

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION RELATING TO THE AWARDING OF A “SMART”
METER CONTRACT TO VODACOM (PTY) LTD BY THE NAMA KHOI MUNICIPALITY
IN 2016**

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LIST OF ACRONYMS

ACRONYMS AND ABBREVIATIONS	DESCRIPTIONS
AGSA	Auditor-General South Africa
CFO	Chief Financial Officer
Constitution	The Constitution of the Republic of South Africa
FSPT	Free State Provincial Treasury
HoD	Head of Department
ICT	Information and Communication Technology
LTD	Limited
MFMA	Municipal Finance Management Act
MFMA SCM Regulation	Municipal Finance Management Act Supply Chain Management Regulation of 13 May 2005
MSCR	Municipal Supply Chain Regulations
Municipality	Nama Khoi Municipality
PPA	Public Protector Act 23 of 1994
PPSA	Public Protector South Africa
PTY	Proprietary
SARS	South African Revenue Services

EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice, and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of improper conduct and maladministration relating to the awarding of a “SMART” meter contract to Vodacom (Pty) Ltd (Vodacom), by the Nama Khoi Local Municipality (the Municipality), in 2016.
- (iii) The investigation originated from a complaint lodged on 11 May 2018 at the Northern Cape Provincial Office of the Public Protector South Africa (PPSA), by Adv Boitumelo Babuseng (Complainant), the former member of the Democratic Alliance in the Northern Cape Provincial Legislature.
- (iv) In the main, the Complainant alleged irregularities in the awarding of a contract to Vodacom in relation to the installation of so-called “SMART” meters by the Municipality in that:
 - (a) During a Municipal Council meeting held on 31 August 2016, Mr Christo Nichols was introduced as an employee of Vodacom. Mr Nichols requested to conduct a pilot to test the accuracy of electricity and water meters, specifically with the view of improving the Municipal revenue collection. The so-called “SMART” meters

would collect data and assist with the management of accounts by the Municipality;

- (b) No further reports were submitted or were made available to the Council regarding this project; and
- (c) During a special Council meeting held on 26 February 2018, it was noted that the adjustment budget for 2017/2018 included an amount of four million six hundred thousand rand (R4 600 000), for the installation of “SMART” meters by Vodacom.
- (v) In essence, the Complainant alleged irregularities in the awarding of a “SMART” meter contract to Vodacom by the Municipality in 2016.
- (vi) Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
 - (a) Whether the Nama Khoi Local Municipality irregularly awarded the “SMART” meter contract to Vodacom, without following the relevant legal prescripts and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in section 6(4)(a)(i) of the Public Protector Act, 1994.
- (vii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Municipality, an analysis of the relevant documents and information obtained during the investigation and a consideration and application of the relevant laws and prescripts.
- (viii) On 03 December 2022, a notice in terms of section 7(9) of the Public Protector Act (the Notice) was issued to the Municipality and other stakeholders to provide an opportunity for responses to the likely adverse findings and proposed remedial

action. Section 7(9)(a) of the Public Protector Act provides that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same.

- (ix) Following the issuing of the Notice, a telephone conversation meeting between the PPSA and the Municipality was held on 20 December 2022. During the conversation, Mr Jan Swartz, the Acting Municipal Manager, agreed with the remedial action proposed by the Public Protector, as contained in the Notice and further stated that on 12 December 2022, Council adopted the report of the Public Protector with all its findings and the recommendations. Mr Swartz later confirmed the position of the Municipality regarding the findings and the recommendations of the Public Protector in an email dated 20 December 2022.

- (x) Having regard to the evidence and regulatory framework determining the standard that the Municipality should have complied with, the following findings are made:
 - (a) Regarding whether the Nama Khoi Local Municipality irregularly awarded the “SMART” meter contract to Vodacom, without following the relevant legal prescripts and if so, whether such conduct constitutes improper conduct as envisaged in section 182 (1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act:
 - (aa) The allegation that the Nama Khoi Local Municipality irregularly awarded the “SMART” meter contract to Vodacom, without following the relevant legal prescripts is substantiated.
 - (bb) The Municipality’s reliance on the provisions of Regulation 36 of the MSCR, as constituting grounds for deviation from following prescribed procurement processes based on an emergency, is not supported by the evidence. The Municipality failed to prove that an emergency existed that necessitated a

deviation from normal procurement processes. The Municipality failed to provide more information in relation to the process it followed, after the Deviation Form was approved in April 2016, to request quotations from Vodacom.

- (cc) The appointment of Vodacom was not in accordance with Regulation 36(1) of the MSCR.
- (dd) The Municipality failed to promote and maintain a high standard of professional ethics in dealing with the awarding of the tender to Vodacom as required in terms of the prescripts of section 195 of the Constitution. The Municipality failed to perform its work diligently, honestly and in a transparent manner in line with the Code of Conduct for Municipal Staff Members.
- (ee) The Municipality therefore awarded the tender to Vodacom without a competitive bidding process and thus fell afoul of section 217 of the Constitution.
- (ff) The conduct of the Municipality, particularly that of the Municipal Manager, accordingly, constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (xi) The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:
 - (a) **The Speaker of the Municipal Council**
 - (aa) Within thirty (30) calendar days from the date of receipt of the final report, table the final report before Council for discussion and implementation; and

(bb) Within sixty (60) calendar days from the date of receipt of the report, ensure that the Municipality investigates allegations of financial misconduct against the accounting officer and any other implicated official in the procurement and awarding of the “SMART” meters contract to Vodacom in compliance with section 171(4) of the MFMA.

(b) The Municipal Manager

(aa) Within sixty (60) calendar days from the date of the report, initiate a process to take appropriate corrective action against the officials of the Municipality who participated in the awarding of the “SMART” meter contract to Vodacom by the Municipality, in terms of the Disciplinary Policy of the Municipality and section 171(4)(a) of the MFMA;

(bb) Ensure that the Internal Audit Unit of the Municipality, on an annual basis, reviews and advise management on the adequacy and effectiveness of the municipality’s system of internal control, risk management and performance management as envisaged by section 165 of the MFMA;

(cc) Ensure that, within thirty (30) calendar days from the date of receipt of the final report, the matter is brought to the attention of the Audit Committee to strengthen oversight over internal controls, to prevent recurrence of breaches and for the proper detection and reporting thereof to the Municipal Council as envisaged by section 166 of the MFMA; and

(dd) Report to the Council on the implementation of the remedial action taken in paragraphs (aa) to (bb) above, within ninety (90) calendar days from the date of receipt of the report and provide the Public Protector with a copy thereof.

1. INTRODUCTION

- 1.1. This is a report of the Public Protector, issued 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 23 of 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to the following persons, to inform them of the outcome of the investigation and the remedial action taken:
 - 1.2.1. Mr Jan Swartz, the Acting Municipal Manager of the Nama Khoi Local Municipality;
 - 1.2.2. Ms Samantha Titus, the former Municipal Manager of the Nama Khoi Local Municipality;
 - 1.2.3. Mr Bentley Vass, the Member of the Northern Cape Provincial Executive Committee responsible for Cooperative Governance, Human Settlements and Traditional Affairs;
 - 1.2.4. Mr Bafedile Lenkoe, the Head of the Northern Cape Department of COGHSTA;
 - 1.2.5. Dr Zamani Saul, the Premier of the Northern Cape Province;
 - 1.2.6. Dr Gustav Block, the Executive Mayor of the Municipality; and
 - 1.2.7. Ms Ravika Naicker, Vodacom Litigation Manager.

- 1.3. The report relates to an investigation into allegations of improper conduct and maladministration relating to the awarding of a “SMART” meter contract to Vodacom (Pty) Ltd (Vodacom), by the Nama Khoi Local Municipality (the Municipality), in 2016.

2. THE COMPLAINT

- 2.1. The investigation originated from a complaint lodged on 11 May 2018 at the Northern Cape Provincial Office of the Public Protector South Africa (PPSA), by Adv Boitumelo Babuseng (Complainant), the former member of the Democratic Alliance in the Northern Cape Provincial Legislature.
- 2.2. In the main, the Complainant alleged irregularities in the awarding of a contract to Vodacom in relation to the installation of so-called “SMART” meters by the Municipality in that:
 - 2.2.1. During a Municipal Council meeting held on 31 August 2016, Mr Christo Nichols was introduced as an employee of Vodacom. Mr Nichols requested to conduct a pilot to test the accuracy of electricity and water meters, specifically with the view of improving the Municipal revenue collection. The so-called “SMART” meters would collect data and assist with the management of accounts by the Municipality;
 - 2.2.2. No further reports were submitted or were made available to the Council regarding this project; and
 - 2.2.3. During a special Council meeting held on 26 February 2018, it was noted that the adjustment budget for 2017/2018, included an amount of four million six hundred thousand rand (R4 600 000), for the installation of “SMART” meters by Vodacom.

- 2.3. In essence, the Complainant alleged irregularities in the awarding of a “SMART” meter contract to Vodacom by the Municipality in 2016.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1. The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution), to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

- 3.2. Section 182(1) of the Constitution provides that:

“The Public Protector has the power, as regulated by national legislation –

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action.”*

- 3.3. Section 182(2) of the Constitution directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

- 3.4. The Municipality is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls

within its competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and section 6(4)(a)(i) of the Public Protector Act.

4. ISSUE IDENTIFIED AND INVESTIGATED

4.1. Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

4.1.1. Whether the Nama Khoi Local Municipality irregularly awarded the “SMART” meter contract to Vodacom (Pty) Ltd, without following the relevant legal prescripts and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.

5. THE INVESTIGATION

5.1. The Investigation Process

5.1.1. The investigation included correspondence and a meeting with the Municipality and the Free State Provincial Treasury (FSPT), an analysis of the relevant documentation, information obtained during the investigation; as well as consideration and application of the relevant laws and prescripts.

5.2. Methodology

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

5.2.2. 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.

5.3. Approach to the investigation

5.3.1. The investigation was approached using an enquiry process that seeks to determine:

5.3.1.1. What happened?

5.3.1.2. What should have happened?

5.3.1.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

5.3.1.4. In the event of improper conduct or maladministration, what would it take to remedy the wrong and what action should be taken?

5.3.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and evidence independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the Municipality irregularly awarded the “SMART” meter contract to Vodacom (Pty) Ltd, without following the relevant legal prescripts and if so, whether the conduct was improper and constitutes maladministration.

5.3.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality to prevent improper conduct and maladministration.

- 5.3.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration where possible and appropriate.

5.4 Key Sources of Information

5.4.1 Documents and correspondence

- 5.4.1.1 Letter from the Department of the Free State Treasury to Vodacom, dated 01 August 2014;
- 5.4.1.2 Letter from the Department of the Free State Treasury to Vodacom, dated 02 December 2014;
- 5.4.1.3 Memorandum from Mr Brandon Love to the Municipal Manager, dated 05 January 2016;
- 5.4.1.4 Memorandum from Mr Brandon Love to the Municipal Manager, dated 12 January 2016;
- 5.4.1.5 Letter from the Municipality to the Department of the Free State Treasury, dated 19 January 2016;
- 5.4.1.6 Minutes of the Bid Adjudication Committee meeting, dated 23 March 2016;
- 5.4.1.7 Deviation application in terms of MFMA SCM Regulation 36, dated 05 April 2016;
- 5.4.1.8 Master Agreement between the Municipality and Vodacom, dated 9 June 2016;

5.4.1.9 Memorandum from Mr Brandon Love to the Municipal Manager, dated 13 June 2016;

5.4.1.10 Letter from the Municipality to the Public Protector, dated 8 June 2018;

5.4.1.11 Letter from the Municipality to the Public Protector, dated 5 December 2020;

5.4.1.12 Letter from the Municipality to the Public Protector, dated 11 February 2021;
and

5.4.1.13 Letter from the Municipality to the Public Protector, dated 19 March 2021.

5.4.2 **Meeting held**

5.4.2.1 A Meeting was held between the Municipality and the Public Protector Investigation Team on 26 November 2020.

5.4.3 **Legislation and other prescripts**

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

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

5.4.3.3 The Local Government: Municipal Systems Act, 32 of 2000;

5.4.3.4 MFMA SCM Regulation 36, dated 05 April 2016; and

5.4.3.5 The Supply Chain Management Policy of the Municipality, June 2016.

5.4.4. **Notices issued in terms of section 7(9)(a) of the Public Protector Act**

5.4.4.1 Notices in terms of section 7(9)(a) of the Public Protector Act were issued on Mr Jan Swartz, the Acting Municipal Manager, on 03 December 2022 and 20 December 2022, affording him an opportunity to respond to the evidence obtained during the investigation.

5.4.4.2 On 03 December 2022 Notices in terms of section 7(9)(a) of the Public Protector Act were served on the following:

(a) Ms Samantha Titus, the former Municipal Manager;

(b) Dr Gustav Block, the Executive Mayor of the Municipality;

(c) Ms Portia Mbokazi, the Account Manager: Public Sector at Vodacom;

(d) Dr Zamani Saul, the Premier of the Northern Cape;

(e) Mr Bafedile Lenkoe, the Head of Department of COGHSTA; and

(f) Mr Bentley Vaas, the MEC for COGHSTA.

5.4.4.3 A further Notice in terms of section 7(9)(a) of the Public Protector Act was issued and served on Ms Ravika Naicker, Vodacom Litigation Manager, on 23 December 2022, affording her an opportunity to respond to the evidence obtained during the investigation.

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

6.1 Whether the Nama Khoi Local Municipality irregularly awarded the “SMART” meter contract to Vodacom (Pty) Ltd without following the

relevant legal prescripts and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994

Common cause issues

- 6.1.1 On 04 August 2014, the Free State Provincial Treasury entered into a contract with Vodacom (FSPT 003/13/14), on behalf of the Department of Agriculture and Rural Development for the supply of voice and data solution services for a period of two (2) years.
- 6.1.2 According to a letter dated 01 August 2014, the Head of Department of the Provincial Treasury (HoD), informed Vodacom that its bid for FSPT003/13/14, in relation to the supply and delivery of voice and data solutions to all Provincial Departments was accepted in accordance with the specifications as well as the Special Conditions of Contract, with effect from 04 August 2014.
- 6.1.3 On 19 January 2016, Mr MP Dichaba, the then Acting Municipal Manager of the Municipality (Mr Dichaba), requested approval to participate in the transversal contract in a letter addressed to Mr MNG Mahlatsi (Mr Mahlatsi), the Head of Department (HoD) of the Provincial Treasury.
- 6.1.4 In a letter dated 11 February 2016, Mr Mahlatsi granted approval to the Municipality to participate in the traversal contract. He further advised the Municipality to procure the services from Vodacom, subject to the approval of Vodacom and familiarise themselves with the Special Conditions of the Contract and Service Level Agreement.

Issue in dispute

- 6.1.5 The issue for the Public Protector's determination is whether the Nama Khoi Local Municipality irregularly awarded the "SMART" Meter contract to Vodacom (Pty) Ltd.

The Complainant's version

- 6.1.6 The Complainant contended that the awarding of the "SMART" meter contract to Vodacom by the Municipality was irregular in that in August 2016, the Municipal Council took a resolution that the administration of the Municipality must do a presentation on "SMART" meters that would collect data and assist with the management of accounts at the Municipality.
- 6.1.7 The Complainant further contended that no reports were submitted or made available to the Council regarding this project until it was noted during a special Council meeting on 26 February 2018, that the adjustment budget for the 2017/2018 financial year included an amount of R4 600 000 for the installation of "SMART" meters by Vodacom.

Municipality's response

- 6.1.8 On 22 May 2018, the allegations were raised with Ms Samantha Titus, the Municipal Manager (Ms Titus), with a view to obtaining a response in respect to the complaint. In her response as per a letter dated 8 June 2018, Ms Titus stated that:
- 6.1.8.1 The Municipality embarked on a "SMART" metering initiative to address the shortcomings relating to electrical services which include, under-collection, incorrect tariff structures and technical losses as indicated by the Auditor-General;

- 6.1.8.2 The objective of the project was aimed at improving the ability to honour the monthly commitment towards Eskom. The challenge however, as experienced by many municipalities, remained the financial capital capability to address the challenges;
- 6.1.8.3 The Municipality had an existing contract with the service provider, Vodacom, for various other services, which included the provision of mobile modems, tablet computers for councillors, VPN services, bandwidth and Cloud services;
- 6.1.8.4 The services of Vodacom were acquired through a TRANSVERSAL APPOINTMENT IN TERMS OF REGULATION 32 OF THE MUNICIPAL SUPPLY CHAIN MANAGEMENT REGULATIONS: CONTRACT NO. FSPT003/13/14, on 9 June 2016;
- 6.1.8.5 After it became known to the Municipality, through a Proof of Concept Presentation on 31 August 2016, to the administration and Council, that Vodacom could assist with a system that could address challenges relating to electricity, services were then activated in terms of the Master Business Agreement (Master Business Nama Khoi Local Municipality, 05 April 2016);
- 6.1.8.6 Section 30 of the Master Agreement provides that the agreement, together with all schedules, appendices, service schedules, annexures and/or amendments, from time to time and any specifically referenced documents if applicable, constitute the complete and exclusive statement of the Agreement between the parties and supersede all prior or contemporaneous agreements, promises, representations, understandings and negotiations between the Parties, whether written or oral, with respect to the subject matter hereof;

- 6.1.8.7 The terms and conditions of any and all schedules, appendices, service schedules (including any specifically referenced documents, if applicable) to this Agreement, as amended from time to time by mutual agreement of the parties or in accordance with the terms of this Agreement, are incorporated herein by reference and shall constitute part of this Agreement as if fully set out herein; and
- 6.1.8.8 The results of the proof of concept were presented to the administration and Council on 19 October 2016. The “Internet of Things” IOT Services (“SMART” metering), were then activated after Council was informed about the strategic approach to address challenges relating to electricity services. During the adjustment budget process, Council was informed that the provision for the “SMART” metering service needed to be made within the budget, which was then approved at the Council meeting on 25 January 2017.
- 6.1.9 In a further response to the allegations, as per a letter dated 08 December 2020, Ms Titus, stated that:
- 6.1.9.1 *“It was previously reported by the Municipality that a process in terms of Regulation 32 of the Municipal Supply Chain Regulations, which states that a supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, was instituted for the appointment of Vodacom as a service provider;*
- 6.1.9.2 *The Municipality followed all due processes in terms of Regulation 32 of the MSCR, to appoint the said service provider under a contract secured by the Provincial Treasury (Supply and Delivery of voice and data solutions to all provincial departments in the Free State Provincial Government (FSPT003/13/14);*

- 6.1.9.3 *The urgency for acquiring the services from Vodacom was exemplified when the Municipality obtained the service under Regulation 32(1) of the MSCR. The process was finalised and a recommendation was referred to the Municipal Manager for approval. The challenge however, was that the contract between Vodacom and the PT was about to expire in two (2) months after the Municipality would have entered into the piggyback agreement;*
- 6.1.9.4 *In terms of Regulation 32 of the MSCR, the Municipality was not allowed to extend the period beyond the original term as per agreement between the PT and Vodacom and for this reason deviated to Regulation 36 of the Supply Chain process;...”*
- 6.1.9.5 *Inter alia, the Municipality used the reasons listed hereunder to deviate:*
- (a) ‘Periodic inaccessible network connectivity for pre-paid electricity vendors, which left consumers without a basic service;*
 - (b) The lack of sufficient bandwidth, which did allow for backups to the Cloud and increased the risk of cyber-attacks and loss of data; and*
 - (c) The lack of regular anti-virus and firmware updates due to bandwidth and connectivity.’*
- 6.1.9.6 *During the appointment process of Vodacom, not all stakeholders were informed about the deviation from a Regulation 32 to a Regulation 36 process;*
- 6.1.9.7 *During the enquiry process of the PPSA, the Municipality became aware of communication between members within supply chain, which confirms the change in process before the appointment of the service provider.*

6.1.9.8 *The Municipality confirmed that due diligence was done during the appointment process of Vodacom and that the process was not in terms of Regulation 32, but rather Regulation 36 of the MSCR.”*

6.1.10 In a further response, dated 11 February 2021, Ms Titus stated:

“(a) In terms of Regulation 36 of the MSCR, 2005, the Municipality was required to report the appointment to Council and it had done so during a special Council meeting held on 25 January 2017;

7 The appointment of Vodacom was further included in the Adjustment Budget of 2016-2017; and

8 The Municipality records all Regulation appointments in a register as required by legislation. Vodacom was not recorded in the register due to the fact that the contract was still active and the Municipality would only be able to do so after the contract had come to an end.”

Documentary evidence received from the Municipality

6.1.11 The Municipality provided the Investigation Team with the following documentary evidence:

6.1.11.1 A Memorandum from Mr Brandon Love (Mr Love), the Division Head: ICT of the Municipality addressed to Mr Dichaba, dated 5 January 2016, titled “*Bandwidth: Section 32 of the Municipal Supply Management Regulations*” obtained during the investigation, Mr Love, which stated that:

(a) The Information and Communication Technology (ICT) infrastructure was failing to deliver the appropriate services to the business and community due to the lack of sufficient bandwidth;

- (b) The ICT forms an essential support structure within the Municipality for the delivery of services to communities, communicating with communities and the improvement of business processes;
- (c) The ICT infrastructure has become the strategic tool within the Nama Khoi jurisdiction to overcome the geographical challenge for delivering certain services to communities;
- (d) The backbone of the ICT infrastructure provides internet connectivity and shares bandwidth between several services like, amongst others, 21X VPN connections for Pre-paid Electricity Vendors; and
- (e) The Municipality should invest in the ICT infrastructure on a yearly basis to make sure the strategic backbone is proper and functional. The ICT should be included in the Municipal Systems Infrastructure Grant business plan.

6.1.11.2 In the said Memorandum, Mr Love attached a detailed proposal from Vodacom, which offers the services needed by the Municipality to deliver the services needed from the ICT infrastructure.

6.1.11.3 In another memorandum from Mr Love, addressed to Mr Dichaba, dated 13 January 2016, titled '*Bandwidth: Section 32 of the Municipal Supply Chain Management Regulations*' obtained during the investigation, Mr Love stated that:

- (a) Due to the importance and urgency of the bandwidth upgrade, the Municipality would obtain the service under Regulation 32(1) of the MSCR, which allows the Municipality to procure goods or services for the

Municipality under a contract secured by another organ of state (transversal contract);

- (b) The Municipality would request positive consideration to appoint Vodacom in terms of Regulation 32 of the MSCR, to immediately provide it with adequate bandwidth in order to prevent failure of the service; and
- (c) The bandwidth needed is important for the following reasons, amongst others, remote offices are dependent on reliable internet connectivity to render a service to the community and the municipality. This service also includes revenue collection, consumer account queries and scheduling of services.

6.1.11.4 According to a letter, from Mr Dichaba to Mr Mahlatsi, dated 19 January 2016, Mr Dichaba stated that:

- (a) The Municipality was desirous to appoint Vodacom in terms of Regulation 32 of the MSCR for the supply and delivery of voice and data solutions;
- (b) Vodacom to indicate its willingness and availability to accept the assignment and also compile a draft service level agreement confirming the understanding of obligations and responsibilities of parties involved in the agreement; and
- (c) The BAC would meet in due course to make final recommendations regarding the appointment of the service provider for the transversal contract.

6.1.11.5 In terms of the Municipal Monthly Report of October 2016, it is noted that:

- (a) The Municipality had embarked on a revenue enhancement initiative through a pilot project with Vodacom as a service provider. This project would focus on the following areas:
 - (i) Installation of “SMART”, electrical and water meters at consumers;
 - (ii) Installation of “SMART” electricity meters at the bulk distribution services, supplied by Eskom and Sedibeng, which would ensure that the Municipality has accurate readings and billed accordingly;
 - (iii) Consumer data cleansing;
 - (iv) Training of community members to assist with preventing tampering; and
 - (v) Rectifying billing of consumers.
- (b) The Pilot project would run for a period of six (6) weeks starting from 08 September 2016. The first phase of the project would focus on the installation of “SMART” post-paid electricity meters at ten (10) businesses. Those meters would allow the Municipality to automate the process of reading the meters and billing the consumers. Readings would be automatically imported from the meters into the financial systems. Consumers would also have the ability to view their consumption and account for electricity through an online system, which would prevent any disputes in future. During this phase, emphasis would be placed on the correctness of the installation, because it would have an effect on the consumption and billing;
- (c) The second phase of the project would focus on the installation of ten (10) pre-paid electricity meters at economic consumers. Those meters would have the same functionality and advantages as the post-paid. The phase would be rolled out in conjunction with the ward Councillor; and

- (d) The third phase of the project would focus on the installation of twenty (20) “SMART” pre-paid water meters at indigent and economic consumers. The Municipality had certain areas within its jurisdiction where electricity is provided by Eskom to consumers. This poses a great challenge for the Municipality in terms of debt collection, as the electricity system could not be used as a tool to collect outstanding debt, as in the other town where electricity is distributed by the Municipality. The installation of the “SMART” pre-paid water meters will enforce the municipality’s debt collection policy through the meter.

6.1.11.6 According to the Minutes of the Municipality’s Budget Allocation Committee (BAC) meeting held on 23 March 2016, the following is noted:

- (a) A request was sent to the FSPT, to participate in the transversal contract with Vodacom;
- (b) The FSPT, provided the necessary authorisation and confirmation as required by Regulation 32 of the MSCR, on 11 February 2016;
- (c) The BAC recommended that the proposal of Vodacom be accepted on condition that Vodacom confirmed that the rates were the same or lower as those for the FSPT;
- (d) The Municipality had the following options to ensure that the services were continued with Vodacom or for the appointment of a new service provider should the contract end in August 2016:
 - (i) SCM Regulation with the Provincial Treasury or other organ of state;

- (ii) MFMA Section 116 contract extension; and
- (iii) New competitive tender, one or two months before the closing date.

6.1.11.7 In the Nama Khoi Municipality SCM Deviation Form of 05 April 2016, Mr Dichaba approved an application for a deviation and ratification of minor breaches of procurement processes on the basis of emergency in terms of Regulation 36(1) of the MSCR.

6.1.11.8 On 9 June 2016, the Municipality signed the Master Business Agreement with Vodacom in terms of Regulation 36 for the supply of Vodacom IP Talk Services, Vodacom Internet Services, Vodacom VOIP Services, Vodacom IPConnect and LANconnect Access Services and Vodacom VPN Services. However, the footer on every page of the Agreement reflects 05 April 2016 – the same date on which the Deviation Form was approved by the Accounting Officer of the Municipality.

6.1.11.9 In an email dated 5 May 2016 from Mr Brandon Boois (Mr Boois), an official of the Municipality, addressed to Mr Love, Mr Boois stated that the Municipality deviated from the original intention of entering into a MSCR, Regulation 32 contract to a deviation, due to emergency or potential threat or risk and to a certain extent Vodacom counter conditions.

Meeting held with the Municipality

6.1.12 The Investigation Team held a meeting with the Municipality on 26 November 2020, wherein a request for information to support its appointment of Vodacom to provide the services as indicated in paragraph 6.1.11.8 above. The Municipality failed to provide more information on the process it followed to request quotations from Vodacom for the supply of Vodacom IP Talk Services, Vodacom Internet Services, Vodacom VOIP Services, Vodacom IPConnect

and LANconnect Access Services and Vodacom VPN Services. There was no request for quotations that the Municipality sent to Vodacom, except for a proposal by Vodacom, presented during a Municipal Council meeting held on 31 August 2016, by Mr Nichols.

Response to the notice in terms of section 7(9)(a) of the Public Protector Act

- 6.1.13 On 03 December 2022, a notice in terms of section 7(9)(a) of the Public Protector Act (the Notice), was served on the Municipality, and other stakeholders to provide them with an opportunity for responses on the likely adverse findings and proposed remedial action.
- 6.1.14 Following the issuing of the Notice to the Municipality, a telephonic meeting was held between the Investigation Team and the Municipality, on 20 December 2022. During the conversation, Mr Jan Swartz, the Acting Municipal Manager, agreed with the remedial action proposed by the Public Protector, as contained in the Notice and further stated that on 12 December 2022, Council, adopted the Notice of the Public Protector with all its findings and the recommendations. Mr Swartz later confirmed the position of the Municipality regarding the findings and the recommendations of the Public Protector in an email dated 20 December 2022.
- 6.1.15 Following the issuing of the Notice to Vodacom on 23 December 2022, a response was received from Ms Ravina Naicker stating that:

“It is unfortunate that the aforesaid Notice was received during Vodacom’s head office annual shut down. We wish to inform you that Vodacom legal is required to engage with the business and it is therefore impractical to respond to the aforesaid Notice at the moment due to the shutdown and internal stakeholders being on leave during this period. Vodacom will resume

operations on 9 January 2023 and consequently requests an extension to respond to the Notice”.

- 6.1.16 On 4 January 2023 the Public Protector granted Vodacom an extension to respond to the findings and proposed remedial action in the section 7(9) Notice on or before 18 January 2023. Notwithstanding the extension, Vodacom has not responded to the Notice.

Application of the relevant law

The Constitution of the Republic of South Africa, 1996

- 6.1.17 Section 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 6.1.18 In this matter the Municipality was required to ensure that the process followed in the awarding of the contract for service of Vodacom was fair, equitable, transparent, competitive and cost-effective as envisaged by section 217 of the Constitution. In this instance the Municipality would be required to provide the reasons and authority for non-compliance with the provisions of section 217 of the Constitution, where no competitive procurement process was followed, because of the purported emergency.
- 6.1.19 Section 195 of the Constitution provides that the public administration must be governed by the democratic values and principles enshrined in the Constitution including, *inter alia*, the following principles:
- (a) A high standard of professional ethics must be promoted and maintained;

- (b) Efficient, economic and effective use of resources must be promoted; and
- (c) Public administration must be accountable.

6.1.20 It was expected of the Municipality, particularly the Municipal Manager and all officials responsible for executing the Municipal Supply Chain Management processes to maintain a high standard of professionalism and be accountable in procuring the services in this matter.

The Local Government: Municipal Systems Act 32 of 2000

6.1.21 A Code of Conduct for Municipal Staff Members is provided for in Schedule 2 of the Municipal Systems Act 32 of 2000. Item 2 of the Code provides that a staff member of a municipality must at all times-

- (a) loyally execute the lawful policies of the municipal council;*
- (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner;*
- (c) act in such a way that the spirit and objects of section 50 are promoted;*
- (d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and*
- (e) act impartially and treat all people, including other staff members, equally without favour or prejudice”.*

The Local Government: Municipal Finance Management Act 56 of 2003

- 6.1.22 Section 62(1)(d) of the MFMA, provides that the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorised, irregular and wasteful expenditure and other losses are prevented.
- 6.1.23 Section 1 of the MFMA defines irregular expenditure, *inter alia*, as expenditure incurred by a municipality in contravention of or that is not in accordance with a requirement of the MFMA or the Municipal Systems Act, and which has not been condoned.
- 6.1.24 A municipality must, in terms of section 171(4) of the MFMA, investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or any other official of the municipality and if the investigation warrants such a step, institute disciplinary proceedings.
- 6.1.25 Section 171(1)(c) of the MFMA provides that the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently makes or permits, or instructs another official of the municipal entity to make an unauthorised, irregular or fruitless and wasteful expenditure.

Regulation 32(1) of the Municipal Supply Chain Regulations: Gazette No 27636 of 30 May 2005

- 6.1.26 Regulation 32(1) of the MSCR provides that a supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if –

- (a) *“ the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;*
- (b) *the municipality or entity has no reason to believe that such contract was not validly procured;*
- (c) *there are demonstrable discounts or benefits for the municipality or entity to do so; and*
- (d) *that other organ of state and the provider have consented to such procurement in writing.”*

Regulation 36(1) of the Municipal Supply Chain Regulations: Gazette No 27636 of 30 May 2005 (MSCR)

6.1.27. Regulation 36(1) of the MSCR provides that a supply chain management policy may allow the accounting officer-

- (a) *“to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only –*
 - (i) *in an emergency;*
 - (ii) *if such goods or services are produced or available from a single provider only;*
 - (iii) *for the acquisition of special works of art or historical objects where specifications are difficult to compile;*
 - (iv) *acquisition of animals for zoos; or*
 - (v) *in any other exceptional case where it is impractical or impossible to follow the official procurement processes; and*

(vi) to ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.”

6.1.28. Regulation 36(2) of the MSCR provides that the accounting officer must record the reasons for any deviations in terms of sub regulation (1)(a) and (b) and report them to the next meeting of the Council, or board of directors in the case of a municipal entity, and include same as a note to the annual financial statements.

Analysis of the evidence

6.1.29. A request by the Municipality was forwarded to the FSPT to participate in its transversal contract with Vodacom, which was authorised by Mr Mahlatsi on 11 February 2016 as required by Regulation 32 of the MSCR. The Investigation Team noted that that the FSPT contract was for the supply and delivery of voice and data services, which did not include “SMART” meters, therefore the Municipality could not enter into a transversal contract in terms of Regulation 32 as the contract did not include “SMART” meters.

6.1.30. According to the Municipality, it did not conclude the process to participate in the transversal contract in terms of Regulation 32, as it would have come to an end within two (2) months of concluding the Master Agreement, being end of July 2016. The Investigation Team established, that in terms of Regulation 32 of the MSCR, the Municipality was not allowed to extend the contract period beyond the original term of the transversal contract of the FSPT.

6.1.31. According to the Municipality, to ensure that the services with Vodacom could continue post August 2016 or for the appointment of a new service provider, the Municipality had one of the following options:

- (a) “SCM Regulation 36 with the Provincial Treasury or other organ of state;
- (b) MFMA, Section 116 contract extension; and
- (c) A new competitive tender, one or two months before the closing date.” (sic)

- 6.1.32. In the Municipality’s SCM Deviation Form of 05 April 2016, Mr Dichaba approved an application for a deviation and ratification of minor breaches of procurement processes on the basis of emergency in terms of Regulation 36(1) of the MSCR.
- 6.1.33. The Investigation Team noted that the “emergency” was self-created as the Municipality was aware, well in advance, of the fact that the transversal contract would expire by the end of July 2016. The Municipality therefore had ample opportunity to follow a proper procurement process to acquire the “SMART” meter services. The Municipality did not substantiate as to why they were of the view that it was an emergency and that they could therefore proceed with the process in terms of Regulation 36.
- 6.1.34. Further, the Municipality was aware that the transversal contract with the FSPT would terminate by the end of July 2016, as confirmed by the Provincial Treasury on 11 February 2016.
- 6.1.35. It was confirmed that the Municipality further did not embark on the process to invite tenders and could not request an extension of a contract in terms of section 116 of the MFMA, as none was in place at the time, hence this option was moot.
- 6.1.36. The Municipality contended that the services of Vodacom were acquired through a TRANSVERSAL APPOINTMENT IN TERMS OF REGULATION 32

OF THE MUNICIPAL SUPPLY CHAIN MANAGEMENT REGULATIONS:
CONTRACT NO. FSPT003/13/14, on 9 June 2016.

- 6.1.37. On 26 November 2020 the Investigation Team held a meeting with the Municipality, whereby the Municipality was requested to supply information to support the appointment of Vodacom, in line with the Regulation 32 application. The Municipality failed to supply the requested information.
- 6.1.38. In addition, the Municipality conceded in their communication to the Investigation Team on 08 December 2022 that “*the process was not in terms of Regulation 32, but rather Regulation 36 of the MSCR*”.
- 6.1.39. The Municipality could also not supply proof that it has requested quotations, except for a presentation, which was conducted during a Municipal Council meeting on 31 August 2016, contrary to the provisions of section 217(1) of the Constitution, which provides that an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 6.1.40. There is no evidence that the Municipal Manager followed a process to obtain competitive tenders before the expiry of the transversal contract to prevent the irregular awarding by the Nama Khoi Local Municipality of the “SMART” Meter contract to Vodacom, in compliance with section 62(1)(d) of the MFMA.
- 6.1.41. Apart from the fact that Vodacom conducted a presentation to the Municipal Council, no other entity was invited to make a presentation. The former Accounting Officer approved the Deviation Form without satisfying himself that the process that was followed by the Supply Chain Management Unit of the Municipality was fair, transparent and competitive in accordance with section 217(1) of the Constitution.

6.1.42. The reasons for the deviation from the normal procurement processes were recorded on the Deviation Form approved by the Municipal Manager on 05 April 2016, and no evidence was supplied by the Municipality that the deviation was discussed at the Municipal Council meeting as prescribed by Regulation 36(2) of the MSCR.

Conclusion

6.1.43. Based on the information obtained, it can be concluded that Vodacom's appointment was not in accordance with Regulation 36 of the MSCR.

6.1.44. In respect of compliance with section 62(1)(d) of the MFMA, there is no evidence that the Municipal Manager, as the accounting officer of the Municipality, took steps to prevent unauthorised, irregular or fruitless, and wasteful expenditure and other losses relating to the awarding of the contract to Vodacom. Before the awarding of the contract to Vodacom there was no tender process that was followed.

6.1.45. During the investigation, it became evident that no disciplinary steps were taken against any official of the Municipality who committed financial misconduct relating to the awarding of the contract to Vodacom as required in terms of section 171(4) of the MFMA. The fact that the Municipal Manager was not aware of this irregularity is concerning, as it could be an indication of a lack of adequate internal controls or a deliberate flouting of the existing controls.

6.1.46. The reasons for deviation from the normal procurement processes were only recorded in the deviation memorandum, dated 5 April 2016. Further, no evidence was obtained that the reasons for deviation from the normal procurement processes were discussed in a Municipal Council meeting as prescribed by Regulation 36(2) of the MSCR.

- 6.1.47. In terms of the Memorandum addressed to Mr Dichaba, dated 5 January 2016, the Municipality was aware of the need for procured services as far back as January 2016. The Municipality should have opted for an open tender to allow other suppliers to bid for the tender.
- 6.1.48. There was no evidence of an emergency as envisaged in Regulation 36(1) of the MSCR, found during the investigation to enable the Municipality to apply for a deviation from procurement processes.
- 6.1.49. According to the Deviation Form dated 5 April 2016, the Municipality did not provide information on how Vodacom was instructed by the Municipality to procure services required and whether the quoted amount for the work required was market related. No requests for quotations were sent by the Municipality to Vodacom after the Deviation Form was approved. The Municipality relied on the existing contract with Vodacom.
- 6.1.50. It must also be noted that the Municipality provided contradictory responses relating to the procurement process followed in the appointment of Vodacom.

7. FINDINGS

- 7.1. Having regard to the evidence and the regulatory framework determining the appropriate standards that the Municipality should have complied with and the impact thereof on good administration, the Public Protector makes the following adverse findings:

- 7.1.1. Whether the Nama Khoi Local Municipality irregularly awarded the “SMART” meter contract to Vodacom (Pty) Ltd without following the relevant legal prescripts, and if so, whether such conduct constitutes improper conduct as envisaged in section 182 (1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994**
- 7.1.1.1. The allegation that the Municipality irregularly awarded the “SMART” meter contract to Vodacom, without following the relevant legal prescripts is substantiated.
- 7.1.1.2. The Municipality’s reliance on the provisions of Regulation 36 of the MSCR as constituting grounds for deviation from prescribed procurement processes based on an emergency is not supported by the evidence. The Municipality failed to prove that an emergency existed that necessitated a deviation from normal procurement processes. The Municipality failed to provide more information in relation to the process it followed after the Deviation Form was approved in April 2016, to request quotations from Vodacom.
- 7.1.1.3. The appointment of Vodacom was not in accordance with Regulation 36(1) of the MSCR.
- 7.1.1.4. The Municipality failed to promote and maintain a high standard of professional ethics in dealing with the awarding of the contract to Vodacom as required in terms of the prescripts of section 195 of the Constitution. The Municipality failed to perform its work diligently, honestly and in a transparent manner in line with the Code of Conduct for Municipal Staff Members.

- 7.1.1.5. The Municipality therefore awarded the tender to Vodacom without a competitive bidding process and thus contravened section 217 of the Constitution.
- 7.1.1.6. The conduct of the Municipality, particularly that of the Municipal Manager, accordingly constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

8. REMEDIAL ACTION

- 8.1. The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this notice upon the conclusion of an investigation where adverse findings are made.
- 8.2. In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng, CJ held that the remedial action taken by the Public Protector has a binding effect.
- 8.3. Having regard to the evidence, the regulatory framework determining the standard the Municipality should have complied with and the impact on the Complainant, the Public Protector takes the following remedial action, in terms of section 182(1)(c) of the Constitution:

The Speaker of the Municipal Council

- 8.3.1. Within thirty (30) calendar days from the date of receipt of the final report, table the final report before Council for discussion and implementation; and
- 8.3.2. Within sixty (60) calendar days from the date of receipt of the report, ensure that the Municipality investigates allegations of financial misconduct against the accounting officer and any other implicated official in the procurement and awarding of the “SMART” meters contract to Vodacom in compliance with section 171(4) of the MFMA.

The Municipal Manager

- 8.3.3. Within sixty (60) calendar days from the date of the report, initiate a process to take appropriate corrective action against the officials of the Municipality who participated in the awarding of the “SMART” meter contract to Vodacom by the Municipality, in terms of the Disciplinary Policy of the Municipality and section 171(4)(a) of the MFMA;
- 8.3.4. Ensure that the Internal Audit Unit of the Municipality, on an annual basis, reviews and advise management on the adequacy and effectiveness of the municipality’s system of internal control, risk management and performance management as envisaged by section 165 of the MFMA;
- 8.3.5. Ensure that, within thirty (30) calendar days from the date of receipt of the final report, the matter is brought to the attention of the Audit Committee to strengthen oversight over internal controls, to prevent recurrence of breaches and for the proper detection and reporting thereof to the Municipal Council as envisaged by section 166 of the MFMA; and

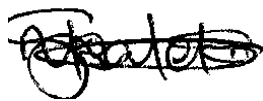
8.3.6. Report to the Council on the implementation of the remedial action taken in paragraphs 8.3.1 to 8.3.5 above, within ninety (90) calendar days from the date of receipt of the final report, and provide the Public Protector with a copy thereof.

9. MONITORING

9.1. The Municipal Manager to submit an action plan to the Public Protector within thirty (30) calendar days from the date of this report on the implementation of the remedial action referred to in paragraph 8 above.

9.2. The Municipal Manager to submit a close off report indicating the full implementation of the remedial action within one hundred and twenty (120) calendar days from the date of receipt of the final report.

9.3. The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 31 MARCH 2023

Assisted by: Adv Deon Barnard

Executive Manager: PII Coastal