Report on an investigation into allegations of maladministration, corruption and the unconscionable use of public funds by the uMzimkhulu Local Municipality in connection with the restoration of the heritage of the dilapidated uMzimkhulu Memorial Hall


PUBLIC PROTECTOR SOUTH AFRICA

Allegations of maladministration, corruption and the unconscionable use of public funds by the uMzimkhulu Local Municipality

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, CORRUPTION AND THE UNCONSCIONABLE USE OF PUBLIC FUNDS BY THE UMZIMKHULU LOCAL MUNICIPALITY IN CONNECTION WITH THE RESTORATION OF THE HERITAGE OF THE DILAPIDATED UMZIMKHULU MEMORIAL HALL

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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, and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and the remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the allegations of maladministration, corruption and the unconscionable use of public funds by the uMzimkhulu Local Municipality (the Municipality) in connection with the restoration of the heritage of the dilapidated uMzimkhulu Memorial Hall.

(iii) Following publications by various media outlets, on 20 September 2017, I decided to conduct an Own Initiative investigation into the above allegations due to the public interest that it attracted, the seriousness of the allegations of imprudent use of public funds as well as allegations of deaths of Councillors who may have blown the whistle about the matter.

(iv) Based on the analysis of the allegations contained in the media reports as well as information that came to my attention from various sources, the following issues were identified to inform and focus the investigation:

(a) Whether the uMzimkhulu Local Municipality obtained the requisite permit from *Amafa A Kwa-Zulu Natali Heritage Resource Agency* to do alterations and renovations to the uMzimkhulu Memorial Hall, a heritage site, and whether the Agency properly exercised its oversight role on the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall;

(b) Whether the procurement process followed by the uMzimkhulu Local Municipality in appointing service providers for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996, read with the
Municipality’s Supply Chain Management Policy and other applicable prescripts; and

(c) Whether the uMzimkhulu Local Municipality Council exercised its oversight role over the Municipal administration to ensure that the project for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was implemented in accordance with the law and that the Municipality derived value for money.

(v) The investigation process was conducted through correspondence, meetings and interviews with two whistle-blowers, Messrs. Thabiso Zulu and Lesley Stuta; relevant officials from the uMzimkhulu Local Municipality; the service providers involved in the project, to wit, Messrs. Loyiso Maggaza of Loyiso Consultants; Mtopeli Buyeye of Buyeye Consulting and Bunmi Ilori of IDC Architects; correspondence and interviews with Ms Ros Devereux of Amafa a KwaZulu-Natal; correspondence to Ms Nondwe Monyake, the Surveyor – General of KwaZulu-Natal, Ms Debbie Whelan of Archaic Consulting and Sfiso Zungu of Sfiso Construction; as well as an inspection of all relevant documents and analysis and application of all relevant laws, and related prescripts.

(vi) Key laws taken into account to help the Public Protector determine if there had been maladministration, corruption and unconscionable use of public funds by the Municipality were principally those imposing administrative standards that should have been upheld by the Municipality. Those are the following:

a. Section 217 of the Constitution of the Republic of South Africa, 1996, which sets out the standard to be upheld in State procurement or Supply Chain Management processes, to ensure a fair, equitable, transparent, competitive and cost effective public procurement system;
b. The Municipal Finance Management Act, 2003, as well as its concomitant Regulations, which regulates the procurement of goods and services by Municipalities, as well as its financial accountability; and

c. The KwaZulu-Natal Heritage Act, 2008, and its concomitant Regulations, which provides protection to buildings older than sixty (60) years old in the KwaZulu-Natal Province, and which further sets out the legislative framework which needs to be adhered to before any alterations and / or renovations to such building older than sixty (60) years can proceed.

(vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings.

(a) Regarding whether the uMzimkhulu Local Municipality obtained the requisite permit from Amafa A Kwa-Zulu Natali Heritage Resource Agency to do alterations and renovations to the uMzimkhulu Memorial Hall, a heritage site, and whether the Agency properly exercised its oversight role on the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall:

(aa) The allegation that the uMzimkhulu Municipality went ahead and made alterations on the uMzimkhulu Memorial Hall, a heritage site, despite not having a requisite permit to do so from the Amafa A Kwa-Zulu Natali Heritage Resource Agency is substantiated;

(bb) The uMzimkhulu Municipality removed the front door and the windows of the Memorial Hall without it having been in possession of the requisite permit from Amafa;

(cc) Both the Municipal Manager of the Municipality and Ms. Ros Devereux of Amafa A Kwa-Zulu Natali conceded that the Municipality was not granted a
requisite permit to do alterations and renovations to the uMzimkhulu Memorial Hall, a heritage site. Both admitted that the Heritage Agency gave the Municipality an “in principle” approval subject to the submission of additional information which would have made it possible for the permit to be granted;

(dd) The removal of the windows and the door constituted a violation of section 33 of the KwaZulu-Natal Heritage Act, and its concomitant Regulations;

(ee) The conduct of the Municipality 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;

(ff) Similarly, *Amafa A Kwa-Zulu Natali* Heritage Council should not have allowed the Municipality to commence with the renovations without the requisite permit and should have stopped them as continuing with demolishing arts of the structure constituted a violation of sections 33, 37 and 38 of the Kwa-Zulu Natal Heritage Act, 2008; and

(gg) Therefore the Agency failed to exercise its oversight function with regard to the refurbishment of the uMzimkhulu Memorial Hall. As the Agency had already granted the Municipality an “in principle” approval but not the permit, they should have held continuous monitoring of the landmark site to ensure its preservation.

(b) **Regarding whether the procurement process followed by the uMzimkhulu Local Municipality in appointing service providers for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996, read with the Municipality’s Supply Chain Management Policy and other applicable prescripts:**
(aa) The allegation that the procurement process followed by the uMzimkhulu Municipality in appointing service providers for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was not in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996, read with the Municipality’s Supply Chain Management Policy, is substantiated;

(bb) The Municipality failed to follow a competitive bidding process in the appointment of the service providers Loyiso Consultants and Buyeye Consulting. Both these entities were previously involved in the project and therefore, had intimate knowledge about the project when they submitted their proposals to the Municipality. Loyiso Consultants conducted the feasibility study prior to appointment for the same project, and Buyeye Consulting prepared the BOQ during the feasibility study as a subcontractor to Loyiso Consultants, and was thereafter also a subcontractor to Loyiso Consultants when the construction commenced;

(cc) The Municipality did not comply with the provisions of section 217 of the Constitution of the Republic of South Africa, 1996, which obliges it to follow a procurement process which is competitive. In addition, the Municipality failed to provide a mechanism, in terms of its Supply Chain Management Policy, for the disclosure of potential conflicts of interests by contractors and the subsequent disqualification of them from participating the procurement process, as required by section 112(1)(j) of the Municipal Finance Management Act;

(dd) The Municipality also exposed itself to a risk of non-completion of the project when it allowed the appointment of a contractor on which it had not conducted any due diligence and it made payment directly to an entity with whom they had no direct contractual relationship, in violation of paragraph 43 of its Supply Chain Management Policy;
(ee) The Municipality failed to adhere to the provisions of the SLA entered into between itself and Loyiso Consultants when it became apparent that Loyiso Consultants was performing poorly. Even after being advised to terminate the contract in May 2015, the Municipality, in contravention of the SLA, continued with Loyiso Consultants as Implementing Agent for the project until March 2016;

(ff) The expenditure incurred by the Municipality for the refurbishment of the Memorial Hall for the period May 2015 until March 2016 constitutes irregular expenditure;

(ee) The conduct of the Municipality 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.

(c) **Regarding whether the uMzimkhulu Local Municipality Council exercised its oversight role over the Municipal administration to ensure that the project for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was implemented in accordance with the law and that the Municipality derived value for money:**

(aa) The allegation that the uMzimkhulu Local Municipal Council failed to exercise oversight over the Municipal Administration to ensure that the refurbishment and restoration of the Memorial Hall was implemented and in accordance with the law, is unsubstantiated;

(bb) It appeared from the evidence that the indeed Council exercised oversight over the project and that regular feedback was provided to Council and to EXCO regarding the progress of the project relating to the upgrade and refurbishment of the Memorial Hall.
(cc) Council approved the termination of the contract between the Municipality and Loyiso Consultants and further approved the appointment of a new Implementing Agent.

(viii) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, with the view to remedying the improper conduct and maladministration, is the following: -

The Municipal Manager to take urgent and appropriate steps to: -

(a) Ensure that the Municipality revises its Supply Chain Management Policy, to provide for the compulsory disclosure of any conflict of interest prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids, as required by section112(1)(j) of the MFMA, within 60 days of date of this report;

(b) Ensure that the Municipality revises its Supply Chain Management Policy within sixty (60) days from date of this report, to include a provision that any service provider which is to be appointed by an Implementing Agent in a Turnkey project, is registered on the database of the Municipality in line with the Municipality’s Supply Chain Management Policy, to ensure compliance with the due diligence requirement prior to appointment;

(c) Ensure that the uMzimkhulu Local Municipality submits its application for a permit to *Amafa A KwaZulu-Natali* within thirty (30) days from date of this report;

(d) *Amafa A KwaZulu-Natali* to ensure that it adjudicates on the application submitted by the Municipality within the timeframes provided for the KwaZulu-Natal Heritage Act.
The National Head: Directorate for Priority Crime Investigations to take urgent and appropriate steps to:

(a) Investigate the root causes and/or motivation behind the alleged political killings of uMzimkhulu Councillors, and provide progress updates on its investigation to me quarterly;

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, CORRUPTION AND THE UNCONSCIONABLE USE OF PUBLIC FUNDS BY THE UMZIMKHULU LOCAL MUNICIPALITY IN CONNECTION WITH THE RESTORATION OF THE HERITAGE OF THE DILAPIDATED UMZIMKHULU MEMORIAL HALL

1. INTRODUCTION

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

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation: -

1.2.1 Hon. M B Mpabanga, the Executive Mayor of the uMzimkhulu Local Municipality;

1.2.2 Mr Zweliphantsi Sikhosana, the Municipal Manager of the uMzimkhulu Local Municipality;

1.2.3 Mr Loyiso Magqaza of Loyiso Consultants;

1.2.4 Mr Mtobeli Buyeye of Buyeye Consulting; and

1.2.5 Mr Sifiso Zungu of Sifiso Building Contractors.

1.3 Section 7(9) letters were previously written to the following persons to provide them with an opportunity to respond to my provisional findings: -

1.3.1 Mr Z Sikhosana, the Municipal Manager of the uMzimkhulu Local Municipality;

1.3.2 Mr Loyiso Magqaza of Loyiso Consultants;

1.3.3 Mr Mtobeli Buyeye of Buyeye Consulting; and

1.3.4 Mr Sifiso Zungu of Sifiso Construction.
1.4 This report relates to an investigation into allegations of maladministration, corruption and the unconscionable use of public funds by the uMzimkhulu Local Municipality in connection with the restoration of the heritage of the dilapidated uMzimkhulu Memorial Hall.

2. THE COMPLAINT

2.1 The investigation was prompted by various media reports which were published following the shooting of the late Councillor Sindiso Magaqa on 13 July 2017, as well as speeches that were made at his funeral held on 16 September 2017.

2.2 During the period July to September 2017, various media houses reported extensively about allegations of corruption and reckless use of public funds by the Municipality in the procurement and payment of service providers who were involved in the project for the heritage restoration of the dilapidated uMzimkhulu Memorial Hall. In this regard, it was inter alia alleged that:

2.2.1 A tender for the upgrading and refurbishment of the uMzimkhulu Memorial Hall was awarded to Loyiso Consulting on 21 August 2012 for an amount of R 1338 190.20.

2.2.2 On 15 November 2013, the Municipality awarded another tender for the upgrade and refurbishment of the Memorial Hall, amounting to R17.9 million, to Loyiso Consulting, (same company) over a period of eighteen (18) months. However, since then, the project had not been completed and the contractor was alleged to have abandoned the project. It was further alleged that Mr Loyiso Magqaza, the Director of Loyiso Consulting, was inappropriately linked and/or associated with a Senior Municipal Official by the name of Ms Kumbuza Dweba, who was at the time of the awarding of the contract the Director responsible for Infrastructure Development at the Municipality, through a special and/or close and/or romantic relationship.
2.2.3 When *Loyiso Consulting* could not complete the project and abandoned same, the entity ceded its rights to an entity by the name and style, *Sfiso Building Contractors*, and thus requested the Municipality to pay the remaining R15 million of the contract directly to the latter. Despite *Sfiso Building Contractors* having been the contractor on site at the time, the Municipality had no contractual relationship with this entity. *Sfiso Building Contractors* also abandoned the project without completion.

2.2.4 On 04 March 2016, the Municipality advertised a tender for the completion of the Memorial Hall under reference number KZN435/15/16/022/INFR, which was ostensibly awarded to *Buyeye Consulting* on 29 April 2016 at a cost to the Municipality of R14 525 018.05 for a period of ten (10) months.

2.2.5 Despite the expiry of the tenure of the contract, the project had still not been completed. Instead, allegations surfaced that the expenditure related thereto had ballooned to approximately R37.9 million, a figure which was not commensurate with the work that had been completed.

2.2.6 According to the information obtained during my preliminary investigation, it was established that, following the appointment of *Buyeye Consulting*, the municipality made various upfront payments to this entity, despite the fact that it had not at that stage set foot on the construction site.

2.2.7 It was alleged that the entity was paid three (3) huge sums of money in a space of three (3) days to wit; R6 million, paid on a Wednesday, R7 million on a Thursday and R3 million paid on a Friday.

2.2.8 It was further alleged that, between the period 10 and 30 June 2016, *Buyeye Consulting* was paid amounts varying from R650 000.00 to R1.6 million and R1.7 million respectively. These payments were allegedly made without the entity submitting Progress Payment Certificates as proof of work already completed to justify the municipality remitting same.
2.2.9 The pictures below depict the Memorial Hall as it was before the construction started. The building at the back of the Memorial Hall is an extended community hall, which according to Ms Devereux, had been there since at least 1954.
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) 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; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers 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 (para 65);

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

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor 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 (para 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. (para 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. (para 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. (para 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; (para 71(a));

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 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 (para 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 In the matter of President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the full court held as follows regarding the powers of the Public Protector:-

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment)

3.7.2 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);

3.7.3 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective. (paragraph 85 and 152 of the judgment)

3.7.4 There is nothing in the Public Protector act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4) (c) (ii) of the Public Protector Act (paragraph 91 and 92 of the judgment)
3.7.5 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 (paragraph 100 and 101 of the judgment):

3.7.5.1 Conduct an investigation;
3.7.5.2 Report on that conduct; and
3.7.5.3 To take remedial action.

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

3.7.7 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. (Paragraph 105 of the report). This was a finding on NEF judgment as well.

3.7.8 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector form taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paragraph 107 and 108 of the Judgment).

3.7.9 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).

3.8 The jurisdiction and power to investigate was not disputed by any of the parties. However, the jurisdiction to investigate the provisional liquidator’s conduct was questioned by the Master, to which matter the following is pointed out:

3.8.1 The Public Protector is empowered by both the Constitution as well as the enabling legislation; the Public Protector Act, to investigate any conduct in
state affairs or in the public administration in any sphere of government; as well as public administration in connection with the affairs of government at any level or of a person performing a public function.

3.5 The uMzimkhulu Local Municipality is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector’s mandate to investigate.

3.6 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 was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3. This complaint was classified as a Good Governance and Integrity complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

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 improper conduct or to maladministration?
d) In the event of improper conduct or maladministration what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?

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 focused on whether and to what extent the Municipality fulfilled its responsibilities.

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 or organ of state to prevent maladministration and prejudice. In this case, key reliance was placed on legislation, prescripts and policies regulating financial management and procurement by Municipalities.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improper conduct or maladministration.

4.3 Based on the analysis of the allegations contained in the media reports as well as information that came to my attention from various sources, the following issues were identified to inform and focus the investigation:
(a) Whether the uMzimkhulu Local Municipality obtained the requisite permit from *Amafa A Kwa-Zulu Natali Heritage Resource Agency* to do alterations and renovations to the uMzimkhulu Memorial Hall, a heritage site, and whether the Agency properly exercised its oversight role on the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall;

(b) Whether the procurement process followed by the uMzimkhulu Local Municipality in appointing service providers for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996, read with the Municipality's Supply Chain Management Policy and other applicable prescripts; and

(c) Whether the uMzimkhulu Local Municipality Council exercised its oversight role over the Municipal administration to ensure that the project for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was implemented in accordance with the law and that the Municipality derived value for money.

4.3. The Key Sources of Information

4.3.1. Documentation

4.3.1.1 Documents received from two whistle-blowers;

4.3.1.2 Documents received from the uMzimkhulu Local Municipality;

4.3.1.3 Documents received from *Mr. Loyiso Magqaza* of *Loyiso Consultants, Project Managers and Consulting Engineers* (hereinafter referred to as Loyiso Consultants);
4.3.1.4 Documents received from Mr. Mtolbi Buyeye of Buyeye Consulting: *Quantity Surveyors & Project Managers* (hereinafter referred to as Buyeye Consulting);

4.3.1.5 Documents received from Mr. Bunmi Ilori of IDC Architects;

4.3.1.6 Documents received from Ms. Debbie Whelan of Archaic Consulting;

4.3.1.7 Documents received from Ms. Ros Devereux of Amafa a Kwa-Zulu Natali;

4.3.1.8 Documents received from Mr. Robert Brusse of Robert J W Brusse Architects;

4.3.1.9 Documents received from MTN;

4.3.1.10 Cell data records received from Vodacom;

4.3.1.11 Cell data analysis received from the *Special Investigating Unit*;

4.3.1.12 Bank statements and information received from First Rand Bank Ltd;

4.3.1.13 Bank statements and information received from Capitec Bank Ltd;

4.3.1.14 Bank statements and information received from *Barclays Africa Group Ltd*;

4.3.1.15 Documents received from the Alfred Nzo Municipality;

4.3.1.16 Affidavits and bank statements received from Councillors; Senior Management of the uMzimkhulu Local Municipality and Messrs. Loyiso Magqaza and Mtolbi Buyeye after serving Notices in terms of sections 7(4) and (5) of the Public Protector Act, 1994;

4.3.1.17 Documents received from Mr. Hein Jordt of C-Track;
4.3.1.18 uMzimkhulu Local Municipality’s formal response to my Notice in terms of section 7(9) of the Public Protector Act, 1994;

4.3.1.19 Formal response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, received from Messrs. Mduzulwana Attorneys & Legal Costs Consultants on behalf of Mr. Loyiso Magqaza of Loyiso Consulting;

4.3.1.20 Formal response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, received from Ms. Ros Devereux of Amafa A KwaZulu-Natali.

4.3.2. Correspondence Sent and Received

4.3.2.1 Email correspondence sent to Mr. Bunmi Ilori of IDC Architects on 18 September 2017;

4.3.2.2 Email correspondence sent to Mr. Thabiso Zulu, a whistle-blower, on 18 September 2017;

4.3.2.3 Letter sent to Mr. Sikhosana, the Municipal Manager of the uMzimkhulu Local Municipality on 21 September 2017;

4.3.2.4 Letter sent to Mr. Loyiso Magqaza of Loyiso Consultants on 21 September 2017;

4.3.2.5 Letter sent to Mr. Siah Masikane of Sfiso Construction on 21 September 2017;

4.3.2.6 Letter sent to Mr. Mtebeli Buyeye of Buyeye Consulting on 21 September 2017;

4.3.2.7 Letter sent to Mr. Bunmi Ilori of IDC Architects on 21 September 2017;

4.3.2.8 Letter sent to Ms. Ros Devereux of Amafa A KwaZulu-Natali (Amafa) dated 21 September 2017;
4.3.2.9 Email received from Ms. Ros Devereux of Amafa dated 22 September 2017;

4.3.2.10 Email received from Ms. Ros Devereux of Amafa A KwaZulu-Natali on 28 September 2017;

4.3.2.11 Email sent to Mr. Mxobeli Buyeye of Buyeye Consulting on 29 September 2017;

4.3.2.12 Email sent to Mr. Siah Masikane of Sfiso Construction on 29 September 2017;

4.2.3.13 Email sent to Mr. Loyiso Magqaza of Loyiso Consultants on 29 September 2017;

4.2.3.14 Email received from Mr. Mxobeli Buyeye of Buyeye Consulting on 03 October 2017;

4.2.3.15 Email to Messrs. Loyiso Magqaza, Mxobeli Buyeye and Bunmi Ilori dated 04 October 2017;

4.2.3.16 Email to Messrs. Loyiso Magqaza, Mxobeli Buyeye and Bunmi Ilori dated 05 October 2017

4.2.3.17 Email to Mr. Vikinduku Mnculwane and Ms. Ros Devereux of Amafa dated 09 October 2017;

4.2.3.18 Email correspondence exchanged between the PPSA investigator and Ms. Ros Devereux of Amafa on 09 October 2017;

4.2.3.19 Email correspondence exchanged between the PPSA investigator and Ms. Ros Devereux of Amafa on 10 October 2017;

4.2.3.20 Email correspondence exchanged between the PPSA investigator and Mr. Sikhosana, the Municipal Manager of the uMzimkhulu Local Municipality on 10 October 2017;
4.2.3.21 Email to Mr. Loyiso Magqaza dated 10 October 2017;

4.2.3.22 Email correspondence to the Municipal Manager and the CFO of the Alfred Nzo Municipality dated 09 and 10 October 2017;

4.2.3.23 Email received from Mr. Loyiso Magqaza dated 10 October 2017;

4.2.3.24 Email to Mr. Loyiso Magqaza dated 10 October 2017;

4.2.3.25 Email to Mr. Bunmi Ilori of IDC Architects dated 10 October 2017;

4.2.3.26 Email received from Ms. Avela Mjila of the Alfred Nzo Municipality dated 10 October 2017;

4.2.3.27 Email received from Mr. Bunmi Ilori of IDC Architects dated 10 October 2017;

4.2.3.28 Email to Mr. Sikhosana, the Municipal Manager of the uMzimkulu Local Municipality dated 10 October 2017;

4.2.3.29 Email correspondence exchanged between the PPSA investigator and Mr. Loyiso Magqaza on 10 October 2017;

4.2.3.30 Email to Mr. Mtobeli Buyeye of Buyeye Consulting on 10 October 2017;

4.2.3.31 Email to Mr. Loyiso Magqaza of Loyiso Consultants on 11 October 2017;

4.2.3.32 Email to Ms. Ros Devereux of Amafa on 11 October 2017;

4.2.3.33 Email correspondence exchanged between the PPSA investigator and Ms. Debbie Whelan on 11 October 2017;

4.2.3.34 Email correspondence exchanged between the PPSA investigator and Mr. Sikhosana, the Municipal Manager of the uMzimkulu Local Municipality on 12 October 2017;

4.2.3.35 Email to Mr. Bunmi Ilori of IDC Architects dated 12 October 2017;
4.2.3.36 Email to Mr. Mtobeli Buyeye of Buyeye Consulting dated 12 October 2017;

4.2.3.37 Email correspondence exchanged between the PPSA investigator and the uMzimkhulu Local Municipality dated 13 October 2017;

4.2.3.38 Email correspondence exchanged between the PPSA investigator and Mr. Robert Brusse of Robert J W Brusse Architects dated 18 October 2017;

4.2.3.39 Email to Mr. Mtobeli Buyeye of Buyeye Consulting dated 18 October 2017;

4.2.3.40 Email to Mr. Robert Brusse dated 20 October 2017;

4.2.3.41 Email to Mr. Mtobeli Buyeye of Buyeye Consulting dated 20 October 2017;

4.2.3.42 Email to the uMzimkhulu Local Municipality dated 20 October 2017;

4.2.3.43 Emails received from Mr. Robert Brusse dated 20 October 2017;

4.2.3.44 Email to Mr. Sikhundla of the Alfred Nzo Municipality dated 24 October 2017;

4.2.3.43 Email correspondence exchanged between the PPSA investigator and Mr. Robert Brusse on 25 and 26 October 2017;

4.2.3.44 Email received from Ms. Nomtandazo Khonza of the uMzimkhulu Local Municipality on 25 October 2017;

4.2.3.45 Email received from Mr. Kholi of the Alfred Nzo Municipality dated 26 October 2017;

4.2.3.46 Email received from Mr. Mtobeli Buyeye of Buyeye Consulting dated 31 October 2017;

4.2.3.47 Email and letter received from Messrs. Mgザli Attorneys dated 14 November 2017;

4.2.3.48 Letter to Adv. Mothibi of the Special Investigating Unit on 28 November 2017;
4.2.3.49 Letter to Ms. Nondwe Monyake, the Surveyor-General of KwaZulu-Natal dated 28 November 2017;

4.2.3.50 Letter received from Ms. Nondwe Monyake, the Surveyor-General of KwaZulu-Natal dated 06 December 2017;

4.2.3.51 Email received from Adv. Malla on behalf of Mr. Loyiso Magqaza on 11 January 2018;

4.2.3.52 Email received from Adv. Malla on behalf of Mr. Loyiso Magqaza on 31 January 2018;

4.2.3.53 Email to Ms. Vythilingam of Vodacom on 02 February 2018;

4.2.3.54 Letter to Hon. Mpabangana, the Executive Mayor of the uMzimkulu Local Municipality dated 19 February 2018;

4.2.3.55 Notice in terms of sections 7(4) and (5) of the Public Protector Act, 1994, issued to Messrs. Sfiso Zungu of Sfiso Construction dated 19 February 2018;

4.2.3.56 Letter to Adv. Jan Mothibi of the Special Investigating Unit dated 19 February 2018;

4.2.3.57 Notice in terms of sections 7(4) and (5) of the Public Protector Act, 1994, issued to Mr. Gerrie Fourie, the Chief Executive Officer of Capitec Bank Ltd dated 19 February 2018;

4.2.3.58 Notice in terms of sections 7(4) and (5) of the Public Protector Act, 1994, issued to Ms. Sashi Sing, of the Fraud Risk Department of First Rand Bank Ltd dated 19 February 2018;

4.2.3.59 Notice in terms of sections 7(4) and (5) of the Public Protector Act, 1994, issued to Mr. Marthinus van Rensburg, General Counsel: Shared Services at Barclays Africa Group Ltd dated 19 February 2018;
4.2.3.60 Email correspondence received from the Hon. Mpabanga, the Executive Mayor of the uMzimkhulu Local Municipality dated 20 February 2018;

4.2.3.61 Letter received from Adv. J L Mothibi of the Special Investigating Unit dated 20 February 2018;

4.2.3.62 Letter to Mr. Leonard Lekgetho, Acting Projects Director at the Special Investigating Unit dated 28 March 2018;

4.2.3.63 Email received from Mr. Felix Lee of the Special Investigating Unit on 11 April 2018;

4.2.3.64 Email to Mr. Felix Lee of the Special Investigating Unit on 13 April 2018;

4.2.3.65 Email received from Mr. Felix Lee of the Special Investigating Unit dated 04 May 2018;

4.2.3.66 Email received from Mr. Felix Lee of the Special Investigating Unit dated 11 May 2018;

4.2.3.67 Email received from Mr. Felix Lee of the Special Investigating Unit dated 15 May 2018.

4.3.3. Interviews, Meetings and Inspections in loco

4.3.3.1 Meeting with two whistle-blowers, to wit, Messrs. Les Stuta and Thabiso Zulu, held on 28 September 2017;

4.3.3.2 Meeting with the Executive Mayor, the Deputy Mayor, the Municipal Manager and other relevant officials of the uMzimkhulu Municipality on 03 October 2017;

4.3.3.3 Meeting with Mr Loyiso Magqaza of Loyiso Consulting on 12 October 2017;
4.3.3.4 Meeting with Ms Ros Devereux of Amafa A KwaZulu-Natal on 12 October 2017;

4.3.3.5 Meeting with Mr Bunmi Ibori of IDC Architects on 12 October 2017;

4.3.3.6 Meeting with Mr Mtoebeli Buyeye of Buyeye Consultants on 17 October 2017;

4.3.3.7 Meeting with the Executive Mayor, the Municipal Manager and other relevant officials of the uMzimkhulu Municipality on 17 October 2017;

4.3.3.8 Meeting with Mr Robert Brusse of Robert J W Brusse Architects on 19 October 2017;

4.3.3.9 Meeting with Ms Pinky Vythilingam, Supervisor: LEA Support at Vodacom on 26 January 2018;

4.3.3.10 Consultation with Mr. Riaan Strydom, Senior Forensic Investigator at Capitec Bank Ltd on 08 March 2018;

4.3.3.11 Meeting with Messrs. Leonard Lekgetho and Felix Lee, as well as Ms. Minette Prinsloo of the Special Investigating Unit on 11 April 2018;

4.3.3.12 Meeting with Mr Felix Lee and Ms. Minette Prinsloo of the Special Investigating Unit on 11 May 2018.

4.3.4 Legislation and other prescripts

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

4.3.4.2 The National Heritage Resources Act, 25 of 1999;

4.3.4.3 The KwaZulu-Natal Heritage Act, 4 of 2008;
4.3.4.4 The KwaZulu-Natal Heritage Regulations, GG 727, 02 April 2012;

4.3.4.5 Local Government: Municipal Finance Management Act, 56 of 2003;

4.3.4.6 The Municipal Supply Chain Management Regulations, GG 27636, 30 May 2005;

4.3.4.7 The uMzimkhulu Local Municipality's Supply Chain Management Policy, 2012;

4.3.4.8 The Local Government: Municipal Systems Act, 32 of 2000.

4.3.5. Case Law

4.3.5.1 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; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).
5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the uMzimkhulu Local Municipality obtained the requisite permit from Amafa A Kwa-Zulu Natali Heritage Resource Agency to do alterations and renovations to the uMzimkhulu Memorial Hall, a heritage site, and whether the Agency properly exercised its oversight role on the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall:

Issues that are Common Cause

It is not in dispute that:

5.1.1 The uMzimkhulu Memorial Hall is a Heritage Site as defined in the KwaZulu-Natal Heritage Act 4 of 2008;

5.1.2 Any alterations to on a Heritage Site must get a prior approval from a Heritage Resource Agency responsible for that jurisdictional are

Issues in dispute

5.1.3 The issue for my determination is whether the uMzimkhulu local Municipality obtained the necessary approvals from Amafa Akwa Zulu-Natali Heritage Resource Agency to do alterations and refurbishments to the uMzimkhulu Memorial Hall.

5.1.4 On 21 September 2017, I corresponded with Ms Roslyn Devereux, the Head of the Built Environment Section of Amafa Akwa Zulu-Natali enquiring whether the
Agency was aware of the alterations made to the uMzimkhulu Memorial Hall and whether such alterations were made with their approval.

5.1.5 She responded on 28 September 2017 and stated that the municipality submitted an application on 11 January 2013 in accordance with the provisions of section 33 of the KwaZulu-Natal Heritage Act No. 4 of 2008 (The Heritage Act) for a permit to do alterations and additions to the Strachan Hall, uMzimkhulu.

5.1.6 According to Ms Devereux, the application was “approved in principle” subject to the following additional information being provided by the municipality;

5.1.6.1 Drawings and specifications for the removal of the extensions to the building to be compiled and submitted by an Architect with Heritage experience (who will also have to supervise the work);

5.1.6.2 Submission of a full set of drawings for the new which must be attached to the permit;

5.1.6.3 Proof that a public participation process was conducted and that the application has been advertised in the government gazette and that the owners and occupiers of buildings and/or sites within a 100 meter radius from the heritage site have been consulted; and

5.1.6.4 The outcome of the public participation process is submitted to the Agency as envisaged in the Heritage Act Regulations.

5.1.7 Despite the request, so stated Ms Devereux, the municipality did not submit the information and no further correspondence was exchanged.

5.1.8 According to Ms Devereux, in June 2014, an attempt was made by the municipality to reinstate the lapsed application and the Agency requested
submission of the information referred to above. However, she stated that in June 2015, she was contacted by Messrs. Walker Smith Architects who resubmitted the original drawings for approval and they were also requested to furnish the outstanding information referred to above.

5.1.9 She further stated that she was subsequently contacted by Mr Robert Brusse and she was engaged in various consultations with him wherein she explained the application process as well as the requisite information to be submitted to enable the Agency to consider the application for a permit. Since then, no formal application for the permit was received by the Agency.

5.1.10 In conclusion, Ms Devereux stated that a permit was never issued by the Amafa Akwa Zulu-Natali granting authorization to the uMzimkhulu Local Municipality to do alterations and/or additions to the uMzimkhulu Memorial Hall. With regard to the windows that were removed from the hall, she stated that such conduct constituted a violation of section 33 of the Heritage Act as the municipality had no permit from the Agency to do so. She however noted that the windows were said to have been stored pending their restoration.

5.1.11 The uMzimkhulu Local Municipality was also approached on 21 September 2017 with an enquiry whether they obtained the requisite permit from Amafa Akwa Zulu-Natali granting them authority to do renovations and alterations on the uMzimkhulu Memorial Hall as the Hall was a Heritage Site and as required by the Heritage Act, they needed to obtain the permit prior to conducting any renovations or alterations on the site.

5.1.12 The Municipality responded on 3 October 2017 and stated that they obtained an “In Principle” permit and approval from Amafa Akwa Zulu-Natali subject to certain conditions. The municipality further stated that they were awaiting the consolidation of the property so as to continue with the construction of the building upwards. According to the municipality, an application for the
consolidation of the three properties was made so that final approval could be obtained from Amafa Akwa Zulu-Natali.

Amafa's response to the Public Protector's Notice in terms of section 7(9) of the Public Protector Act, 1994

5.1.13 Amafa indicated that, whilst it was not disputed that the Municipality failed to obtain formal approval for the work and that it undertook work that had been “approved in principle,” is was also not disputed that the Municipality was aware that formal Amafa approval was required prior to work being undertaken as specifically stated on the letter indicating the approval in principle;

5.1.14 It acknowledged that what was not approved was the work on the historic part of the complex. According to Amafa, the applications made for the redevelopment of the site on 11 January 2013 and the 13 June 2014 by IDC Architects were referred for more information and for the public participation process as was required by the Regulations issued in terms of the Kwa-Zulu Natal Heritage Act;

5.1.15 In addition, it was submitted that these applications were ostensibly submitted during the feasibility phase, and that Amafa was not informed at the time of the submission of the 13 June 2014 application that the project had moved to the implementation phase. Amafa first discovered that work had begun on site on the 18th of April 2015. According to Amafa, work appeared to be at a standstill at that time. During the week immediately following this discovery, Amafa attempted to contact the Architect who made the submissions, but unsuccessfully;

5.1.16 Seven weeks after the above discovery, a further application which included the drawings submitted on 13 June 2014 for the refurbishment of the Memorial
Hall was submitted — on 06 June 2015. The drawings were submitted by a new agent and second architect, Mr. Wayne Usher of Walker Smith Architects, whom last communicated with Amafa on 2 November 2015 without having obtained formal approval of the IDC drawings due to the fact that the requirements listed in the referral letter of the 06 February 2013, had still not been met;

5.1.17 In 2016, Amafa was notified by Mr. Robert Brusse that he would be taking over the heritage aspects of the work and Amafa was in contact with him from that point onwards, with confirmation that there was no progress received on 23 March 2017. On 06 September 2017, Amafa staff confirmed on site that the work was stopped and no work had continued since 18 April 2017;

5.1.18 Amafa further submitted that the building is a memorial structure, protected under section 41, which automatically protects it as if it had been formally protected under section 39, as it is State owned. Since the application received in 2014 had given an impression that the project was still at feasibility stage and not at implementation stage, there was no reason for Amafa to have expected that work had commenced or that there was anything to monitor on site. Since no permit had been issued, there was no requirement for Amafa to monitor work under the conditions of a permit;

5.1.19 Amafa supplied my investigation team with copies of Dr. Whelan’s assessment of the building. Amafa thus submitted that the demolition of the addition to the Memorial Hall was in line with the recommendations and had been approved in principle as per the referral letter issued on 6 February 2013. It further submitted that no parts of the building that were not earmarked for demolition were demolished and that there was no demolition to stop. Furthermore, the fears that Amafa had with regard to the impact of the demolition of the addition proved to be unfounded;
5.1.20 **Amafa** became aware that the work had taken place on the site by accident when passing by uMzimkhulu *en route* to Kokstad on Saturday 18 April 2015. Apart from repairing the existing roof and not replacing it with corrugated iron as recommended by **Dr. Whelan**, no work undertaken appeared to be in contravention of her recommendations and the drawings and specifications submitted to **Amafa** which had not been required to be revised, only embellished on with additional information that was required;

5.1.21 **Amafa** would most likely have approved the revised drawings showing the roof repaired, as has been carried out as there was no concrete evidence that the original roofing material was corrugated iron;

5.1.22 **Ms. Devereux** submitted that, during late August and early September 2016, **Mr. Brusse** started copying her on emails which he sent to **Buyeye Consulting** regarding the door and the windows that had been removed for refurbishing, *and she contacted Mr. Buyeye to obtain confirmation regarding what happened to the door and the windows. Mr Buyeye assured Ms. Devereux at that stage that they had been returned to site and were in secure storage;*

5.1.23 **Amafa** acknowledged that oversight can be exercised by them in line with the provisions of sections 45 and 46 of the **National Heritage Resources Act** and the **Amafa Applications Policy and Procedures**. This included the issuing of a Stop Work Order or a Compulsory Repair Order. With regard to its neglect to issue a Stop Work Order, **Amafa** submitted that it discovered the contravention on **18 April 2015**, when it appeared that work on site had in fact been stopped already. Therefore, it alleged, it was futile to issue a Stop Work Order. With regard to its neglect to issue a Compulsory Repair Order, **Amafa** submitted that there was no need as the Municipality clearly had every intention of repairing the building;
5.1.24 It further stated that: -

"In conclusion, the onus is fairly and squarely on the municipality to obtain the necessary compliance in terms of the Heritage legislation, both provincial and national, and it was aware of the fact that it needed to do so but did not ensure that its consultants and contractors did so on its behalf. The accusation that Amafa did not ensure compliance with the legislation is not backed up with evidence to that effect:

All three applications received were responded to in clear unequivocal terms;
Amafa maintained contact with the applicant’s agents; and
Confirmed the status quo on site to the best of its ability, given the circumstances surrounding the project.

Although the applications were approved in principle, no final approval (permit), was granted. Furthermore, until 18 April 2015, Amafa was unaware that work had commenced without a permit having been granted. In the normal course of events, Amafa would only monitor work, once the work had been approved by the granting of a permit. The work that had commenced, was therefore, unauthorised. At no stage did Amafa authorise the work that was conducted, since no permit was or has since been granted. Although a permit may have been granted had the outstanding requirements been attended to, this was not done since Amafa did not receive communication of such.” (own emphasis)

The Municipality’s response to the Public Protector’s Notice in terms of section 7(9) of the Public Protector Act, 1994

5.1.25 In its formal response to my Notice in terms of section 7(9) of the Public Protector Act, the Municipality indicated that the Memorial Hall had, to date, not been refurbished, renovated, altered, added to or in any way demolished.
5.1.26 It further contended that there had been a misunderstanding by all concerned about the status of the site on which the Memorial Hall is situated. The Municipality submitted that the Memorial Hall is situated on Erf 43, uMzimkhulu. Directly behind it on Erf 43, another building is situated. The remainder of Erf 152 is vacant land. None of the sites are reflected as heritage sites in the Schedules to the KwaZulu-Natal Heritage Act, 2008. The buildings, including the Memorial Hall, were not listed as heritage buildings in the Schedules to the Act. In addition, it was submitted that a portion of Erf 43 had to be subdivided so that the encroaching portion could be subdivided and transferred to the Department of Public Works.

5.1.27 According to the Municipality, the initial intention was to demolish the building situated behind the Memorial Hall, to construct a new building and to merge and align the construction of the new building to the Memorial Hall. It was for this reason that the Municipality initially applied for Amafa approval, specifically on the basis of section 33 of the KwaZulu-Natal Heritage Act, as the newly constructed building was to be aligned to and merged with the Memorial Hall.

5.1.28 The Municipality further submitted that:

"12.9 [...] All that was done to the Memorial Hall was that the wooden window frames were removed for restoration purposes and these were delivered to an accredited heritage restorer for such restoration to be done. The window frames have been delivered back to the Municipality but they have not yet been reinstalled because you directed that all work must stop.

12.10 We point out that the approval in principle which had been given only related to the front portion where the Memorial Hall was situated. [...].

[...]
12.12 The approval in principle was given in order to merge the building being constructed with the Memorial Hall and the requirements which were to be fulfilled would have to be submitted to Amafa to make the conditional approval (in principle approval) a final one. The Municipality has to date not merged the two buildings and therefore thus far no approval is required from Amafa until such time as the merging and alignment of the two buildings is proceeded with, which up to now has not taken place."

5.1.29 In addition, the Municipality acknowledged that it did not submit the further information in compliance with what was required of it because the Municipality did not proceed any further with its original intention to align and merge the Memorial Hall with the building that was being constructed.

5.1.30 It contended further that the building which was demolished was a separate and distinct building situated behind the Memorial Hall.

5.1.31 The Municipality proceeded to indicate that:

"13.6 It is correct that Amafa did not issue a permit authorising the Municipality to do alterations and/or additions to the Memorial Hall. As a matter of fact, the Municipality did not do any alterations and additions to the Memorial Hall. As pointed out the removal of the window frames was not a violation of Section 33 of the Act as referred to above. The window frames were removed in order to be restored by an accredited restorer. These window frames once restored to their original condition would be refitted into the Memorial Hall. [...]"

5.1.32 Following submission of its formal response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, I had a meeting with the Executive Mayor, the Deputy Mayor, the Municipal Manager and other delegates from
the Municipality on **Tuesday 18 December 2018** in Pretoria. The Municipality submitted its formal response to me and we had subsequent discussions about the matter and my intended or provisional findings, as they were communicated in my section 7(9) Notice.

5.1.33 During my discussions with the Municipality, we agreed that indeed, the evidence presented to me, indicated that the Memorial Hall itself had an extended annex, which was built, or added to the Memorial Hall much later in time. We agreed that the Municipality could demolish the annex and proceed with the erection of the new building where the annex was situated.

5.1.34 We further agreed that the Memorial Hall was not listed as a Heritage Site in terms of the Schedules to the *KwaZulu-Natal Heritage Act*, 2008, but was protected under section 33 of the said legislation as it was a building presumed to be older than sixty (60) years.

5.1.35 The Municipality acknowledged that, the windows and the door of the Memorial Hall was removed without the Municipality being in possession of the requisite permit from *Amafa*, authorising it to do so.

5.1.36 The Municipality further conceded that it had not, to date, resubmitted its application for the approval of a permit to *Amafa*. The Municipality indicated that this was because of my instruction that no further costs should be incurred pending the finalisation of my investigation. After confirming with the transcription of my earlier engagement with the Municipality in October 2017, I indicated that my instruction was with regard to the construction costs, and that I have always indicated that the approval from *Amafa* should be fast-tracked to ensure that work on the Memorial Hall can proceed.
Application of the relevant law

5.1.37 The purpose of the KwaZulu-Natal Heritage Act, 2008, is to provide for conservation, protection and administration of both the physical and the living or intangible heritage resources of the Province of KwaZulu-Natal and to establish a statutory Council to administer that heritage. Chapter 4 of the Act regulates the establishment of the Amafa A KwaZulu-Natali Heritage Council and provides inter alia for the powers, duties and functions of the Council.

5.1.38 Section 20 places the responsibility to ensure compliance with this Act on the Chief Executive Officer of the Council.

5.1.39 In terms of section 33(1) of the Act, states that provided for in the National Heritage Resource Act. It provides that "[n]o structure which is, or which may reasonably be expected to be older than 60 years, may be demolished, altered or added to without the prior written approval of the Council having been obtained on written application to the Council." (own emphasis)

5.1.40 In addition, it provides that:

(1)(b) Where the Council does not grant approval, the Council must consider special protection in terms of sections 38, 39, 40, 41 and 43 of Chapter 9.

(2) The Council may, by Notice in the Gazette, exempt –
(a) a defined geographical area; or
(b) defined categories of sites within a defined geographical area, from the provisions of subsection (1) where the Council is satisfied that the heritage resources falling in the defined geographical area or category have been identified and are adequately protected in terms of sections 38, 39, 40, 41 and 43 of Chapter 9.
(3) A notice referred to in subsection (2) may, by notice in the Gazette, be amended or withdrawn by the Council.”

5.1.41 Section 38 provides for the Special protection: Heritage Landmark status and state that;

“

(1) No person may damage, alter, redecorate, remove from its original position, subdivide or amend any plan—

(a) of a Heritage Landmark site; or
(b) of a site in respect of which a notice referred to in subsection (3) has been published, without the prior written approval of the Council having been obtained on written application to the Council.

(2) The Council may:

(a) subject to the provisions of subsections (3), (4) and (5); and
(b) after due consideration of all written representations and submissions, confer the special protection of Heritage Landmark status on sites which, in the opinion of the Council, constitute important elements of the heritage of the Province, but which are not owned by the Provincial Government or a local authority, whereupon the Council must—

(i). in terms of section 37 (2), list the site in the Schedule; and
(ii). list the site in the Register of Heritage Sites referred to in section 42.

(3) When the Council decides to confer Heritage Landmark status, the Council must give notice in the Gazette of the intention to confer Heritage Landmark status.

(4) The notice referred to in subsection (3) must:

(a) identify the affected site and include the following information regarding the site and the land on which the site is situated—
(i). the full title deed description, including the title deed number, the administrative
district in which the land is situated, the extent of the land and, if applicable, the
nature of any right in or over such land;
(ii). a full description of the outer boundaries of the site and the extent of the site on the
land;
(iii). the current zoning of the land;
(iv). the actual current use of the site and the land; and
(v). full details of any improvements to, and structures on, the site and the land;
(vi). the GPS co-ordinates of the site;
(b) give interested parties an opportunity to make written representations or
submissions regarding the conferral of Heritage Landmark status within a period
of not less than 30 days; and
(c) draw attention to the provisions of subsections (1) and (2).

(5) The Council must, in addition to the notice to be published in terms of subsection
(3), cause a copy of such notice to be sent by registered post or delivered—

(a) the registered owner of the land;
(b) the occupier, if any, of the land; and
(c) the municipal manager of the municipality for the area in which the land is situated,
advising those persons that they may make written representations or
submissions regarding the proposed conferral of Heritage Landmark status within
a period of not less than 30 days of receipt of the notice.

(6) Except in cases where the Council considers it inappropriate, all Heritage
Landmarks must bear a plaque indicating their status.

(7) The Council must, within 30 working days, after conferring the special protection
of Heritage Landmark status on sites owned by the Provincial Government or a
local authority, lay any register, certificate or other document before the registrar
of deeds as defined in section 102 of the Deeds Registries Act, 1937 (Act No. 47
of 1937), in order to enable him or her to make such entries and endorsements as
he or she may deem necessary in or on any relevant register, certificate or other
document in his or her office or laid before him or her, in order to reflect the Heritage Landmark status of any land or portion of land conferred in terms of this section.

(8) …

(9) If a site on which Heritage Landmark status has been conferred, becomes the property of the Provincial Government or a local authority, the site is at the date of registration of transfer, regarded as having been conferred Provincial Landmark status.

(10) A Heritage Landmark site is regarded as a Grade II Heritage Resource referred to in section 7 (1) (b) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999)."

5.1.42 Regulation 2(1) of the KwaZulu-Natal Heritage Regulations, outlines that any person wishing to demolish, alter or make additions to a structure which is, or which may reasonably be expected to be older than sixty (60) years, must make an application to obtain the written approval of the Council.

5.1.43 According to the Heritage Impact Assessment conducted by Ms. Debbie Whelan, the uMzimkhulu Memorial Hall was built in 1920, and it was thus older than sixty (60) years in 2012 when the uMzimkhulu Municipality embarked on the process of refurbishing it. The uMzimkhulu Municipality was thus obliged to obtain the necessary permit from Amafa prior to embarking of the project related to the upgrade and refurbishment of the uMzimkhulu Memorial Hall.

5.1.44 The Municipality thus could not have removed the windows and the door of the Memorial Hall without the written prior approval of the Provincial Heritage Council. In doing so, the Municipality thus contravened the law.

Conclusion

5.1.45 It can thus be concluded that the Municipality did not have the requisite permit from the Amafa A KwaZulu-Natali Heritage Council to do any alterations on the Memorial Hall as required in law. An "in principle" approval was not
enough as it was subject to the submission of other relevant information which was never submitted.

5.1.46 Similarly, Amafa A KwaZulu-Natal Heritage Council should not have allowed the Municipality to commence with the renovations without the requisite permit and should have stopped them once it realised that the windows and door were removed.

5.2 Regarding whether the procurement process followed by the uMzimkhulu Local Municipality in appointing service providers for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996, read with the Municipality's Supply Chain Management Policy and other applicable prescripts:

*Common cause facts*

5.2.1 The uMzimkhulu Memorial Hall was in a dilapidated state and thus needed restoration and refurbishment.

5.2.2 The Municipality appointed service providers to assist in the refurbishment and the restoration of the heritage of the Memorial Hall and *Loyiso Consultants*, and later *Buyeye Consulting*, were appointed by the Municipality as the Implementing Agents for the project.

5.2.3 The project related to the upgrade and refurbishment of the dilapidated uMzimkhulu Memorial Hall was a *Turn-Key project*. It essence it means that the contractor appointed would act as both a Project Manager and a contractor. The Implementing Agent was responsible to appoint any contractor required in
the project and pay the contractor from any monies which were received as the Implementing Agent.

**Issues in dispute**

5.2.4 The issue for my determination is whether the appointment of the service providers by the municipality was in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996 read with the Municipality’s Supply Chain Management Policy and that the municipality derived value for money.

5.2.5 The uMzimkhulu Local Municipality was approached on 21 September 2017 with an enquiry about the process followed in determining and appointing service providers to assist in the refurbishment and restoration of the heritage of the Memorial Hall.

5.2.6 The Municipal Manager, Mr Zweliphansi Sikhosana responded to the enquiries on 3 October 2017. He stated that in delivering the project, the municipality complied with the imperatives of transparency, cost effectiveness, fairness and competitiveness as enshrined in section 217 of the constitution, 1996. He thus disputed any allegations of corruption and reckless use of public funds in delivering the project.

5.2.7 According to Mr Sikhosana, the municipality issued advertisements for the projected which culminated in the appointment of Loyiso Consultants and IDC Architects Joint Venture. The municipality entered into a service level agreement with the Joint Venture (JV) as implementing agents for the feasibility study at an amount of R1 338 109.20. Subsequently, the JV produced various reports to the municipality and satisfactorily completed their scope of work and payments totalling R1 338 109.20 were made by the municipality to the JV.
5.2.8 With Phase 1 of the project having been completed, the Municipal Council took a resolution approving the budget during the financial year 2013/14 for the actual renovation works to the Memorial Hall. Having obtained the Council approval, the municipality issued advertisements for an implementing agent. Tenders were received from Loyiso Consultants and RB Management and Consultants.

5.2.9 The lowest bidder was Loyiso Consultants at an amount of R17 922 746.77 and ultimately, Loyiso Consultants were again appointed as Implementing Agents. A service level agreement was entered between the parties and apparently, Loyiso Consultants further appointed the following consultants and subcontractors namely IDC Architects, Structural Engineers, Sukan and Associates, Electrical Engineers, Uzuko Consulting, Quantity Surveyors, Buyeye Consulting and the sub-building contractor, Sifiso Contractors CC in the project relating to phase 2.

5.2.10 On 15 April 2014, a deed of cession was entered between the municipality, Loyiso Consultants and Sifiso Contractors CC making provision for direct payment to be made to Sifiso Contractors CC by the municipality. This is despite the fact that the municipality had no contractual obligations towards Sifiso Contractors CC as they were sub-contracting to Loyiso Consultants.

5.2.11 Apparently work progress reports were submitted to the municipality by Loyiso Consultants and it appears that the municipality was not satisfied with the work performance and raised several complaints with Loyiso Consultants to an extent that the municipality filed several letters of intention to terminate the service level agreement entered into between the parties due to poor performance and delays in completing the project.

5.2.12 On 15 March 2016, the municipality terminated the contract with Loyiso Consultants and the total payments made to the entity and to Sifiso Contractors CC is an amount of R10 317 199.22. The Municipal Council subsequently took
a resolution endorsing the termination of the contract with Loyiso Consultants and made an approval for the municipality to appoint a new service provider and on 4 March 2016, a tender was advertised for the completion of the Memorial Hall.

5.2.13 Subsequently, Buyeye Consulting was appointed on 14 April 2016 for a further amount of R15 904 426.54 and on 19 April 2016 the parties entered into negotiations about the price which was later agreed at R14 525 018.05 and a service level agreement was entered into between the parties and thereafter Buyeye Consulting commenced with the project.

5.2.14 According to Mr Sikhosana, the payments which were made to Buyeye Consulting were R653 380.26, R1 655 680.37, R1 701 115.91, R1 540 002 and R503 617.34 thus totalling an amount of R6 053 796.58.

5.2.15 He further stated that, the balance which is still due to Buyeye Consultants in terms of the contract is R8 471 221.47 and the total cost of the project would be approximately R24 842 217.24 and not the R37.9million that was alleged. He also stated that the payments made to date are commensurate with the work that has since been completed.

5.2.16 The officials of the municipality lead by Mr Sikhosana were interviewed on 3 October 2017 in the company of the Executive Mayor, Mr Mphuthumi Mpabanga. At the interview, the municipality confirmed what is written in their statement as well and also narrated the events from the provision of a feasibility study, the termination of the contract with Loyiso Consultants until the appointment of Buyeye Consulting.

5.2.17 They further reiterated that they followed the MFMA, as well as the SCM policy of the municipality and other relevant prescripts in appointing service providers to assist with the project.
The Municipality’s response to the Public Protector’s Notice in terms of section 7(9) of the Public Protector Act, 1994

5.2.18 The Municipality acknowledged that it awarded Phase 2 of the project to Loysiso Consultants, in the amount of R17.9 million. It submitted that the Municipality followed all the procedural requirements prior to the award and complied with it Supply Chain Management Policy and the legislative requirements.

5.2.19 It further indicated that the allegation that Loysiso Consultants abandoned the project was not factually correct, as the Municipality terminated the services of Loysiso Consultants due to poor performance by the entity on 15 March 2016, and after the Municipality had, on several occasions threatened to do so.

5.2.20 The Municipality further acknowledged that the amount spent during Phase 2 of the project was R10 317 199.22. It submitted that this amount was for actual work done and materials supplied.

5.2.21 After complying with its Supply Chain Management Policy and the legislative requirements, the Municipality awarded the completion of the contract to Buyeye Consulting in the amount of R14 525 018.05. The Municipality further submitted that I have misconstrued that the latter amount had been paid to Buyeye Consultants which ultimately ballooned the expenditure to R37.9 million. The Municipality further indicated that it did not spend R37.9 million of the project. The completed work was commensurate with the amount spent which is approximately R16.3 million.

5.2.22 The Municipality indicated that, despite the fact that the contract value of the award to Buyeye Consulting was R 14 525 018.05, the total amount paid to Buyeye Consulting for work actually done was R6 053 796.58. The Municipality further denied that any payments were made to this entity without the submission of Payment Progress Certificates.
5.2.23 The Municipality further contended that Buyeye Consulting was subcontracting to *Loyiso Consultants* prior to April 2016, and this did not stop Buyeye from entering the competitive bidding process. In their view, it would have been against the Municipality’s SCMP to bar or disallow Buyeye Consulting from bidding when the completion of the project was advertised calling for tenderers.

5.2.24 With regard to the cession entered into between the Municipality, *Loyiso Consultants* and *Sfiso Construction*, the Municipality submitted that *Loyiso Consultants* was not paying *Sfiso Construction*. They were concerned that the non-payment had the potential to retard or delay progress of the work on site, so the cession was done as an interim practical measure to avoid this and to decrease the tension between the parties, and in order to give effect to and prioritise progress with respect to the project.

5.2.25 The Municipality further submitted that it acted in the interests of the Municipality in order to attain progress on the project. *They submitted that*, in the context of the poor performance by Loyiso Consultants and bearing in mind that Sfiso Construction was doing the actual work, the payment to Sfiso Construction was entirely reasonable in the circumstances. The Municipality again acknowledged that there was no contract between the Municipality and Sfiso Construction, and contended that this was the reason why Sfiso’s contract had to be terminated when the contract with Loyiso Consultants was terminated.

5.2.26 As already alluded, I had a subsequent meeting with the Municipal delegation on **18 December 2018** at my office in Pretoria. During the meeting the Municipality indicated that at all relevant times, it followed proper supply chain management processes to appoint the service providers involved in the project related to the refurbishment of the Memorial Hall.
5.2.27 It further indicated that the project was audited twice by the Auditor-General, and they also furnished documentation to the National Treasury following enquiries from them.

5.2.28 My request was that the Municipality should respond to the intended finding that the service providers were appointed contra the provisions of the Constitution bearing in mind our previous discussions around the potential conflict which existed in appointing a service provider which had previous knowledge about the project.

5.2.29 I explained that the contravention lies in the fact that, firstly, **Loyiso Consultants** completed the feasibility study, had knowledge about the price and the scope for the implementation of the project by the time he submitted his proposal for Phase 2 of the project. I indicated to the Municipal delegation that the feeling of the investigation team was that **Loyiso Consultants** clearly had an unfair advantage over the other bidder(s) whom submitted proposals, and therefore, the supply chain process could not have been competitive, as per the requirements of the Constitution.

5.2.30 The same argument was true for **Buyeye Consulting. Buyeye Consulting** had been a subcontractor to **Loyiso Consultants** in both Phases 1 and 2 of the project.

5.2.31 The Municipal delegation indicated that there was no basis in law for disqualifying any potential bidder from the process. They indicated that, should a bidder lodge an appeal because the bidder was unsuccessful, the Municipality should be able to justify its decision to disqualify the bidder from the process and requested that I provide them with a basis in law on which they would have been able to do so.

5.2.32 The delegation was referred to specifically section 112(1)(j) of the Municipal Finance Management Act, which required the Municipality to address potential
conflict of interest situations of potential contractors, and the exclusion of such contractors from the bidding process, in its Supply Chain Management Policy.

5.2.33 The Municipality further indicated that the expenditure relating to the project was roughly as follows:

<table>
<thead>
<tr>
<th>Phase</th>
<th>Budget</th>
<th>Actual Expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 1</td>
<td>R2 million</td>
<td>R1.3 million</td>
</tr>
<tr>
<td>Phase 2</td>
<td>R17.9 million</td>
<td>R10.3 million</td>
</tr>
<tr>
<td>Phase 3</td>
<td>R14.5 million</td>
<td>R6 million</td>
</tr>
</tbody>
</table>

5.2.34 The Municipality further indicated that the actual expenditure on the construction was at about R16.3 million, and the estimated costs when the project was ultimately finalised was about R24 million.

5.2.35 I wanted clarification though on how the amount which it will take to complete the project could be higher than the remainder value of the contract. For instance, if the Municipality paid an amount of R10.3 million to Loyiso Consultants, and the initial budget was R17.9 million, it would mean that another entity should be able to finalise the project with the remaining R7.4 million budget. According to the Municipality, there was a time lapse when there was poor performance by Loyiso Consultants, and this lead to a dilapidation of the existing construction.

5.2.36 During the meeting I wanted to ascertain the reasons why it took so long to terminate Loyiso Consulting's contract. We placed on record that evidence suggested that there had been complaints by the Contracts Manager since May 2015 about the apparent poor performance and there was a request then already for termination. In response, the Municipality indicated that several Notices sent were sent to Loyiso Consultants and the Municipality ultimately
did not release any retention to **Loyiso Consultants**, which seemingly was 10% of the cost of services as per the SLA.

**Application of the relevant law**

5.2.37 Section 215 of the Constitution of the Republic of South Africa, 1996, provides that the National, Provincial and Municipal budgetary processes must promote transparency, accountability and effective financial management of the economy, debt and the public sector. This is regulated by *inter alia* the Local Government: Municipal Finance Management Act, 2003.

5.2.38 The Constitutional imperative for procurement of goods and services by organs of state in all spheres of government is to be found in section 217 of the Constitution. In terms of this provision, organs of state that contract for goods and services must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

5.2.39 The procurement of goods and services by Municipalities are specifically regulated by the Municipal Finance Management Act, 2003 (the MFMA).

5.2.40 In terms of section 1 of the MFMA "fruitless and wasteful means expenditure that was made in vain and would have been avoided had reasonable care been exercised."

5.2.41 Irregular expenditure in relation to a Municipality means *inter alia:* -

- Expenditure incurred by a Municipality in contravention or that is not in accordance with a requirement of the Act and which has not been condoned by the National Treasury;

- Expenditure incurred by a Municipality in contravention of, or that is not in accordance with a requirement of the Supply Chain Management Policy;
- It excludes expenditure by a Municipality that falls within the definition of unauthorised expenditure.

5.2.42 Unauthorised expenditure means any expenditure incurred by a Municipality otherwise than in accordance with section 15 or 11(3).

5.2.43 In terms of section 15, a Municipality may (except where otherwise provided in the Act), incur expenditure only in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget.

5.2.44 Section 29(1) provides that the Executive Mayor of a Municipality may, in an emergency or other exceptional circumstances, authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure –

(a) must be in accordance with any framework that may be prescribed;
(b) may not exceed a prescribed percentage of the approved annual budget;
(c) must be reported by the Mayor to the Municipal Council at its next meeting; and
(d) must be appropriated in an adjustments budget.

5.2.45 Section 29(3) provides that, if such adjustments budget is not passed within 60 days after the expenditure in authorised, the expenditure is unauthorised and section 32 applies.

5.2.46 Section 77 of the MFMA provides that the top management of a Municipality’s administration consists of the Accounting Officer, the Chief Financial Officer, all Senior Managers who are responsible for managing the respective votes of the Municipality and to whom powers and duties for this purpose have been delegated by the Accounting Officer. The top management must assist the Accounting Officer in managing and coordinating the financial administration of the Municipality.
5.2.47 Senior Managers and other officials of municipalities exercising financial management responsibilities must, in terms of section 78, take all reasonable steps within their respective areas of responsibility to ensure *inter alia* that:

5.2.72.1 The systems of financial management and internal control established for the Municipality is carried out diligently;

5.2.72.2 The financial and other resources of the Municipality are utilised effectively, efficiently, economically and transparently;

5.2.72.3 Any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented.

5.2.48 In terms of this Act, every Municipality is obliged, by virtue of the provisions of section 111 and 112, to have and implement a Supply Chain Management Policy that complies with the requirements of section 217 of the Constitution, referred to above.

5.2.49 Section 112(1)(j) of the MFMA obliges a Municipality to adopt a Supply Chain Management Policy which is fair, equitable, transparent, competitive and cost-effective, and which must comply with the prescribed regulatory framework for municipal supply chain management, and which must cover at least:

"(i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;

(j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids."
5.2.50 The Accounting Officer of a Municipality must, in terms of section 115, implement the Supply Chain Management Policy of the Municipality and take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices.

5.2.51 The competency levels of officials involved in Municipal supply chain management are regulated by section 119, which provides that it has to comply with the prescribed standard. Municipalities must provide resources or opportunities for the training of the relevant officials and may be assisted in this regard by the National Treasury.

5.2.52 In terms of section 171(2) of the MFMA, the Chief Financial Officer of a Municipality commits an act of financial misconduct if that officer deliberately or negligently fails to carry out a duty delegated to that officer in terms of the Act.

5.2.53 Section 171(4) of the MFMA provides that:

"A municipality must: (own emphasis)

(a) investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality unless those allegations are frivolous, vexatious, speculative or obviously unfounded; and

(b) if the investigation warrants such a step, institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other official in accordance with systems and procedures referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of the Act."
5.2.54 The Municipal Supply Chain Management Regulations were promulgated in terms of section 168 of the MFMA.

5.2.55 In terms of Regulation 10, a Municipality's Supply Chain Management Policy must provide for an effective system of demand management in order to ensure that the resources required to support the strategic and operational commitments of the Municipality are delivered at the correct time, at the right price and at the right location and that the quantity and quality satisfy the needs of the Municipality.

5.2.56 Regulation 27 sets out the requirements with which municipal supply chain management policies must comply. It requires that a Bid Specification Committee must compile the specifications for each procurement of goods or services by the municipality. Such specifications must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services.

5.2.57 Regulation 46 provides that a Municipality's Supply Chain Management Policy must establish a code of ethical standards for officials and other role players in the supply chain management system in order to promote mutual trust and respect, and an environment where business can be conducted with integrity and in a fair and reasonable manner.

5.2.58 In June 2012, the Municipality adopted a Supply Chain Management Policy (SCM Policy) which was implemented effective from 01 July of that year. It was reviewed in May 2013 and subsequent reviews were in May 2015 and 2016 respectively.

5.2.59 Part 1 of the 2012 policy regulates the demand management system of the Municipality as a basis for procuring goods and services. Paragraph 11(1) of the Policy provides that the Accounting Officer must establish, through operational procedures, an effective system of demand management in order
to ensure that the resources required to support the strategic and operational commitments are delivered at the correct time, at the right place and at the right location, and that the quantity and quality satisfy the needs.

5.2.60 Paragraph 11(2) provides that the system must include timely planning and management process and to ensure that all goods and services required by the Municipality are quantified and budgeted for.

5.2.61 Part 2 of the Policy regulates the acquisition management system and states that procurement of goods and services by the Municipality must be done in accordance with authorized processes only and that the expenditure on goods and services must be incurred in terms of an approved budget.

5.2.62 Paragraph 7 of the Policy places upon the Council the duty to play an oversight role over the implementation of the SCM Policy of the Municipality and places a duty on the Municipal Manager to submit annual reports to the Council on the implementation of the SCM Policy of the Municipality.

5.2.63 Paragraph 20 of the Policy provides for thresholds in respect of procurement of goods and services and states that transactions above R200 000 including VAT and long term contracts may only be procured through a competitive bidding process and may not be deliberately slit into parts or items of lesser value merely for the sake of procuring the goods or services.

5.2.64 Paragraph 36 regulates the appointment of Consultants and provides that these service providers must be procured through a competitive bidding process if the value of the contract exceeds R200 000 including VAT or that the duration period of the contract exceeds six months.

5.2.65 Paragraph 43 provides for management of risk and bestows upon the Municipal Manager the duty to establish an effective risk management system for the identification, consideration and avoidance of potential risk in the supply chain management system and state in sub-paragraph (2)(d) that the management
of risks should be done in a pro-active manner and the provision of adequate cover for residual risks.

5.2.66 I have noted the process which had to be followed by the Municipality when there was breach of contract, as outlined in the Service Level Agreement (SLA) entered into between the Municipality and *Loyiso Consultants*. The SLA indicated that the Implementing Agent had seven (7) days to remedy a breach once called upon to do so by the Municipality, failure of which, the Municipality could:

- Suspend further payments;
- Terminate the agreement following a written notice of not less than fourteen (14) business days, and claim damages arising from such termination; and
- Appoint any other person to complete the execution of the services in which instance Loyiso Consultants shall be held liable for the reasonable costs incurred for the appointment of such person, as well as the reasonable costs associated with the delay.

**Conclusion**

5.2.67 The Municipality appointed both *Loyiso Consultants* and *Buyeye Consulting* as service providers to the project related to the upgrade and refurbishment of the Memorial Hall without following a competitive bidding process. Both these entities were involved in the project prior to appointment. Loyiso conducted a feasibility study, and Buyeye was at all times, during Phases 1 and 2, a subcontractor to Loyiso Consultants as a Quantity Surveyor. These entities therefore had intimate knowledge about the project which other bidders did not have, consequently giving them an unfair advantage and exposing themselves to a situation of conflict of interest. The Municipality appointed these two entities irregularly;
5.2.68 The Municipality also exposed itself to a risk of non-completion of the project when it allowed the appointment of a contractor on which it had not conducted any due diligence and it made payment directly to an entity with whom they had no contractual relationship;

5.2.69 The Municipality failed to adhere to the provisions of the SLA entered into between itself and Loyiso Consultants when it became apparent that Loyiso Consultants was performing poorly. Even after being advised to terminate the contract in May 2015, the Municipality, in contravention of the SLA, continued with Loyiso Consultants as Implementing Agent for the project until March 2016.

5.3 Regarding whether the uMzimkhulu Local Municipality Council exercised its oversight role over the Municipal administration to ensure that the project for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was implemented in accordance with the law and that the Municipality derived value for money:

Common cause facts

5.3.1 The uMzimkhulu Memorial Hall was in a dilapidated state and thus needs to be renovated and refurbished back to its original state as much as possible.

5.3.2 The Municipal Council took a Resolution to apply for funding with the National Treasury for an Urban Renewal Programme for the town of uMzimkhulu and its jurisdictional area.

5.3.3 The Council approved the budget for a feasibility study to be conducted for the renovation and restoration of the dilapidated uMzimkhulu Memorial Hall.

5.3.4 Thereafter, the Council approved budget for the implementation of the actual renovations to the Hall.
Issues in dispute

5.3.5 The issue for my determination is whether the Municipal Council exercised its oversight function over the Municipal Administration to ensure that the project for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall is implemented in accordance with the law and that the municipality derived value for money.

5.3.6 Amongst the enquiries that were made with the Municipality regarding the project for the refurbishment of the uMzimkhulu Memorial Hall is whether an approval was obtained from the Municipal Council to undertake the project.

5.3.7 In his 3 October 2017 response to my enquiries, Mr. Sikhosana confirmed that during or about 2012, the Council took a Resolution to apply for an Urban Renewal Programme and a Business Plan for the renewal of the City Centre was formulated by the Municipality and used as a basis to obtain funding. A request for funding was made with the National Treasury which initially approved funding for the feasibility study for the renovation of the uMzimkhulu Memorial Hall in the sum of R2 million. Subsequently, the Council approved the budget for the project. The approvals were in respect of Phase 1 of the project.

5.3.8 Phase 2 of the project was in relation to the actual refurbishment of the Memorial Hall and in this regard, the Council took a Resolution approving the budget for the period 2013/14 and pursuant to the approval of the budget, the Municipality commenced with the procurement processes for the appointment of service providers to assist with the implementation of the project. Initially, Loyiso Consultants were appointed to assist in the implementation of the project for an amount of R17 922 746.77, representing the total cost of the project.

5.3.9 Subsequent to the poor performance by Loyiso Consultants in implementing the project, it was terminated on 15 March 2016 and on 14 April 2016, Buyeye
Consulting was appointed for a further R14 525 018.05 to complete the project. It is not clear whether Council actually took a Resolution approving the latest amount other than authorizing the Municipal Administration to follow due process and appoint a service provider to complete the project.

The Municipality's response to the Public Protector's Notice in terms of section 7(9) of the Public Protector Act, 1994

5.3.10 The Municipality indicated, in its formal response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, that no evidence has been produced to support the finding that the costs related to the refurbishment of the Hall was left to escalate unabated and that the Council did not take it upon itself to monitor the progress of the project.

5.3.11 It indicated further that the Council Resolutions formed part of its initial response to my office, and that the project and the budget was mentioned in the Integrated Development Plan and SDBIP. The expenditure on the project was also brought to the Council's attention from time to time and the expenditure was monitored.

5.3.12 The Municipality submitted that it was incorrect to state that the project started at approximately R2 million and went to R17 million that was meant to complete the project and that a further R15 million had to be availed as the contractor could not complete the project. According to the Municipality, Phase 1 costed R1.3 million and Phase 2 was for R17.9 million, and Phase 2 was incomplete.

5.3.13 It further indicated that Loyiso Consultant's poor performance was reported to the Council and hence the decision was made to terminate the contract. The Municipality stated that it was incorrect and misleading to state that the costs were doubled. When Council became aware the Loyiso Consultants was
performing poorly, it instructed the Municipality to terminate the contract which was done. The Municipality stated categorically that Council did not fail to act.

5.3.14 In addition, the Municipality indicated that:

(a) No factual or legal basis has been laid for the finding that the Council acted dishonestly, without good faith, and in a manner that was not in the best interests of the Municipality;

(b) No factual or legal basis has been laid to make the finding that the Municipality's credibility and integrity were compromised;

(c) The nature of the conduct of Councillors which was a violation of the Code of Conduct has not been specified and that the Councillors involved in so-called dishonest conduct was not named.

5.3.15 According to the Municipality, the expenditure incurred thus far was budgeted for, and Council did not allow the costs related to the refurbishment to escalate unabated from the initial amount of the budgeted R17 million to an additional amount of approximately R15 million.

5.3.16 To date, no valuation had been conducted by the Public Protector of what had been built thus far.

5.3.17 During the meeting which I had with the Municipal delegation on 18 December 2018, the Executive Mayor and the other officials from the Municipality reiterated that all processes were submitted to Council. The Mayor reiterated that Council was on board on each project and that Council received reports and was presented with interventions, up to a point where the Municipality submitted to Council that it wanted to terminate Loyiso Consultant's contract. Council approved the termination of the contract and instructed the Municipality to start the process afresh.
5.3.18 It further indicated that the budgets for the respective years reflected the amount which will be spent on the Memorial Hall and same was submitted to Council in the form of a schedule.

5.3.19 As part of its response to me, it submitted to me Council Minutes as proof that progress on site was reported to Council.

5.3.20 I have noted that on 28 April 2015, it was reported to Council that the contractor was showing unsatisfactory progress whilst trying to overcome elapsed time, and that correspondence had been issued for a revised programme to be submitted.

5.3.21 On 30 June 2015, the Infrastructure and Engineering Department of the Municipality reported to Council that a meeting was held on the 12\textsuperscript{th} of May 2015 at the Municipal Manager’s office regarding the slow progress of the project. The contractor explained that it experienced cash flow problems and that an arrangement was made to overcome same by putting a counter-funder in place. It was further reported that the contractor committed himself to ensuring that the project does not experience challenges as before.

5.3.22 By 28 October 2015, Council Minutes reflected a Resolution that Loyiso Consultant’s contract be extended for a further six (6) to nine (9) months, following the presentation of the Department Infrastructure and Engineering.

5.3.23 In January 2016, the Infrastructure and Engineering Department reported to Council that progress on site is not appealing, and that a meeting was held on the 08\textsuperscript{th} of December 2015 to discuss a possible solution since the contractor seemed unable to deliver on the scope of this appointment. It was further reported that the contractor will be terminated.
5.3.24 On 29 February 2016, it was further reported that the contractor had been served with intention to terminate. The Minutes recorded that a meeting was held on the 26th January with the Quantity Surveyor to discuss the progress and the remaining scope of works which can be covered with the remaining budget. In addition, it was reported that the contractor will be terminated and there will be an advertisement for a new one. A final meeting was scheduled for 02 February 2016 with the Principle Agent for the submission of a final report and fee reconciliation.

5.3.25 On 23 March 2016, Council resolved that, albeit the extension of six months which were given to the contractor, he still failed to perform, and decided that the contract should be terminated and the supply chain management processes followed to procure the services of a new contractor. The Minutes further reflect that the project had since been re-advertised and a new contractor was to be appointed in due course.

5.3.26 By 29 September 2016, the Department Infrastructure and Engineering reported that the bulk material had already been ordered and the commencement date is proposed for the 6th of September 2016.

5.3.27 On 26 January 2017, it was further reported to Council that the project was re-advertised for a new Implementing Agent, and included a report on the scope of the tender.

5.3.28 On 30 June 2017, Council approved an extension of time for the construction for the period of nine months as per the request made by the Implementing Agent.

The Application of the relevant law

5.3.29 Section 195(1)(f) of the Constitution of the Republic of South Africa, 1996, provides that public administration must be accountable.
5.3.30 The Municipal Council regulates as well as delegates the functions and powers of oversight committees. In terms of the Municipal Structures Act, the executive is entitled to receive reports from oversight committees and refer these to Council for recommendations.\(^1\)

5.3.31 In addition, Schedule 1 to the Act provides for a Code of Conduct for Councillors.

5.3.32 Item 2 of the Code provides that Councillor must perform the functions of office in good faith, honestly and in a transparent manner; and 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.

5.3.33 In terms of item 6 a Councillor may not use the position or privileges of a Councillor, or confidential information obtained as a Councillor, for private gain or to improperly benefit another person.

5.3.34 Item 14 provides that:

\["(1) \text{ A municipal council may-}\
(a) \text{ investigate and make a finding on any alleged breach of a provision of this Code; or}\
(b) \text{ establish a special committee-}\
(i) \text{ to investigate and make a finding on any alleged breach of this Code; and}\
(ii) \text{ to make appropriate recommendations to the council.}\
(2) \text{ If the council or a special committee finds that a councillor has breached a provision of this Code, the council may-}\
(a) \text{ issue a formal warning to the councillor;}\
(b) \text{ reprimand the councillor;}\]

(c) request the MEC for local government in the province to suspend the councillor for a period;
(d) fine the councillor; and
(e) request the MEC to remove the councillor from office."

5.3.35 It appeared from the evidence that indeed Council exercised oversight over the project and that regular feedback was provided to Council and to EXCO regarding the progress of the project relating to the upgrade and refurbishment of the Memorial Hall.

5.3.36 Council approved the termination of the contract between the Municipality and Loyiso Consultants and further approved the appointment of a new Implementing Agent.

Conclusion

5.3.37 The Municipal Council of uMzimkhulu Local Municipality exercised proper oversight over the project related to the upgrade and refurbishment of the Memorial Hall.

6. FINDINGS

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the Municipality, I now make the following findings:

6.1 Regarding whether the uMzimkhulu Local Municipality obtained the requisite permit from Amafa A Kwa-Zulu Natali Heritage Resource Agency to do alterations and renovations to the uMzimkhulu Memorial Hall, a heritage site, and whether the Agency properly exercised its oversight role
on the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall:

(aa) The allegation that the uMzimkhulu Municipality went ahead and made alterations on the uMzimkhulu Memorial Hall, a heritage site, despite not having a requisite permit to do so from the *Amafa A Kwa-Zulu Natal Heritage Resource Agency* is substantiated;

(bb) The uMzimkhulu Municipality removed the front door and the windows of the Memorial Hall without it having been in possession of the requisite permit from *Amafa*;

(cc) Both the Municipal Manager of the Municipality and *Ms. Ros Devereux* of *Amafa A Kwa-Zulu Natali* conceded that the Municipality was not granted a requisite permit to do alterations and renovations to the uMzimkhulu Memorial Hall, a heritage site. Both admitted that the Heritage Agency gave the Municipality an "in principle" approval subject to the submission of additional information which would have made it possible for the permit to be granted;

(dd) The removal of the windows and the door constituted a violation of section 33 of the KwaZulu-Natal Heritage Act, and its concomitant Regulations;

(ee) The conduct of the Municipality 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;

(ff) Similarly, *Amafa A Kwa-Zulu Natali* Heritage Council should not have allowed the Municipality to commence with the renovations without the requisite permit and should have stopped them as continuing with demolishing arts of the structure constituted a violation of sections 33, 37 and 38 of the Kwa-Zulu Natal Heritage Act, 2008; and
(gg) Therefore the Agency failed to exercise its oversight function with regard to the refurbishment of the uMzimkhulu Memorial Hall. As the Agency had already granted the Municipality an "in principle" approval but not the permit, they should have held continuous monitoring of the landmark site to ensure its preservation.

6.2 Regarding whether the procurement process followed by the uMzimkhulu Local Municipality in appointing service providers for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996, read with the Municipality’s Supply Chain Management Policy and other applicable prescripts:

(aa) The allegation that the procurement process followed by the uMzimkhulu Municipality in appointing service providers for the refurbishment and restoration of the heritage of the uMzimkhulu Memorial Hall was not in accordance with a system that is fair, equitable, transparent, competitive and cost effective as contemplated in section 217 of the Constitution, 1996, read with the Municipality’s Supply Chain Management Policy, is substantiated;

(bb) The Municipality failed to follow a competitive bidding process in the appointment of the service providers Loyiso Consultants and Buyeye Consulting. Both these entities were previously involved in the project and therefore, had intimate knowledge about the project when they submitted their proposals to the Municipality. Loyiso Consultants conducted the feasibility study prior to appointment for the same project, and Buyeye Consulting prepared the BOQ during the feasibility study as a subcontractor to Loyiso Consultants, and was thereafter also a subcontractor to Loyiso Consultants when the construction commenced;
(cc) The Municipality did not comply with the provisions of section 217 of the Constitution of the Republic of South Africa, 1996, which obliges it to follow a procurement process which is competitive. In addition, the Municipality failed to provide a mechanism, in terms of its Supply Chain Management Policy, for the disclosure of potential conflicts of interests by contractors and the subsequent disqualification of them from participating the procurement process, as required by section 112(1)(j) of the Municipal Finance Management Act;

(dd) The Municipality also exposed itself to a risk of non-completion of the project when it allowed the appointment of a contractor on which it had not conducted any due diligence and it made payment directly to an entity with whom they had no direct contractual relationship, in violation of paragraph 43 of its Supply Chain Management Policy;

(ee) The Municipality failed to adhere to the provisions of the SLA entered into between itself and Loyiso Consultants when it became apparent that Loyiso Consultants was performing poorly. Even after being advised to terminate the contract in May 2015, the Municipality, in contravention of the SLA, continued with Loyiso Consultants as Implementing Agent for the project until March 2016;

(ff) The expenditure incurred by the Municipality for the refurbishment of the Memorial Hall for the period May 2015 until March 2016 constitutes irregular expenditure;

(ee) The conduct of the Municipality 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.

6.3 Regarding whether the uMzimkhulu Local Municipality Council exercised its oversight role over the Municipal administration to ensure that the project for the refurbishment and restoration of the heritage of the
uMzimkulu Memorial Hall was implemented in accordance with the law and that the Municipality derived value for money:

(aa) The allegation that the uMzimkulu Local Municipal Council failed to exercise oversight over the Municipal Administration to ensure that the refurbishment and restoration of the Memorial Hall was implemented and in accordance with the law, is unsubstantiated;

(bb) It appeared from the evidence that the indeed Council exercised oversight over the project and that regular feedback was provided to EXCO and to Council regarding the progress of the project relating to the upgrade and refurbishment of the Memorial Hall.

(cc) Council approved the termination of the contract between the Municipality and Loyiso Consultants and further approved the appointment of a new Implementing Agent.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking in terms of section 182(1) (c) of the Constitution, with the view to redressing the consequences of the improper conduct or maladministration, is the following:

7.1 The Municipal Manager to: -

7.1.1 Ensure that the Municipality revises its Supply Chain Management Policy, to provide for the compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids, as required by section 112(1)(j) of the MFMA, within 60 days of date of this report;
7.1.2 Ensure that the Municipality revises its Supply Chain Management Policy within sixty (60) days from date of this report, to include a provision that any service provider which is to be appointed by an Implementing Agent in a Turnkey project, is registered on the database of the Municipality in line with the Municipality's Supply Chain Management Policy, to ensure compliance with the due diligence requirement prior to appointment, to ensure compliance with the due diligence requirement prior to appointment;

7.1.3 Ensure that the uMzimkhulu Local Municipality submits its application for a permit to *Amafa A KwaZulu-Natali* within thirty (30) days from date of this report;

7.1.4 *Amafa A KwaZulu-Natali* to ensure that its adjudicates on the application submitted by the Municipality within the timeframes provided for the KwaZulu-Natal Heritage Act.

7.2 **The National Head: Directorate for Priority Crime Investigations to take urgent and appropriate steps to:**

7.2.1 Investigate the root causes and/or motivation behind the alleged political killings of uMzimkhulu Councillors, and provide progress updates on its investigation to me quarterly;

8 MONITORING

8.1 The uMzimkhulu Local Municipality must, within fourteen (14) days from date of this report, provide me with an action plan, indicating timelines, in respect of the above-mentioned remedial action;

8.2 The Public Protector will monitor the remedial action in terms of this report within one (1) month of its signature, and thereafter on a monthly basis.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19/12/2018
Assisted by: GGI Investigation Team