

**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**

***“Allegations of improper conduct and maladministration by the Msunduzi
Local Municipality in relation to the procurement of goods and services”***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER
CONDUCT AND MALADMINISTRATION BY THE MSUNDUZI LOCAL
MUNICIPALITY IN THE KWAZULU-NATAL PROVINCE RELATING TO THE
PROCUREMENT OF GOODS AND SERVICES**

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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 (Constitution) and section 8 (1) of the Public Protector Act 1994 (Public Protector Act).
- (ii) The report communicates the findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct and maladministration by the Msunduzi Local Municipality in the Kwazulu-Natal Province (Municipality) relating to the procurement of goods and services
- (iii) The complaint was lodged on 2 December 2017 at the Kwazulu-Natal Provincial Office of the Public Protector South Africa by Mr Thabiso Zulu (Complainant).
- (vi) In the main, the Complainant alleged that the Municipality paid for goods and services procured for meetings held in Ward 29 from February 2017 to November 2017 at the request of a Councillor, some of which were not rendered or delivered.
- (vii) In essence, the Complainant contended that the conduct of the Municipality was improper, amounts to maladministration and resulted in the misappropriation of public funds.
- (viii) **On analysis of the complaint, the following issues were considered and investigated:**
 - (a) Whether the verification by the Municipality of the receipt or delivery of goods and services procured for community meetings held in Ward 29 from February 2017 to November 2017 was not in accordance with the relevant laws and prescripts regulating procurement by the Municipality; and if yes, whether the conduct of the Municipality was improper and constitutes maladministration.

- (ix) The investigation was conducted in terms of section 182(1) of the Constitution and section 6 and 7 of the Public Protector Act. It included correspondence and meetings with officials of the Municipality, an analysis of the relevant documents and information obtained during the investigation and consideration and application of the relevant laws and prescripts.
- (x) The Municipal Manager and the Chief Financial Officer of the Municipality were afforded an opportunity to respond to the evidence obtained during the investigation, in terms of section 7(9) of the Public Protector Act. The responses received were also considered during the investigation.
- (xi) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:
 - (a) Regarding whether the verification by the Municipality of the receipt or delivery of goods and services procured for community meetings held in Ward 29 from February 2017 to November 2017 was not in accordance with the relevant laws and prescripts of the Municipality; and if yes, whether the conduct of the Municipality was improper and constitutes maladministration.**
 - (aa) The allegation that the verification by the Municipality of the receipt and delivery of goods and services procured for the community meetings held in Ward 29 from February 2017 to November 2017 was not in accordance with the relevant laws and prescripts of the Municipality, is substantiated.
 - (bb) The Municipality failed to verify the receipt and delivery of goods and services procured for community meetings held in Ward 29 from February 2017 to November 2017. The conduct of the Municipality in relation to these procurements constituted a contravention of section 217 (1) of the Constitution and Section 2 of the Msunduzi Supply Chain Management Policy, 2016 (dated 3 May 2016) in terms of which a “*fair, equitable, transparent, competitive and cost effective Supply Chain*”

Management system must be implemented". The conduct of the Municipality also constituted a contravention of clause 6.3 of the Msunduzi Municipality Creditors Payment Procedure Manual which requires "*the Deputy Municipal Manager of the Business Unit or his/her delegated official responsible to ensure that goods or services have been received in correct quantity and right quality.*"

- (cc) The allegation that the conduct of the Municipality was improper and constitutes maladministration, is therefore also substantiated.
- (dd) The conduct of the Municipality constitutes maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act, 1994 and improper conduct as envisaged in section 182(1) of the Constitution, 1996.
- (xii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:
 - (a) The Speaker of the Council of the Municipality to:**
 - (aa) Take the appropriate steps to ensure that the Council considers an investigation, as contemplated by section 171 (4) of the Local Government: Municipal Finance Management Act 2003 (MFMA), into financial misconduct by the officials of the Municipality that were responsible for the procurement of the goods and services referred to in this report, and if the investigation warrants such steps, institute disciplinary proceedings in accordance with the systems and procedures referred to in section 67 of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) within 60 days from the date of this report

(b) The Municipal Manager of the Municipality to take the appropriate steps to ensure:

- (aa) That the Supply Chain Management system (including the electronic system) of the Municipality in all respects complies with the requirement of the MFMA, the Municipal Supply Chain Management Regulations and the SCM Policy and that anomalies relating the items purchased and delivered are resolved, within 60 days from the date of this report;
- (bb) Compliance by the employees in the Office of the Speaker with the provisions of section 217 of the Constitution, the MFMA, the Municipal Supply Chain Management Regulations, the SCM Policy and the Creditors Payment Procedure Manual, within 60 days from the date of this report;
- (cc) The employees, in the Office of the Speaker, Finance Unit and the Supply Chain Management Unit, responsible for the procurement of goods and services and the verification of receipt and delivery thereof are trained on the relevant provisions of the MFMA, the Municipal Supply Chain Management Regulations, the SCM Policy and the Creditors Payment Procedure Manual in respect of the procurement of goods and services, within 90 days from the date of this report; and
- (dd) A report on the implementation of the remedial action taken in paragraph (xii) (b) above is submitted to the Council of the Municipality within 60 days from the date of this report.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE MSUNDUZI LOCAL MUNICIPALITY IN THE KWAZULU-NATAL PROVINCE RELATING TO THE PROCUREMENT OF GOODS AND SERVICES

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to the following persons to note the outcome of the investigation:
 - 1.2.1 The Member of the Executive Council (MEC) for Cooperative Governance and Traditional Affairs of the KwaZulu-Natal Provincial Government, Mr Siphon Hlomuka;
 - 1.2.2 The Speaker of Msunduzi Local Municipality (Municipality), Ms Eunice Nomagugu Majola;
 - 1.2.3 The Executive Mayor of the Municipality, Mr Mzimkhulu Thebolla;
 - 1.2.4 The Municipal Manager of the Municipality, Mr Madoda P. Khathide;
 - 1.2.5 The Chief Financial Officer of the Municipality, Ms Nelisiwe Ngcobo;
- 1.3 A copy of the report is also provided Mr Thabiso Zulu, who lodged the complaint.

- 1.4 The report pertains to an investigation into allegations of improper conduct and maladministration by the Municipality in relation to the procurement of goods and services.

2 THE COMPLAINT

- 2.1 The complaint was lodged on 2 December 2017, by Mr Thabiso Zulu (Complainant).
- 2.2 In the main, the Complainant alleged that the Municipality paid for goods and services procured for meetings held in Ward 29 from February 2017 to November 2017 at the request of a Councillor, some of which were not rendered or delivered.
- 2.3 In essence, the Complainant contended that the conduct of the Municipality was improper, amounts to maladministration and resulted in the misuse of public funds.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established in terms of section 181(1) (a) of the Constitution to support and 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 prescribed in 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 and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that:

*“When 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 constitutional matter, Mogoeng CJ, 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 (paragraph 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. (paragraph 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could

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

² *Supra* at para [73].

do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.6.4 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; (paragraph 69) ;

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; (paragraph 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; (paragraph 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; (paragraph 71(a));

3.6.8 The Public Protector has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 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; (paragraph 71(e).”

3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (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 (para 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. (para 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; (paragraphs 100 and 101 of the judgment):

3.7.3.1 Conduct an investigation;

3.7.3.2 Report on that conduct; and

3.7.3.3 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 of the judgment).

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 of the judgment).

- 3.7.6 The fact that there is 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 (paragraphs 107 and 108 of the judgment)
- 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 of the judgment)
- 3.8 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the matter falls within the jurisdiction of the Public Protector. The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1. Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a) 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 Like every Public Protector investigation, 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 improper conduct or maladministration?

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

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 goods and services by the Municipality for meetings held in Ward 29 from February 2017 to November 2017 was not in accordance with the law and prescripts regulating the procurement of goods and services by the Municipality and if so, whether the conduct of the Municipality was improper and constitutes maladministration.

4.2.2. In the *Public Protector versus Mail and Guardian*, 2011(4) SA 420 (SCA), the Supreme Court of Appeal (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

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

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

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

4.3.1. Whether the verification by the Municipality of the receipt or delivery of goods and services procured for community meetings held in Ward 29 from February 2017 to November 2017 was not in accordance with the relevant laws and prescripts regulating procurement by the Municipality; and if yes, whether the conduct of the Municipality was improper and constitutes maladministration.

4.4. Key Sources of information

4.4.1. Correspondence exchanged:

4.4.1.1. Between the PPSA and the Municipality on 17 December 2019, 11 February 2020, 4 March 2020, 20 November 2020, 23 November 2020, 4 December 2020, 19 January 2021, 28 January 2021, 3 February 2021, 4 February 2021, 5 February 2021, 8 February 2021, 11 February 2021, 18 May 2021, 20 May 2021, 26 May 2021, 27 May 2021, 7 June 2021, 11 June 2021, and 14 June 2021

4.4.2. Documents provided and received from the Municipality:

4.4.2.1. Documents relating to procurements between February 2017 and November 2017;

4.4.2.2. Purchase Orders for procurements made for Ward 29 between February 2017 and November 2017;

4.4.2.3. Suppliers' Invoices for procurements made for Ward 29 between February 2017 and November 2017;

4.4.2.4. Municipal Service Entry Sheets (SES) for procurements made for Ward 29 between February 2017 and November 2017;

4.4.2.5. Msunduzi Municipality : Creditors Payment Procedure Manual;

4.4.3. Meetings

4.4.3.1 The PPSA investigation team met with officials of the Municipality on 5 February 2020, 3 December 2020 and 18 June 2021.

4.4.4. Legislation and other prescripts

4.4.4.1. The Constitution of the Republic of South Africa, 1996;

4.4.4.2. The Public Protector Act 23 of 1994;

4.4.4.3. Local Government: Municipal Systems Act 32 of 2000;

4.4.4.4. Local Government: Municipal Structures Act 117 of 1998;

4.4.4.5. Local Government: Municipal Finance Management Act,2003;

4.4.4.6. Msunduzi Municipality Supply Chain Management Policy;

4.4.4.7. Msunduzi Municipality Payment Procedure Manual.

4.5. Case Law

4.5.1. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);

4.5.2. *President of the Republic of South Africa vs Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) (13 December 2017);

4.5.3. *Public Protector and Mail & Guardian Ltd (2011) ZASCA 108;*

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

4.6.1. A Notice was issued in terms of section 7 (9) of the Public Protector Act, 1994 to the Municipal Manager of the Municipality on 3 November 2020, affording him an opportunity to respond to the evidence obtained during the investigation. The Municipal Manager responded on 13 November 2020.

4.6.2. Subsequent to the response by the Municipality to the Notice, a further Notice was issued in terms of section 7(9) of the Public Protector Act, on the additional evidence obtained. The second notice was served on the Municipal Manager and the Chief Financial Officer on 29 April 2021. The Municipal Manager responded on 27 May 2021. No response was received from the Chief Financial Officer.

4.6.3. On 25 August 2021 a further letter was personally served upon the Offices of the Mayor, Municipal Manager and the Chief Financial Officer affording the Municipality a final opportunity to respond before 4:30 pm on Monday 30 August 2021. An acknowledgement of receipt, dated 25 August 2021 was received from the office of the Municipal Manager, and an e-mail, dated 25 August 2021, was received from the Chief Financial officer, which is more fully dealt with in paragraphs 5.1.29 to 5.1.32 below.

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 verification by the Municipality of the receipt or delivery of goods and services procured for community meetings held in Ward 29 from February 2017 to November 2017 was not in accordance with the relevant laws and prescripts of the Municipality; and if yes,

whether the conduct of the Municipality was improper and constitutes maladministration.

Common cause or facts not in dispute

5.1.1. It is common cause that the Municipality made eleven (11) procurements for events held in Ward 29 during the period from February 2017 to November 2017, paid for as reflected in the table below:

	Name of company	Purchase order number	Date of event	Material description	Payment Made
1	Bongathina Trading	4510000907	26/02/2017	Chairs, PA system	R10 000.00
2	Mavitshe (Pty) Ltd	4510000948	26/02/2017	Stage	R7 980.00
3	Mabhungu Trading	4510001180	09/04/ 2017	Marquee, tables, chairs	R9 800.00
4	Mercy at work	4510001642	17/04/2017	Marquee, tables, chairs	R9 700.00
5	Iphi Intsha	4510001708	20/07/2017	Marquee, tables, chairs	R3 200.00
6	Mercy at work	4510001710	21/07/2017	Marquee, tables, chairs, PA system	R7 400.00
7	Bongathina Trading	4510001925	20/08/2017	Marquee, tables, chairs	R13 900.00
8	Mercy at work	4510002219	24/09/2017	Marquee, tables, chairs, PA system	R13 000.00

9	Mercy at work	4510002196	06/10/2017	Marquee, tables, chairs, PA system	R13 000.00
10	Mercy at work	4510002358	05/11/2017	Marquee, tables, chairs, PA system	R13 000.00
11	Mercy at work	4510002501	24/11/2017	Marquee, tables, chairs, sound system	R15 000.00

5.1.2. It is also not in dispute that in terms of the institutional arrangements of the Municipality, a Ward Councillor that requires support from the Municipality to convene a community meeting approaches the Office of the Speaker with the request, where it is processed for procurement and payment and the verification of the receipt of the quantity and quality of the goods and services procured is done.

Issue in dispute

5.1.3. The Complainant alleged that the Office of the Speaker of the Municipality was requested to procure goods and services for community meetings to be held in Ward 29. He alleged that there were instances where there were goods and/or services that were not supplied and/or rendered, yet service providers submitted invoices to the Municipality and payment was made. Payment of such invoices was allegedly made possible due to the certification of invoices without verification of whether the goods ordered were delivered or the services rendered.

5.1.4. In response to the allegations made by the Complainant as enunciated above, the Municipality maintained that its procurement is done in terms of the Municipality's Supply Chain Management (SCM) Policy.

5.1.5. In a letter in response to the complaint, dated 17 January 2020 submitted by Mr Sikelela Ndzalela, the Acting Manager: Supply Chain Management and Ms Thuli Msomi, Coordinator: Office of the Speaker of the Municipality, it is stated that the process to be followed by Councillors requesting resources for ward and public meetings is as follows:

“Process to follow when requesting Resources

- *Cllr will either by telephone, email or walk in submit a request of the resources required to the particular meeting.*
- *This is recorded in the Recording Book indicating date, time and venue together with resources requested.*
- *The official creates a purchase requisition (PR) listing the requested resources.*
- *PR goes with control sheet and the memorandum stating that this ward has requested the said above items.*
- *Control sheet signed by Line Manager is also signed by the Senior Manager for approval.*
- *Thereafter the documentation will be forwarded to the relevant official who is allocated for our office i.e. in Supply Chain Management.*
- *After supply chain has finalised the process of outsourcing, he will inform the office of the Speaker as of the successful Service Provider.*
- *The office (we) will then call the Service Provider and the Councillor informing them of the outcome so they can meet and agree on how and where the service will be rendered.*
- *Service Provider after the service has been rendered he/she will submit the invoice in the office of the Speaker (OTS).*
- *The office will call the Cllr. to confirm if the meeting took place.*
- *The process of stamping and signing of the invoice will be done by the Office of the Speaker and it goes to creditors for payment.”*

- 5.1.6. During the course of the investigation, the Municipality submitted documents including purchase orders, invoices, Service Entry Sheets (SES) and certifications issued by the Office of the Speaker, indicating that during the period February 2017 to November 2017, payments were made to various service providers in respect of goods and services delivered or rendered at community meetings in ward 29, as reflected in the table above.
- 5.1.7. Based on the documents received and provided subsequent to the first Notice issued in terms of section 7 (9) of the Public Protector Act as referred to above, further queries were raised with the Municipality by email, dated 19 January 2021 in order to fully clarify the procurement process.
- 5.1.8. The Municipality was requested to advise whether quotations were requested from the suppliers before the Purchase Orders were generated and if these were requested, copies thereof were required. By way of an undated written response received by the PPSA investigation team on 04 February 2021, the Municipality confirmed that quotations were requested from service providers, but it failed to furnish team with the copies thereof, as requested.
- 5.1.9. In its response to the second section 7(9) Notice, dated 27 May 2021, the Municipality did furnish certain quotations, but once again failed to furnish the required number of quotations in respect of each and every procurement that was investigated, as indicated in the letter of the Municipality dated 17 January 2020.
- 5.1.10 The Municipality was further requested to explain exactly how service providers knew what to deliver in a situation where quotations were not requested. This specific issue required clarification due to the fact that the Municipality had, during the course of the investigation, indicated that the procurement system codes that were used automatically uploaded certain additional items on the procurement documents that were not required when the items procured were being ordered. Accordingly, an explanation was required as to how the supplier

was informed as to exactly what was required when the aforesaid automated procurement system generated a misleading and incorrect purchase order.

5.1.11 In the Municipality's response, received on 04 February 2021 and signed by the Chief Financial Officer, the following was stated:

"When the request for quotation and purchase is issued, service providers are notified via telephonic (sic) or email to clarify the specification, time and place of delivery..."

5.1.12 The investigation identified irregularities in respect to the following procurements for events held at the Copesville Community Hall during the period February 2017 to November 2017 as follows:

5.1.12.1 Procurement: 26 February 2017: Purchase Orders: 4510000907 and 4510000948

(a) In terms of Purchase Order:4510000907, dated 21 February 2017 the Municipality procured 300 chairs and a Public Address (PA) System with roving microphones from Bongathina Trading (Pty) Ltd at a cost of R10 000.00 for a public meeting held at the Copesville Community Hall on 26 February 2017.

(b) Further engagements with the Municipality in response to the first Notice issued in terms of section 7(9) of the Public Protector Act, resulted in the Municipality furnishing the PPSA investigation team with the following documents in respect of the procurements for the event on 26 February 2017:

(aa) An invoice from Bongathina;

(bb) An invoice from Mavoshe (Pty) Ltd (Mavoshe);

- (cc) Service Entry sheet (SES) relating to the procurement from Mavoshe;
- (dd) Service Entry sheet (SES) relating to the procurement from Bongathina
- (c) The invoice furnished by Bongathina Trading (Pty) Ltd confirmed the hire of 300 chairs together with a PA system and roving mics for the sum of R10 000.
- (d) In stark contrast to the municipal purchase order and the supplier's invoice in respect of the procurement from Bongathina for 26 February 2017, the SES delivery verification document generated by the Municipality listed a marquee, chairs and PA system as the items procured.
- (e) It was noted that the Purchase Order and supplier's invoice in respect of the procurement for 26 February 2017 from Bongathina did not make any reference to the procurement of a marquee, but the SES verification document confirmed the procurement of a marquee.
- (f) To further compound the anomaly related to this procurement, the supplier's invoice from Bongathina Trading, which was endorsed with the Office of the Speaker stamp and signed by S. P. Dlamini on 15 May 2017, verified the delivery as being correct.
- (g) Purchase Order: 4510000948, dated 28 February 2017 shows that the Municipality procured a 2m x 2m stage from Mavoshe at a cost of R7 980.00 for a public meeting held at Copesville Community Hall on 26 February 2017.
- (h) The suppliers invoice from Mavoshe, which was endorsed with the Office of the Speaker stamp certifying correct delivery, was signed by S. P.

Dlamini on 06 March 2017 and confirmed the supply of a 2m x 2m stage. The total amount reflected on the invoice was the sum of R7 000.

- (i) In contrast to this however, the Service Entry Sheet (SES) in respect of the Mavoshe procurement for 26 February 2017 made no mention whatsoever of the hire of a stage, but instead indicated that a P.A system with microphones was hired.
- (j) Accordingly, when the procurement documents referred to above are read in conjunction with each other, the evidence shows that, a PA System with microphones, was hired from Bongathina and paid for at a cost of R10 000.00, whilst Mavoshe was also paid R7000.00 for the hire of a PA System with microphones for the same venue on the same date.
- (k) With regard to the procurement from Mavoshe for the event of 26 February 2017, it was also noted that the Purchase Order generated by the Municipality indicated a transaction value of R7 980.00 whilst the (SES) also generated by the Municipality indicated a transaction value of R7000.00 and the supplier's invoice issued by Mavoshe indicated the value of R7 000.00. Despite the glaring irregularity regarding the value of the transaction, the supplier's invoice was nonetheless endorsed with the Office of the Speaker verification stamp certifying correct delivery.
- (l) Furthermore, with regard to the procurement for the event of 26 February 2017, it was noted that the Mavoshe purchase order (4510000948) was dated 28 February 2017 whilst the actual event was held two (2) days earlier on 26 February 2017. By email dated 19 January 2021, the Municipality was requested to explain this discrepancy, and in a written response received on 04 February 2021, it was stated that: *“the procurement processes were done and completed before the delivery date however the system was down on the 25th of February 2017, the service provider was then given a go ahead deliver (sic).”*

- (m) It is significant to note that during the investigation the Municipality indicated in a letter dated 17 January 2020 that the process to be complied with when payment for the procurement of goods and services was to be made, was as follows:

“Service provider after the service has been rendered he/she will submit the invoice in the Office of the Speaker (OTS). - The office will call the Councillor (Cllr) to confirm if the meeting took place.

- The process of stamping or signing of the invoice will be done by OTS and it goes to creditors for payment.”

- (n) In the Municipality’s response of 17 January 2020, these two procurements were referred to as *“approved procurements”*. The letter further states that *“due to capacity issues quotation less than R30 000.00 (sic) we rely on business unit/ requester to monitor if the work was done as per the request”*, whilst in the same document the Municipality admitted that it had failed to verify all deliveries by stating that *“the Supply Chain Management, Contract Management division visits sites to verify delivery of goods and service. However, due to the high number of orders issued and staff shortage not all appointments/delivery are verified”*. (emphasis added)

5.1.12.2 Procurement: 17 April 2017: Purchase Order: 4510001642

- (a) According to Purchase Order: 4510001642, dated 20 June 2017 the Municipality procured a marquee, tables, chairs and a PA System at a cost of R9 700.00 for a public meeting held at Copesville Community Hall on 17 April 2017.
- (b) The supplier, Mercy at Work Pty (Ltd) (Mercy at Work) issued an invoice, dated 18 April 2017 confirming the supply of 500 plastic chairs and PA system on 17 April 2017, for the sum of R9 700.00.

- (c) Verification of proper and correct delivery of the goods and services ordered was certified, stamped and signed on the suppliers invoice, by S. P. Dlamini on behalf of the Office of the Speaker on 24 April 2017.
- (d) Subsequent to the issuing of the first Notice in terms of section 7 (9) of the Public Protector Act referred to above, the Municipality submitted a second supplier's invoice in terms of the transaction, which was also certified by S. P. Dlamini. The certification on this invoice was dated 20 June 2017. When requested to furnish an explanation for the existence of two (2) supplier's invoices in respect of the same transaction at a meeting held with officials of the Municipality on 03 December 2020, it was indicated that the second invoice was issued by the supplier because the first one did not contain a VAT number.
- (e) However, the second supplier's invoice, which was stamped with the Office of the Speaker certification on 20 June 2017, and which the Municipality contended was the correct invoice as it bore a VAT number, stated the service date to be 29 March 2017, whereas it is common cause that the event was actually held on 17 April 2017. Despite this material discrepancy, the delivery verification stamp referred to above was nevertheless endorsed on the supplier's invoice to approve payment.
- (f) A further material discrepancy illustrated by the evidence in respect of the procurement on 17 April 2017 is that the "*Request for Quotation*" document submitted during the investigation is dated 19 May 2017 whilst, it is common cause that the actual event, in respect of which the quotation was being requested, had already occurred over a month previously on 17 April 2017.

5.1.12.3 Procurement: 20 July 2017: Purchase Order: 4510001708

- (a) In the course of the investigation, it was established that the Chairperson of the Ward 29 "*War Room*" organised a workshop at the Copesville

Community Hall, which was conducted by the South African Human Rights Commission (SAHRC) on 19 and 20 July 2017.

- (b) At a meeting held with the Complainant on 16 April 2018, he stated that since the workshops were to be held at the Community Hall and the SAHRC was to provide its own PA system, the organisers did not request any assistance from the Municipality.
- (c) The SAHRC confirmed to the PPSA investigation team in writing, during the investigation that the events were held on 19 and 20 July 2017 at the Copesville Community Hall and that: *“we did make use of our PA system on the 19th & 20th July 2017 with no cost implications.”*
- (d) In terms of Purchase Order PO: 4510001708, dated 20 July 2017, a marquee, tables, chairs and a PA system were procured at a cost of R3 200.00 for a public meeting held at Copesville Community Hall on 20 July 2017.
- (e) The service provider, *Iphi Intsha Trading*, submitted an invoice dated 21 July 2017 for the supply of 300 chairs for the sum of R3 200.00. No reference is made to a marquee, tables and a PA system. However, the amount invoiced is the same as the amount of the purchase order.
- (f) Verification of proper and correct delivery is confirmed by the stamp of the Office of the Speaker, dated 21 July 2017.
- (g) In further engagement with the Municipality in response to the first Notice issued in terms of section 7(9) of the Public Protector Act, referred to above, it was explained that the discrepancy between the Purchase Orders and the Service Entry Sheets, when compared with the items specified on the suppliers invoices, was due to the fact that the procurement system codes that were used automatically uploaded certain additional items on the

procurement documents, that were not required when the items were being ordered.

5.1.12.4 Procurement: 24 November 2017: Purchase Order: 4510002501

- (a) According to Purchase order: 4510002501, dated 24 November 2017, the Municipality procured a marquee, tables and chairs, a stage, sound system and interpretation equipment at a cost of R15 000.00, for a public meeting held at Ward 29 on 24 November 2017.
- (b) The service provider, Mercy at Work submitted an invoice dated 28 November 2017 for the supply of a PA System, chairs, tables and stage for the sum of R15 000.00. Reference is not made to a marquee and interpretation equipment as listed in the purchase order, but the amount paid is the same.
- (c) In this instance also, the explanation tendered by the Municipality for the discrepancy between the procured items specified on the purchase order when compared to the procured items specified on the supplier's invoice was that the procurement system codes that were used automatically uploaded certain additional items, on the procurement documents, that were not required when the required items were being ordered.
- (d) Verification of proper and correct delivery was certified by the stamp of the Office of the Speaker, dated 11 December 2017.
- (e) The invoice was also stamped "*paid*".
- (f) Mr S. P. Dlamini who signed for the verification of delivery on behalf of the Office of the Speaker in most instances was not available to the interviewed during the investigation, due to ill health.

Responses to Notices issued in terms of Section 7 (9) of the Public Protector Act, 1994

- 5.1.13 During the investigation of the complaint, the Public Protector came across evidence indicating wrongdoing on the part Municipality and furnished the Municipal Manager with a Notice in terms of section 7(9) of the Public Protector Act affording him an opportunity to respond thereto, which was duly served on his office on 4 November 2020.
- 5.1.14 The Municipal Manager responded thereto by letter dated 13 November 2020, and furnished additional documents under cover of a letter dated 23 November 2020.
- 5.1.15 Taking into account all the evidence obtained and the information received during the investigation, including the response from the Municipal Manager to the section 7(9) Notice, and all further information and documentation subsequently submitted by the Municipality, the evidence still implicated the Municipality .
- 5.1.16 In order to afford the Municipality a further opportunity to respond to all the relevant evidence obtained, the issued a second Notice in terms of section 7(9) of the Public Protector Act, which was served on the Municipal Manager and the Chief Financial Officer of the Municipality on 29 April 2021.
- 5.1.17 The Municipal Manager responded thereto by letter dated 27 May 2021, to which was attached a voluminous bundle of supporting documentation. No response was received from the Chief Financial Officer.
- 5.1.18 The response from the Municipal Manager was vague and ambiguous and parts of the documentation appeared to be irrelevant, whilst other portions were illegible. It also did not disclose any grounds on which the evidence obtained during the investigation or the proposed findings as indicated in both section 7(9) Notices, as set out above, could be disputed or challenged.

- 5.1.19 In order to afford the Municipality yet another opportunity to clarify its written response to the second Section 7(9) Notice, dated 27 May 2021, the PPSA investigation team met with officials of the Municipality on 18 June 2021.
- 5.1.20 The meeting was attended in person by the Senior Manager Political Support in the Office of the Mayor, the Supply Chain Management Contract Officer and two (2) officials from the Office of the Speaker, and remotely, via virtual link, by the Head of Supply Chain Management and the Senior Manager: Expenditure. The Municipal Manager and the Chief Financial Officer did not attend the meeting.
- 5.1.21 During the engagement on the contents of the section 7(9) Notices, the officials did not advance any cogent or plausible grounds upon which the evidence and the proposed findings could be challenged.
- 5.1.22 The officials repeated their explanation regarding the system codes that erroneously listed items on the Purchase Orders when these items were not actually procured.
- 5.1.23 The officials then requested a further indulgence to submit additional documents by 21 June 2021, but failed to do so.
- 5.1.24 On 25 August 2021 a decision was taken by the Public Protector South Africa to afford the Municipality one final opportunity of making submissions before any adverse findings were made.
- 5.1.25 A letter was duly served personally on the Offices of the Mayor, the Municipal Manager and the Chief Financial Officer on 25 August 2021.
- 5.1.26 The letter noted the fact that no response had been received from the Chief Financial Officer to the Supplementary Section 7 (9) Notice dated 29 April

2021 and indicated, that the lack of response from the Chief Financial Officer would result in the Public Protector South Africa finalizing the report solely on the basis of the response received from the Municipal Manager dated 27 May 2021. However the letter afforded the Municipality a final opportunity to respond by 4:30pm on Monday, 30 August 2021.

- 5.1.27 The letter also specifically drew the attention of the Municipality to the envisaged Remedial Action set forth in paragraph 14 of the Supplementary Section 7 (9) Notice and invited the comment of the Municipality in this regard.
- 5.1.28 An email acknowledging receipt of the letter was received on 25 August 2021 from the Executive Secretary in the Office of the Municipal Manager, but no further substantive response was received from the Municipal Manager.
- 5.1.29 A brief e-mailed response, dated 25 August 2021 was received from the Chief Financial Officer. This e-mail was, however, only received by the office of the Public Protector on 9 September 2021, as it had initially been sent to an incorrect e-mail address.
- 5.1.30 In the e-mail the Chief Financial Officer requested a copy of the document to which a response was sought. The Section 7 (9) Notice in question had, however, been personally served on the Office of the Chief Financial Officer on 29 April 2021, and receipt thereof was acknowledged by way of an official stamp bearing the date of receipt.
- 5.1.31 In the e-mail the Chief Financial Officer did not raise any substantive challenge to the proposed findings in the Supplementary Section 7 (9) Notice that had been served upon her office, but rather stated that “...we were interviewed and submitted all the documentation that was requested. We even submitted the information that assisted the office of the MM to respond on all the issues...”

5.1.32 Accordingly, the response from the Chief Financial Officer did not disclose any grounds upon which the evidence and proposed findings in the Supplementary Section 7 (9) Notice could be challenged.

Application of the relevant law

5.1.33 *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”.*

5.1.34 The accounting officer is, in terms of section 65 (1) of the Local Government: Municipal Finance Management Act, 2003 (MFMA) responsible for the management of the expenditure of the municipality. Section 65 (2) provides that the accounting officer must take all reasonable steps to ensure, inter alia, that the municipality has and maintains an effective system of expenditure control.

5.1.35 Section 78(1) of the MFMA provides that each senior manager and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure, *inter alia* that:

5.1.35.1 The system of financial management and internal control established for the municipality is carried out diligently;

5.1.35.2 The financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently; and

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

- 5.1.36 In terms of section 1 of the MFMA, irregular expenditure means *inter alia* expenditure incurred by a municipality that is not in accordance with the Act and which has not been condoned in terms of section 170.
- 5.1.37 Each municipality must, in terms of section 111 of the MFMA implement a supply chain management policy which gives effect to the relevant provisions of the Act.
- 5.1.38 Section 112(2) of the MFMA provides that supply chain management policy of a municipality must be fair, equitable, transparent, competitive and cost effective.
- 5.1.39 Regulation 7 of the Municipal Supply Chain Management Regulations made in terms of section 168 of the MFMA provides that the supply chain unit of a municipality must, where possible, operate under the direct supervision of the Chief Financial Officer.
- 5.1.40 Section 171(3) of the MFMA provides that a senior manager or other official of the municipality exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79, commits an act of financial misconduct if that senior manager or official deliberately or negligently, *inter alia* makes an unauthorised, irregular or fruitless and wasteful expenditure.
- 5.1.41 A municipality must, in terms of section 171(4) of the MFMA investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality and if the investigation warrants such a step, institute disciplinary proceedings in accordance with the systems and procedures referred to in section 67 of the Municipal Systems Act, 2000 (Municipal Systems Act)
- 5.1.42 Item 2 of the Code of Conduct for Municipal Staff Members contained in Schedule 2 to the Municipal Systems Act stipulates that a staff member of a

municipality must at all times perform the functions of the office in good faith, diligently, honestly and in a transparent manner and act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised”

5.1.43 In terms of paragraph 2 of the Municipality’s Supply Chain Management Policy, dated 3 May 2016 (SCM Policy), all officials and other role players in the supply chain management system of the Municipality must implement the SCM Policy in a way that gives effect to Section 217 of the Constitution.

5.1.44 Paragraph 16(e) of the SCM Policy provides that the conditions for the procurement of goods or services through written or verbal quotations, are as follows: if a quotation was submitted verbally, the order may be placed only against written confirmation by the selected provider.

5.1.45 The Msunduzi Municipality Creditors Payment Procedure Manual (Payment Procedure Manual), regulates the internal control and accounting procedures of the Municipality for the processing of payments to creditors.

5.1.46 Paragraph 3 of the Creditors Payment Procedure Manual provides that it applies to all employees of the Municipality. It is based on the provisions of the MFMA that requires of the accounting officer of a municipality to ensure that the financial and other resources of the municipality are utilised effectively and efficiently.

5.1.47 Paragraph 6.2 of the Payment Procedure Manual provides that:

“Before any documents are sent to creditors for payment the Finance Officer of the respective business unit must ensure that the following has been complied with:

- (a) *Order has been placed before goods are delivered or before service is provided.*
- (b) *Fully completed SES has been provided.*
- (c) *A valid invoice or tax invoice in the case of a VAT vendor has been received and has been duly authorised by the delegated business unit official;*
- (d) *.....;*
- (e) *.....;*

5.1.48 The verification process of receipt and delivery of goods and services ordered is provided for in paragraph 6.3 of the Payment Procedure Manual. It provides that *“the GM (General Manager) of the business unit or his/her delegated official is responsible to ensure that goods or services have been received in correct quantity and right quality. This is confirmed through generating on SAP ERP of a SES (service entry sheet).”*

Conclusion

5.1.49 The Municipality failed to comply with the provisions of paragraph 6 of the Payment Procedure Manual regulating the verification of goods and services in terms of the MFMA, in respect of the Purchase Orders referred to in paragraphs 5.1.12.1 to 5.1.12.4 above. The amounts stipulated in the Purchase Orders were certified for payment, even though there is a clear disparity between the items listed on the Purchase Orders and the invoices submitted for payment.

5.1.50 The Purchase Orders issued by the Municipality included items that were not specified on the invoices submitted by the service providers for the same amount as the orders, resulting in anomalous payments being made.

5.1.51 The discrepancy between the items specified on the Purchase Orders and the SES documents on the one hand, and the items specified on the supplier's invoices on the other, was explained, by the Municipality, on the basis the pre-

loaded system codes that automatically inserted certain additional items on the purchase orders and SES documents, despite these items not being ordered. However, this explanation does not alter the fact that the Purchase Orders and the SES documents were, on the face thereof, incorrect and misleading, neither does the explanation render these documents compliant with the applicable legislative prescripts.

5.1.52 The response from the Municipality dated on 04 February 2021, explaining the manner in which suppliers were informed as to exactly what to deliver if quotations were not requested, discloses conduct that is non-compliant with the provisions of paragraph 16 of the SCM Policy and paragraph 6 of the Payment Procedure Manual.

5.1.53 The discrepancy regarding the date of Purchase Order: 4510000948 in relation to the actual date of the event indicated a failure on the part of the Municipality to comply with paragraph 16 of the SCM Policy. The explanation tendered by the Municipality for the discrepancy does not make the defective purchase order compliant with the applicable legislative transcripts.

5.1.54 The dating of Purchase Order: 4510000948 after the event had occurred is also not in line with paragraph 6.2(a) of the Payment Procedure Manual, which stipulates that before any documents are sent to creditors for payment, the Finance Official of the respective business unit must ensure that the order was placed before goods are delivered or before the service is provided.

5.1.55 The patently incorrect and misleading SES that was generated for the Mavoshe procurement on 26 February 2017, was a material contravention of paragraph 6.3 of the Payment Procedure Manual.

6 FINDINGS

6.1 Regarding whether the verification by the Municipality of the receipt or delivery of goods and services procured for community meetings held

in Ward 29 from February 2017 to November 2017 was not in accordance with the relevant laws and prescripts of the Municipality; and if yes, whether the conduct of the Municipality was improper and constitutes maladministration.

- 6.1.1 The allegation that the verification by the Municipality of the receipt and delivery of goods and services procured for the community meetings held in Ward 29 from February 2017 to November 2017 was not in accordance with the relevant laws and prescripts of the Municipality, is substantiated.
- 6.1.2 The Municipality failed to verify the receipt and delivery of goods and services procured for community meetings held in Ward 29 from February 2017 to November 2017. The conduct of the Municipality in relation to these procurements constituted a contravention of section 217 (1) of the Constitution and Section 2 of the Msunduzi Supply Chain Management Policy, 2016 (dated 3 May 2016) in terms of which a *“fair, equitable, transparent, competitive and cost effective Supply Chain Management system must be implemented”*. The conduct of the Municipality also constituted a contravention of clause 6.3 of the Msunduzi Municipality Creditors Payment Procedure Manual which requires *“the Deputy Municipal Manager of the Business Unit or his/her delegated official responsible to ensure that goods or services have been received in correct quantity and right quality.”*
- 6.1.3 The allegation that the conduct of the Municipality was improper and constitutes maladministration, is therefore also substantiated.
- 6.1.4 The conduct of the Municipality constitutes maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act, 1994 and improper conduct as envisaged in section 182(1) of the Constitution, 1996.

7 REMEDIAL ACTION

7.1 The appropriate remedial action that Public Protector is taking 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 considers an investigation, as contemplated by section 171 (4) of the MFMA, into financial misconduct by the officials of the Municipality that were responsible for the procurement of the goods and services referred to in this report, and if the investigation warrants such steps, institute disciplinary proceedings in accordance with the systems and procedures referred to in section 67 of the Municipal Systems Act, within 60 days from the date of this report

7.1.2 The Municipal Manager of the Municipality to take the appropriate steps to ensure:

7.1.2.1 That the SCM system (including the electronic system) of the Municipality in all respects complies with the requirement of the MFMA, the Municipal Supply Chain Management Regulations and the SCM Policy and that anomalies relating the items purchased and delivered are resolved, within 60 days from the date of this report;

7.1.2.2 Compliance by the employees in the Office of the Speaker with the provisions of section 217 of the Constitution, the MFMA, the Municipal Supply Chain Management Regulations, the SCM Policy and the Creditors Payment Procedure Manual, within 60 days from the date of this report;

7.1.2.3 The employees, in the Office of the Speaker, Finance Unit and the Supply Chain Management Unit, responsible for the procurement of goods and services and the verification of receipt and delivery thereof are trained on the relevant provisions of the MFMA, the Municipal Supply Chain Management Regulations, the SCM Policy and the Creditors Payment Procedure Manual in

respect of the procurement of goods and services, within 90 days from the date of this report; and

7.1.2.4 A report on the implementation of the remedial action taken in paragraph 7.1.2 of this report is submitted to the Council of the Municipality within 60 days from the date of this report.

8 MONITORING

8.1 The Speaker and the Municipal Manager of the Municipality is to submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7 above will be implemented within 30 days from the date of this report.

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



**ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA**

DATE: 28/09/2021

Assisted by: Adv. MM Nkosi-
Provincial Representative: KwaZulu Natal