Ms BT Shongwe
MEC for Social Development
NELSPRUIT

Per email: sindisiweGa@dsdmpu.gov.za

Dear Ms Shongwe


1. Please find attached a copy of my report no. 45 of 2019/2020 on an investigation into allegations of irregular awarding of tenders and fruitless and wasteful expenditure incurred by the Mpumalanga Department of Social, to inform you about the outcome of the investigation.

Kind regards

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

"Allegations of maladministration in the matter between Mr TE Mahlangu and the Department of Social Development"

Report No: 45 of 2019/20


REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR AWARDING OF TENDERS AND FRUITLESS AND WASTEFUL EXPENDITURE BY THE MPUMALANGA DEPARTMENT OF SOCIAL DEVELOPMENT
# TABLE OF CONTENTS

Executive Summary........................................................................................................3

1. INTRODUCTION........................................................................................................9

2. THE COMPLAINT......................................................................................................10

3. POWERS AND JURISDICTION...............................................................................11

4. THE INVESTIGATION................................................................................................15

5. THE DETERMINATION OF ISSUES IN RELATION TO THE
   EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO
   THE APPLICABLE LAW AND PRESCRIPTS.........................................................19

6. FINDINGS..................................................................................................................36

7. REMEDIAL ACTION..................................................................................................38

8. MONITORING............................................................................................................39
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, and published in terms section 8(1) of the Public Protector Act, 1994.

(ii) The report relates to investigation relating to allegations of irregular awarding of tenders and fruitless and wasteful expenditure in that the former Head of Department (the HOD) of Mpumalanga Department of Social Development (the Department) refused to allow Mr Thulani Mahlangu to return to work after he was found not guilty of misconduct and the Department continued to pay his salary while he was sitting at home.

(iii) The complaint was lodged on 20 January 2017 by Mr T.E. Mahlangu (the Complainant) who alleged that two tenders for catering and cafeteria services and travel arrangements and accommodation services, were irregularly awarded and further that the Department abused its power by improperly extending his precautionary suspension despite the fact that he was found not guilty by the disciplinary committee.

(iv) The Complainant alleged that awarding of the tender for travel arrangements and accommodation services with tender number SOC/005/16/MP was done irregularly;

(v) The tender for Swartfontein catering and cafeteria services with number SOC/022/16/MP, was awarded to the third highest bidder who was supposed to have been disqualified on account of not attaching a valid UIF certificate on the closing of the tender;

(vi) The same tender for Swartfontein Catering and Cafeteria Services was re-evaluated and adjudicated to favour the incumbent;
(vii) A member of the Bid Specification Committee also served in the Bid Evaluation Committee;

(viii) He was suspended pending an investigation and after a disciplinary hearing he was found not guilty but the Department refused to allow him back at work through a letter dated 18 July 2016 (despite the fact that the department had initially informed him to report for duty in a letter dated 15 July 2016), yet they continued to pay him a salary since July 2016; and that

(ix) On 20 January 2017 the matter was referred to the Bargaining Council by his attorneys and the Department contended that the Complainant was neither dismissed nor suspended but could not explain why he was not called to resume his duties. They reached a mutual agreement and the Complainant was ordered to report for duty;

(x) He continued to receive his monthly salary and has also received a performance bonus while at home during the period he was on suspension.

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

(a) Whether the Department unduly failed to follow proper procurement processes in the awarding of the tender for Catering and Cafeteria Services and Travel Arrangements and Accommodation Services?

(b) Whether the Department acted improperly by continuing to pay the Complainant’s salary but refused, without a just cause, to allow him to report for duty after he was found not guilty of any misconduct?

(xii) The investigation process included an exchange of correspondence and conducting meetings and interviews with relevant officials of the Department of
Social Development as well as analysis of relevant documents and application of all relevant laws, policies and related prescripts.

(xiii) Key laws and policies taken into account to determine if there had been maladministration and/or improper conduct by the Department were principally those imposing administrative standards and procedures that should have been complied with when the Department awarded the tenders for the Swarfontein Catering services and Travelling Arrangements as well as the continued payment of a salary to the Complainant.

(xiv) Having considered the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by the Office of the Premier, my findings are as follows:

(a) **Regarding whether the Department unduly failed to follow proper procurement processes in the awarding of the Catering and Cafeteria Services and Travelling Arrangements tenders:**

(aa) The allegation that the Department unduly failed to follow proper procurement processes in the awarding of the Catering and Cafeteria Services and Travelling Arrangements tenders is unsubstantiated.

(bb) The Department advertised, evaluated and adjudicated a tender for the provision of catering and cafeteria services at Swarfontein Treatment Centre in 2016. The BEC recommended the appointment of the fourth highest scored bidder because the first, second and third bidder already had been rendering services to the Department at the time of this tender.

(cc) The BAC instead, did not support the recommendations of the BEC. As a result, the BAC recommended the appointment of the third highest scored bidder being
Phakamile Investments, citing reasons of continuity and women empowerment. The Accounting Officer approved the recommendations of the BAC. Proper procurement procedures were followed by the Department in the awarding of the Catering and Cafeteria Services and Travelling Arrangements tenders. No irregularity could be found also in the awarding of the Travel Arrangement tender.

(dd) The conduct of the Department, particularly the BAC and HOD, was not in contravention of any applicable laws, especially, sections 195 and 217 of the Constitution, section 38(1)(a)(iii) of the PFMA and the Supply Chain Management Policy of the Department.

(ee) The conduct of the Department, particularly the BAC and HOD, does not constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether the Department acted improperly by continuing to pay the Complainant’s salary but refused, without a just cause, to allow him to report for duty after he was found not guilty of any misconduct:

(aa) The allegation that the Department acted improperly by continuing to pay for the Complainant’s monthly salary but refused to allow him to report for duty without a valid reason is substantiated.

(bb) The Complainant was charged for misconduct in 2015 and he was acquitted on both charges against him in 2016. However, the Department refused to allow him back at work without any justifiable reason. The Department continued to pay him a monthly salary until October 2017 when it decided to stop his salary after the Department attempted to transfer him to another District without providing him with
any reason for the transfer. The Department was interdicted by the High Court to release the Complainant’s salary.

(cc) The Department failed to allow the Complainant to report for duty despite the fact that he was found not guilty for misconduct and the Department did not have any just cause as to why the Complainant should not resume his duties. The conduct of the Department led to the incurring of irregular, fruitless and wasteful expenditure and also constitute abuse of power.

(dd) The conduct of the Department, in particular, the former HOD Ms N.L Mlangeni was in contravention of section 38(1)(a),(b) and (c) of the Public Finance Management Act.

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

(xv) **REMEDIAL ACTION**

In the light of the above, and having taken into account evidence before me, the fact that honesty and integrity are paramount for the execution of duties by the Director-General of a Province and all the relevant facts before me, the appropriate remedial actions I am taking in terms of section 182(1)(c) of the Constitution are the following:

**The Acting Director-General of Mpumalanga Province, Mr Mohlasedi must:**

(xvi) Within sixty (60) days of this report hand over this matter to the Executive Authority, to take disciplinary action against Ms NL Mlangeni, the former Head of
Department of Mpumalanga Department of Social Development for exposing the Department to acts of maladministration and for failing to adhere to sections 38 of the Public Finance Management Act by continuing to pay a salary to Mr T Mahlangu whom she instructed to remain on suspension while he was found not guilty and acquitted of all disciplinary charges.

(xvii) MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTION

(a) The Acting Director-General of the Mpumalanga Provincial Government must, within 30 days from the date of the issuing of this Report and for approval by the Public Protector, submit the implementation plan to her indicating how the remedial actions referred to in paragraph 7 will be implemented.

(b) 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 Premier and the Acting Director-General of Mpumalanga Province, unless they obtain a Court order directing otherwise.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR AWARDING OF TENDERS AND FRUITLESS AND WASTEFUL EXPENDITURE BY THE MPUMALANGA DEPARTMENT OF SOCIAL DEVELOPMENT

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, 1994 (the 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 actions:

1.2.1. Member of the Executive Council (MEC) for Social Development in Mpumalanga Province, Ms T. Shongwe;

1.2.2. The Acting Director-General of the Mpumalanga Provincial Government, Mr KM Mohlasedi.

1.2.3. The Head of the Department of Social Development in Mpumalanga Province, Mr X Mahlalela;

1.2.4. The former Head of the Department of Social Development in Mpumalanga Province, Ms NL Mlangeni;

1.3. A copy of the report is also provided to Mr TE Mahlangu, the Complainant to inform him about the outcome of the investigation.
1.4. The report relates to investigation into allegation of maladministration, irregular awarding of catering services tenders and fruitless and wasteful expenditure resulting from the suspension of the Complainant, Mr Mahlangu by the Mpumalanga Department of Social Development (the Department).

2. THE COMPLAINT

2.1. On 17 November 2016, I received a complaint from Mr T.E. Mahlangu (the Complainant) who alleged that two tenders for catering and cafeteria services and travel arrangements and accommodation service, were irregularly awarded and further that the Department abused its power by improperly extending his precautionary suspension despite the fact that he was found not guilty by the disciplinary committee. He further alleged that:

2.1.1 The awarding of the tender for travel arrangements and accommodation services with tender number SOC/005/16/MP was done irregularly;

2.1.2 The tender no. SOC/022/16/MP for Swartfontein catering and cafeteria services was awarded to the third highest bidder who was supposed to have been disqualified on account of not attaching a valid UIF certificate on the closing of the tender;

2.1.3 The same tender for Swartfontein Catering was re-evaluated and adjudicated to favour the incumbent;

2.1.4 A member of the Bid Specification Committee also served in the Bid Evaluation Committee;
2.1.5 He was suspended pending an investigation and after a disciplinary hearing he was found not guilty but the department refused to allow him back at work through a letter dated 18 July 2016 (despite the fact that the department had initially informed him to report for duty in a letter dated 15 July 2016), yet they continued to pay him a salary since July 2016;

2.1.6 On 20 January 2017 the matter was referred to the Bargaining Council by his attorneys and the Department contended that the Complainant was neither dismissed nor suspended but could not explain why he was not called to resume his duties. They reached a mutual agreement and the Complainant was ordered to report for duty;

2.1.7 He continued to receive his monthly salary and has also received a performance bonus while at home during the period he was on suspension.

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
3.3 Section 182(2) 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 power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the constitutional court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11(5); 2016(5) BCLR 618 (CC); 2016(3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers of the public protector:

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

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

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

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

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

3.5.6 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);

3.5.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in 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));

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d))
3.5.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e));

3.6 The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, "When remedial action is binding, compliance is not optional, and 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."

3.7 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101);
(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

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

3.9 The Mpumalanga Department of Social Development is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

3.10 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.
4. THE INVESTIGATION

4.1. Methodology

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

4.1.2. The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The investigation was conducted by way of correspondences, meetings and interviews with the Complainant. The process also entailed correspondence with the Department, analysis of the relevant documentation, consideration and application of the relevant laws and regulatory framework.

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:
(a) What happened?
(b) What should have happened?
(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
(d) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the 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. In this particular case, the factual enquiry principally focused on whether or not the Department irregularly awarded tenders and incurred fruitless and wasteful expenditure by suspending Mr T.E. Mahlangu.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department to prevent maladministration.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration. Where a complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3. **On analysis of the complaint, the following issues were considered and investigated:**
4.3.1. Whether the Department unduly failed to follow proper procurement processes in the awarding of the tender for Catering and Cafeteria Services and Travel Arrangements and Accommodation Services?

4.3.2. Whether the Department acted improperly by continuing to pay the Complainant’s salary but refused, without a just cause, to allow him to report for duty after he was found not guilty of any misconduct?

4.4. The Key Sources of information

4.4.1. Documents

4.4.1.1 Outcomes of disciplinary hearing of Mr Mahlangu held on 18 – 19 January 2016, 05, 28 and 29 April 2016;

4.4.1.2 A Notice of Intention to oppose filed by the Department to the to the Gauteng Division of the High Court dated 18 October 2017;

4.4.1.3 A Notice of Motion filed by Mr Mahlangu to the Gauteng Division of the High Court dated 20 October 2017;

4.4.1.4 A confirmatory Affidavit of Petros Elvis Nkosi to the Gauteng Division of the High Court dated 23 October 2017;

4.4.1.5 A filing notice of Mr Thulani Ernest Mahlangu (the Complainant) to the Gauteng Division of the High Court dated 24 October 2017;

4.4.1.6 A Draft Order granted by Honourable Judge Mali of the Gauteng Division of the High Court dated 24 October 2017;

4.4.1.7 Evaluation reports of the two tenders (SOC/005/16MP and SOC/022/16MP);

4.4.1.8 Terms of Reference for tender specifications;

4.4.1.9 Adjudication reports of the two tenders (SOC/005/16MP and SOC/022/16MP);

4.4.1.10 Bid Document for Phakamile Investments for tender SOC/022/16/MP;

4.4.1.11 Bid Document for Dana Agency for tender SOC/005/16/MP;

4.4.1.12 Bid Document for Big Sky Travel Joint Venture for tender SOC/005/16/MP;
4.4.1.13 Bid Document for Lets Cruze Travel for tender SOC/005/16/MP;
4.4.1.14 Bid Document for Zap Travel & Tourism for tender SOC/005/16/MP;
4.4.1.15 Letter to Mr Mahlangu from Lekhu Pilson Attorneys dated 30 October 2017;
4.4.1.16 Letter of suspension to Mr Mahlangu from the Department dated 14 May 2015;
4.4.1.17 Transfer letter issued to Mr Mahlangu by the Head of Department (HOD) dated 20 September 2017;
4.4.1.18 Letter to Jacobs & Makwakwa Attorneys from the HOD dated 20 January 2017;
4.4.1.19 Transfer letter issued to Mr Mahlangu by the Head of Department (HOD) dated 03 May 2017;
4.4.1.20 Failure to report for duty letter issued to Mr Mahlangu by the HOD date 25 May 2017;
4.4.1.21 Disciplinary outcome and upliftment of precautionary suspension letter to Mr Mahlangu from HOD dated 05 July 2016;
4.4.1.22 Letter from HOD to Mr Mahlangu extending precautionary suspension dated 18 July 2016;
4.4.1.23 Appointment letters to service providers from the Department dated 30 May 2016 and 02 June 2016.

4.4.1. Correspondence sent and received

4.4.2.1 Enquiry letter from my office to the Head of Department (HOD) dated 08 February 2017;
4.4.2.2 Update letter to the Complainant from my office dated 23 February 2017;
4.4.2.3 Follow up letter from my office to the Head of Department (HOD) dated 23 March 2017;
4.4.2.4 Email received from the Department dated 29 March 2017;
4.4.2.5 Department’s response to the my letter of enquiry, dated 03 May 2017;
4.4.2.6 Update letter to the Complainant from my office dated 04 October 2017;
4.4.2.7 Update letter to the Complainant from my office dated 23 November 2017;
4.4.2.8 Update letter to the Complainant from my office dated 12 December 2018;
4.4.2.9 Section 7(9) Notice from the my office to the HOD, Mr M.V Mahlalela, dated 24 June 2019;
4.4.2.10 Email forwarded to the HOD, dated 26 June 2019;
4.4.2.11 Section 7(9) Notice from my office to the former HOD, Ms N.L. Mlangeni, dated 24 June 2019.

4.4.3 Meetings held

4.4.3.1 Meeting held with the Complainant on 08 February 2017

4.4.2. Legislation and other prescripts

4.4.3.1 The Constitution, 1996;
4.4.3.2 Public Finance Management Act, 1998;
4.4.3.3 Supply Chain Management Regulations, 2005.
4.4.3.4 Department of Social Development Supply Chain Management Policy.

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

5.1. Regarding whether the Department unduly failed to follow proper procurement processes in the awarding of the Catering and Cafeteria Services and Travel Arrangements and Accommodation Services tenders:
Common cause issues

5.1.1. It is common cause that the Department advertised a tender for the provision of comprehensive Catering and Cafeteria Services (SOC/022/16/MP) at Swartfontein Treatment Centre in the tender bulletin of February 2016.

5.1.2. It is also common cause that the Department also advertised a tender for the provision of Travel Arrangements and Accommodation Services (SOC/005/16/MP) for a period of 36 months in the tender bulletin of February 2016.

5.1.3. It is not disputed that the Complainant is an employee of the Department and holds the position of Director: Supply Chain Management.

Issues in dispute

5.1.4. It is in dispute whether the Department followed proper procurement procedures when awarding the tenders for the provision of catering and cafeteria services and travel arrangements and accommodation services.

5.1.5. The Complainant argued that the Department improperly and irregularly awarded the Swartfontein tender for the provision of catering and cafeteria services to a third highest bidder who did not have a valid Unemployment Insurance Fund (UIF) certificate. The Complainant further alleged that the tender was re-evaluated and re-adjudicated to favour the third highest bidder.

5.1.6. My investigation team raised the matter with the Department on 08 February 2017. The Department’s former Head of Department, Ms N.L. Mlangeni (the former HOD), responded in a letter dated 03 May 2017 as follows:
"...The allegations of irregular awarding of tenders and fruitless and wasteful expenditure are baseless and untrue."

5.1.7. The former HOD provided supporting documents as Annexures for the two tenders (SOC/022/16/MP and SOC/005/16/MP) in response to the allegation.

5.1.8. The documents provided by the former HOD were perused by my investigation team. The tender specifications document for the provisioning of catering and cafeteria services at Swartfontein Treatment Centre stated under paragraph 10.1(h) that bidders must submit an Unemployment Insurance Fund certificate clearly stating the date of issue and date of expiry. However, upon perusal of the Bid Document and attachments of Phakamile Investments, the service provider who was awarded the tender, my investigation team discovered a copy of the UIF certificate of Phakamile Investments. It was noted that the certificate was issued on 21 January 2015 and expired on 21 January 2016.

5.1.9. In response to my section 7(9) notice sent to the former HOD on 24 June 2019, the former HOD stated as follows:

"In response to whether the Department followed proper procurement procedures when awarding the tender for the provision of catering and cafeteria services at Swartfontein Treatment Centre SOC/022/16/MP as captured in Paragraph 8.2.1.5 of your correspondence I would like to state the following:

...All bid documents are submitted to the Provincial Treasury as indicated in the Tender Bulletin of February 2016 which closed on the 08 March 2016 which is available from both the Department of Social Development and Provincial Treasury. On receipt of documents Provincial Treasury records and stamps each page of the Bid documents. The respective Department which issues a tender which was Social Department in this case only received duly stamped
documents from Provincial Treasury after the closing date, therefore Paragraph 8.2.1.9 of your correspondence is incorrect.

...Phakamile Investment was duly registered for UIF before and during the awarding process and supporting documentation from the Department of Labour were part of the pack and are available from the Department of Social Development viz:

Certificate of good standing issued on 2015/05/11 and expiring on 2016/04/30. Registration certificate issued on 2016/03/08”.

5.1.10. It was however, discovered from the evidence provided by the former HOD initially that other than the expired UIF certificate, Phakamile Investments had indeed made an application to request for a certificate of compliance. Phakamile Investments had applied for a new certificate of compliance on 25 January 2016 and the certificate was then issued on 08 March 2016.

5.1.11. Evidence before me has revealed that the tender was advertised in the tender bulletin of February 2016 and the closing date was recorded as 08 March 2016. The tender document of Phakamile Investments was received by the Department’s Supply Chain Management on 18 February 2016. The Bid Evaluation Committee (BEC) held their evaluation meeting on 08 April 2016.

5.1.12. The BEC report provided by the HOD reads under paragraph 02 that all service providers who did not meet the mandatory requirements were disqualified in the first round and responsive bids were evaluated further for functionality. A total of 47 bids were received and evaluated, 38 were then disqualified for not meeting the requirements. Amongst the disqualified bids, two (2) bids were disqualified for not having a UIF certificate. Phakamile Investments was listed as one of the nine (9) bids that were acceptable in terms of meeting the requirements, pricing and functionality.
5.1.13. In its recommendation, the BEC stated that the price of the first highest bidder was not responsive to the bid. The second highest bidder in terms of scoring was providing a service to the Department at the time of evaluation. Therefore, appointment of the service provider for the tender under evaluation would not be in the spirit of fairness and equitable distribution of resources.

5.1.14. The BEC stated further in their recommendations that the third highest bidder being Phakamile Investment was at the time of evaluation providing catering and cafeteria services at Swartfontein Treatment Centre where the tender in question was advertised. It was stated that the appointment of the service provider would not be in the spirit of fairness and equitable distribution of resources. Therefore, the service provider that scored as the fourth highest being Reashile Trading was recommended for appointment by the BEC.

5.1.15. The evaluated bids were adjudicated by the Bid Adjudication Committee (BAC) and a report to the former HOD was compiled by the Chairperson of the BAC on 25 May 2016. In their recommendations, the BAC stated that the reasons for eliminating the first highest bidder as non-responsive was supported. Also the reasons advanced by the BEC regarding the second highest bidder were also supported as the bidder at the time of adjudication and evaluation had two running contracts with the Department.

5.1.16. The third highest bidder being Phakamile Investments was not recommended by the BEC because the company was awarded the same contract in the previous year. Therefore, it would not have been in the interest of fairness to award them the tender again. However, The BAC stated in their recommendations that they have considered the issue of continuity and women empowerment which weighs heavily in favour of Phakamile Investments. As a result, Phakamile Investments was recommended for appointment. The
recommendations of the BAC were approved by the former HOD on 02 June 2016.

5.1.17. It should however be noted that the Department’s Procurement Policy does not put any restrictions or prevent the service provider who has rendered a service to the Department before from continuing to do so in future. Conversely, no restriction is provided for women empowerment, hence the appointment of Phakamile Investments. The advertisement for the catering and cafeteria services tender at Swartfontein Treatment Centre did not place any restrictions on the above mentioned recommendations of the BAC.

5.1.18. It is the Complainant’s version that the tender for the provision of travel arrangements and accommodation services for the Department was not properly awarded.

5.1.19. In her response to my enquiry dated 03 May 2017 as quoted in paragraph 5.1.6 above, the HOD refuted the allegation as baseless and untrue. She provided supporting documents for the tender for the provision of travel arrangements and accommodation services to the Department.

5.1.20. It is evident that the BEC conducted evaluation of the eleven (11) bids received for the tender for the provision of travel arrangements and accommodation services for the Department with tender number SOC/005/16/MP and submitted their report to the Chairperson of the BAC on 26 April 2016. Of the 11 bids received, three (3) were disqualified for not meeting the functionality threshold.

5.1.21. In their recommendations dated 26 April 2016, the BEC stated that five (5) bidders be appointed for the tender since they have satisfied all the tender requirements and they charge an acceptable rate. The bidders recommended for appointment were XL Travel Today, Dana Travel Agency, Zap Travel, Let's
Cruise Travel and Big Sky Travel. Three (3) bidders were not recommended for appointment based on the rate charged.

5.1.22. The BAC recommended the appointment of 04 bidders and excluded one from the recommendations of the BEC. In their report dated 25 May 2016, the BAC stated that XL Travel Today was excluded and not recommended for appointment on the grounds that they did not comply with the BEE scores, they received zero (0) score on BEE. The former HOD approved the recommendation of the BAC on 02 June 2016.

5.1.23. It is also the Complainant’s contention that a member of the Specification Committee also served in the Evaluation Committee for both of the irregularly awarded tenders.

5.1.24. In her response to the above allegation, the former HOD provided a memorandum of the appointment of Departmental Committees for the financial year ending 31 March 2017 prepared by the Chief Financial Officer, Mr JB Mbattha on 04 April 2016. The memorandum was approved by the former HOD on 06 April 2016, for the appointment of the Bid Adjudication, Bid Evaluation and Bid Specification Committees.

5.1.25. The Bid Evaluation Committee included the following members:

<table>
<thead>
<tr>
<th>NAME</th>
<th>DESIGNATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr CM Malele</td>
<td>Chairperson</td>
</tr>
<tr>
<td>Ms VZ Maseko</td>
<td>Deputy-Chairperson</td>
</tr>
<tr>
<td>Ms PA Nkosi</td>
<td>Member</td>
</tr>
<tr>
<td>Ms RA Jordaan</td>
<td>Member</td>
</tr>
<tr>
<td>Mr SM Khoza</td>
<td>Member</td>
</tr>
<tr>
<td>Mr KJ Dlamini</td>
<td>Member</td>
</tr>
</tbody>
</table>
5.1.26. The Bid Specification Committee included the following members:

<table>
<thead>
<tr>
<th>NAME</th>
<th>DESIGNATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ms MF Dlamini</td>
<td>Chairperson</td>
</tr>
<tr>
<td>Mr SG Ntuli</td>
<td>Deputy-Chairperson</td>
</tr>
<tr>
<td>Mr GS Mazibuko</td>
<td>Member</td>
</tr>
<tr>
<td>Ms DDT Mathebula</td>
<td>Member</td>
</tr>
<tr>
<td>Mr MM Makhubela</td>
<td>Member</td>
</tr>
<tr>
<td>Mr SC Shabangu</td>
<td>Member</td>
</tr>
<tr>
<td>Ms P Mbatha</td>
<td>Secretariat</td>
</tr>
</tbody>
</table>

5.1.27. It became evident from the documents obtained that no member of the Bid Specification Committee served in the Bid Evaluation Committee or vice versa.

Application of the relevant law

5.1.28. Section 195(1) of the Constitution, 1996, stipulates that public administration must be governed by the democratic values and principles enshrined in the Constitution. It requires *inter alia* a high standard of professional ethics and accountability in public administration as well as the efficient and economic utilisation of resources.

5.1.29. The BAC was expected to maintain this high standard of professional ethics when it adjudicated on the matter by being fair and ensure that it complies with the Department’s Supply Chain Management Policy.

5.1.30. Section 217(1) of the Constitution provides that when an organ of state (which includes a provincial sphere of government), contracts for goods or services, it
must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

5.1.31. The above section is supported by section 38(1)(a)(iii) of the PFMA which also provides, inter alia, that the accounting officer of a department must ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

5.1.32. In terms of the above provisions, the Accounting Officer of a Department or organ of state must ensure that proper systems are implemented to ensure that the principles of fairness, equitability, transparency, competitiveness and cost-effective are realized. It is evident that the Department has systems in place that ensures that the procurement of goods and services are done in accordance with the law. This has been seen from the different procurement committees that were established to ensure that proper processes were followed. However, the principles of fairness and transparency were overlooked.

5.1.33. The Department of Social Development’s Supply Chain Management Policy which was reviewed, as approved and adopted on 11 March 2015, states the following:

2.4 Code of Conduct for Bid Adjudication Committee
(a) Committee members must execute their responsibilities in a fair, impartial and transparent manner in terms of their delegated powers.

5.1.34. Members of the BAC are required to perform their responsibilities in a manner which is fair and transparent when adjudicating bids. The BAC of the Department adjudicated the bid for the provisioning of catering and cafeteria services at Swartfontein Treatment Centre and made recommendation for the appointment of Phakamine Investments who did not have a valid UIF certificate, through a process which was not fair, impartial or transparent.
5.1.35. Paragraph 16 of the policy deals with combating and avoiding abuse of supply chain management systems and provides that:

(a) Investigate any allegations against an official or other role player of corruption, improper conduct, favourism, unfair or irregular practices or failure to comply with the provisions of this policy, and when justified-

(i) take appropriate steps against such officials or other role players and inform the provincial treasury of such steps;

5.1.36. The recommendations of the BAC of the Department were approved by the Accounting Officer, appointing Phakamile Investments for the provisioning of catering and cafeteria services at Swartfontein Treatment Centre. The former HOD as the Accounting Officer overlooked this irregular practice and improper conduct by members of the BAC.

Conclusion

5.1.37. Based on the evidence, it can be concluded that the Department did not comply with its own Supply Chain Management Policy, the Constitution and the PFMA. The BAC did not comply with the Code of Conduct of the committee and the former HOD overlooked the principle of fairness. However, it was further discovered that no member of the Bid Specification Committee served in the Bid Evaluation Committee as alleged by the Complainant.

5.2. Regarding whether the Department acted improperly by continuing to pay the Complainant’s salary but refused, without a just cause, to allow him to report for duty after he was found not guilty of any misconduct:
Common cause issues

5.2.1. It is common cause that the Complainant is an employee of the Department holding a position of Director Supply Chain Management.

5.2.2. The Complainant was served with a notice of suspension. He attended a disciplinary hearing which was held on 18 – 19 January 2016, 5, 28 and 29 April 2016 and on 16 May 2016, respectively.

5.2.3. It is also common cause that the Complainant was charged with two (2) counts of misconduct and an alternative to the second count and was placed on precautionary suspension since June 2015. At the time he approached my office in January 2017, he was still on suspension despite the fact that he was found not guilty on both charges on 23 June 2016.

5.2.4. After he was found not guilty, the Complainant received a letter dated 05 July 2016 from the former HOD instructing the Complainant to report back to work. However, following the initial instruction to report for duty, the former HOD on 15 July 2016 retracted the instruction and advised the Complainant to exercise patience and not to report for duty as previously instructed.

Issues in dispute

5.2.5. The Complainant stated that he was suspended pending an investigation and after a disciplinary hearing he was found not guilty but the department refused to allow him back at work yet they continued to pay him a salary since July 2016 until the salary was stopped in October 2017.
5.2.6. My investigation team raised the matter with the Department on 08 February 2017.

5.2.7. The former HOD responded in a letter dated 03 May 2017 as follows:

“...The Department sent a communication to Mr Mahlangu advising him that the Department is considering its options in law in respect of the outcome...”

“...Upon finalization of our options, we then sent a communication to his attorney inviting them for a consultation meeting scheduled for January 2017, however Mr Mahlangu and his attorney did not show up...”

“...The Department then decided to transfer Mr Mahlangu to Nkangala District to the post of District Director with effect from 08 May 2017...”

“...Mr Mahlangu was paid a performance bonus for the previous period of the 2013/2014 financial year and not for the period whilst he was not at work...”

5.2.8. In her response, the former HOD provided supporting documents as Annexures regarding Mr Mahlangu’s continued stay on suspension.

5.2.9. The disciplinary hearing outcome report that the former HOD submitted revealed the decision of the presiding officer as: “the matter was hanging at 50/50 and in order to prove on a balance of probabilities, it must be at 50% plus one (1%) and in order to prove beyond reasonable doubt evidence should be at 80% upwards. Thus, in casu, the employer failed to prove on a balance of probabilities and as such I cannot find the employee guilty on both charges”. The presiding officer arrived at this decision on 23 June 2016.

5.2.10. It is evident that the employee was served with a notice of intention to suspend him and eventually suspended on May 2015. Charges against him were brought in 2016 and the disciplinary hearing was concluded in June 2016. On 05 July 2016, the former HOD wrote a letter to the Complainant informing him about the
outcomes of his disciplinary hearing and that his precautionary suspension was uplifted. The former HOD stated the following in the letter:

“1. Kindly be informed that the Department has received the outcome of your disciplinary process (see attached report), the Department is busy studying the report with a view to consider various options available for the Department”

“2. In the meantime, your precautionary suspension is hereby uplifted and you are expected to report to the Department on the 18 July 2016, you are required to report directly to your supervisor, who will appraise you with the decision of the Department if any.”

5.2.11. Following the above mentioned letter, the former HOD then wrote a second letter to the Complainant on 15 July 2016 advising him as follows:

“1. Kindly be informed that subsequent to our letter dated 05 July 2016 with the above heading, wherein we requested you to report on the 18 July 2016. Due to unforeseen circumstances, the Department would like to sincerely apologize for the inconvenience this might cause, since we could not finalise our options.”

“2. In the light of the above, you are hereby requested to exercise your patience and not to report as previously directed. The Department will communicate with you within two weeks from the date of this letter.”

5.2.12. Despite the promise to communicate with the Complainant within two weeks because they, as the Department had not finalised their options as mentioned above, the former HOD failed to revert to the Complainant and the Complainant had since been on suspension and continued to receive his full salary from the Department.
5.2.13. On 20 January 2017, the former HOD wrote a letter to Jacobs & Makwakwa Attorneys who were representing the Complainant in his battle to be reinstated. In the letter, she requested a consultation meeting in relation to the possible placement of the Complainant. The meeting was scheduled to be held on 30 January 2016. The requested meeting did not materialise because the Complainant and his legal team did not attend.

5.2.14. In a meeting with my investigation team, the Complainant stated that he had never received a letter from the former HOD nor his legal representative requesting a consultation. As a result, the Complainant submitted a letter dated 01 August 2016, where he wrote to the then MEC for the Department of Social Services, Ms NS Mtshweni requesting for intervention and reinstatement. He further stated that no response came forth from the MEC after he stated in the letter that he had been found not guilty in the disciplinary hearing.

5.2.15. The Complainant stated further that as a result of the delay of his reinstatement, he decided to approach the Public Health and Social Development Sectoral Bargaining Council (PHSDBC) in March 2017, but the council could not hear his matter because it was stated that he was still receiving a salary and his referral of the matter was premature.

5.2.16. On 03 May 2017, the former HOD wrote another letter to the Complainant informing him that subsequent to the letter addressed to his attorneys dated January 2017, where the requested meeting could not materialise because of non-attendance by the Complainant, the Department took a decision to transfer the Complainant to Nkangala District of Social Development to occupy the post of District Director. He was advised to report for duty on 08 May 2017.
5.2.17. It is evident that the Complainant did not report for duty at Nkangala District as directed by the former HOD after the Department took a decision to transfer him. It further became evident from a letter written to the Complainant by the Acting Head of Department, Ms TE Mhlongo on 20 September 2017 where she informed the Complainant that the Department had decided to give the Complainant another opportunity to report for duty at the Nkangala District from 01 October 2017. He was advised further that failure to report for duty, would leave the Department with no option but to consider suspending his salary or take other steps to ensure compliance.

5.2.18. It is evident that the Complainant did not report for duty once more as directed by the Department. As a result, his salary was stopped for the month of October 2017 and this conduct of the Department resulted in the Complainant engaging his legal representative to interdict the Department and to release his salary for October 2017. In an order granted by the Gauteng High Court on 24 October 2017, the Department was ordered to pay the Complainant his salary within 48 hours. This came after the Department was engaged by the Complainant’s union (NEHAWU) on 11 October 2017 to discuss the reinstatement of the Complainant. In the same meeting, the Department undertook to reinstate the Complainant subject to a discussion with the MEC.

5.2.19. The former HOD responded to the section 7(9) notice that I had issued to her on 24 June 2019. In her response dated 09 July 2019, the former HOD stated that there was a breakdown of relationship within the Chief Directorate as all the Senior Managers were directly/indirectly involved in the case between the Complainant and the victim, Mr Malele, who was apparently assaulted by the Complainant. No additional information was provided to counter what was already in my possession.
Application of the relevant law

5.2.20. Section 38(1)(a) of the Public Finance Management Act states that the Accounting Officer for a department, trading entity or Constitutional Institution: "must ensure that that department, trading entity or constitutional institution has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;"

5.2.21. The Complainant was acquitted on both charges that were levelled against him in June 2016. However, he was refused to report back for duty because he had been informed through a letter by the former HOD that the Department is considering its options. No response came forth to inform him about the options until he was informed that he was being transferred to Nkangala District. Throughout the delay in reinstating him, he had been receiving a salary from the Department without rendering any service.

5.2.22. Section 38(1)(b) and (c) of the Public Finance Management Act states that the accounting officer for a department, trading entity or constitutional institution:

"(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(c) must take effective and appropriate steps to—

(i) ….  

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and  

(iii) manage available working capital efficiently and economically."
5.2.23. The conduct of the former Accounting Officer of the Department was not in accordance to the above section of the PFMA which resulted in an ineffective, inefficient and uneconomical use of the resources of the department by continuously paying the Complainant a salary while he was not rendering any service to the Department. The failure to reinstate him could not be justified on any lawful grounds by the Department, an act which resulted in irregular, fruitless and wasteful expenditure.

5.2.24. Paragraph 29 of the Irregular Expenditure Framework of 2018 referred to in the National Treasury Instruction No. 1 of 2018/2019, acknowledges that there may be instances where irregular expenditure arose from fraudulent, corrupt, or criminal acts or through actions that deprived the Department from achieving value for money.

5.2.25. According to paragraph 30 of the same Framework an irregular expenditure emanating from fraudulent, corrupt or criminal acts may also result in a department incurring a loss. This must immediately be brought to the attention of the accounting officer or accounting authority in writing in order that he/she may institute a civil action for the recovery of the loss.

Conclusion

5.2.26. Based on the evidence gathered, it can be concluded that the Department incurred irregular, fruitless and wasteful expenditure by continuously paying the Complainant a monthly salary without any services being rendered by him when he could have been reinstated.
6. FINDINGS

Having regard to the evidence uncovered during the investigation, the regulatory framework determining the standard the Department should have complied with and the impact on the Complainant, I therefore make the following findings:

6.1 Regarding whether the Department unduly failed to follow proper procurement processes in the awarding of the Catering and Cafeteria Services and Travelling Arrangements tenders:

6.1.1 The allegation that the Department unduly failed to follow proper procurement processes in the awarding of the Catering and Cafeteria Services and Travelling Arrangements tenders is unsubstantiated.

6.1.2 The Department advertised, evaluated and adjudicated a tender for the provision of catering and cafeteria services at Swarfontein Treatment Centre in 2016. The BEC recommended the appointment of the fourth highest scored bidder because the first, second and third bidder already had been rendering services to the Department at the time of this tender.

6.1.3 The BAC instead, did not support the recommendations of the BEC. As a result, the BAC recommended the appointment of the third highest scored bidder being Phakamile Investments, citing reasons of continuity and women empowerment. The Accounting Officer approved the recommendations of the BAC. The UIF certificate was valid when the tender documents were submitted. Proper procurement procedures were followed by the Department in the awarding of the Catering and Cafeteria Services and Travelling Arrangements tenders. No irregularity could be found also in the awarding of the Travel Arrangement tender.
6.1.4 The conduct of the Department, particularly the BAC and HOD, was not in contravention of any applicable laws, especially, sections 195 and 217 of the Constitution, section 38(1)(a)(iii) of the PFMA and the Supply Chain Management Policy of the Department.

6.1.5 The conduct of the Department, particularly the BAC and HOD, does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Department acted improperly by continuing to pay the Complainant’s salary but refused, without a just cause, to allow him to report for duty after he was found not guilty of any misconduct:

6.2.1 The allegation that the Department acted improperly by continuing to pay for the Complainant’s monthly salary but refused to allow him to report for duty without a valid reason is substantiated.

6.2.2 The Complainant was charged for misconduct in 2015 and he was acquitted on both charges against him in 2016. However, the Department refused to allow him back at work without any justifiable reason. The Department continued to pay him a monthly salary until October 2017 when it decided to stop his salary after the Department attempted to transfer him to another District without providing him with any reason for the transfer. The Department was interdicted by the High Court and order to release the Complainant’s salary.

6.2.3 The Department and in particular the former HOD, failed to allow the Complainant to report for duty despite the fact that he was found not guilty for misconduct and the Department did not have any just cause as to why the Complainant should
not resume his duties. The conduct of the Department and the former HOD led to the incurring of irregular, fruitless and wasteful expenditure and also constitute abuse of power.

6.2.4 The conduct of the Department, in particular, the former HOD Ms N.L Mlangeni was in contravention of section 38(1)(a),(b) and (c) of the Public Finance Management Act.

6.2.5 The conduct of the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking is in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

7.1. The Department of Social Development must ensure that:

7.1.1 Within sixty (60) working days from the date of this report, the Head of Department determines an appropriate and reasonable amount recoverable, as irregular expenditure, from Ms. NL Mlangeni and/or any other person liable in law, taking into account taxable deductions such as Pay As You Earn (PAYE) and pension contributions; and

7.1.2 Within thirty (30) working days from the date of receipt of the amount certified by the Department as recoverable, it institutes civil proceedings, in terms of paragraph 30 of the Irregular Expenditure Framework, against Ms. NL Mlangeni
and/or any other person liable in law, for the recovery of such appropriate and reasonable amount.

8. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTION

8.1 The Acting Director-General must, within fifteen (15) working days from the date of the issuing of this report, submit to my office the implementation plan with timelines indicating how the remedial acting referred 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 Premier and the Acting Director-General of Mpumalanga Province, unless they obtain a Court order directing otherwise.

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