

**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(2A)
OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

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*“Allegations of improper conduct and maladministration against the Knysna
Local Municipality”*

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION BY THE KNYSNA LOCAL MUNICIPALITY IN THE
WESTERN CAPE PROVINCE RELATING TO THE PROCUREMENT OF SERVICES
FROM KNYSNA TOURISM**

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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) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- (ii) The report relates to an investigation into allegations of improper conduct and maladministration by the Knysna Local Municipality (Municipality) in the Western Cape Province relating to the procurement of services from Knysna Tourism.
- (iii) The complaint was initially lodged by Ms S Campbell on 03 July 2017.
- (iv) Based on an analysis of the complaint, the following issues were considered and investigated:
 - (a) Whether the procurement of tourism services by the Municipality from Knysna Tourism (KT) was in accordance with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality; and if not whether the conduct of the Municipality was improper and constitutes maladministration.
- (v) 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, a meeting with officials of the Municipality, an analysis of the documents and information obtained during the investigation and application of the relevant legislation, policy and jurisprudence.

(vi) Having considered the evidence obtained during the investigation against the relevant regulatory framework, the following findings are made:

(a) Whether the procurement of tourism services by the Municipality from KT was in accordance with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality; and if not whether the conduct of the Municipality was improper and constitutes maladministration.

(aa) The allegation that the procurement of tourism services by the Municipality from KT was not in accordance with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality, is substantiated.

(bb) The conduct of the Municipality in procuring services from KT from 2000, was at variance with the provisions section 217 of the Constitution, section 112(1)(a) of the Local Government: Municipal Finance Management Act, 2003 (MFMA), Supply Chain Management Regulations (SCM Regulations) 11, 12 and 36(1)(a) and paragraphs 11, 12 and 36(1)(a) of the Municipality's Supply Chain Management Policy (SCM Policy), in terms of which it was required to follow a fair, equitable, transparent, competitive and cost effective tender process and only to deviate from it, *inter alia*, in an emergency.

(cc) More than R58 million was paid by the Municipality to KT for services rendered.

- (dd) The conduct of the Municipality was thus improper, constitutes maladministration and resulted in irregular expenditure, as contemplated by section 1 of the MFMA.
 - (ee) The conduct of the municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (vii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution are the following:**
- (a) The Speaker of Council of the Municipality to:**
 - (aa) Take the appropriate steps to ensure that the Council of the Municipality refers the irregular expenditure incurred by the Municipality in respect of procuring services from KT to the relevant Council Committee to investigate and determine in terms of section 32(2) of the MFMA whether the irregular expenditure is recoverable or not, and if so action is taken accordingly within 30 days from the date of this report.
 - (bb) To take the appropriate steps to ensure that criminal charges are laid in terms of section 173 of the MFMA in respect of the irregular expenditure incurred within 30 days from the date of this report.

(b) The Acting Municipal Manager of the Municipality to:

- (aa) In terms of section 32(4) of the MFMA, report the irregular expenditure by the Municipality to the Executive Mayor of the Municipality, the Western Cape Provincial Treasury, the Western Cape MEC for Local Government and the Auditor-General South Africa in writing, within 30 days from the date of this report;
- (bb) In terms of section 171(4) of the MFMA, take the appropriate steps to investigate whether any of the officials of the Municipality that were involved in the irregular procurement of the services of KT should be held accountable for financial misconduct, and if so take the appropriate steps to ensure that disciplinary action is instituted against them, within 30 days from the date of this report;
- (cc) Ensure that all the staff of the Municipality involved in the SCM processes for the procurement of goods and services attend an appropriate training course on the provisions of section 217 of the Constitution, the MFMA, the Regulations, the SCM Policy and the Grant-in-Aid Policy within 60 days from the date of this report; and
- (dd) Submit a report to the Council of the Municipality on the action taken as referred to in paragraphs (vii)(b)(aa) to (vii)(b)(cc) above within 60 days from the date of this report.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE KNYSNA LOCAL MUNICIPALITY IN THE WESTERN CAPE PROVINCE RELATING TO THE PROCUREMENT OF SERVICES FROM KNYSNA TOURISM

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, 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 note the outcome of the investigation and to implement the remedial action, where applicable:

1.2.1 The Speaker of the Council of the Knysna Local Municipality (Municipality), Ms M Gombo;

1.2.2 The Executive Mayor of the Municipality, Mr E van Aswegen;

1.2.3 The Acting Municipal Manager of the Municipality, Mr D Adonis; and

1.2.4 The Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning, Mr A Bredell.

1.3 Copies of the report are also provided to:

1.3.1 The Chairperson of the National Council of Provinces, Mr Amos Maseko, MP;

- 1.3.2 Ms S Campbell, who lodged the initial complaint and Mr M Hampton who petitioned to the Standing Committee on Petitions and Executive Undertakings;
- 1.3.3 The former Municipal Manager of the Municipality, Mr K Chetty; and
- 1.3.4 The former Chief Financial Officer of the Municipality, Mr M Memani.
- 1.4 The report relates to an investigation into allegations of improper conduct and maladministration by the Municipality pertaining to the procurement of services from Knysna Tourism (KT), now Knysna & Partners, over a period from 2002 to 2017.

2. THE COMPLAINT

- 2.1 The complaint was lodged with the Public Protector South Africa (PPSA) on 3 July 2017 by Ms Susan Campbell (the Complainant).
- 2.2 On assessment of the complaint it was found to be the same matter that was reported to the National Council of Provinces (NCOP) by Mr Mike Hampton during April 2015 as a petition, which was at considered by the NCOP's Standing Committee on Petitions and Executive Undertakings.
- 2.3 On 11 September 2018, the NCOP referred Mr Hampton's complaint to the PPSA for investigation. Mr Mike Hampton, is a resident of Knysna and a self-proclaimed activist. The Complainant, also a resident of Knysna, supported Mr Hampton in his petition to the NCOP.
- 2.4 In the main, it was alleged that:

- 2.4.1 The Municipality entered into agreements with KT over a period from 2002 to 2017, to market the greater Knysna area as a premier destination aimed at achieving tourism growth and to provide a world class visitor centre.
- 2.4.2 According to the agreement which was entered between the Municipality and KT, the Municipality would annually provide funding to KT to conduct tourism services on behalf of the Municipality. Funding allegedly came from “*Grant-in-Aid*” funds, to be allocated and/or awarded to an organization or body outside of any sphere of government, which is not a commercial or business organisation, for specific purposes.
- 2.4.3 Payments made to KT by the Municipality were not in accordance with Municipality’s Grant-in-Aid Policy, which provides that all applications for the “*Grant-in-Aid*” funds were to be assessed by the Municipal Committee responsible for the consideration of Grant-in-Aid applications.
- 2.4.4 Even though the Municipality obtained a legal opinion, which indicated that the Service Level Agreement (SLA) would be unlawful if it was further extended, the Council of the Municipality still resolved on 29 May 2017 to renew the SLA with KT for an additional twelve (12) months.
- 2.5 In essence, the complainants contended that the procurement of services by the Municipality from KT was not in accordance with section 217 of the Constitution and the Municipality’s Supply Chain Management (SCM) Policy, and was therefore improper and amounts to maladministration.

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 to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

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

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

(b) to report on that conduct; and

(c) to take appropriate remedial action”.

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the

Public Protector has a binding effect¹. The Constitutional Court further held that: “When the remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”².

3.6. In the above-mentioned matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others*, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

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

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

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

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

¹ [2016]ZACC 11;2016(3) SA 580(CC) and 2016 (5) BCLR 618 (cc) at para[76].

² *Supra* at para[73]

- 3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);
- 3.6.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);
- 3.6.7 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence(para 71(a));
- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d)); and
- 3.6.9 "*Appropriate*" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e)).
- 3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);
- 3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);
- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);
- 3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105);
- 3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct; and
- 3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).

- 3.8 Section 6(9) of the Public Protector Act grants the Public Protector discretionary powers to accept complaints which are lodged more than two (2) years after the occurrence of the incident.
- 3.9 In terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two (2) years from the date of the incident unless special circumstances exist. However, the mere fact that the incident occurred more than two (2) years before being reported to the Public Protector does not, in itself, bar the Public Protector from investigating the matter. Instead, it is mainly the interests of justice that dictate whether the Public Protector should investigate the matter or not. It is axiomatic that the Public Protector is to identify special circumstances using a discretion, should the Public Protector decide to entertain such a complaint.
- 3.10 In the case between *South African Bureau of Standards v The Public Protector*³ the North Gauteng High Court held that, as with most claims and complaints, there is for good reason time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving.
- 3.11 Similarly in the case between *Gordhan v Public Protector and Others*⁴ the North Gauteng High Court held that, in view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint.

³ [2019] ZAGPPHC 101 (27 March 2019)

⁴ [2020] ZAGPPHC 777 (17 December 2020)

- 3.12 Some of the special circumstances that the Public Protector took into account to exercise her discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether she would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s) and whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.
- 3.13 The subject of the complaint spans over a number of years and have been continuing until 2017, when the complaint was lodged. A substantial amount of public money was allegedly spent by the Municipality in irregularly procuring the services of KT, to its detriment. The Public Protector therefore concluded that it is in the public interest that the matter is investigated.
- 3.14 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate. The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

4. THE INVESTIGATION

4.1 Methodology

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

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

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong or what action should be taken, where appropriate.

4.2.1.5 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 particular case, the factual enquiry principally focused on whether the procurement of tourism services by the Municipality from KT complied with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality.

4.2.1.6 The enquiry regarding what should have happened, focuses on the standard that should have been met by the Municipality in procuring of goods and services from KT to ensure legal compliance.

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

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

4.3.1 Whether the procurement of tourism services by the Municipality from KT was in accordance with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality; and if not whether the conduct of the Municipality was improper and constitutes maladministration.

4.4 Key sources of information

4.4.1 Documents

4.4.1.1 Copy of a Petition reported to the National Council of Provinces, Standing Committee on Petitions on 28 April 2015 by Mr Mike Hampton in connection with complaints against the Municipality;

4.4.1.2 Copy of the Service Level Agreement (SLA) entered into between the Municipality and KT on 02 September 2005;

4.4.1.3 Copy of the SLA entered into between the Municipality and KT on 20 May 2010;

4.4.1.4 Copy of the Municipal Public Accounts Committee (MPAC) Report titled "*Consolidated Report of MPAC on Fruitless & Wasteful and Irregular Expenditure as far as from 2013 and up to June 2019*;

4.4.1.5 Copy of the addendum for the 2010 SLA dated 01 August 2014;

4.4.1.6 Copy of an additional addendum for the 2010 SLA in August 2014;

4.4.1.7 Copy of the Municipal Council Resolution, dated 11 August 2017;

4.4.1.8 Copy of minutes of an Ordinary Council Meeting held on 11 August 2017;

- 4.4.1.9 Copy of invoice issued by KT for R1, 000, 000.00 (one million Rand) to the Municipality on 01 July 2017;
- 4.4.1.10 Copy of the legal opinion obtained from Messrs Cliffe Dekker Hofmeyr Attorneys on, *inter alia* the legal constraints on funding KT as a legal entity outside a sphere of government, dated 23 May 2017;
- 4.4.1.11 Copies of the MPAC Agenda, dated 28 May 2019 and 13 August 2018; and
- 4.4.1.12 Copy of an unsigned legal opinion provided to Mr K Chetty, the former Municipal Manager of the Municipality by Sohn and Associates Attorneys on, dated 22 June 2017.

4.4.2 Correspondence between the Public Protector and:

- 4.4.2.1 The Complainant, dated 03 July 2017;
- 4.4.2.2 The Chairperson of the National Council of Provinces, Mr A Masondo MP, dated 19 December 2018 and 07 August 2019;
- 4.4.2.3 The Municipality, dated 26 July 2019, 13 August 2019, 14 May 2020, 25 May 2020, 6 June 2020, 23 June 2020 and 1 July 2020; and
- 4.4.2.4 The Procedural Advisor at the Parliament of South Africa (Parliament), dated 14 August 2019 and 22 August 2019.

4.4.3 Legislation and other prescripts

- 4.4.3.1 The Constitution of the Republic of South Africa, 1996.

4.4.3.2 The Public Protector Act No 23 of 1994.

4.4.3.3 The Local Government: Municipal Finance Management Act No 56 of 2003 (MFMA).

4.4.3.4 The Municipal Supply Chain Management Regulations made in terms of section 168 of the MFMA and promulgated on 01 July 2005 (Regulations).

4.4.3.5 The Municipality's Grant-in-Aid Policy, 2011 (Policy).

4.4.3.6 The Municipality's Supply Chain Management Policy (SCM Policy).

4.4.3.7 The National Treasury MFMA Circular 62 issued on 3 July 2013.

4.4.4 Jurisprudence considered

4.4.4.1 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).*

4.4.4.2 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016(3) SA 580(CC).*

4.4.4.3 *Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA.*

4.4.4.4 *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).*

4.4.4.5 *South African Bureau of Standards v The Public Protector*⁵.

⁵ [2019] ZAGPPHC 101 (27 March 2019)

4.4.4.6 *Gordhan v Public Protector and Others*⁶.

4.4.5 Notices issued in terms of section 7(9) of the Public Protector Act

4.4.5.1 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the Speaker of the Council of the Municipality, Ms M Gombo to afford her an opportunity to respond to the evidence obtained during the investigation, on 15 June 2021. She did not reply.

4.4.5.2 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the Executive Mayor of the Municipality, Mr E van Aswegen on 15 June 2021. He did not reply.

4.4.5.3 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the Acting Municipal Manager of the Municipality, Mr D Adonis on 15 June 2021. He replied thereto on 30 June 2021.

4.4.5.4 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the former Municipal Manager of the Municipality, Mr K Chetty on 15 June 2021. He replied on thereto on 12 July 2021.

4.4.5.5 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the former Chief Financial Officer of the Municipality, Mr M Memani on 15 June 2021. He replied thereto on 23 June 2021.

⁶ [2020] ZAGPPHC 777 (17 December 2020)

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

5.1 Regarding whether the procurement of tourism services by the Municipality from KT was in accordance with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality; and if not whether the conduct of the Municipality was improper and constitutes maladministration.

Common cause or Undisputed Facts

5.1.1 It is common cause that KT is a voluntary organization, previously known as Knysna Publicity Association and thereafter as the Knysna Tourism Bureau, incorporated during 2000 under section 21 of the Companies Act No 61 of 1973. During 2015, KT was incorporated under section 21 of the Companies Act, No. 71 of 2008 as Knysna & Partners NPC, with registration number 2000/015490/08. For the purposes of this report, Knysna Tourism and Knysna Partners NPC will be referred to as “KT”.

5.1.2 It is not in dispute that the Municipality (former employees of the Municipality acting on behalf of the Municipality) has since 2000 regularly entered into agreements with KT ostensibly for the achievement of tourism growth for the greater Knysna area by KT, marketing it as a premier destination and to provide a world class visitor and tourism centre. In turn, the Municipality annually funded KT to conduct tourism services in its interest. Initially, the Municipality funded KT’s services by imposing levies on businesses in Knysna that were paid over to KT.

5.1.3 On 6 September 2005, the Municipality and KT entered into an agreement that recorded the termination of the agreement signed on 15 May 2000. The new

agreement provided that the relationship between the parties would continue for the purpose of facilitation of tourism in the greater Knysna area. In terms of Clause 4.3 of the 2005 agreement, KT would be funded by, *inter alia*, appropriations from the Municipality, pursuant to KT's annual budget being submitted and approved by the Municipality. It was further agreed in clause 4.5, that the Municipality would pay to KT an amount of R4 million from its 2005/2006 budget, which would be taken as "*a base level for future appropriations.*" There was no clause in the agreement that stipulates when it would expire.

- 5.1.4 It is also not in dispute that the Municipality entered into a SLA with KT on 20 May 2010. This SLA terminated the agreement between the parties entered into on 6 September 2005. In terms of clause 4, the duration of the SLA was three years. The objective of the SLA was the same as stated in the 6 September 2005 agreement. In clause 5.5 of this SLA, it was stated, *inter alia* that:

"The parties therefore record that the Municipality has committed itself to a base level contribution of R4 million (R 4,000,000-00) per annum as a Grant-in-Aid to Knysna Tourism for the duration of this contract period."

- 5.1.5 The Council of the Municipality resolved on 24 January 2013 to extend the 2010 SLA for a period not exceeding one year, commencing on 1 July 2013. On 26 November 2013, six (6) months after the SLA signed on 20 May 2010 had expired, the Municipality and KT signed an Addendum to the SLA, extending it to 30 June 2014.

- 5.1.6 On 27 March 2014, the Council resolved to instruct the Municipal Manager to provide for an amount of R4 million for KT in the Municipality's budget for 2014/15, and to conclude a revised SLA with KT, to run until 30 June 2015.

- 5.1.7 The Municipality and KT signed a further Addendum to the 2010 SLA on 1 August 2014 (one month after the previous addendum had expired) extending it to 30 June 2015. The agreement in respect of payment to KT remained the same.
- 5.1.8 The next SLA concluded between the Municipality and KT (date signed unknown) commenced on 1 July 2015 and was for a period of fifteen (15) months. It was to expire on 30 September 2016. It stated that funds in favour of KT were allocated from a Grant-in-Aid at the value of R4 million, which amount was payable quarterly in the amount of R1 million.
- 5.1.9 On 1 October 2016, an Addendum to the SLA was entered into between the Municipality and KT, extending its operation to 30 June 2017.
- 5.1.10 It is further common cause that in May 2017, the Municipality obtained a legal opinion from Messrs Cliffe Dekker Hofmeyr Attorneys on, *inter alia* the legal constraints on funding KT as a legal entity outside a sphere of government.
- 5.1.11 It was established during the investigation and it is not in dispute that the Municipality paid to KT an amount of R8 060 021.97 for the period from 1 April 2002 to 10 May 2006. The Municipality further paid to KT an amount of R50 715 469.60 for the period from 3 July 2006 to 9 April 2018.
- 5.1.12 The total amount paid to KT by the Municipality is R58 775 491.57 for the period from 2000 until 2018.

Issues in dispute

- 5.1.13 The Complainants averred that the funding for the procurement of the services of KT by the Municipality was done by way of a “Grant-in-Aid” award, but that KT never applied for a grant and neither did the Municipality’s Grant-in Aid

Committee have the opportunity to consider any application, as required in terms of the relevant policy.

- 5.1.14 In the “ANNUAL STATE OF THE TOWN AND IDP BUDGET ADDRESS “ by the then Executive Mayor, Councillor G Wolmarans, on 29 May 2012, it was stated, *inter alia* that:

“The main Grant-In-Aid allocation given by this Council to Knysna Tourism which is budgeted to receive only R4 million in 2012/13 as opposed to the amount of R4,7 million for the current year. There seems to have been a lot of local speculation and comment regarding Knysna Tourism and its relationship with Council. Knysna Tourism is an independent Section 21 company tasked with marketing the municipality as a destination. For much of the last decade this marketing has been highly successful and Knysna has become a premier holiday centre for domestic and international visitors. The recent economic downturn hit the national and most specifically the Southern Cape tourist market very hard and ultimately it has impacted negatively upon the Knysna economy. The result is that the Council has decided to review the contribution made to Knysna Tourism, as we are preparing an efficiency budget and that all elements of the Knysna economy need to be critically re-examined at this time”. (emphasis added)

- 5.1.15 However, the Municipality contended during the investigation that the funding for the services procured from KT was provided for as a separate line item budgeted for tourism related services, within the Municipality’s annual budget for the years referred to in the complaint. The payments in terms of the SLA’s were always budgeted for and that KT never applied for a Grant-in-Aid and the funding was never indicated in the consolidated Grant-in-Aid allocations, as considered by the Grant-in-Aid Committee of the Municipality. This was confirmed in email correspondence with Ms M Botha, the Legal Advisor of the Municipality on 13

November 2018. It was also the instructions given by the Municipality to Messrs Cliffe Dekker Hofmeyr Attorneys, as it appears from their legal opinion.

5.1.16 Messrs Cliffe Dekker Hofmeyr Attorneys concluded in their opinion dated 23 May 2017, *inter alia* that:

“The provision of the services specified by the SLA by K&P (KT) (as was the case in all the agreements between the Municipality and KT since 2000) amounts to the provision of commercial services to the Municipality. This means that the payments in relation to those services fall outside of the scope of section 67(1) of the MFMA. Given that, in receiving the services, the Municipality would be procuring services within the meaning of section 217 of the Constitution, the Municipality is required to follow the prescribed SCM procedure in securing a service provider, which in this case is a competitive bidding process.”

5.1.17 Ms Marilyn Botha, the Legal Advisor of the Municipality confirmed during the investigation, in correspondence dated 7 July 2020, that in terms of the legal opinion obtained by the Municipality, *“the provision of services in previous SLA’s with Knysna Tourism amounted to commercial services to the municipality-by an external service provider.”* Ms Botha also indicated that the Municipality accepted the advice and recommendation as set out in the legal opinion.

5.1.18 During the investigation, the Municipality submitted an unsigned copy of a document titled: *“Application for deviation in terms of section 36 (sic) of the SCM Policy.”* It appears from this document that it purported to be an application that had to be approved by the Supply Chain Management (SCM) Division, the Chief Financial Officer and the Municipal Manager. The application for deviation was dated 6 July 2017 and was based on the disaster that occurred in the Knysna area in June 2017 as a result of fires. Paragraph 2 of the application document stated, *inter alia* that:

“The disaster disrupted the status quo. The impacts of the disaster on tourism necessitates the provision of some tourism related services in the interim to facilitate the recovery of the industry, while long term services are being procured. The option to cater for the provision of these services on an urgent basis by using section 67 of the Municipal Finance Management Act, as an alternative was explored, but based on a legal opinion obtained, this cannot be explored. This deviation seeks to provide for procurement of certain services, as described in the attached specifications scope document on an emergency basis as envisaged by section 36(1)(a)(i) of the Knysna Supply Chain Management Policy (sic).”

- 5.1.19 The “*Recommended Price*” in the application for deviation document was R4 million.
- 5.1.20 The Municipality entered into a SLA with KT on 11 July 2017 for the provision of services. The contract amount was R4 million. The SLA expired on 30 June 2018. The scope of services (scope document) included to provide assistance with accommodation and bookings, event and ticket sales, to generate and provide local tourism related contents for social media and other platforms, and to market the greater Knysna area as a destination.
- 5.1.21 On 11 August 2017, the former Municipal Manager, Mr K Chetty, submitted a Memorandum to the former Chief Financial Officer of the Municipality, Mr Mbulelo Memani, informing him that he had authorised and approved a deviation from the Municipality’s SCM Policy and entered into a SLA with KT on 11 July 2017. It appears from this Memorandum that the Council resolved on 26 May 2017 to terminate the previous SLA with KT and that tourism related services should be procured on a long term contract basis.

5.1.22 The former Municipal Manager further indicated that devastating fires in Knysna resulted in a disaster being declared on 9 June 2017 “*which had a severe impact on the tourism economy as well as the environment, which is an integral part of Knysna’s tourism attraction.*” He further stated that the Council resolved on 11 August 2017 (the same date) to note the SLA entered into with KT as well as the deviation from the SCM processes provided for in Regulation 36(1) of the SCM Regulations.

5.1.23 The following note appears on the Memorandum, below the signature of the former Municipal Manager:

5.1.24 “*Comments and concern:*

SCM Manager places on record that the instruction from MM was executed, but I do not agree with the reasons for deviation. KM (Knysna Municipality) cannot show any process for competitive bidding although the legal opinion was obtained some time ago already and various discussions re this matter has taken place and it was agreed to go out on tender.” (sic)

5.1.25 The Director: Corporate Services of the Municipality (details of whom are unknown) submitted a report to the Council on 11 August 2017 on the SLA concluded between the Municipality and KT on 11 July 2017. This report referred to the resolutions taken by the Council on 26 May 2017, *inter alia* that the SLA with KT that expired on 30 June 2017 not be renewed, that a new SLA be negotiated with KT for a period of three (3) years up to an amount of R4 million. It was further reported to the Council that the Municipal Manager entered into a SLA with KT in terms of a deviation process which was recorded as “*an emergency situation.*” The report concluded that “*the Municipal Manager herewith reports to the Municipal Council on the deviation process followed, the reasons*

attributed and to ensure that it is included as a note in the annual financial statements.”

- 5.1.26 The Minutes of an Ordinary Council Meeting held on the same day (11 August 2017) state that it was unanimously resolved as follows:

“[a] That the service level agreement between Knysna Municipality, Knysna and Partners (KT) as well as the report from the Accounting Officer, be noted;

[b] That the Municipal Manager be mandated to include the deviation as a note in the annual financial statements.”

- 5.1.27 KT submitted an invoice for R1, 000, 000.00 (one million Rand) to the Municipality on 1 July 2017. This invoice was processed on instruction of the former Municipal Manager, Mr Chetty on 25 August 2017.

- 5.1.28 No indication could be found in the records submitted by the Municipality that the procurement of tourism services from KT was included in its Annual Procurement Plans.

- 5.1.29 It was also not alleged and no evidence was found that KT did not provide the tourism services it was contracted to deliver to the Municipality.

Responses to Notices issued in terms of section 7(9)(a) of the Public Protector Act

Mr M Memani, former Chief Financial Officer of the Municipality

- 5.1.30 In a response email received from Mr M Memani on 23 June 2021, he maintained the view that during his involvement with the KT SLA, a deviation process was

executed by the then Municipal Manager, but the said document was unsigned. There was also an internal memorandum that was sent (no date specified) to the former team (himself, the Legal Manager, SCM Manager and also the Director Planning and Development) informing them regarding the then Municipal Manger, Mr K Chetty's decision and that the matter was to be referred to the MPAC for Council to write off any irregular expenditure.

Mr D Adonis, Acting Municipal Manager of the Municipality

- 5.1.31 The Acting Municipal Manager stated that it is an accepted practice currently in all municipalities within the Republic of South Africa, to utilise the services of registered tourism organisations, to perform tourism and destination marketing services and any adverse findings against the municipality would therefore have an adverse effect on other municipalities.
- 5.1.32 A deviation memorandum was completed by the then Municipal Manager, Mr K Chetty, dated 06 July 2017, and a memorandum to the then Chief Financial Officer dated 11 August 2017 were based on a council resolution dated 26 March 2017.
- 5.1.33 The council resolution states "*that the SLA be for a period of up to three (3) years and that an amount of up to R4 million per year be provided for in the annual budgets approved by the Municipal Council*" The former Municipal Manager thus only executed the council resolution and the payment to KT which was already approved by way of a deviation process.
- 5.1.34 In terms of section 168(3) of the MFMA, "*no guidelines issued in terms of subsection (1), are binding on a municipality unless adopted by its council*". The Municipality was therefore not bound by the definition of "*emergency cases*" as defined in the *National Treasury Supply Chain Management: A guide for*

Accounting Officers/ Authorities: February 2004, as the said guide was not adopted by the Municipal Council.

- 5.1.35 The Municipal Council adopted and approved a SCM policy for 2017/2018 which is inclusive of the Regulation 36 deviation application that includes the definition of an emergency as *“a situation which is considered unforeseeable and sudden event with materially harmful or potentially material harmful consequences for the municipality which requires urgent action by the Municipal Council”*. The memorandum dated 11 August 2017, by the then Acting Municipal Manger, Mr K Chetty stated that *“the disaster had a severe impact on the tourism economy as well as the environment which is an integral part of Knysna’s tourism attraction”* and *“requires urgent action to address, through the procurement of certain tourism services to facilitate the recovery of the industry.”*
- 5.1.36 Even though the deviation was not supported by the SCM Manager, the Municipal Manager was the decision maker in terms of Regulation 36 as the *“Accounting Officer”* who dispensed with the official procurement process of which the payment of the funds was already approved by Council on 26 May 2017.
- 5.1.37 With reference to section 217 of the Constitution, the enabling local government legislation to give effect to it is the MFMA, which only became operational on 01 July 2004. Section 112 of the MFMA regulates the supply chain management process, *inter alia* and states that a SCM policy must comply with the *prescribed regulatory framework* for municipal supply chain management which must cover the range of the processes that a municipality may use in relating to tenders, quotations and other types of competitive bidding.
- 5.1.38 The above section 112 of the MFMA only became operational on 01 December 2004 and the prescribed regulatory framework, in the Municipality’s view constitutes the Municipal Supply Chain Management Regulations, 2005 which came into operation on 01 July 2005.

5.1.39 The expenditure by the Municipality for the period since 2000, which amounts to R58 million, does not constitute irregular expenditure as a whole, due to the enactment dates of the relevant legislation.

Mr K Chetty, former Acting Municipal Manager of the Municipality

5.1.40 Mr Chetty stated that he was employed as the Municipal Manager of the Municipality for the period from July 2017 to July 2018 (no dates specified) whereby he terminated his employment by means of a resignation via the then Executive Mayor of the Municipality on 06 July 2018, citing reasons relating to the employer creating an unbearable working environment. His response therefore only relates to his period whilst employed at the Municipality.

5.1.41 According to him, he was confronted on 3 July 2017 with dealing with the Knysna wildfire disaster incident, which occurred prior to his employment in earlier June 2017, having negatively impacted on just over nine hundred (900) homes being destroyed, an estimated evacuation of about between eight thousand (8000) to ten thousand (10 000) people and several local businesses being destroyed. The “*lifeblood*” of Knysna’s economy is tourism which is one of the most important economic sector and the largest contributor towards local employment.

5.1.42 Mr Chetty stated that the Municipality included the amount for KT in its annual budget in accordance with the MFMA; the budget was consulted and approved by Council. The allocated funds were used for its intended purpose in terms of the SLA and in an another legal opinion dated 22 June 2017 which was sought from attorneys Sonn and Partners, it was argued that if the above processes were followed then section 67 of the MFMA is permissible and lawful of which many municipalities in South Africa have utilised to support their local tourism.

5.1.43 The legal opinion in essence expressed that:

“It can be argued that the contract arrangement between the parties fall short of the ordinary dictionary meaning of commercial transaction as the exchange does not involve some type of remuneration.”

5.1.44 Reliance for the interpretation of the above was emphasised through to two cases, the first being *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)⁷ in which the court stated that *“it is a primary rule of statutory construction that words in a statute should be constructed in light of their context and that the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words are clear, one still has to look at the context in which they appear.”*

5.1.45 In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA⁸, the court referred to the *Bastian Financial Services* case⁹ which sets out the present approach in law regarding interpretation. The court stated that *“interpretation is the process of attributing meaning to words used in a document. In addition consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the apparent purpose to which it is directed and the material known to the drafters of the Act. Where more than one meaning is possible, each possibility must be weighted in light of all these factors and this is an objective and not a subjective process”*.

⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13

⁹ *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* (207/07) [2008] ZASCA 70; [2008] 4 All SA 117 (SCA); 2008 (5) SA 1 (SCA) (30 May 2008)

- 5.1.46 KT did not receive any remuneration as they were a non-profit organisation having grant funding and membership subscriptions. There was no commercial benefit to the Municipality as the commercial benefit was received by the community and KT rendered services on behalf of its partnership with the Municipality. It based on these aforementioned reasons that the arrangements between the parties (KT and the Municipality) are not commercial in nature and therefore the provisions of section 67 of the MFMA applies.
- 5.1.47 Mr Chetty further stated that in respect of the expired contract between the Municipality and KT during his employment at the Municipality, he was provided with a copy of the Council Resolution dated 26 May 2017 and reference no. *C10/05/17 TOURISM DESTINATION MARKETING FUNCTION* by the Manager attached to the Executive Mayor's Office. The SLA was therefore signed through a deviation made in terms of executing the previously mentioned Council Resolution and also in terms of section 36 of the MFMA and the Municipal Supply Chain Regulations.
- 5.1.48 The justification for the emergency procurement process was in terms of section 36 of the MFMA and the Municipal Supply Chain Regulations as it fell within its legal description. The definition of "*emergency*" is broad and the municipal council did not adopt the guidelines in terms of the MFMA and hence the use of the emergency provision was done in "*good faith*" to ameliorate the human suffering and potential danger to victims of the wildfire. These fires was an unforeseeable event that caused tremendous devastation in the urban areas with potential danger to its inhabitants particularly the victims of the fire. The motivation for the deviation does not only confirm to the requirements of an emergency, which was in this case but could easily been categorised as a single source impractical and impossible, specifically because the role that KT played within the tourism industry.

- 5.1.49 The legal opinion obtained from attorneys CDH, was the direct cause of the Municipality following a deviation process for the 2017 SLA as well as considering a long term option for local tourism during the 2017/2018 financial year.
- 5.1.50 In regard to the SCM views expressed by the then former CFO under “*comments and concerns*”, Mr Chetty stated that he had several disagreements particularly on issues on the role of development in local government. The Memorandum to the same CFO, also confirmed the signing of the agreement and SLA with the Municipality and KT on 11 July 2017 and this was not an extension of the old agreement but a SLA in terms of section 36 of the MFMA.
- 5.1.51 Mr Chetty further stated that whilst the Municipality may have had sufficient time to enter into another agreement with the service provider, none was taken upon his advent in July 2017 and failure to enter into an agreement for a limited period would have resulting in misery, as previously highlighted.
- 5.1.52 The signing of the agreement and SLA with KT on 11 July 2017, was intended to act in the public interest after one of the country’s most devastating fires, and to urgently create employment and economic activities to reduce the hardship and misery faced by the Knysna communities.
- 5.1.53 The Municipality thereafter considered options for the process of addressing tourism services in the following year (2018/2019) which resulted in the Municipality signing an agreement with the Western Cape Provincial Government in the latter part of 2018.
- 5.1.54 The Public Protector considered the responses, information and documents provided by the above mentioned persons to the Notices issued in terms of section 7(9) of the Public Protector Act.

Application of the relevant law

- 5.1.55 Section 217 of the Constitution provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The evidence and information obtained during the course of the investigation as discussed above indicates that the Municipality procured tourism services from May 2000 until June 2017 from KT by means of agreements or SLAs entered into between the parties and without following a competitive, cost effective process, as required by section 217 of the Constitution.
- 5.1.56 The commencement date of the Municipal Finance Management Act, No 56 of 2003 was 1 July 2004 (i.e. after the first agreement was entered into with KT in 2000).
- 5.1.57 Irregular expenditure is defined by section 1 of the MFMA, *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 supply chain management policy of the municipality and which has not been condoned.*”
- 5.1.58 Section 60 (a) of the MFMA provides that the Municipal Manager of a municipality is the accounting officer of the municipality and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act. These functions and powers entail that service procured must be in compliance with the legal prescripts.
- 5.1.59 In terms of section 62(1) (d) of the MFMA, the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorized, irregular and wasteful expenditure and other losses are prevented.

5.1.60 Section 67(1) of the MFMA provides as follows:

“(1) Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body-

(a) has the capacity and has agreed-

(i) to comply with any agreement with the municipality;

(ii) for the period of the agreement comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;

(iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and

(b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial management; and

(c) has in respect of previous similar transfers complied with all the requirements of this section.”

5.1.61 Two legal opinions were presented during the investigation differing in views pertaining to the relationship between the Municipality and KT on whether it was commercial or other business transaction in nature. If so, the outcome of the accepted legal opinion would determine whether Section 67(1) of the MFMA is applicable or not.

5.1.62 In the legal opinion provided by attorney Sonn and Partners, the view was held that the contract arrangement between the Municipality and KT fell short of the ordinary dictionary meaning of commercial transaction as the exchange does not

involve some type of remuneration whilst on the other hand, in the legal opinion provided by Messrs Cliffe Dekker Hofmeyr Attorneys, it was expressed that the provision of the services specified in the SLA by KT (as was the case in all the agreements between the Municipality and KT since 2000) amounts to the provision of commercial services to the Municipality.

- 5.1.63 Section 67(1) of the MFMA relates to the transferring of funds of the Municipality to an organisation or body outside any sphere of government, otherwise than in compliance with a commercial or other business transaction. Even though KT is a non-profit organisation they did not receive any Grant-In-Aid from the Municipality. The Grant-In-Aid Policy indicates that grants may be awarded to an organisation which promotes and supports matters listed in Part B of Schedule 4 and 5 of the Constitution¹⁰. In this instance, local tourism is listed under Part B of Schedule 4 of the Constitution.
- 5.1.64 The payment arrangement which was provided for in the initial SLA between the Municipality and KT dated 15 May 2000, indicated that the Municipality would collect levies from businesses and thereafter pay over the net proceeds to KT to provide tourism services. This arrangement came to an end with the implementation of the next SLA dated 6 September 2005, as under clause 4.3.1 it now indicated that funds to KT shall consist of the appropriation from the Municipality, pursuant to the annual budget submitted by KT and approved by the Municipality. The pre-mentioned SLAs' which followed until 2017 makes it clear that KT was entering into an agreement in relation to tourism on behalf of the Municipality in exchange for the provision of funding. This therefore rendered the Municipality legally obliged to pay KT for services rendered under the agreed terms and conditions of the respective SLA's.

¹⁰ Constitution of the Republic of South Africa, 1996, read with section 156(1)(a) thereof.

- 5.1.65 The agreements and SLA between KT and the Municipality therefore constituted commercial or business transactions, as KT was expected to deliver a service to the Municipality and would be paid for it by means of agreed transfers.
- 5.1.66 The Grant-in-Aid Policy of the Municipality was originally adopted by the Council of the Municipality on 30 November 2011. It provides for a monetary donation of municipal funds to an organisation or body outside any sphere of government, which does not constitute a commercial or business transaction. Paragraph 3 of the Grant-in-Aid Policy stipulates a process in terms of which Grant-in-Aid applications are invited through advertisements in local newspapers. Applications are considered by a Grant-in-Aid Committee and the allocations proposed approved by the Council.
- 5.1.67 Once the grant is approved, the beneficiary must, in terms of paragraph 4 of the Grant-in-Aid Policy, enter into an agreement with the Municipality in accordance with the provisions of the Policy. No provision is made for a service of any kind to be rendered to the Municipality in return for the grant and for a SLA to be entered into between the parties. The Municipality indicated that the funding provided in favour of KT was budgeted as a line item and not in terms of the Grant-In-Aid policy.
- 5.1.68 No evidence was found that KT applied for a Grant-in-Aid or that funds were transferred by the Municipality to KT in terms of the Grant-in-Aid Policy.
- 5.1.69 Each municipality must, in terms of Section 111 of the MFMA have and implement a supply chain management policy, which gives effect to the provisions of the Act. The Municipality has a Supply Chain Management Policy prescribing the procedure to be followed in the acquiring of services and/or goods above R200 000-00.

- 5.1.70 Section 112 (1) (a) of the MFMA further states that the supply chain management policy of a municipality must be fair, equitable, transparent, cost effective and comply with a prescribed regulatory framework for municipal supply chain management which must cover the range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding, which is aligned with Section 217 of the Constitution mentioned above.
- 5.1.71 Regulation 11 of the Municipal Supply Chain Management Regulations made in terms of Section 168 of the MFMA and promulgated on 1 July 2005 (Regulations) stipulates that the supply chain management policy of a municipality must provide for an effective system of acquisition management in order to ensure, *inter alia* that goods and services are procured by the municipality in accordance with authorised processes only.
- 5.1.72 In terms of Regulation 12(1)(d), the supply chain management policy of a municipality must provide for a competitive bidding process for procurements of goods and services of a transaction value of above R200 000 (VAT included) and the procurement of long term contracts.
- 5.1.73 In terms of section 168(3) of the MFMA, "*no guidelines issued in terms of subsection (1), are binding on a municipality unless adopted by its council*". Regulations or guidelines or/ and regulations applicable to a Municipality in respect of fiscal matters only become binding on the Municipality once Council has adopted same.
- 5.1.74 The provisions of paragraphs 11 and 12 of the Municipality's Supply Chain Management Policy (SCM Policy) that was approved and adopted by Council on 30 May 2013 are similar to that of Regulations 11 of 12 of the Regulations. A "*long term contract*" is defined in Regulation 1 and paragraph 1 of the SCM Policy,

as a contract with a duration of more than one year. The SLA's which had been entered into all, except for one, where an addendum was approved for another year, were long term contracts.

- 5.1.75 The Addendum to the Service Level Agreement of May 2010 entered into between the parties on 26 November 2013 for a period of three years, was invalid as a the main agreement had already expired. The further Addendum of the 2010 Service Level Agreement entered into between the parties on 1 August 2014 was therefore also invalid, more so as the Addendum of 26 November 2013 had also expired.
- 5.1.76 The procurement by the Municipality of tourism services from KT in 2005 was not in accordance with the provisions of the MFMA and the Regulations. It therefore resulted in irregular expenditure, as contemplated by the MFMA.
- 5.1.77 The National Treasury issued MFMA Circular 62 in terms of the MFMA on 3 July 2013 (Circular 62). Circular 62, which has to be read with other Circulars issued by the National Treasury on SCM by municipalities, stipulates that the MFMA requires that the resources of municipalities are used effectively, efficiently and economically. It provides *inter alia* that accounting officers of municipalities may, upon request, make available to the relevant Provincial Treasury a procurement plan containing all planned procurement for the financial year, in respect of the procurement of goods, services and infrastructure projects which exceed R200 000.00 per case. This procurement plan must be approved by the accounting officer.
- 5.1.78 Circular 62 further provides that all user departments of a municipality are required to submit their procurement plans to the Head of SCM of the municipality to improve planning and the management of resources.

- 5.1.79 The procurement of tourism services from KT exceeded R200 000-00 per SLA. The expenditure was budgeted for by the Municipality as a line item under tourism related services. It was not included in the Annual Procurement Plans of the Municipality.
- 5.1.80 Regulation 36(1)(a) of the Regulations provides, *inter alia* that the SCM Policy of a municipality may allow the accounting officer to dispense with the official procurement process established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations in an emergency.
- 5.1.81 Paragraph 36(1)(a)(i) of the SCM Policy provides that the accounting officer of the Municipality (Municipal Manager) may dispense with the official procurement processes established by the SCM Policy and procure any required goods or services through any convenient process, which may include direct negotiations, but only, *inter alia*, in an emergency. The wording of paragraph 36 is similar to that of Regulation 36 of the Regulations and in essence refers to a deviation.
- 5.1.82 Paragraph 36(2) of the SCM Policy further provides that the accounting officer must record the reasons for any deviations in terms of subparagraph (1) of this policy and report them to the next meeting of the council and include as a note to the annual financial statements. The Municipality submitted a deviation application and Council based on a fire disaster incident and Council recommended that the SLA between KT and the Municipality should be extended for a period of up to three (3) years with a provided amount of up to R4 million per year.
- 5.1.83 Paragraph 36(4) further implies that subparagraph (1) does not apply in instances for the procurement of long term contracts. The SLA extended in terms of the deviation application fell under the category of long term contract.

- 5.1.84 The National Treasury defines “*emergency cases*” as cases where immediate action is necessary in order to avoid a dangerous or risky situation or misery (paragraph 4.7.5.3 of National Treasury Supply Chain Management: A Guide for Accounting Officers/Authorities: February 2004). However, the Municipality was aware of the fact that the Service Level Agreement, which had been signed on 11 July 2017, was to expire on 30 June 2018 and could therefore have taken steps to timeously enter into a another agreement with the service provider. Instead it waited until the expiry date of the 2017/2018 before a deviation report was submitted in terms of Regulation 36 of the Supply Chain Management Policy.
- 5.1.85 The disaster in the Knysna area in June 2017 did not constitute an emergency, as contemplated by paragraph 36 of the Municipality’s SCM Policy in respect of procuring tourism related services. No immediate action was necessary in order to avoid a dangerous or risky situation or misery. No evidence was found indicating that a competitive procurement process could not have addressed the need for tourism services at the time. According to Mr Chetty nine hundred (900) homes were destroyed, an estimated eight thousand (8000) to ten thousand (10 000) people had to be evacuated and several local businesses were destroyed. These results of the disaster clearly indicate that there were more pressing and emergency matters at the time that the Municipality had to attend to and provide funding for, than promoting tourism.
- 5.1.86 The approval of the deviation from a competitive process was not supported by the SCM Manager and the Municipality could not provide the signed and approved application to deviate in terms of paragraph 36 of the SCM Policy and the Annexure to the SLA.
- 5.1.87 The procurement of services by the Municipality from KT by means of the Service Level Agreement signed on 11 July 2017 was therefore not in accordance with section 217 of the Constitution, the MFMA, the Regulations and the Municipality’s

SCM Policy. It therefore resulted in irregular expenditure, as contemplated by the MFMA.

- 5.1.88 Section 32(1)(c) of the MFMA provides that any political office bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure, is liable for that expenditure. A municipality must, in terms of section 32(2) recover irregular expenditure from the person liable for that expenditure unless the expenditure is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.
- 5.1.89 Section 32(4) of the MFMA provides that the accounting officer of a municipality must promptly inform the mayor, the MEC for Local Government in the province and the Auditor-General, in writing of, *inter alia*, any irregular expenditure incurred by the municipality, whether any person is responsible or under investigation for such irregular expenditure and the steps have been taken to recover such expenditure and to prevent a recurrence thereof.
- 5.1.90 A municipality must, in terms of section 171(4) investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality and in terms of section 171(4)(b), if the investigations warrants such a step institute disciplinary proceedings.
- 5.1.91 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 irregular or fruitless and wasteful expenditure.
- 5.1.92 Section 173(1)(a)(i) of the MFMA provides that the accounting officer of a municipality is guilty of an offence if that accounting officer deliberately or in a grossly negligent way contravenes or fails to comply with a provision of *inter alia* section 62(1) of the MFMA or fails to take all reasonable steps to prevent

unauthorised, irregular or fruitless and wasteful expenditure. In this case no criminal charges were laid in connection with the irregular expenditure.

Conclusion

- 5.1.93 It was a standard practice at the Municipality to utilise the services of KT, a registered tourism organisation, to perform tourism and destination marketing services by means of procurement.
- 5.1.94 The evidence and information obtained from the investigation indicates that the Municipality procured tourism services from May 2000 to June 2017 from KT by means of agreements or SLAs entered into between the parties.
- 5.1.95 KT in terms of the SLAs' would discharge certain tourism and destination marketing functions for the Knysna municipal areas over an agreed period of time on behalf of the Municipality, in exchange for the provision of funding.
- 5.1.96 Between 2000 and 2017, only one application, dated 06 July 2017 was submitted to the Council for a deviation from the competitive bidding process in terms of section 36 of the SCM Policy.
- 5.1.97 It is worth noting that the deviation application was made after Council had previously resolved on 27 May 2017 that the SLA between KT and the Municipality should not be renewed and that a new SLA which complies with all the legislative and regulatory requirements be negotiated with KT.
- 5.1.98 The deviation application was grounded on a fire disaster incident that occurred within the Knysna area from 7 June 2017 resulting in Council recommending and approving that the SLA with KT be extended for a period of up to three (3) years with an amount of up to R4 million per year.

- 5.1.99 The rationale for the decision included that the Knysna and the surrounding areas after having been engulfed with wild fires, had been financially negatively impacted with the locals losing their homes, properties and in some instances their businesses.
- 5.1.100 It is worth noting that the Municipality could have timeously executed a competitive bidding process as legally required prior to fire disaster incident which occurred from 7 June 2021, but did not.
- 5.1.101 The SLA with KT was valid until 30 June 2017 and the deviation application was submitted after the SLA had expired.
- 5.1.102 Council was informed by the Municipality on 11 August 2017 that the SLA between the Municipality and KT had been concluded on 11 July 2017 for a period of up to three (3) years.
- 5.1.103 The SLA entered into between Municipality and KT on 11 July 2017 exceeded the duration of a year and was therefore fall within the category of a long term contract. Considering that the arrangement was a long-term contract, the deviation process as outlined in the SCM Policy and relied upon by the former Municipal Manager did not apply.
- 5.1.104 Due to the fact that the amounts also exceeded the threshold of R200 000.00 per agreement, a competitive bidding process was required, which the Municipality failed to follow.
- 5.1.105 The expenditure was budgeted for by the Municipality as a line item under tourism related services. It was not included in the Annual Procurement Plans of the Municipality.

- 5.1.106 No competitive process to procure the services of KT was followed by the Municipality, as required by section 217 of the Constitution from 2000 to 2017.
- 5.1.107 The procurement by the Municipality of the services of KT as from July 2004 to June 2017 also did not comply with the provisions of the MFMA, the Regulations and the Municipality's SCM Policy. No SCM process was followed and no other potential service provider considered.
- 5.1.108 No evidence was found that KT applied for a Grant-in-Aid or that funds were transferred by the Municipality to KT in terms of the Grant-in-Aid Policy.
- 5.1.109 The procurement of tourism services by the Municipality from KT referred to in this report was not in accordance with the relevant laws and prescripts that regulate the procurement of goods and services by the Municipality. The conduct of the Municipality in this regard was therefore improper. It also constitutes maladministration and resulted in irregular expenditure, as contemplated by the MFMA.
- 5.1.110 In terms of section 1 of the MFMA, "*fruitless and wasteful expenditure*" means expenditure that was made in vain and would have been avoided had reasonable care been exercised.
- 5.1.111 It was not alleged and no evidence was found that KT did not provide the tourism services that they were contracted to deliver to the Municipality, and that the expenditure was therefore made in vain.
- 5.1.112 It was also established that the Municipal Managers that were responsible as the accounting officers for entering into the agreements and SLA's with KT have since left the employ of the Municipality.

- 5.1.113 The period of the last SLA entered into by the Municipality with KT has already expired.
- 5.1.114 The Municipality later entered into with an agreement with the Western Cape Provincial Government in the latter part of 2018 to assist in providing tourism services.

6. FINDINGS

6.1 **Regarding whether the procurement of tourism services by the Municipality from KT was in accordance with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality; and if not, whether the conduct of the Municipality was improper and constitutes maladministration.**

- 6.1.1 The allegation that the procurement of tourism services by the Municipality from KT was not in accordance with the relevant laws and prescripts regulating the procurement of goods and services by the Municipality, is substantiated.
- 6.1.2 The conduct of the Municipality in procuring services from KT from 2000, was at variance with the provisions section 217 of the Constitution, section 112(1)(a) of the MFMA, Regulations 11, 12 and 36(1)(a) of the Regulations and paragraphs 11, 12 and 36(1)(a) of the SCM Policy, in terms of which it was required to follow a fair, equitable, transparent, competitive and cost effective tender process and only to deviate from it, *inter alia*, in an emergency.
- 6.1.3 More than R58 million was paid by the Municipality to KT for services rendered.
- 6.1.4 The conduct of the Municipality was thus improper, constitutes maladministration and resulted in irregular expenditure, as contemplated by section 1 of the MFMA.

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

7. REMEDIAL ACTION

7.1 The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, is the following:

7.1.1 The Speaker of the Council of the Municipality to:

7.1.1.1 Take the appropriate steps to ensure that the Council of the Municipality refers the irregular expenditure incurred by the Municipality in respect of procuring services from KT to the relevant Council Committee to investigate and determine in terms of section 32(2) of the MFMA whether the irregular expenditure is recoverable or not, and if so action is taken accordingly within 30 days from the date of this report.

7.1.1.2 To take the appropriate steps to ensure that criminal charges are laid in terms of section 173 of the MFMA in respect of the irregular expenditure incurred within 30 days from the date of this report.

7.1.2 The Acting Municipal Manager to:

7.1.2.1 In terms of section 32(4) of the MFMA, report the irregular expenditure by the Municipality to the Executive Mayor of the Municipality, the Western Cape Provincial Treasury, the Western Cape MEC for Local Government and the Auditor-General South Africa in writing, within 30 days from the date of this report;

- 7.1.2.2 In terms of section 171(4) of the MFMA, take the appropriate steps to investigate whether any of the officials of the Municipality that were involved in the irregular procurement of the services of KT should be held accountable for financial misconduct, and if so take the appropriate steps to ensure that disciplinary action is instituted against them, within 30 days from the date of this report;
- 7.1.2.3 Ensure that all the staff of the Municipality involved in the SCM processes for the procurement of goods and services attend an appropriate training course on the provisions of section 217 of the Constitution, the MFMA, the Regulations, the SCM Policy and the Grant-in-Aid Policy within 60 days from the date of this report; and
- 7.1.2.4 Submit a report to the Council of the Municipality on the action taken as referred to in paragraphs 7.1.2.1 to 7.1.2.3 above within 60 days from the date of this report.

8 MONITORING

- 8.1 The Municipal Manager to submit an implementation plan indicating how the remedial action referred to in paragraph 7.1.2 is implemented to the Public Protector, within thirty (30) business days from the date of this report.

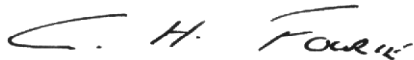
*REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION
BY THE KNYSNA LOCAL MUNICIPALITY IN THE WESTERN CAPE PROVINCE RELATING TO THE
PROCUREMENT OF SERVICES FROM KNYSNA TOURISM*

8.2 The Speaker of the Council of the Municipality to submit a copy of the resolution of the Municipal Council referred to in paragraph 7.1.1.1 and a report on the implementation of the remedial action taken in paragraph 7.1.1.2 to the Public Protector, within ninety (90) days from the date of this report.



**ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 22/10/2021**

Assisted by:



**ADV CH FOURIE
EXECUTIVE MANAGER
PII: COASTAL**