afforded to Mr Deshmukh by CoJ may have the potential of adding value to LFS’s profile or attract customers based on the endorsement or support by a big municipality such as CoJ.

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

5.9.71 I proceed to consider the responses submitted in respect of section 7(9) notice issued.

5.9.72 A written response was received by my office on 30 June 2020 on behalf of Mr Mashaba, from Mr Michael Power: Power Singh Incorporated (Power Singh Inc.)

5.9.73 The core attack on my section 7(9) Notice was based on law and mainly sought to argue that Mr Mashaba’s conduct in this instance did not trigger the provisions of section 217 of the Constitution, since there was no contract involving costs between Mr Mashaba and Mr Deshmukh.
5.9.74 It was argued further on behalf of Mr Mashaba that “section 217 of the Constitution is clear when it speaks of procurement. It spells out that it applies only when a public body contracts for goods or services. It does not apply when someone gives the City free advice as a favour, and without a contract”.68

5.9.75 Further that Mr Mashaba’s only role in this matter was to ask his friend, Mr Deshmukh, to give the CoJ free advice and then to introduce him to the responsible CoJ’s officials. Mr Mashaba played no part thereafter in the matter. Mr Deshmukh was then contacted by officials in the CoJ’s Human Resources Department, with whom he dealt with going forward.

5.9.76 The above contention by Power Singh falls to be rejected on the grounds that it seeks to unreasonably confine the meaning of “procurement” in section 217 of the Constitution, only to situations when an organ of state incurs an expenditure under a written contract, to the exclusion of verbal/oral contracts.

5.9.77 The language used in section 217 of the Constitution is clear and unambiguous. The ordinary meaning of ‘procure’ is ‘obtain’.69

5.9.78 Importantly, Article 2(j) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement70 defines ‘procurement’ as ‘the acquisition of goods, construction or services by a procuring entity’. It does not limit procurement to state expenditure.71

5.9.79 Notably, section 217 of the Constitution does not restrict the means by which goods and services are acquired. The wording of this section is plain and unqualified. CoJ’s and Mr Mashaba’s restrictive reading thus finds no

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68 Para 18, page 9 of the response to my section 7(9) Notice submitted by Power Singh on behalf of Mr Mashaba.

69 South African Concise Oxford dictionary ‘obtain’; Webster’s dictionary: encyclopaedic edition ‘to obtain’ Black’s Law dictionary 7 ed ‘the act of getting or obtaining something’.


71 Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others (1306/18) [2020] ZASCA 02 (31 January 2020) at Para 22.
support in the plain language of the section. It thus places the meaning of the word beyond doubt.

5.9.80 The general rule under section 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.\(^{72}\)

5.9.81 Moreover, there is no dispute that Mr Mashaba and CoJ had a pressing need for a service to create a financial model that would determine the feasibility of insourcing its security personnel. That averment must be considered in the context of the following assertion made in Mr Mashaba and CoJ:

"After assuming office, Mr Mashaba sought to determine the feasibility of insourcing security personnel to ensure that security personnel contracted to the City were afforded dignity in the workplace through increased salaries and benefits. This was in-line with Mr Mashaba’s pro-poor agenda. Mashaba hoped that by insourcing and directly contracting with security personnel, the City could assist with ensuring a more dignified workplace and enhanced opportunities for security personnel and their families.\(^{73}\)

The City maintains that it “did not have the requisite internal capacity to create a financial model that would determine the feasibility of insourcing its security personnel.”\(^{74}\)

5.9.82 Bearing the foregoing averments and CoJ’s subsequent action in mind, following directly a result of Mr Mashaba’s idea and suggestion to approach Mr Deshmukh, it cannot be gainsaid that the essence of the transaction was that CoJ should contract with Mr Deshmukh to in order complete the insourcing of its security personnel. .

\(^{72}\) Steenkamp NO v Provincial Tender Board of the Eastern Cape [2006] ZACC 16; 2007 (3) SA 121 (CC) para 33.

\(^{73}\) Affidavit by Mr Mashaba, 3 May 2018, at para 4.

\(^{74}\) Response by the City of Johannesburg.
Absent the services of Mr Deshmukh, CoJ would have been expected to provide a similar service itself or source services of another consultant for this function in respect of which it pleaded lack of internal capacity. In my view, that falls within the concept of “contracting” for goods and services, particularly on the purposive approach that I am bound to adopt in the interpretation of the Constitution. In the circumstances, CoJ should not therefore succeed to escape its ostensible contract with Mr Deshmukh.

In this case, the focus also falls on what constitutes services in section 217 of the Constitution. The contention that the advice granted by Mr Deshmukh did not equate to contracting for services within the meaning of section 217 of the Constitution thus amounts to the elevation of form over substance. I submit that it is baseless and therefore falls to be rejected.

Conclusion

The totality of evidence sets out a probable detail and facts which underpin a reasonable suspicion that there existed a prima facie perception of bias and/or conflict of interest on Mr Mashaba’s part.

The conduct or decision of CoJ to procure the services of Mr Deshmukh, following a suggestion/advice by Mr Mashaba did not accord with the principles and standards determined in terms of section 217(1) of the Constitution, section 8 and 9 of PAMA and CoJ’s SCM policy.

Similarly, the conduct of Mr Mashaba as a councillor and a Mayor as he was then, of approaching and/or recommending to CoJ his former business partner and/or a close friend namely, Mr Deshmukh who still work directly with Mr Mashaba’s wife at LFS, was irreconcilable with clause 11 of the Code of Councillors.

Mr Mashaba (the Mayor of CoJ as he was then) had direct power and influence over those who reported to him, especially the members of the
Mayoral Committee. As a result, any involvement or influence by Mr Mashaba in procuring the services of Mr Deshmukh was unwarranted.

5.9.89 The fact that Mr Deshmukh was willing to render his service free of charge to CoJ was indeed a noble, commendable and philanthropic gesture. However, I find it extremely difficult to deny that this gesture would not have potential to enhance the profile and add value to Mr Deshmukh as an individual and by extension to LFS, in which as said, Mr Mashaba’s wife is still a co-director.

5.9.90 Any other individuals or service providers could also have made an offer on a *pro bono* basis had they been afforded an opportunity to do so. However, in this instance, this was not the case, as this offer was only made specifically to Mr Deshmukh who is a friend of Mr Mashaba.

5.9.91 I am therefore inclined to find that, this created a perception of impropriety and risk upon which the public could assume that Mr Deshmukh or LFS was given access to CoJ due to his proximity with Mr Mashaba.

5.9.92 Although the security guards may have benefitted from the services of Mr Deshmukh, the potential or perceived conflict of interests to LFS and Deshmukh was sufficient to erode the public trust that benefiting poor families and improving the lives of security guards was the only motivation for this exercise.

5.10 Whether the Executive Mayor of CoJ: Mr Herman Mashaba allegedly interfered or influenced the CoJ to use funding allocation of youth drug rehabilitation and support programme to fund Field Band Foundation (FBF) which is Non-Governmental Organisation (NGO).
The Field Band Foundation (FBF) is a registered non-profit organisation, incorporated as such in terms of the Companies Act. FBF is registered with the National Department of Social Development and South African Revenue Services.

FBF teaches life skills, health education and music and dance skills to young people. In doing so, it promotes the values of respect, discipline, commitment, empathy, honesty, and integrity to its young members. Central to its mission is youth development, the prevention of HIV/AIDS and TB, and the reduction of drug and alcohol abuse.

It aims to work to improve social cohesion through broadening of the horizons of life opportunities for young people who benefit from training in music and movement, along with a life skills education designed to improve emotional and psychological resilience.

In terms of combating alcohol and drug abuse, and alongside its marching band activities, the FBF focuses on “living with oneself”, which assists learners with understanding alcohol and drug abuse and how to take control of it.

FBF relies on amongst other sources, state funding in order to run youth and community related projects indicated above. FBF has assisted countless young people through programmes with the Emalahleni Local Municipality, the Bitou Local Municipality, the Stellenbosch Local Municipality, and it has a long-standing relationship with the National Department of Arts and Culture.

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75 Act 71 of 2008.
Mr Mashaba was appointed Director and Chairman of the FBF from 2002 and held the position(s) until he resigned on 20 January 2016\textsuperscript{76} to pursue a career in politics. At all material times, Mr Mashaba, his family, his businesses and his Family Trust have all been donors to the FBF.

Before beginning political campaign for mayorship of CoJ, Mr Mashaba was a director and a board member of the FBF. Mr Mashaba resigned from all directorships including FBF, which was a voluntary position from which he apparently drew no income or benefit. Mr Mashaba and his wife (Ms Connie Mashaba) were also long standing patrons of the organisation.

On or about March 2017, FBF was offered by the CoJ’s Department of Health and Social Development a grant of an amount of \textit{R 3,5 million for first year, R 3,7 million for second year and R 3,9 million for a third year} for three consecutive years, respectively, starting from 2017/18 financial year to 2019/2020.

In summary, CoJ undertook to commit funds totalling to \textit{R 11, 1 million and one hundred thousand rand} for the purpose of supporting youth programme through vote number 3790152274013.

The essence of the activities and projects to be undertaken by FBF entailed \textit{inter alia}:

(a) Alcohol and drug abuse, HIV, bullying, conflict management, living with others, discipline empathy, coping skills, joy and living in the future, life choices etc.

All of these activities were to be achieved in areas such as CoJ’s Region C and G - Orange Farm and Cosmo City, Region D-Soweto, Region E- Alexandra etc.

\textsuperscript{76} As recorded in the FBF’s audited Annual Financial Statement 2015/2016 and as published by FBF on 10 February 2016. Refer also to Companies and Intellectual Property Commission (CIPC) winded document.
5.10.12 The grant agreement was signed by Mr Wandile Zwane: Executive Head Social Development on behalf of CoJ and Ms Nicolette du Plessis: Chief Executive Officer on behalf of FBF on 12 December 2017.

Issues in Dispute

5.10.13 Complainant alleged that Mr Mashaba interfered in the CoJ’s funding allocation of youth drug rehabilitation and support programme to fund FBF which he claims as a personal project.

5.10.14 Complainant argued that on 15 February 2017, at Magaliesburg during a Mayoral Lekgotla, Mr Mashaba improperly influenced CoJ’s MMC for Health and Social Development to fund the FBF as one of the possible recipients of the CoJ’s grant programme.

5.10.15 In support of the above allegation, the Complainant submitted to my team an email sent by Mr Mashaba on 15 February 2017 to CoJ’s MMC for Health and Social Development: Ms Mpho Louisa Phalatse, Mr Wandile Zwane and copied Ms Nonhlanhla Sifumba and it read as follows:

“From: Herman Mashaba (mailto:herman.mashabapvt@gmail.com )
Sent: 15 February 2017 05:12 PM
To: Mpho Phalatse; Wandile Zwane
Cc: Nonhlanhla Sifumba
Subject: FBF Website

Dear All

Just check Field Band Foundation on www.fieldband.org.za

Regards
Herman

Sent from iPhone”

5.10.16 On 20 February 2017, CoJ’s official Department of Health and Social Development namely, Ms Londiwe Mthabela wrote an email to FBF’s
official namely, Ushama requesting their first meeting and the email read

*inter alia*:

> “Dear Usha

*We received your Organisation’s details from the Office of Executive Mayor.*

*The Department of Health and Social Development is looking at creating Partnership with the Private Sector that is why the Executive Mayor sent your organisation details to our Department.*

*Yours Faithfully”*

5.10.17 On 29 March 2017 at 11:22 am, the CEO of FBF: Ms Nicolette du Plessis sent an email to the MMC for Health and Social Development in the CoJ: Ms Mpho Phalatse and expressed amongst other things the following words in the email:

> “Dear Dr Phalatse and Colleagues

*Thank you all once again for our meeting of 15 March in which we discussed ways in which Field Band Foundation could become involved in your department’s Integrated Plan to combat drug abuse amongst the youth in the City of Johannesburg.*

*It was my pleasure to be able to describe our work to you and to lay the ground for future collaboration. As discussed, the goal is to have Field Band in seven regions within the City parameters…………*

*A budget of R3, 5 million per annum for a three year period for these activities was proposed…………*

*It was suggested that some of these capital expenses could be funded by your department outside of that R 3, 5 million budget- for example, donations of trucks or people moving vehicles- and this was something to be explored”.*

5.10.18 In order to support his argument or allegations further, the Complainant indicated that a schedule of donations consistently made by Mr Mashaba’s
companies such as Black Like Me, Amka Products and Mashaba Family Trusts to FBF have been reported as follows: 77

<table>
<thead>
<tr>
<th>Year</th>
<th>Black Like Me</th>
<th>Amka Products</th>
<th>Mashaba Family Trust</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018</td>
<td>R 220,000</td>
<td>R220,000</td>
<td>R 440,000</td>
<td>R880,00</td>
</tr>
<tr>
<td>2017</td>
<td>R 220,000</td>
<td>R220,000</td>
<td>R440,000</td>
<td>R880,00</td>
</tr>
<tr>
<td>2016</td>
<td>R200,000</td>
<td>R200,000</td>
<td>R400,000</td>
<td>R800,00</td>
</tr>
<tr>
<td>2015</td>
<td>R200,000</td>
<td>R200,000</td>
<td>R397,400</td>
<td>R797,00</td>
</tr>
<tr>
<td>2014</td>
<td>R200,000</td>
<td>R100,000</td>
<td>R397,400</td>
<td>R697,400</td>
</tr>
</tbody>
</table>

5.10.19 To further support arguments that Mr Mashaba continued to associate himself with FBF after his resignation in 2016, the Complainant submitted evidence in a form of a media statement by FBF dated 6 October 2017, where Mr Mashaba was invited as a guest speaker in his capacity as an Executive Mayor of CoJ at Alexandra Stadium, to an event held by FBF on 07 October 2017.

5.10.20 Furthermore, the Complainant tendered evidence that on 26 October 2017, Mr Mashaba was invited and attended FBF’s 20th anniversary as a legacy guest and partner(s). Subsequently, Mr Mashaba received a gift, valued at R595 as part of FBF’s 20th anniversary celebrations, which he declared on the Mayor’s gift register.

5.10.21 Mr Mashaba replied as per affidavit submitted to my office to the above allegations as follows:

“I dismiss the allegations that I interfered in the funding of a youth drug rehabilitation and support programme to fund the Field Band Foundation (FBF). This again is baseless and unsubstantiated claim.”

77 As per the Forensic Investigation Report into the funding of FBF by CoJ dated 11 September 2019.
I see it as an attempt to not only tarnish the reputation of the City but that of myself. As mentioned above, before beginning my political campaign for mayorship of the City of Johannesburg, I resigned from all directorships that I had held at that point. This included FBF which was a voluntary position from which I drew no income or benefit. Prior to joining the board of FBF, my wife and I were also long standing patrons of the organisation.”

However, Mr Mashaba conceded to the allegation that he was at the Mayoral Lekgotla held on 15 February 2017 (at Magaliesburg), where CoJ discussed amongst other things the anti-drug strategy and allocations made to (Non-Governmental Organisation) NGO’s for the purposes of achieving the City’s priorities.

Mr Mashaba admitted that he did propose during this Mayoral Lekgotla that the Department of Health and Social Development in the CoJ should consider assessing the value of a partnership with the FBF for the purpose of enhancing the CoJ’s youth development and integrated plan to combat drug and alcohol abuse in all geographical regions of the CoJ.

However, Mr Mashaba qualified his concession and submitted that his proposal to CoJ to consider FBF was by no means an instruction but rather a suggestion during an open discussion at the Mayoral Lekgotla.

Mr Mashaba disputed that he played any part in the assessments of the proposal, took no action to place pressure on CoJ’s officials to positively consider the FBF for a grant.

The FBF was subsequently approached by the CoJ’s Department of Health and Social Development later in March 2017 and asked to present a proposal on a contribution towards youth development and combatting the scourge of drugs.

On the strength of their proposal, a report was tabled by the Department of Health and Social Development with the CoJ’s Mayoral Committee
requesting approval for a grant of an amount of R 3.5 million, allocated in each financial year, starting in 2017/18 financial year to 2019/2020.

5.10.28 The award was made through a discretionary grant held by the MMC for Health and Social Development: Mpho Louisa Phalatse, which allowed the MMC to approve any grant, donation or sponsorship to an organisation, institution or body which promotes or contributes to the objectives of the CoJ. The report was approved by the Mayoral Committee.

5.10.29 In an affidavit dated 26 March 2018, from the MMC for Health and Social Development: Mpho Louisa Phalatse (Ms Phalatse) which was submitted to my office, she also confirmed that Mr Mashaba proposed on 15 February 2017, during the Mayoral Lekgotla that the CoJ should consider FBF as one of the possible recipients of the CoJ’s grant programme.

5.10.30 According to Ms Phalatse, her Department then began a process of engaging with the FBF to determine whether FBF’s model for youth development could be incorporated into the CoJ’s integrated plan to combat drug and alcohol abuse.

5.10.31 However, Ms Phalatse emphatically indicated that she was at no point under any form of duress or undue influence to consider funding the FBF. Ms Phalatse further said that her Department engaged with FBF at their own volition and that Mr Mashaba played no role in the Department’s engagement with FBF.

Application of the relevant legal prescripts

Constitution

5.10.32 Section 195(1) of the Constitution provides, amongst others, that:

“Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained;
(b) ………;
(c) ………;
(d) Services must be provided impartially, fairly, equitably and without bias;
(e) ………;
(f) ………;
(g) Transparency must be fostered……”

5.10.33 Section 8(2) of PAMA stipulates the following:

An employee may not -
(a) conduct business with the State or
(b) be a director of a public or private company conducting business with the State.

5.10.34 Section 9 of PAMA provides that-

(1) “an employee must in the prescribed manner, disclose to the relevant head of the institution all his or her financial interests and the financial interests of his or her spouse and a person living with that person as if they were married to each other, including all-
(a) shares
(b) sponsorships
(c) gifts above the prescribed value, other than gifts received from a family member;
(d) benefits and
(e) immovable property
(3) Failure by an employee to comply with obligations referred to in subsection (1) constitutes misconduct”

5.10.35 It is axiomatic that Mr Mashaba the Executive Mayor of CoJ (as he was then) was expected to maintain a high standard of professional ethics,
foster transparency and to be accountable and impartial in all his public engagements.

5.10.36  Section 79(16)(a) of the Transvaal Local Government Ordinance 17 of 1939 provides that the Council may do all or any of the following things namely:

(a) “Make a grant or donation to an institution or organisation in the Province:
   (i) which promotes public health;
   (ii) welfare organisation;
   (iii) promotes education;
   (iv) promotes art and culture including music;
   (v) Acts in the interests of youth

Where such grant or donation would in the opinion of the Council or inhabitants of the Municipality, provided that such grant or donation must not be made to an institution or organisation where any person, who is concerned with the administration thereof, make any profit or gain therefrom, other than reasonable remuneration, rent or out of pocket expenses”.

5.10.37  Mr Mashaba as the former Executive Mayor of CoJ then, was delegated with such powers through the Delegation of Authority Framework to approve any grant donation and sponsorship to an organisation, body or institution to which the CoJ is lawfully empowered to make such grants or which promotes or contributes to the purposes or duties of local government.

5.10.38  However, what is visibly notable, is that the manner in which the Executive Mayor of CoJ must exercise his discretion to allocate grants is not prescribed by any policy or legal instrument.
The evidence of Mr Mashaba’s long standing association with FBF is self-evidently of primary importance in determining the question of how Mr Mashaba should have exercised his discretion to propose and ultimately approve a grant to FBF.

**Councillor's Code of Conduct**

5.10.40 Clause 2 of the Code deals with a General Conduct of Councillors and states *inter alia*:

2. “A councillor must-

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

5.10.41 Clause 11 of the Code regulates **Intervention in Administration** and states the following:

11. A councillor may not, except as provided by law-

   (a) interfere in the management or administration of any department of the municipal council unless mandated by council;

   (b) give or purport to give any instruction to any employee of the council except when authorised to do so.

5.10.42 Mr Mashaba admitted as already indicated above that he proposed during the Mayoral Lekgotla that the CoJ’s Department of Health and Social Development consider assessing the value of a partnership with the FBF for the purposes of enhancing the CoJ’s youth development and integrated plan to combat drug and alcohol abuse in all geographical regions of the CoJ.
5.10.43 FBF was subsequently approached by the CoJ’s Department of Health and Social Development later in March 2017 and asked to present a proposal on a contribution towards youth development and combatting the scourge of drugs.

5.10.44 The FBF complied and submitted a comprehensive proposal to the CoJ on 21 June 2017 and a grant of an amount of R 3.5 million was ultimately approved by the Mayoral Committee on 20 September 2017, for the funding of FBF.

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

5.10.45 I now turn to consider the responses submitted in respect of the section 7(9) notice on this issue.

5.10.46 A written response was received by my office on 30 June 2020 on behalf of Mr Mashaba, from Mr Michael Power: Power Singh Incorporated (Power Singh Inc.)

5.10.47 The crux of contention in reply to my notice was both factual and legal namely, that the grant agreement to FBF itself is signed by CoJ’s officials and not Mr Mashaba. Therefore any claim to the contrary is without basis.

5.10.48 It was contended further on behalf of Mr Mashaba that a Grant is not procurement as contemplated in the Constitution. Grant-making, or the awarding of Grants, is wholly distinct from public procurement as it does not constitute contracting for goods or services as is required by section 217 of the Constitution.

5.10.49 More contentions were expressed to say that, grant-making is regulated by section 67 of the MFMA which provides for “funds transferred to organisations and bodies outside government”. In addition or in support, section 17(3)(j) of the MFMA was cited which expressly provides that when an annual budget is tabled it must be accompanied by “particulars of any
proposed allocations or grants by the municipality to any organisations or bodies referred to in section 67(1)

5.10.50 Further in support of this challenge to my Notice, Value Added Tax Act\(^{78}\) was cited to assist with distinguishing between a Grant and a Service. It defines a Grant as:

“any appropriation, grant in aid, subsidy or contribution transferred, granted or paid to a vendor by a public authority, municipality or constitutional institution” and it expressly excludes payments in terms of chapter 11 of the MFMA”.

5.10.51 Additionally, it was contended that the South African Revenue Service (“SARS”) Interpretation Note 39 explains that:

“The use of the words “appropriation”, “grant in aid” and “subsidy” indicate that the receipt constitutes assistance from the state (usually in the form of money). In other words, it is a gratuitous or “unrequited” payment by the grantor, where no reciprocity is expected from the recipient in the form of a supply of goods or services of corresponding value”.

5.10.52 Undeniably, and while I find myself in agreement with the above adjectival and contextual definition of what constitutes a Grant. A Grant is indeed granted to in support or furtherance of a public purpose and seek to complement the goals, objectives, programmes and actions of a public institution. This is clearly the case with the FBF which sought to complement the CoJ’s fight against drugs and alcohol abuse.

5.10.53 However, the Constitution is the supreme law of South Africa and all other law is subject to it.\(^{79}\) Thus, its interpretation cannot depend on any legislation enacted under it. One can accordingly not invoke the MFMA,

\(^{78}\) Act 89 of 199.

\(^{79}\) Section 2 of the Constitution provides: ‘This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled
Value Added Tax or any other legal Code as a guide to the interpretation of the Constitution.\textsuperscript{80}

5.10.54 It is now settled that when interpreting legislation, the point of departure is the provision itself, read in context and having regard to the purpose of the provision.\textsuperscript{81} The Constitution does not exclude grants, subsidy nor does it limit procurement in any conceivable sense.

5.10.55 By and large, the basis upon which my Notice is challenged tended to be peripheral to the main issue I have to decide, and thus of no real moment. Whether section 217 of the Constitution is triggered when a Grant Funding is made is peripheral and this is not what my investigation sought to answer or consider under this issue.

5.10.56 The true issue(s) I have to decide are whether, Mr Mashaba improperly influenced the Grant or Funding of FBF by CoJ and if yes, whether such amounted to conflict of interest and improper conduct.

5.10.57 I turn now, having highlighted Mr Mashaba’s association with FBF to record emphatically that the exercise of discretion may be susceptible to review if, ‘for instance’, the repository of the power concerned is tainted and vitiated by possible conflict of interests or if s/he acted with ulterior and improper motives.

Conclusion

5.10.58 Based on the exposition of evidence extrapolated herein, it can be concluded that Mr Mashaba improperly influenced the grant funding of FBF to the total amount of R 11, 1 million over three years beginning in the 2017/18 financial year, when he proposed during the mayoral Lekgotla

\textsuperscript{80} Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others (1306/18) [2020] ZASCA at para 22.

\textsuperscript{81} Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
at Magaliesburg on 17 February 2017 that CoJ’s Department for Health and Social Development consider the value of partnering with FBF.

5.10.59 It is apparent from Mr Mashaba’s own evidence/affidavit that FBF is an organisation in which Mr Mashaba once held directorship shortly before he took the mayoral position within CoJ. This on its own makes Mr Mashaba’s proposal to CoJ, to consider partnering with FBF wholly unwarranted and undesirable.

5.10.60 Evidence further revealed a continued and a sustained association between Mr Mashaba and FBF after Mr Mashaba had taken up mayorship in the CoJ.

5.10.61 Considering the obvious and palpable perception of conflict of interest on Mr Mashaba’s part, it is rather surprising that Mr Mashaba made this kind of a proposal to CoJ, considering his long-standing association and vested interests in FBF, which is his brain child.

5.10.62 The very fact that Mr Mashaba terminated his directorship with FBF and further disclosed the issue suggests that Mr Mashaba was acutely aware of the difficulties he may face in presiding, involvement or making suggestion over matters relating to FBF, having served as its director and/or a patron for a long time.

5.10.63 It is submitted therefore that although Mr Mashaba was not directly involved in the FBF funding process, he improperly proposed/suggested the grant/funding of FBF to CoJ’s employees over whom he had direct power and influence as the Executive Mayor of CoJ at the time.

5.10.64 The funding or grant of FBF itself by CoJ did not follow an assessment process that is in accordance with a system that is fair, equitable, transparent and competitive.

5.10.65 For discretionary grants, the organ of state awarding the grant would issue a notice, Request for Proposal (RFP) and invite applications, followed by a review, assessment and evaluation of the quality of the grant applicants.
to inform their funding decisions. It is therefore a competitive, fair and a transparent process.

5.11  Whether the Complainant, CoJ or any other party suffered improper prejudice in the circumstances.

Common Cause

5.11.1  After the CoJ's selection panel carefully considered all the inputs of the recruitment process Mr Moses Metileni was considered the most suitable for the position of Executive Director of Housing and subsequently appointed as such.

5.11.2  After the CoJ's panel carefully considered all the inputs of the recruitment process, Mr David Sony Tembe was considered and appointed as the most suitable candidate for the position of Chief of JMPD in December 2017.

5.11.3  KPMG was appointed from a panel of Service Providers for Group Risk and Assurance functions in the CoJ's Core Administration and Municipal Entities under contract number A528/13 for a period of three years namely, 21 May 2014 to 20 May 2017.

5.11.4  The aforementioned contract was extended for KPMG in May 2017 for a period of six months. KPMG's engagement was to investigate alleged irregularities and irregular conduct within the Billing environment based on information provided by whistle blowers.

5.11.5  During their execution of investigations KPMG's engagement was further extended to investigate certain refund payments made by CoJ. This was informed by a tip off from a senior official within the Refunds Department that during 2016, CoJ's Treasury Department identified refunds that were processed based on fraudulent supporting documents and journal transfers for which no supporting documents were available.
Subsequent to the execution of this investigation, KPMG was further tasked in June 2017 to investigate credit balance transfers and rate category changes also raised by another Whistle Blower. Again, during this period (2017), City Power had also brought to the attention of the CoJ a modus operandi which creates false/fraudulent account balances in the billing system.

In early 2017, which is a period leading up towards the insourcing of security personnel in the CoJ, Mr Mashaba sourced the assistance of a former business associate from LFS namely, Mr Deshmukh Akhter Alli (Mr Deshmukh) to advise on the financial modelling of this exercise. Mr Deshmukh subsequently offered this assistance/service/advice to CoJ.

On or about March 2017, FBF was offered by the CoJ’s Department of Health and Social Development a grant of an amount of R 3.5 million for three years, allocated in each financial year, starting on 2017/18 financial year to 2019/2020, totalling to R 11,1 million.

Issues in Dispute

Complainant argued that the composition of the panel members for the appointment of an Executive Director of Housing position did not promote strategic intent of section 12 of the Local Government regulations appointment and conditions of employment of senior Managers Council policy.

Further that, the Chief of JMPD, Mr Tembe was recommended for appointment although he ranked 5th out of nine (9) candidates. This has disadvantaged more competent candidates. It is also alleged that Mr Tembe’s qualifications are not in order and that my office should investigate this appointment including Mr Tembe’s qualifications.

Further that, the CoJ appointed KPMG to conduct investigations in various departments including the Revenue Unit in 2016. In 2017 the services of
KPMG were retained to perform analysis of the customer accounts in the CoJ’s database and develop strategies to improve CoJ’s revenue collection. These were clearly different assignments which would require different expertise.

5.11.12 Whilst the first appointment was made via a panel of forensic service providers, which KPMG belong to, the second did not fall under the expertise for which the panel was appointed. KPMG was appointed without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management regulations. The basis of this appointment was through unsolicited bid procedures. This is believed to be an irregular appointment which denied other service providers an equal opportunity to offer same services on similar terms.

5.11.13 Also that, Lephatsi Financial Services is a company owned by the Executive Mayor’s wife Connie Mashaba. The Executive Mayor/Mr Mashaba in the mist of his frustration with the City Manager’s report unlawfully and irregularly entered the procurement space and solicited free services from Lephatsi Financial Services.

5.11.14 Complainant further argued that Mr Mashaba allegedly interfered in the funding allocation by CoJ of a youth drug rehabilitation and support programme to fund a Non-Governmental Organisation (NGO) known as Field Band Foundation (FBF) which he claims as a personal project.

Application of the relevant legal prescripts

Constitution

5.11.15 Section 195 of the Constitution states inter alia:

“Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained;
(b) …;
(c) …;
(d) Services must be provided impartially, fairly, equitably and without bias;
(e) …;
(f) Public administration must be accountable and
(g) Transparency must be fostered……”

5.11.16 It stands to reason that CoJ as an organ of state and a public administration constituted at local sphere is subject to the above constitutional provisions. By all accounts, it was expected of CoJ to uphold these principles in handling all the issues complained of in this matter.

5.11.17 Section 6(4)(a) provides amongst other the following:

The Public Protector shall be competent to-

(a) Investigate on his or her own initiative or on receipt of a complaint, any alleged:
   (i) Maladministration in connection with affairs of government at any level;
   (ii) Abuse or unjustifiable exercise of power, capricious, discourteous or other improper conduct or undue delay by a person performing public function.
   (iii) Improper or dishonest act or omission…;
   (ii) …….;
   (iii) Act or omission by a person in the employ of government at any level or a person performing public function which results in unlawful or improper prejudice to any other person.
It is on the basis of the above legal provisions that my investigation seeks to also explore whether there has been improper prejudice to any other person, as a result of maladministration contemplated by section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the PPA.

Applicable legal prescripts have established, that in appointing Mr Moses Metileni, Mr David Sony Tembe, procurement of Mr Deshmukh and extension LFS, extension of KPMG’s contract and funding/grant of FBF, CoJ had an obligation to follow certain due processes as provided by relevant legal and policy instruments.

Section 1 of the MFMA defines “irregular expenditure” in relation to a municipality or municipal entity means-

(a) “expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of this Act, and which has not been condoned in terms of this section 170.

(b) expenditure incurred by a municipality or municipal entity in contravention of or that is not in accordance with, a requirement of the Municipal Systems Act, and which has not been condoned in terms of that Act;

(c) expenditure incurred by a municipality in contravention of, or that is not in accordance with a requirement of the Public Office-Bearers Act, 1998 (Act 30 No. 20 of 1998): or

(d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality’s by-laws giving effect to such policy, and which has not been condoned in terms of such policy or by-
law, but excludes expenditure by a municipality which falls within the definition of “unauthorised expenditure”.

5.11.21 Section 62 of the MFMA states amongst others the following:

(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 unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;

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

5.11.22 The implication of the above provisions, when applied to this matter is that CoJ as a municipality had a legal duty to prevent irregular expenditure amongst other financial misconducts. Another implication of these provisions is that CoJ had a duty to act in accordance with MSA and its SCM Policy when administering its affairs in relation to this matter.
Conclusion

5.11.23 Based on objective evidence which underpins all issues that are corroborated/substantiated in this matter, my conclusion is that, due processes in connection with the recruitment of Mr Metileni, Mr Tembe, procurement of Mr Deshmukh/LFS, extension of KPMG’S contract and funding/allocation of grant to FBF were not followed and executed in accordance with the Constitution, MSA, MFMA, SCM, GTAPF and other relevant legal prescripts as shown in evidence.

5.11.24 Accordingly, I submit as a result of the flawed processes by CoJ, the outcomes lacked fairness, transparency and equity. The outcomes were uncompetitive, flawed, irregular and further amounted to gross improper prejudice to the public at large, finances of the CoJ and those potential service providers and job applicants who also qualified to be considered for these opportunities.

6 FINDINGS

Having regard to the evidence, and the regulatory framework setting the standard that should have been upheld by the CoJ and the impact on the complainant, I make the following findings against the CoJ:

6.1 Regarding whether CoJ improperly or irregularly appointed Mr Moses Metileni to the position of Executive Director of Housing without following due processes:

6.1.1 The allegation that the CoJ improperly or irregularly appointed Mr Moses Metileni to the position of Executive Director of Housing without following due processes, is substantiated.
6.1.2 Based on the summary of the interview score sheet in my possession in relation to this appointment, my finding is that Mr Moses Metileni who was recommended and appointed by CoJ to the position of Executive Director of Housing did not rank the highest during the interview process.

6.1.3 Instead, evidence at my disposal reveals that Mr Moses Metileni ranked fifth (5th) during the interview process.

6.1.4 My further finding, having considered the totality of factual evidence as shown in the appointment of Executive Director Housing: Mr Moses Metileni, a conclusion that I have drawn on a balance of probability is that, the CoJ’s Council did not fully comply with section 195 of the Constitution, sections 17(1-4) and 15 (1-6) of MSA: Local Government Appointment Regulations for Senior Managers and Clause 8.3.4 of the GTAPF during this appointment.

6.1.5 Accordingly, this conduct by CoJ’s Council constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether CoJ improperly or irregularly appointed Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts without following due processes:

6.2.1 The allegation that CoJ improperly or irregularly appointed Mr Mafoane Mogashoa to the position of Group Head: Legal and Contracts without following due processes, is not substantiated.

6.2.2 My finding is that, as it stands, this matter is res judicata, having been heard and adjudicated upon by a court of law as shown in evidence. It stands to reason therefore that the current court decision literally settled this matter.
6.2.3 For further clarity on this issue, the court categorically held as per “Mbulelo Allan Ruda vs City of Johannesburg and Others”, that the threshold requirements of section 56 of the MSA had been met during the appointment of Mr Mafoane Mogashoa to the position of a Group Head: Legal and Contracts.

6.2.4 In the light of the above court decision, I submit that the decision of a court should prevail as far as this issue is concerned.

6.2.5 Based on this court judgment I am therefore legally precluded from pronouncing myself on this issue.

6.3 Regarding whether CoJ improperly or irregularly appointed Dr Ndivhoniswa Lukhwareni to the position of City Manager without following due processes:

6.3.1 The allegation that CoJ improperly or irregularly appointed Dr Ndivhoniswa Lukhwareni to the position of City Manager without following due processes, is not substantiated.

6.3.2 Based on the exposition of the factual and legal evidence discussed under this issue, it is submitted that the CoJ did not act improperly or irregularly in appointing Dr Ndivhoniswa Lukhwareni to the position of City Manager.

6.3.3 My finding is that, all due processes have been visibly followed and no identifiable legal or policy framework was flouted or violated by CoJ during the process of appointing Dr Lukhwareni.

6.3.4 Accordingly, the conduct of CoJ in the circumstances, does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.4 Regarding whether the establishment of Group Forensic Investigation Services (GFIS) and the subsequent appointment of General Shadrack Sibiya as its Executive Head by the CoJ were improper and irregular:

6.4.1 The allegation that the establishment of Group Forensic Investigation Services (GFIS) and the subsequent appointment of General Shadrack Sibiya as its Executive Head by the CoJ were improper and irregular, is not substantiated.

6.4.2 My finding, having examined the relevant legal framework, including the applicable policies of the CoJ’s and its concomitant Group Human Capital Management processes, is that the appointment of General Sibiya and his subsequent salary grading was in compliance with all the CoJ’s applicable legal framework.

6.4.3 On the strength of the evidence currently available at my disposal, I could not find justifiable reason, both in law and on facts to fault the process followed by CoJ in the appointment and subsequent upgrading of General Sibiya’s salary.

6.4.4 Accordingly, the conduct of CoJ in the circumstances, does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.5 Regarding whether CoJ improperly or irregularly appointed Mr David Tembe to the position of Chief of Johannesburg Metro Police (JMPD) without following due processes:

6.5.1 The allegation that CoJ improperly or irregularly appointed Mr David Tembe to the position of Chief of Johannesburg Metro Police (JMPD) without following due processes, is substantiated.
6.5.2 Based on the totality of objective evidence considered, I am persuaded to find on a balance of probability that the appointment of Mr Tembe was ostensibly vitiated by various factual, legal, administrative and procedural irregularities. Those can be recorded as follows:

6.5.2.1 Mr Tembe attended the Traffic or Metropolitan Police Diploma’s course on a part time basis, which entailed not being in a class with other learners, attending on weekends, after hours and sometimes instructors had to teach him in his office or at home.

6.5.2.2 There was no written application by CoJ to RTMC or to such other authority to exempt or indemnify Mr Tembe from attending the course on a full time basis like all other learners.

6.5.2.3 Similarly, there was no authorisation or permission granted by RTMC or such other responsible authority to allow Mr Tembe to attend the course on a part time basis as he did.

6.5.2.4 No class attendance register could be provided by CoJ to my office and to RTMC as proof of actual attendance of lessons by Mr Tembe in respect of the course in Traffic Diploma, despite numerous request for same.

6.5.2.5 An incomplete Portfolio of Evidence (PoE) file was submitted by CoJ to my office which did not reflect all the standard units and all assessments that had to be complied with by Mr Tembe before he could satisfy all the requirements to be issued with the Traffic or Metropolitan Officers Diploma as shown in terms of RTMC Policy Document and SAPS Conversion modules as per table in evidence.

6.5.2.6 It was also conceded by Mr Ben Mashigo: Director at JMPD Academy during an interview with my team that Mr Tembe was attending training on weekends, sometimes at seven and eight at night on a part time basis because he was already Director, operational and functioning. The only ineluctable inference to be drawn from this statement by Mr Ben Mashigo
is that Mr Tembe was already operational and performing traffic or metropolitan officer's functions while he was still under training, which I find to be rather irregular and an abuse of power by JMPD.

6.5.2.7 The Traffic or Metro Police Diploma for Mr Tembe was issued on 30 June 2007 which was ahead or before some of his summative and formative assessments were done on 04 October 2007 as shown in evidence. This discrepancy was not explained by CoJ.

6.5.2.8 In 2017, CoJ shortlisted and subsequently appointed Mr Tembe to the position of Chief of JMPD, notwithstanding the fact that the advertisement for the post required a minimum qualification of a “B degree or equivalent qualification in an appropriate field, such as Policing and/or Management, which Mr Tembe does not possess.

6.5.2.9 Evidence at my disposal has revealed that Mr Tembe only possesses a three year Diploma in Personnel Management from Mentor Business College. SAQA has advised my office that for the purposes of the NQF, a three year Diploma in Personnel Management is not comparable to a Bachelor’s degree, since the two are rated differently in terms of NQF ratings/levels. As such, I find that Mr Tembe did not meet the minimum academic requirements for this post, as framed in a job advertisement.

6.5.3 By parity of reasoning, I further find it inconceivable to figure out how JMPD academy issued Mr Tembe with a Traffic Diploma before assessments could be finalised. With that apparent irregularity in mind, I must immediately record that on the basis of evidence before me, this question was not addressed by CoJ. I submit that this was particularly improper and amounted to maladministration.

6.5.4 My ultimate finding is that the appointment of Mr Tembe by CoJ was irregular and made in gross violation of section 33 of the Constitution, section 3 of PAJA, section 3D of NRTA, section 3E of the NRTA, clause 1.11 of Policy Document for Traffic Training Centres, clause 3.13.3 of Policy Document for Traffic Training Centres, clause 3.13.5 of Policy
Document for Traffic Training Centres and clause 8.3.4 of the GTAPF, as shown in evidence.

6.5.5 I am therefore unable to countenance or endorse a qualification/Traffic or Metropolitan Officer’s Diploma awarded in the manner that was not only characterised by capriciousness, but which also lacked transparency. My office would be failing in its duty if it does not send out a clear and unequivocal pronouncement that South Africa is committed to the promotion of sound and robust legal principles that seek to inculcate a culture of good and clean governance within the public administration.

6.5.6 Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.6 Regarding whether CoJ irregularly increased the Chief of Staff: Mr Michael Beaumont’s salary and further allocated him the vehicle and Very Important Person (VIP) protection services without conducting security risk assessment:

6.6.1 The allegation that CoJ irregularly increased the Chief of Staff: Mr Michael Beaumont’s salary and further allocated him the vehicle and Very Important Person (VIP) protection services without conducting security risk assessment, is not substantiated.

6.6.2 My finding on this issue, based on the evidence at my disposal, is that the position of Chief of Staff for Mr Beaumont was graded in line with CoJ's Job Evaluation Policy and the remuneration paid to the incumbent was in line with the job evaluation outcomes.

6.6.3 Most importantly, when comparing salary scales of the previous incumbents with that of Mr Beaumont, it should be noted that, historically all his predecessors were remunerated at the minimum of salary level 2B
or to a maximum of salary level 2C, which is equal to a minimum of 2B. It would therefore be unfair for Mr Beaumont to be paid less than others for the work of equal and same value.

6.6.4 With regard to allegations of VIP protection services given to Mr Beaumont, my finding is that Mr Beaumont was attacked and his laptop and phone were stolen on his way home after work. As a result, a safety arrangement was made by CoJ whereby he would be picked-up at home and dropped off again after work by JMPD for only a month.

6.6.5 Mr Beaumont stopped this arrangement as in his view the incident was just a crime and not politically motivated. No transportation or security services were then provided to Mr Beaumont.

6.6.6 I am therefore persuaded to conclude and further find that CoJ adhered to all the provisions of its MSA, LRA, EEA and Job Evaluation Policy in the salary adjustment of Mr Beaumont as the Chief of Staff.

6.6.7 Accordingly, the conduct of CoJ in the circumstances, does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.7 Regarding whether CoJ returned nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017, which money was meant for provision of basic services to the residents of CoJ including water and sanitation, roads, housing, electricity and waste amongst others and if the answer is Yes, whether this was an indication of non-compliance, mismanagement and poor oversight by the CoJ:

6.7.1 The allegation that CoJ returned nearly R736 million to National Treasury that was allocated as conditional grants for the year ended in June 2017, which money was meant for provision of basic services to the residents of
CoJ including water and sanitation, roads, housing, electricity and waste amongst others and if the answer is Yes, whether this was an indication of non-compliance, mismanagement and poor oversight by the CoJ, is not substantiated.

6.7.2 Coming to a finding on this particular issue, I first had to grapple with a factual and a legal question of whether or not the fact that the CoJ was unable to spend all the monies allocated as conditional grants was in itself, an indication of financial mismanagement, maladministration or non-performance.

6.7.3 Based on the exposition of the valid and lawful reasons given by CoJ in respect of each project, as to why those funds could not be spent during that particular financial year ending in June 2017, I was persuaded to conclude that the mere returning of unspent funds to Treasury is not on its own, an indication of financial mismanagement or non-compliance with the MFMA, MSA or Constitution.

6.7.4 Evidence at my disposal has revealed that projects were completed, however in some instances the actual expenditure incurred was less than the allocation received. This resulted in the unspent amounts as indicated in evidence.

6.7.5 Further evidence at my disposal revealed that some projects such as housing were halted by discovery of dolomitic conditions which necessitated changes in township layout hence the delay on expenditure. Such unforeseen events cannot be classified as mismanagement or poor oversight.

6.7.6 Accordingly, the conduct of CoJ in the circumstances, did not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.8 Regarding whether CoJ improperly or irregularly appointed KPMG to conduct investigations in various departments within CoJ for clearly different assignments, which would require different expertise, without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management (SCM) regulations:

6.8.1 The allegation that CoJ improperly or irregularly appointed KPMG to conduct investigations in various departments within CoJ, for clearly different assignments which would require different expertise, without advertising the tender as required by the Municipal Finance Management Act (MFMA) and Supply Chain Management (SCM) regulations, is substantiated.

6.8.2 CoJ appointed KMPG Services (Pty) Ltd (KPMG) from a panel of Service Providers for Group Risk and Assurance functions in the CoJ's Core Administration and Municipal Entities under contract number A528/13 for a period of three years namely, 21 May 2014 to 20 May 2017.

6.8.3 The contract value of R30 million per annum was allocated to six categories of services identified in terms of the Frame Work Contract A528/13 and KPMG was to provide the CoJ with the following services:

   a) Risk Management Advisory Services;
   b) Compliance Advisory and Monitoring Services;
   c) Internal Audit Services;
   d) Forensic Investigation;
   e) Combined Assurance and
   f) Probity Services.

6.8.4 The aforementioned contract was extended by CoJ for a period of six months, when CoJ further tasked KPMG in June 2017 to investigate credit balance transfers and rate category changes raised by a Whistle Blower,
after City Power had brought to the attention of the CoJ a modus operandi which created false/fraudulent account balances in the billing system.

6.8.5 This tasking clearly took place after the contract/A528/13 between CoJ and KPMG had lapsed in May 2017. CoJ could not to furnish my office with KPMG’s contract variation/expansion addendum commencing from 21 May 2017 to 21 November 2017, despite conceding that such expansion/ variation exceeded the 15% threshold.

6.8.6 Although it became clear from the report approved by Dr Lukhwareni that a request for KPMG’s contract extension was recommended for three months at a total value not exceeding 12, 4 million, which is 13, 8% of the total value of the original contract, the KPMG’s contract with CoJ continued to a total of six months, notwithstanding the condition/limitation set by Dr Lukhwareni, thereby exceeding 15% of the original contract.

6.8.7 CoJ failed to indicate if these expansion/variations were dealt with in terms of the provisions of section 116(3) of the MFMA which will be regarded as an amendment to the contract and whether they were reported to the Council and National Treasury.

6.8.8 Based, on this apparent contract expansion, I find that CoJ irregularly and improperly concluded a contract with KPMG post May 2017. In concluding this contract/expansion/amendment or variation in favour of KPMG, CoJ failed to comply with section 217 of the constitution, section 62 of the MFMA, Circular No: 62 of MFMA, Clause 2, 4, 10.1, 10.6 and 17 of the CoJ’s SCM Policy.

6.8.9 I further find that, a contractual engagement between CoJ and KPMG post May 2017, was at odds with the Constitution, MFMA and CoJ’s SCM policy insofar as it may be uncompetitive, less transparent, unfair and/or not reported to Council or Treasury as required by regulatory framework.

6.8.10 It is my further finding that, the lack of full and proper records of the financial affairs of the municipality (especially those relating to expansion
or variation of this contract) is in direct violation of the MFMA, insofar as they were not kept in accordance with any prescribed norms and standards, as required by regulatory framework.

6.8.11 Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.9 Regarding whether the former Executive Mayor of CoJ: Mr Herman Mashaba unlawfully and irregularly entered the procurement space and solicited free services from Lephatsi Financial Services and whether such amounted to a conflict of interests:

6.9.1 The allegation that the former Executive Mayor of CoJ: Mr Herman Mashaba (Mr Mashaba) unlawfully and irregularly entered the procurement space and solicited free services from Lephatsi Financial Services (LFS) and whether such amounted to a conflict of interests, is substantiated.

6.9.2 In early 2017, which is the period leading towards the insourcing of security personnel in the CoJ, Mr Mashaba contacted a friend and a former business partner or associate from LFS namely, Mr Deshmukh Akhter Alli (Mr Deshmukh) and requested his assistance to advise CoJ on the financial modelling for insourcing of security personnel.

6.9.3 Mr Deshmukh subsequently offered this assistance, service and/or advice to CoJ, following Mr Mashaba’s request.

6.9.4 The totality of the evidence at my disposal sets out facts which points to an agreement or contract based on bias and/or conflict of interest on the part of Mr Mashaba.

6.9.5 The conduct or decision of CoJ to procure or source the services of Mr Deshmukh, did not accord with the principles and validity of a procurement
standards determined in terms of the legislative framework creating the system that section 217(1) of the Constitution, section 195(1)(a), section 8 and 9 of PAMA and Clause 4 of CoJ’s SCM policy call for in each particular case.

6.9.6 Similarly, the conduct of Mr Mashaba as a councillor and a Mayor (as he was then), of directly approaching, handpicking and recommending to CoJ his former business partner namely Mr Deshmukh who still work directly with his wife at LFS, was irreconcilable with clause 11, 2, 5.1 and 5.2 of the Code of Councillors embedded in MSA.

6.9.7 Mr Mashaba (the Mayor of CoJ as he was then) had direct power and influence over those who reported to him, especially the members of the Mayoral Committee. As a result, any involvement or influence of Mr Mashaba in securing the services of Mr Deshmukh was unwarranted.

6.9.8 The fact that Mr Deshmukh was willing to render his service free of charge to CoJ, was indeed a noble, commendable and philanthropic gesture. However, I find it extremely difficult to deny that this gesture would not have potential to enhance the profile and add value to Mr Deshmukh as an individual and by extension to LFS, in which as said, Mr Mashaba’s wife is still a co-director.

6.9.9 Any other individuals or service providers could also have made an offer on a pro bono basis had they been afforded an opportunity to do so. However, in this instance, this was not the case, as this offer was only made specifically to Mr Deshmukh who is a co-director of LFS.

6.9.10 I am therefore persuaded to find that, this created an impression of impropriety and risk upon which the public could assume that Mr Deshmukh or LFS was given access to CoJ due to proximity with Mr Mashaba.

6.9.11 Although the security guards may have benefitted from the services of Mr Deshmukh, the potential or perceived conflict of interests to LFS and Deshmukh was sufficient to erode the public trust that benefiting poor families
and improving the lives of security guards was the only motivation for this exercise.

6.9.12 Accordingly, the conduct of Mr Mashaba and CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.10 Regarding whether the Executive Mayor of CoJ: Mr Herman Mashaba allegedly interfered or influenced the CoJ to use funding allocation of youth drug rehabilitation and support programme to fund Field Band Foundation (FBF) which is Non-Governmental Organisation (NGO) by the CoJ:

6.10.1 The allegation that the Executive Mayor of CoJ: Mr Herman Mashaba interfered or influenced the CoJ to use funding allocation of youth drug rehabilitation and support programme to fund Field Band Foundation (FBF) which is Non-Governmental Organisation (NGO) by the CoJ, is substantiated.

6.10.2 Based on the exposition of evidence considered, I find that Mr Mashaba unduly and improperly influenced the grant or funding of FBF to the tune of R 11, 1 million over three years beginning in the 2017/2018 to 2019/2020 financial year, when he proposed during the mayoral Lekgotla at Magaliesburg on 17 February 2017, that CoJ’s Department for Health and Social Development consider the value of partnering with FBF.

6.10.3 It is further apparent from Mr Mashaba’s own evidence/affidavit that FBF is an organisation in which Mr Mashaba once held directorship shortly before he took the mayoral position within CoJ. This on its own makes Mr Mashaba’s proposal to CoJ, to consider partnering with FBF wholly unwarranted and undesirable.
6.10.4 Given the obvious and palpable perception of conflict of interest on Mr Mashaba’s part, it is unacceptable that Mr Mashaba made this kind of a proposal to CoJ, considering his long-standing and continued association with FBF.

6.10.5 The very fact that Mr Mashaba terminated his directorship with FBF and further disclosed the issue, suggests that Mr Mashaba was acutely aware of the difficulties he may face in presiding or making suggestion over matters involving FBF.

6.10.6 Although Mr Mashaba was not directly involved in the FBF funding process, he improperly proposed/suggested and/or initiated the idea of partnering with FBF to CoJ’s employees over whom he wielded direct power, authority and influence as the executive Mayor of CoJ.

6.10.7 Therefore, I find that the grant of funding of FBF by CoJ, did not follow an assessment or evaluation process that is in accordance with a system that is fair, transparent and competitive.

6.10.8 The conduct of Mr Mashaba was at variance and did not conform with the standard contemplated in Clause 2 and 11 of Code of Councillors embedded in the MSA which regulates Intervention in Administration.

6.10.9 Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.11 Regarding whether the Complainant, CoJ or any other party suffered improper prejudice in the circumstances:

6.11.1 The allegation that the Complainant, CoJ or any other party suffered improper prejudice in the circumstances, is substantiated.
6.11.2 Based on objective evidence which underpins all issues that are corroborated/substantiated in this matter, my finding is that, processes followed by CoJ in connection with the recruitment of Mr Metileni, Mr Tembe, procurement of Mr Deshmukh/LFS, extension of KPMG’S contract and the grant funding of FBF were improper and not executed in accordance with the Constitution, MSA, MFMA, SCM, GTAPF and other relevant legal prescripts as shown in evidence.

6.11.3 Accordingly, the outcomes of the above administrative processes amounted to gross improper prejudice to those potential service providers and job applicants who also qualified to be considered for these opportunities.

6.11.4 It is my further finding that, non-compliance by CoJ with SCM and Recruitment processes in this matter had the following negative impact on the City’s finances:

(a) Due to the fact that some procurement and recruitments as shown in evidence were done in contravention of applicable regulatory framework, this would have an inevitable corollary effect of “irregular expenditure” and prejudice to the South African tax payers.

(b) Salaries paid by CoJ to Mr Moses Metileni, Mr David Tembe and payments made to services rendered by KPMG, all fall into the category of irregular expenditure, since processes leading up to these appointments were made in contravention of regulatory or legal framework.

(c) Loss of public confidence in the CoJ and organs of state in general, in relation to an open and transparent procurement and recruitment processes.

(d) The perception by potential service providers and job applicants that they cannot expect a fair and equal treatment from organs of state.
6.11.5 Accordingly, the conduct of CoJ in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7 REMEDIAL ACTION

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

The City Manager of CoJ must take appropriate steps to ensure that:

7.1 Within sixty (60) working days from the date of this report, disclose the irregular expenditure incurred in connection with the irregular appointments of Mr Metileni, Mr Tembe and irregular extension of a contract with KPMG to the Council and Treasury.

7.2 Directs the Chief Financial Officer (CFO) of CoJ to amend the closing balance of the current financial statements to accordingly include the irregular expenditure in the previous financial statements.

7.3 Within sixty (60) working days of the issuing of this report; all CoJ’s officials who are involved in the SCM and Recruitment processes, including all the senior management, attend a workshop on the SCM, Recruitment and Selection procedures and processes.

7.4 Within thirty (30) working days from the date of this report, present this report to the current Executive Mayor of the CoJ, for disciplinary action to be taken against all current CoJ employees who are responsible for the flouting of Recruitment processes, SCM processes or any other form of maladministration or improper conduct highlighted in this report.
The Speaker of Council of CoJ

7.5 Within sixty (60) working days from the date of this report, ensure that the Council develops a policy regulating the exercise of discretionary power delegated to the Executive Mayor in relation to the Grants for Funding or Donation to institutions or organisations which promotes public health, social welfare, art, culture and education within the jurisdiction of the CoJ as contemplated in Section 79(16)(a) of the Transvaal Local Government Ordinance 17 of 1939.

7.6 Within sixty (60) working days of the issuing of this report; all CoJ’s councillors attend a workshop on Management of Conflict of Interests and on Policies related to mandatory Disclosure of Conflict of Interests.

7.7 Within thirty (30) working days from the date of this report, present this report to the MEC for Cooperative Governance and Traditional Affairs in the Gauteng province, for a decision to address all irregular expenditure incurred as a result of maladministration and improper conduct highlighted in this report.

The CEO of RTMC must take appropriate steps to ensure that:

7.8 Within sixty (60) working days from the date of this report, engage in a necessary process to nullify the Metropolitan Police Diploma issued to Mr Tembe by JMPD on 30 June 2007, and further disclose or communicate the outcome of the nullification process to the Head of Department (HoD) for the Gauteng Department of Roads and Transport.
8 MONITORING

8.1 The City Manager of the CoJ, CEO of RTMC and the Speaker of Council must all, submit an Implementation Plan to my office within thirty (30) working days from the date of receipt of this report, indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others [2016]ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the City Manager of the CoJ, CEO of RTMC and HoD of GDRT, unless she obtains an Interim Interdict or Court Order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 18/12/2020

Assisted by: Mr Vusumuzi Dlamini, PR-EC