

**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**



Accountability • Integrity • Responsiveness

---

**REPORT NUMBER: 22 of 2022/23**

**ISBN NUMBER: 978-1-7764603-4-2**

**INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE  
FUNCTIONARIES OF LEKWA-TEEMANE LOCAL MUNICIPALITY IN  
IRREGULARLY APPOINTING CIGICELL (PTY) LTD AS A SERVICE PROVIDER  
FOR THE INSTALLATION OF SMART ELECTRICITY METERS AT THE  
BLOEMHOF AND CHRISTIANA TOWNSHIPS**

<b>TABLE OF CONTENTS</b>		
<b>ITEM</b>	<b>DESCRIPTION</b>	<b>NO.</b>
	<b>LIST OF ACRONYMS AND ABBREVIATIONS</b>	<b>3</b>
	<b>EXECUTIVE SUMMARY</b>	<b>4</b>
<b>1.</b>	<b>INTRODUCTION</b>	<b>12</b>
<b>2.</b>	<b>THE COMPLAINT</b>	<b>13</b>
<b>3.</b>	<b>POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</b>	<b>15</b>
<b>4.</b>	<b>ISSUES IDENTIFIED FOR INVESTIGATION</b>	<b>16</b>
<b>5.</b>	<b>THE INVESTIGATION</b>	<b>16</b>
<b>6.</b>	<b>THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS</b>	<b>20</b>
<b>7.</b>	<b>FINDINGS</b>	<b>44</b>
<b>8.</b>	<b>REMEDIAL ACTION</b>	<b>47</b>
<b>9.</b>	<b>MONITORING</b>	<b>49</b>

## LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS / ABBREVIATIONS	DESCRIPTION
<b>CIGICELL</b>	CIGICELL (Pty) Ltd
<b>COGHTA</b>	Department of Cooperate Governance, Human Settlements and Traditional Affairs
<b>GCC</b>	General Conditions of Contracts
<b>Constitution</b>	Constitution of the Republic of South Africa Act, 1996
<b>MFMA</b>	Municipal Finance Management Act, 2000
<b>MSA</b>	Municipal Systems Act, 2000
<b>Public Protector</b>	Public Protector of the Republic of South Africa
<b>SANCO</b>	South African National Civic Organisation
<b>SCC</b>	Special Conditions of Contract
<b>SLA</b>	Service Level Agreement
<b>The Municipality</b>	Lekwa-Teemane Local Municipality

## 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), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, 1994 (Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
  
- (ii) The report relates to an investigation into the alleged irregular appointment of CIGICELL (Pty) Ltd (CIGICELL), by the functionaries of the Lekwa-Teemane Local Municipality (the Municipality), as a service provider for the Municipality for a period of thirty-six (36) months for the installation of smart electricity meters at the Bloemhof and Christiana townships.
  
- (iii) The investigation originates from a complaint lodged with the North West Office of the Public Protector by Mr JM Moselane (the Complainant) on 21 January 2020.
  
- (iv) In the main, the Complainant alleged that:
  - (a) On 18 February 2019, the Municipality appointed a company called CIGICELL as a service provider to install smart electricity meters in the Bloemhof and Christiana townships. This appointment was irregular and in contravention of the Municipal Systems Act, 2000 (MSA) and the Municipal Finance Management Act, 2003 (MFMA), in that:
    - (aa) The Municipality failed to observe the provisions of section 21 of the MSA which compels a municipality to communicate with the community/residents in a specified way;

- (bb) The Municipality failed to observe the provisions of sections 78 and 80 of the MSA which provide and/or outline the process to be followed in the appointment of service providers such as CIGICELL;
- (cc) The communities of Bloemhof and Christiana townships, which are served by the Municipality, were never consulted regarding the decision of the Municipality to solicit an external service provider to install smart electricity meters and to render a *“turnkey solution for the provision of revenue enhancement services, online and real time electricity vending, revenue protection, and an ICT backed up system and metering services”*, on behalf of the Municipality;
- (dd) Although the Municipality issued a Public Notice in May 2019 in the local newspaper, the *“Klerksdorp Record”*, informing the communities of Bloemhof and Christiana about its initiative to reduce electricity distribution losses, to improve service delivery and revenue collection, the notice was written in English, which is not the predominant language in the area of jurisdiction of the Municipality;
- (ee) On 28 June 2019, the Geluksoord Ratepayers, a section of the community in Christiana, delivered a petition dated 26 June 2019 to the Municipality, seeking an explanation in respect of its failure to consult the community regarding the contract/service level agreement (SLA) between CIGICELL and the Municipality. The Municipality failed and/or neglected to provide a response to the petition; and
- (ff) The Municipality acted contrary to the provisions of the MFMA, which elucidate the terms and processes that a municipality must follow in obtaining loans. In this regard, it was alleged that the Municipality received thirty million rand (R30 000 000) from CIGICELL, which was utilised to service its Eskom debt.

- (b) The Complainant sought the following relief from the Public Protector:
  - (aa) To investigate if proper procurement processes were followed by the Municipality in the awarding of the contract to CIGICELL;
  - (bb) To investigate and determine whether the Municipality acted unlawfully when it entered into a contract with CIGICELL without consulting the community; and
  - (cc) Whether the Municipality acted irregularly when it received an amount of R30 000 000 from CIGICELL and utilised it to service its Eskom debt.
  
- (v) Based on the analysis of the complaint, the following issues were considered and investigated:
  - (a) Whether the functionaries of the Lekwa-Teemane Local Municipality failed to follow proper procurement processes in the outsourcing of electricity revenue enhancement services which resulted in the appointment of CIGICELL as a service provider, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a) of the Public Protector Act, 1994; and
  - (b) Whether the Municipality unlawfully received an amount of R30 000 000 from CIGICELL and irregularly utilised same to service its Eskom debt, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
  
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.

- (vii) On 23 November 2023, notices in terms of section 7(9)(a) of the Public Protector Act, (section 7(9) notices) were delivered to Mr JK Lesaisane (Mr Lesaisane), the Acting Municipal Manager; Mr MS Motlhabi (Mr Motlhabi) the Mayor; Ms NJ Mbonani (Ms Mbonani), the former Municipal Manager; Mr N Mgengo (Mr Mgengo), the former Municipal Manager; Mr JM Moselane (the Complainant); and Mr M Nyawane (Mr Nyawane), the Chief Executive Officer (CEO) of CIGICELL, to afford them an opportunity to respond on the likely adverse findings and proposed remedial action. Section 7(9)(a) of the Public Protector Act, 1994, provides that persons implicated in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding the likely adverse findings and remedial action.
- (viii) An e-mail acknowledging receipt of the section 7(9) notice dated 26 November 2023, was received from Mr Nyawane. The contents thereof were noted and considered by the Public Protector.
- (ix) A response from Mr Mgengo was received on 04 December 2023. The contents were noted and considered by the Public Protector.
- (x) No responses were received from Mr Motlhabi; the current Mayor; Mr Lesaisane, the Acting Municipal Manager; Ms Mbonambi, the former Municipal Manager; and the Complainant.
- (xi) Having regard to the evidence and regulatory framework determining the standards that the Municipality should have complied with, the following findings are made:
- (a) **Whether the functionaries of Lekwa-Teemane Local Municipality failed to follow proper procurement processes in the outsourcing of electricity revenue enhancement services which resulted in the appointment of CIGICELL as a service provider, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the**

**Constitution and amounts to maladministration in terms of section 6(4)(a) of the Public Protector Act, 1994**

- (aa) The allegation that the functionaries of the Municipality failed to follow proper procurement processes in the outsourcing of electricity revenue enhancement services which resulted in the appointment of CIGICELL as a service provider, **is substantiated**.
- (bb) The evidence reveals that there was no public participation or community consultation at the time the Lekwa-Teemane Local Municipality appointed CIGICELL as a service provider. The Municipality conceded that there was no public participation to provide services through the appointment of an external mechanism, in this instance to appoint CIGICELL. Consequently, the Municipality failed to uphold the core values and principles of accountability and transparency contained in section 195(1)(a) and (f), read with section 152(1) of the Constitution and section 4(2)(c) of the Municipal Systems Act.
- (cc) The Municipality failed to give notice to obtain the views of the local community of its intention to procure the services through an external service provider, CIGICELL. This conduct denied the local community an opportunity to participate in the process of appointing CIGICELL as the service provider. Therefore, the Municipality acted in contravention of the provisions of section 78 of the MSA.
- (dd) The Municipality publicised the Notice in the local newspaper in May 2019 when the SLA had already been signed. Section 80 of the MSA states that before the Municipality enters into a service delivery agreement for basic municipal services, the Municipality must establish mechanisms and programmes for community consultation and information dissemination regarding the service delivery agreement. In this instance the Lekwa-Teemane Local Municipality failed to observe the provisions of section 80 of the MSA.



- (ee) The evidence further reveals that the appointment of CIGICELL was concluded without a Council Resolution as the request to grant permission and to endorse the implementation of the envisaged Municipal Revenue Enhancement Plan was tabled before the Municipal Council Meeting of 06 March 2019, when CIGICELL was already appointed on 18 February 2019. In terms of sections 152 and 195 of the Constitution, the Municipality should have conducted its affairs in an accountable manner whilst promoting the spirit of transparency and this was not done in this instance.
- (ff) The conduct of Mr Mgengo in the appointment of CIGICELL constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) **Whether the Lekwa-Teemane Local Municipality unlawfully received an amount of R30 000 000 from CIGICELL and irregularly utilised same to service its Eskom debt, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**
- (aa) The allegation that the Municipality unlawfully received an amount of R30 000 000 from CIGICELL as performance security, is **unsubstantiated**.
- (bb) The Municipality and CIGICELL through an Addendum to the SLA dated 11 April 2019, agreed to a reduced performance security of R22 000 000. In terms of clause 7 of the General Conditions of Contract (the GCC), the Municipality was entitled to performance security, payable by CIGICELL, as compensation for any loss that could result from their failure to complete their obligations in terms of the contract.

- (cc) The allegation, however, that the Municipality irregularly utilised the performance security to settle its Eskom municipal debt, is **substantiated**.
- (dd) The Municipal Council Resolution of 06 March 2019, which allowed the functionaries of the Municipality to utilise performance security to pay the Municipal debt and in particular the Eskom debt, was irregular and contrary to the provisions of clause 7 of the GCC, which provides that such performance security should be retained by the Municipality and reimbursed to CIGICELL upon completion of its performance obligations under the contract.
- (ee) The then Municipal Manager, Mr Mgengo, acted contrary to the provisions of sections 60 and 61(1)(b) of MFMA in that he failed to perform his functions and powers as the Accounting Officer. In this instance, Mr Mgengo as the Accounting Officer, was expected to know the terms and conditions of the SLA and the provisions of the GCC in relation to the management of the performance security and was obliged to advise the Municipal Council accordingly. Mr Mgengo failed to give proper guidance and advice on the conditions of GCC to the Municipal Council, which led to the adoption of a resolution to utilise the performance security to service the Municipality's outstanding Eskom debt.
- (ff) In implementing the Council Resolution of 06 March 2019, by directing the former CEO of CIGICELL to pay the performance security directly to Eskom to settle the municipal debt, the then CFO and Mr Mgengo acted contrary to the terms and conditions of SLA and clause 7.2 of GCC. As a result, the performance security was irregularly utilised to settle the Municipality's Eskom debt.
- (gg) The conduct of the functionaries of the Municipality therefore constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

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

### **The Mayor of Lekwa-Teemane Local Municipality**

- (aa) Within **ninety (90) calendar** days from the date of this report, in terms of section 56(3)(f) of the MSA, table the report before the Municipal Council to discuss the maladministration which occurred during the appointment of CIGICELL and the manner in which the Municipality dealt with the issue of the performance security which ought to have been paid by CIGICELL, as compensation for any loss that could result from their failure to fulfil their obligations in terms of the contract, to adopt the report and pass a resolution thereon with a view to establish controls to identify and prevent future recurrence of the identified deficiencies.

### **The Municipal Manager**

- (bb) Within **ninety (90) calendar** days from the date of this report and in terms of section 62(1)(c) of the MFMA, conduct a supply chain, contract management and risk assessment and develop risk mitigation plans.
- (cc) Within **ninety (90) calendar** days from the date of this report and in terms of section 62(1)(c) of the MFMA, direct internal audit to include in its annual plan an audit of supply chain and contract management to identify internal control deficiencies that may result in the recurrence of similar incidents.
- (dd) The Audit Committee, in its quarterly meetings, monitor the implementation of all internal audit reports and recommendations, including recommendations by the Auditor General South Africa (AGSA) and advise management in terms of section 166(2) of the MFMA.

## 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 This report is submitted in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation, to affected parties, for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:
- 1.2.1 Mr J K Lesaisane, the Municipal Manager of Lekwa-Teemane Local Municipality;
- 1.2.2 Mr MS Motlhabi, the Mayor of Lekwa-Teemane Local Municipality;
- 1.2.3 Mr N Mgengo, the erstwhile Municipal Manager of Lekwa-Teemane Local Municipality;
- 1.2.4 Ms NJ Mbonani, the Municipal Manager of Maquassi Hills Local Municipality; and
- 1.2.5 Mr Modise Nyawane, the Chief Executive Officer of CIGICELL (Pty) Ltd.
- 1.3 A copy of the report is also provided to the Complainant.
- 1.4 The report relates to an investigation into the alleged irregular appointment of CIGICELL by the functionaries of the Lekwa-Teemane Local Municipality (the Municipality), as a service provider for the Municipality for the installation of smart electricity meters at the Bloemhof and Christiana townships for a period of thirty-six (36) months.

## 2. THE COMPLAINT

2.1 The investigation originates from a complaint lodged with the North West Provincial Office of the Public Protector by Mr JM Moselane (the Complainant), on 21 January 2020.

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

2.2.1 On 18 February 2019, the Municipality appointed a company called CIGICELL as a service provider to install smart electricity meters in the Bloemhof and Christiana townships. This appointment was irregular and in contravention of the Municipal Systems Act, 2000 (MSA) and the Municipal Finance Management Act, 2003 (MFMA), in that:

2.2.1.1 The Municipality failed to observe the provisions of section 21 of the MSA which compels a municipality to communicate with the community or residents in a specified way;

2.2.1.2 The Municipality failed to observe the provisions of sections 78 and 80 of the MSA which provides and/or outlines the process to be followed in the appointment of service providers such as CIGICELL;

2.2.1.3 The communities of Bloemhof and Christiana townships, which are served by the Municipality, were never consulted regarding the decision of the Municipality to solicit an external service provider to install smart electricity meters and to render a *“turnkey solution for the provision of revenue enhancement services, online and real time electricity vending, revenue protection, and an ICT backed up system and metering services”*, on behalf of the Municipality;

2.2.1.4 Although the Municipality issued a Public Notice in May 2019 in the local newspaper, the *“Klerksdorp Record”*, informing the communities of Bloemhof and Christiana about its initiative to reduce electricity distribution

losses and to improve service delivery and revenue collection, the notice was written in English, which is not the predominant language in the area of jurisdiction of the Municipality;

2.2.1.5 On 28 June 2019, the Geluksoord Ratepayers, a section of the community in Christiana, delivered a petition dated 26 June 2019 to the Municipality, seeking an explanation in respect of its failure to consult the community regarding the contract/service level agreement (SLA) between CIGICELL and the Municipality. The Municipality failed and/or neglected to provide a response to the petition; and

2.2.1.6 The Municipality acted contrary to the provisions of the MFMA, which elucidate the terms and processes that a municipality must follow in obtaining loans. In this regard, it was alleged that the Municipality received thirty million rand (R30 000 000) from CIGICELL, which was utilised to service its Eskom debt.

2.3 The Complainant sought the following relief from the Public Protector:

2.3.1 To investigate if proper procurement processes were followed by the Municipality in the awarding of the contract to CIGICELL;

2.3.2 To investigate and determine whether the Municipality acted unlawfully when it entered into a contract with CIGICELL without consulting the community; and

2.3.3 Whether the Municipality acted irregularly when it received an amount of thirty million rand (R30 000 000) from CIGICELL and utilised it to service its Eskom debt.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

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

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

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

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

## **4. ISSUES IDENTIFIED FOR INVESTIGATION**

4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.1.1 Whether the functionaries of Lekwa-Teemane Local Municipality failed to follow proper procurement processes in the outsourcing of electricity revenue enhancement services which resulted in the appointment of CIGICELL as a service provider, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994; and

4.1.2 Whether the Lekwa-Teemane Local Municipality unlawfully received an amount of thirty million rand (R30 000 000) from CIGICELL and irregularly utilised same to service its Eskom debt, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

## **5 THE INVESTIGATION**

### **5.1 Methodology**

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

5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to investigate with due regard to the circumstances of each case.



## 5.2 Approach to the investigation

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

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

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?
- (d) In the event of improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been, but for the maladministration or improper conduct?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this case, the factual enquiry principally focused on whether the alleged conduct was inconsistent with the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law and/or rules that regulate the standards that should have been met by the functionaries of the Municipality in the appointment of CIGICELL.

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

## 5.3 Key sources of information

### 5.3.1 Documents and Correspondence

- 5.3.1.1 Copy of the advertisement, dated 13 January 2019;
- 5.3.1.2 Copy of the appointment letter, dated 18 February 2019;
- 5.3.1.3 Copy of the acceptance letter, dated 20 February 2019;
- 5.3.1.4 Copy of Council Resolution, dated 06 March 2019;
- 5.3.1.5 Copy of the Service Level Agreement, dated 03 April 2019;
- 5.3.1.6 Copy of the Public Notice, dated May 2019;
- 5.3.1.7 Copy of the Eskom “*Tax Invoice*” for April 2019;
- 5.3.1.8 Copy of the Petition, dated 28 June 2019;
- 5.3.1.9 Complaint form from Mr JM Moselane, dated 21 January 2020;
- 5.3.1.10 Letter from the Public Protector to Mr Moatshe, the then Administrator of the Municipality, dated 10 March 2020;
- 5.3.1.11 Letter from the Public Protector to Mr, PE Motoko, the then HoD of COGTA, dated 22 July 2020;
- 5.3.1.12 Section 7(4) Notice from the Public Protector to Ms N Mbonani, the then Acting Municipal Manager and Mr M Pilane, the then Mayor of the Municipality, dated 17 September 2020;
- 5.3.1.13 The Minutes of a meeting between the Investigation Team and the Municipality, dated 09 October 2020;
- 5.3.1.14 A copy of the Legal Opinion from Adv Ayayee to the Municipality, dated 28 October 2020;
- 5.3.1.15 *Subpoena* to Mr M Nyawane, dated 22 August 2023;
- 5.3.1.16 *Subpoena* to Ms NJ Mbonani, dated 22 August 2023;
- 5.3.1.17 *Subpoena* to Mr JK Lesaisane, dated 22 August 2023;
- 5.3.1.18 Affidavit from Mr M Nyawane, dated 13 September 2023;
- 5.3.1.19 Letter from Ms NJ Mbonani to the Public Protector, dated 28 September 2023; and
- 5.3.1.20 Letter from Mr JK Lesaisane to the Public Protector, dated 29 September 2023.

### 5.3.2 **Legislation and Policies**

- 5.3.2.1 Constitution of the Republic of South Africa, 1996;
- 5.3.2.2 Municipal Systems Act, 2000;
- 5.3.2.3 Municipal Finance Management Act, 2000;
- 5.3.2.4 National Treasury Practice Note Number SCM 1 of 2003: General Conditions of Contracts;
- 5.3.2.5 Public Protector Act, 1994.

### 5.3.3 **Case Law**

- 5.3.3.1 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017)

### 5.3.4 **Notice issued in terms of section 7(9)(a) of the Public Protector Act**

- 5.3.4.1 On 23 November 2023, notices in terms of section 7(9)(a) of the Public Protector Act, (section 7(9) notices) were delivered to Mr Lesaisane, Mr Motlhabi, Ms Mbonani, Mr Mgengo, Mr Moselane (the Complainant) and Mr Nyawane to afford them an opportunity to respond on the likely adverse findings and proposed remedial action.
- 5.3.4.2 Section 7(9)(a) of the Public Protector Act, provides that persons implicated in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding the same.
- 5.3.4.3 An e-mail dated 26 November 2023, acknowledging receipt, was received from Mr Nyawane. The contents thereof were noted and considered by the Public Protector.
- 5.3.4.4 A response was also received from Mr Mgengo on 04 December 2023. The contents were noted and considered by the Public Protector.

5.3.4.5 No responses were received from the Mayor, the Acting Municipal Manager, the former Municipal Manager, Mrs Mbonani, and the Complainant.

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

**6.1 Whether the functionaries of Lekwa-Teemane Local Municipality failed to follow proper procurement processes in the outsourcing of electricity revenue enhancement services which resulted in the appointment of CIGICELL as a service provider, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a) of the Public Protector Act, 1994**

### *Common cause*

6.1.1 The Municipality advertised a tender, with Reference Number LTLM2018-19/BTO01, in the “*City Press*” newspaper, dated 13 January 2019, as well as in a local newspaper, the “*Klerksdorp Record*” on 18 January 2019. The closing date for the tender was 31 January 2019.

6.1.2 The tender was for the “*Appointment of Service Providers for the rendering of a complete revenue enhancement services, online and real time electricity vending, revenue protection, ICT backed up system and metering for the period of 36 months*”.

6.1.3 The Municipality appointed CIGICELL as the preferred service provider on 18 February 2019.

6.1.4 The Municipality issued a Public Notice in May 2019 in the local newspaper, the “*Klerksdorp Record*”, informing the communities of Bloemhof and

Christiana about its initiative to reduce electricity distribution losses and to improve service delivery and revenue collection. The notice was issued in English.

- 6.1.5 On 28 June 2019, the South African National Civic Organization (SANCO) submitted a petition to the Municipality titled “*Petition: Geluksoord smart-meter installation: 26 June 2019*” complaining about the English language used in the Notice and the process followed by the Municipality in terms of section 78 and 80 of the MSA.

*Issue in dispute*

- 6.1.6 The issue for the Public Protector’s determination is whether proper procurement processes were followed by the Municipality in appointing CIGICELL as a service provider.

*The Complainant’s version*

- 6.1.7 The Complainant contends that the appointment of CIGICELL was contrary to both the MSA and the MFMA in that:
- 6.1.7.1 The Municipality failed to observe the provisions of section 21 of the MSA, which compels a municipality to communicate with the local community/residents in a specified way, which is clear to everyone, and which must be followed in full; and
- 6.1.7.2 The Municipality failed to observe the provisions of sections 78 and 80 of the MSA, which outline the process to be followed in the appointment of service providers, such as CIGICELL.
- 6.1.8 The communities of Bloemhof and Christiana townships, which are served by the Municipality, were never consulted regarding the decision by the

Municipality to solicit an external service provider to install smart electricity meters on behalf of the Municipality;

- 6.1.9 Although the Municipality issued a Public Notice in May 2019 in the local newspaper, the *Klerksdorp Record*, informing the communities of Bloemhof and Christiana about its initiative, the notice was issued in English, which is not the predominant language in the area of jurisdiction of the Municipality. The notice was also issued long after the SLA was signed with CIGICELL; and
- 6.1.10 On 26 June 2019, the Geluksoord Ratepayers, a section of the community in Christiana, submitted a petition to the Municipality seeking an explanation in respect of its failure to consult the community regarding the contract or SLA between CIGICELL and the Municipality. The Municipality failed and/or neglected to provide a response to the community.

*The Municipality's version*

- 6.1.11 The Public Protector wrote an allegations letter dated 10 March 2020, to the then Acting Municipal Manager, Ms Nokuthula Mbonani (Ms Mbonani). No response was received from Ms Mbonani.
- 6.1.12 The Public Protector Investigation Team (the Investigation Team) sought intervention from COGHTA on 22 July 2020, in line with the Memorandum of Understanding (MOU) between the Department of Cooperate Governance, Human Settlements and Traditional Affairs (COGHTA), however, no response was provided.
- 6.1.13 On 17 September 2020, the Public Protector issued a *subpoena*<sup>1</sup> to the Municipality, specifically to the then Mayor, Mr Mpho Pilane (Mr. Pilane), and Ms Mbonani.

---

<sup>1</sup> Section 7(4)(a) subpoena: For the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her

- 6.1.14 At the *subpoena* hearing held on 09 October 2020, the Municipality was represented by Mr Pilane and Ms Mbonani. They were assisted by Mr Sakile Sibeko of Sibeko Incorporated Attorneys, as well as by Adv AE Ayayee (Adv Ayayee). The following submissions were made by the Municipality:
- 6.1.14.1 After the appointment of CIGICELL on 18 February 2019, the Member of the Executive Council (MEC) for the North West COGHTA, the late Mr GM Kegakilwe, deployed Administrators and Intervention Teams to various Municipalities in the North West Province;
- 6.1.14.2 Mr Bakwanga Moatshe (Mr Moatshe) was appointed as the Administrator for the Municipality in July 2019 and he commissioned an investigation against the then Municipal Manager, Mr Mgengo. The appointment of CIGICELL was one of the issues that the investigation focused on;
- 6.1.14.3 On 18 February 2020, Mr Moatshe presented the Municipal Investigation Report, drafted by Mr PO Jafta (Mr Jafta), an independent investigator, to the Municipal Council. The report found, amongst others, that Mr Mgengo, was suspected of several serious acts of misconduct in respect of which the Municipality should consider laying criminal charges against him. Such misconduct included the appointment of CIGICELL. Mr Mgengo was subsequently suspended by the Municipal Council on 18 February 2020 and by agreement, the Municipality and Mr Mgengo terminated their employment relationship on 04 June 2021.
- 6.1.14.4 On 18 June 2020, upon her appointment as Acting Municipal Manager, Ms Mbonani appointed Sibeko Attorneys to investigate the appointment of CIGICELL as a service provider. Sibeko Attorneys then instructed Adv Ayayee to provide a legal opinion on the lawfulness of the appointment of

---

possession or under his or her control which has a bearing on the matter being investigated and may examine such person.

CIGICELL and the legal remedies available to the Municipality. Adv Ayayee provided his legal opinion on 28 October 2020;

6.1.14.5 The Municipality conceded that members of the public were not consulted before the appointment of CIGICELL and that a feasibility assessment was not done regarding the cost implications of the appointment of CIGICELL; and

6.1.14.6 After receiving the legal opinion of Adv Ayayee, the Municipality considered approaching the Court to institute legal proceedings for the cancellation of the SLA between the Municipality and CIGICELL. The challenge, however, was firstly, that the Municipality was using the vending system, which is the property of CIGICELL and secondly, should the Municipality cancel the SLA, CIGICELL was likely to withhold the money it had collected on behalf of the Municipality. As a result of the identified challenges, the Municipality decided not to approach the Court as advised by Adv Ayayee.

*Additional submission from the Municipality: Mr Shuping*

6.1.15 On 01 November 2023, Mr M Shuping, the Municipal Labour Relations Officer, telephonically informed the Investigation Team that before Mr Mgengo was dismissed, he approached the Labour Court (the Court) challenging his suspension. On 10 June 2020, the Court ordered that Mr Mgengo be reinstated as Municipal Manager. On 04 June 2021, however, the Municipality and Mr Mgengo entered into a Settlement Agreement to terminate the employment contract between the parties.



*Documentation received from the Municipality*

**Procurement Records**

- 6.1.16 On 14 March 2022, the Municipality submitted procurement records in respect of the appointment of CIGICELL. The records provided by the Municipality reflected the following:

**Advertisement**

- 6.1.16.1 The Municipality initially advertised a tender, with Reference Number LTLM2018-19/BTO01, in the *City Press* newspaper, dated 13 January 2019 as well as in a local newspaper, the *Klerksdorp Record* on 18 January 2019. The closing date for submission of bids was 31 January 2019.
- 6.1.16.2 The Municipality issued an *erratum* on 23 January 2019, advising prospective bidders that the tender was for the “*appointment of a service provider for the rendering of a complete turnkey solution for the provision of revenue enhancement services, online and real time electricity vending, revenue protection, and an ICT backed up system and metering for the period of 36 months*”.
- 6.1.16.3 The advertisement indicated that the closing date for the submission of bids was extended to 11 February 2019 at 12h00. A compulsory briefing was scheduled for 31 January 2019 at 12h00.

**Investigation report by Mr Jafta**

- 6.1.17 A copy of the report compiled by Mr Jafta dated 25 March 2020, titled “*INDEPENDENT INVESTIGATOR’S REPORT ON ALLEGATIONS OF MISCONDUCT AGAINST THE MUNICIPAL MANAGER: MR NDODA MGENGO IN TERMS OF REGULATION 5(4) OF THE DISCIPLINARY REGULATIONS FOR SENIOR MANAGERS ISSUED UNDER THE*

*MUNICIPAL SYSTEMS ACT NO 32 OF 2000, AS AMENDED*". The report, *inter alia*, made the following findings:

- 6.1.17.1 Mr Mgengo, in appointing CIGICELL contravened municipal policies and legal prescripts in that he made the Municipality take a loan in an unlawful manner from CIGICELL; and
- 6.1.17.2 Disciplinary hearing to be instituted against Mr Mgengo for gross misconduct.

#### **Legal Opinion by Adv Ayayee**

- 6.1.18 A copy of the legal opinion dated 28 October 2020, by Adv Ayayee, stating that:
  - 6.1.18.1 Adv Ayayee was requested to provide a legal opinion on the lawfulness of the appointment of CIGICELL and should the view be that the appointment is invalid, to provide an opinion on the remedies and cause of action that the Municipality should take;
  - 6.1.18.2 The opinion stated that the public tender process followed by the Municipality, leading to the appointment of CIGICELL was in contravention of sections 77 and 78 of the MSA and consequently the appointment was invalid;
  - 6.1.18.3 The SLA concluded between the Municipality and CIGICELL was invalid, as it did not comply with the public participation process, as envisaged by section 80(2) of the MSA. Consequently, the appointment of CIGICELL was invalid; and
  - 6.1.18.4 Adv Ayayee advised the Municipality to approach the Court to set aside the irregular appointment of CIGICELL.

## Responses to the section 7(9)

### *Response from Mr Nyawane*

- 6.1.19 The Public Protector received an acknowledgement on 26 November 2023 from Mr Nyawane, wherein he stated that CIGICELL reconfirms its commitment to cooperate with the Office of the Public Protector to bring the matter to finality. Subsequent to studying the contents of the Notice, CIGICELL would consult its legal personnel and act as expected by the Public Protector.

### *Response from Mr Mgengo*

- 6.1.20 Mr Mgengo responded on 04 December 2023 and stated that:
- 6.1.20.1 Having studied the contents of the notice, he accepts that the Public Protector proceeds with the formal report in this matter and pronounce on the remedial action as contained in paragraph 8 of the notice; and
- 6.1.20.2 He is pleased with the manner in which the Public Protector has handled this matter and all allegations that have been levelled against him by the Complainant and the then Administrator, Mr Moatshe.

### *Applicable law*

## **The Constitution of the Republic of South Africa, 1996 (the Constitution)**

- 6.1.21 Section 152(1)(a) of the Constitution provides that the objects of local government is to provide a democratic and accountable government for local communities.

6.1.22 Section 195(1) of the Constitution provides that:

*“Public Administration must be governed by the democratic values and principles enshrined in the Constitution”, including the following principle:*

(a) ....

(f) *Public Administration must be accountable...*”

### **Local Government: Municipal Systems Act, 2000 (MSA)**

6.1.23 Section 4 of the MSA, provides for the duties of municipal councils as follows:

*“(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) .....

(b) .....

(c) *encourage the involvement of the local community;*

(d) .....

(e) *consult the local community about:*

(i) *the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider, and*

(ii) *the available options for service delivery”.*

6.1.24 Section 76 provides that *“a Municipality may provide municipal services in its area or part of its area through:*

(b) *an external mechanism by entering into a service delivery agreement with-*

- (v) *any other institution, entity or person legally competent to operate a business activity”.*

6.1.25 Section 78(3) of the MSA, provides, *inter alia*, that:

*“If a municipality decides in terms of subsection 2(b) to explore the possibility of the service through an external mechanism it must:*

- (a) *Give notice to the local community of its intention to explore the provision of the service through an external mechanism; and*
- (b) *Assess the different service delivery options in terms of section 76(b), taking into account:*
  - (i) *The direct and indirect cost and benefits associated with the project including the expected effect of any service delivery mechanism on the environment and on human health wellbeing and safety;*
  - (ii) *The capacity and potential future capacity of prospective service providers to furnish the skills expertise and resources necessary for the provision of the service;*
  - (iii) *The views of the local community;*
  - (iv) *The likely impact on development and employment patterns in the municipality, and*
  - (v) *The views of the organised labour”.*

6.1.26 Section 80 of the MSA provides that:

*“(2) Before a Municipality enters into a service delivery agreement for a basic municipal service it must establish a mechanism and programme for community consultation and information dissemination regarding the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media”.*

**Local Government Disciplinary Regulations for Senior Managers, 2010 (Disciplinary Regulations for Senior Managers)**

6.1.27 Clause 3(4) of the Local Government Disciplinary Regulations for Senior Managers issued in terms of the Local Government: Municipal Systems Act, 2000 (Disciplinary Regulations for Senior Managers) provides that:

*“Except in exceptional circumstances, disciplinary action may not be taken against a senior manager until a full investigation has been carried out”.*

*Analysis*

6.1.28 The evidence before the Public Protector indicates that the Municipality did not give notice to the community to explore the provision of rendering a complete revenue enhancement service through an external mechanism. The Municipality was expected, in terms of sections 152(1)(a) and 195(1)(f) of the Constitution, to be accountable and to consult with the community during the process of procuring services as part of promoting accountability.

6.1.29 The evidence shows that the lack of involvement of the community in the process of procuring an external service provider, denied the Community the opportunity to participate and make inputs on the quality, level, range and impact of the service to be rendered by CIGICELL. The Municipality was expected in terms of section 4(2)(c) and (e) of the MSA to involve the

community, which gives effect to the provisions of sections 152(1)(a) and 195(1)(f) of the Constitution, enjoining the Municipality to encourage community involvement and consultation in the provision of services.

- 6.1.30 The Municipality is authorised in terms of section 76(b)(v) of MSA to provide services to its communities through an external service provider or entity, in this instance, CIGICELL. However, when the Municipality decides to explore the provision of services through external mechanisms, section 78(3) of the MSA, requires the Municipality to assess the service delivery options by considering direct and indirect costs and benefits, capacity, views of the community, organised labour, and the likely impact on development and employment. The evidence reveals that the Municipality issued a Public Notice to the community of both Bloemhof and Christiana in May 2019. However, at the time when the Public Notice was issued, the Municipality had already appointed CIGICELL on 18 February 2019.
- 6.1.31 Once the Municipality decides to provide a service through an external service provider and before it enters into an SLA, section 80(2) of the MSA requires the Municipality to establish the mechanism and programme for community consultation and information dissemination regarding the service delivery agreement, which agreement must be communicated to the community through the media. The Municipality is therefore required to develop a plan on how to communicate the terms of the SLA with the community.
- 6.1.32 The Public Protector could find no evidence indicating that the Municipality provided a communication plan to establish a mechanism for community consultation and information dissemination regarding the SLA. There is also no evidence to indicate that the contents of the SLA were communicated to the community of Bloemhof and Christiana through the media, as required by section 80(2) of the MSA.

- 6.1.33 In terms of clause 3(4) of the Disciplinary Regulations for Senior Managers, the Municipality can institute disciplinary action against a senior manager, in this instance Mr Mgengo, after investigating the allegations levelled against him. The Municipality appointed Mr Jafta to investigate the alleged misconduct against Mr Mgengo. He was found to have committed acts of gross misconduct including “*soliciting a loan*” from CIGICELL without following proper processes. The Municipality then charged him with various acts of misconduct as recommended by Mr Jafta’s investigation report. However, after his suspension, Mr Mgengo approached the Labour Court to dispute his suspension. The Municipality and Mr Mgengo thereafter, on 04 June 2021, entered into a Settlement Agreement to terminate the employment relationship between them.
- 6.1.34 Following the service of section 7(9)(a) notice to all affected parties, responses were received and considered from the parties who submitted further representations prior to the finalisation of the matter. Upon analysis of the submissions to the Public Protector from Mr Nyawane and Mr Mgengo, their responses did not have any effect on the intended findings and remedial action.

### *Conclusion*

- 6.1.35 Having considered the evidence received during the investigation, it is concluded that the Lekwa-Teemane Local Municipality did not follow the prescribed procurement processes in the outsourcing of electricity revenue enhancement services to CIGICELL.
- 6.2 Whether the Lekwa-Teemane Local Municipality unlawfully received an amount of R30 000 000 from CIGICELL and irregularly utilised same to service its Eskom debt, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**



*Common cause*

- 6.2.1 The Municipality and CIGICELL entered into an SLA on 03 April 2019, to render “a complete turnkey solution for the provision of revenue enhancement service, online and real time electricity vending, revenue protection, ICT backed and metering” for a period of thirty six (36) months.
- 6.2.2 The SLA amongst others stipulated that CIGICELL pay a performance security in the amount of R30 000 000 payable into the municipal bank account.

*Issue in Dispute*

- 6.2.3 The issue for the Public Protector’s determination is whether the Municipality followed due processes when it received R30 000 000 from CIGICELL and utilised the same to service its Eskom debt.

*The Complainant’s version*

- 6.2.4 The Complainant contended that the Municipality acted contrary to the provisions of the MFMA, which elucidates the terms and processes that a municipality must follow in obtaining loans. He further alleged that the Municipality unlawfully received R30 000 000 from CIGICELL, which was utilised to service its Eskom debt.

*The Municipality’s version*

- 6.2.5 The Public Protector requested the Municipality through a letter dated 10 March 2020, to respond to the allegations raised. Following delays in receiving a response from the Municipality, a *subpoena* in terms of section 7(4)(a) was issued on 17 September 2020.

- 6.2.6 On 09 October 2020, during the *subpoena* hearing, Mr Pilane submitted that CIGICELL paid a sum of twenty-two million rand (R22 000 000) as part of the R30 000 000 performance security directly to Eskom to service the Municipality's Eskom debt. However, Mr Pilane and Ms Mbonani could at that stage not confirm whether the balance of eight million rand (R8 000 000) was ever paid by CIGICELL.
- 6.2.7 The Municipality further indicated that they had already reimbursed CIGICELL a portion of the performance security, however, during the *subpoena* hearing, they could not confirm the amount that had been reimbursed to CIGICELL.
- 6.2.8 In terms of the SLA, CIGICELL agreed to provide performance security in the amount of R30 000 000 payable into the municipal bank account on or before the commencement date of the contract.
- 6.2.9 CIGICELL paid the money directly into Eskom's account to service the Municipality's debt to Eskom.

*Documents received from the Municipality*

- 6.2.10 The Municipality provided copies of the Municipal Council Resolution dated 06 March 2019; the Letter of Appointment dated 18 February 2019; SLA dated 03 April 2019; as well as copies of the Municipal Eskom Account for April 2019.

*Municipal Special Council Meeting Resolution number 17/2019, of 06 March 2019*

- 6.2.11 According to the Municipal Council Resolution 17/2019, of 06 March 2019, the Municipal Council resolved that:

6.2.11.1 CIGICELL pays performance security in favour of the Municipality in an aggregate amount of not more than thirty-five million rand (R35 000 000); and

6.2.11.2 The amount be referred to and recorded as a performance guarantee and be administered by the Chief Financial Officer in consultation with the Municipal Administrator. The principal contract to be concluded should provide for and allow the Municipality to use part of the total amount of the performance guarantee, for purposes deemed necessary by the Municipality, prioritising the full payment of the Eskom debt.

*The appointment letter dated 18 February 2019 issued to CIGICELL*

6.2.12 The appointment letter dated 18 February 2019 articulates the purpose of the payment of R30 000 000 by CIGICELL. The purpose and/or the object of the “Performance Security” was, according to the appointment letter for the Municipality to mitigate financial risks, flowing from the collection of revenue on behalf of the Municipality by CIGICELL.

*SLA entered into between the Municipality and CIGICELL on 03 April 2019*

6.2.13 In terms of the SLA, the parties agreed that CIGICELL should pay into the municipal bank account an amount of R30 000 000 as performance security, in accordance with the General Conditions of Contract (GCC). According to the SLA’s suspensive conditions, the Municipality had to repay the performance security on twelve consecutive months in the amount of two million five hundred thousand rand (R2 500 000), until the obligations of the Municipality are fully discharged.

*Copies of Municipal “Tax Invoice Eskom Statements” dated 12 April 2019*

6.2.14 The Municipal Eskom Statement of Account for April 2019 indicates two (02) direct payments made by CIGICELL to Eskom in two separate

amounts of eighteen million one hundred and ninety-five thousand seven hundred and forty-eight rand seventeen cents (R18 195 748.17), and three million eight hundred and four thousand two hundred and fifty-one rand and fifty-three cents (R3 804.251.53). A total amount of twenty-two million rand (R22 000 000) was paid by CIGICELL.

*Additional Subpoenas issued against the Municipality and CIGICELL*

6.2.15 On 22 August 2023, *subpoena* notices were issued to the Acting Municipal Manager, Mr Lesaisane, Ms Mbonani and the Chief Executive Officer (CEO) of CIGICELL, Mr M Nyawane, requesting additional information in the possession of the parties regarding the payment of the performance security by CIGICELL to the Municipality. The following responses were received:

6.2.15.1 Mr Lesaisane responded on 29 September 2023, as follows:

- (a) According to the Municipality, the information requested was submitted on 09 October 2020, and it is his view that the current *subpoena* is just a duplicate of the October 2020 process; and
- (b) He further indicated that there have been changes to the municipal systems; leadership; and bankers, as such they experience challenges in retrieving most of the information.

6.2.15.2 Ms Mbonani responded on 04 October 2023, as follows:

- (a) She is no longer an employee of the Municipality (since October 2022), therefore, she is unable to assist with any information relating to the Municipality as she no longer has access thereto. The information sought, should be obtained from the Municipality.

6.2.15.3 CIGICELL's CEO, Mr Nyawane, responded in an affidavit dated 13 September 2023, stating that:

- (a) There was an Addendum<sup>2</sup>, to the SLA that was subsequently concluded between the Municipality represented by Mr Mgengo and CIGICELL represented by its former CEO, Mr Alan Kodesh. The purpose of the Addendum was to amend certain provisions of the performance agreement. In terms of the Addendum, the parties agreed to a reduced performance security in the amount of R22 000 000 and not R30 000 000, to be payable by CIGICELL;
- (b) The Municipality instructed CIGICELL through an email received from the Municipal CFO, Mr Thokoane, dated 11 April 2019 at 15:01, stating *inter alia* that:

*"Subject: FW: TOTAL OUTSTANDING ESKOM ACCOUNTS*

*Hi Allan*

*Please as per our discussions after Consultation with the Municipal Manager we request that you split the payment in the following order:*

1. *Central account R3 804 251.53*
2. *North West R18 195 748.47*

*Please the amount be paid directly to Eskom as per our discussions the account numbers are attached as per spreadsheet." (sic)*

- (c) Mr Nyawane indicated that although he cannot confirm that the account numbers provided belonged to Eskom, on 12 April 2019,

---

<sup>2</sup> Copy of Addendum signed on 11 April 2019 by Mr Ndoda Mgengo and his witnesses was submitted.

CIGICELL made two payments totalling R22 000 000 as performance security under the instruction received from Mr Thokoane;

- (d) Mr Nyawane also provided copies of two “*Notification of payments*” from CIGICELL’s Nedbank Business and First National Bank (FNB) accounts. The notification indicates that payment was made from CIGICELL’s Nedbank Business account to Lekwa-Teemane’s Eskom account in the amount of R18 195 748.47. The FNB notification indicates the payee as CIGICELL and the recipient as Eskom Holdings SOC L, and the amount of R3 804 251.53;
- (e) Mr Nyawane also stated that in view of the Addendum to the SLA no additional payment of R8 000 000 was due;
- (f) Mr Nyawane stated that the total performance security was not repaid by the Municipality after the expiry of the contract on 02 April 2022. The Municipality had repaid, via debit orders an amount of ten million two hundred thousand five hundred and fifty-five rand and fifty-five cents (R10 255 555.55). As a result of some debit orders of the Municipality “*bouncing*”, CIGICELL set off the balance of the debt owed by the Municipality in respect of the performance security against payments made for prepaid electricity sales, in the amount of eleven million seven hundred forty-four thousand four hundred and forty-four rand and forty-five cents (R11 744 444.45). Consequently, CIGICELL has received the full amount of R22 000 000 in respect of the performance security.
- (g) CIGICELL collected an amount of forty-nine million nine hundred eighty-six thousand three hundred and one rand and fifty-three cents (R49 986 301.53) on behalf of the Municipality as per its obligations in terms of the SLA. Total payments made to the Municipality over the contract period were twenty-one million two hundred fifty-six thousand six hundred fifty-four rand and sixteen cents (R21 256 654,16), after

withholding amounts due to CIGICELL for all services rendered in terms of the contract.

#### *Submission from Eskom*

- 6.2.16 On 17 October 2023, the Investigation Team approached Eskom requesting confirmation of account numbers and verification of payments received in favour of the Municipality. On 17 October 2023, per e-mail, Ms Tsholo Prince, the Acting Middle Manager: Revenue Management for Eskom confirmed that the account numbers provided by the Municipality belonged to Eskom. She further confirmed that Eskom received the two payments as mentioned above and she provided two copies of documents titled “*Tax Invoice Eskom Statements*” as proof of receipt of both payments.

#### **Responses to the section 7(9) notice**

- 6.2.17 Notices in terms of section 7(9)(a) of the Public Protector Act were sent to various persons on 23 November 2023. The responses from paragraph 6.1.18 above also apply in this instance and will not be repeated.

#### *Applicable law*

#### **National Treasury Practice Notes, 2003**

- 6.2.18 National Treasury Practice Note Number SCM 1 of 2003: General Conditions of Contracts (GCC) and Standardized Bidding Documents (Practice Note), revised in July 2010, provides as follows:

- 6.2.19 Clause 7 states that:

*“7.1 Within 30 days of receipt of the notification of the contract award, the successful bidder shall furnish to the purchaser the performance security of the amount specified in SCC<sup>3</sup>.”*

---

<sup>3</sup> Special Conditions of Contract

7.2 *The proceeds of the performance security shall be payable to the purchaser as compensation for any loss resulting from the supplier's failure to complete his obligations under the contract.*

7.3 ...

7.4 *The performance security will be discharged by the purchaser and returned to the supplier not later than 30 days following the date of completion of the supplier's performance obligations under the contract including any warranty obligations, unless otherwise specified in SCC".*

### **MFMA Circular No 25: Supply Chain Management Guide, General Conditions of Contract and Municipal Bidding Documents**

6.2.20 The circular provides as follows:

*"In accordance with regulation 21 of the Municipal Supply Chain Management Regulations (promulgated in Government Gazette Number 27636 on 30 May 2005), National Treasury has issued general conditions of contract, municipal bidding documentation and a guide on implementing supply chain management.*

#### *1 General Conditions of Contract (GCC)*

*1.1 To ensure that uniformity exists in the bidding processes, accounting officers are requested to base bid invitations on the General Conditions of Contract (GCC) issued by the National Treasury..."*



## **The Municipal Finance Management Act, 2000 (MFMA)**

6.2.21 Section 60 of the MFMA provides that:

*“60. The municipal manager of a municipality is the accounting officer of the Municipality for the purposes of this Act, and as accounting officer must –*

- (a) exercise the functions and powers assigned to an accounting officer in terms of this Act, and*
- (b) provide guidance and advice on compliance with this Act to –*
  - (i) the political structures, political office-bearers and officials of the municipality, and*
  - (ii) any municipal entity under the sole or shared control of the municipality.*

6.2.22 Section 61 of the MFMA provides that:

*“(1) The accounting officer of a municipality must-*

- (a) ...;*
  - (b) disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor: ...”*
- (2) An accounting officer may not-*
- (a) act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of this act ...”*

6.2.23 Section 62(1)(c) of the MFMA provides that:

- (1) *The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure –*
  - (a)
  - (b)
  - (c) *that the municipality has and maintains effective, efficient and transparent systems-*
    - (i) *of financial and risk management and internal control.*

#### *Analysis*

6.2.24 Contrary to what was submitted by the Complainant, that the Municipality received a loan from CIGICELL for purposes of servicing its Municipal debt, the evidence before the Public Protector indicates that CIGICELL paid performance security in terms of the SLA concluded between the parties.

6.2.25 The evidence before the Public Protector indicates that the Municipal Council resolved that the performance security due by CIGICELL be utilised to pay its municipal debts and to prioritise its Eskom debt. The parties then entered into an SLA requiring CIGICELL to pay the performance security in the amount of R30 000 000. However, after the signing of the SLA, the parties further agreed in an Addendum to a reduced performance security of R22 000 000.

6.2.26 The evidence further reveals that after the conclusion of the Addendum, Mr Mgengo, Mr Thokoane, and the then CIGICELL CEO agreed that the performance security be paid into two separate accounts as provided by the Municipality. Both the Municipality and Eskom provided documents titled "*Tax Invoice Eskom Statements*" as proof that these payments were made, reflecting the R18 195 748.17 payment, as well as R3 804 251.53

respectively, which amounted to a total payment of R22 000 000 made by CIGICELL to Eskom.

- 6.2.27 The Addendum provided by CIGICELL reveals that CIGICELL acted upon it and only paid R22 000 000 as performance security.
- 6.2.28 Clause 7 of the GCC authorises the Municipality to request and receive performance security from a successful bidder for compensation for any loss that could result from their failure to complete their obligations in terms of the contract. Furthermore, clause 7 obliges the Municipality to reimburse the performance security to the appointed service provider upon completion of its performance obligations under the contract. In this instance, however the Municipality instructed CIGICELL to pay the performance security directly to Eskom to settle its outstanding municipal debt and then undertook in terms of the SLA to reimburse CIGICELL the performance security paid to Eskom on a monthly basis, contrary to the provisions of the GCC.
- 6.2.29 In terms of section 60 and section 61(1)(b) of MFMA, Mr Mgengo was the Accounting Officer of the Municipality and he was expected to perform the functions and powers assigned to him in terms of the MFMA, including giving advice to the Municipal Council and/or Mayor in assisting the latter to make informed decisions. He was required to advise the Municipal Council about the terms and conditions of GCC, at the time when the Municipal Council took the resolution on how it would utilise the performance security. The lack of proper advice from Mr Mgengo as the Accounting Officer, resulted in a Council Resolution that the money be used to settle the municipality's Eskom debt.

### *Conclusion*

- 6.2.30 The evidence before the Public Protector reveals that the parties agreed to performance security in the amount of R30 000 000. However, the parties

thereafter agreed in terms of an Addendum to the SLA to a reduced performance security of R22 000 000 payable to the municipal bank account. Mr Mgengo and Mr Thokoane directed CIGICELL to pay the performance security directly to Eskom to settle the municipality's outstanding debt. This directive was contrary to the terms and conditions of the SLA and the provisions of the GCC.

## 7. FINDINGS

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

### 7.1 **Whether the functionaries of Lekwa-Teemane Local Municipality failed to follow proper procurement processes in the outsourcing of electricity revenue enhancement services which resulted in the appointment of CIGICELL as a service provider, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a) of the Public Protector Act, 1994**

7.1.1 The allegation that the functionaries of the Municipality failed to follow proper procurement processes in the outsourcing of electricity revenue enhancement services which resulted in the appointment of CIGICELL as a service provider, **is substantiated**.

7.1.2 The evidence reveals that there was no public participation or community consultation at the time the Lekwa-Teemane Local Municipality appointed CIGICELL as a service provider. The Municipality conceded that there was no public participation to provide services through the appointment of an external mechanism, in this instance to appoint CIGICELL. Consequently, the Municipality failed to uphold the core values and principles of accountability and transparency contained in section 195(1)(a) and (f), read

with section 152(1) of the Constitution and section 4(2)(c) of the Municipal Systems Act.

- 7.1.3 The Municipality failed to give notice to obtain the views of the local community of its intention to procure the services through an external service provider, CIGICELL. This conduct denied the local community an opportunity to participate in the process of appointing CIGICELL as the service provider. Therefore, the Municipality acted in contravention of the provisions of section 78 of the MSA.
- 7.1.4 The Municipality publicised the notice in the local newspaper in May 2019 when the SLA had already been signed. Section 80 of the MSA states that before the Municipality enters into a service delivery agreement for basic municipal services, the Municipality must establish mechanisms and programmes for community consultation and information dissemination regarding the service delivery agreement. In this instance the Lekwa-Teemane Local Municipality failed to observe the provisions of section 80 of the MSA.
- 7.1.5 The evidence further reveals that the appointment of CIGICELL was concluded without a Council Resolution as the request to grant permission and to endorse the implementation of the envisaged Municipal Revenue Enhancement Plan was tabled before the Municipal Council meeting of 06 March 2019, when CIGICELL was already appointed on 18 February 2019. In terms of sections 152 and 195 of the Constitution, the Municipality should have conducted its affairs in an accountable manner whilst promoting the spirit of transparency and, this was not done in this instance.
- 7.1.6 The conduct of Mr Mgengo in the appointment of CIGICELL constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

- 7.2 **Whether the Lekwa-Teemane Local Municipality unlawfully received an amount of R30 000 000 from CIGICELL and irregularly utilised same to service its Eskom debt, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**
- 7.2.1 The allegation that the Municipality unlawfully received an amount of R30 000 000 from CIGICELL as performance security, is **unsubstantiated**.
- 7.2.2 The Municipality and CIGICELL, through an Addendum to the SLA dated 11 April 2019, agreed to a reduced performance security of R22 000 000. In terms of clause 7 of the GCC, the Municipality was entitled to a performance security, payable by CIGICELL for compensation for any loss that could result from their failure to complete their obligations in terms of the contract.
- 7.2.3 The allegation, however, that the Municipality irregularly utilised the performance security to settle its Eskom municipal debt, is **substantiated**.
- 7.2.4 The Municipal Council Resolution of 06 March 2019, which allowed the functionaries of the Municipality to utilise performance security to pay the Municipal debt and in particular the Eskom debt was irregular and contrary to the provisions of clause 7 of the GCC, which provides that such performance security should be retained by the Municipality and reimbursed to CIGICELL upon completion of its performance obligations under the contract.
- 7.2.5 The then Municipal Manager, Mr Mgengo, acted contrary to the provisions of sections 60 and 61(1)(b) of MFMA in that he failed to perform his functions and powers as an Accounting Officer. In this instance, Mr Mgengo as the Accounting Officer, was expected to have knowledge about the terms and conditions of the SLA and the provisions of the GCC in relation

to the management of the performance security and advise the Municipal Council accordingly. Mr Mgengo failed to give proper guidance and advice on the conditions of GCC to the Municipal Council, which led to the adoption of a resolution to utilise the performance security to service the Municipality's outstanding Eskom debt.

7.2.6 In implementing the Council Resolution of 06 March 2019, by directing the former CEO of CIGICELL to pay the performance security directly to settle Municipal Eskom debt, the then CFO and Mr Mgengo acted contrary to the terms and conditions of SLA and clause 7.2 of GCC. As a result, the performance security was irregularly utilised to settle the Municipality's Eskom debt.

7.2.7 The conduct of the functionaries of the Municipality therefore constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## **8 REMEDIAL ACTION**

8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report upon the conclusion of an investigation where adverse findings are made.

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

8.3 The senior functionaries of the Municipality, namely Mr Mgengo, as well as Mr Thokoane, are no longer in the employ of the Municipality. Mr Mgengo was subjected to a disciplinary process at the Municipality, which he

challenged in the Labour court. Subsequent to that, the Municipality and Mr Mgengo reached a Settlement Agreement on 04 June 2021, in terms of which the employment contract between the parties was terminated.

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

#### **The Mayor of Lekwa-Teemane Local Municipality**

- 8.4.1 Within **ninety (90) calendar days** from the date of this report, in terms of section 56(3)(f) of the MSA, table the report before the Municipal Council to discuss the maladministration which occurred during the appointment of CIGICELL and the manner in which the Municipality dealt with the performance security, to adopt the report and pass a resolution thereon with a view to establish controls to identify and prevent future recurrence of the identified deficiencies.

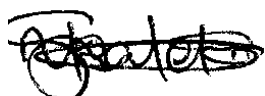
#### **The Municipal Manager**

- 8.4.2 Within **ninety (90) calendar days** from the date of this report and in terms of section 62(1)(c) of the MFMA, conduct a supply chain and contract management risk assessment and develop risk mitigation plans.
- 8.4.3 Within **ninety (90) calendar** days from the date of this report and in terms of section 62(1)(c) of the MFMA, direct internal audit to include in its annual plan an audit of supply chain and contract management to identify internal control deficiencies that may result in the recurrence of similar incidents.
- 8.4.4 The Audit Committee, in its quarterly meetings, monitor the implementation of all internal audit reports and recommendations, including recommendations by the Auditor General South Africa (AGSA) and advise management in terms of section 166 (2) of the MFMA.



## 9 MONITORING

- 9.1 The Municipal Manager to submit an action plan to the Public Protector **within thirty (30) calendar days** from the date of this report on the implementation of the remedial action referred to in paragraph 8 above.
- 9.2 The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.
- 9.1 In line with the Constitutional Court Judgement in the matter of *Economic Freedom Fighters*, and in order to ensure the effectiveness of the Public Protector, the remedial action prescribed in this Report is legally binding on the Municipality unless there is an Interim Interdict or Court Order directing otherwise.



---

**ADV KHOLEKA GCALEKA**  
**PUBLIC PROTECTOR**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE: 29 DECEMBER 2023**

*Assisted by: Ms Nthoriseng Motsitsi*

*Executive Manager: PII Inland*