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 No. 57 OF 2019/20

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# REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT RELATING TO IRREGULAR APPOINTMENT OF A MANAGER SPECIAL PROGRAMMES, TENDER IRREGULARITIES WITH REGARDS TO THE COMPANIES PROCURED FOR THE MAYORAL GOLF DAY AND THE STATE OF MUNICIPAL ADDRESS BY LESEDI LOCAL MUNICIPALITY.

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## Executive Summary

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of irregular appointment of the Manager: Special Programmes; tender irregularities with regard to the companies appointed for the Mayoral Golf Day and State of the Municipal Address (SOMA), by approving a deviation from normal procurement process while disregarding procurement policy, by the Lesedi Local Municipality (the Municipality).

(iii) The investigation was conducted in terms of section 182(1) (a) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6 and 7 of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(iv) **On analysis of the allegations, the following issues were identified and investigated:**

(a) Whether the Municipality irregularly appointed Ms Melato without the requisite qualifications as its Manager: Special Programmes;

(b) Whether the Municipality improperly procured a tender for the State of the Municipal Address and Mayoral Golf Day without following the procurement processes; and

(c) Whether the Municipality, Complainant and other applicants suffered prejudice as a result of the appointment of Ms Melato and the improper procurement of the tender.

(v) My office did not investigate the following allegations as made by the Complainant:

(a) The allegations that Mr Mkhize threatened to shut down the tender deals/contracts or projects if he was not given kickbacks by Reatile Vopak and Zandile Management was not investigated. According to the letter dated 16 April 2018 provided to my office by the former Municipal Manager, Mr Tshotleho Paul Mpele (Mr Mpele) of the Municipality, it was stated that Mr Mkhize was not an employee of the Municipality. Although Mr Mkhize previously worked for the Municipality, the allegations were not in connection with his previous official capacity in the Municipality.

(b) The actual allegations were that Mr Mkhize threatened Reatile Vopak and Zandile Management while he was no longer in the employ of the Municipality. I am therefore of the view that such allegations may amount to extortion by a private person who is not a public official, thereby falling outside the scope of my mandate and can best be handled by another competent authority of the state, such as the South African Police Service (SAPS).

(vi) The investigation process commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act, which included assessment of a complaint, analysis of the relevant documentation; research conducted; consideration and application of the relevant laws, regulatory framework, jurisprudence and sending a request letter for information.

(vii) Key laws and policies taken into account to determine if there had been maladministration by the Municipality and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Municipality when processing a service provider for SOMA, the Mayoral Golf Day and the appointment of the Manager Special Programme. Those are the following:

(a) The Constitution of the Republic of South Africa, 1996.
(b) Supply Chain Management Policy as Revised in March 2015,
(c) Municipal Recruitment and Selection Policy: Reference NR: 4/1/1/1B, and
(d) The Municipal Finance Management Act, 2003

(viii) Having considered the submissions made and evidence uncovered during the investigation, as against the relevant regulatory framework, the complaint received as against the concomitant responses received, I now make the following findings.

**(a) Regarding whether the Lesedi Local Municipality irregularly appointed Ms Melato without the requisite qualifications as its Manager Special Programmes:**

(aa) The allegation that the Municipality irregularly appointed Ms Melato as a Manager: Special Programme without following proper recruitment processes, is substantiated.

(bb) My investigation revealed that Ms Melato did not possess the requisite academic qualifications for the position of Manager: Special Programme, namely, a NQF level 6/7 qualification. *The SAQA* confirmed that Ms Melato's qualification, the *Executive Leadership Municipal Development Programme,* provided by the University of Pretoria from February to

October 2009 is a short course and not registered on the NQF nor does it have a NQF level.

(cc) The AG's audit findings revealed further that there were other employees including Ms Melato, in the employ of the Municipality who do not have the qualifications commensurate with the posts they occupy.

(dd) I find therefore that, the Municipality failed to promote and maintain the constitutional standard of professional ethics, to foster transparency and to ensure good human-resource management in this case.

(ee) Equally, I find that the Municipality did not observe its own Recruitment Policy which requires it to attract competent individuals for every task and to fill all vacant positions with the best qualified and/ or skilled applicants. In short, the Municipality failed to ensure that applicants are shortlisted in accordance with the advertisement and minimum requirements set therein. Factors to be considered when making an appointment such as formal qualifications, were not considered by the Municipality.

(ff) The Municipality, in particular the members of the Interview Panel namely, Jabu Marwa, Jankie Khumalo and Nerina Ramsammy violated the service standards and guidelines as laid out in section 195(1) of the Constitution, Clauses 1, 9 and 15 of the Recruitment Policy.

(gg) The evidence does not reveal any active participation by Mr Makhanya in the shortlisting and interview stages except to approve the appointment based on the Interview Panel's recommendations. Furthermore, Mr Makhanya convincingly argued his innocence by indicating the following:

"*That his role was to process a recommendation that recommended the applicant (Ms Melato) as a fit and proper person for appointment as Manager: Special Projects. The Lesedi Local Municipality operates through*

*a system of delegations, the Delegated Powers of Authority, which is an acknowledgement that a Municipal Manager alone cannot perform all the tasks assigned to him but must rely on his subordinates and entrust such to perform their responsibilities with utmost good faith"*

(hh) The conduct by the Interview Panel members constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**(b) Regarding whether the Lesedi Local Municipality improperly procured a tender for the State of the Municipal Address and Mayoral Golf Day without following the procurement processes:**

(aa) The allegation that the Municipality improperly procured a tender during SOMA and the Mayoral Golf Day without following the prescribed procurement policy, is substantiated.

(bb) I find that the Municipality failed to uphold the Constitution by way of ensuring that as an organ of state, when contracting for goods and services, it should make use of a system that is fair, equitable, transparent, and competitive. Similarly, the Municipality failed to record any proper reasons for its deviation from the normal procurement process.

(cc) Furthermore, the grounds advanced by the Municipality for deviation do not meet criteria to be classified as emergency in terms of the applicable procurement law. There were no impractical circumstances which compelled the Municipality to deviate from the normal procurement processes or not to appoint the service provider that was recommended under the first normal procurement process.

(dd) Accordingly, the Municipality and in particular Ms Melato, Mr Rampedi and Mr Makhanya violated section 217 of the Constitution, section 112 (1) and

32 of the MFMA and Clause 36(5) of the Municipality's SCM Policy as they all collectively initiated, participated and irregularly approved this deviation. There is no evidence of any active role played by Mr Malgas, Mr Majavu and Cllr Maloka in the deviation procurement process.

(ee) The conduct by Ms Melato, Mr Rampedi and Mr Makhanya constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**(c) Regarding whether the Municipality, Complainant and other applicants suffered prejudice as a result of the appointment of Ms Melato and the improper procurement of the tender:**

(aa) The allegation that the Municipality suffered prejudice as a result of an alleged irregular appointment of Ms Melato and the improper procurement of the tender, is substantiated.

(bb) The prejudice caused to other candidates who had applied for the post, would likely be irreversible as long as the appointment of Ms Melato is allowed stand. The integrity of the selection process was compromised. According to the appointment letter, Ms Melato was given a salary scale of **R449 796 per annum (Four hundred and forty nine thousands seven hundred and ninety six rand)** excluding benefits, subject to annual increments, pay progression from the date of appointment until present moment.

(cc) Mos M Projects, appointed for the Mayoral Golf Day, was paid an amount of **R228 000.00 including VAT** by the Municipality.

(dd) The service provider identified to provide catering for SOMA was Minaki Trading Enterprise and it was paid by the Municipality an amount of **R247 400.00 including VAT.**

(ee) The conduct of the Municipality and/or its officials as shown above was in violation of section 195(1) of the Constitution, section 217 of the Constitution, sections 62(1) (d) and 94(1) of the MFMA, section 112 (1) and 32 of the MFMA, Clause 36(5) Municipality's SCM Policy and Clause 1, 9 and 15 of the Recruitment Policy.

(ff) The conduct by the municipality and its officials constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(ix) The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

**The Municipal Manager of the Lesedi Local Municipality must:**

(aa) Within sixty (60) working days from the date of this report, initiate a judicial review process in terms of section 6 and 7 of PAJA to review the appointment of Ms Melato on the basis that she was irregularly appointed to the post of Manager Special Programmes without holding the minimum academic requirements for the post;

(bb) Ensure that within sixty (60) working days from the date of this report, all Municipal officials who are involved in the Procurement processes, Recruitment and Selection processes including all the senior management, attend a workshop on the Procurement Policy, MFMA SCM Regulations, Recruitment and Selection Policy and related legal prescripts of the Municipality.

(cc) Within thirty (30) working days from the date of this report, s/he consider disciplinary steps against all the Municipal officials who are still in its employ, who were responsible for the violation of the Constitution, MFMA, Municipality's SCM Policy and Recruitment and Selection Policy of the Municipality;

(dd) Within thirty (30) days of the date of this report implement the recommendations/findings of the report of the Auditor General in connection with the adverse finding on the appointment of Ms Melato; and

(ee) Within sixty (60) working days from the date of this report, disclose any irregular expenditure to the Council and Treasury.

**The Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks:**

**The appropriate recommendation that I am making in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks) is as follows:**

(ff) Within thirty (30) working days from the date of this report, consider initiating a criminal investigation and probe whether or not there was any deliberate or intentional effort by Ms Melato or any other person to misrepresent facts, or commit fraud or forgery by way of creating an impression to the Municipality that Ms Melato held a degree in Bachelor of Administration as per her CV, when she did not possess such qualification.

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT RELATING TO IRREGULAR APPOINTMENT OF A MANAGER SPECIAL PROGRAMMES, TENDER IRREGULARITIES WITH REGARDS TO THE COMPANIES PROCURED FOR THE MAYORAL GOLF DAY AND STATE OF MUNICIPAL ADDRESS BY THE LESEDI LOCAL MUNICIPALITY.**

## 1. INTRODUCTION

1.1 This is my report issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation and implement remedial action:

1.2.1 The Premier of Gauteng Province, Mr D Makhura;

1.2.2 The Executive Mayor, Cllr Lerato F Maloka;

1.2.3 The Municipal Manager, Advocate Gugu Thimane;

1.2.4 Speaker of the Council; Cllr Mluleki Nkosi,

1.2.5 The MEC of COGTA, Mr LI Maile.

1.3 The report relates into an investigation into allegations of irregular appointment of a Manager Special Programmes, tender irregularities with regard to the companies appointed for the Mayoral Golf Day and State of Municipal Address by approving a deviation whilst disregarding the procurement policy by the Lesedi Local Municipality.

## 2 THE COMPLAINT

2.1 The Complaint was lodged with my office on 26 January 2016 by an Anonymous Complainant.

2.2 The Complainant alleged *inter alia*:

2.2.1 There was fraud and corruption committed by Mr Tebogo Mkhize (Mr Mkhize) who solicited a thirty percent (30%) stake from Reatile Vopak and thirty percent (30%) stake from Zandile Management. Mr Mkhize is a former employee of the Municipality and the husband of the Mayor of the Municipality. He threatened to shut down Reatile Vopak and Zandile Management tender deals/contracts with the Municipality unless he was given a stake by the owners of these companies;

2.2.2 The former Municipal Manager, Mr Ayanda Makhanya (Mr Makhanya) irregularly approved the appointment of Ms Malekula Julia Melato, also known as MaDlamini (Ms Melato) as the Municipal Manager: Special Programmes, because Ms Melato used fake qualifications and degrees to apply for the position, but she only held a matric certificate. The findings of the Auditor General (AG) also revealed that that Ms Melato had only a matric certificate;

2.2.3 Ms Melato organised the SOMA event, using deviations and disregarding the Municipal procurement processes. She also organised a Mayoral Golf Day, disregarding the normal Municipal procurement processes. Mr Makhanya improperly conducted himself by approving the irregular deviation; and

2.2.4 The Acting Municipal Manager, Mr Isaac Rampedi (Mr Rampedi), approved the deviation payment documents for the benefit of the Mayor to thank the mayor for protecting him from the findings of the AG. Disciplinary

action was about to be taken against Mr Rampedi for an unspecified misconduct, before he was appointed as the Acting Municipal Manager.

## 3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution 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) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

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

the remedial action taken by the Public Protector has a binding 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 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65).

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

3.8 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 that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68).

3.9 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).

3.10 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

[1] [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
[2] *Supra* at para [73].

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).

3.11 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71).

3.12 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (paragraph 71(a)).

3.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).

3.14 "*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)).

3.15 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:

*(a) The Public Protector, in appropriate circumstances, has the power to direct the President to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be*

*unconstitutional as it will render the power to take remedial action meaningless or ineffective (paragraphs 85 and 152).*

*(b) There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92).*

*(c) 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):*

*(i) Conduct an investigation.*
*(ii) Report on that conduct; and*
*(iii) To take remedial action.*

*(d) The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (paragraph 104).*

*(e) 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).*

*(f) The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108).*

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

*(h)Basis for the Public Protector to take remedial action (paragraph 112)."*

3.16 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls within the ambit of the Public Protector's mandate.

3.17 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.

3.18 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.19 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly ***the interests of justice*** that dictate whether I should investigate the matter or not. It is axiomatic that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is a huge

***public interest*** in the public administration or in the governing of public affairs.

## 4 THE INVESTIGATION

### 4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1) (a), (b) and (c) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 During the investigation process, notices in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notices), dated 24 June 2019, were served on the Premier of Gauteng, Mr David Makhura, the Executive Mayor, Cllr Lerato F Maloka, The Acting Municipal Manager, Adv Gugu Thimane, the former Municipal Manager, Mr Ayanda Makhanya, the former Acting Municipal Manager Mr Isaac Rampedi and the Manager Special Programme, Ms Malekula Julia Melato to afford them an opportunity to respond to my provisional findings. A written response was received from the Acting Municipal Manager, Adv Gugu Thimane, dated 15 July 2019

and from the former Municipal Manager, Mr Ayanda Makhanya dated 18 July 2019. The responses were considered and factored into this report.

## 4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

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. The evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal[1] (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.3 In this particular case, the factual enquiry primarily focused on whether or not the Municipality irregularly appointed the Manager Special Programme without the requisite qualifications; also

[1] *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA),*

4.2.4 Whether or not the Municipality improperly failed to follow procurement processes when appointing service providers for the SOMA and the Mayoral Golf Day.

4.2.5 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the Municipality to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been maladministration by the Municipality and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Municipality or its officials when appointing Ms Melato to the position of Manager Special Programme and the appointment of the service providers for SOMA and the Mayoral Golf Day.

4.2.6 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the Municipality or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.2.7 In the case of conduct failure as was the case in this matter, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

4.2.8 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

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

4.3.1 Whether the Municipality irregularly appointed Ms Melato without the requisite qualifications as its Manager: Special Programmes;

4.3.2 Whether the Municipality improperly procured a tender for the State of the Municipal Address and the Mayoral Golf Day without following the procurement processes; and

4.3.3 Whether the Municipality, Complainant and other applicants suffered prejudice as a result of the appointment of Ms Melato and the improper procurement of the tender.

4.4 **The Key Sources of information**

4.4.1 **Correspondence sent and received**

4.4.1.1 A copy of the complaint form dated 26 January 2016;

4.4.1.2 Allegations letter dated 02 March 2016 addressed to the Municipality;

4.4.1.3 Follow up letter dated 14 July 2016 sent to the Municipality;

4.4.1.4 Response to allegations received from the Municipality including the followings annexures: CV and Qualifications of Ms Melato, Supply Chain Management Policy, Recruitment Policy, Mayoral Golf Day Documents and State of Municipal Address documents;

4.4.1.5 Section 7(9)(a) notices dated 24 June 2019 from my office addressed to various affected, to the Premier of Gauteng: Mr David Makhura, Executive Mayor: Cllr Lerato F Maloka, The Acting Municipal Manager: Adv Gugu Thimane, Former Municipal Manager: Mr Ayanda Makhanya, Former

Acting Municipal Manager: Mr Isaac Rampedi and the Manager Special Programmes: Ms Malekula Julia Melato.

4.4.1.6 A response to the section 7(9)(a) notice dated 15 July 2019 received by my office from the current Acting Municipal Manager, Ms Gugu Thimane.

4.4.1.7 A response to the section 7(9)(a) notice received by my office from Mr Makhanya dated 18 July 2019 to my office.

4.4.2 **Legislation and other legal prescripts**

4.4.2.1 The Constitution of the Republic of RSA, 1996;
4.4.2.2 The Public Protector Act 23 of 1994;
4.4.2.3 Promotion of Administrative and Justice Act 03 of 2000;
4.4.2.4 Labour Relations Act 66 of 1995;
4.4.2.5 The Municipal Finance Management Act, 2003 (the MFMA);
4.4.2.6 Lesedi Local Municipality Recruitment and Selection Policy Reference NR: 4/1/1/1/B; and
4.4.2.7 Lesedi Local Municipality Supply Chain Management Policy Revised March 2015.

4.4.3 **Case Law**

4.4.3.1 *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);
4.4.3.2 *President of the Republic of South Africa v Office of the Public Protector and Others, Case no* 91139/2016 [2017] ZAGPPHC 747; and
4.4.3.3 *Public Protector vs Mail and Guardian,* 2011(4) SA 420 (SCA).
4.4.3.4 Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013).

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

### 5.1 Regarding whether the Lesedi Local Municipality irregularly appointed Ms Melato without the requisite qualifications as its Manager: Special Programmes:

*Common cause issues*

5.1.1 On 15 November 2014, the Municipality advertised a position of Manager: Special Programmes on its website with a closing date of 28 November 2014. In terms of the advertisement, the successful incumbent had to be in possession of the following qualifications:

*"NQF level 6/7 qualification in relevant disciplines with a minimum of 5 years working experience in Municipal Environment and Special Programmes".*

5.1.2 The Curriculum Vitae which was submitted to my office by the Municipality indicated that Ms Melato had the following academic qualifications when she applied:

(i) Grade twelve certificate (Senior Certificate);
(ii) Executive Leadership Municipal Development Programme Certificate;
(iii) Independent Development Trust Business Plan Certificate; and
(iv) Course in Development Administration (Dev. Admin)

5.1.3 After the interviews were conducted, Ms Melato was appointed by the Municipality to the position of Manager: Special Programmes with effect from 01 April 2015. The appointment was approved by Mr Makhanya.

*Issues in dispute*

5.1.4 The Complainant argued that the Municipality irregularly appointed Ms Melato as its Manager: Special Programmes, while she used fake qualifications to apply for the position and that she only had a matric certificate.

5.1.5 The Complainant further stated that the Municipality was aware of the findings of the Auditor General (AG) audit report which had already confirmed that Ms Melato did not have qualifications for the post she occupies.

5.1.6 It is worth noting that in terms of the AG's audit report in my possession at page 171 subparagraph 73(a), an adverse finding was made against the Municipality as follows:

*"73(a) The Recruitment, Selection and Appointment of persons as staff members". During the testing of new staff, it was noted that there were candidates appointed that do not have the qualifications to meet the requirements as per the positions job description."*

5.1.7 In the AG table that spells out the unqualified staff members, Ms Melato's position, Manager: Special Programmes) persal number (10362211) and the highest qualification as being Matric, is captured in the report.

5.1.8 On 16 April 2018, the Municipality contended through a letter signed by Mr Mpele, that Ms Melato had NQF Level 6 qualifications namely; "*Executive Leadership Development Programme Certificate which is equivalent to, if not more than the post requirements."*

5.1.9 On 17 July 2018, an email was sent by my investigation team to Mr Mpele and the Municipal's Industrial Relations Practitioner: MS Ntuntu Mabaso (Ms Mabaso), requesting amongst other things a copy of Ms Melato's Bachelor of Administration Degree or NQF 6/7 qualification.

5.1.10 On 16 July 2018, an email was received from Ms Mabaso providing my office with a response regarding the above request however no proof of a Bachelor of Administration Degree or other NQF 6/7 qualification for Ms Melato was furnished to my office.

5.1.11 Furthermore, an email dated 18 July 2018 from Ms Mabaso, stated that Ms Melato was not in possession of a Bachelor Degree in Administration and/or in Development Administration.

5.1.12 On 03 August 2018, an email was sent by my investigation team to Mr Abbey Mathekga, the Deputy Director: Student Administration from the University of Pretoria, seeking clarity on the accreditation grading or status of *Executive Leadership Municipality Development Programme* certificate of Ms Melato.

5.1.13 A letter dated 15 August 2018 was received by my team from Ms Faith Majola (Ms Majola), the Programme Administration Manager from Enterprises University of Pretoria (Pty) Ltd who said the Company is wholly owned by the University of Pretoria and offers short courses on its behalf.

5.1.14 According to Ms Majola, short courses are not credit-bearing, and do not lead to formal qualifications on the NQF scale, unless stated otherwise.

5.1.15 Ms Majola also confirmed that Ms Melato successfully completed the *Executive Leadership Municipal Development Programme* in 2009, and received a certificate of successful completion which was issued by the University of Pretoria.

5.1.16 Enterprise University of Pretoria further made it clear that the *Executive Leadership Municipal Development Programme Certificate is* a ***non-credit bearing short learning programme and does not lead to a formal qualification registered on the NQF.*** (own emphasis)

5.1.17 Enterprise University of Pretoria further indicated that NQF levels and credits are not relevant in the case of non-credit bearing courses.

5.1.18 On 12 November 2018, a letter was sent to SAQA by my team requesting verification regarding certificate of *Executive Leadership Municipal Development Programme* issued to Ms Melato as to whether the certificate is accredited on NQF level 6 or not.

5.1.19 On 15 November 2018, a letter was received from the Chief Executive Officer (CEO) of SAQA, Mr Joe Samuels, who confirmed that *Executive Leadership Municipal Development Programme Certificate* provided by the University of Pretoria from February to October 2009 is a short course and not registered on the NQF, nor does it have a NQF level.

5.1.20 The explanation and clarity from both SAQA and Enterprises University of Pretoria (Pty) LTD as solicited by my office that Ms Melato's certificate is not credit-bearing was communicated to the Municipality. Notwithstanding the weight of evidence from the qualification verification bodies, the Municipality, and in particular Mr Mpele, insisted that Ms Melato has the necessary qualifications.

5.1.21 According to Ms Melato's curriculum vitae (CV) in my possession, Ms Melato indicated under Educational Background *inter alia* :

| | |
|---|---|
| **1990**: | Standard 10 |
| **Institution:** | Tseki Senior Secondary School |
| **Subjects:** | English |

Afrikaans
Southern Sotho
Mathematics
Biology
Physical Science

**1992:** Bachelor of Administration (B. Admin)
**Institution:** University of the North (QwaQwa Branch)
**Courses:** Local Government Administration (LGA) 101 & 102
Public Administration (PA) 101 & 102
Industrial Psychology (IPSY) 101 & 102
Political Science (PS) 101 & 102

**2001:** Bachelor of Development Administration (Dev Admin)
**Institution:** University of South Africa (UNISA)
**Courses:** Development Admin – 100R

5.1.22 During an interview held on Friday 23 August 2019, Ms Melato was asked to clarify the academic qualifications she holds or held at the time she was appointed to a position of Manager: Special Programmes.

5.1.23 Ms Melato failed to answer this question during the interview and indicated to the investigation team that she will answer the question in a written submission. From her CV, it appears as though she holds a degree in Bachelor of Administration. There is no indication on her CV that she has not completed the degree.

5.1.24 On Monday 26 August 2019, the investigation team held an interview with Ms Nerina Ramsammy (Ms Ramsammy) who is a Senior Human Resources Practitioner at Lesedi Municipality. Ms Ramsammy was part of the interview process that led to the appointment of Ms Melato. According to Ms Ramsammy, the CV of Ms Melato indicated or showed that she had

a Bachelor of Administration and it looked as if Ms Melato had completed her degree in Bachelor of Administration. Ms Ramsammy further indicated she asked Ms Melato if she has a degree and Ms Melato indicated that she did not complete her degree.

5.1.25 It is therefore inconceivable how the interview panel and in particular the chairperson of the interview panel (namely Mr Jabu Marwa) continued to recommend Ms Melato for appointment as Manager: Special Programmes despite the admission during the interview that Ms Melato did not have the minimum academic requirements for the post.

*Application of the relevant legal prescripts*

5.1.26 Section 195(1) of the Constitution provides amongst other things that *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 and economic use of resources must be promoted;*
*(c) …;*
*(d) Services must be provided impartially, fairly, equitably and without bias*
*(e) …:*
*(f) Public administration must be accountable;*
*(g) Transparency must be fostered; and*
*(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*

5.1.27 It was expected of the Municipality to ensure that the process followed in the recruitment and selection of Ms Melato was fair, equitable and transparent. The high standard of professional ethics required by the Constitution was also expected to be met when she was appointed.

5.1.28 Clause 1 of the Municipality's Recruitment and Selection Policy[2] (the Recruitment and Selection Policy) states the aim of the policy as being:

*"To enable the Municipality to attract competent individuals for every task and to fill all vacant positions with the best qualified and/ or skilled applicants, and to form a demographical balanced workforce, with the intention of providing quality and value for money service delivery to the community. In short to put the right person in the right position".*

5.1.29 Clause 9 of the Recruitment and Selection Policy states as follows:
*"Screening and Shortlisting of Candidates*

*For task grade 10 – 25: at least a maximum of 5 applicants be short listed in accordance to advertisement and requirements (responsibility of the Municipal Manager, HOD, and the HR Manager), subject to delegation of powers.*

*Interviews*

*For task Grade 10 – 25 positions*

*(a) The Municipal Manager or his/her delegated representatives*
*(b) The relevant HOD or his/her delegated representative and head of the section (manager/supervisor)*
*(c) The HR Manager and his/her delegated HR Officer (s)*
*(d) Unions, observatory capacity- to ensure transparency."*

5.1.30 In terms of an email dated 18 July 2018, Ms Mabaso stated that Ms Melato was not in possession of a Bachelor Degree in Administration and/or in Development Administration. However, the Municipality still shortlisted,

[2] Reference NR: 4/1/1/1/B which came into implementation on 01 September 2007.

interviewed and subsequently appointed Ms Melato for the post of Manager: Special Programmes.

5.1.31 Clause 15 of the Recruitment and Selection Policy stipulates factors to be considered when making an appointment as being the following:

*(a)"Formal qualifications*
*(b)Prior Learning*
*(c)Relevant Experience*
*(d)Knowledge acquired*
*(e) Skills acquired*
*(f) Competencies and behavioral traits*
*(g) …*
*(h)Capacity of acquire, within a reasonable time, ability to do the job."*

5.1.32 A per research and engagements conducted with the SAQA and Enterprise University of Pretoria, the *Executive Leadership Municipal Development Programme* is not credit-bearing, and does not lead to any formal qualifications on the NQF, unless stated otherwise.

5.1.33 It stands to reason in the circumstances that the shortlisting, interviewing and subsequent appointment of Ms Melato had to be congruent with the above clauses of the Recruitment and Selection Policy. In short, the above requires that vacant positions be filled with best qualified candidates, short listed in accordance to advertisement and requirements.

5.1.34 The Office of the Municipal Manager was requested on several occasions to furnish my office with the criteria that was used to shortlist, interview and appoint Ms Melato. To date the Office of the Municipal Manager had not provided my office with the requested information and/or explanation.

5.1.35 The seminal case of ***Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal***[3] raised an important constitutional issue relating to the state's obligation to comply with the requirements of the rule of law under section 1(c) of the Constitution in the context of public-sector employment. This case followed after the Task Team report sanctioned by MEC found that Mr Khumalo did not meet the minimum requirements relating to supervisory experience stated in the advertisement of the post he was appointed to. The MEC subsequently approached the court to set aside the appointment of Mr Khumalo.

5.1.36 The Labour Court further held that section 195 of the Constitution compelled the MEC, in the public interest, to avoid and eliminate illegalities in public administration. The principle of legality is applicable to all exercises of public power and not only to "administrative action" as defined in Promotion of Administrative and Justice Act 03 of 2000 (PAJA).[4] The rule of law is a founding value of our constitutional democracy.

5.1.37 Section 6(1) and (2) of PAJA provides for a Judicial Review of Administrative Action as follows:

*"(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*

*(2) A court or tribunal has the power to judicially review an administrative action if –*

*(a) the administrator who took it –*

*(i) …*

[3] (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013).

[4] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 58-9.

*(ii)...*

*or*

*(iii) was biased or reasonably suspected of bias;*

*(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*

*(c) the action was procedurally unfair;*

*(d) the action was materially influenced by an error of law;*

*(e) the action was taken –*

*(i) for a reason not authorised by the empowering provision;*

*(ii) for an ulterior purpose or motive;*

*(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;*

*(iv) because of the unauthorised or unwarranted dictates of another person or body;*

*(v) in bad faith; or*

*(vi) arbitrarily or capriciously;*

*(f) the action itself –*

*(i) contravenes a law or is not authorised by the empowering provision; or*

*(ii) is not rationally connected to –*

*(aa) the purpose for which it was taken;*

*(bb) the purpose of the empowering provision;*

*(cc) the information before the administrator; or*

*(dd) the reasons given for it by the administrator;*

*(g) the action concerned consists of a failure to take a decision;*

*(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*

*(i) the action is otherwise unconstitutional or unlawful".*

5.1.38 Section 7(1) of PAJA provides for a Judicial Review of Administrative Action as follows:

*"Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-"*

5.1.39 Section 158(1)(h) of the Labour Relations Act which regulates the powers of the Labour Court provides as follows:

*"The Labour Court may- review any decision taken or any act performed by the State in its capacity as employer, on such grounds art are permissible in law*".

5.1.40 In the *Khumalo and Another vs MEC of Education KZN*[5] case, the court outlined the process to be followed when a responsible functionary is embarking on a process of remedying an administrative irregularity.

5.1.41 It follows therefore that should Ms Melato's appointment be found to have been tainted with irregularity, that may have compel the accounting officer of the Municipality embarking on a course, either of judicial review or approach to the Labour Court in order to review the appointment of Ms Melato within the stipulated time frame namely, 180 days of being aware of such irregularities.

[5] Supra.

*Conclusion*

5.1.42 Based on the evidence gathered, I conclude that processes and the guidelines as laid out in the recruitment and selection prescripts were not adhered to during the appointment of Ms Melato. Ms Melato did not meet the minimum academic requirements for the post of Manager: Special Programmes.

5.1.43 Similarly, the Municipality failed to act on the findings of the Auditor General as far as they relate to the appointment of Ms Melato.

5.2 **Regarding whether the Lesedi Local Municipality improperly procured a tender for the State of the Municipal Address and the Mayoral Golf Day without following the procurement processes:**

*Common cause issues*

5.2.1 On 26 October 2015, Mr Rampedi appointed an Events Management Company, Mos M Projects, for the Mayoral Golf Day. On 13 November 2015, Mos M Projects was paid an amount of R228 000.00 including VAT as per invoice number 0056 for the service rendered. The Municipality apparently appointed this service provider by way of deviation from normal procurement processes due to the time frame.

5.2.2 On 12 June 2015, Ms Melato submitted a request to the Executive Corporative Services for approval by the office of the Municipal Manager regarding deviation from the procurement process of providing services for the SOMA 2015.

5.2.3 A deviation was approved by Mr Makhanya on 12 June 2015. The service provider identified for SOMA for the catering was Minaki Trading Enterprise,

and was paid an amount of R247 400.00 by the Municipality, on 01 July 2015 as per invoice number 18062015.

*Issues in dispute*

5.2.4 According to the contention advanced by the Complainant, Ms Melato organised the SOMA and Mayoral Golf Day using deviation procedures, thereby disregarding procurement policies of the Municipality.

5.2.5 The Municipality submitted that due to a limited timeframe, the then accounting officer, Mr Makhanya, requested to deviate from the normal procurement process. The Municipality argued that as a result of limited time available, the deviation for SOMA was embarked upon as it would have been impossible to follow normal procurement process.

5.2.6 It was also stated by Mr Mpele that the deviation was approved by Council and that Mr Rampedi relied on the applicable legal frame work at the time.

5.2.7 On Friday 16 August 2019, my team held an interview with the Municipality's SCM Manager: Mr Paul Malgas (Mr Malgas). Mr Malgas indicated during this interview that the Municipality's SCM had timeously undertaken a normal procurement process for SOMA and the Mayoral Golf Day and duly recommended a particular service provider for appointment.

5.2.8 Mr Malgas could not recall the specific name of the company/service provider recommended due to efflux of time. However, Mr Malgas did concede that SCM had already recommended a particular service provider through the normal procurement process, before the deviation that later led to the appointment of Mos M Projects, for the Mayoral Golf Day and Minaki Trading Enterprise for SOMA.[6]

[6] As per recorded audio of the interview at minute 14 – 18 (interview with Mr Malgas).

5.2.9 Similarly, my investigation team held a telephonic interview[7] with the former Senior Procurement Officer of the Municipality; Mr Sandi Majavu (Mr Majavu) on 23 August 2019 at about 11:40. Mr Majavu further corroborated Mr Malgas' evidence and confirmed to my team that there was a normal procurement process that had already been completed and a lowest/cheapest company or service provider was recommended by SCM.

5.2.10 According to Mr Majavu, the recommended company was selected from the municipality's database. Mr Majavu further indicated that although he could not recall the exact name of the recommended company, he indicated that he gave the procurement documents with the company's name to the previous investigator of this matter in my office.

5.2.11 Mr Majavu also indicated to the investigation team that Mos M Projects was not on the database of the Municipality, but that it was imposed by Ms Melato who was from the office of the Mayor at the time.

5.2.12 According to the page 5 (five) of the Executive Summary/Memorandum from SCM to Bid Adjudication Committee (BAC) with the subject, Hiring of Facilities and Procurement of Catering for the SOMA,[8] it was recommended that the BAC should allocate the job to a company called **Chesturbury Trading and Project 15.**

5.2.13 On 23 August 2019, my investigation team held an interview with the Executive Mayor of Lesedi Municipality: Cllr Lerato F Maloka (Cllr Maloka) in connection with this matter. Cllr Maloka was asked to explain her role in relation to the allegations of undue influence by her office in the procurement process for SOMA and the Mayoral Golf Day in 2015. Cllr Maloka did not answer any questions during this interview and only undertook to provide a written

[7] The cellphone number used is known to the Public Protector and shall not be regurgitated here for security reasons.
[8] Part of documentary evidence in my possession received from the Municipality's SCM.

submission. Similarly, Ms Melato did not answer this question during the interview and also undertook to reply in writing.

*Application of the relevant legal prescripts*

5.2.14 Section 217(1) of the Constitution requires that an organ of state, when contracting for goods and services, to make use of a system that is fair, equitable, transparent, competitive, and cost-effective.

5.2.15 The Municipal Supply Chain Management (SCM) process of procuring goods and services by means of public advertisement, including its publication, gives effect to the Constitution's prescripts that all potential suppliers should be afforded the right to compete for public sector business through competitive bidding.

5.2.16 Section 112 (1) of the Municipal Finance Management Act, 2003 (the MFMA) provides that the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost – effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following;

*(a) the range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions, and other types of competitive bidding;*
*(b) when a municipality or municipal entity may or must use a particular type of process;*
*(c) procedures and mechanisms for each type of process;*
*(d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;*
*(e) open and transparent pre-qualification processes for tenders or bids;*

*(f) competitive bidding processes in which only pre-qualified persons may participate;*

*(g) bid documentation, advertising of and invitations for contracts;*

5.2.17 The Municipality, in compliance with the Constitution and MFMA, developed its own SCM, as revised on March 2015.

5.2.18 Clause 36 of the SCM Policy deals with the deviation from normal procurement policy as follows:

*(1) "The accounting officer may—*

*(a) Dispense with the official procurement processes established by this policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only—*

*(I) in an emergency*
*(II) if such goods or services are produced or available from a single provider only;*
*(III) for the acquisition of special works of art or historical;*
*(IV) acquisition of animals for zoos and or nature and game reserves; or*
*(V) in any other exceptional case where it is impractical or impossible to follow the official procurement processes; and*
*(b).....*

*(2) The Accounting Officer must record the reasons for any deviations in terms of subparagraphs (1) (a) and (b) of this policy and report them to the next meeting of the council and include as a note to the annual financial statements.*

*(3) Subparagraph (2) does not apply to the procurement of goods and services contemplated in paragraph 11 (2) of this policy."*

5.2.19 The Municipality's SCM Clause 36 is phrased in exactly the same terms as the general MFMA's Municipal Supply Chain Management Regulation 36 of 2005. The SCM Policy clearly demands that the Municipality ***must record the reasons for any deviations*** (own emphasis) in terms of subparagraphs (1)(a) and (b) of this Policy and report them to the next meeting of the Council and include as a note to the annual financial statements.

5.2.20 However, in this instance, the Municipality did not record any reasons as to why it was faced with limited time frame to embark on a competitive tender process. There were no valid reasons that were provided by the Municipality except the one of time limits.

5.2.21 The SOMA as well as the Mayoral Golf Day are annual calendar events that are foreseeable and can be planned ahead. It is therefore inconceivable how such events can be categorised as an emergency under Clause 36 of the above stated SCM policy. Poor planning or a self-created emergency on the part of the Municipal officials may not translate to emergency envisaged in this Policy. Furthermore, the services which were procured were not available from a single/sole provider only. Any service provider could have provided the services.

Conclusion

5.2.22 Based on the evidence obtained, it can be concluded that the Municipality did not comply with the applicable procurement legal prescripts in procuring the services in this matter.

5.2.23 There is also sufficient evidence which indicates that there was indeed a normal procurement process undertaken by SCM which was later abandoned for deviation purposes. No plausible reasons were advanced by the Municipality for not appointing the recommended service provider namely

**Chesturbury Trading and Project 15** in favour a Mos M Projects which was appointed through a deviation process.

5.2.24 Lastly, there were no circumstances recorded which could have compelled the Municipality not to follow the normal procurement processes that is fair, equitable, transparent, competitive, and cost-effective as demanded by Constitution.

5.3 **Regarding whether the Municipality, Complainant and other applicants suffered prejudice as a result of the appointment of Ms Melato and improper procurement of the tender:**

*Common cause issues*

5.3.1 Ms Melato was appointed to the position of Manager: Special Programmes by the Municipality even though she did not meet the minimum requirements of the post in terms of the advertisement.

5.3.2 According to the appointment letter, Ms Melato was given a salary scale of **R449 796 per annum (Four hundred and forty nine thousands seven hundred and ninety six rand)** excluding benefits, subject to annual increments, pay progression from the date of appointment until present moment.

5.3.3 Mos M Projects, appointed for the Mayoral Golf Day, was paid an amount of **R228 000.00 including VAT** by the Municipality.

5.3.4 The service provider identified for SOMA for catering was Minaki Trading Enterprise and was paid by the Municipality an amount of R**247 400.00 including VAT.**

5.3.5 Both of the above companies/service providers were appointed through a deviation procurement process in terms of Regulation 36 of MFMA SCM guidelines.

*Issues in dispute*

5.3.6 According to the Complainant, Ms Melato is unduly benefitting from her irregular appointment despite being unqualified for the post she occupies.

5.3.7 The Complainant asserted that the Municipality suffered and is still incurring irregular expenditure by paying Ms Melato in the position of Manager: Special Programmes. Other qualifying candidates who also applied for this post were unfairly disqualified in favour of an unsuitable or unqualified candidate.

5.3.8 The Complainant further contested that the Municipality appointed the service provider for the Mayoral Golf Day and SOMA, Mos M Projects and Minaki Trading Enterprises, by way of deviation from normal procurement processes due to self-created limited time frames.

5.3.9 It has been argued by Complainant that the procurement of the above service providers was irregular as the Municipality had no valid reasons not to advertise the tender for competitive bidding as required by legal prescripts.

5.3.10 The Municipality contended that Ms Melato is in possession of an NQF Level 6 in the form of an "*Executive Leadership Development Programme Certificate which is equivalent to NQF 6, if not more than the post requirements".* The Municipality further contended that the deviation process in this case was in line with a Council Resolution, its SCM policy and other applicable legal prescripts.

*Application of the relevant legal prescripts*

5.3.11 Section 55(1) of the Local Government: Municipal Systems Act[9] (MSA) provides as follows:

*"The Municipal Manager, as head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for—*

*(e) the appointment of staff other than those referred to in section 56(a),subject to the Employment Equity Act, 1998 (Act No. 55 of 1998)"*

5.3.12 Section 67(1) of the Municipal Systems Act provides as follows:

*"A municipality, in accordance with the Employment Equity Act 1998, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including:*

*(a) the recruitment, selection and appointment of persons as staff members;"*

*The Municipality Recruitment and Selection Policy is a system that ensures compliance with section 67(1) of the Municipal Systems Act.*

5.3.13 The Interview Panel did not follow the policy directives of the Municipal Council namely the Recruitment Policy as entrusted/delegated to them when appointing Ms Melato. Similarly, Mr Makhanya and the SCM personnel did not follow the SCM policy of the Municipality when procuring the services of private companies for SOMA as shown in evidence above.

5.3.14 Section 62(1)(d) of the MFMA provides as follows:

[9] Act 32 of 2000.

*"That the Accounting Officer is responsible for managing the financial administration of the Municipality and must for this purpose take all reasonable steps to ensure that unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented."*

5.3.15 In terms of section 1 of MFMA, **irregular expenditure** is defined as follows:

***"irregular expenditure"**, in relation to a municipality or municipal entity, means—*

*(a) Expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of this Act, and which has not been condoned in terms of section 170;*

*(b) Expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the Municipal Systems Act, and which has not been condoned in terms of that Act;*

*(c) Expenditure incurred by a municipality in contravention of, or that is not in accordance with, a requirement of the Public Office-Bearers Act, 1998 (Act No. 20 of 1998); or*

*(d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality's by-laws giving effect to such policy, and which has not been condoned in terms of such policy or by-law, but excludes expenditure by unauthorised expenditure."*

5.3.16 Ms Melato was appointed in contravention of the Municipality's Recruitment Policy, MFMA and MSA as indicated herein. By corollary, this conduct would amount to irregular expenditure as defined above as Ms Melato would be paid a salary whereas she does not qualify for the position. Similarly, the amounts of money paid to the service providers at SOMA and the Mayoral Golf Day

would also be an irregular expenditure since the procurement was at odds with the SCM policy as explained above.

5.3.17 Section 94(1)(b) of the MFMA requires that:

"*The accounting officer of a municipal entity must act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity.*"

5.3.18 The members of the Interview Panel and Mr Makhanya appointed Ms Melato without following a prescribed recruitment process thereby failing to act with utmost honesty and integrity. As a result, the said appointment could not have been in the best interest of the Municipality.

5.3.19 Section 94(1) (d) of MFMA requires that the Accounting Officer;

"*Seek, within the sphere of influence of that accounting officer, to prevent any prejudice to the financial interests of the parent municipality or the municipal entity.*"

5.3.20 The members of the Interview and Mr Makhanya appointed Ms Melato without following a prescribed recruitment process thereby leading to improper prejudice to other prospective applicants who participated in the recruitment process.

5.3.21 Section 94(2)(a) of the MFMA provides that:

"*The accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this Act.*"

5.3.22 The appointment of Ms Melato without the minimum academic qualifications and outside the Recruitment Policy as was done here, was in direct contravention of section 94(2)(a) of the MFMA.

5.3.23 Section 32 of MFMA provides that:

*"(1) Without limiting liability in terms of the common law or other legislation—*

*(a) ...;*

*(e) the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3);*

*(f) ...; or*

*(g) ...*

*(2) A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure—*

*(a)...—*

*(i)...; or*

*(ii) ...; and*

*(b)... in the case of irregular or fruitless and wasteful expenditure is after investigation by a council committee, certified by the council as irrecoverable and written off by the council.*

*(3)...*

*(4) The accounting officer must promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of—*

*(a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;*

*(b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and*

*(c) the steps that have been taken—*

*(i) to recover or rectify such expenditure; and*

*(ii) to prevent a recurrence of such expenditure."*

5.3.24 It follows from the above cited provisions that a municipal manager has a legal obligation not only to prevent but recover irregular expenditure incurred by municipality.

*Conclusion*

5.3.25 Based on the evidence obtained, it can be concluded that the appointment of both Ms Melato and the above stated service providers were irregular and not in compliance with the applicable legal prescripts, thereby causing financial prejudice to the Municipality and improper prejudice to other applicants to the post.

**Response to the Notice in terms of the provisions of section 7(9) (a) of the Public Protector Act, 1994, by Acting Municipal Manager Advocate Gugu Thimane.**

5.3.26 On 24 June 2019, I signed off and subsequently issued all implicated Lesedi Local Municipal officials including other parties with direct interest in this matter with a notice in terms of section 7(9) (a) of the Public Protector Act, with a view to afford them an opportunity to respond to the allegations against them, particularly in relation to the role they played in this matter. Section 7(9)(a) of the Public Protector Act provides that: -

*"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."*

5.3.27 I now turn to consider the responses submitted regarding the section 7(9) notices (hereinafter referred to as notice). I have however, not dealt with each and every aspect raised in the responses but that should not be misconstrued as an admission of any kind of the averments contained therein.

**A response was received by my office dated 15 July 2019 from the Acting Municipal Manager's office, Advocate Gugu Thimane (Adv Thimane).**

5.3.28 Adv Thimane indicated that any attempt to rebut the allegations and preliminary findings as contained in my provisional report would be, at the very least, disingenuous and at most, dishonest. Adv Thimane appreciated the opportunity granted to the Municipality to submit inputs and or to make submissions before a final report and findings are made in this matter. Adv Thimane opted to refrain from making any submissions at that stage and indicated that she shall abide by the findings of the Public Protector in the matter once the final report is tabled.

**Response to the Notice in terms of the provisions of section 7(9) (a) of the Public Protector Act, 1994, Former Municipal Manager, Mr Ayanda Makhanya.**

5.3.29 Mr Makhanya responded to my Notice as per letter dated 18 July 2019 and indicated that he was employed as a Municipal Manager at Lesedi in August 2012 and that his services were unfairly terminated in April 2017. Mr Makhanya also stated that he had been on prolonged and unfair suspension from office since October 2015 contrary to the narrative that he failed to report malfeasance in the Municipality.

5.3.30 Mr Makhanya argued that prior to his suspension he had caused a report to be given to the then Speaker of Council and other councillors in general, about the probable cause for the fallout with the Executive Mayor (Cllr Maloka) and

the respective role played by Ms Melato, on wanting to influence procurement decisions through attempts to interfere with the running of the administration. The same report was given to the then District Mayor, Mr Simon Mofokeng, and the former Head of Department: Gauteng COGTA, Mr Nhlakanipho Nkontwana. These reports were also furnished to my team by Mr Makhanya in support of his assertion.

5.3.31 Further, Mr Makhanya confirmed that Ms Melato interacted with Cllr Maloka after her appointment at the Municipality in 2015. As Manager: Special Programmes, Ms Melato is responsible for the day to day running of the activities in the office of the Executive Mayor. Further that both Cllr Maloka and Ms Melato come from Phuthaditshaba in the Free State Province, and thus Ms Melato reports directly to Cllr Maloka as a functionary in her office and administratively to the Senior Manager: Monitoring and Reporting. Mr Makhanya indicated that he did not participate in any activities that led to appointment Ms Melato, that is, shortlisting, interview, vetting of qualifications and criminal record, salary negotiations and putting together a submission for approval on the appropriateness of the person that was being recommended for employment. Mr Makhanya submitted that his role was to process a recommendation that recommended Ms Melato as a fit and proper person for appointment as Manager: Special Programmes.

5.3.32 On the circumstances that led to the procurement of service providers for the SOMA and the Mayoral Golf Day, Mr Makhanya mentioned that he is not sure whether he was still at work when it was processed. Mr Makhanya averred that my section 7(9) notice mentioned that the appointment of Mos M Projects was signed and approved by Mr Rampedi on 26 October 2015, however, according to Mr Makhanya he was still employed on this date. Mr Makhanya further argued that any approval by Mr Rampedi was irregular as he had no delegated authority.

5.3.33 Mr Makhanya concurred with the finding that Ms Melato fabricated her qualifications on her CV and indicated that he only became aware of this after the AG findings in December 2015, whilst he was on suspension. Mr Makhanya alleged that he was shocked to discover that Ms Melato misrepresented her qualifications in the CV. Mr Makhanya submitted that the verification of academic records and criminal checks are the responsibility of the Ms Nerina Ramdaloo, who is still employed at the Municipality as a Senior HR Practitioner. Mr Makhanya stated that he would have relied on such checks and balances, that is, policies, systems and processes, including periodic audits, that were put in place to red flag any malfeasance in office or collusive behaviour that would have resulted in such erosion in good governance. Mr Makhanya mentioned that his role to deal with AG findings was curtailed through his unfair suspension, which happened before the AG findings.

5.3.34 Mr Makhanya argued further that it was only on the 12th of September 2018, after his employment had long been terminated, that Ms Melato's CV was leaked to him, which indicated that Ms Melato listed her qualifications as a Bachelor of Administration (University of the North, QwaQwa branch), Bachelor of Development Administration (UNISA), Programme Management (University of Natal), Programme Management (Wits Business School) and Executive Leadership Municipal Development Programme (University of Pretoria). According to Mr Makhanya, from the listings above; it is clear that Ms Melato's intention was to deceive through misrepresentation and ultimately, this has resulted in her financial or personal gain to the detriment of the taxpayers.

5.3.35 Mr Makhanya further submitted that what is alarming, is the fact that Ms Melato has been allowed to remain in gainful employment of the Municipality, four years after such findings by the AG. Mr Makhanya submitted further as follows:

*"That nothing was done about it for this long, may perhaps, point to the degree of protection that Ms Melato enjoys politically and the extent to which malfeasance in office is tolerated, through collusive behaviour, in the Municipality. In that regard, the subsequent acting Municipal Managers, that occupied this position immediately thereafter to-date should have acted to prevent further expenditure which was, and continues to be, incurred in vain and recovered such from the beneficiary thereof timeously, whilst proceeding against Ms Melato criminally. Furthermore, Mr Makhanya indicated the findings of the AG are tabled in the Audit Committee, Mayoral Committee and committee of council, and finally Council. Further that the silence of these committees and its members, which are tasked with governance oversight leaves a lot to be desired".*

5.3.36 Mr Makhanya further submitted that on or about the 12th of June 2015, a dispute arose on the suitability of a service provider that was recommended by the SCM after due process was followed in order to comply with the Municipality's SCM Policy, that is, advertisement and evaluation with recommendations, which was led by Mr Paul Malgas (Malgas) as Manager SCM. This dispute was being spearheaded through the Executive Mayor's office by Cllr Maloka and Ms Melato against the functionary in the SCM by the name of Mr Sandi Majavu (Majavu) who had occupied the position of Senior Procurement Officer. The objections were that a company without any appropriate experience was being recommended.

5.3.37 In essence, Mr Makhanya argued that the Executive Mayor: Cllr Maloka was interfering with procurement processes, using the power of her office to usurp the process from SCM and Municipal Manager's office. According to Mr Makhanya's submission, Cllr Maloka was emotional whilst threatening to cancel the event with the resultant adverse cost implications.

5.3.38 According to Mr Makhanya, the State of the Municipal Address (SOMA) would have taken place on the 18th of June 2015, within six (6) days and any attempt

at restarting this process again would have fallen foul of policy based on the threshold values and timelines attached thereto. Further that , most of the organising had already been completed, which included amongst other things, adverts popularising the event, invites being sent to key stakeholders and dignitaries with appropriate confirmations having been received, KAYA FM having been secured for live broadcasting and the brass band that would perform therein.

5.3.39 Mr Makhanya submitted that allowing the event not to proceed based on this dispute would have caused the Municipality more harm and resulted in the undesirable fruitless and wasteful expenditure. In such discussions, Minaki Trading Enterprise (Minaki) was touted by Cllr Maloka and Ms Melato as the company that had appropriate experience to deliver to the satisfaction of all stakeholders, having done similar work for Sedibeng District Municipality.

5.3.40 Based on the aforesaid situation, whilst trying to manage the risks that the Municipality was facing, Mr Makhanya, in exercising his discretion conferred upon him by the regulations and policy, utilised Section 36 of the SCM Policy to appoint Minaki. The justification used in that regard was the impracticality clause contained specifically in section 36 (1)(a)(v), subject to negotiations on price being firmed and agreed upfront so that the rates were in line with the norm established through the earlier tender process.

5.3.41 Mr Makhanya stated that he supported Mr Majavu's initial recommendations, for the appointment of the other entity, whose identity he could not recall. *"Mr Makhanya mentioned that he was confronted by Cllr Maloka's manipulative, together with her proxy Ms Melato, calculated threats of cancellation of SOMA when she knew that Municipal funds had already been spent in the preparation for SOMA and in certain instances, the Municipality had already bound itself legally by booking service providers. Mr Makhanya said he was forced to save the day and resolve the impasse and the untenable situation".*

5.3.42 Mr Makhanya further averred that cancellation of SOMA five (5) days before the scheduled date would have meant that the Municipality would have incurred fruitless and wasteful expenditure and the reputational risks or damage associated with the cancellation decision. The Municipality would not have recovered the moneys already paid to service providers and would have been exposed to legal action. Mr Makhanya submitted that he considered the situation to fall within section 36(1) (a)(v) of the MFMA, hence the approval of the deviation.

5.3.43 According Mr Makhanya, deviations are policy matters that have been fully delegated to the Accounting Officer, Municipal Manager, of the municipality by the accounting authority, Council. Subsection (1) gives the Municipal Manager the discretion to approve or reject any application for deviations. The SOMA and the Mayoral Golf Day events are indeed annual events. As part of demand management, procurement plans were in place to procure such services and indeed open tender processes were followed. Mr Makhanya argued that the SOMA procurement process was halted at recommendation stage, when Cllr Maloka and Ms Melato disputed the specification that was issued to bidders and the outcome of the bidding process.

5.3.44 Ultimately, Mr Makhanya submitted that the powers that be namely, Cllr Maloka and Ms Melato, should shed light on why this procurement was halted, thereby forcing him to embark on a deviation at the last moment.

**Response to the Notice in terms of the provisions of section 7(9) (a) of the Public Protector Act, 1994 as per Tshiqi Zebediele Attorneys on behalf of Cllr Maloka and Ms Melato.**

5.3.45 Cllr Maloka and Ms Melato responded to my Notice and Interview questions posed to them by my team on 23 August 2019. The interview questions posed to Cllr Maloka included amongst other things her alleged undue influence into procurement activities and appointment of Ms Melato. The response was

received by my office as per letters dated 12 September 2019 through the legal representatives Tshiqi Zebediele Attorneys (Zebediele Attorneys).

5.3.46 Messrs. Zebediele Attorneys argued that Mr Makhanya as the Municipal Manager was the sole authority/person responsible in terms of Local Government and Municipal Systems Act 23 of 2000 for appointment of staff[10], efficient, effective and economic administration of the municipality. It was further argued by Zebediele Attorneys that Ms Melato applied for the position of Manager Special Programme, she was shortlisted, interviewed and appointed. Furthermore, that Ms Melato did not play any role in her own appointment.

5.3.47 It was contended that Mr Makhanya is the only one who could provide irrefutable evidence of where and how he was pressured, improperly influenced or misled to appoint Ms Melato or any other employee. In a nutshell, allegations of any undue influence by Cllr Maloka in the appointment of Ms Melato or on procurement were categorically denied and Mr Makhanya was placed in proof thereof.

5.3.48 Ms Melato admitted during the interview with my team on 23 August 2019 that she is also from Phuthaditshaba in the Free State but categorically denied that this had any bearing in her appointment as Manager Special Programmes at Lesedi Municipality.

*Conclusion*

5.3.49 Based on the reports supplied by Mr Makhanya in support of his assertion above, it does not appear from such reports that acts pertaining to malfeasance in the Municipality, were reported to COGTA, Internal Auditors District Municipality, Council and its committees. Instead, in these reports Mr Makhanya sought to address other issues not related to this investigation. This

[10] Other than those referred to in section 56 Local Government and Municipal Systems Act 23 of 2000.

investigation was solely concerned about procurement for SOMA, Mayoral Golf Day and appointment of Ms Melato. These issues were not raised in the reports supplied by Mr Makhanya in support of his assertion.

5.3.50 Notwithstanding all the arguments and protestation by Mr Makhanya in his submission, I am of the view that Mr Makhanya should have stood firmly by the regulatory policies/framework and not succumb to any pressure of initiating an unlawful deviation procurement process. A procurement process had already been undertaken by SCM as indicated above and Mr Makhanya should have insisted on the appointment of the service provider that was appointed along proper normal procurement processes. As the Municipal Manager, he was the accounting officer and responsible for overall administration of the Municipality.

## 6. FINDINGS

Having carefully examined the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been complied with, I make the following adverse findings against the Lesedi Local Municipality.

### 6.1 Regarding whether the Lesedi Local Municipality irregularly appointed Ms Melato without the requisite qualifications as its Manager: Special Programmes:

6.1.1 The allegation that the Municipality irregularly appointed Ms Melato as a Manager: Special Programmes without following proper recruitment processes, is substantiated.

6.1.2 My investigation revealed that Ms Melato did not possess the requisite academic qualifications for the position of the Manager: Special Programmes,

namely, the NQF level 6/7. *The SAQA* confirmed that Ms Melato's qualification, the *Executive Leadership Municipal Development Programme,* provided by the University of Pretoria from February to October 2009 is a short course and is not registered on the NQF, nor does it have a NQF level.

6.1.3 The AG's audit findings revealed further that there were employees, including Ms Melato, in the employ of the Municipality who do not have the qualifications commensurate with the posts they occupy.

6.1.4 I find therefore that, the Municipality failed to promote and maintain the constitutional standard of professional ethics, to foster transparency and to ensure good human-resource management in this case.

6.1.5 Equally, I find that the Municipality did not observe its own Recruitment Policy which requires it to attract competent individuals for every task and to fill all vacant positions with the best qualified and/ or skilled applicants. In short, the Municipality failed to put the right person in the right position and to ensure that applicants are shortlisted in accordance with the advertisement and minimum requirements set therein. Factors to be considered when making an appointment such as formal qualifications were not considered by the Municipality.

6.1.6 The Municipality, in particular the members of the Interview Panel namely, Jabu Marwa, Jankie Khumalo and Nerina Ramsammy violated the service standards and guidelines as laid out in section 195(1) of the Constitution, Clauses 1, 9 and 15 of the Recruitment Policy.

6.1.7 The evidence does not reveal any active participation by Mr Makhanya in the shortlisting and interview stages except to approve appointment based on the strength of the Interview Panel's recommendations. Furthermore, Mr Makhanya convincingly argued his innocence by indicating the following:

*"That his role was to process a recommendation that recommended the applicant (Ms Melato) as fit and proper person for appointment as Manager: Special Projects. The Lesedi Local Municipality operates through a system of delegations, the Delegated Powers of Authority, which is an acknowledgement that a Municipal Manager alone cannot perform all the tasks assigned to him but must rely on his subordinates and entrust such to perform their responsibilities with utmost good faith"*

6.1.8 The conduct by the Interview Panel constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**6.2 Regarding whether the Lesedi Local Municipality improperly procured a tender for the State of the Municipal Address and Mayoral Golf Day without following the procurement processes:**

6.2.1 The allegation that the Municipality improperly procured a tender during SOMA and Mayoral Golf Day without following the procurement policy, is substantiated.

6.2.2 I find that the Municipality failed to uphold the Constitution by way of ensuring that as an organ of state, when contracting for goods and services, make use of a system that is fair, equitable, transparent, and competitive. Similarly, the Municipality failed to record any proper reasons for its deviations from the normal procurement process.

6.2.3 Furthermore, the grounds advanced by the Municipality for deviation do not meet criteria to be classified as emergency in terms of the applicable procurement law. There were no impractical circumstances which compelled the Municipality to deviate from the normal procurement processes or not to appoint the service provider that was recommended under the first normal procurement process.

6.2.4 Accordingly, the Municipality and in particular Ms Melato, Mr Rampedi and Mr Makhanya violated section 217 of the Constitution, section 112 (1) and 32 of the MFMA and Clause 36(5) Municipality's SCM Policy as they all collectively initiated, participated and irregularly approved this deviation. There is no evidence of active role played by Mr Malgas, Mr Majavu and Cllr Maloka in the deviation procurement process.

6.2.5 Such conduct by Ms Melato, Mr Rampedi and Mr Makhanya constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**6.3 Regarding whether the Municipality, Complainant and other applicants suffered prejudice as a result of the appointment of Ms Melato and improper procurement of the tender:**

6.3.1 The allegation that the Municipality suffered prejudice as a result of an alleged irregular appointment of Ms Melato and the improper procurement of the tender, is substantiated.

6.3.2 The prejudice caused to other candidates who had applied for the post, would likely be irreversible as long as the appointment of Ms Melato is allowed stand. The integrity of the selection process was compromised. According to the appointment letter, Ms Melato was given a salary scale of **R449 796 per annum (Four hundred and forty nine thousands seven hundred and ninety six rand)** excluding benefits, subject to annual increments, pay progression from the date of appointment until present moment.

6.3.3 Mos M Projects, appointed for the Mayoral Golf Day, was paid an amount of **R228 000.00 including VAT** by the Municipality.

6.3.4 The service provider identified for SOMA for catering was Minaki Trading Enterprise and was paid by the Municipality an amount of R**247 400.00 including VAT.**

6.3.5 The conduct of the Municipality or its officials as shown above was in violation of section 195(1) of the Constitution, section 217 of the Constitution, section sections 62(1) (d) and 94(1) of the MFMA, section 112 (1) and 32 of the MFMA Clause 36(5) Municipality's SCM Policy and Clause 1, 9 and 15 of the Recruitment Policy.

6.3.6 The conduct by the Municipality and its officials constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## 7. REMEDIAL ACTION

The appropriate Remedial Action that I am taking in pursuit of section 182(1) (c) of the Constitution is the following:

**The Municipal Manager of Lesedi Local Municipality must:**

7.1.1 Within sixty (60) working days from the date of this report, initiate a judicial review process in terms of section 6 and 7 of PAJA to review the appointment of Ms Melato on the basis that she was irregularly appointed to a post of Manager Special Programmes without having the minimum academic requirements for the post.

7.1.2 Within sixty (60) working days of the issue of this report, all Municipal officials who are involved in the Procurement processes, Recruitment and Selection processes including all the senior management, attend a workshop on the Procurement Policy, MFMA SCM Regulations, Recruitment and Selection Policy and related legal prescripts of the Municipality.

7.1.3 Within thirty (30) working days from the date of this report, s/he takes disciplinary steps against all the Municipal officials who are still in its employ, that were responsible for violation of the Constitution, MFMA, Municipality's SCM Policy and Recruitment and Selection Policy of the municipality.

7.1.4 Within thirty (30) days of the date of this report implements or work on the recommendations/findings of the report of the Auditor General in connection with the adverse finding on the appointment of Ms Melato.

7.1.5 Within sixty (60) working days from the date of this report, disclose any irregular expenditure to the Council and Treasury.

**The Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks:**

**The appropriate recommendation that I am making in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks) is as follows:**

7.1.6 Within thirty (30) working days from the date of this report, consider initiating a criminal investigation and probe whether or not there was any deliberate or intentional effort by Ms Melato or any other person to misrepresent facts, or commit fraud or forgery by way of creating an impression to the Municipality that Ms Melato held a degree in Bachelor of Administration as per her CV, when she did not possess such qualification.

## 8. MONITORING

8.1 The Municipal Manager must submit an Implementation Plan to my office within thirty (30) working days from the date of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of ***Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others*[2016]ZACC 11**, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Municipal Manager unless they obtain an *Interim Interdict* or *Court Order* directing otherwise.

**ADV. BUSISIWE MKHWEBANE**
**PUBLIC PROTECTOR OF THE**
**REPUBLIC OF SOUTH AFRICA**
**DATE:** 24/01/2020

Assisted by: Nthengiseni Mulaudzi and Vusumuzi Dlamini (Gauteng Provincial Office)