

**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**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF TENDER  
IRREGULARITIES AND VICTIMISATION AS PER TENDER GT/BULK  
LIQUIDS/HO/2019 BY THE GAUTENG DEPARTMENT OF SOCIAL  
DEVELOPMENT**

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## LIST OF ACRONYMS

BAC:	Bid Adjudication Committee
BEC:	Bid Evaluation Committee
CONSTITUTION	The Constitution of the Republic of South Africa, 1996
DAC:	Departmental Acquisition Committee
HOD:	Head of Department
GPT:	Gauteng Provincial Treasury
GDSD:	Gauteng Department of Social Development
MEC	Member of Executive Council
MOU:	Memorandum of Understanding
MKM Attorneys:	Murphy Kwape Maritz Attorneys
PPA	Public Protector Act No. 23 of 1994
PAIA:	Promotion of Access to Information Act No. 2 of 2000
PAJA:	Promotion of Administrative Justice Act No. 3 of 2000
PPSA:	Public Protector South Africa
RFQ:	Request for quotation
SARS:	South African Revenue Services
SBD:	Standard Bidding Document
SCM:	Supply Chain Management
VAT:	Value Added Tax

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## EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1) (b) of the Constitution, which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated.
- (ii) The report relates to an investigation into allegations of tender irregularities and victimisation in connection with tender number GT/Bulk Liquids/HO/2019 by the Gauteng Department of Social Development (GDSD).
- (iii) The complaint was lodged with the Public Protector by Mr Amanath Soorju (the Complainant) on 21 January 2020.
- (iv) In the main, the Complainant alleged that:
  - (a) There is massive tender irregularities in respect of tender GT/Bulk Liquids/HO/2019, which needs to be scrutinized and placed on hold;
  - (b) He tendered for the above mentioned tender with the GDSD and was called to a meeting on 20 November 2019, at the GDSD's offices where it was indicated that he and his competitor, Mrs Phindile Duma (Mrs Duma) were successful;
  - (c) Ms Ntombi Mekgoe (Ms Mekgoe), Supply Chain Manager, Ms Mbali Ndlovu (Ms Ndlovu), Sustainable Livelihoods and Ms Phindile Lengoasa (Ms Lengoasa), Supply Chain Manager from the GDSD, told the Complainant that his tender pricing was the lowest. GDSD officials wanted to proceed with the meeting in the absence of Mrs Duma and the Complainant objected as it appeared as if it was a foregone conclusion that her presence was not necessary;

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- (d) After Mrs Duma arrived, Ms Mekgoe then told Mrs Duma that the Departmental Acquisition Committee (DAC) approved two service providers, which were the Complainant and Mrs Duma's companies. Ms Mekgoe further told Mrs Duma that her pricing was approximately two to three Rands more expensive than the Complainant's pricing, effectively averaging three million rand (R3 million) more, across the tender. Mrs Duma was told that she must adjust her pricing to get half the tender in line with Complainant's pricing;
- (e) Mrs Duma questioned the GDSD officials about the Complainant's pricing and all the Complainant's pricing was revealed to Mrs Duma in that meeting. This was a violation of the Standard Bidding Document (SBD) which expressively talks about no collusion on a vertical plain. GDSD officials actually enforced the violation to such an extent that they made Mrs Duma reduce her pricing and concluded the meeting by saying that Mrs Duma must send an email to confirm her new pricing;
- (f) The Complainant maintained his pricing, which is the same pricing he put in the tender box, but he was asked to allocate seven Rands (R7.00) more towards packaging, as this is what Mrs Duma charged and that it is more favourable towards the co-operatives. The Complainant was instructed to change his pricing accordingly, which would be outsourced to co-operatives for packaging. He acceded to this and signed the document. The Complainant's overall basket pricing remained the same from the time of the tender until the tender was awarded;
- (g) The GDSD officials namely, Ms Mekgoe, Ms Ndlovu and Ms Lengoasa, then indicated that both Complainant and Mrs Duma got half of the initial tender quantities (600 000) each from the overall tender of 120 000 and that their letters of award would be sent to them by the end of the week;
- (h) The Complainant proceeded to order all the raw material, goods and consumables and to set up a factory with machinery which amounted to millions

- of Rands. He needed to be proactive in order to meet deadlines as the items requested were to be manufactured specifically for the project;
- (i) The GDSD then on 11 December 2019 issued the Complainant with a letter citing its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers and Mrs Duma received an award letter. The Complainant responded through his attorney on 13 December 2019 requesting the GDSD to provide him with reasons for blacklisting and to put the tender on hold until he received the reasons for such a decision to withhold the award letter to his company, due to alleged blacklisting;
  - (j) The Complainant asked the Head of Department (HoD) of the GDSD, Ms Thembeni Mhlongo (Ms Mhlongo) for reasons and Ms Mhlongo's "WhatsApp" response was that the Complainant should communicate with the author of the letter, namely Mr Johann Strauss (Mr Strauss), the Chief Financial Officer of the GDSD, even though the letter was signed by Ms Mhlongo;
  - (k) It was stated in the letter that the Complainant will be blacklisted on the National Treasury database of defaulters and restricted service providers, due to the outcome of a forensic investigation conducted by Messrs. Bowman Attorneys (Bowmans) regarding the supply of food parcels sourced through transfer payments prior to May 2018; and
  - (l) The Complainant further alleged that he formally lodged an application to the GDSD on the 6 February 2020, in terms of Section 18(1) of the Promotion of Access to Information Act (PAIA),<sup>1</sup> to have access to the forensic investigation report. He has been denied a tender amounting to twenty two million Rand (R22 million) and he has still not received answers why he did not receive the tender.
  - (v) Based on the analysis of the complaint, the following issues were considered and investigated:

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<sup>1</sup> Act 2 of 2000.

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- (a) Whether there was a failure by the GDSD to provide reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers; and whether it refused to provide him with the Bowman`s forensic investigation report requested through PAIA, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (b) Whether the GDSD disclosed the Complainant`s pricing to his competitor during the price negotiation meeting held on 20 November 2019, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
- (vii) On 19 September 2022, a notice in terms of section 7(9) of the Public Protector Act was issued to the Head of Department (Gauteng Department of Social Development), Ms Thembeni Mhlongo (Ms Mhlongo), the Premier (Gauteng Province), Mr David Makhura (Mr Makhura) and Member of Executive Council (Gauteng Department of Social Development), Ms Morakane Mosupyoe (Ms Mosupyoe) to provide an opportunity for the responses on the likely adverse findings and proposed remedial action. Sections 7(9)(a) and (b) of the Public Protector Act provide that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations in response thereto.
- (viii) A response was received on 29 September 2022. The response and information/ evidence submitted in response to the notice in terms of section 7(9) of the Public

Protector Act, were duly considered by the Public Protector in relation to the substance of any allegations against the person(s) concerned or the grounds for adverse comments or findings against or remedial action involving them.

(ix) Having regard to the evidence and regulatory framework determining the standard that the (GDSD) should have complied with, the following findings are made:

(a) **Whether there is a failure by the GDSD to provide reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers and whether it refused to provide him with the Bowman's forensic investigation report requested through PAIA, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act:**

(aa) The allegation that there was a failure by the GDSD to provide full reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers, **is substantiated**.

(bb) The GDSD also refused the PAIA request of the Complainant to obtain a copy of the Bowman's forensic report.

(cc) The evidence in the Public Protector's possession indicates that the GDSD failed to provide the Complainant with adequate reasons (as taken after the outcome of the Bowman's forensic investigation report) in its letter of intention to blacklist his Company on the National Treasury database of defaulters and restricted service providers.



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- (dd) The Complainant was and is still unable to provide a response to or provide reasons why his Company should not be blacklisted, as he still does not know on what basis the GDSD is intending to blacklist his Company on the National Treasury database of defaulters and restricted service providers.
- (ee) The GDSD has to date also not informed the National Treasury of its intention to blacklist the Complainant's Company on the National Treasury database of defaulters and restricted service providers, as the Complainant has not submitted reasons why his Company should not be blacklisted. Both the Complainant and the GDSD are thus in limbo in this process.
- (ff) The evidence in the possession of the Public Protector further indicates that the GDSD did not follow prescribed processes in responding to the Complainant's PAIA request to access the Bowman's forensic investigation report – which report led to the intention to blacklist his Company on the National Treasury database of defaulters and restricted service providers. However, the GDSD indicated that they were not in possession of the report (as it was with GPT), and that the report was classified as confidential.
- (gg) The conduct of the HoD of the GDSD, Ms Mhlongo in not providing adequate reasons for the intention to blacklist the Complainant's Company is in violation of Section 33 of the Constitution; section 3(2)(b) of the PAJA and Regulation 2(2) of the Supply Chain Management office Practice note. Sections 25 and 26 of the PAIA were also not properly adhered to in that the Complainant was not advised of his rights in terms of PAIA and in that the GDSD delayed in responding to the Complainant's PAIA request.

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- (hh) Accordingly, the conduct of the GDSD in the circumstances, constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) **Whether the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**
- (aa) The allegation that the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019, **is unsubstantiated**.
- (bb) There is no evidence in the Public Protector's possession that indicates that the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019.
- (cc) The conduct of the GDSD officials and in particular that of Ms Mekgoe was not in contravention of section 217(1) of the Constitution, Clause 19 of the Preferential Procurement Regulations and Clause 13.2 of the GDSD Supply Chain Management Policy in dealing with the price negotiation meeting held on 20 November 2019.
- (dd) Accordingly, the conduct of the GDSD in the circumstances, does not 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.

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

**The Head of the Department of the Gauteng Department of Social Development must ensure that:-**

- (aa) In terms of Section 33 of the Constitution, Section 3(2)(b) of the PAJA and Regulation 2(2) of Supply Chain Management Office Practice Note, within **thirty (30) working days** of receipt of this report provide full reasons to the Complainant for its intention to blacklist Ubunyoninco Trading and Projects in line with the Bowman's forensic report.

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## **REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF TENDER IRREGULARITIES AND VICTIMISATION AS PER TENDER GT/BULK LIQUIDS/HO/2019 BY THE GAUTENG DEPARTMENT OF SOCIAL DEVELOPMENT**

### **1. INTRODUCTION**

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant) for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:
- 1.2.1 The Head of Department of the Gauteng Department of Social Development: Ms Thembeni Mhlongo;
- 1.2.2 Member of Executive Council (MEC) for the Gauteng Department of Social Development: Ms Morakane Mosupyoe;
- 1.2.3 The Premier of the Gauteng Province: Mr David Makhura; and
- 1.2.4 Mr Amanath Soorju, the Complainant.
- 1.3 The report relates to an investigation into allegations of tender irregularities and victimisation in connection with tender number GT/Bulk Liquids/HO/2019 by the GDSD.

## 2. COMPLAINT

2.1 The complaint was lodged with the Public Protector by Mr Amanath Soorju (the Complainant) on 21 January 2020.

2.2 In the main, the Complainant alleged that:

2.2.1 There is massive tender irregularities in respect of tender GT/Bulk Liquids/HO/2019, which needs it to be scrutinized and placed on hold;

2.2.2 He tendered for the above mentioned tender with the GDSD and was called to a meeting on 20 November 2019, at the GDSD's offices where it was indicated that he and his competitor, Mrs Duma were successful;

2.2.3 Ms Mekgoe, Supply Chain Manager, Ms Ndlovu, Sustainable Livelihoods and Ms Lengosa, Supply Chain Manager from the GDSD, told the Complainant that his tender pricing was the lowest. GDSD officials wanted to proceed with the meeting in the absence of Mrs Duma and the Complainant objected as it appears as if it was a foregone conclusion that her presence was not necessary;

2.2.4 After Mrs Duma arrived, Ms Mekgoe then told Mrs Duma that the DAC approved two service providers, which is the Complainant and Mrs Duma's companies. Ms Mekgoe further told Mrs Duma that her pricing was approximately two to three Rands more expensive than the Complainant's pricing, effectively averaging R3 Million more across the tender. Mrs Duma was told that she must adjust her pricing to get half the tender in line with Complainant's pricing;

2.2.5 Mrs Duma questioned the GDSD officials about the Complainant's pricing and all the Complainant's pricing was revealed to Mrs Duma in that meeting. This was a violation of the Standard Bidding Document (SBD) which

- expressively talks about no collusion on a vertical plain. GDSD officials actually enforced the violation to such an extent that they made Mrs Duma to reduce her pricing and concluded the meeting by saying that Mrs Duma must send an email to confirm her new pricing;
- 2.2.6 The Complainant maintained his pricing, which is the same pricing he put in the tender box, but he was asked to allocate seven Rands more towards packaging as this is what Mrs Duma charged and that it is more favourable towards the co-operatives. The Complainant was instructed to change his pricing accordingly, which would be outsourced to co-operatives for packaging. He acceded to this and signed the document. The Complainant's overall basket pricing remained the same from the time of the tender until the tender was awarded;
- 2.2.7 The GDSD officials namely, Ms Mekgoe, Ms Ndlovu and Ms Lengoasa, then indicated that both Complainant and Mrs Duma got half of the initial tender quantities (600 000) each from the overall tender of 120 000 and that their letters of award would be sent to them by the end of the week;
- 2.2.8 The Complainant proceeded to order all the raw material, goods and consumables and to set up a factory with machinery which amounted to millions. He needed to be proactive in order to meet deadlines as the items requested were to be manufactured specifically for the project;
- 2.2.9 The GDSD then on 11 December 2019 issued the Complainant with a letter citing its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers and Mrs Duma received an award letter. The Complainant responded through his attorney on 13 December 2019 requesting the GDSD to provide him with reasons for blacklisting and to put the tender on hold until he received the reasons for such a decision to withhold the award letter to his company, due to alleged blacklisting;

- 2.2.10 The Complainant asked the Head of Department (HoD) of the GDSD, Ms Mhlongo for reasons and Ms Mhlongo's "WhatsApp" response was that the Complainant should communicate with the author of the letter, namely Mr Strauss, the Chief Financial Officer of the GDSD, even though the letter was signed by Ms Mhlongo;
- 2.2.11 It was stated in the letter that the Complainant will be blacklisted on the National Treasury database of defaulters and restricted service providers, due to the outcome of a forensic investigation conducted by Messrs. Bowman Attorneys (Bowmans) regarding the supply of food parcels sourced through transfer payments prior to May 2018; and
- 2.2.12 The Complainant further alleged that he formally lodged an application to the GDSD on the 6 February 2020, in terms of Section 18(1) of the Promotion of Access to Information Act (PAIA), to have access to the forensic investigation report. He has been denied a tender amounting to R22 million and he has still not received answers why he did not receive the tender.

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

- 3.1 The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the powers 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(4) of the Public Protector Act 23 of 1994 (Public Protector Act), which regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.
- 3.2 In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR (CC) at paragraph 76, the Constitutional Court per Mogoeng

CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held at paragraph 73 that:

3.2.1 *“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.”*

3.3 The GDSD is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls within the Public Protector’s competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and sections 6(4) and (5) of the Act.

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

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

4.1.1. Whether there was a failure by the GDSD to provide reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers; and whether it refused to provide him with the Bowman’s forensic investigation report requested through PAIA, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

4.1.2. Whether the GDSD disclosed the Complainant’s pricing to his competitor during the price negotiation meeting held on 20 November 2019, and if so, whether such conduct constitutes improper conduct in terms of section



182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

4.2 The Public Protector has concluded the investigation and based on the information and evidence obtained during the course thereof, the Public Protector is now in a position to make findings and take appropriate remedial action.

4.3 Evidence indicating that there was a failure by the GDSD to provide reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers; and its refusal to provide him with the Bowman`s forensic investigation report requested through PAIA was found and since the Public Protector did not receive further evidence that refutes the evidence in its possession, the Public Protector has made adverse findings against the GDSD and has taken appropriate remedial action in order to place the Complainant as close as possible to where he is likely to have been had the GDSD acted properly.

## **5. THE INVESTIGATION**

### **5.1 Methodology**

5.1.1 The investigation was conducted in terms of section 182 of the Constitution and Section 6 and 7 of the Public Protector Act.

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

## 5.2 Approach to the investigation

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

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

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to amounts to maladministration, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct was inconsistent with the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the GDSD.

5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where he would have been, but for the improper conduct or maladministration.

### 5.3 The Investigation Process

5.3.1 A preliminary investigation was conducted in terms of section 7(1) of the Act seeks to determine the merits of the complaint, allegation or information, and the manner in which the matter should be dealt with, including whether or not a “full scaled” investigation was justified.

5.3.2 The investigation process commenced with correspondence to the GDSD on 13 February 2020 wherein the Institution was informed of the investigation, the legislation in terms of which the investigation was conducted, as well what information is required and the format thereof.

5.3.3 The format and the procedure followed in conducting the investigation included

- a) *An allegations and information request letter dated 13 February 2020 was sent to the GDSD on the same date;*
- b) *On 20 March 2020 the Public Protector obtained documents relevant to the investigation which were in the possession or under control of GDSD;*
- c) *On 07 August 2020 further request of information letter was sent to the GDSD;*
- d) *A further response letter dated 02 October 2020 was received from the GDSD;*
- e) *On 30 September 2021 the Public Protector issued a subpoena directing the appearance of a person before the Public Protector for purposes of obtaining or clarifying information, producing any document or giving evidence in terms of section 7(4)(a) of the Act.*

### 5.4 Key sources of information

#### 5.4.1 Documents and e-mail correspondence

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- 5.4.1.1 A copy of a partial undated report by Bowmans Attorneys titled *“Report in respect of our forensic investigation into possible procurement irregularities, fraudulent, corrupt and other irregular conduct at the GDSD in relation to the implementation of the Dignity Parks programme by Non-Governmental Organisations;*
- 5.4.1.2 A copy of the letter of intention to blacklist Ubunyoninco Trading and Projects dated 29 November 2019;
- 5.4.1.3 Copies of the Complainant’s PAIA application forms dated 08 January 2020;
- 5.4.1.4 A copy of the follow up letter on the PAIA application dated 06 February 2020 from the Complainant’s attorney, Murphy Kwape Maritz Attorneys (MKM Attorneys) to the GDSD;
- 5.4.1.5 A copy of an email dated 02 March 2020 from the erstwhile Director of the GDSD Legal Services, Mr Victor Languza (Mr Languza) sent to the Complainant and his attorneys, MKM Attorneys requesting extension to provide PAIA application response;
- 5.4.1.6 A copy of the response letter to the Complainant’s PAIA application dated 14 December 2020 from Ms Mhlongo sent to MKM Attorneys;
- 5.4.1.7 A copy of the BEC submission dated 18 October 2019, wherein Oxy Trading and Ubunyoninco Trading and Projects were recommended to be awarded the short-term contracts to supply and deliver bulk liquids for body lotions and roll-on deodorants and to subcontract the cooperatives to package same at the total amounts of R22 242 000.00 and R20 988 000.00 respectively, subject to price negotiations;
- 5.4.1.8 A copy of the BAC submission to the HoD providing feedback on the price negotiations and requesting approval to appoint Oxy Trading and Ubunyoninco Trading and Projects for the supply of bulk liquids, packaging,

subcontracting and delivery of bulk liquids at the total amount of R20 988 000.00, respectively;

- 5.4.1.9 A copy of the minutes of the price negotiation meeting held on 20 November 2019 approved by the Chairperson, Ms Mekgoe as the true reflection of proceedings, wherein the two agenda items of price negotiation to get the two suppliers to a reasonable price for subcontracting of packaging services by cooperatives and Oxy Trading to revise its prices per dignity pack were discussed;
- 5.4.1.10 A copy of the Complainant's amended hand written quotation dated 20 November 2019 wherein he agreed at the meeting held on 20 November 2019 that the overall price remains the same at R34.98, however packaging price to cooperatives is lifted to R10.00 for half packaging;
- 5.4.1.11 A copy of an email dated 20 November 2019, from Mr Bongani Duma of Oxy Trading sent to Ms Mekgoe, Ms Ndlovu and Ms Lengoasa wherein he stated that *"This is to confirm that Oxy Trading 617 cc is accepting the proposed R 34.98 per pack as discussed in our meeting earlier today"*.
- 5.4.1.12 A copy of the Subpoena hearing session attendance register dated 30 September 2021;
- 5.4.1.13 An email dated 17 January 2020 from the Complainant to the Public Protector;
- 5.4.1.14 A copy of acknowledgement of complaint and confirmation of issues for investigation from the Public Protector to the Complainant dated 05 February 2020;
- 5.4.1.15 An email dated 13 February 2020 confirming issues for investigation from the Complainant to the Public Protector;

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- 5.4.1.16 A copy of the request of information letter dated 13 February 2020, from the Public Protector to the GDSD;
- 5.4.1.17 A copy of the response letter dated 20 March 2020 from the GDSD to the Public Protector;
- 5.4.1.18 A copy of the further request of information letter from the Public Protector to the GDSD dated 07 August 2020;
- 5.4.1.19 A copy of the further response letter dated 02 October 2020 from the GDSD to the Public Protector;
- 5.4.1.20 A copy of the further request of information letter from the Public Protector to the GDSD dated 28 October 2020;
- 5.4.1.21 A copy of the further response letter dated 10 December 2020 from the GDSD to the Public Protector;
- 5.4.1.22 A copy of the Subpoena dated 29 January 2021 from the Public Protector to the GDSD;
- 5.4.1.23 A copy of the further request of information letter from the Public Protector to the GDSD dated 24 May 2021;
- 5.4.1.24 A copy of the request of information letter dated 24 May 2021, from the Public Protector to Mrs Duma;
- 5.4.1.25 A copy of a response affidavit from Mrs Duma dated 15 June 2021 to the Public Protector;
- 5.4.1.26 An email dated 02 August 2021 from the GDSD to the Public Protector;
- 5.4.1.27 A copy of the further request of information email dated 10 August 2021 from the Public Protector to the GDSD;

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- 5.4.1.28 A copy of the Subpoena dated 22 September 2021 from the Public Protector to the GDSD;
- 5.4.1.29 A copy of a response affidavit from Ms Ndlovu dated 03 November 2021 to the Public Protector;
- 5.4.1.30 A copy of a response affidavit from Ms Lengoasa dated 17 November 2021 to the Public Protector;
- 5.4.1.31 A copy of a response affidavit from Ms Mekgoe dated 17 November 2021 to the Public Protector; and
- 5.4.1.32 A copy of the Section 7(9) response letter dated 28 September 2022 from MEC Mosupyoe to the Public Protector.

#### 5.4.2 **Legislation and other prescripts**

- 5.4.2.1 The Constitution of the Republic of South Africa, 1996;
- 5.4.2.2 The Public Protector Act No. 23 of 1994;
- 5.4.2.3 The Supply Chain Management Office Practice Note Number,2006( SCM 5 of 2006);
- 5.4.2.4 The Promotion of Access to Information Act No. 2 of 2000;
- 5.4.2.5 The Preferential Procurement Regulations of 2017; and
- 5.4.2.6 The GDSD Supply Chain Management Policy of 2009.

#### 5.4.3 **Case Law**

- 5.4.3.1 *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);

5.4.3.2 *Public Protector and Mail & Guardian Ltd: (2011) ZASCA 108 (1 June 2011)* at paragraph 9;

5.4.3.3 *South African Bureau of Standards v The Public Protector, the North Gauteng High Court 34290/15* ) [2019] ZAGPPHC 101; and

5.4.3.4 *Gordhan v Public Protector and Others* [2020] ZAGPPHC 777.

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

5.4.4.1 On 19 September 2022, a notice in terms of section 7(9) of the Public Protector Act was issued to the Head of Department (Gauteng Department of Social Development), Ms Mhlongo, the Premier (Gauteng Province), Mr Makhura and MEC (GDSD) Ms Mosupyoe, to provide an opportunity for them to provide responses on the likely adverse findings and proposed remedial action. Sections 7(9) (a) and (b) of the Public Protector Act provide that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations in response thereto.

5.4.4.2 A response was received on 29 September 2022. The response and information/ evidence submitted in response to the notice in terms of section 7(9) of the Public Protector Act, were duly considered by the Public Protector in relation to the substance of any allegations against the GDSD.

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

6.1. **Whether there is a failure by the GDSD to provide reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers, and whether it refused to provide him with the Bowman`s**



**forensic investigation report requested through PAIA, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

Common cause issues

- 6.1.1. On 13 August 2019, the GDSD requested a deviation approval from the Gauteng Provincial Treasury (GPT) to procure “dignity packs for orphaned and vulnerable girl children within no fee paying schools across the 15 Education Districts in Gauteng” through a Request for Quotation (RFQ) process exceeding R500 000.00. The GPT granted the GDSD approval to deviate on 04 September 2019.
- 6.1.2. The GDSD issued an RFQ for supply of dignity packs to Mrs Duma’s company, Oxy Trading 617cc (Oxy Trading), the Complainant’s company, Ubunyoninco Trading and Projects, Barath Chemicals and Muhlohloteri Projects on 23 September 2019 with a closing date of 27 September 2019.
- 6.1.3. On 29 October 2019, the Bid Evaluation Committee (BEC) evaluated the quotations received and recommended Oxy Trading and Ubunyoninco Trading and Projects as the successful bidders.
- 6.1.4. On 18 November 2019, the Bid Adjudication Committee (BAC) approved the BEC’s recommendation for the HoD’s appointment.
- 6.1.5. On 11 December 2019 however, the Complainant received the letter of intention to blacklist his company on the National Treasury database of defaulters and restricted service providers, from the GDSD.
- 6.1.6. The Complainant lodged an application with the GDSD on 06 February 2020, in terms of PAIA to have access to the Bowman’s forensic investigation

report which led to the letter of intention to blacklist his company being issued to him by the GDSD.

Issue in dispute

- 6.1.7. The issue for the Public Protector's determination is whether there was a failure by the GDSD to provide reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers; and whether it refused to provide him with the Bowman's forensic investigation report requested through PAIA.

The Complainant's version

- 6.1.8. The Complainant submitted that the GDSD issued him with a letter for its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers on 11 December 2019, and that his competitor received an award letter. He responded through his attorney on 13 December 2019 requesting that the GDSD should provide him with reasons for blacklisting; and, to put the tender on hold until he received reasons for such a decision to withhold the award letter to alleged or pending blacklisting.
- 6.1.9. The Complainant asked Ms Mhlongo for reasons and Ms Mhlongo's "WhatsApp" response was that the Complainant should communicate with the author of the letter, a certain Mr Strauss, even though the letter was signed by Ms Mhlongo.
- 6.1.10. It was stated in the letter that the Complainant will be blacklisted on the National Treasury database of defaulters and restricted service providers due to the outcome of a forensic investigation conducted by Messrs. Bowman Attorneys regarding the supply of food parcels sourced through transfer payments prior to May 2018.

- 6.1.11. On 6 February 2020, the Complainant formally submitted a request to the GDSD in terms of Section 18(1) of the PAIA, to have access to the forensic investigation report.
- 6.1.12. The Complainant further submitted that he has been denied a tender amounting to twenty two million Rand (R22 million) and he has not received answers on why he did not receive the tender.

*The GDSD's version*

- 6.1.13. In the response letter to the Public Protector dated 20 March 2020, Ms Mhlongo, the HoD of the GDSD submitted that the recommendation for approval was forwarded to her as the Accounting Officer and she did not approve the award based on the recommendations made in a forensic investigation report which recommended that Ubunyoninco Trading and Projects be blacklisted. She then advised that the process of blacklisting should be proceeded with and that a letter of intention to blacklist was issued to the Complainant in accordance with relevant prescripts.
- 6.1.14. Ms Mhlongo further indicated that this was done in respect of all suppliers and persons as implicated in the forensic investigation report. Based on this recommendation in the forensic report, it would have been a big risk for the GDSD to award this contract seeing the outcome of the forensic investigation. The final consideration for blacklisting would only be done upon receipt of the response with reasons as to why the Complainant should not be blacklisted.
- 6.1.15. The HoD, Ms Mhlongo further submitted that the GDSD is awaiting feedback from the GPT and the forensic investigators with regard to the specific areas that are applicable to the Complainant and his company. Based on the fact that the forensic investigation contained several findings and recommendations against several other suppliers and also GDSD staff members, the full investigation report could not be made available to the

Complainant in its entirety and the specific areas needed to be extracted for each supplier implicated.

- 6.1.16. On 25 August 2021, the Public Protector received a further response letter dated 20 August 2021 from Ms Mhlongo wherein she alluded that the appointment of Ubunyoninco Trading and Projects was not approved due to the outcome of the Forensic Investigation conducted by Bowman's, read together with section 27.2 of the GDSD Supply Chain Management Policy<sup>2</sup>.
- 6.1.17. Ms Mhlongo submitted that the Forensic Investigation Report compiled by Bowman's recommended that criminal action be instituted against Pink Power Trading, Ubunyoninco Trading and Projects and Masinga Trading, and their representative, Mr Soorju, for contravening Section 34 of the Prevention and Combating of Corrupt Activities Act for fraud and/or corruption and section 2(1) (a)-(g) of the Organised Crime Act for racketeering and money laundering in respect of moneys paid to them from 01 April 2016 to 31 March 2018, for wilfully taking part in a fraudulent scheme devised by an erstwhile employee of the GDSD. The Forensic Investigation Report further recommended that Pink Power Trading and Ubunyoninco Trading and Projects be reported to the South African Revenue Services (SARS) for submitting invoices exceeding R 1 million rand without having a Value Added Tax (VAT) registration number recorded on its invoices.
- 6.1.18. The Public Protector is in possession of an undated partial copy of the report by Bowman's titled "*Report in respect of our forensic investigation into possible procurement irregularities, fraudulent, corrupt and other irregular*

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<sup>2</sup> Section 27.2.1 states that the Accounting Officer may disregard the bid of any bidder if that bidder, or any of its directors: (continued on next page)

- (a) Has abused the institution's Supply Chain Management system;
- (b) Has committed fraud or any other improper conduct in relation to such system; or

.....”.

*conduct at the GDSD in relation to the implementation of the Dignity Parks programme by Non-Governmental Organisations outlining the above mentioned recommendations”.*

- 6.1.19. Ms Mhlongo further confirmed that the GDSD Supply Chain Manager was requested to write a letter of intention to blacklist Ubunyoninco Trading and Projects, after the forensic report was received. The letter of intention to blacklist the company was signed by her and delivered to the company by the GDSD driver. The company’s representative signed acknowledgement of receipt of the letter. The company thereafter engaged the GDSD requesting information regarding the intention to blacklist.

*Interviews conducted by the Public Protector Investigation team*

- 6.1.20. In an interview held with Ms Mhlongo assisted by the GDSD legal representative, Advocate Lwazi Mtshiyi (Adv Mtshiyi), on 30 September 2021, with the Public Protector Investigation Team, Ms Mhlongo submitted that the GDSD issued a letter of intention to blacklist the Complainant’s company on 29 November 2019.
- 6.1.21. Ms Mhlongo indicated that the outcome of the investigation emanates from a forensic report and that the GDSD was unable to list the reasons for blacklisting as the investigation was not conducted by the GDSD. Ms Mhlongo conceded that the GDSD was in possession of the report when it wrote the letter of intention to blacklist the Complainant’s company, but that it could not issue the report to the Complainant as the report contained several findings and recommendations against several other suppliers for different commodities.
- 6.1.22. Adv Mtshiyi argued that the blacklisting notice does provide reasons for the intention to blacklist. Adv Mtshiyi further conceded that the notice of intention to blacklist may have been limited, as the forensic report is not with the GDSD but with the GPT. Adv Mtshiyi also conceded to the fact that the

Complainant does not know the full details of the outcome of the forensic investigation, which led to the letter of intention to blacklist his company.

- 6.1.23. Ms Mhlongo further indicated that in the interest of due process and administrative justice, the National Treasury has not yet been informed of the intention to blacklist the Complainant because the GDSD was still awaiting his formal response and as such the Complainant has not yet been blacklisted.
- 6.1.24. Ms Mhlongo alluded that with regard to the issue of the forensic investigation report, the GDSD has requested the Gauteng Provincial Forensic Audit Unit to provide the GDSD with a redacted report focusing on the Complainant's company and other suppliers for the GDSD to be in a position to provide same to the Complainant and other implicated suppliers and to finalise the blacklisting process.
- 6.1.25. The Public Protector's Investigation Team is in possession of a letter of intention to blacklist Ubunyoninco Trading and Projects dated 29 November 2019 from Ms Mhlongo for the attention of the Complainant wherein it is stated *"that the GDSD wishes to inform you that your company will be blacklisted on the National Treasury database of defaulters and restricted service providers due to the outcome of the forensic investigation conducted by the external auditors regarding supply of food parcels sourced through the transfer payments prior to May 2018"*.
- 6.1.26. It is further stated in the above mentioned letter that *"your company has fourteen (14) days to respond/object why the restriction should not be imposed and failure of which the GDSD will proceed with the blacklisting"*.
- 6.1.27. The Public Protector Investigation Team is also in possession of the Complainant's PAIA application forms dated 08 January 2020 requesting the GDSD to grant him access to the forensic investigation report recorded in the notice of intention to blacklist his company.

- 6.1.28. The Public Protector Investigation Team is also in possession of the follow up letter in respect of the above PAIA application dated 06 February 2020 from the Complainant's attorney, Messrs. Murphy Kwape Maritz Attorneys (MKM Attorneys) to the GDSD.
- 6.1.29. Ms Mhlongo confirmed in the response letter dated 20 March 2020 to the Public Protector that the GDSD received the request for information in terms of PAIA. In response to his PAIA request, an email was addressed to the Complainant to allow the GDSD an extension as the GDSD was putting the documents together. According to Ms Mhlongo, the Complainant subsequently indicated to the GDSD *'that there was no need to respond (to his PAIA request) in view of the fact that the matter has been escalated to the Competition Commission of South Africa and the Public Protector SA'*. As a result of this, the PAIA request was not proceeded with.
- 6.1.30. Ms Mhlongo submitted in the above mentioned response letter, that the GDSD is still awaiting feedback from the GPT and the forensic investigators with regard to the specific areas that are applicable to the Complainant and Ubunyoninco Trading and Projects.
- 6.1.31. Ms Mhlongo further submitted that based on the fact that the forensic investigation report contained several findings and recommendations against several suppliers and GDSD staff members, the investigation report could not be made available in its entirety. The specific areas needed to be redacted for each supplier implicated.
- 6.1.32. The Public Protector Investigation Team is in possession of the above mentioned email dated 02 March 2020 from the erstwhile Director of the GDSD Legal Services, Mr Victor Languza (Mr Languza), sent to the Complainant and his attorneys, Messrs. MKM Attorneys, in response to his PAIA request.

- 6.1.33. The Public Protector Investigation Team is also in possession of the response letter to the Complainant's PAIA application dated 14 December 2020 from Ms Mhlongo sent to Messrs. MKM Attorneys via email on the same date by Mr Robert Mulaudzi, wherein it is stated that the GDSD has held countless meetings regarding this matter due to the sensitivity of the record requested.
- 6.1.34. Ms Mhlongo indicated in the same letter of 14 December 2020 that the recommendation that the GDSD should obtain a redacted report from the GPT was no longer being pursued due to the fact that the full investigation report was classified as confidential by the GPT in totality. The report contains information that is protected in terms of the Protected Disclosure Act. The GDSD in consideration of the above, is not able to provide the Complainant with the investigation report.
- 6.1.35. Adv Mtshiyo submitted during the interview with the Public Protector Investigative Team on 30 September 2021, that the Complainant lodged a PAIA request to get access to the report immediately after he did not get the report from the GDSD and before he approached the Public Protector for its intervention. The recourse which is still applicable to him to get access to the report is to approach a relevant Court. The GDSD's hands are tied as the report is with the GPT. Even if the report was with the GDSD physically it would not be able to provide it, as there is an issue of it being classified. The GDSD therefore cannot make the report available in terms of PAIA.
- 6.1.36. The GDSD also did not provide the Complainant with the redacted report, in so far as it only relates to his company to enable him to respond to the letter of intention to blacklist his company.



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**Response to the Notice in terms of the provisions of Section 7(9)(a) of the Public Protector Act, 1994**

6.1.37. On 29 September 2022, the Public Protector received a response letter dated 28 September 2022 from Ms Mosupyoe wherein she submitted that the GDSD unequivocally provides its commitment to abide by and subsequently implement the remedial action as set out in the Provisional Report upon receipt of the Final Report.

**Application of the relevant law and prescripts**

6.1.38. Section 2 of the Constitution<sup>3</sup> lays the foundation for the control of public power. It provides that:

*“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.*

6.1.39. Section 33 of the Constitution provides, that:

*(1) “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.*

*(2) Everyone whose rights have been adversely affected by Administrative action has the right to be given written reasons”.*

*(own emphasis added)*

6.1.40. Section 33 (3) of the Constitution further states that “ *National legislation must be enacted to give effect to these rights, and must-*

*(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*

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<sup>3</sup> Constitution of the Republic of South Africa, 1996.

- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
- (c) promote an efficient administration”.*

6.1.41. Section 33 (3) therefore required the state to promulgate legislation to give effect to this constitutional obligation and the Promotion of Administrative Justice Act<sup>4</sup> (PAJA) was enacted.

6.1.42. Section 3(2)(b) of PAJA provides that in order to give effect to the right to procedurally fair administration action, an administrator must give a person whose rights and legitimate expectations have been adversely affected the following:

- (i) Adequate notice of the nature and purpose of the proposed administrative action;*
- (ii) a reasonable opportunity to make representations;*
- (iii) a clear statement of the administrative action;*
- (iv) adequate notice of any right of review or internal appeal, where applicable; and*
- (v) adequate notice of any right to request reasons in terms of section 5”.*

6.1.43. Regulation 2 (2) of the Regulations which deals with restriction of suppliers of the Supply Chain Management Office Practice Note Number SCM 5 of 2006 provides that:

*“Should the Accounting Officer/ Authority opt to restrict the contractor and/ or any person(s) from obtaining business with the public sector, the Accounting Officer/ Authority must:*

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<sup>4</sup> Act 3 of 2000.

- (a) *Inform the contractor or person(s) by registered mail or by delivery of the notice by hand of the intention to impose the restriction, provide the reasons for such decision and the envisaged period of restriction;*
- (b) *Allow the contractor and/or person(s) fourteen (14) calendar days to provide reasons why the envisaged restriction should be imposed;*
- (c) .....
- (d) .....
- (e) .....

6.1.44. The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law<sup>5</sup>. It appears *prima facie* from this investigation that the GDSD did not comply with the above constitutional injunctions, namely PAJA and the National Treasury Regulations by not providing the Complainant detailed written reasons for its decision or administrative action. The letter of intention to blacklist the Complainant's company amounts to 'administrative action' within the meaning of Section 33 of the Constitution.

6.1.45. It was expected therefore of the GDSD to adhere to PAJA, the National Treasury Regulations and the constitutional requirement of fairness as envisaged in terms of section 33 of the Constitution in dealing with the RFQ of Ubunyoninco Trading and Projects. By not providing the Complainant with detailed reasons (as per the outcome of the forensic investigation) for the intention to blacklist his company on the National Treasury database of defaulters and restricted service providers, would be manifestly unfair.

6.1.46. Furthermore, the above provisions requires the letter of intention to blacklist, to specifically indicate the period and/or timeframe within which the restriction will be applicable. From the letter addressed to the Complainant in the Public Protector's possession, the letter is silent in this regard.

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<sup>5</sup> Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 1999 (4) SA 788 (T) at paragraph 20.

6.1.47. Section 26 of the of the PAIA which regulates the extension of period to deal with request provides as follows—

(1) “ .....

(2) *If a period is extended in terms of subsection (1), the information officer must, as soon as reasonably possible, but in any event within 30 days, after the request is received or transferred, notify the requester of that extension.*

(3) *The notice in terms of subsection (2) must state—*

*(a) the period of the extension;*

*(b) adequate reasons for the extension, including the provisions of this Act relied upon; and*

*(c) that the requester may lodge an internal appeal or an application with a court, as the case may be, against the extension, and the procedure (including the period) for lodging the internal appeal or application, as the case may be”.*

6.1.48. The above provision places an obligation on the information officer to notify the requester of the extension within 30 days, after the request is received or transferred if a period is extended in terms of subsection (1). It further prescribes that the notice in terms of subsection (2) must state the period of the extension; adequate reasons for the extension, including the provisions of this Act relied upon; and that the requester may lodge an internal appeal or an application with a Court, as the case may be, against the extension, and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

6.1.49. In this instance, the GDSD notified the Complainant and his Attorney of the requested extension to deal with his PAIA request for access to the forensic investigation report through the email dated 02 March 2022. The notice of

extension only stated the period of extension to provide a response, but not the reasons for the extension and it also did not include the provisions of this Act relied upon. The Complainant was also not advised that he may lodge an internal appeal or an application with a Court, as the case may be, against the extension and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

6.1.50. Section 25 of the PAIA which regulates the decision on request and notice thereof states that—

(1) *“The information officer to whom a request for access is made or transferred, must subject to section 26 and Chapter 5 of this Part, as soon as reasonably possible, but in any event within 30 days, after the request is received—*

(a) *decide in accordance with this Act whether to grant the request;*  
*and*

(b) *notify the requester of the decision and, if the requester stated, as contemplated in section 18(2)(e), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible”.*

(2) .....

(3) *If the request for access is refused, the notice in terms of subsection (1)(b) must—*

(a) *state adequate reasons for the refusal, including the provisions of this Act relied upon;*

(b) .....

(c) *state that the requester may lodge an internal appeal or an application with a court, as the case may be, against the refusal of*

*the request, and the procedure (including the period) for lodging the internal appeal or application, as the case may be.*

- 6.1.51. Section 27 of PAIA further reads: - *“If an information officer fails to give the decision on a request to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request.”*
- 6.1.52. The information officer to whom a request for access is made or transferred is required in terms of the above provision subject to section 26 and Chapter 5 of this Part, to as soon as reasonably possible but in any event within 30 days, after the request is received decide in accordance with this Act whether to grant the request and notify the requester of the decision.
- 6.1.53. The above provision further requires that the notice must state adequate reasons for the refusal, including the provisions of this Act relied upon and state that the requester may lodge an internal appeal or an application with the Court as the case may be, against the refusal of the request and the procedure (including the period) for lodging the internal appeal or application, as the case may be.
- 6.1.54. In this case, the Complainant’s Attorney was notified that the request is refused, nine months later after the provided and expected extension date of response and the notice for refusal only stated the reasons for the refusal. The response did not include the provisions of this Act relied upon and did not state that the Complainant may lodge an internal appeal or an application with the Court, as the case may be, against the refusal of the request and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

### Conclusion

- 6.1.55. It follows therefore, as shown in the evidence discussed above, that the notice of intention to blacklist the Complainant's company submitted to the Complainant by the GDSD did not provide him with full reasons for such intention as per the outcome of the Bowman's Forensic Investigation Report and the envisaged period of restriction. It can be concluded that the GDSD did not conduct itself in compliance with the applicable legal prescripts namely, the Constitution and the National Treasury Regulations.
- 6.1.56. Based on the above discussed evidence and legal prescripts, it can be further concluded that the GDSD refused to provide the Complainant with the requested information in terms of his request to access the forensic investigation report in terms of PAIA.
- 6.1.57. The Public Protector noted that Ms Mhlongo indicated during the interview meeting with the Public Protector Investigation Team that the GDSD has requested the Gauteng Forensic Audit Unit to provide them with the redacted report focusing on the Complainant only. The requested redacted report will enable the GDSD to be in position to provide same to the Complainant and other implicated suppliers and to finalise the blacklisting process.
- 6.2. Whether the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

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Common cause issues

- 6.2.1. The RFQ GT/Bulk Liquids/HO/2019 for the supply, delivery of bulk liquids and packaging materials to packaging cooperatives specifications, indicated amongst others that the GDSD reserves the right to award the contract to more than one service provider per region and that the service provider must subcontract the packaging to identified cooperatives.
- 6.2.2. On 29 October 2019, the BEC evaluated the quotations and recommended Oxy Trading and Ubunyoinco Trading and Projects as the successful bidders.
- 6.2.3. The GDSD held a price negotiation meeting on 20 November 2019 with the Complainant and the Director of Oxy Trading, Mrs Duma.

Issues in dispute

- 6.2.4. The issue for the Public Protector's determination is whether the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019.

The Complainant's version

- 6.2.5. The Complainant argued that he tendered for the above mentioned RFQ with the GDSD and he was called to a meeting on 20 November 2019 at the GDSD's offices where it was indicated that he and Mrs Duma were successful.
- 6.2.6. Ms Mekgoe, Ms Ndlovu, and Ms Lengoasa from the GDSD told the Complainant that his pricing was the lowest pricing. GDSD officials wanted to proceed with the meeting in the absence of Mrs Duma and the Complainant objected as her presence was necessary.



- 6.2.7. After Mrs Duma arrived, Ms Mekgoe then told Mrs Duma that the DAC approved two service providers, which is the Complainant's and Mrs Duma's companies. Ms Mekgoe further told Mrs Duma that her pricing was approximately two to three Rands more expensive than Complainant's effectively averaging three million Rand (R3 000 000.00) more across the tender. Mrs Duma was told that she must adjust her pricing to get half the tender in line with the Complainant's pricing.
- 6.2.8. Mrs Duma questioned the GDSD officials about the Complainant's pricing and all the Complainant's pricing was revealed to Mrs Duma at that meeting. According to the Complainant, this act is a violation of SBD which expressly talks about no collusion on a vertical plain. GDSD officials actually enforced such violation to such an extent that they made Mrs Duma reduce her pricing and concluded the meeting by saying that Mrs Duma must send an email to confirm her new pricing.
- 6.2.9. The Complainant maintained his pricing, which is the same pricing he put in the tender box, but he was asked to allocate seven Rands (R7.00) more towards packaging as this is what his competitor charged and that it is more favourable towards the co-operatives. He was instructed to change his pricing accordingly, which would be outsourced to co-operatives for packaging. He agreed to this and signed the document. His overall basket pricing remained the same from the time of the tender until the tender was awarded.
- 6.2.10. The GDSD officials then indicated that the Complainant and Mrs Duma each got half of the initial tender quantities (600 000) from overall tender of 120 000 and that their letters of award would be sent to them by the end of the week.
- 6.2.11. He proceeded to order all the raw material, goods and consumables and setting up a factory with machinery - which amounted to millions of Rands.

He needed to be proactive in order to meet deadlines as the items requested are to be manufactured specifically for the project.

- 6.2.12. The Complainant further indicated that the GDSD issued him thereafter with a blacklisting letter and his competitor received an award letter.

*The GDSD's version*

- 6.2.13. The HoD, Ms Mhlongo submitted in her response letter dated 20 March 2020 that the specifications as per RFQ process was based on the fact that the GDSD will appoint two service providers to render the services. Based on the above, the other supplier that attended the meeting was not a competitor, rather another recommended bidder as per the RFQ process. According to her, the Complainant was called for price negotiations as recommended by the BAC, but was not informed that he was successful, as the outcome of the price negotiations were still subject to approval.
- 6.2.14. Ms Mhlongo indicated in the response letter dated 20 August 2021 that, Oxy Trading and Ubunyoninco Trading and Projects were evaluated and recommended by the BEC in line with the GDSD Supply Chain Management Policy. The submission to recommend the above two suppliers to be awarded the short-term contracts to supply and deliver bulk liquids for body lotions and roll-on deodorants and to subcontract the cooperatives to package same was tabled at the BAC on 18 November 2019.
- 6.2.15. The Public Protector Investigation Team is in possession of the BEC submission dated 18 October 2019, wherein Oxy Trading and Ubunyoninco Trading and Projects were recommended to be awarded the short-term contracts to supply and deliver bulk liquids for body lotions and roll-on deodorants and to subcontract to cooperatives to package same at the total amount of R 22 242 000.00 and R 20 988 000.00 respectively, subject to price negotiations.

- 6.2.16. Ms Mhlongo alluded that the BAC deliberated on the submission and recommended that the BEC should negotiate the pricing with the recommended suppliers, Oxy Trading and Ubunyoninco Trading and Projects. The BAC was comfortable with the price of R10.00 per pack, however it did not agree with the price of the actual items as quoted by Oxy Trading. Ubunyoninco Trading and Projects quoted a better price for the items, however its price for packaging presented a concern for the BAC as the supplier quoted a price of R3.20 per pack.
- 6.2.17. Ms Mhlongo argued that the instruction given to the BEC members by the BAC was to negotiate the price as Oxy Trading packaging price was preferable and same should be maintained as it was considered fair towards the cooperatives.
- 6.2.18. Ms Mhlongo contended that the BEC subsequently invited the two suppliers to a meeting scheduled at Thusanong Boardroom on 20 November 2019 at 10am. Ubunyoninco Trading and Projects represented by the Complainant arrived on time and was requested to wait for Oxy Trading representative, Mrs Duma, before the meeting could start. The aim was to provide both suppliers the brief at the same time and thereafter discuss pricing individually.
- 6.2.19. Ms Mhlongo further contended that Mrs Duma was running late and thereafter the BEC decided to start the meeting at 10:15. The Complainant was given the brief regarding the pricing relating to the cooperatives wherein the BAC requested his company to raise its monetary amount from R3.20 to R10.00. It was duly indicated that the cooperative from West Rand had already signed the Memorandum of Understanding (MOU) with the second company and should it be approved, the cooperatives could very possibly communicate with each other. The resultant price difference would cause dissatisfaction between the cooperatives. In the interest of fairness and

equity, the BAC preferred that the company increased its packaging price to the cooperatives that were to be sub-contracted.

- 6.2.20. Ms Mhlongo mentioned that Mrs Duma arrived at the meeting about 15 minutes late. The BEC paused its deliberations and made the necessary introductions. The meeting thereafter re-started and the background for the meeting was provided to Mrs Duma. She was informed that the BEC and the other service provider were discussing the BAC's recommendations regarding the price negotiations on packaging in respect of the cooperatives, which resulted in the price differences of the sub-contracting amounts.
- 6.2.21. Ms Mhlongo stated that Ms Mekgoe, the Deputy Director: Tenders and Contract Management chaired the meeting and requested that the issue of pricing be discussed separately with the individual companies. The Deputy Director also mentioned that the BEC had recommended both suppliers for tabling at the BAC and for the HoD's approval of the award. It was further indicated that the BAC had recommended the negotiated approach as explained above.
- 6.2.22. Ms Mhlongo further stated that the Complainant replied first by indicating that he is not uneasy with discussing his company's pricing and he immediately presented the pricing of the items as charged for by his company and how the pricing was computed. He also immediately indicated that he will increase his packaging price to R10.00. He then requested for his company's original quotation and amended it by hand and signed the said amendment. Mrs Duma did not respond immediately. She indicated that she must consider the total cost and will then send an email with the revised amount.
- 6.2.23. Ms Mhlongo indicated that the Complainant enquired if he could begin stocking the chemicals because the factories were about to close. Both suppliers were advised not to consider the recommendation as their appointment, but that they must await the approval by the HoD, should the

BAC recommend same and the meeting was then adjourned. Mrs Duma sent her quote to the GDSD via email on the following day.

- 6.2.24. Ms Mhlongo further indicated that the submission was received and tabled at BAC for recommendation and approval by the HoD. The BAC was satisfied with the new proposals submitted and approved the recommendation for the HoD's appointment. The appointment letters were submitted for the HoD's signature - for both companies. However, when the letters were returned to Supply Chain Management (SCM) only the letter for Oxy Trading was signed by the HoD. The appointment letter for Ubunyoninco Trading and Projects was cancelled and marked not approved. The tender could therefore not be awarded to Ubunyoninco Trading and Projects.
- 6.2.25. The Investigation Team is also in possession of the BAC submission to the HoD providing feedback on the price negotiations and requesting approval to appoint Oxy Trading and Ubunyoninco Trading and Projects for the supply of bulk liquids, packaging, subcontracting and delivery of bulk liquids at the total amount of R 20 988 000.00, respectively.
- 6.2.26. Ms Mhlongo further mentioned that the appointment of Ubunyoninco Trading and Projects was not approved due to the outcome of a Forensic Investigation conducted by Bowman's, together with the application of section 27.2 of the GDSD SCM Policy (*supra*).
- 6.2.27. The Investigation Team is in possession of the minutes of the above mentioned price negotiation meeting held on 20 November 2019, approved by the Chairperson, Ms Mekgoe, as a true reflection of proceedings, wherein the two agenda items of price negotiation to get the two suppliers to a reasonable price for subcontracting of packaging services by cooperatives and Oxy Trading to revise its prices per dignity pack, were discussed.
- 6.2.28. The Investigation Team is also in possession of the Complainant's amended hand written quotation dated 20 November 2019 wherein he agreed at the

meeting held on 20 November 2019 that the overall price remains the same at R34.98, however packaging price to cooperatives is lifted to R10 for half packaging.

- 6.2.29. The Investigation Team is further in possession of an email dated 20 November 2019, from Mr Bongani Duma of Oxy Trading sent to Ms Mekgoe, Ms Ndlovu and Ms Lengoasa wherein he stated that *“This is to confirm that Oxy Trading 617 cc is accepting the proposed R 34.98 per pack as discussed in our meeting earlier today”*.
- 6.2.30. The Investigation Team received an affidavit from Mrs Duma dated 15 June 2021 wherein she stated that both her entity and the Complainant disclosed their prices for negotiation and both gave consent of disclosure of the said prices to Ms Mekgoe.
- 6.2.31. Mrs Duma indicated that Ms Mekgoe did state that she had submitted their quotations to the decision making committee and the said committee further requested her office to negotiate packaging prices with both their entities since they had successfully done these projects in the past and both entities understood the dynamics of working with third parties (Co-operatives).
- 6.2.32. Mrs Duma alluded that they were both informed that the GDSD is interested in the price of R10.00 per pack and that her entity Oxy Trading had negotiated with cooperatives. They were informed that the GDSD is not happy with the pricing of R3.20 per pack that the Complainant was offering. She further alluded that the final decision or the outcome of the meeting was that both entities agreed to give the cooperatives a price of R10.00 per pack since that price was regarded by the GDSD as a dignified way of compensating the work done.
- 6.2.33. Ms Ndlovu submitted in an affidavit dated 03 November 2021, to the Investigation team. She indicated that on 20 November 2019 the suppliers attended the price negotiation meeting for the purpose of negotiating the

- prices of the suppliers to get a reasonable price for subcontracting of packing services by cooperatives.
- 6.2.34. Ms Ndlovu further indicated that the purpose of the meeting was also to request Oxy Trading to revise its prices for dignity packs and that she does not have any recollection of the price disclosures.
- 6.2.35. The Investigation Team also received an affidavit dated 17 November 2021 from Ms Lengoasa of the GDSD wherein she indicated that the purpose of the meeting held on 20 November 2019 between the suppliers and the GDSD was to negotiate the prices for the two suppliers to get a reasonable price for the subcontracting of packaging services by the cooperatives and to also request Oxy Trading to revise its prices for the dignity packs.
- 6.2.36. Ms Lengoasa stated that the two suppliers were taken through the process of the initial stage of the RFQ and they were also informed that they will be addressed jointly in the same office during the discussion of the background process. The suppliers were informed that they would be addressed in separate offices when their prices were to be negotiated.
- 6.2.37. Ms Lengoasa further stated that the Complainant mentioned his prices in the presence of Mrs Duma to the extent that he voluntarily amended his quotation to the revised price he requested from her. Ms Lengoasa submitted that Mrs Duma indicated that she would provide her revised pricing by email, which she did on 21 November 2019. In concluding the meeting, Ms Mekgoe informed both suppliers that they should not commit to anyone until they have been given appointment letters by the GDSD.
- 6.2.38. In an affidavit dated 17 November 2021 by Ms Mekgoe of the GDSD, she indicated that on 18 November 2019 the BAC recommended that the BEC should negotiate the prices quoted by Oxy Trading and Ubunyoninco Trading and Projects, for the supply of bulk liquids and packaging material. The BAC had already approved the recommendations of the two suppliers subject to

the outcome of the price negotiations. The price negotiation meeting had no bearing on the Complainant's company not being appointed.

- 6.2.39. Ms Mekgoe indicated that on 18 November 2019, the two suppliers were requested telephonically to attend the price negotiation meeting. On 20 November 2019, the suppliers honoured the request for a meeting. She chaired the price negotiation meeting between the two suppliers and the GDSD.
- 6.2.40. Ms Mekgoe stated that the purpose of the meeting was to negotiate the prices for the two suppliers to get a reasonable price for the subcontracting of packaging services by the cooperatives and to also request Oxy Trading to revise its prices for the dignity packs. The two suppliers were taken through the process of the initial stage of the RFQ and they were also informed that they will be addressed jointly in the same office during the discussion of the background process. The suppliers were informed that they would be addressed in separate offices when their prices were to be negotiated.
- 6.2.41. Ms Mekgoe contended that the Complainant mentioned his prices in the presence of Mrs Duma to the extent that he voluntarily amended his quotation to the revised price which he requested from Ms Lengoasa. Ms Mekgoe further contended that Mrs Duma indicated that she would provide her revised pricing by email which she duly did on 21 November 2019. In concluding the meeting, she informed both suppliers that they should not commit to anyone until they have been given appointment letters by the GDSD.
- 6.2.42. It is worth noting that the Investigation Team requested the recordings and/or the transcripts of the above mentioned meeting and Ms Mhlongo in her response letter dated 10 December 2020 indicated that the meeting was not recorded.



Application of the relevant law and prescripts

6.2.43. Section 217(1) of the Constitution is of relevance for public procurement regulation and as such is quoted:

*“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”*

6.2.44. The above provisions require organs of state to procure goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. In this instance, the GDSD adhered to the Constitutional principles of fairness, transparency and competitiveness by inviting both bidders to the price negotiation meeting in ensuring that the prices offered are market related.

6.2.45. Clause 19 of the Preferential Procurement Regulations of 2017 (Preferential Procurement Regulations) states amongst others that:

19.1. *“Institutions may include in their SCM policies a process for negotiating with preferred bidders after a competitive bidding process or price quotations.*

19.2. *Institutions must include in the tender documents a condition stating clearly that the award of the tender may be subjected to price negotiation with the preferred tenderers.*

19.3. *Negotiations must be fair and objective and may not be used to unfairly prejudice the highest scoring / preferred tenderer or any other tenderer.*

19.4. ....

19.5. ....

19.6. ....

- 19.7. ....
- 19.8. ....
- 19.9. ....
- 19.10. *All negotiations must be officially closed with a decision communicated and agreed between parties before moving to negotiate with the next preferred tenderer.*

6.2.46. Clause 13.2 of the GDSD Supply Chain Management Policy states amongst others that the Department may “*negotiate a market related price with the bidder scoring the highest points or cancel the bid*”.

6.2.47. The above provisions provide that the GDSD should adhere to the constitutional requirement of fairness when procuring goods and services, include in their SCM policies a process for negotiating with preferred bidders after a competitive bidding process or price quotations, include in the tender documents a condition stating clearly that the award of the tender may be subjected to price negotiation with the preferred tenderers.

6.2.48. Furthermore, that negotiations must be fair and objective and may not be used to unfairly prejudice the highest scoring / preferred tenderer or any other tenderer and that all negotiations must be officially closed with a decision communicated and agreed between parties before moving to negotiate with the next preferred tenderer.

6.2.49. In this instance, the Public Protector is unable to establish that the GDSD has unfairly prejudiced Ubunyoninco Trading and Projects during the price negotiation meeting. Evidence in the Public Protector`s possession revealed that the Complainant and Mrs Duma were advised of the process to be followed before the negotiations commenced.

6.2.50. The GDSD advised both bidders that the issue of pricing will be discussed with them separately but the Complainant, nonetheless opted to voluntarily

divulge his pricing during the price negotiation meeting to Oxy Trading. The Complainant willingly amended and signed his original quotation during the meeting in the presence of all parties without citing an objection.

- 6.2.51. The GDSD included in the RFQ documents, a condition that the award of the tender may be subjected to price negotiations with the preferred tenderers. In this instance, the price negotiation meeting was held after a competitive price quotations process as per the provisions of the RFQ.

### Conclusion

- 6.2.52. It can be concluded that there is no evidence that indicates that the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019 or that GDSD violated the applicable legal prescripts namely, the Constitution, the Preferential Procurement Regulations and its Supply Chain Management Policy.

## **7. FINDINGS**

Having regard to the evidence, the regulatory framework determining the standard that should have been complied with by the GDSD and the impact on the Complainant, the Public Protector makes the following findings against GDSD:

- 7.1. Whether there is a failure by the GDSD to provide reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers and whether it refused to provide him with the Bowman's forensic investigation report requested through PAIA, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

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- 7.1.1. The allegation that there was a failure by the GDSD to provide full reasons to the Complainant regarding its intention to blacklist his company on the National Treasury database of defaulters and restricted service providers, **is substantiated.**
- 7.1.2. The GDSD also refused the PAIA request of the Complainant to obtain a copy of the Bowman's forensic report.
- 7.1.3. The evidence in the Public Protector's possession indicates that the GDSD failed to provide the Complainant with adequate reasons (as taken after the outcome of the Bowman's forensic investigation report) in its letter of intention to blacklist his company on the National Treasury database of defaulters and restricted service providers.
- 7.1.4. The Complainant was and is still unable to provide a response to or provide reasons why his company should not be blacklisted, as he still does not know on what basis the GDSD is intending to blacklist his company on the National Treasury database of defaulters and restricted service providers.
- 7.1.5. The GDSD has to date also not informed the National Treasury of its intention to blacklist the Complainant's company on the National Treasury database of defaulters and restricted service providers, as the Complainant has not submitted reasons why his company should not be blacklisted. Both the Complainant and the GDSD are thus in limbo in this process.
- 7.1.6. The evidence in the possession of the Public Protector further indicates that the GDSD did not follow prescribed processes in responding to the Complainant's PAIA request to access the Bowman's forensic investigation report – which report led to the intention to blacklist his company on the National Treasury database of defaulters and restricted service providers. However, the GDSD indicated that they were not in possession of the report (as it was with GPT), and that the report was classified as confidential.

- 7.1.7. The conduct of the HoD of the GDSD, Ms Mhlongo in not providing reasons for the intention to blacklist the Complainant's company is in violation of Section 33 of the Constitution; section 3(2)(b) of the PAJA and Regulation 2(2) of the Supply Chain Management office Practice note. Sections 25 and 26 of the PAIA were also not adhered to in that the Complainant was not advised of his rights in terms of PAIA and in that the GDSD delayed in responding to the Complainant's PAIA request.
- 7.1.8. Accordingly, the conduct of the GDSD in the circumstances, constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 7.2. Whether the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019, and if so, whether such conduct constitutes improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**
- 7.2.1. The allegation that the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019, **is unsubstantiated.**
- 7.2.2. There is no evidence in the Public Protector's possession that indicates that the GDSD disclosed the Complainant's pricing to his competitor during the price negotiation meeting held on 20 November 2019.
- 7.2.3. The conduct of the GDSD officials and in particular that of Ms Mekgoe was not in contravention of section 217(1) of the Constitution, Clause 19 of the Preferential Procurement Regulations and Clause 13.2 of the GDSD Supply Chain Management Policy in dealing with the price negotiation meeting held on 20 November 2019.

7.2.4. Accordingly, the conduct of the GDSD in the circumstances, does not 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.

## 8. REMEDIAL ACTION

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

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

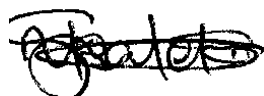
8.3 Having regard to the evidence, the regulatory framework determining the standard the GDSD should have complied with, and the impact on the Complainant, the Public Protector takes the following remedial action:

**The Head of the Department of the Gauteng Department of Social Development must ensure that:-**

- 8.3.1. In terms of Section 33 of the Constitution, Section 3(2)(b) of the PAJA and Regulation 2(2) of Supply Chain Management Office Practice Note, within **thirty (30) working days** of receipt of this report provide full reasons to the Complainant for its intention to blacklist Ubunyoninco Trading and Projects as stipulated in the Bowman's forensic report.

**9. MONITORING**

- 9.1 The HoD of the GDSD to provide a report to the Public Protector on the implementation of the remedial action within thirty (30) days from the date of this report.



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**ADV. KHOLEKA GCALEKA  
ACTING PUBLIC PROTECTOR  
OF THE REPUBLIC OF SOUTH AFRICA  
DATE: 30 SEPTEMBER 2022**

*Assisted by: Ms M. Manyathela  
Provincial Representative: Gauteng*