

**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, 23 OF 1994.**



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report No 17 of 2019/20

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION DURING THE DEVELOPMENT OF THE HOUSING
PROJECTS MANAGED BY TORO YA AFRICA ON BEHALF OF THE CITY OF
MATLOSANA 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, (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (Public Protector Act).
- (ii) This report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into a complaint lodged by the former Municipal Manager of the City of Matlosana Local Municipality (City of Matlosana), Mr Matshedisho Moses Moadira, (hereinafter referred to as the Complainant) on 30 August 2011.
- (iii) In the main, the complaint received by Public Protector South Africa was that there was malfeasance and maladministration during the delivery of the housing projects managed by Toro ya Africa (Pty) Ltd (TYA) on behalf of the City of Matlosana. The said malfeasance and maladministration allegedly involved both City of Matlosana and the Department of Local Government and Human Settlement in the North West Provincial Government (the Department). The Complainant also raised allegations of wasteful expenditure and failure by the City of Matlosana to implement its own resolutions.
- (iv) The Complainant also raised issues pertaining to his dismissal which I did not investigate because these issues were considered and addressed by other competent bodies, including the Labour Court.
- (v) **On analysis of the complaint, the following issues were identified and investigated:**
 - (aa) Whether the City of Matlosana improperly appointed TYA to develop the Alabama Extension 3 Housing Project (Alabama Project);

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- (bb) Whether payments made to TYA in relation to the Alabama Project were irregular and constituted fruitless and wasteful expenditure;
- (cc) Whether the City of Matlosana improperly appointed TYA to develop the Pilot Project;
- (dd) Whether the City of Matlosana's withdrawal of civil proceedings against TYA from the court roll contravened Council resolution CC84/2010 and whether it constituted maladministration;
- (ee) Whether the City of Matlosana improperly disregarded some of its adopted resolutions in the performance of its functions and in exercising its powers;
- (ff) Whether the Department improperly failed to implement the settlement agreement concluded between TYA, the City of Matlosana and the Department on 31 January 2012;
- (gg) Whether the City of Matlosana's withdrawal of the civil litigation against the Complainant amounted to fruitless and wasteful expenditure;
- (hh) Whether the Department improperly re-appointed TYA to continue with the development of both the Alabama and Pilot Projects; and
- (ii) Whether the community of Matlosana was improperly prejudiced by the conduct of both the Department and the City of Matlosana
- (vi) In dealing with the matter, some issues were mediated upon in line with section 6(4)(b) of the Public Protector Act. However, the main investigation was conducted through correspondence, meetings and interviews with the Complainant, the City of Matlosana and the Department. I also held interviews with former employees of both the City of Matlosana and the Department.

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- (vii) Key laws and policies taken into account to help me determine if there had been maladministration by the City of Matlosana and the Department were principally those imposing administrative standards that should have been upheld by the City of Matlosana and the Department and/or its officials.
- (viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:
- (a) **Regarding whether the City of Matlosana improperly appointed TYA to develop the Alabama Project**
- (aa) The allegation that the City of Matlosana improperly appointed TYA to develop the Alabama Project, is substantiated;
- (bb) The contract to deliver the Alabama Project was not determined through a competitive bidding process;
- (cc) In view of the above, the appointment of TYA was in contravention of section 217(1) of the Constitution and section 83(1) of the Municipal Systems Act which requires the contract for goods or services to be competitive; and
- (dd) Therefore, the actions of the City of Matlosana amount to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and constitute maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (b) **Whether payments made to TYA in relation to the Alabama Project were irregular and constituted fruitless and wasteful expenditure**
- (aa) The allegations that payments to TYA in relation to the Alabama Project constituted fruitless and wasteful expenditure, is substantiated;

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- (bb) Payments made to TYA were irregular and constituted fruitless and wasteful expenditure in terms of the Municipal Finance Management Act in that TYA services were not procured in line with the City of Matlosana Supply Chain Management Policy; and
- (cc) Therefore, the actions of the City of Matlosana amount to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and constitute maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (c) Whether the City of Matlosana improperly appointed TYA to develop the Pilot Project**
- (aa) The allegation that the City of Matlosana improperly appointed TYA to develop the Pilot Project, is unsubstantiated;
- (bb) Although TYA was not in the City of Matlosana's Supplier Data Base at the time of its appointment as prescribed by its Supply Chain Management Policy, its inclusion was consistent with section 217 of the Constitution; and
- (cc) Therefore, the actions of the City of Matlosana does not amount to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution or constitute maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(d) Whether the City of Matlosana's withdrawal of civil proceedings instituted against TYA from the court roll contravened Council Resolution CC84/2010 and whether it constituted maladministration

- (aa) The allegation that the City of Matlosana's withdrawal of civil proceedings instituted against TYA from the court roll contravened Council resolution CC84/2010, is substantiated;
- (bb) The City of Matlosana withdrew the civil proceedings in contravention of Council resolution CC84/2010;
- (cc) The withdrawal of the civil proceedings without rescinding or amending the previous Council resolution was in contravention of section 160(1) of the Constitution; and
- (dd) Therefore, the City of Matlosana's actions amount to improper conduct in state affairs in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(e) Whether City of Matlosana improperly disregarded some of its adopted resolutions in the performance of its functions and in exercising its powers

- (aa) The allegation that the City of Matlosana improperly disregarded some of its adopted resolutions in the performance of its functions and in exercising its powers, is substantiated;
- (bb) The City of Matlosana failed to comply with resolutions CC35/2010 and CC138/2010 respectively;

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- (cc) Deviation from complying with the said resolutions without rescinding them was in contravention of section 160(1) of the Constitution and the principles enunciated in the *Mputumi case*;
- (dd) Therefore, the City of Matlosana's actions constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms section 6(4)(a)(i) of the Public Protector Act.
- (f) Whether the Department improperly failed to implement the settlement agreement concluded between TYA, the City of Matlosana and the Department on 31 January 2012**
- (aa) The allegation that the Department improperly failed to implement the settlement agreement concluded between TYA, the City of Matlosana and the Department on 31 January 2012, is substantiated;
- (bb) The Department did not implement the settlement agreement as agreed upon on 31 January 2012;
- (cc) The Department failed to compel TYA to act in accordance with the terms and conditions as set out in the settlement agreement and contrary to the *Mansell* and *Greeff* cases; and
- (dd) Therefore, the Department's actions constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(g) Whether the City of Matlosana's withdrawal of the civil litigation against the Complainant amounted to fruitless and wasteful expenditure

- (aa) The allegation that the City of Matlosana's withdrawal of the civil litigation against the Complainant amounted to fruitless and wasteful expenditure, is substantiated;
- (bb) The City of Matlosana withdrew all claims and tendered the associated costs on 12 January 2017 and 15 November 2017 respectively;
- (cc) The monies expended in pursuit of this matter amounts to fruitless and wasteful expenditure in terms of the Municipal Finance Management Act; and
- (dd) Therefore, the actions of the City of Matlosana constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(h) Whether the Department improperly re-appointed TYA to continue with the development of the Pilot Project.

- (aa) The allegation that the Department improperly re-appointed TYA to continue with the development of the Pilot Project, is substantiated;
- (bb) The Department did not follow any procurement process.
- (cc) The re-appointment of TYA was in contravention of the Constitution, the Public Finance Management Act and Treasury Regulations;
- (dd) Therefore, the Department's actions constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

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- (i) **Whether the Complainant and the community of Matlosana was improperly prejudiced by the conduct of both the City of Matlosana and the Department**
- (aa) The allegation that the community of Matlosana was prejudiced by the conduct of both the City of Matlosana and the Department, is substantiated;
- (bb) The Complainant was prejudiced by the protracted civil litigation by the City of Matlosana;
- (cc) The beneficiaries of both the Alabama and the Pilot Projects received defective houses whilst other beneficiaries had been denied access to adequate housing;
- (dd) The conduct of both the City of Matlosana and the Department was contrary to section 26 of the Constitution; and
- (ee) Therefore, actions and/or omissions of both the Department and the City of Matlosana constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (ix) The remedial action I considered appropriate in terms of section 182(1)(c) of the Constitution is that:
- (a) **The MEC for Local Government and Human Settlements to ensure that:**
- (aa) The Department's procurement process for goods and services is in compliance with section 217 of the Constitution, section 38 of the Public Finance Management Act, Treasury Regulations and the Department's Supply Chain Management Policy.

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- (bb) All employees of the Department dealing with supply chain management are properly qualified and trained to perform their functions.
- (cc) The Department audits the performance of TYA to determine whether it has fully complied with the terms and conditions as contained in the 2012 settlement agreement and issue a compliance report to the Public Protector, within forty five (45) working days of the date of this report.
- (b) The HOD of the Department of Local Government and Human Settlements to ensure that:**
- (aa) TYA effects remedial works on all properties attributed to its poor workmanship, within six (6) months of the date of this report.
- (bb) The Department conducts an audit to verify the list of approved beneficiaries *vis-a-vis* the allocated houses in the Pilot Project to determine if all approved beneficiaries have been allocated houses, and submit the outcome of the audit with corrective measures to the Public Protector, within 6 months from the date of this report.
- (c) The Executive Mayor of the City of Matlosana to take steps to ensure that:**
- (aa) Henceforth, Council implements its adopted resolutions unless they have been properly rescinded.
- (d) The Municipal Manger of the City of Matlosana to take steps to ensure that:**
- (aa) The Complainant is issued with a letter of apology for instituting a civil litigation only to withdraw it six (6) years later and for pursuing misconduct

charges against the Complainant that could not be upheld at the Labour Court.

- (bb) The Complainant is paid his legal costs once it has been taxed by the tax Master, within 20 working days after it has been submitted to the City of Matlosana.

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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 section 8(1) of the Public Protector Act, 23 of 1994 (Public Protector Act).

1.2. This report is submitted in terms of section 8 of the Public Protector Act to:

1.2.1. The Premier of the North West Provincial Government ;

1.2.2. The Member of the Executive Council (MEC) responsible for Local Government & Human Settlement in the North West Provincial Government;

1.2.3. The Head of Department (HOD): Department of Local Government and Human Settlement in the North West Provincial Government (the Department);

1.2.4. Executive Mayor of the City of Matlosana Local Municipality (City of Matlosana);

1.2.5. The Municipal Manager of the City of Matlosana; and

1.2.6. The Complainant: Mr. Matshedisho Moses Moadira.

1.3. This report relates to my investigation into allegations of improper conduct and maladministration during the development of the housing projects managed by Toro ya Africa (TYA) on behalf of the City of Matlosana Local Municipality.

2. THE COMPLAINT

2.1. The complaint was lodged by the former Municipal Manager of the City of Matlosana, Mr M M Moadira, (the Complainant) on 30 August 2011, alleging that:

2.1.1 He (the Complainant) assumed his duties as a Municipal Manager for the City of Matlosana on 01 November 2006. Around December 2006, he declined to authorise a guarantee letter to a bank confirming that the City of Matlosana was indebted to TYA, a contractor appointed by the City of Matlosana, before his tenure, for the construction of five thousand (5000) low cost houses in Jouberton Extension 24, Kanana Extension 14 and Khuma Extension 11 (the Pilot Project). This was after officials from TYA had unsuccessfully tried to convince him to accede to their several requests for him to do so;

2.1.2 Premised on the above refusal, TYA instituted civil proceedings against the City of Matlosana for payment of services rendered, under case number 4114/2007. However, based on the visual poor workmanship employed on the Pilot Project, failure by TYA to substantiate its claim as well as the National Home Builders Registration Council's (NHBRC) report of February 2007, the City of Matlosana decided to defend the litigation against TYA;

2.1.3 The City of Matlosana and TYA entered into a settlement agreement in terms of which TYA was to comply with its contractual obligations, but TYA failed to do so. Consequently the City of Matlosana cancelled all contracts entered into with TYA;

2.1.4 The City of Matlosana proceeded to institute civil proceedings against TYA after it failed to meet the terms and conditions of the settlement agreement. Two cases were instituted under case numbers 38274/2008 and 55305/2008 for damages amounting to R134 million in relation to the Pilot Project and for

damages amounting to R89 million in relation to the Alabama Extension 3 respectively;

- 2.1.5 The erstwhile Executive Mayor, Cllr OM Mogale, who succeeded Cllr T S Dodovu in 2010, made it clear on his assumption of duty that the litigation against TYA should be stopped as he considered it a waste of money;
- 2.1.6 During a Special Council Meeting held on 20 August 2010, the City of Matlosana resolved to remove TYA's case scheduled for 23 August 2010 from the roll and to suspend the Complainant as a Municipal Manager. His suspension took effect and the case against TYA was also removed from the roll; and
- 2.1.7 After failing to coerce him to carry out the verbal instruction to stop the litigation, Cllr Mogale resorted to measures that eventually saw him being dismissed from the City of Matlosana.
- 2.2. The Complainant made allegations of wasteful expenditure and failure by the City of Matlosana to implement its own resolutions.
- 2.3. Further thereto, the Complainant also raised issues pertaining to his dismissal which I did not investigate because these issues were considered and addressed by other competent bodies, including the Council for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court under case number JR 1875/14. However, it is worth noting that in the aforementioned case, although the court deemed the Complainant's dismissal to be substantially fair, the Complainant was only found guilty of four¹ (4) out of the thirteen 1(3) charges levelled against him.
- 2.4. In the main, the complaint was that there was malfeasance and maladministration during the delivery of the low cost housing projects managed by TYA on behalf

¹ Count 6,7,8 and 11

of the City of Matlosana. On the assessment of the information at the Public Protector's disposal, the said malfeasance and maladministration involved both the City of Matlosana and the Department of Local Government and Human Settlement in the North West Provincial Government (the Department).

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector was 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 power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,

(b) to report on that conduct ; and

(c) to take appropriate remedial action".

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by 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 power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the constitutional court, (in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v*

Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the public protector:

- 3.5.1 The remedial action taken by the Public Protector has a binding effect, *“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”* (para 73);
- 3.5.2 Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.5.3 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** (para 67);
- 3.5.4 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** (para 68);
- 3.5.5 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 (para 69) ;

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- 3.5.6 Every complaint requires a **practical or effective remedy** that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);
- 3.5.7 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** (para 71);
- 3.5.8 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** (para 71(c));
- 3.5.9 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (para 71(d));
- 3.5.10 "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 (para 71(e));
- 3.6 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:
- 3.6.1 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers

entrusted on them under the constitution where that is required to remedy the harm in question (para 82);

- 3.6.2 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 (para 85 and 152);
- 3.6.3 There is nothing in the Public Protector Act or Ethics Act that prohibit 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 (para 91 and 92);
- 3.6.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):
- (a) Conduct an investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 3.6.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);
- 3.6.6 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 (para 105).
- 3.6.7 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108);

- 3.6.8 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);
- 3.7 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute 'special circumstances', 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 Complainants and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitutes as 'special circumstances' depends on the merits of each case
- 3.8 The institutions mentioned in this report, viz, the City of Matlosana and the Department are organs of state and their conduct amounts to conduct in state affairs, as a result the complaints fall within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.
- 3.9 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.

4. THE INVESTIGATION

4.1 Methodology

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- 4.1.1 Some of the issues raised by the Complainant, which included the allegation of the delay by the City of Matlosana to set down a civil litigation (under the North Gauteng High Court case number 49905/11) against him was mediated in line with section 6(4)(b) of the Public Protector Act. An Alternative Dispute Resolution (ADR) session was held on 10 August 2016 where it was agreed that the parties' legal representatives should invoke internal remedies to deal with the pending litigation.
- 4.1.2 The main investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.3 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.
- 4.2 Approach to the investigation**
- 4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
- 4.2.1.1 What happened?
- 4.2.1.2 What should have happened?
- 4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?
- 4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the 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. In this particular case, the factual enquiry principally focused on the roles played by both the City of Matlosana and the Department during the

delivery of housing projects managed by TYA. Further thereto, the investigation also focussed on whether the City of Matlosana complied with its own resolutions as adopted by Council in the execution of its duties and functions.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the City of Matlosana and the Department.

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

4.3 Notice issued in terms of section 7(9) of the Public Protector Act

4.3.1 During the investigation process, I issued notices in terms of section 7(9)(a) of the Public Protector Act (Notice) to the institutions implicated in the report on 19 March 2019 to afford them an opportunity to respond to the Public Protector's provisional findings. All the institutions and affected persons served with a Notice were to respond before 31 March 2019.

4.3.2 I only received a response to the Notice dated 27 March 2019 from the City of Matlosana Municipal Manager, Mr TSR Nkhumise, on 28 March 2019. Unfortunately no responses or submissions were received from the MEC, the Department, and the Executive Mayor of the City of Matlosana in this regard.

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

- 4.3.1 Whether the City of Matlosana improperly appointed TYA to develop the Alabama Extension 3 Housing Project (Alabama Project);
- 4.3.2 Whether payments made to TYA in relation to the Alabama Project were irregular and constituted fruitless and wasteful expenditure;
- 4.3.3 Whether the City of Matlosana improperly appointed TYA to develop the Pilot Project;
- 4.3.4 Whether the City of Matlosana's withdrawal of civil proceedings against TYA from the court roll contravened Council Resolution CC84/2010 and whether it constituted maladministration;
- 4.3.5 Whether the City of Matlosana improperly disregarded some of its adopted resolutions in the performance of its functions and in exercising its powers;
- 4.3.6 Whether the Department improperly failed to implement the settlement agreement concluded between TYA, the City of Matlosana and the Department on 31 January 2012;
- 4.3.7 Whether the City of Matlosana's withdrawal of the civil litigation against the Complainant amounted to fruitless and wasteful expenditure;
- 4.3.8 Whether the Department improperly re-appointed TYA to continue with the development of both the Alabama and Pilot Projects; and
- 4.3.9 Whether the community of the City of Matlosana was improperly prejudiced by the conduct of both the City of Matlosana and the Department?

4.5 The Key Sources of information

4.5.1 Documents

- 4.5.1.1 Complaint letters dated 10/01/2013, 06/04/2013, 3 November 2015 (addressed to The Administrator, Mr. S Ramagaga), 16 June 2016, 30 July 2018, 22 November 2018.
- 4.5.1.2 Agreement (Project Number B05050001) between Department and the City of Matlosana in respect of the Alabama Ext. 3 -13 May 2004.
- 4.5.1.3 Land Availability Agreement (LAA) -18 November 2005.
- 4.5.1.4 Documents pertaining contract no. H5/2005.
- 4.5.1.5 Ramathe Fivas Forensic & Investigation Accounting Services-Forensic audit into the appointment of Toro ya Africa, 20 December 2006.
- 4.5.1.6 NHBRC: Forensic Engineering Audits on Subsidy Houses Built in Klerksdorp: Kanana X14 & Jouberton X 24.
- 4.5.1.7 Messrs Dlanjwa Attorneys: Report of the Investigating Committee on the Oversight and Annual Reports 2007/2008.
- 4.5.1.8 Copies of Court papers- North Gauteng High Court-Pretoria case numbers, 38274/2008 and 55305/2008.
- 4.5.1.9 Copies of Court papers –North Gauteng High Court –Pretoria case number 49905/11.
- 4.5.1.10 Open Water: Draft Report Summarised Findings -22 September 2015.
- 4.5.1.11 DWP Consultants Incorporated: Final Report of the Results of the Investigation into Services Rendered to the City of Matlosana by Service Providers for the Construction of Low Cost Housing in Alabama Ext.13 and the so-called “Pilot Project”.
- 4.5.1.12 The City of Matlosana Council Resolutions: CC33/2010, CC35/2010, CC83/2010, CC84/2010, CC138/2010.
- 4.5.1.13 Deed of Settlement between TYA, the City of Matlosana and the Department- 31 January 2012.
- 4.5.1.14 Alabama Ext 3 Verification report dated 19 February 2019.

4.5.2 Interviews conducted

- 4.5.2.1 Interviews with the Complainant on 14 April 2014, 20 September 2018.
- 4.5.2.2 ADR hearing held with the Complainant and the City of Matlosana on 10 August 2016.
- 4.5.2.3 Subpoena hearing with the Department and the City of Matlosana on 22 May 2017.
- 4.5.2.4 Interview with Messrs LB Attorneys Incorporated on 19 & 20 June 2017.
- 4.5.2.5 Interview with the City of Matlosana, Mr TSR Nkhumise, on 08 February 2019.
- 4.5.2.6 Interview with the former Executive Mayor, M. O M Mogale, on 08 February 2019.
- 4.5.2.7 Interview with the HOD of Department, Mr. P E Motoko, on 11 February 2019.
- 4.5.2.8 Interview with the former Executive Mayor, Mr. M K Khauoe, on 11 February 2019
- 4.5.2.9 Interview with the former HODs, Mr. TZ Mokhatla, and Mr. I Motala on 11 February 2019.
- 4.5.2.10 Interview with the former Executive Mayor, Mr T S Dodovu, on 19 February 2019.

4.5.3 Correspondence sent and received

- 4.5.3.1 Letter to the City of Matlosana dated 30 November 2011 from the Public Protector.
- 4.5.3.2 Letter dated 1 February 2012 from Messrs Lourens Bezuidenhout & Venter (LB&V) Attorneys Incorporated² on behalf of the City of Matlosana.
- 4.5.3.3 Letter from the Public Protector dated 18 June 2015, to former Executive Mayor, Cllr K M Khauoe.
- 4.5.3.4 Letter dated 08 December 2015 from Messrs Lourens & Bezuidenhout (LB) Attorneys Incorporated on behalf of the City of Matlosana.

² Later became LB Attorneys

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- 4.5.3.5 Letter dated 20 September 2016 addressed to the Acting Municipal Manager of the City of Matlosana from the Public Protector.
 - 4.5.3.6 Letter dated 20 September 2016 addressed to the HOD of the Department from the Public Protector.
 - 4.5.3.7 Letters to the Public Protector dated 31 May 2017 and 07 June 2017 from the Municipal Manager: Mr TSR Nkhumise.
 - 4.5.3.8 Letter dated 31 September 2017 addressed to Municipal Manager: M. TSR Nkhumise from the Public Protector.
 - 4.5.3.9 Letter dated 18 October 2018 addressed to Municipal Manager: Mr TSR Nkhumise from the Public Protector
 - 4.5.3.10 Letter to the Public Protector dated 02 November 2018 from the Municipal Manager: Mr TSR Nkhumise.
 - 4.5.3.11 Letter to the Public Protector dated 19 February 2019 and 27 March 2019 from the Municipal Manager: Mr TSR Nkhumise
 - 4.5.3.12 Letters dated 21 January 2019, 07 February 2019 and 14 February 2019 to Public Protector from Messrs De Kocks Attorneys.
- 4.5.4 **Legislation and other prescripts.**
- 4.5.4.1 The Constitution of the Republic of South Africa, 1996 (The Constitution).
 - 4.5.4.2 The Public Protector Act, no. 23 of 1994 (Public protector Act).
 - 4.5.4.3 The City of Matlosana Supply Chain Management Policy -1 December 2004.
 - 4.5.4.4 The Public Finance Management Act, no.1 of 1999 (PFMA).
 - 4.5.4.5 Local Government: Municipal Systems Act, no. 32 of 2000 (MSA)
 - 4.5.4.6 Local Government: Municipal Financial Management Act, no.56 of 2003 (MFMA).

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

5.1 Whether the City of Matlosana improperly appointed TYA to develop the Alabama Project

Common cause issues:

- 5.1.1 It is common cause that the City of Matlosana was assigned the administration of the housing project known as Alabama Extension 3 for the construction of initially 300, 40m² low cost houses, which were subsequently extended to 1485 and finally 2129³ within its municipal area through the housing implementation plan of the Department.
- 5.1.2 TYA, through a letter to the City of Matlosana dated 05 May 2004, informed the City of Matlosana that it had been appointed as “*Developers /Project Managers by Thubelisha Homes to implement a Right Sizing Project at Alabama Extension 3*”. The aforesaid letter also served as a formal application by TYA for one thousand five hundred (1500) stands situated in Alabama Extension 3, which it was prepared to develop in phases of two hundred (200) houses for the beneficiaries in the City of Matlosana’s waiting list.
- 5.1.3 During a meeting on Alabama Project on 08 November 2004, the then Executive Mayor and as per resolution EM 173/2004 resolved that:
- (a) *A land availability agreement with Toro Ya Africa be signed for the development of 1485 stands in Alabama Extension 3.*

³ The CoM has also presented this number as 2132

- (b) *Cognisance be taken that 300 of the stands mentioned in paragraph 1 above will be for development by Toro Ya Africa (Pty) Ltd on behalf of Thubelisha Home Loans as part of the relocation subsidies.*
- (c) *Toro Ya Africa (Pty) Ltd be held responsible for the payment of the stand price and the installation of services on the 1485 stands....”*

- 5.1.4 In the execution of the above-mentioned resolution, the City of Matlosana, represented by the then Municipal Manager, Mr T Z Mokhatla, and TYA, represented by Mr F W C Nel, concluded the Land Availability Agreement (LAA) on 18 November 2005. In essence, the City of Matlosana ceded its development rights to develop the Alabama Project, to TYA on terms and conditions contained therein.
- 5.1.5 TYA, through a letter to the City of Matlosana dated 17 December 2004, advised that it had already commenced with the Alabama Project at the request of Thubelisha Homes.
- 5.1.6 It was observed in the Ramathe Fivas report⁴ in par. 4.4.4 and 4.4.5 that there was no agreement between TYA and the City of Matlosana other than the LAA when some amount of R1 587 600.00 was paid to TYA on 21 December 2004. The City of Matlosana approved payment on the premise that Thubelisha had ceded its rights to TYA to develop certain erven on its behalf while no such agreement existed between the City of Matlosana and Thubelisha and/or Thubelisha and TYA.
- 5.1.7 In its response to the Public Protector dated 31 January 2012, the City of Matlosana conceded that the Alabama Project “*was not done by a way of a*

⁴ Ramathe Fivas: Forensic & Investigation Accounting Services-Forensic audit into the appointment of Toro ya Africa, 20 December 2006

tender process or in compliance with the Supply Chain Management Policy and/or process of the City of Matlosana”.

Issues in dispute

- 5.1.8 The main issue for determination was whether the conduct of the City of Matlosana in allowing TYA to take over from Thubelisha was consistent with the applicable legislative framework.
- 5.1.9 The contractual relationship between the City of Matlosana and TYA appears to have commenced by way of resolution EM 173/2004 and the signing of the LAA on 18 November 2005.
- 5.1.10 However, through a letter dated 18 October 2004, TYA addressed a letter to Mr T Z Mokhatla, requesting a meeting in order to clarify the LAA for the Alabama Project. In this letter, TYA wrote :
- “There are still conflicting reports as to whether it is Toro that has an agreement or whether it is Thubelisha itself that has an agreement with Council. We therefore request this meeting in order to resolve this matter for once and for all” .*
- 5.1.11 The details of what transpired during the said meeting were not availed for consideration during this investigation. However, in its response dated 31 January 2012, the City of Matlosana submitted that when Thubelisha Homes failed to perform its obligation in terms of the Alabama Project, Thubelisha Homes consented to TYA taking over its obligations.
- 5.1.12 Through a letter to the former Speaker of the Council, Mr B S Tshwene, dated 28 November 2005, Thubelisha wrote:

“This serves to confirm that Thubelisha Homes did not have land availability agreement with the Klerksdorp Municipality.

We further reiterate that we did not cede any agreement to Toro ya Africa”.

5.1.13 In the above letter, Thubelisha disputed the existence of the LAA with the City of Matlosana and the alleged ceding of its rights under the LAA to TYA. It should be noted that during this investigation, the City of Matlosana did not furnish a copy of the LAA and/or any contract it had with Thubelisha in respect to the Alabama Project to the investigation team.

5.1.14 It should be determined whether the City of Matlosana’s conduct in the circumstances constituted a proper appointment of TYA to deliver on the Alabama Project by considering the regulatory framework to be discussed hereunder.

Application of the relevant legal framework

5.1.15 Section 217(1) of the Constitution stipulates that:

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

5.1.16 Section 83 of the Municipal Systems Act ⁵(MSA) requires the Municipality to embark on processes which are *inter alia*: competitive; fair; transparent; equitable and cost effective, when providing municipal services through a service delivery agreement.

⁵ No 32 of 2000.

- 5.1.17 Clause 6 of Supply Chain Management (SCM) Policy of the City of Matlosana states that *“the guiding principle for undertaking and measuring of empowerment in the procurement activities include, enhanced competitiveness and fair trade practices....”* and *“Compliance with legislation...”*
- 5.1.18 The City of Matlosana did not offer an explanation why the processes contained in its SCM Policy and the requirements of the Constitution and MSA were not adhered to during the procurement of both Thubelisha and TYA's services.
- 5.1.19 The City of Matlosana did not embark on a competitive bidding process as required by the Constitution, the MSA and the policy, when procuring the services of TYA for the Alabama Project.

Conclusion

- 5.1.20 In the circumstances, the appointment of TYA to develop the Alabama Project contravened section 217(1) of the Constitution, section 83(1) of the MSA and the provisions of the SCM Policy.
- 5.2 Whether payments made to TYA in relation to the Alabama Project were irregular and constituted fruitless and wasteful expenditure.**

Common cause issues

- 5.2.1 It is common cause that Thubelisha Homes was the original developer of the Alabama Project.

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- 5.2.2 Thubelisha Homes addressed a letter to TYA dated 17 December 2004 indicating that Thubelisha Homes will not be pursuing the conclusion of its agreement with the City of Matlosana for the construction of any units in the Alabama Project.
- 5.2.3 TYA, through a letter dated 17 December 2004, advised the City of Matlosana that it had already commenced with the Alabama project at the request of Thubelisha Homes. TYA also advised that Thubelisha Homes was facing a financial crisis. TYA further requested financial intervention from the City of Matlosana to assist it in the completion of its first phase of three hundred (300) houses.
- 5.2.4 TYA submitted a payment claim dated 14 December 2004 to the City of Matlosana for the amount of R 1 587 600.00 excluding VAT and an amount of R1 809 864.00 including VAT. A Special Mayoral Committee meeting held on 22 December 2004 made a recommendation that payment of R 1 587 600.00 be made to TYA.
- 5.2.5 The first payment totalling R1 587 600.00 was made to TYA through a cheque dated 21 December 2004. In the end, the City of Matlosana paid TYA a total of R86 987 750.78 in relation to the Alabama Project.
- 5.2.6 The City of Matlosana, through a letter dated 31 January 2012, conceded to the following:
- 5.2.6.1 That the Alabama Project was never enrolled with the National Home Builders Registration Council (NHBRC) prior to the construction of the housing unit;
- 5.2.6.2 That DWP Consultants Incorporated⁶ (DWP) was sourced to conduct an audit of the housing units in the Alabama Project. In this instance, DWP, *inter alia*,

⁶ A civil and structural engineering company with registration number 2005/004099/21

conducted concrete hammer and compressive strength tests to determine the concrete strength of the foundations and visual inspection of the top structures of the housing units;

- 5.2.6.3 That amongst other things, the tests done indicated that one thousand four hundred and twenty seven (1427) of the two thousand one hundred and thirty two (2132) houses (i.e. about 69%) had foundation strength below 20 MPa; and
- 5.2.6.4 Further that in terms of compressive strength test conducted, the conclusion reached was that about 88.8% of the houses in the Alabama Project had foundation strength below 20 MPa.

Issues in dispute

- 5.2.7 The main issue for determination is whether or not the payment to TYA for the Alabama Project constituted an irregular and/or fruitless and wasteful expenditure.
- 5.2.8 The City of Matlosana did not argue that any tender or procurement process in terms of its own SCM policy was followed when contracting the services of TYA. In this regard, the City of Matlosana made the first payment of R1 587 600.00 and subsequent payments to TYA on the basis of the LAA. A total amount paid to TYA in respect of the project was about R86 987 750.78.
- 5.2.9 The City of Matlosana submitted that when TYA abandoned the Alabama Project without having fulfilled its contractual obligations, it cancelled the contract and claimed damages to the amount of R89 271 87961 (Including VAT) through case number 55305/08. However, the case against TYA was subsequently removed from the court's roll in 2010.

Application of the relevant legal framework

5.2.10 In terms of the Municipal Financial Management Act,⁷ “**irregular expenditure**”, is defined as:

“in relation to a municipality or municipal entity, means 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”.

*“**fruitless and wasteful expenditure**” means expenditure that was made in vain and would have been avoided had reasonable care been exercised;*

5.2.11 As noted in this investigation, the Ramathe Fivas report also observed that payments made to TYA were done contrary to the MFMA in that it was not in terms of a legal liability on the City of Matlosana and pursuant to a valid procurement and/or tender process⁸. In this regard, TYA was paid about R86 million for the development of about two thousand one hundred and twenty nine (2 129) housing units for the Alabama Project.

5.2.12 The expenditure incurred by the City of Matlosana in relation to the services rendered by TYA which assumed its duties contrary to the MFMA should be regarded as irregular.

5.2.13 The expenditure was fruitless and wasteful in that TYA was paid despite not having fulfilled its contractual obligation under the Alabama Project.

5.2.14 Section 32 of the MFMA read thus:

⁷ No, 56 of 2003

⁸ At par. 448

- (2) *“A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure,*
- (a) *in the case of unauthorised expenditure, is-*
- (i) *authorised in an adjustments budget; or*
- (ii) *certified by the municipal council, after investigation by a council*
- (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”.*

5.2.15 Both the Ramathe Fivas report and the Council’s ADHOC Committee⁹ which investigated the appointment of TYA in respect to the Alabama Project found prime facie evidence that the appointment was irregular. However, it would appear that no measures were taken in terms of the above-mentioned section.

Conclusion

5.2.16 In light of the information traversed above, payments to TYA for the Alabama Project by the City of Matlosana was irregular and constituted fruitless and wasteful expenditure in terms of the MFMA.

5.3 Whether the City of Matlosana improperly appointed TYA to develop the Pilot Project

Common cause issues

⁹ Report by the ADHOC Committee to Investigate Possible Irregularities Regarding the Appointment of Toro ya Africa Consultants in the City of Matlosna

- 5.3.1 The City of Matlosana advertised a tender in 2005 under tender reference “Contract H5/2005” inviting bidders “*for the construction of 5000 houses for the Klerksdorp Pilot Project*”. The bid due date was 10 October 2005, at 11h00. On or about 10 October 2005, TYA submitted a written tender, signed by its Chief Executive Officer of TYA for the Construction of the five thousand (5000) low cost houses.
- 5.3.2 On or about 18 November 2005, the City of Matlosana, under reference MM 16/2005, resolved to appoint TYA to construct four thousand three hundred and fifty two (4352) houses of the five thousand (5000) houses in the Pilot Project at a fixed amount of R 27 071.93.
- 5.3.3 The 4352 houses comprised of one thousand seven hundred and fifty three (1753) houses in Jouberton Extension 24 and two thousand five hundred and ninety nine (2599) houses in Kanana Extension 14 were awarded to TYA. The 332 houses to be constructed in Jouberton Extension 14 were awarded to KOSH Contractors & Building Supplies CC (KOSH). The remaining three hundred and sixteen (316) houses to be constructed in Khuma Extension 11 were awarded to Let’s Trade 1252 (Let’s Trade).
- 5.3.4 On 17 January 2006, the CoM, through the then Municipal Manager, Mr T Z Mokhatla, counter signed the written tender documents submitted by TYA whereby the tender documents became an agreement between the parties.

Issues in dispute

- 5.3.5 The main issue for determination was whether the appointment of TYA was in accordance with the City of Matlosana’s procurement processes and the Constitution.

5.3.6 The City of Matlosana, through a letter dated 19 November 2015, provided a list of service providers who appeared in its supplier database. In the aforementioned list, the name of TYA did not appear as one of the Service Providers.

Application of the relevant legal framework

5.3.7 Clause 8.1 bullet point 9 of SCM Policy¹⁰, required that there must be a “*database of pre-qualified suppliers to participate in all bidding processes. Non-registered suppliers, service providers and contractors will not be permitted to participate in the Council’s procurement activities*”.

5.3.8 According to the City of Matlosana’s SCM Policy, where a Service Provider is not listed in the supplier database, it is not permitted to take part in any Council’s procurement activities. Therefore, enlistment in the database was a prerequisite for any participation in the procurement processes of the City of Matlosana.

5.3.9 Although TYA did not appear on the supplier database, its inclusion in the tender process was still consistent with the principles espoused in section 217 of the Constitution and section 83 of the MSA. The principle of competitive bidding revolves around the need to afford opportunities to as many bidders as possible in order to derive, *inter alia*, cost-effectiveness, in the delivery of government’ services.

¹⁰ Approved and implemented 1st December 2004.

Conclusion

5.3.10 In the circumstances, I am not persuaded that it will be appropriate to regard the appointment of TYA for the Pilot Project as improper, due to the non-registration of the company on the City of Matlosana's database.

5.4 Whether the City of Matlosana's withdrawal of civil proceedings instituted against TYA from the court roll contravened Council resolution CC84/2010 and whether it constituted maladministration

Common cause issues

5.4.1 It is common cause that the City of Matlosana Council received a request through a letter dated 18 August 2010 from TYA in terms of which the parties were to enter into a settlement agreement instead of proceeding with the matter under case numbers 38274/08 and 55305/08.

5.4.2 The City of Matlosana Council convened a special Council sitting on 20 August 2010 to discuss the aforementioned court case. The Council, as per resolution number CC 84/2010 resolved *inter alia* the following:

"That in view of the attitude conveyed by TYA and taking into account the high cost associated with continuing with the civil proceedings against TYA, the Council is of the view that the possibility to reach a settlement in this matter will be to the benefit of the City of Matlosana and should be explored in the following manner:

- (a) *The City of Matlosana's legal representative be instructed to engage the legal representative of TYA to explore the possibilities of reaching a settlement in this matter with the aim of protecting City of Matlosana's interests;*

- (b) *In order for the process to commence and be conducted, the matter must be removed from the court roll for hearing and be postponed sine die on the following conditions:*
- (i) *The City of Matlosana legal representative be mandated to compile a format for settlement and further engage on the houses with minor defects;*
 - (ii) *Postpone the case on condition that TYA pay legal expenses of the City of Matlosana and the provincial government; and*
 - (iii) *In the event that TYA is not agreeing to pay the City of Matlosana's legal costs the matter should not be removed from the court roll, but commence on 23 August 2010 and carry on to its conclusion.*
- (c) *In the event of the parties not being able to reach an agreement of settlement by 22 August 2010, the City of Matlosana's legal representative be instructed to report this and the reasons thereof to Council, who will then, after further consideration of the matter provide the City of Matlosana's legal representatives with further instructions."*

5.4.3 The City of Matlosana submitted in a letter dated 8 December 2015 that there was an agreement between the Council and TYA's legal representatives that TYA will have to pay the legal costs of the City of Matlosana before the matter could be withdrawn. Due to the fact that TYA agreed to pay the costs of postponement of the matter, the City of Matlosana agreed to postpone the matter *sine die* until a settlement agreement was reached or until it was confirmed that a settlement of the matter would not be possible.

5.4.4 The terms and conditions of the proposed deed of settlement drafted by TYA were not acceptable to the City of Matlosana. The draft deed of settlement was presented to and approved by Council at a special council meeting held on 19 December 2011. A final draft was prepared by City of Matlosana and delivered to TYA on 5 January 2012 for their signature.

Issue in dispute

5.4.5 The main issue for determination was whether the removal of the case from the roll was in contravention of Council resolution CC84/2010.

5.4.6 It was the Complainant's submission that when the new guard, in the form of Cllr Mogale, came in as the Executive Mayor, he was not interested in pursuing TYA through litigation. However, during the subpoena hearing on 08 February 2019, Cllr Mogale submitted that it was the cost factor which prompted him to consider an out of court settlement.

5.4.7 This argument was also advanced by some of the City of Matlosana's former officials¹¹ who argued that the withdrawal of the litigation against TYA was premised on that fact that exorbitant legal fees had already been expended in this litigation and therefore it was desirable to reach a settlement with TYA instead.

5.4.8 However, neither the former officials of both the Department and the City of Matlosana nor the current guard of the Department were able to demonstrate how the withdrawal benefited the City of Matlosana and the beneficiaries of the housing projects.

5.4.9 During the investigation, the City of Matlosana was requested to produce a Council resolution revoking CC84/2010, but the City of Matlosana failed to do

¹¹ During subpoena hearings conducted with ex officials on 08/03/2019, 11/03/2019 and 19 February 2019

so. Its legal representatives submitted that the matter was removed from the Court roll after receiving a verbal instruction from the City of Matlosana on 22 August 2010.

- 5.4.10 During the subpoena hearing with Cllr Mogale, he denied any knowledge of a verbal instruction given to the City of Matlosana's legal representative to withdraw the case. He contended that it was resolution CC84/2010 that sanctioned the withdrawal of the litigation against TYA. In any event, he argued, if there was such a verbal instruction, it would have come from the then Acting Municipal Manager, Mr S G Mabunda¹². This was due to the fact that the Complainant, who was advocating for this litigation, had been suspended at the time.

Application of the relevant legal framework

- 5.4.11 Section 160(1)(a) of the Constitution states that "a *Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.*"
- 5.4.12 The above requirement was further echoed in *Mputumi Camaron Manana v King Sabata Dalindyebo Municipality*¹³ (*Mputumi case*), wherein the Court emphasised that a municipal council acts through its resolutions. Once a resolution is adopted, its officials are bound to execute it, until such time as it is either rescinded or set aside on review.
- 5.4.13 According to the *Mputumi case*, the City of Matlosana Council, like any other Municipal Council is obliged to act through its resolutions. It is expected that once a resolution has been adopted, the officials are bound to execute the resolution, until such time that it is either rescinded or set aside on review.

¹² Deceased and could not be interviewed on this aspect.

¹³ (345/09) [2010] ZASCA 144 (25 November 2010) at Par 22

- 5.4.14 The investigation revealed that the Council indeed held a special Council meeting on 20 August 2010, wherein the Council resolved that civil proceedings against TYA should be postponed or removed from the court roll on condition that TYA pay legal expenses incurred by the City of Matlosana in instituting civil proceedings against TYA.
- 5.4.15 According to the resolution, the removal of the matter from the roll was dependent on a suspensive condition that a format for settlement be compiled and that TYA pay legal expenses of the City of Matlosana and the provincial government. The resolution further stated that the agreement on both conditions should be reached by 22 August 2010, failure to do so means the matter should not be removed from the roll, but commence on 23 August 2010 until its completion.
- 5.4.16 In a letter dated 8 December 2015, the City of Matlosana's legal representatives stated that *"...Toro agreed to pay the costs of the postponement of the matter, provided instructions to our offices that the matter be postponed sine die until a settlement agreement has either been reached or until it was confirmed that a settlement of the matter would not be possible. There was no Council resolution to this effect as the Council of our client did not meet on Sunday 22 August 2010 after we reported the said position to our client and did not have time to meet on Monday, 23 August 2010, before the matter came before court. We were telephonically instructed by our client to postpone the matter sine die on 23 August 2010"*.
- 5.4.17 From the information obtained from the City of Matlosana legal representative, the City of Matlosana removed civil proceedings instituted against TYA from the court roll without recovering legal expenses incurred by the City of Matlosana in relation to TYA matter. A total amount of R3 million was fully paid in 2011, long after the matter had been removed from the roll.

5.4.18 There was no evidence to indicate that the City of Matlosana complied with Council resolution CC84/2010, before removing civil proceedings against TYA from the court roll. The alleged instruction given to the City of Matlosana's legal representatives was not sanctioned by a Council's resolution.

Conclusion

5.4.19 From the evidence canvassed above, it is clear that the removal of the matter from the roll by the City of Matlosana contravened council resolution CC84/2010 as there was a suspensive condition directing what should happen should TYA not meet the terms of the removal of the case from the roll. In this regard, it was expressly stated that if a settlement could not be reached by the 22nd August 2010, the case should continue on 23 August 2010 until its conclusion.

5.5 Whether the City of Matlosana improperly disregarded some of its adopted resolutions in the performance of its functions and in exercising its powers.

Common cause issues

5.5.1 It is common cause that paragraph (c) of resolution CC33/2010¹⁴ on *Oversight Report on Annual Report of 2007/2008* read thus:

"That the Executive Mayor establish an Investigation Committee with terms of reference to investigate the identified irregularities as captured in both the Oversight and Annual Report".

¹⁴ Dated 29/04/2010

5.5.2 The then Executive Mayor, Cllr O M Mogale, appointed the Investigation Committee as per the resolution. Mr G S Dlanjwa of Messrs Dlanjwa Attorneys was appointed as the chairperson of the Investigation Committee. Ten (10) Councillors were announced as members of the Investigation Committee. The Investigation Committee submitted its report dated 05 July 2010 to the then Executive Mayor.

5.5.3 Paragraph (a) of resolution CC35/2010 on *Grievance: Manager Support services against the Municipal Manager*, read thus

“That the Executive Mayor be given a latitude to establish an Investigation Committee and also appoint an independent legal person to advise the Investigation Committee and same submit a final recommendation to the Council within 30 days on the grievance and allegations levelled at the Municipal Manager”.

5.5.4 Messrs Setshedi Makgale & Matlapeng Attorneys submitted a memorandum of fees and disbursements of about R 672 675.95 due and payable by the office of the Executive Mayor and the City of Matlosana as per resolution CC35/2010.

5.5.5 Paragraph (a)(1) of *Resolution CC83/2010¹⁵ on Report on the Investigation of the Grievances and Allegations Levelled Against the Municipal Manager* read thus:

“That, there apparently being substance to grievance of Mr Makhetha, it be dealt with in terms of applicable provisions of the Bargaining Collective Agreements separate from the investigations into the allegations”.

¹⁵ Dated 03/08/2010

5.5.6 Resolution CC138/2010 on *Disciplinary Enquiry: Director: Corporate Governance Ms M I Matthews* read thus:

“That the matter be regarded as finalised as at 13 May 2010 and SALGA should defend the matter as such”

Issue in dispute

5.5.7 The main issue for determination was whether Council complied or disregarded its own resolutions in the performance of its functions and in exercising its powers. Firstly, the Complainant submitted that Cllr Mogale defied resolution CC35/2010 by appointing Messrs Setshedi Makgale & Matlapeng Attorneys to conduct an investigation instead of offering legal advice as per the said resolution. Instead of the Investigation Committee conducting the investigation, Mr. Makgale of SM&M Attorneys was leading the interrogations in this process.

5.5.8 Whilst the City of Matlosana could neither confirm nor deny the Complainant’s allegations during the subpoena hearing on 08 February 2019, Cllr Mogale, denied having been involved in the appointment of Messrs Setshedi Makgale & Matlapeng Attorneys and he submitted that the appointment of service providers fell within the purview of the Municipal Manager. This was despite resolution CC35/2010 specifically empowering him to *“appoint an independent legal person to advise the investigation”*.

5.5.9 The Complainant also submitted an unsigned report purporting to be a report of the Investigation Committee, the report which was never adopted by Council.

5.5.10 Secondly, the Complainant’s assertions were that the City of Matlosana did not comply with resolution CC83/2010 in that it decided to pursue Mr Makhetha’s

grievance by commissioning an investigation by Messrs Setshedi Makgale & Matlapeng Attorneys. However, the contents of the report he submitted appears to indicate that the said investigation preceded the resolution. In this regard, Messrs Setshedi Makgale & Matlapeng Attorneys' investigation could not have been in contravention of resolution CC83/2010.

5.5.11 Thirdly, the Complainant submitted that in spite of resolution CC138/2010, the City of Matlosana decided to defend the matter on behalf of Ms Matthews contrary to the resolution. However, the City of Matlosana submitted that resolution CC27/2011 on *Appeal Hearing on the Disciplinary Case of Director: Corporate Governance: Ms M I Matthews*, which stated that she should be reinstated in her position as per the findings of the Appeal Hearing.

5.5.12 The City of Matlosana did not provide another resolution evidencing the rescission of resolution CC138/2010, or explained how her reinstatement occurred. The Complainant also alleged that Ms Matthews was allowed to lodge an appeal in November 2010 and was assisted by Council whilst she was no longer an employee. In this regard, Council should have first rescinded its decision before getting involved in the matter.

5.5.13 The question was whether resolution CC27/2011 constituted a rescission of resolution CC138/2010.

Application of the relevant legal framework

5.5.14 As already provided for under discussion in par.5.4, the City of Matlosana is obliged to conduct its business in line with adopted resolutions unless they have been so rescinded.

5.5.15 Wikipedia defines legal advice as "*the giving of a professional or formal opinion regarding the substance or procedure of the law in relation to a particular*

factual situation. The provision of legal advice will often involve analysing a set of facts and advising a person to take a specific course of action based on the applicable law”.

5.5.16 Cllr. Mogale conceded to having disregarded resolution CC35/2010 in that he was not involved in the appointment of Messrs Setshedi Makgale & Matlapeng Attorneys. The evidence presented above also revealed that Messrs Setshedi Makgale & Matlapeng Attorneys did not just provide legal advice to the Investigation Committee, as resolved by Council.

5.5.17 There was no evidence presented showing that resolution CC138/2010 was either complied with or amended or rescinded. The City of Matlosana did not provide the full record of how the appeal of Ms Matthews occurred and whether it was consistent with due process.

Conclusion

5.5.18 Based on the information traversed above, the City of Matlosana disregarded resolutions CC35/2010 and CC138 respectively in contravention of section 160(1) of the Constitution and *Mputumi case*, whilst there was no evidence of such disregard pertaining to resolution CC33/2010.

5.5.19 There was no sufficient evidence available to enable me to decide on whether resolution CC83/2010 was disregarded by Council.

5.6 Whether the Department improperly failed to implement the settlement agreement concluded between TYA, the City of Matlosana and the Department on 31 January 2012.

Common cause issues

5.6.1 It is common cause that the then MEC for the Developmental Local Government and Housing¹⁶), Mr H D Yawa, through a letter to the erstwhile Cllr T C Dodovu dated 6 February 2008, decided to withdraw the responsibilities of CoM as the Developer of the Pilot Project. In the aforesaid letter, *inter alia* the former MEC advanced the reasons for revoking the City of Matlosana's responsibilities as follows:

- (a) *"Lack of capacity to manage the housing project;*
- (b) *Inability to resolve and manage housing disputes;*
- (c) *Failure to ensure completion of the Pilot Project as planned and agreed to the signed contract between the Department and CoM..."*

5.6.2 In its response dated 25 February 2008, the City of Matlosana through the erstwhile Cllr TC Dodovu, dismissed the former MEC's reasoning for wanting to revoke its responsibilities under the Pilot Project. In its response, the City of Matlosana indicated that the Department was continuously updated on the progress of the project as well as its challenges and highlighted that the service providers were not performing, but yet wanted to be paid for same. The City of Matlosana went on to highlight that the Department was placing pressure on the City of Matlosana to proceed with the same service providers despite their non-performance.

¹⁶ Now known as the Department of Local Government and Human Settlement (North West Province)

5.6.3 In an attempt to deal with the court cases against one another, a settlement agreement was signed between the City of Matlosana, TYA and the Department on 31 January 2012. In terms of this settlement agreement, the Department was to take over the roles and responsibilities of the City of Matlosana under both the Alabama and the Pilot Projects.

5.6.4 Of note, paragraphs 1.1 and 1.3 of the settlement agreement reads that:

“The 1st Defendant [TYA] agrees and confirms that it will remain liable to execute and effect any and all performance, obligation under the agreement concluded with the Plaintiff [City of Matlosana]...and to execute and effect all the necessary required repairs to the houses in the housing project...in order to bring the specifications thereof in line with the specifications agreed upon between the parties in terms of the agreement concluded between the parties... the 1st Defendant herewith accepts these obligations and gives its irrevocable undertaking that it will attend to such performance and repairs when called upon to do so, and to carry out any and all instructions that it may receive from the 2nd defendant [the Department] and/or the NHBRC in this regard .

“The 2nd Defendant accepts full responsibility for any and all issues relating to the housing project...which responsibility includes but is not limited the project management of the project to the finality of the project, the due and proper construction of the houses that formed part of the said projects to the standards and specifications as agreed between the Plaintiff and 1st Defendant, as well as obtaining and ensuring that all houses in the stated projects will be completed to the standards of the NHBRC Home Builders Manual and the enrolling of the said houses under the NHBRC’s statutory warranty scheme”.

5.6.5 The then Municipal Manager, T Z Mokhatla, who concluded a contract with TYA on behalf of the City of Matlosana for the delivery of the Pilot Project,

became the signatory on behalf of the Department (in his capacity as the HOD) to the settlement agreement concluded between the City of Matlosana, TYA and the Department.

5.6.6 It should be noted that the settlement agreement was made an order of court during 2012.

5.6.7 During a subpoena hearing held on 25 May 2017, the HOD, Mr. P E Motoko, conceded that there was no progress made with regard to the issues contained in the settlement agreement. He further confirmed that the issues that existed before the Department took over from the City of Matlosana still exists.

5.6.8 During a subpoena hearing held on 11 February 2019, the HOD once again reported that no ground work was covered in determining whether or not TYA had complied with the conditions of the settlement agreement. The Department was unable to provide details of work done by TYA after the signing of settlement agreement.

Issue in dispute

5.6.9 The main issue for determination was whether the department took full responsibility of the housing projects until their completion as agreed upon in the settlement agreement.

5.6.10 During the subpoena hearing on 11 February 2019, the Department submitted that the City of Matlosana had undertaken some repair work on the houses with defects, thus the obligation of TYA to repair defective houses did not exist any longer. However, former Cllr T C Dodovu, argued that the repair work sanctioned by the City of Matlosana occurred when he was still the Executive Mayor, i.e. before he resigned in January 2010. He further asserted that the decision to intervene was necessitated by the potential danger posed by some of the houses constructed by TYA occasioned by poor workmanship.

- 5.6.11 The Department contended that it had not received any complaints regarding poor workmanship on the houses built by TYA. However, during the subpoena hearing on 08 February 2019, the City of Matlosana conceded that it has received numerous complaints in this regard. In its letter dated 12 February 2019, the Department requested the City of Matlosana to provide a list of complaints relating to defects on houses built in the Alabama Project. However, it could not be determined if the said list of complaints was provided to the Department.
- 5.6.12 In its letter dated 20 February 2019, the Department reported that following the subpoena hearing, it conducted an inspection *in loco* for the Alabama Project. Whereas most of the alleged complaints referred to cracked walls and roof leakages, the verification report did not provide discernible insights on the status of the houses vis-à-vis the obligation of TYA in this regard.
- 5.6.13 It was also noted that the Department only conducted an inspection *in loco* in respect to the Alabama Project only and not the Pilot Project.

Application of the relevant legal framework

- 5.6.14 In the case of *Mansell v Mansell*¹⁷ (*Mansell case*) indicated that “*for many years this court has set its face against the making of agreements orders of court merely on consent. We have frequently pointed out that the court is not a registry of obligations. Where persons enter into an agreement, the obligee’s remedy is to sue on it, obtain judgement and execute. If the agreement is made an order of court, the obligee’s remedy is to execute merely. The only merit in making such an agreement an order of court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution...*”

¹⁷ 1953 3 SA 716 N at 721 B –F

5.6.15 Further, in *Greeff v Consol Glass (Pty) Ltd*¹⁸(Greeff case) the court stated that:

“Making settlement agreements orders of court may be regarded as important for the protection of the rights of the parties to the settlement. It only facilitates and enables execution through court processes, but would enable an aggrieved party to institute contempt proceedings if the order of court is not complied with.”

5.6.16 It is improbable that the settlement agreement signed by the parties on 31 January 2012 would set conditions which had already been fulfilled at the time of settlement. Thus the submission that there were no outstanding issues pertaining to the houses in both the housing projects because the City of Matlosana had intervened, should be dismissed. What was apparent was that the Department appeared to have been in haste in usurping the City of Matlosana’s rights and obligations under these contracts, but loathe in ensuring that TYA was delivering per its contracts.

5.6.17 In terms of the above mentioned case law, the court emphasised the right of the aggrieved party to institute contempt proceedings where a settlement agreement was made an order of court. In this regard, the Department failed to exercise its rights to compel TYA to honour the settlement agreement through contempt proceedings against TYA.

Conclusion

5.6.18 The Department, in terms of the settlement agreement, undertook to implement the housing project in accordance to the specification agreed upon in the settlement agreement by ensuring proper project management, due and

¹⁸ (2013) 34 ILJ 2835 (LAC) at 24

proper construction of the house and adherence to the NHBRC's Home Builders Manual.

5.6.19 There were no available reports evidencing the implementation of the settlement agreement signed by the parties.

5.7 Whether the City of Matlosana's withdrawal of the civil litigation against the Complainant amounted to fruitless and wasteful expenditure.

Common cause issues

5.7.1 It is common cause that in 2011 the City of Matlosana instituted civil litigation against the Complainant in the North Gauteng High Court, Pretoria (High Court) Court as per case number 499905/11 consisting of a total of six (6) claims.

5.7.2 On 12 January 2017, the City of Matlosana withdrew claims 2 to 6 of its particulars of claims and followed by claim 1 of its particulars of claim on 15 November 2017. On both occasions, the City of Matlosana offered to tender wasted costs on a party and party scale.

5.7.3 The City of Matlosana paid a total amount of about R189 084.64 of the debited amount of R 196 083.14 for the legal services rendered through Messrs De Kocks Incorporated.

5.7.4 The Complainant submitted that he spent ±R120 000.00 through LegalWise to cover for his legal costs on this matter. The City of Matlosana, also confirmed that the Complainant would collect his legal costs once it has been taxed by the tax Master.

Issue in dispute

- 5.7.5 The main issue for determination was whether the City of Matlosana's conduct amounted to fruitless and wasteful expenditure.
- 5.7.6 The Complainant contended that the City of Matlosana's conduct in instituting a civil claim against him was malicious due to his stance on the issue of TYA. In other words, he was being punished for steadfastly refusing to carry out an unlawful verbal instruction from the then Cllr Mogale to stop the litigation against TYA.
- 5.7.7 The City of Matlosana, through its letter dated 02 November 2018, denied the Complainant's assertions and submitted that the civil litigation against him was borne from the fact that he was found guilty on numerous charges during his disciplinary hearing. In an attempt to recover some of the monies as a result of the misconduct, a civil litigation was instituted against the Complainant.
- 5.7.8 During a subpoena meeting on 08 February 2019, the City of Matlosana represented by the Municipal Manager, Mr T S R Nkhumise, submitted that the reason for the withdrawal of this litigation against the Complainant was due to the unavailability of some of the witnesses, who were either deceased or uncooperative and the technical defence of prescription. The Complainant submitted that this matter was postponed *sine die* in 2013 due to lack of urgency and/or preparedness by the City of Matlosana in taking the matter further.
- 5.7.9 The City of Matlosana legal representative averred that the cause of action of claim 1 in the particulars of claim arose sometime in August 2007 or earlier and the City of Matlosana only served and filed its summons on 30 August 2011. In this regard, the matter had already prescribed by the time the summons were served on the Complainant.

5.7.10 Notwithstanding the above, the City of Matlosana contended that the monies spent in pursuit of this litigation did not amount to fruitless and wasteful expenditure.

Application of the relevant legal framework

5.7.11 As already alluded to above, the MFMA defines fruitless and wasteful expenditure as “*expenditure that was made in vain and would have been avoided had reasonable care been exercised*”.

5.7.12 The City of Matlosana’s explanation as to why the matter was not pursued within reasonable time before some of its witnesses were no longer available or technical defence of prescription could be an issue, was not tendered. The City of Matlosana made no submission on how the pursuit of this matter for about six (6) years was beneficial to the municipality and thus not in vain.

Conclusion

5.7.13 In the circumstances, the monies spent by the City of Matlosana was in vain and could have been avoided had reasonable care been exercised and therefore in contravention of the MFMA.

5.8 Whether the Department improperly re-appointed TYA to continue with the development of the Pilot Project?

Common cause issue

5.8.1 It is common cause that during November 2006, TYA abandoned the construction of the Pilot Project. Through an urgent application to High Court under case number 4114/07, TYA sued for payment of R16 313 366.00 being due and payable by the City of Matlosana under case number 4114/2007. The

City of Matlosana defended the application and raised TYA's breach of contract by rendering sub-standard and below specifications performance.

5.8.2 On 24 July 2007, a settlement agreement was entered into between the City of Matlosana and TYA wherein the parties *inter alia* agreed:

- (a) That TYA will repair all the past performance rendered before 24 July 2007 and undertook to conclude its future performance in compliance with the standards set out in the NHBRC's manual;
- (b) That the NHBRC would adjudicate on the quality of TYA's performance in that the NHBRC will enrol the houses built by TYA into the NHBRC's warranty scheme.
- (c) TYA will complete all outstanding performance by end of November 2007, with a possible extension to this deadline to the end of February 2008, upon request to do so.

5.8.3 TYA breached the terms and conditions of the above-mentioned settlement agreement and the City of Matlosana elected to cancel its contracts with TYA on 3 December 2007. The City of Matlosana also elected to institute a claim for damages against TYA to the amount of R114 286 823.86 (including VAT) through case number 38274/08.

5.8.4 The above-mentioned case was set down for trial on 23 August 2010, but the matter was postponed *sine die* as narrated in paragraph 8.4 above.

5.8.5 In terms of the project summary reports, TYA was paid through the period of alleged termination of the contract by the City of Matlosana.

Issue in dispute

- 5.8.6 The main issue for determination is whether the Department followed a proper procurement process when re-appointing TYA.
- 5.8.7 The Complainant submitted that the Department re-appointed TYA on 04 February 2011 to continue with the Pilot Project despite the City of Matlosana having cancelled the contract on 3 November 2007. When the Department was requested, through a letter dated 20 September 2016, to provide the Public Protector with clarification as to how TYA was appointed, the Department's letter dated 10 October 2016 offered no explanation on the process followed in the re-appointment of TYA.
- 5.8.8 Notwithstanding the above, the evidence presented showed that a settlement agreement between the City of Matlosana, TYA and the Department was only concluded on 31 January 2012 wherein the latter assumed the rights and obligations of the City of Matlosana under both the Pilot Project and the Alabama Project. However, the Department did not enforce compliance with the above-mentioned settlement agreement by TYA.

Application of the relevant legal framework

- 5.8.9 Section 38 (1)(a)(iii) of the PFMA states that:

“The Accounting Officer for a Department, trading entity or constitutional institution must ensure that the Department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective”.

5.8.10 Clause 16A3.1 of the Treasury Regulations¹⁹ read thus:

“The accounting officer or accounting authority of an institution to which these Regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for –

- 1. the acquisition of goods and services*
- 2. ...”.*

5.8.11 Clause 16A3.2 of the Treasury Regulation read thus:

“A supply chain management system referred to in paragraph 16A.3.1 must–

- (a) be fair, equitable, transparent, competitive and cost effective;*
- (d) ...”.*

5.8.12 The Department could not provide an explanation as to how the re-appointment of TYA complied with section 38 of the PFMA and the Treasury Regulations.

5.8.13 Furthermore, the Department offered no information or explanation on how it complied with the provisions of the Constitution discussed above, and/or its own SCM Policy.

Conclusion

5.8.14 The re-appointment of TYA to continue with the development of the Pilot Project by the Department was not compliant with the Constitution, the PMFA and Treasury Regulations.

¹⁹ March 2005, published in terms of section 78 of the Public Finance Management Act (Act 1 of 1999)

5.9 Whether the Complainant and the community of Matlosana was improperly prejudiced by the conduct of both the City of Matlosana and the Department

Common cause issue

5.9.1 It is common cause that the City of Matlosana instituted civil proceedings against the Complainant. However, the civil proceedings that were instituted against him were subsequently withdrawn after about six (6) years.

5.9.2 It is noted that upon withdrawing its ligation against the Complainant, the City of Matlosana offered to tender wasted costs on a party and party scale.

5.9.3 It is also common cause that the City of Matlosana, through a letter dated 31 January 2012, reported, amongst other things, the following regarding the concrete tests conducted by DWP:

- (a) 68.8% of the houses constructed in Jouberton Extension 24 had foundation strength below 20 MPa;
- (b) 92.5% of the houses constructed in Kanana Extension 14 had foundations strength below 20 MPa;
- (c) 29.8% of the houses constructed in Khuma Extension 11 had foundations strength below 20 MPa; and
- (d) 66.9% of the houses constructed in Alabama Extension 3 had foundations strength below 20 MPa.

-
- 5.9.4 In the above-mentioned response, the City of Matlosana also referred to the NHBRC report which revealed that there was evidence of poor workmanship on the houses constructed by TYA for the Pilot Project.
- 5.9.5 Both the DWP report in respect to the Alabama Project and the NHBRC report in respect to the Pilot Project found that the houses constructed by TYA were defective and required remedial work. The latest inspection conducted by the Department on 18th and 19th of February 2019, still suggests that the beneficiaries of the Alabama Project are still living in defective houses.
- 5.9.6 The Department conceded, through its letter dated 25 October 2016, that during the dispute between the City of Matlosana and TYA, there was mismanagement on both financial and beneficiary administration. It was further submitted that during this time the City of Matlosana did not get any new housing projects.
- 5.9.7 The Department did not present any evidence showing that the taking over of the housing projects from the City of Matlosana improved the circumstances of the community of the City of Matlosana.
- 5.9.8 The extent of the prejudice suffered by the community of the City of Matlosana has not fully been determined due to lack of full verification that should have been conducted by the Department when it took over the rights and obligations of the City of Matlosana under the two projects.

Issue in dispute

- 5.9.9 Due to the concessions above, there were no issue in dispute on this aspect.

Application of the relevant legal framework

- 5.9.10 Section 26(1) of the Constitution grants everyone the right to have access to adequate housing.
- 5.9.11 Whereas many community members became beneficiaries of both the Alabama and the Pilot Projects, it is arguable whether the housing units were adequate from the outset due to their defective nature.
- 5.9.12 The mismanagement of the housing projects, denied the community of the City of Matlosana an opportunity to have access to adequate housing, as no new projects could be rolled out.

Conclusion

- 5.9.13 Based on the information traversed above, the community of Matlosana endured prejudice by either receiving defective houses or not accessing housing contrary to their constitutional enshrined right to adequate housing

6 FINDINGS AND OBSERVATIONS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I hereby make the following findings:

6.1 Regarding whether the City of Matlosana improperly appointed TYA to develop the Alabama Project.

- 6.1.1 The allegation that the City of Matlosana improperly appointed TYA to develop the Alabama Project, is substantiated;

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- 6.1.2 The contract to deliver the Alabama Project was not determined through a competitive bidding process;
- 6.1.3 In view of the above, the appointment of TYA was in contravention of section 217(1) of the Constitution and section 83(1) of the MSA which requires the contract for goods or services to be competitive; and
- 6.1.4 Therefore, the actions of the City of Matlosana amount to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and constitute maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- 6.2 Whether payments made to TYA in relation to the Alabama Project were irregular and constituted fruitless and wasteful expenditure.**
- 6.2.1 The allegations that payments to TYA in relation to the Alabama Project constituted fruitless and wasteful expenditure, is substantiated;
- 6.2.2 Payments made to TYA were irregular and constituted fruitless and wasteful expenditure in terms of the MFMA in that TYA services were not procured in line with the City of Matlosana's SCM Policy; and
- 6.2.3 Therefore, the actions of the City of Matlosana amount to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and constitute maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- 6.3 Whether the City of Matlosana improperly appointed TYA to develop the Pilot Project.**
- 6.3.1 The allegation that the City of Matlosana improperly appointed TYA to develop the Pilot Project, is unsubstantiated;

6.3.2 Although TYA was appointed to develop the Pilot Project despite not appearing on the list of service providers on the City of Matlosana's database as per the City of Matlosana's SCM Policy, its inclusion was consistent with section 217 of the Constitution; and

6.3.3 Therefore, the actions of the City of Matlosana does not amount to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution or constitute maladministration in terms of section 6(4)(a)(i) of the Public Protector Act .

6.4 Whether the City of Matlosana's withdrawal of civil proceedings instituted against TYA from the court roll contravened Council Resolution CC84/2010 and whether it constituted maladministration.

6.4.1 The allegation that the City of Matlosana's withdrawal of civil proceedings instituted against TYA from the court roll contravened Council resolution CC84/2010, is substantiated;

6.4.2 The City of Matlosana withdrew the civil proceedings in contravention of Council resolution CC84/2010;

6.4.3 The withdrawal of the civil proceedings without rescinding or amending the previous Council resolution was in contravention of section 160(1) of the Constitution; and

6.4.4 Therefore, the City of Matlosana's actions amount to improper conduct in state affairs in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.5 Whether the City of Matlosana improperly disregarded some of its adopted resolutions in the performance of its functions and in exercising its powers

6.5.1 The allegation that the City of Matlosana improperly disregarded some of its adopted resolutions in the performance of its functions and in exercising its powers, is substantiated;

6.5.2 The City of Matlosana failed to comply with resolutions CC35/2010 and CC138/2010 respectively;

6.5.3 Deviation from complying with the said resolutions without rescinding them was in contravention of section 160(1) of the Constitution and the principles enunciated in the *Mputumi case*; and

6.5.4 Therefore, the City of Matlosana's actions constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms section 6(4)(a)(i) of the Public Protector Act.

6.6 Whether the Department improperly failed to implement the settlement agreement concluded between TYA, the City of Matlosana and the Department on 31 January 2012.

6.6.1 The allegation that the Department improperly failed to implement the settlement agreement concluded between TYA, the City of Matlosana and the Department on 31 January 2012, is substantiated;

6.6.2 The Department did not implement the settlement agreement as agreed upon on 31 January 2012.

6.6.3 The Department failed to compel TYA to act in accordance with the terms and conditions as set out in the settlement agreement and contrary to the *Mansell* and *Greeff* cases.

6.6.4 Therefore, the Department's actions constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

6.7 Whether the City of Matlosana's withdrawal of the civil litigation against the Complainant amounted to fruitless and wasteful expenditure.

6.7.1 The allegation that the City of Matlosana's withdrawal of the civil litigation against the Complainant amounted to fruitless and wasteful expenditure, is substantiated;

6.7.2 The City of Matlosana withdrew all claims and tendered the associated costs on 12 January 2017 and 15 November 2017 respectively;

6.7.3 The monies expended in pursuit of this matter amounts to fruitless and wasteful expenditure in terms of the MFMA;

6.7.4 Therefore, the actions of the City of Matlosana constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

6.8 Whether the Department improperly re-appointed TYA to continue with the development of the Pilot Project

6.8.1 The allegation that the Department improperly re-appointed TYA to continue with the development of the Pilot Project, is substantiated;

6.8.2 The Department did not follow any procurement process;

6.8.3 The re-appointment of TYA was in contravention of the Constitution, PFMA and Treasury Regulations; and

6.8.4 Therefore, the Department's actions constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

6.9 Whether the community of the City of Matlosana was improperly prejudiced by the conduct of both the City of Matlosana and the Department.

6.9.1 The allegation that the Complainant and the community of Matlosana was prejudiced by the conduct of both the City of Matlosana and the Department, is substantiated;

6.9.2 The Complainant was prejudiced by the protracted civil litigation by the City of Matlosana;

6.9.3 The beneficiaries of both the Alabama and the Pilot Projects received defective houses whilst other beneficiaries had been denied access to adequate housing;

6.9.4 The conduct of both the City of Matlosana and the Department was contrary to section 26 of the Constitution; and

6.9.5 Therefore, the actions and/or omissions of both the Department and the City of Matlosana constitute improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

6.10 OBSERVATIONS

6.10.1 There were potential incidents of conflict of interests from the inception of the housing projects until the conclusion of the settlement agreement between TYA, the City of Matlosana and the Department.

6.10.2 It would appear that the City of Matlosana did not receive any other low cost housing projects during the legal battle between the City of Matlosana and TYA.

6.10.3 Most of the officials who were involved in the Alabama and Pilot Projects are no longer in the employ of both the City of Matlosana and the Department.

7 REMEDIAL ACTION

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

7.1.1 The MEC for Local Government and Human Settlements to ensure that:

7.1.1.1 The Department's procurement process for goods and services is in compliance with section 217 of the Constitution, section 38 of the PFMA, Treasury Regulations and the Department's SCM Policy.

7.1.1.2 All employees of the Department dealing with supply chain management are properly qualified and trained to perform their functions.

7.1.1.3 The Department audits the performance of TYA to determine whether it has fully complied with terms and conditions as contained in the 2012 settlement agreement and issue a compliance report to the Public Protector, within 45 working days of the issuing of this report.

7.1.2 The HOD of the Department to ensure that:

7.1.2.1 TYA effects remedial works on all properties attributed to its poor workmanship, within six (6) months of the date of this report.

7.1.2.2 The Department conducts an audit to verify the list of approved beneficiaries *vis-a-vis* the allocated houses in the Pilot Project to determine if all approved beneficiaries have been allocated houses, and submit the outcome of the audit with corrective measures to the Public Protector, within 6 months from the date of this report.

7.1.3 **The Executive Mayor of the City of Matlosana to take steps to ensure that:**

7.1.3.1 Henceforth, Council implements its adopted resolutions unless they have properly been rescinded.

7.1.4 **The Municipal Manger of the City of Matlosana to take steps to ensure that:**

7.1.4.1 The Complainant be issued with a letter of apology for instituting a civil litigation only to withdraw it six years later and for pursuing misconduct charges against the Complainant that could not be upheld at the Labour Court.

7.1.4.2 The Complainant is paid his legal costs once it has been taxed by the tax Master, within 20 working days after it has been submitted to the City of Matlosana.

8. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTIONS

8.1 The HOD of the Department to submit an action plan, within 30 days of issuing this report, indicating how the remedial actions mentioned above will be implemented.



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

DATE: 30/04/2019