

**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**

REPORT NUMBER: 03 of 2024/2025

ISBN NUMBER: 978-1-0672387-0-4

**INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF
OPULENTIA FINANCIAL SERVICES JV FEZI AUDITORS AND CONSULTANTS AS A
SERVICE PROVIDER FOR THE PROVISION OF SHORT-TERM INSURANCE BY THE
FUNCTIONARIES OF EMFULENI LOCAL MUNICIPALITY**

TABLE OF CONTENTS		
ITEM NO.	DESCRIPTION	PAGE NO.
	LIST OF ACRONYMS AND ABBREVIATIONS	3
	EXECUTIVE SUMMARY	4
1.	INTRODUCTION	9
2.	THE COMPLAINT	9
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	13
4.	ISSUE IDENTIFIED FOR INVESTIGATION	14
5.	THE INVESTIGATION	15
6.	THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	19
7.	FINDINGS	37
8.	REMEDIAL ACTION	39
9.	CONCLUSION	40

LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS AND ABBREVIATIONS	DESCRIPTIONS
AMM	Acting Municipal Manager
AO	Accounting Officer
BAC	Bid Adjudication Committee
BEC	Bid Evaluation Committee
CFO	Chief Financial Officer
Comperio	Comperio Forensic Services (Pty) Ltd
Constitution	Constitution of the Republic of South Africa, 1996
CRO	Chief Risk Officer
DPSA	Department of Public Service and Administration
IGR	Intergovernmental Relations
Municipality	Emfuleni Local Municipality
Lateral Unison	Lateral Unison Insurance Brokers
MBD Attorneys	MBD Attorneys Debt Collectors
MFMA	Municipal Finance Management Act, 2003
MLM	Matjhabeng Local Municipality
MM	Municipal Manager
OPULENTIA	Opulentia Financial Services JV Fezi Auditors and Consultants
PPPFA	Preferential Procurement Policy Framework Act, 2000
SAICA	South African Institute of Chartered Accountants
SCA	Supreme Court of Appeal
SCM	Supply Chain Management

EXECUTIVE SUMMARY

- (i) 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), 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, 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 in connection with allegations of irregularities in the appointment of service providers by the functionaries of the Emfuleni Local Municipality (the Municipality).
- (iii) The investigation originates from a complaint lodged with the Public Protector by an Anonymous Complainant on 17 September 2020.
- (iv) The Complainant alleged, *inter alia*, that the Municipality irregularly appointed Opulentia Financial Services JV Fezi Auditors and Consultants, to provide brokerage and Comperio Forensic Services (Pty) Ltd for forensic services;
- (v) Based on analysis of the complaint, the following issue was considered and investigated:
 - (a) Whether the functionaries of the Emfuleni Local Municipality irregularly procured Opulentia Financial Services JV Fezi Auditors and Consultants for the provision of insurance brokerage services, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (vi) The Public Protector did not continue with the investigation of the second complaint relating to the appointment of Comperio Forensic Services (Pty) Ltd, for the provision of forensic investigation services on behalf of the Municipality. This

was due to the consideration of section 6(9) of the Public Protector Act, which places a limitation on the jurisdiction to investigate an incident or a matter that occurred more than two (02) years prior to reporting same to the Public Protector, unless special circumstances exist as envisaged in Rule 10(1) of the Public Protector Rules.

- (vii) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law, and related prescripts.
- (viii) Notices in terms of Rule 41(1) read with Rule 42(1) of the Public Protector Rules, 2018, as amended were issued to all the following implicated and/or affected parties to provide them with an opportunity to respond to the proposed provisional findings/observations on 28 February 2024 and on 20 June 2024:
 - (a) The anonymous Complainant (name known by Public Protector); and
 - (b) The Municipal Manager, Mr April Ntuli.
- (ix) Written responses to the Notices were received on 01 March 2024 and on 24 June 2024 respectively, from the anonymous Complainant and from Mr April Ntuli.
- (x) Having regard to the evidence, the regulatory framework determining the standards that the functionaries of the Municipality should have complied with and the impact thereof on good administration, the Public Protector makes the following findings:
 - (a) **Whether the functionaries of the Municipality irregularly procured Opulentia Financial Services JV Fezi Auditors and Consultants for the provision of insurance brokerage services, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

-
- (aa) The allegation that the Municipality irregularly procured Opulentia Financial Services JV Fezi Auditors and Consultants for the provision of insurance brokerage services, **is substantiated.**
- (bb) The evidence before the Public Protector reveals that on 13 February 2020 the Municipality had already commissioned an internal audit or probity investigation through its Internal Audit Department, with a view to investigate the same allegations raised by the Complainant. The Municipality finalised its investigation and issued an Internal Probity Audit Report, dated 06 May 2020.
- (cc) The Municipality's Internal Probity Audit Report found, amongst other things, the following material irregularities associated with the processes followed by the functionaries of the Municipality to procure Opulentia for the provision of insurance brokerage services:
- (i) There was a lack of an appropriate procurement plan;
 - (ii) There was also a lack of monitoring and oversight of the functionality of the bid committees which resulted in non-functional SCM bid committees;
 - (iii) The bid committees had inadequate capacity and skills to evaluate complicated bids and the analysis of financial information;
 - (iv) There was a lack of and/or ineffective communication within the SCM related structures within the Municipality;
 - (v) There was no monitoring of the bid validity period and there was also a continuation with the bidding processes while the tender was no longer valid;
 - (vi) Wasteful expenditure incurred in terms of the cost attached to normal competitive bidding processes was also identified;
 - (vii) There was non-compliance with SCM Regulation 32 on the processes followed by the Municipality regarding the implementation of Regulation 32; and
 - (viii) The Municipality's approved SCM policy did not make provision for processes and procedures that had to be followed when implementing Regulation 32.

-
- (dd) Based on the above, the conduct of the Municipality constitutes improper conduct as envisaged by section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (xi) 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 highlighted in this report on finalisation of an investigation where adverse findings are made.
- (aa) The Public Protector has taken cognisance of the fact that following the issuing of the Municipality's Internal Probity Report, the Municipality took steps to implement its recommendations, including taking disciplinary action against implicated official(s), except those that were no longer in the employ of the Municipality.
- (bb) Further cognisance is taken of the fact that the following functionaries who were involved in the procurement process left the employ of the Municipality before disciplinary proceedings could be instituted against them:
- (i) Mr Motubatsi - Executive Director: Local Economic Development;
 - (ii) Mr T Nxumalo - Executive Director – Infrastructure;
 - (iii) Mr V Campbell - Executive Director - Community Services;
 - (iv) Mr T Ndlovu - Executive Director - Shared Services; and
 - (v) Ms R Mokgosi - Executive Director: Basic Services.
- (cc) On 01 April 2024, the Public Protector was furnished with a copy of an amended ELM's SCM Policy for 2022-2023 and it is confirmed that paragraph 36 thereof, which deals with the procurement of goods and services under contracts secured by other organs of state, is revised to remedy identified governance gaps and to provide for clear guidelines aimed at addressing underlying administrative lapses as recommended by the probity report.

-
- (dd) The Public Protector further noted that the Municipality's Internal Probity Report was ratified by the Municipal Council as per Council Resolution Item C160 and Council Resolution Item A4845 respectively.
- (ee) The Municipal Council resolved that the Municipality's policies, including the SCM policy be reviewed; that a workshop be arranged for employees on SCM policy; and that the dismissal of the implicated employees be endorsed as recommended by the chairperson of the hearing.
- (ff) In the light of the corrective action already taken by the Municipality, the Public Protector is of the view that where a state institution has already taken action or implemented remedial action based on its own internal practice and prescripts, within its sphere of administration, as is clear in this matter, it would not be prudent for the Public Protector to take further remedial action.
- (xii) Accordingly, the Public Protector concludes and finalises this matter based on the findings set out above and will not take any further remedial action.

1. INTRODUCTION

- 1.1. 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) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. The report relates to an investigation in connection with allegations of irregularities in the appointment of service providers by the functionaries of the Municipality.
- 1.3. The report is submitted in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation to the following affected persons, for such persons to note the outcome of the investigation:

1.3.1. The Municipal Manager of the Emfuleni Local Municipality, Mr April Ntuli (Mr Ntuli), and

1.3.2. The Complainant.

2. THE COMPLAINT

2.1. The investigation originates from a complaint lodged with the Public Protector by an Anonymous Complainant (the Complainant) on 17 September 2020.

2.2. The Complainant alleged, *inter alia*, that:

2.2.1 The Municipality irregularly appointed Opuientia Financial Services JV Fezi Auditors and Consultants (Opuientia) to provide brokerage and Comperio Forensic Services (Pty) Ltd (Comperio) for forensic services;

2.2.1. On 06 May 2019, tender number 37/2019 for the provision of brokerage services for short term insurance was advertised by the Municipality with a closing date of 19 June 2019;

2.2.2. Several bidders responded to the bid and Opuientia and Lateral Unison Insurance Brokers (Lateral Unison) were two of the bidders. Lateral Unison was still under contract for the brokerage services for short term insurance services to the Municipality. On submission of its bid for the new tender, Lateral Unison scored the highest out of all the bidders and it was the recommended service provider;

2.2.3. Before the appointment of Lateral Unison could be confirmed by the Bid Adjudication Committee (BAC), the Chief Financial Officer (CFO), Mr Andile Dyakala (Mr Dyakala) appointed Opuientia by way of the Supply Chain Management Regulation for the procurement of goods or services under contracts which have been secured by other organs of state (Regulation 32 of the Municipal Finance Management Act, 2003) (MFMA). Opuientia was amongst the group of bidders that tendered for the provision of brokerage services, but it failed to make the shortlist;

-
- 2.2.4. On 20 February 2020, Mr Dyakala was advised that his instruction to finalise the Service Level Agreement (SLA) for the appointment of Opulentia, through Regulation 32 of the MFMA, would expose the Municipality to unnecessary risk and possible litigation;
- 2.2.5. The Preferential Procurement Policy Framework Act, 2000 (PPPFA), Regulation 13 further states that a tender cancellation must be undertaken before the Municipality can enter/finalise a new contract, and the reasons therefore must be recorded as well;
- 2.2.6. There were newspaper reports indicating that a formal complaint was lodged with the former Municipal Manager, Mr Lucky Leseane (Mr Leseane), for his urgent intervention into the conduct of Mr Dyakala. In terms of Regulation 38 of the MFMA, an award will be invalid if a company was awarded a tender through Regulation 32 whilst there was a normal tender process being undertaken;
- 2.2.7. Due to Mr Dyakala's influence at the Municipal Council, reports that should have been discussed by the Municipal Council to address Mr Dyakala's conduct were shifted and not tabled to protect him. This action led to the suspension of Mr Leseane, by Council;
- 2.2.8. The recommended companies' appointment (Opulentia) was invalid because the normal tender process had not been followed by the Municipality. Opulentia was only appointed to siphon monies from the coffers of the Municipality;
- 2.2.9. Despite numerous complaints by the Supply Chain Management (SCM) staff regarding the irregularities, the newly appointed Acting Municipal Manager, Mr Oupa Nkoane (Mr Nkoane) and Mr Dyakala failed to investigate the complaints;
- 2.2.10. Large amounts of money were paid out to Opulentia after they were irregularly appointed by the Municipality;
- 2.2.11. Comperio was one of several service providers appointed to be on the Municipality's database for forensic services in 2013;

-
- 2.2.12. Comperio started working at the Municipality on 10 February 2015 or 2016 and there was no written agreement between the Municipality and Comperio. There was no appointment letter to provide services and the first assignment (unspecified assignment) to the Municipality was delivered by Comperio on 24 February 2016;
- 2.2.13. In terms of the statutory framework, the services can be procured from the panel by means of a request for proposal or presentation. An appointment letter is then issued with an agreed fee as well as the scope of work and the conclusion of the Service Level Agreement (SLA).
- 2.2.14. All appointments must have a start and end date as per section 116 of the Municipal Systems Act, 1998 and the scope of work and the price must be clearly defined;
- 2.2.15. On 15 November 2015, the Accounting Officer appointed Comperio to conduct certain forensic investigations regarding irregular expenditure within the Municipality. Comperio was further appointed by the Municipality to provide forensic investigation services regarding the review of the Trust Account of MBD Attorneys (Debt Collectors) on 06 March 2017, in terms of the appointment letter;
- 2.2.16. It also came to the attention of the Complainant that Comperio was rendering different services without being properly appointed and their invoices amounted to millions of rands with some payments being made without authorisation; and
- 2.2.17. Notwithstanding several complaints lodged with the Municipality's SCM regarding the irregularities, Mr Nkoane and Mr Dyakala neglected and/or refused to investigate Comperio;
- 2.2.18. To date the following is still unknown:
- 2.2.18.1. How was Comperio appointed for all the work they were doing;
 - 2.2.18.2. What was the scope of work;
 - 2.2.18.3. What was the compensation structure;

-
- 2.2.18.4. Were all invoices paid in terms of the agreed South African Institute of Chartered Accountants (SAICA) rates;
- 2.2.18.5. Why was Comperio Forensic Services (Pty) Ltd now trading as Comperio Consulting (Pty) Ltd and changing Directors with people linked to political office bearers without forensic investigation expertise;
- 2.2.18.6. Why several officials were suspended but had to be brought back due to the lack of evidence emanating from the sub-standard investigations and reports made by Comperio Consulting;
- 2.2.18.7. Why there are no appointment letters for the current investigations whilst an amount of about thirty million rands (R30 000 000) was paid to Comperio in this short space of time;
- 2.2.18.8. Investigations instructed by the previous Accounting Officers were completed with a certain outcome whilst the current Accounting Officer re-instructed Comperio to do investigations based on already completed investigations but this time with a different outcome and recommendation;
- 2.2.18.9. Council funds are being wasted as Comperio was paid twice for the same investigations;
- 2.2.18.10. There is no fee structure or appointment letter or SLA for the current investigations; and
- 2.2.18.11. The above questions and use of Comperio left them with no option but to report the matter to the Public Protector because their conclusion was that some of the investigations conducted by making use of Comperio were aimed to assist in the abuse of the power and misuse of Emfuleni Local Municipality's funds.

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 of the Republic of South Africa, 1996

(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 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. 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 in terms of section 239 of the Constitution and the conduct of its functionaries amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls within its competency to investigate as envisaged in section 182(1)(a) of the Constitution and section 6(4)(a) of the Public Protector Act.

4. ISSUE IDENTIFIED FOR INVESTIGATION

4.1. On analysis of the complaint, the following issue was considered and investigated:

4.1.1. Whether the functionaries of the Municipality irregularly procured Opuientia Financial Services JV Fezi Auditors and Consultants for the provision of insurance brokerage services, if so, whether such conduct is improper as

envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

- 4.2. The Public Protector did not continue with the investigation of the second complaint relating to the appointment of Comperio for the provision of forensic investigation services on behalf of the Municipality. This was due to the consideration of section 6(9) of the Public Protector Act, which places a limitation on the jurisdiction to investigate an incident or a matter that occurred more than two (02) years prior to reporting same to the Public Protector, unless special circumstances exist as envisaged in Rule 10(1) of the Public Protector Rules.
- 4.3. The complaint regarding the appointment of Comperio relates to an incident emanating from 2013 to January 2018 and the complaint was reported to the Public Protector in September 2020.
- 4.4. In *Gordhan v Public Protector and Others*, the Supreme Court of Appeal (the SCA) and the High Court in Pretoria respectively, held that it is only where special circumstances exist, that complaints that are older than two years can be entertained and that, the particulars of the special circumstances must be succinctly set out prior to the commencement of the investigation. The court stated that it does not avail the Public Protector to say she remembered special circumstances later.
- 4.5. Under the circumstances, the Public Protector determined after exercising its discretion that there were no special circumstances to warrant an investigation of the allegation relating to the appointment of Comperio for the provision of forensic investigation services on behalf of the Municipality.

5. THE INVESTIGATION

5.1. Methodology

- 5.1.1. The investigation is conducted in terms of section 182 of the Constitution, read with sections 6 and 7 of the Public Protector Act.

5.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.2. **Approach to the investigation**

5.2.1. The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework, and prescripts.

5.2.2. The investigation process included an exchange of correspondence with officials from the Municipality wherein they were informed of the investigation as well as the information required from them.

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

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.2.4. 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. In this case, the factual enquiry principally focused on whether the alleged conduct was inconsistent with the applicable process.

5.2.5. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the functionaries of the Municipality in the appointment of Opulentia.

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

5.3. **Key Sources of Information**

5.3.1. **Correspondence exchanged**

5.3.1.1. Complaint letter from the Complainant, dated 17 September 2020;

5.3.1.2. Allegations letter from the Public Protector to the former Municipal Manager, Mr Leseane, dated 09 October 2020;

5.3.1.3. Letter from Mr Leseane to the Public Protector responding to the allegations, dated 14 February 2022;

5.3.1.4. Email from the Public Protector to Mr Ntuli requesting further information, dated 27 September 2023;

5.3.1.5. Email from the Municipality's Intergovernmental Relations Officer (IGR), Ms Jero Mofokeng (Ms Mofokeng) to the Public Protector responding to the allegations letter, dated 31 October 2023;

5.3.1.6. Email from the Public Protector to Mr Ntuli seeking clarity on the review of the SCM policy, dated 02 February 2024 and

5.3.1.7. Email from Mr George Zwane, an IGR official of the Municipality responding to the e-mail dated 02 February 2024 from the Public Protector, dated 23 February 2024.

5.4. **Documents**

5.4.1. Council Resolution-Item 01-Regulation 32: RFP NO: 04/09/2017 Short Term Insurance Portfolio, dated 04 February 2020;

-
- 5.4.2. Appointment letter signed by the then Acting Municipal Manager (AMM) Mr Thabo Ndlovu, appointing Opulentia, dated 04 February 2020;
- 5.4.3. Memorandum from the CFO, Mr Dyakala to all clusters within the Municipality regarding Regulation 32, dated 24 January 2020;
- 5.4.4. Letter of consent from Ms Zingisa Khuthaza Tindleni, the AMM at the Matjhabeng Local Municipality (MLM) to the Municipality, dated 16 January 2020;
- 5.4.5. Unsigned report of the second BEC, dated 29 January 2020;
- 5.4.6. Request for Probity Audit Memorandum signed by Mr Dyakala to Chief Audit Officer, Ms Laura Mabunda, dated 13 February 2020;
- 5.4.7. Probity Audit Report titled “*Special Assignment on the Review of Supply Chain Management processes*”, dated 06 May 2020;
- 5.4.8. Outcome of Disciplinary Enquiry and Sanction, signed by Mr Ntuli, the Municipal Manager, dated 25 August 2023 and
- 5.4.9. Copy of the Revised Municipality’s SCM Policy-2022-2023, received from Mr Ntuli on 01 April 2024.
- 5.5. **Legal Framework**
- 5.5.1. Constitution of the Republic of South Africa, 1996;
- 5.5.2. Municipal Finance Management Act, 2003;
- 5.5.3. MFMA Circular No. 96 of the Municipal Finance Management Act, 2003-Supply Chain Management Regulation 32;
- 5.5.4. Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2017; and
- 5.5.5. Emfuleni Local Municipality’s SCM Policy, adopted on 01 April 2019.

5.6. **Case Law**

5.6.1. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; and

5.6.2. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004).

5.7. **Rule 41(1) and Rule 42(1) Notice/Letter issued**

5.7.1 Rule 41(1) Notice to the Complainant, dated 28 February 2024;

5.7.2 Response to the Rule 41(1) Notice from the Complainant, dated 01 March 2024; and

5.7.3 Rule 42(1) Notice/Letter issued to Mr Ntuli on 20 June 2024 and his response dated 24 June 2024.

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 functionaries of the Municipality irregularly procured Opulentia Financial Services JV Fezi Auditors and Consultants for the provision of insurance brokerage services, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

Common cause

- 6.1.1. On 06 May 2019, the Municipality advertised a tender on the municipal website and in newspapers for the provision of Short-Term Insurance Brokerage Services under tender number 37/2019. The closing date of the tender was 19 June 2019.
- 6.1.2. Seven (07) bidders responded to the bid namely, Tshianelo Holdings (Pty) Ltd, Omni Risk Solutions (Pty) Ltd, Kunene Makopo Risk Solutions, Indwe Risk Solutions, Sankofa Insurance Brokers, Opulentia and Lateral Unison.

Issue in dispute

- 6.1.3. The issue for the Public Protector's determination is whether the SCM process followed in the awarding of the tender to Opulentia by the functionaries of the Municipality for the provision of short-term insurance brokerage services was proper and in line with the relevant prescripts.

Complainant's version

- 6.1.4. The Complainant contended that:
- 6.1.4.1 Lateral Unison was the incumbent service provider (still under contract) for the provision of insurance services and had submitted their bid for the new tender. Lateral Unison had scored the highest of all the bidders and was the recommended service provider;
- 6.1.4.2 Mr Dyakala appointed Opulentia through Regulation 32 of the MFMA before the appointment of Lateral Unison could be confirmed by the BAC. Opulentia had failed to make the shortlist of bidders;

-
- 6.1.4.3 On 20 February 2020, an email was sent to Mr Dyakala advising him that his instruction to finalise the SLA for the appointment of Opulentia through the Regulation 32 process of the MFMA would expose the Municipality to unnecessary risk and possible litigation;
- 6.1.4.4 PPPFA Regulation 13 provides that a tender cancellation must be undertaken before the Municipality can enter/finalise a new contract. The reasons for such cancellation must also be recorded;
- 6.1.4.5 Newspapers had reported that a formal complaint was lodged with Mr Leseane for his urgent intervention into the conduct of Mr Dyakala regarding the Regulation 32 of the MFMA appointment. The Regulation clearly stated that a company which was awarded a tender through Regulation 32 whilst there was a normal tender would not be considered as having been legally appointed;
- 6.1.4.6 Due to Mr Dyakala's influence in the Municipal Council, the tabling and discussion by the Municipal Council regarding his conduct and complaints that were lodged against him were not dealt with by the Council as they were protecting him;
- 6.1.4.7 The Municipality was informed that Opulentia's appointment would not be valid if a normal tender process had been followed. There were other unlawful motives to appoint Opulentia, which were to siphon money from the coffers of the Municipality;
- 6.1.4.8 Despite numerous complaints by staff within the SCM unit of the Municipality regarding the irregularities, the AMM, Mr Nkoane and Mr Dyakala failed to investigate the complaints; and
- 6.1.4.9 Large amounts of money were being paid out to Opulentia since the commencement of its appointment in terms of Regulation 32 of the MFMA.

Municipality's version

- 6.1.5. On 09 October 2020, the Public Protector issued an allegations letter to Mr Leseane, regarding the allegations raised by the Complainant.
- 6.1.6. In a response letter dated 14 February 2022, Mr Leseane, stated, *inter alia*, that:
- 6.1.6.1. The Municipality went out on a competitive bidding process on 06 May 2019, for the attainment of Short-Term Insurance Brokerage Services for a period of three (03) years;
- 6.1.6.2. The tender was advertised on 06 May 2019 and the closing date was 19 June 2019;
- 6.1.6.3. The first BEC was appointed to evaluate the tender and during the process, the BEC was dissolved by Mr Dyakala without any valid reason and a second BEC was appointed. The second BEC members refused the appointments because the first BEC had looked at functionality of the tenders and were finalising the pricing;
- 6.1.6.4. The first BEC was reinstated and whilst busy finalising their tender report, which was to serve before the BAC, it was informed by Mr Dyakala through a Memorandum dated 24 January 2020, that the Municipality had resolved to recommend to the Accounting Officer to apply the Regulation 32 process of the MFMA and to appoint Oplentia as a Service Provider;
- 6.1.6.5. The Municipality did not follow the procedure laid down in Regulation 13 of PPPFA. The reasons contained in the BEC report were not in line with the provisions of Regulation 13 of the PPPFA. The reasons of the BEC for appointment of Oplentia was that the evaluation process was taking long. Furthermore, the decision by Mr Dyakala to cancel the tender was not publicised either in newspapers or on the Municipal website, which were used to advertise the original tender;

- 6.1.6.6. On 04 February 2020, the BAC, at its sitting resolved that the Accounting Officer should approve the request made by the BAC to invoke Regulation 32 of the MFMA for the Municipality to participate in the contract of the MLM for short term insurance and appoint Opulentia for the service;
- 6.1.6.7. On the same day (04 February 2020), the AMM, Mr Thabo Ndlovu, as the Accounting Officer, appointed Opulentia to provide short term insurance services for the Municipality for a period of fourteen (14) months to tally with that of the MLM as requested by the BAC as per Regulation 32 of the MFMA;
- 6.1.6.8. Notwithstanding the sitting of the BAC on 04 February 2020 and the appointment of Opulentia, Mr Nkoane had already started the Regulation 32 process on 06 December 2019 when he asked for permission from the AMM of the MLM, Ms Zingisa Khuthaza Tindleni, to use the short-term insurance contract which they had with Opulentia;
- 6.1.6.9. Mr Nkoane acted irregularly by overlooking the BEC which he had appointed to evaluate the tender in question. Furthermore, the report which served before the BAC and on which the BAC had based its recommendations, was not prepared by members of the first BEC, because the first BEC was at that stage was defunct. All the BEC members who were consulted by Mr Leseane, disassociated themselves from the report;
- 6.1.6.10. The Municipality abused and failed to apply its SCM policy, particularly, section 32 thereof, which provides that the BAC must consider the report and the recommendations of the BEC and either, depending on delegation, make a final award or recommendation to the Accounting Officer or make another recommendation to the Accounting Officer on how to proceed with the relevant procurement.
- 6.1.6.11. The BEC report which was considered by the BAC was not the report of the first appointed BEC, but that of the second BEC. The actions of the BAC were contrary to the provisions of Regulation 13 of PPPFA of 2017;

6.1.6.12. The Regulation 38 of the MFMA provides that the Municipality's SCM policy must contain the procedure to be followed regarding the prevention of abuse of the SCM system. Combating abuse of the SCM system is contained in Paragraph 42 of the Municipality's SCM Policy;

6.1.6.13. Paragraph 42 of the Municipality's SCM Policy provides that:

“(1) The Accounting Officer must:

(a) Take all reasonable steps to prevent the abuse of the supply chain management system;

(b) Investigate any allegations against an official or other role player of such fraud, corruption, favouritism, unfair or irregular practices or failure to comply with this policy, and when justified-

(2) Take any appropriate step against such officials or other role players or report any alleged criminal conduct to the South African Police Services”

6.1.6.14. Whilst he was on suspension, which was uplifted in December 2021, the various AMMs did not apply the Municipality's SCM policy. The principle of *nemo iudex in causa sua*¹ applied to all the AMMs because they were all members of the BAC;

6.1.6.15. On 13 February 2020, the Municipality requested the Internal Audit Department of the Municipality to undertake a Probity Audit for the procurement of the short-term insurance brokerage services and the compilation of the insurance schedule as a basis for improving the procurement outcome and addressing unexpected probity issues that might arise;

¹ The principle of *nemo iudex in causa sua* means that “no one can be a judge in his own cause or case.” It is a Latin Brocard and a principle of natural justice that no person can judge a case in which they have an interest and that the rule is strictly applied to any appearance of a possible bias, even if there is actually no such biasness. The principle meant that justice must not only be done but must be seen to be done.

- 6.1.6.16. According to the second BEC report, the Municipality was expected to pay Opuientia three million three hundred and twenty-four thousand four hundred and ninety-eight rand (R3 324 498) per month as the “*conventional amount excluding the part of the shortfall funds*”;
- 6.1.6.17. The Municipality paid Opuientia a conventional amount of three million six hundred-thousand-rand (R3 600 000) for a period of fourteen (14) months during the subsistence of the contract, which amounted to fifty million four hundred thousand rand (R50 400 000). The shortfall that was paid from the coffers of the Municipality amounted to two million nine hundred forty-eight thousand seven hundred and forty-eight rand eighty-four cents (R2 948 748, 84); and
- 6.1.6.18. The “*implicated*” AMM (Mr Nkoane) has since left the service of the Municipality because his contract lapsed.

Additional response from the Municipality

- 6.1.7. On 27 September 2023, the Public Protector sent an email to Mr Ntuli, the current Municipal Manager requesting additional information relating to the adoption, ratification, and implementation of the Probity Report by the Municipal Council.
- 6.1.8. On 31 October 2023, a response email was received from the Municipality’s IGR, Ms Mofokeng, with a copy of the outcome of a disciplinary enquiry against Mr Dyakala attached thereto. The outcome indicated that:
- 6.1.8.1. A disciplinary enquiry was held against Mr Dyakala *in absentia*, as he had elected not to attend on 29 June 2023 and 13 July 2023. The Presiding Officer of the enquiry, Adv. Phuroe, recommended, *inter alia*, that Mr Dyakala’s services be terminated by the Municipality.
- 6.1.9. In line with the applicable Regulations for Senior Managers, a report (Item C160) was tabled at the Municipality’s Council meeting on 24 August 2023, to consider the report detailing the ruling by Adv. Phuroe. The Council meeting endorsed

and/or ratified the ruling by the Presiding Officer and Mr Dyakala's employment with the Municipality was terminated on 25 August 2023.

- 6.1.10. The AMM and other Executive Directors, listed below, were on the panel of the BAC, but were no longer in the employ of the Municipality:
- 6.1.10.1 Acting Municipal Manager: Mr Oupa Nkoane, contract lapsed;
 - 6.1.10.2 Executive Director - Local Economic Development: Mr Motubatsi resigned;
 - 6.1.10.3 Executive Director - Infrastructure: Mr T Nxumalo resigned;
 - 6.1.10.4 Executive Director – Community Services: Mr V. Campbell resigned;
 - 6.1.10.5 Executive Director - Shared Services: Mr T Ndlovu resigned;
 - 6.1.10.6 Executive Director - Basic Services: Ms R Mokgosi resigned, and;
 - 6.1.10.7 Chief Financial Officer- Mr Dyakala was dismissed by the Municipality.

Documentary Evidence submitted by the Municipality

- 6.1.11. Ms Mofokeng submitted with her response dated 31 October 2023, the following copies of documentation relating to Opulentia:
- 6.1.11.1. **Council Resolution-Item 01-dated 04-02-2020-Regulation 32: RFP NO: 04/09/2017 Short Term Insurance Portfolio:** resolution that the Accounting Officer should approve the request to invoke Regulation 32 for the Municipality to participate in the contract of the MLM for short-term Insurance and to appoint Opulentia;

-
- 6.1.11.2. **Appointment letter:** Letter signed by the then AMM Mr Thabo Ndlovu, dated 04 February 2020, appointing Oplentia to provide short term insurance services;
- 6.1.11.3. **Memorandum from the CFO:** Memorandum signed by Mr Dyakala dated 24 January 2020, addressed to all clusters within the Municipality regarding Regulation 32 for the appointment of Oplentia;
- 6.1.11.4. **Letter consenting to use:** Letter from Ms Zingisa Khuthaza Tindleni, the AMM at the MLM, dated 16 January 2020, granting permission to the Municipality, to use the short-term insurance contract they have with Oplentia;
- 6.1.11.5. **Bid Evaluation Committee Report:** Copy of unsigned report of the second BEC dated 29 January 2020, seeking the approval of the BAC to appoint Oplentia, utilising Regulation 32 of the MFMA;
- 6.1.11.6. **Request for Probity Audit-** Memorandum signed by Mr Dyakala to Chief Audit Officer, Ms Laura Mabunda, dated 13 February 2020, requesting provision of advice for the procurement of short-term insurance brokerage services;
- 6.1.11.7. **A copy of Probity Audit Report-Titled- Special Assignment on the Review of Supply Chain Management processes:** Dated 06 May 2020, regarding the Municipality's implementation of Regulation 32 of the Municipal Supply Chain Management Regulations for the procurement of short-term insurance brokerage services. The Probity Report stated under various headings, *inter alia*, that:
- (a) On 13 February 2020, the Municipality's Internal Audit Department was requested by Mr Dyakala to provide a probity report for the procurement of short-term insurance brokerage services and to compile an insurance schedule so that there could be an improvement in the procurement processes and to deal with unexpected probity issues which may arise in future;
 - (b) The policy allowed the Accounting Officer/Municipal Manager to use Regulation 32 of MFMA to deviate from the normal competitive bidding

process prescribed by Regulation 20 of MFMA (process for competitive bidding);

- (c) The main objective of the probity report was to provide the Municipality's management with reasonable assurance and an independent and objective opinion on whether the implementation of MFMA SCM Regulations 20, 32, and 36 for the short-term insurance contract as consented to by the MLM conformed with the applicable laws, regulations and/or the supply chain management policy.

6.1.11.8. Paragraph 8 of the Probity Audit Report, which contained the summary of the findings relating to the implementation of the competitive bidding process regarding the appointment of the short-term insurance service provider under bid number 11/2019/37, indicates that:

- (a) There was a lack of an appropriate procurement plan;
- (b) There was also a lack of monitoring and oversight of the functionality of the bid committees which resulted in a non-functional SCM bid committee;
- (c) The bid committees had inadequate capacity and skills to evaluate complicated bids and the analysis of financial information;
- (d) There was a lack of and/or ineffective communication within the SCM related structures within the Municipality;
- (e) There was no monitoring of the bid validity period and there was also a continuation with the bidding processes while the tender was no longer valid; and
- (f) The issue of wasteful expenditure having been incurred in terms of cost attached to normal competitive bidding processes was also identified.

6.1.11.9. Regarding compliance with SCM Regulation 36 and the irregular expenditure incurred for the servicing of short-term insurance, the probity report also found that:

- (a) There was poor contract management resulting in the irregular contract being repeatedly extended;
- (b) There was a lack of appropriate deviation processes in order to ensure compliance to Regulation 36; and
- (c) The services were rendered without the MM's approval on deviations, and this included the services which were rendered without a contract and/or a service level agreement being entered into.

6.1.11.10. Regarding the implementation of the SCM Regulation 32, the findings of the probity report were that:

- (a) There was non-compliance with SCM Regulation 32 on the processes followed by the Municipality regarding the implementation of Regulation 32;
- (b) The Municipality's approved SCM policy did not make provision for processes and procedures that had to be followed when implementing Regulation 32;
- (c) The services which were procured were not the same in every respect including the terms and conditions as required;
- (d) The benefits and discounts could only be demonstrated in terms of monetary savings and not in terms of each type of cover and the excesses that had to be paid to the insurance company;
- (e) The bid adjudication committee members as reflected in the minutes of the Municipality's BAC held on 04 February 2019, were different from the members who had signed the attendance register; and
- (f) Opuientia's appointment letter was signed off by the then AMM who was also part of the BAC, and therefore he was conflicted.

6.1.11.11. Regarding compliance with the Preferential Procurement Policy Framework of 2017, the probity report stated that:

- (a) There was non-compliance with the Preferential Procurement Policy Framework Act, 2000: the preference point system as found in the Preferential Procurement Regulations, 2017;

6.1.11.12. Regarding the SLA, the probity report stated that:

- (a) The term of the contract was not aligned with the contract period of MLM as Opulentia was awarded the contract by MLM on 07 August 2018 until 07 August 2021, whilst the Municipality's contract with Opulentia commenced on 04 February 2020 until 04 February 2022; and
- (b) The terms and conditions reflected on the SLA that was signed between the Municipality and Opulentia differed from the SLA that was signed by the MLM and Opulentia. The report indicated that clause 6.8 in the SLA which authorised the service provider to arrange finance through a third party was not included as part of MLM SLA, which meant that there was non-compliance with section 45 of the MFMA relating to the short-term borrowing.

Conclusion of the Probity Report

6.1.11.13. The report stated that there were deficiencies in the internal controls. The communication and monitoring of the SCM activities were not working fully and effectively, as there was inadequate procurement management and planning; non functionality of the bid committees; and ineffective communication between the SCM governance structures. The report stated that the Municipality was continually incurring irregular expenditure due to the lack of proper contract management and monitoring of the SLA's which were entered into with service providers and consequently there was exploitation of the deviation processes which led to irregular expenditure;

- 6.1.11.14. The process of competitive bidding as advertised for the invitation of service providers for the procurement of short-term insurance brokerage services had lapsed on 17 September 2019 and any extension of the bid validity period after 17 September 2019, was regarded as unlawful and the Municipality was no longer in a position to negotiate with the bidders. When the Municipality extended the bid validity period after the contract had lapsed, it raised expectations from bidders leading to litigation issues. This was an indication of inadequate controls and procedures for handling of bids;
- 6.1.11.15. The approved Municipality SCM policy was silent on the processes and procedures that were required to be followed when implementing Regulation 32. It further stated that it appeared that there had been conflicting roles and responsibilities amongst the officials responsible for the SCM bid appointment processes which included the inadequate assessment of the bid documentation as provided by the other organs of state; and
- 6.1.11.16. The internal audit department could not completely validate that the contract of the MLM was procured through a compliant competitive bidding procurement process that was fair, equitable, transparent, competitive and cost effective and consistent with the public sector procurement principles as set out in section 217 of the Constitution.

Outcome of Mr Dyakala's Disciplinary Enquiry

- 6.1.11.17. On 31 October 2023, Ms Mofokeng also furnished the Investigation Team with a copy of Outcome of Disciplinary Enquiry and Sanction dated 25 August 2023, signed by Mr Ntuli informing Mr Dyakala of the termination of his services.

Additional Documentary Evidence submitted by the Municipality

- 6.1.11.18. On 02 February 2024, the Investigation Team sent an email to the Municipality requesting clarity on whether there was a review of the Municipality's SCM policy as per the Probity Report findings and recommendations.

- 6.1.11.19. On 23 February 2024, Mr George Zwane, an IGR official from the Municipality provided a copy of the Municipal Council Resolution Item A4845 titled “*Report on Revision of the Supply Chain Management Policy 2022/2023 Financial Year (O/MM New /AA6/Finance/Reports 2023/Fs 07-23) (EXCO 13-02-2023) (Section 80 FIN 21-02-2023) (MC 21-02-2023)*”
- 6.1.11.20. The above Municipal Council Resolution stated amongst other things that the Council resolved that the revised SCM Policy for the financial year 2022/2023, (16 January 2023) be approved and that a workshop be arranged for all Councillors on the SCM Policy.

Revised ELM’s SCM Policy-2022-2023

- 6.1.11.21. On 01 April 2024, Mr Ntuli submitted through an email, a copy of the amended version of the ELM’s SCM Policy for 2022-2023 to the Investigation Team for perusal. Paragraph 36 thereof, which deals with procurement of goods and services under contracts secured by other organs of state, had been revised to provide for clear guidelines aimed at addressing underlying systemic gaps as recommended by the probity report.

6.1.12. **Response to the Rule 41(1) Notice**

- 6.1.12.1. On 28 February 2024, the Investigation Team issued a Rule 41(1) notice in terms of the Public Protector Rules to the Complainant to inform him/her about the preliminary outcomes of the investigation and likely findings as well as to invite comments.
- 6.1.12.2. On 01 March 2024 the Complainant provided a response through an email, and it is necessary to reproduce its contents verbatim. The response reads:

“Thanks for the conclusion of this matter but however i was hoping the Public Protector (PP) will recommend the recouping of some of the funds as the contract has been proven to have been appointed irregularly, my wish is for

the PP not to close this matter without compelling the Municipality from starting a process of recouping what it has lost.” (sic)

Response to the Notice in terms of Rule 42(1) read with Rule 41(1) of the Public Protector Rules by Mr Ntuli

- 6.1.12.3. On 20 June 2024, the Investigation Team issued a Rule 42(1) read with Rule 41(1) notice in terms of the Public Protector Rules, to Mr Ntuli to inform him about the preliminary outcomes of the investigation and likely findings/observations, as well as to invite his comments.
- 6.1.12.4. On 24 June 2024 Mr Ntuli provided a response through a letter, and he stated that the Public Protector’s letter dated 20 June 2024 is acknowledged and the content therein is noted.

Applicable law

The Constitution of the Republic of South Africa, 1996

- 6.1.13. 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.

Municipal Finance Management Act, 2003

- 6.1.14. Section 62(1) 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 ensure internal controls, take all reasonable steps to ensure that unauthorised, irregular, or fruitless and wasteful expenditure and other losses are prevented, amongst others.

6.1.15. In terms of section 78(1) of the MFMA, each senior manager of a municipality and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure that the system of financial management and internal control established for the municipality is carried out diligently, financial resources of the municipality are utilised effectively, efficiently, economically, and transparently.

MFMA Circular No. 96 of the Municipal Finance Management Act 56 of 2003-Supply Chain Management Regulation 32

6.1.16. Regulation 32 of the MFMA Circular No. 96 dealing with procurement of goods and services under contracts secured by other organs of state highlights the following:

- (1) 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.
- (2) Sub regulation (1)(c) and (d) do not apply if—
 - (a) a municipal entity procures goods or services through a contract secured by its parent Municipality; or
 - (b) a Municipality procures goods or services through a contract secured by a municipal entity of which it is the parent Municipality.

Emfuleni Local Municipality SCM Policy, adopted on 01 April 2019

6.1.17. Paragraph 34 of the Municipality's approved SCM Policy adopted in April 2019 deals with procurement of goods and services under contracts secured by other organs of state and states that:

“(1) 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.*

(2) Sub regulation (1)(c) and (d) do not apply if—

- (a) a municipal entity procures goods or services through a contract secured by its parent Municipality; or*
- (b) a Municipality procures goods or services through a contract secured by a municipal entity of which it is the parent Municipality.”*

Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2017

13. (1) An organ of state may, before the award of a tender, cancel a tender invitation if-

- (a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;
- (b) funds are no longer available to cover the total envisaged expenditure;
- (c) no acceptable tender is received; or

(d) there is a material irregularity in the tender process.

- (2) The decision to cancel a tender invitation in terms of sub regulation (1) must be published in the same manner in which the original tender invitation was advertised.

**MFMA Circular 96, Municipal Finance Management Act, 2003 SCM
Regulation 32: Procurement of goods and services under contracts
secured by other organs of state**

6.1.18. Regulation 32 of the Municipal Supply Chain Management Regulation states that a municipality or municipal entity may dispense with the competitive bidding process in terms of regulation 32 of the Municipal SCM Regulations, provided that the municipality or municipal entity complies with the requirements. The goods or services that were procured by the organ of state are exactly the same in every respect including the terms and conditions as that required by the municipality or municipal entity. The municipality or municipal entity will rely on the open competitive bidding process that the other organ of state undertook in appointing the service provider, thereby saving on the administrative efforts and costs.

Analysis

- 6.1.19. The evidence before the Public Protector indicates that the Municipality embarked on a competitive bidding process from 06 May 2019 for the procurement of a Short-Term Brokerage Service. The first BEC was appointed to evaluate the tender and it was dissolved before the evaluation process was finalised.
- 6.1.20. On 04 February 2020 a second BEC was appointed, and this process was discontinued although the tender was not formally cancelled. Instead, the Municipality embarked on a separate process in terms of Regulation 32 of the MFMA to procure the same service.

-
- 6.1.21. Upon evaluation of the legal framework, it is clear that the Municipality did not act in accordance with Regulation 13(1) and 13(2) of the PPPFA which require organs of state to give the stipulated reasons for the cancellation of the tender and publish a notice in the newspapers and on the Municipality's website where the original tender was advertised.
- 6.1.22. The evidence further reveals that the Municipality opted to utilise Regulation 32 of the MFMA to procure Short-Term Brokerage Services for the Municipality under a contract secured by the MLM without ensuring that the contract periods are aligned. Further the terms and conditions differed in that there were additional costs incurred through the brokering services for Short-Term Borrowing.
- 6.1.23. Furthermore, the Municipality did not follow the terms and conditions of Section 45 of the MFMA in that they did not obtain a resolution from the Municipal Council approving the debt agreement.
- 6.1.24. The evidence further establishes that paragraph 34 of the Municipality's approved SCM Policy does not provide for the procedure to be followed when procuring goods and services under contracts secured by other organs of states, as contemplated in Regulation 32 of the MFMA;
- 6.1.25. Section 217 of the Constitution requires that when an institution enters into contracts for goods and services it must follow a system which is fair, equitable, transparent, competitive, and cost effective. The tender to Lateral Unison was already in place on 04 February 2020, when Mr Dyakala used Regulation 32, to appoint Opluentia whilst Lateral Unison was still contracted to provide the same services to the Municipality, contrary to section 217 of the Constitution.
- 6.1.26. Though the probity report flagged irregularity due to exploitation of the deviation processes which led to irregular expenditure, there is no evidence before the Public Protector to establish any undue enrichment or undue benefit.

- 6.1.27. It is evident that the Municipality concedes to the irregularities in the procurement process and has as a result it implemented reforms to remedy the maladministration.

Conclusion

- 6.1.28. On the strength of evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it is concluded that the functionaries of the Municipality procured the contract in terms of Regulation 32 of the MFMA without cancelling the initial advert as required by Regulation 13 of the PPPFA.
- 6.1.29. The contract was not in compliance with Regulations 32 of the SCM Regulations in that the terms and conditions were not the same and the period of the contract were misaligned.
- 6.1.30. The appointment of Opuientia for the provision of insurance brokerage services was irregular and not in accordance with section 217 of the Constitution, 1996 and section 62(1) and 78(1) of the MFMA.

7. FINDINGS

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

- 7.1. **Whether the functionaries of the Municipality irregularly procured Opuientia Financial Services JV Fezi Auditors and Consultants for the provision of insurance brokerage services, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

-
- 7.1.1. The allegation that the Municipality irregularly procured Opulentia Financial Services JV Fezi Auditors and Consultants for the provision of insurance brokerage services, **is substantiated.**
- 7.1.2. The evidence before the Public Protector reveals that on 13 February 2020 the Municipality had already commissioned an internal audit or probity investigation through its Internal Audit Department, with a view to investigate the same allegations raised by the Complainant. The Municipality finalised its investigation and issued an Internal Probity Audit Report, dated 06 May 2020.
- 7.1.3. The Municipality's Internal Probity Audit Report found, amongst other things, the following material irregularities associated with the processes followed by the functionaries of the Municipality to procure Opulentia for the provision of insurance brokerage services:
- 7.1.3.1 There was a lack of an appropriate procurement plan;
- 7.1.3.2 There was also a lack of monitoring and oversight of the functionality of the bid committees which resulted in non-functional SCM bid committees;
- 7.1.3.3 The bid committees had inadequate capacity and skills to evaluate complicated bids and the analysis of financial information;
- 7.1.3.4 There was a lack of and/or ineffective communication within the SCM related structures within the Municipality;
- 7.1.3.5 There was no monitoring of the bid validity period and there was also a continuation with the bidding processes while the tender was no longer valid;
- 7.1.3.6 Wasteful expenditure incurred in terms of the cost attached to normal competitive bidding processes was also identified;
- 7.1.3.7 There was non-compliance with SCM Regulation 32 on the processes followed by the Municipality regarding the implementation of Regulation 32; and

7.1.3.8 The Municipality's approved SCM policy did not make provision for processes and procedures that had to be followed when implementing Regulation 32.

7.1.4. Based on the above, the conduct of the Municipality constitutes improper conduct as envisaged by section 182(1)(a) of the Constitution and maladministration as envisaged in 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 highlighted in this report on finalisation of an investigation where adverse findings are made.

8.2. The Public Protector has taken cognisance of the fact that following the issuing of the Municipality's Internal Probity Report, the Municipality took steps to implement its recommendations, including taking disciplinary action against implicated official(s), except those that were no longer in the employ of the Municipality.

8.3. Further cognisance is taken of the fact that the following functionaries who were involved in the procurement process, left the employ of the Municipality before disciplinary proceedings could be instituted against them:

8.3.1. Mr Motubatsi - Executive Director: Local Economic Development;

8.3.2. Mr T Nxumalo - Executive Director – Infrastructure;

8.3.3. Mr V Campbell - Executive Director - Community Services;

8.3.4. Mr T Ndlovu - Executive Director - Shared Services; and

8.3.5. Ms R Mokgosi - Executive Director: Basic Services.

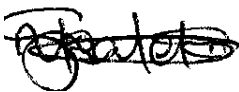
8.4. On 01 April 2024, the Public Protector was furnished with a copy of an amended ELM's SCM Policy for 2022-2023 and it is confirmed that paragraph 36 thereof, which deals with the procurement of goods and services under contracts secured by other organs of state, is revised to remedy identified governance gaps and to

provide for clear guidelines aimed at addressing underlying administrative lapses as recommended by the probity report.

- 8.5. The Public Protector further noted that the Municipality's Internal Probity Report was ratified by the Municipal Council as per Council Resolution Item C160 and Council Resolution Item A4845 respectively.
- 8.6. The Municipal Council resolved that the Municipality's policies, including the SCM policy be reviewed; that a workshop be arranged for employees on SCM policy; and that the dismissal of the implicated employees be endorsed as recommended by the chairperson of the hearing.
- 8.7. In the light of the corrective action already taken by the Municipality, the Public Protector is of the view that where a state institution has already taken action or implemented remedial action based on its own internal practice and prescripts, within its sphere of administration, as is clear in this matter, it would not be prudent for the Public Protector to take further remedial action.

9. CONCLUSION

- 9.1. Accordingly, the Public Protector concludes and finalises this matter based on the findings set out above and will not take any further remedial action.



ADV. KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 30 JUNE 2024

Assisted by: Ms Nthoriseng Motsitsi

Executive Manager: PII Inland