

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NUMBER: 94 of 2021/22

ISBN NUMBER: 978-1-998955-52-7

“Allegations of improper conduct and maladministration by the George Municipality”

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND
MALADMINISTRATION BY THE GEORGE MUNICIPALITY RELATING TO THE ALLEGED
IRREGULAR INVESTMENT OF PUBLIC FUNDS WITH OLD MUTUAL LIMITED**

INDEX

Executive Summary	3
1. INTRODUCTION	9
2. THE COMPLAINT	9
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	13
4. THE INVESTIGATION	17
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	20
6. FINDINGS	42
7. REMEDIAL ACTION	43
8. MONITORING	46

Executive Summary

- (i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- (ii) The report communicates the findings of the Public Protector and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation relating to allegations of improper conduct and maladministration by the George Municipality (Municipality) with regard to the alleged irregular investment of public funds in the amount of R350 million with Old Mutual Limited (OM), during 2017.
- (iii) The complaint was lodged by Ms P de Lille MP, the Minister of Public Works and Infrastructure on 4 April 2019, in her capacity as the Leader of the *Good Party*.
- (iv) A preliminary investigation was conducted in terms of section 7(1) of the Public Protector Act, for the purpose of determining the merits of the complaint, allegations or information and the manner in which the matter should be dealt with because the information submitted with the complaint indicated that the former Municipal Manager, Mr Trevor Botha, had reported the allegations of financial misconduct pertaining to the Portfolio Councillor for Financial Services, Councillor D L Cronje, and the former Chief Financial Officer (CFO), Mr Keith Jordaan of the Municipality, in respect of certain investments with OM, to the SAPS Directorate for Priority Crime Investigation (DPCI), the Western Cape Minister for Local Government, Environmental Affairs and Development Planning, Mr A Bredell (MEC) the Head of Department of the Western Cape Provincial Treasury, the Director-General of the National Treasury, as well as the Executive Mayor of the Municipality.
- (v) In response to the written enquiries of the Public Protector South Africa (PPSA) investigation team, the DPCI and the National Prosecuting Authority (NPA), advised that charges of fraud and corruption were proffered against the former CFO, Councillor DL

Cronje Sr and, his son, Mr DL Cronje Jr, and that the NPA had declined to prosecute the matter in 2020/21.

(vi) In his response to the PPSA's written enquiries to the MEC, he advised on 12 March 2021 that:

(a) The former CFO, Mr Jordaan, was dismissed following a disciplinary hearing in connection with the matter and vacated his office on 8 July 2019.

(b) The Council appointed a Special Committee to investigate and make a finding on the alleged breach of the Code of Conduct for Councillors by Councillor Cronje.

(vii) On 24 May 2021 the Municipality advised the PPSA investigation team that, with regard to the disciplinary hearing of Councillor Cronje, the Municipal Council had resolved on 25 March 2021 that:

“(a) ... Council takes note of the report of the Special Committee appointed by Council as well as its finding that Councillor Cronje made himself guilty of the breach of Items 2 and 5(2) of the Code of Conduct for Councillors;

(b) ... Council imposes a sanction of a fine equivalent to one month's salary on Councillor Cronje along with a written apology to be provided to the Speaker.”

(viii) In light of the aforesaid, the investigation conducted by the PPSA focussed on the allegations that in July 2017 the Municipality entered into an agreement with OM giving rise to the irregular investment of an initial amount of R200 million of public funds, and the subsequent investment in November 2017 of a further amount of R150 million with OM.

(ix) The investigation specifically focussed on the alleged contravention of the Municipal Finance Management Act, the Municipal Investment Regulations and the Cash and Investment Policy of the Municipality caused by the investment transactions the Municipality concluded with OM.

- (x) Based on the analysis of the complaint, the following issues were identified for investigation:
- (a) Whether the Municipality irregularly invested public funds with OM, and if so, whether the conduct of the Municipality was improper and constitutes maladministration; and
 - (b) Whether the systems and processes of the Municipality, governing the investment of public funds by the Municipality, were efficient and provided adequate checks and balances to prevent improper investment of municipal funds.
- (xi) 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 the exchange of correspondence with the South African Police Service, the National Prosecuting Authority, the MEC, and the Municipality, the evaluation and consideration of the documents submitted and obtained, and consideration and application of the relevant laws and legal prescripts.
- (xii) Notices were issued in terms of section 7(9) of the Public Protector Act on 5 January 2022, affording the persons implicated or affected by the evidence obtained during the investigation. The MEC responded on 17 January 2022 and the Acting Municipal Manager, Dr M Gratz on 19 January 2022.
- (xiii) Having considered the evidence and information obtained during the investigation, the following findings are made:
- (a) Regarding whether the Municipality irregularly invested municipal funds with OM, and if so, whether the investment was improper and constitutes maladministration:**
 - (aa) The allegation that the Municipality irregularly invested municipal funds with OM, is substantiated.
 - (bb) The investments made by the Municipality with OM were in violation of section 13(1) of the Local Government: Municipal Finance Management Act

(MFMA), the Municipal Investment Regulations (Investment Regulations) and the Cash and Investment Policy (Investment Policy) of the Municipality.

(cc) 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. The conduct of the officials and councillor involved were also not in accordance with the standard of ethics and diligence contemplated in section 195 of the Constitution.

(b) Regarding whether the systems and processes of the Municipality, governing the investment of public funds by the Municipality, were inefficient and provided inadequate checks and balances to prevent improper investment of municipal funds

(aa) The systems, processes, internal control measures and checks and balances of the Municipality, governing the investment of public funds by the Municipality, were not entirely efficient and provided inadequate checks and balances to prevent the improper investment of municipal funds.

(bb) The internal control mechanisms and checks and balances provided for by the Local Government: Municipal System Act, 2000 (MSA), the MFMA, the relevant Regulations and the Investment Policy were either deficient or if available, were not effectively applied by the Municipality to safeguard the Municipality from the irregular investments made with OM.

(cc) The effectiveness of the Investment Policy is dependent on the accuracy and integrity of a municipality's cash management programme, which must identify the amount surplus to the municipality's needs, as well as the time when and period for which such revenues are surplus.

- (dd) The above is subject to the underlying standard of due care being taken by the Municipality in regard to the investment of the municipal funds, as contemplated by the Regulations, which was clearly absent in this case.
 - (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.
- (xiv) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:
- (a) The Acting Municipal Manager of the Municipality to:**
 - (aa) Evaluate and identify what were the main deficiencies with regard to the Municipality's investment policy and procedure, its internal financial controls and risk management policies and procedures, which made the irregular investment possible and then take steps to address these deficiencies in order to prevent a recurrence of a similar incident, within **ninety (90) working days** from the date of the report.
 - (bb) Take disciplinary action against the municipal officials who were implicated in non-compliance with the Municipality's policies and procedures that resulted in the irregular investments of municipal funds with OM within **sixty (60) working days** from the date of the report.
 - (cc) Engage with the Financial Sector Conduct Authority (FSCA) to assist with the identification of the deficiencies and assist with training of the relevant municipal officials and councillors responsible for oversight regarding municipal investments, on the relevant provisions of the MFMA and the Regulations, within **ninety (90) working days** from the date of this report.
 - (dd) Ensure that the Municipality's administrative units and processes are capacitated to detect and prevent gaps and threats in regard to the

Municipality's investment transactions involving internal and external parties as envisaged by the relevant provisions of the MFMA, MSA, the relevant Regulations and the Investment Policy of the Municipality regulating investments, within **ninety (90) working days** of the date of the report.

- (ee) Ensure that investments by the Municipality are included as a risk in the operational and strategic Risk Register of the Municipality, as contemplated by section 62(1)(c) of the MFMA, which would serve as an early warning indicator in order to avert irregular investments and audit queries.
- (ff) Report to the Council on a quarterly basis on the status of investments made or to be made by the Municipality.
- (gg) Ensure that the Internal Audit Unit of the Municipality conducts regular audits, and reviews the adequacy and effectiveness of controls, processes and procedures on the investment account of the Municipality and report accordingly, as envisaged by section 165 of the MFMA.
- (hh) Report to the Council on the implementation of the remedial action referred to in paragraphs (xiv) (a) (aa) to (gg) above within **one hundred and twenty (120) working days** from the date of this report and submit a copy of the report to the Public Protector.

(b) The Executive Mayor of the Municipality to:

- (aa) Take the appropriate steps to ensure that the Audit Committee of the Municipality is properly constituted as contemplated by section 166 of the MFMA with members that are competent and that they have the necessary skills, qualifications and experience to perform their statutory responsibilities.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE GEORGE MUNICIPALITY RELATING TO THE INVESTMENT OF PUBLIC FUNDS WITH OLD MUTUAL LIMITED

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 section 8(3) of the Public Protector Act to the following persons, to inform them of the outcome of the investigation and the remedial action taken:
 - 1.2.1 Mr A Bredell, the Western Cape MEC for Local Government, Environmental Affairs and Development Planning;
 - 1.2.2 Mr Sean Snyman, the Speaker of the George Municipality (Municipality);
 - 1.2.3 Mr L van Wyk, Executive Mayor of the Municipality; and
 - 1.2.4 Dr M Gratz, Acting Municipal Manager of the Municipality.
- 1.3 A copy of the report is also provided to, Ms P de Lille MP, the Minister of Public Works and Infrastructure, who lodged the complaint in her capacity as the Leader of the Good Party. (Complainant)

2. THE COMPLAINT

- 2.1 The complaint was lodged on 4 April 2019.
- 2.2 The Complainant stated that:

“The MFMA (Local Government: Municipal Finance Management Act, 2003) and its regulations clearly stipulate that matters such as incurring unauthorised, irregular and fruitless and wasteful expenditure, the possible abuse of the SCM system including inter alia fraud, corruption and improper conduct as well as allegations of financial misconduct should be investigated.”

- 2.3 The Complainant requested the Public Protector to conduct an investigation into the alleged improper conduct of the Municipality relating to the investments of municipal funds with Old Mutual Limited (OM).
- 2.4 The investigation commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act, for the purpose of determining the merits of the complaint, allegations or information and the manner in which the matter should be dealt with.
- 2.5 During the course of the preliminary investigation it was established that on or about 23 and 24 July 2018, the former Municipal Manager, Mr Trevor Botha, reported allegations of financial misconduct pertaining to the Portfolio Councillor for Financial Services, Councillor D L Cronje, and the former Chief Financial Officer (CFO), Mr Keith Jordaan of the Municipality, in respect of an investment with OM, to the SAPS Directorate for Priority Crime Investigation (DPCI), (also known as the *Hawks*) the Western Cape MEC for Local Government, Environmental Affairs and Development Planning, Mr A Bredell (MEC) the Head of Department of the Western Cape Provincial Treasury, the Director-General of the National Treasury, as well as the Executive Mayor of the Municipality.
- 2.6 In response to the written enquiries of the PPSA investigation team, the DPCI and the National Prosecuting Authority (NPA), advised that charges of fraud and corruption were proffered against the former CFO, Councillor DL Cronje Sr and, his son, Mr DL Cronje Jr, and that the NPA had declined to prosecute in the matter in 2020/21.
- 2.7 In his response to the PPSA’s written enquiries to the MEC, he advised on 12 March 2021 that:
- 2.8 The former CFO, Mr Jordaan, was dismissed following a disciplinary hearing in connection with the matter and vacated his office on 8 July 2019.

- 2.9 The Council appointed a Special Committee to investigate and make a finding on the alleged breach of the Code of Conduct for Councillors by Councillor Cronje. The disciplinary hearing against Councillor Cronje was initially set down for 8 August 2020, but was postponed, when he challenged the matter in the High Court.
- 2.10 On 4 December 2020, the High Court dismissed Councillor Cronje's application, and the disciplinary hearing was rescheduled for 21 February 2021 by the Municipality.
- 2.11 The Special Committee prepared and presented a report to the Speaker on 10 March 2021, which was considered by the Disciplinary Committee in line with the Code of Conduct for Councillors.
- 2.12 The former Municipal Manager reported the matter to the Commercial Crime Unit of the SAPS on 23 July 2020. The docket was referred to the National Prosecuting Authority, who declined to prosecute, due to a lack of evidence.
- 2.13 On 24 May 2021 the Municipality advised the PPSA that, pertaining to the disciplinary hearing involving Councillor Cronje, the Municipal Council had resolved on 25 March 2021 that:
- “(a) ... Council takes note of the report of the Special Committee appointed by Council as well as its finding that Councillor Cronje made himself guilty of the breach of Items 2 and 5(2) of the Code of Conduct for Councillors;*
- (b) ... Council imposes a sanction of a fine equivalent to one month's salary on Councillor Cronje along with a written apology to be provided to the Speaker.”*
- 2.14 In light of the aforesaid, the investigation conducted by the PPSA focussed on the following allegations of the Complainant, namely:
- 2.14.1 During July 2017 the Municipality entered into an agreement with OM giving rise to the investment of an amount of R200 million of public funds with them and that during November 2017 a further amount of R150 million was invested with OM.

- 2.14.2 In February 2018, the former CFO presented a second agreement with OM to the former Municipal Manager for his signature. The former Municipal Manager refused to sign and instructed the Internal Audit Unit of the Municipality to conduct a preliminary investigation into the matter.
- 2.14.3 Monthly invoices for the payment of management fees were received from OM, whereas the Municipality had never paid commission on investments.
- 2.14.4 On 9 July 2018, the former Municipal Manager received an anonymous letter requesting an urgent high level investigation into the potentially corrupt investment transactions by the Municipality with OM. The allegations centred on the non-compliance with the prescribed supply chain management procedures, the provisions of the Municipality's Cash and Investment Policy and the Municipal Investment Regulations by the CFO with regard to the procurement of the services of OM as an investment manager. It was also alleged that the investments by the CFO caused financial risk to the Municipality.
- 2.14.5 OM's response of 9 November 2018 to *FTI*, the service provider appointed by the Municipality to conduct a forensic investigation into the allegations against the CFO, revealed that the potential investment was referred to OM by a mandated agent, Mr Cronje Jr. It was further reported that Mr Cronje Jr had enquired from his father, Councillor Cronje, whether the Municipality still invested surplus funds, and that Councillor Cronje had referred him to the former CFO.
- 2.14.6 It was further reported that after confirming with the former CFO that the Municipality still invests surplus funds, Mr Cronje referred the lead to OM to pursue.
- 2.14.7 According to the Complainant, *FTI* reported that OM subsequently contacted the former CFO, based on the referral provided by Mr Cronje Jr and the latter was consequently recorded as the referring party and he was subsequently paid a referral fee of R152 356.76 by OM in regard to investments that materialised.
- 2.14.8 On 15 November 2018 National Treasury in an e-mail addressed to the Municipality directed its attention to, *inter alia*, the following:

- 2.14.8.1 The Municipality must ensure that its Investment Policies are reviewed and brought in line with the legal framework; and
- 2.14.8.2 It should review its current investments to ensure compliance.
- 2.15 After various follow-ups to the office of the MEC, enquiring about the status of its investigation, the MEC finally responded on 15 January 2019 with an assessment of the allegations that were provided to his office on 24 July 2018, concluding that in light of the seriousness of the allegations against the former CFO and Councillor Cronje and the implications thereof, the Municipality should attend to the matters outlined in his letter.
- 2.16 According to a *Daily Maverick* news article, dated 4 April 2019, the Complainant compared the alleged corruption in this matter to that of the VBS Mutual Bank corruption allegations in Limpopo, and reported that according to the Complainant “...a similar investment and kickback scheme has been operating in the DA-led George Municipality, in the Western Cape.”
- 2.17 In essence, the Complainant alleged that the conduct of the Municipality was improper and amounted 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 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);

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

² *Supra* at para [73].

- 3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the 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 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, where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));
- 3.6.8 She 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 (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 (paragraphs 100 and 101):
- 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);
- 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 (paragraphs 107 and 108); and

3.7.7 *Prima facie* evidence which points to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).

3.8 The Municipality is a category B, medium capacity, local government institution, established in terms of section 151 of the Constitution. Its operations are governed by the Local Government: Municipal Finance Management Act, 2003 (MFMA), Local Government: Municipal Structures Act, 1998, Local Government: Municipal Systems Act, 2000 (MSA) and various other acts and regulations. Its conduct amounts to conduct in state affairs. As a result the matter falls squarely within the ambit of the Public Protector's mandate.

3.9 The jurisdiction of the Public Protector in this matter, was not disputed by the Municipality.

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 improper conduct and/or maladministration?

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

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this case the factual enquiry principally focussed on whether or not the investments made by the Municipality as referred to in 2.14.1 above were in accordance with the relevant laws and other prescripts regulating the investment of municipal funds.

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

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

4.3 On analysis of the complaint, the following issues were identified for investigation:

4.3.1 Whether the Municipality irregularly invested public funds with OM, and if so, whether the conduct of the Municipality was improper and constitutes maladministration; and

4.3.2 Whether the systems and processes of the Municipality, governing the investment of public funds by the Municipality, were efficient and provided adequate checks and balances to prevent improper investment of municipal funds.

4.4 The Key Sources of information

4.4.1 Documents:

4.4.1.1 The letter of complaint submitted by the Complainant on 4 April 2019, and supporting documents attached thereto, in particular:

- (a) Requests for Quotation letters dated 17 July 2017, 31 July 2017, 23 August 2017, 28 September 2017 and 21 November 2017.
- (b) Municipality's schedule of investment quotations received, dated 26 July 2017.
- (c) The letter dated 19 July 2018 from Schröter and Associated Attorneys on the preliminary investigation conducted by them into the matter.
- (d) Working document dated 28 July 2018.
- (e) First contract concluded between the Municipality and Old Mutual, 27 July 2017.
- (f) Memorandum from Municipal Manager to CFO, dated 13 February 2018.
- (g) Memorandum from CFO to Municipal Manager, dated 16 March 2018.
- (h) Second OM contract submitted to the former Municipal Manager by the former CFO.
- (i) Extract of Special Council meeting dated 30 July 2018; correspondence between the Municipality and CFO concerning the alleged financial misconduct by the CFO, dated 1 August 2018 and 8 August 2018.
- (j) Letter from Old Mutual to FTI Consulting, dated 9 November 2018, containing their response to FTI Consulting's request for information.
- (k) FTI Consulting's report on its investigation into allegations of misconduct by the CFO, dated 12 November 2018.
- (l) Minutes of Special Council Meeting held on 19 November 2018.
- (m) Arbitration award in regard to the former CFO, dated 29 April 2021.

4.4.2 Correspondence (including e-mail) between the PPSA and:

4.4.2.1 SAPS, the National Prosecuting Authority, the Municipality and the MEC from 9 March 2021 to 19 January 2022.

4.4.2.1 Letter, dated 9 July 2021, containing the allegations and request for information was sent to the acting MM, and a response was received on 23 July 2021.

4.4.3 Meetings

4.4.3.1 A virtual meeting was held by the PPSA investigation team with the Executive Mayor and the Acting Municipal Manager of the Municipality on 1 February 2022.

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 The Local Government: Municipal Systems Act, 2000 (MSA).

4.4.4.4 The Local Government: Municipal Finance Management Act, 2003 (MFMA).

4.4.4.5 The Municipal Investment Regulations, No R308 of 1 April 2005.

4.4.4.6 The George Municipality Cash and Investment Policy, approved on 31 May 2017.

4.4.4.7 The George Municipality Cash Management and Investment Policy, approved 27 May 2021.

4.4.5 Jurisprudence considered:

4.4.5.1 *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).*

4.4.5.2 *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); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017).*

4.4.6 Notices issued in terms of section 7(9)(a) of the Public Protector Act:

4.4.6.1 On 5 January 2022 a Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the Municipality's Executive Mayor, Mr L van Wyk, the former Speaker, Mr G Pretorius, the Acting Municipal Manager, Dr M Gratz, and the Acting CFO, Mr Leon Wallace affording them an opportunity to respond to the evidence obtained during the investigation. The Acting Municipal Manager responded by letter, dated 19 January 2022.

4.4.6.2 A copy of the Notice issued in terms of section 7(9) of the Public Protector Act was also sent to Mr A Bredell, the MEC. He responded by letter dated 17 January 2022.

4.4.6.3 A copy of the Notice issued in terms of section 7(9) of the Public Protector Act was also sent to Mr K Jordaan, the former CFO of the Municipality. No comments were received from him.

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 Municipality irregularly invested municipal funds with OM, and if so, whether the investment was improper and constitutes maladministration

Common cause or undisputed facts

5.1.1 The former CFO of the Municipality issued requests for interest rate quotations (RFQs) for the investment of surplus municipal funds on 17 July 2017, 31 July 2017, 23 August 2017, 28 September 2017 and 21 November 2017, to ABSA, Standard Bank, Nedbank, Investec bank, First National Bank (FNB) and OM.

5.1.2 It is not in dispute that on 24 July 2017 the Municipality again sent RFQ letters to ABSA, FNB, Investec, Nedbank, Standard Bank and OM, inviting them to submit quotations for interest rates with regard to the investment of R100 million of surplus municipal funds, to be invested in a Call Account. The submission deadline was for 12h00 on 26 July 2017.

- 5.1.3 According to the Municipality's schedule of investment quotations received, dated 26 July 2017, OM offered the highest interest rate at 7.44%.
- 5.1.4 On 27 July 2017 the Municipal Manager, at the request of the CFO, signed a document titled "*Treasury and Advisory Services Investment Management Agreement*" (TAS Agreement) with Old Mutual Life Assurance Company South Africa Limited (OMLACSA), on behalf of Old Mutual Wealth Treasury and Advisory Services (TAS), registration number 1999/004643/06. According to clause 1.1 of the TAS Agreement, TAS is not a separate legal entity, but a business unit of OMLACSA, which is a licenced Financial Services Provider (FSP) as defined in the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act).
- 5.1.5 According to the TAS Agreement, OMLACSA is licenced as a Category I and II FSP, licence number 703, and TAS is authorised to provide advice and intermediary services (including Treasury Portfolio management services) on the OMLACSA licence, which includes long-term and short-term deposits. According to Annexure J of the TAS Agreement, Old Mutual Wealth (Pty) Ltd is a non-operating holding company, 100% owned by OMLACSA.
- 5.1.6 On 31 July 2018, the former CFO gave instructions that R200 million of the Municipality's funds be invested with OM, although the RFQ, dated 24 July 2017, even though requested quotations had only been for the investment of an amount of R100 million in a Call Account. According to the FTI investigation report, the R100 million placed with ABSA on a Call Account earlier in respect of the RFQ for 12 July 2017, was withdrawn and re-invested with OM. OM invested the R200 million as follows:
- R50 million in a 32 day notice account with Nedbank at an interest rate of 7.2%; and
 - R150 million in a 12 month fixed deposit with Investec Bank at an interest rate of 7.8%.
- 5.1.7 The statements provided by Nedbank for the deposit are addressed to:

"OMLACSA-GEORGE MUNICIPALITY PO Box 650140, Benmore, 2010"; and

the statements provided by Investec Bank for the deposit are addressed to:

“OLD MUTUAL LIFE ASSURANCE COMPANY SOUTH AFRICA-GEORGE MUNICIPALITY (OMLACSA) PO BOX 1014, CAPE TOWN, 8000”.

- 5.1.8 On 17 November 2017 the Municipality again sent RFQ letters to ABSA, FNB, Investec, Nedbank, Standard Bank and OM for quotations of interest rates with regard to the investment of R150 million of its surplus municipal funds in a 60 Day Account.
- 5.1.9 According to the Municipality’s schedule of investment quotations received, dated 21 November 2017, OM offered the highest interest rate at 7.90% and the R150 million was invested with OM.
- 5.1.10 During February 2018 the former CFO presented the former Municipal Manager with a second agreement with OM for signature. The former Municipal Manager did not sign the agreement, and first instructed the Internal Audit Unit of the Municipality to conduct a preliminary investigation into the matter; and thereafter appointed Schröter and Associates Attorneys (Schröter) to investigate the sequence of events that gave rise to the signing of the investment management contract in question and the making of the investments with OM.

Issues in dispute

- 5.1.11 The key issue in dispute is whether there was non-compliance by the Municipality with the prescribed provisions of the MFMA, the Municipal Investment Regulations and the provisions of the Municipality’s Cash and Investment Policy (Investment Policy) with regard to the making of investments with OM.
- 5.1.12 In a Memorandum to the former CFO dated 13 February 2018 the former Municipal Manager requested the CFO to clarify why a second agreement was necessary and also to explain the supply chain management procedures followed to appoint an investment manager.

5.1.13 On 16 March 2018 the former CFO replied by means of a Memorandum, *inter alia*, that the contract with OM was for a money market fund and that an investment manager has never been appointed as allowed by the regulations and policy. The former CFO also advised the former Municipal Manager that the new Full Discretionary Client Mandate will supersede the previous agreement signed on 28 July 2017.

5.1.14 According to the former CFO's written response, dated 18 August 2018, to the Municipality's allegations of financial misconduct against him:

"The Municipality has at no time appointed Old Mutual Wealth as an investment manager as permitted and defined in section 14(1) of the municipality's Cash and Investment Policy".

"No investment company or firm has ever been appointed to ensure that the municipal manager or person delegated in Part 11 complies with the policy in terms of investments and to capacitate the municipality further by the Municipal Manager contracting an investment manager who is a natural person or legal entity that is a portfolio manager registered in terms of the Financial Markets Control Act (Act no. 55 of 1989) and the Stock Exchange Control Act (Act 1 of 1985) and who is a registered financial services provider in terms of the Financial Advisory and Intermediary Services Act (Act No. 37 of 2002).

"The documentation completed by Old Mutual Wealth, was for them to comply with applicable legislation (FICA and FAIS) before any investment funds could be received and/or accepted from the George Municipality for the investment of surplus funds by them".

"The normal procurement processes for the call of investments were always followed, where financial institutions that tendered the highest interest rate were always awarded the tender".

5.1.15 Contrary to the former CFO's abovementioned reply, the Municipality's former Deputy Director: Internal Audit, who retired in 2019, testified during the former CFO's arbitration hearing that the former Municipal Manager asked him to investigate the invoices

presented by OM to the Municipality for payment during September 2017. After his investigations, he provided the Municipal Manager with a written report in which he recorded his concerns with investments placed at OM by the applicant. According to him, the Municipality's Investment Policy provides for the appointment of an Investment Manager. However, at no stage prior to July 2017 did the Municipality ever place surplus cash with financial institutions such as OM. The practice that was always followed was that investments were placed by the Municipality with the five major banks, namely Absa, Standard, Investec, Nedbank and First National.

- 5.1.16 According to the former Deputy Director – Internal Audit the Municipality's Investment Policy requires that External Investment Managers such as OM must be appointed in terms of the Municipality's SCM policy. He testified that this was never done, and that this constitutes a violation of Municipality's policies
- 5.1.17 The Municipality advised the PPSA investigation team that OM had paid back the amount of R350 million.
- 5.1.18 In her response to the Notice issued in terms of section 7(9) of the Public Protector Act, Dr Gartz, the Acting Municipal Manager conceded that municipal funds were irregularly invested with OM. However, she contended that the irregular investments were made by an official of the Municipality and not by the Municipality itself.

Application of the relevant legal framework

- 5.1.19 The Municipality is subject to the Constitution, as the supreme law, which imposes obligations on public officials, in all spheres of government, and which must be complied with at all times.
- 5.1.20 In the circumstances, the conduct of the Municipality with regard to these investments should be viewed in the light of the obligations laid down in section 195 of the Constitution, which provides, *inter alia*, that:

"1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) *A high standard of professional ethics must be promoted and maintained.*
- (b) *Efficient, economic and effective use of resources must be promoted.*
- (c) ...
- (d) ...
- (e) ...
- (f) *Public administration must be accountable...*

5.1.21 In terms of the aforesaid provisions, the officials of the Municipality are obligated to exercise a high standard of professional ethics, whilst also promoting the efficient, economical and effective use of the use of its resources in the circumstances.

5.1.22 In addition to the Constitution, the MFMA also imposes certain statutory obligations on municipalities. In particular, Section 13 of the MFMA provides, *inter alia*, that:

- “(1) The Minister, acting with the concurrence of the Cabinet member responsible for local government, may prescribe a framework within which municipalities must*
 - (a) Conduct their cash management and investments; and*
 - (b) Invest money not immediately required.*

- (2) A municipality must establish an appropriate and effective cash management and investment policy in accordance with any framework that may be prescribed in terms of subsection (1).” (emphasis added)*

5.1.23 The Minister of Finance developed the Municipal Investment Regulations (Regulations) in terms of section 168 read with section 13 of the MFMA, published on 1 April 2005, to regulate investments by municipalities. According to Regulation 2 of the Regulations, it applies to all municipalities, and Regulation 5 provides for the standard of care to be exercised when making investments. Regulation 5(c) specifically stipulates that investments by a municipality must in the first instance be made with primary regard being had to the probable safety of the investment, in the second instance to the liquidity needs of the municipality and lastly to the probable income derived from the investment.

5.1.24 Regulation 6 provides for the permitted types of investments that may be made by municipalities, and provides that:

“A municipality or municipal entity may invest funds only in any of the following investment types—

- (a) securities issued by the national government;*
- (b) listed corporate bonds with an investment grade rating from a nationally or internationally recognised credit rating agency;*
- (c) deposits with banks registered in terms of the Banks Act, 1990 (Act 94 of 1990);*
- (c) deposits with the Public Investment Commissioners as contemplated by the Public Investment Commissioners Act, 1984 (Act 45 of 1984);*
- (e) deposits with the Corporation for Public Deposits as contemplated by the Corporation for Public Deposits Act, 1984 (Act 46 of 1984);*
- (f) banker’s acceptance certificates or negotiable certificates of deposit of banks registered in terms of the Banks Act, 1990;*
- (g) guaranteed endowment policies with the intention of establishing a sinking fund;*
- (h) repurchase agreements with banks registered in terms of the Banks Act, 1990;*
- (i) municipal bonds issued by a municipality; and*
- (j) any other investment type as the Minister may identify by regulation in terms of section 168 of the Act, in consultation with the Financial Services Board.”*

5.1.25 The Municipality’s Cash and Investment Policy (Investment Policy), approved on 31 May 2017 (now repealed), issued in terms of section 13(2) of the MFMA, was applicable at the time of the investments with OM. The following provisions of the Investment Policy are of particular relevance to this matter:

5.1.25.1 Section 81(1), which provides that a municipality, through a service delivery agreement, may assign to a service provider responsibility for managing its own accounting, financial management, budgeting, investment and borrowing activities within a framework of transparency, accountability, reporting and financial control determined by the Municipality, subject to applicable municipal finance management.

- 5.1.25.2 In terms of this provision the responsibility for, *inter alia*, managing the Municipality's investments may be assigned to a service provider, and that it had to be done by means of a service delivery agreement that was subject to applicable municipal finance management.
- 5.1.25.3 Section 81(2) stipulated that support granted, which does not conform to the legislation referred to above as well as the provisions of the Investment Policy is deemed irregular expenditure and will be treated as such in terms of the MFMA.
- 5.1.26 In terms of paragraph 11.2 of the Investment Policy the CFO, as designated in writing by the Municipal Manager, must advise the Municipal Manager of the exercise of the powers and duties with regard to the Policy and must assist the Municipal Manager in the administration of the cash resources, the bank accounts and investment accounts.
- 5.1.27 In terms of paragraph 11.3 the CFO may not sub-delegate the duty to assist the Municipal Manager in the administration of the municipality's bank and investment accounts.
- 5.1.28 Paragraph 14.1.1 of the Investment Policy stipulates that the Municipal Manager is responsible for the administration of all investment procedures and must take reasonable steps to ensure investments were being managed in accordance with any auditing requirements as well as any legal requirements including as prescribed by the MFMA, in particular section 13 of the Act.
- 5.1.29 In terms of paragraph 14.1.3 of the Investment Policy, in order to ensure that the Municipal Manager or any delegated person complies with the policy in terms of investments and to capacitate the municipality further, the Municipal Manager, may contract an investment manager. The investment manager must advise the municipal manager or delegated officials on investments and may manage investments on the Municipality's behalf, subject to any conditions and controls the Municipal Manager may determine through, for example, the Policy.
- 5.1.30 The entities and instruments that the Municipality may invest in are provided for in paragraph 14.6.5 of Investment Policy which corresponds with the permitted types of

investments mentioned in Regulation 6 of the Regulations. It does not include insurance entities such as OM.

5.1.31 It therefore follows that the investments made in this case were made by the Municipality, in as much as officials of the Municipality were responsible for the irregularity thereof. It was still municipal funds invested by an official acting or purporting to act in his capacity as an employee of the Municipality. According to the evidence, the then CFO who was responsible for the irregular investment by the Municipality was dismissed, and the then Municipal Manager (accounting officer) of the Municipality resigned.

5.1.32 Contents of the 1st agreement with OM:

5.1.32.1 In the TAS agreement, “*financial institutions*” refer to a financial institution registered as such with the Financial Services Board and in terms of the provisions of the Banks Act 94 of 1990 (as amended) and particulars as listed in Annexure A to the TAS agreement.

5.1.32.2 Annexure A of the TAS Agreement refers to and lists certain “*Authorised Financial Institutions*”, such as:

Absa Bank Ltd
Nedbank Ltd
FirstRand Bank Ltd
Investec Bank Ltd
The Standard Bank of South Africa Ltd, and
Land and Agricultural Development Bank.

5.1.32.3 Annexure F of the TAS Agreement refers to the Service Level Agreement and states that “*TAS negotiates interest rates (within the scope of this agreement) with the banks and trades the deals (i.e. TAS books the ‘contract’ and delivers the funds).*”

5.1.32.4 The term “Agreement” is defined as meaning the “... *Investment Management Agreement, including any schedules or Annexures forming part thereof. Agreement shall also mean Full Discretionary Mandate.*”

5.1.32.5 Full discretionary mandate is defined as meaning the : “... *full discretionary mandate granted by you to TAS (Treasury and Advisory Services) in terms of the FAIS with specific reference to the Code of Conduct for authorised discretionary Financial Service Providers. This mandate allows TAS to buy, sell or otherwise transact in investments inside the Republic of South Africa that we think appropriate to meet your investment objective. We do not have to consult with you before we transact.*”

5.1.33 Clause 8 of the Agreement makes provision for the payment of management fees and that OM will invoice the investor (the municipality) on a monthly basis.

Conclusion

5.1.34 In 2017, in accordance with their practice, the Municipality issued requests for quotations for interest rates from registered banks for the investment of surplus municipal funds.

5.1.35 Such RFQs were issued to OM, who is not a registered bank in terms of the Banks Act or another entity as envisaged by Regulation 6 of the Investment Regulations, but a registered FSP.

5.1.36 On 27 July 2017 the former Municipal Manager and former CFO concluded an agreement with OM, which purported to be an investment management agreement, which gave OM the full discretionary mandate, as described in the Agreement, “*TAS negotiates interest rates...with the banks and trades the deals...*”.

5.1.37 On 31 July 2017 and 21 November 2017 the Municipality invested a total of R350 million with OM. The investments were accordingly irregular as it was not in accordance with section 13(1) of the MFMA, Regulation 6 of the Investment Regulations and the Municipality’s Investment Policy. It was therefore improper and constitutes maladministration.

5.1.38 It was established during the investigation that OM paid the R350 million back to the Municipality.

5.2 Regarding whether the systems and processes of the Municipality, governing the investment of public funds by the Municipality, were efficient and provided adequate checks and balances to prevent improper investment of municipal funds

Common cause or undisputed facts

5.2.1 On 27 July 2017 an agreement for the appointment of OM as an investment manager was submitted by the office of the CFO to the former Municipal Manager for signature. The Municipal Manager signed the agreement with OM, and it was co-signed by the former CFO.

Issues in dispute:

5.2.2 According to the former Municipal Manager's affidavit, obtained during the investigation, he signed the agreement as he *"understood that as chief financial officer, he was satisfied that the correct procedure had been followed and that entering into the agreement was in the best interest of the municipality."*

5.2.3 During the Arbitration hearing relating to the disciplinary action taken against the former CFO, the Manager: Executive Support Services testified that on 27 July 2017 the former CFO's Personal Assistant sent an unsigned agreement to the office of the Municipal Manager for signature. She advised the Personal Assistant that she would not forward the unsigned agreement to the Municipal Manager for consideration and signature unless the agreement was first sent to the legal department and to the former CFO for his signature. This was the practice that had to be followed for all agreements to be signed by the Municipal Manager. Accordingly she sent the agreement back to the former CFO to ensure that these requirements were met.

5.2.4 The Manager: Executive Support Services testified further that the former CFO:

"...phoned her and challenged her on her insistence that the document was a contract and that therefore the legal department must first approve it. He was complaining that

it was taking too long for the document to be signed and that it would take even longer if the legal department must also sign. She stood her ground and said that unless applicant and the legal department had first signed the document, she will not present it to the municipal manager for his signature”.

5.2.5 The Manager: Executive Support Services also testified that

“The document was later returned to her after applicant and the legal department had signed it. She then took the contract to the municipal manager who was on his way to another meeting. She advised the municipal manager that applicant and the legal department had signed the document. The municipal manager signed the agreement after he looked at it. She stood next to the municipal manager while he looked at it and signed it. It took him a few minutes to look at the agreement. Normally she does not stand next to the municipal manager when he signs document. This was a unique situation where she stood next to the municipal manager while he signed, due to the fact that applicant and his PA said this was so urgent.”

5.2.6 The former Municipal Manager stated further in his affidavit that in February 2018 he received a second agreement with OM for his signature. He signed it at first, but then decided against it and scratched out his signature.

5.2.7 On 28 February 2018 he sent an Internal Memorandum to the former CFO requesting an explanation as to why, within such a short space of time, a second agreement, and on the face of it, being virtually the same agreement as the first, needed to be signed.

5.2.8 According to his affidavit, the former Municipal Manager was not satisfied with the former CFO’s response and requested the Internal Auditor’s assistance to make sense of the situation.

5.2.9 Thereafter, he appointed an independent attorney (Schröter) to investigate the matter and to establish whether financial misconduct, reportable to the Council, had been committed.

5.2.10 Arising from Schröter's report, he initiated proceedings to have the possible contravention of section 173 of the MFMA investigated.

5.2.11 In addition, the Arbitration Award in respect of the former CFO revealed the following:

5.2.11.1 The Municipality had conducted investigations in relation to possible disciplinary action to be taken in regard to the other officials implicated in the matter.

5.2.11.2 Two additional reports from FTI had been submitted to Council for consideration.

5.2.11.3 A report in regard to the former Municipal Manager was also submitted to the Council in the meantime, but he resigned in December 2020.

5.2.12 On 9 July 2021 the PPSA investigation team addressed a letter to Dr M Gratz, the acting Municipal Manager of the Municipality, containing the following questions regarding the governance processes and systems in place at the Municipality when the alleged irregular transactions were concluded by the former CFO, namely:

“2.1 What were the processes and systems of the Municipality which governed the investment of public funds by the Municipality at the time?”

2.2 Were these systems and processes effective and did it provide adequate checks and balances to prevent improper investment of municipal funds?”

2.3 Whether these processes and systems were reviewed by the Municipality, arising from the irregular investment transactions? If so, who conducted the review and what was the results thereof?”

2.4 Arising from Councillor Cronje's involvement in the matter and seeing that he was found guilty of contravening the Code of Conduct for Councillors, kindly advise what was his role as the Portfolio Councillor for Finance; and also the role of the municipal council itself in regard to these transactions?”

5.2.13 On 23 July 2021 the PPSA investigation team received a response from the Acting CFO of the Municipality (the Acting CFO), to the aforesaid enquiries. From the Acting CFO's response it was established that:

5.2.13.1 The process of investing municipal funds comprises:

- (a) Written requests to banking institutions to submit interest rates' proposals in a sealed envelope, which is placed in a tender box by a specific date and time.
- (b) The interest rate proposals are opened in the presence of all banking institutions.
- (c) The CFO selects the interest rate proposal that will maximise the interest earned on an investment.
- (d) The investment proposal is submitted to the Municipal Manager for approval.
- (e) The process to establish which institutions qualify for investments were not defined to ensure compliance with section 14.6 of the Cash Management and Investment Policy.

5.2.13.2 Regarding the efficacy of the financial governance systems and processes that were applicable at the time, the acting CFO advised that:

- (a) A report on the investment was compiled by the then Chief Audit Executive who concluded as follows in his report:

“The contract entered has many uncertain matters. The fees paid to the referring agent is uncertain. The person involved with interest should be clarified to ensure that any relevant interest was declared. The investment diversification matter should be resolved. The delegation matters should be addressed.”

- (b) The delegation issue referred to by the Chief Audit Executive related to section 10.3.2 of the repealed Investment Policy, which provided that:

“10.3.2 Section 60 Restrictions on delegations:

- (2) The Council may only delegate to the Executive Committee or Executive Mayor or Chief Financial Officer decisions to make*

investments on behalf of the municipality within a policy framework determine (sic) by the Minister of Finance.”

(c) The Policy was revised in 2018/2019 and now provides as follows:

“10.3.2 Section 60 Restrictions on delegations:

(2) the Council may only delegate to the municipal manager the power to make decisions on investments on behalf of the municipality within the municipality’s investment policy contemplated in section 13.2 of the Local Government: Municipal Finance Management Act, Act no. 56 of 2003.”

5.2.14 Regarding the role of Councillor Cronje as the Portfolio Councillor for Finance; and the role of the Council in regard to these investment transactions, the Acting CFO advised that:

“Councillor DL Cronje was the Portfolio Councillor for Finance and as such he was the Chairperson of the Finance Committee. As the Portfolio Councillor for Finance he was in close liaison with the CFO on a daily basis. The Councillor is however not allowed to become involved in the administration of the Finance Department.

The Municipal Council reviews the Cash Management and investment Policy on an annual basis and the revised policy is approved by Council each year during the tabling of the budget. The investment made during the year are reported to Council.”

5.2.15 In her response to the Notice issued in terms of section 7(9) of the Public Protector Act dated 19 January 2022 Dr Gratz, the Acting Municipal Manager, indicated that a number of the shortcomings in the application of systems and processes pertaining to the investment of public funds have been or are in the process of being addressed. She reiterated that the officials that were responsible for the irregular investments were no longer in the employ of the Municipality

Application of the relevant legal framework

5.2.16 Section 4 of the MSA stipulates, *inter alia*, that:

- “(2) The Council of a municipality, within the municipality’s financial and administrative capacity, and having regard to practical considerations, has the duty to-*
- (a) Exercise the municipality’s executive and legislative authority and use the resources of the municipality in the best interests of the local community;*
 - (b) Provide without favour or prejudice, democratic and accountable government...”*

5.2.17 In terms of section 6(2) of the MSA, subject to section 195(1) of the Constitution, municipal administration must, *inter alia*, *“(b) facilitate a culture of public service and accountability amongst staff”* and *“(c) take measures to prevent corruption.”*

5.2.18 Section 51(1) of the MSA requires that *“... a municipality must within its administrative and financial capacity establish and organise its administration in a manner that would enable the municipality to –*

- (b) facilitate a culture of public service and accountability amongst staff;*
- ...*
- (g) perform its functions - (i) through operationally effective and appropriate administrative units and mechanisms, including departments and other functional or business units;*
- (h) assign clear responsibilities for the management and co-ordination of these administrative units and mechanisms;*
- (i) hold the municipal manager accountable for the overall performance of the administration;*
- (j) maximise efficiency of communication and decision-making within the administration;*
- (k) delegate responsibility to the most effective level within the administration...”*

5.2.19 Section 59 of the MSA relating to ‘Delegations’ provides that:

- “(1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may -*
- (a) delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;*
 - (b) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and*
 - (c) withdraw any delegation or instruction.”*

5.2.20 In terms of Section 63(1), there is a duty to report to delegated authorities:

“A political structure, political office bearer, councillor or staff member of a municipality to whom a delegating authority has delegated or sub-delegated a power or duty, must report to the delegating authority at such intervals as the delegating authority may require, on decisions taken in terms of that delegated or sub-delegated power or duty since the last report.”

5.2.21 In terms of Regulation 12 of the Regulations, the responsibility and risk arising from any investment transaction vests with the relevant municipality.

5.2.22 In regard to the second issue investigated, the Municipality’s Investment Policy, *inter alia*, stated in the Preamble, paragraph 1.4, that *“Councillors and officials, as trustees of public funds have an obligation to ensure that cash resources are managed as effectively, efficiently and economically as possible.”*

5.2.23 The purpose of the Investment Policy is stated in paragraph 2, being to ensure that the investment of surplus funds forms part of the financial management procedures of the

Municipality and that prudent cash management and investment procedures are applied consistently.

5.2.24 Paragraph 8.1 provides that due care must be exercised by each functionary in the cash management and investment process, who should exercise the same judgment and care as a person of prudence, discretion and intelligence would exercise in the management of his own affairs, with the main concern being the probable safety of his capital.

5.2.25 Paragraph 8.2 of the Investment Policy provides that the Council is responsible for the entire risk management process and determining the effectiveness of the process. The municipal management, on the other hand is accountable to the Council for designing, implementing and monitoring the process of risk management and integrating it into the daily activities of the Municipality.

5.2.26 Paragraph 8.3 of the Investment Policy stipulates that the Council is responsible for setting the risk strategy policies in liaison with the Municipal Manager and senior municipal management. These policies should be clearly communicated to all staff to ensure that the risk strategy is incorporated into the language and culture of the Municipality.

5.2.27 In terms of paragraph 8.4 Investment Policy the Council must decide the municipality's appetite or tolerance for risk, i.e. those risks it will take and the risks it will not take in pursuit of its goals.

5.2.28 Paragraph 8.5 provides that the Council should make use of generally recognised risk management and internal control models and frameworks in order to maintain a sound system of risk management and internal control to provide reasonable assurance regarding the achievement of organisational objectives in regard to:

5.2.28.1 Effectiveness and efficiency of operations;

5.2.28.2 Safeguarding the municipality's assets;

5.2.28.3 Compliance with applicable laws, regulations and supervisory requirements;

- 5.2.28.4 Supporting business sustainability under normal and adverse operating conditions
 - 5.2.28.5 Reliability of reporting; and
 - 5.2.28.6 Behaving responsibly towards all stakeholders.
- 5.2.29 In terms of paragraph 8.8 of the Investment Policy, risk management and internal control should be practiced throughout the municipality by all staff, and should be embedded in the daily activities.
- 5.2.30 Paragraph 8.9 provides that the municipality should also consider the need for a confidential reporting process (whistleblowing) covering fraud and other risks.
- 5.2.31 Paragraph 8.10 provides that officials entrusted with investment and management of funds have a responsibility and are accountable to the community to exercise due care when investing funds.
- 5.2.32 Paragraph 11.1 of the Investment Policy provides that the management of all the cash resources of the municipality is the responsibility of the Municipal Manager, as the accounting officer, who must for the proper application of the Policy, develop an appropriate system of delegation that will both maximise administrative and operational efficiency and provide adequate checks and balances in the management of cash resources.
- 5.2.33 Paragraph 12, relates to the management and internal controls procedures, and entrusted the Municipal Manager assisted by the CFO with the responsibility of taking all reasonable steps to, *inter alia*, ensure, that:
- 5.2.33.1 That the municipality has and maintains a system of internal control over its bank and investment accounts, receipting, withdrawals, cash management and investment transactions.
 - 5.2.33.2 That criminal proceedings are instituted against any official who has allegedly committed an act of financial misconduct of an offence in terms of the MFMA and the Policy.

5.2.33.3 In order to prevent losses from fraud, misrepresentations, error, conflict of interest or imprudent action, a system of internal controls governs the administration and management of the Investment and Cash Management Portfolios.

5.2.34 According to paragraph 12.3 Investment Policy, some of the most important controls include, *inter alia*:

- 5.2.34.1 Control of collusion and separation of duties;
- 5.2.34.2 Minimising the number of authorised investment officials;
- 5.2.34.3 Checking and verification by senior officials of all investments;
- 5.2.34.4 Documentation of transactions and strategies;
- 5.2.34.5 Code of ethics and standards;
- 5.2.34.6 Strict adherence to investment framework policy and guidelines;
- 5.2.34.7 Limits placed on the investment by the various officials;
- 5.2.34.8 Procedures manuals; and
- 5.2.34.9 Regular reporting to the Committee of all investments.

Conclusion

5.2.35 Based on the evidence gathered during the investigation, it is unclear how exactly the Municipality's investment functions were operationally effectively performed by the appropriate administrative units, departments and other functional or business units, what were their designated responsibilities, and how they coordinated their duties.

5.2.35 In light of the evidence of the former CFO and the former Deputy Director: Internal Audit, the process for obtaining RFQs from banks was clearly understood, because it was a long-standing practice.

5.2.36 The testimony of the Manager: Executive Support provided some assurance that there were checks and controls in place, but that compliance therewith is inconsistent.

- 5.2.37 It can thus be concluded that the control processes implemented by the Municipality to prevent the irregular investments and manage risks to the Municipality were not completely effective.
- 5.2.38 The improper conduct of the former CFO, who caused the Municipal Manager to sign an irregular investment management agreement with OM, resulted in a plethora of contraventions of the relevant provisions of the MFMA; the Regulations and the Municipality's Investment Policy. These contraventions range from the initial irregular appointment of OM as an investment manager, which was contrary to the Investment Regulations as well as the SCM prescripts and processes, followed by the irregular investment of R350 million of municipal funds with OM, the improper payment of a referral fee to a close relative of the Chairperson of the Finance Portfolio Committee, as well as the payment of management fees to OM.
- 5.2.39 These irregularities were not detected in advance and in time by either the municipal administration, headed by the Municipal Manager, who should have been able to rely on the senior managers responsible for the SCM, legal services and internal audit functions, or the Municipal Council, who should have been able to rely on the Finance Portfolio Committee, to strengthen the implementation of these control functions.

6. FINDINGS

6.1 **Regarding whether the Municipality irregularly invested municipal funds with OM, and if so, whether the investment was improper and constitutes maladministration**

- 6.1.1 The allegation, that the Municipality irregularly invested municipal funds with OM, is substantiated.
- 6.1.2 The investments made by the Municipality with OM were in violation of section 13(1) of the MFMA, the Investment Regulations and the Investment Policy of the Municipality.
- 6.1.3 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. The conduct of the officials and councillor involved were also not in accordance with the standard of ethics and diligence contemplated in section 195 of the Constitution.

6.2 Regarding whether the systems and processes of the Municipality, governing the investment of public funds by the Municipality, were inefficient and provided inadequate checks and balances to prevent improper investment of municipal funds

6.2.1 The systems, processes, internal control measures and checks and balances of the Municipality, governing the investment of public funds by the Municipality, were not entirely efficient and provided inadequate checks and balances to prevent the improper investment of municipal funds as indeed happened.

6.2.2 The internal control mechanisms and checks and balances provided for by the MSA, MFMA, the relevant Regulations and the Investment Policy were either deficient or if available, were not effectively applied by the Municipality to safeguard the Municipality from the irregular investments made with OM.

6.2.3 The effectiveness of the Investment Policy is dependent on the accuracy and integrity of a municipality's cash management programme, which must identify the amount surplus to the municipality's needs, as well as the time when and period for which such revenues are surplus.

6.2.4 The above is subject to the underlying standard of due care being taken by the Municipality in regard to the investment of the municipal funds, as contemplated by the Regulations, which was clearly absent in this case.

6.2.5 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 Acting Municipal Manager of the Municipality to:

7.1.1.1 Evaluate and identify what were the main deficiencies in regard to the Municipality's Investment policy and procedure, its internal financial controls and risk management policies and procedures, which made the irregular investment possible and then take steps to address these deficiencies in order to prevent a recurrence of a similar incident, within **ninety (90) working days** from the date of the report

7.1.1.2 Take disciplinary action against the municipal officials who were implicated in non-compliance with the Municipality's policies and procedures that resulted in the irregular investments of municipal funds with OM, within **sixty (60) working days** from the date of the report.

7.1.1.3 Engage with the Financial Sector Conduct Authority (FSCA) to assist with the identification of the deficiencies and assist with training of the relevant municipal officials and councillors responsible for oversight regarding municipal investments, on the relevant provisions of the MFMA and the Investment Regulations, within **ninety (90) working days** from the date of this report.

7.1.1.4 Ensure that the Municipality's administrative units and processes are capacitated to detect and prevent gaps and threats in regard to the Municipality's investment transactions involving internal and external parties as envisaged by the relevant provisions of the MFMA, MSA, the relevant Regulations and Investment Policy of the Municipality regulating investments, within **ninety (90) working days** of the date of the report.

7.1.1.5 Ensure that investments by the Municipality are included as a risk in the operational and strategic Risk Register of the Municipality, as contemplated by section 62(1)(c) of the

MFMA, which would serve as an early warning indicator in order to avert irregular investments and audit queries.

7.1.1.6 Report to the Council on a quarterly basis on the status of investments made or to be made by the Municipality.

7.1.1.7 Ensure that the Internal Audit Unit of the Municipality conducts regular audits, and reviews the adequacy and effectiveness of controls, processes and procedures on the investment account of the Municipality and report accordingly, as envisaged by section 165 of the MFMA.

7.1.1.8 Report to the Council on the implementation of the remedial action referred to in paragraph 7.1.1.1 to 7.1.1.7 above within **one hundred and twenty (120) working days** from the date of this report and submit a copy of the report to the Public Protector.

7.1.2 The Executive Mayor of the Municipality to:

7.1.2.1 Take the appropriate steps to ensure that the Audit Committee of the Municipality is properly constituted as contemplated by section 166 of the MFMA with members that are competent and that they have the necessary skills, qualifications and experience to perform their statutory responsibilities.

7.2 On 1 February 2022 the Acting Municipal Manager advised the PPSA that the following remedial action has been taken or is in the process of being taken by the Municipality:

7.2.1 The Internal Audit Unit is in the process of auditing the Cash and Investment Policy and related procedures, processes, risks and controls.

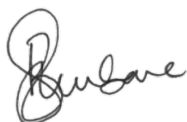
7.2.2 Disciplinary action was instituted against the previous CFO, Mr Keith Jordaan. Mr Jordaan was dismissed and the Deputy CFO has since left the services of the Municipality.

7.2.3 The FSCA will be requested to provide training on the Investment Regulations and relevant provisions of the MFMA, to relevant officials and councillors who are responsible for and who deal with investment transactions.

- 7.2.4 The operational and strategic risk register includes risks relating to “*Investments*”.
- 7.2.5 The status of investments are reported to Council, monthly, by means of a “*Section 71*” Report.
- 7.2.6 The approved Internal Audit Plan (2021/2022) includes Investments. The adequacy and effectiveness of controls, processes and procedures on Investments will be audited. The report will be issued by 9 May 2022.
- 7.2.7 A report will be issued to Council in May 2022 on the implementation status of the remedial action.
- 7.2.8 A copy of the report will be issued to the Public Protector before 21 June 2022.

8. MONITORING

- 8.1.1 The Acting Municipal Manager to submit an implementation plan to the Public Protector within **thirty (30) working days** from the date of this report on the full implementation of the remedial action taken in paragraph 7.1 above and the status thereof.
- 8.1.2 The submission of the implementation plan 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: 27/02/2022

Assisted by:

ADV CH FOURIE
EXECUTIVE MANAGER: PII COASTAL

