

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report 23 of 2019/20

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***Report on allegations of maladministration, corruption and tender irregularities
by the Amathole District Municipality***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION, CORRUPTION AND TENDER IRREGULARITIES IN
CONNECTION WITH THE PROCUREMENT AND AWARDING OF A CONTRACT
AMOUNTING TO R631 MILLION TO SIYENZA BY THE AMATHOLE DISTRICT
MUNICIPALITY FOR THE BUILDING OF TOILETS WITHOUT FOLLOWING DUE
PROCESS**



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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, and section 8(1) of the Public Protector Act, 1994.
- (ii) The report relates to an investigation into allegations of maladministration, corruption and tender irregularities in connection with the procurement and awarding of a contract amounting to R631 million to Siyenza by the Amathole District Municipality (ADM) for the building of toilets without following due process.
- (iii) I received three complaints relating to allegations which surfaced in the media, specifically as reported in the *Daily Dispatch* and *Saturday Dispatch* newspapers in early 2015, in connection with the alleged irregular award of a tender by the ADM to a company by the name and style, Siyenza. In essence, these media reports suggested that during or about October 2014, the ADM awarded a contract to Siyenza, a company owned by a certain Mr Bongani Mpeluza, who was alleged to have strong links with a group of politically connected individuals, to build sixty-six thousand (66 000) toilets at a cost to the Municipality of R631 million. The contract was further alleged to have been awarded to Siyenza without following the Municipality's supply chain management processes and procedures, and despite same having been awarded to four other entities in August 2014.
- (iv) On analysis of the complaints received, as well as the media reports relating to the matter, I determined that the following allegations were made against the ADM: -
 - (aa) The ADM initially awarded the contract to the following four entities; Betram, Rocla, Concretex and Izwelethu Cemforce, in August 2014. The said entities were divided into clusters and allocated areas within the district that they were going to service. However, in a meeting held on 17 September 2014, which was attended by the former Chief Financial Officer of the ADM,

Mr Nkosinathi Soga, and the former Director responsible for Engineering Services, Mr Mpumelelo Shezi, the ADM introduced Siyenza to the four entities as Implementing Agents for the project. This was in breach of the agreement entered into with the appointed service providers and without following due process; as a consequence of which, the ADM was alleged to have appointed the company notwithstanding that: -

- (i) The appointment was not made in accordance with a competitive bidding process, as envisaged by section 217 of the Constitution, the Municipal Finance Management Act (MFMA), and the related Supply Chain Management prescripts which require organs of state to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective;
- (ii) The ADM did not conduct due diligence prior to the appointment of Siyenza, as the entity was appointed despite not being registered with the Companies and Intellectual Property Commission (CIPC), as well as the Construction Industry Development Board (CIDB). It was allegedly not in possession of the requisite CIDB grading, and as such, did not qualify to render the services it was appointed to deliver; and
- (iii) Notwithstanding these allegations, the ADM paid amounts totaling approximately R94 million to the Siyenza Group during the period September to December 2014, prior to the entity's appointment and delivery of any services, despite the fact that the Development Bank of Southern Africa (DBSA) had not, at that stage, transferred the allocated grant to the Municipality. The grant was alleged to have been transferred in January 2015. It was thus alleged that, effectively, the ADM disbursed funds that were budgeted for other purposes, out of its own coffers, to the toilet project managed by Siyenza; and



- (bb) In addition to the above payments, a further amount totaling approximately R19 million was paid to the Siyenza Group in January 2015, despite the fact that there was allegedly little delivery by the company to an extent that it was doubtful whether they would have met the deadline of June 2015.
- (v) On analysis of the complaint, the following issues were identified and investigated:**
- (a) Whether there were irregularities in the awarding of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM and if so, whether such conduct constitutes improper conduct and maladministration;
- (b) Whether political influence played a role in the award of the contract and if so, whether such conduct constitutes improper conduct and maladministration; and
- (c) Whether the ADM incurred any irregular, fruitless and wasteful expenditure as a result of the awarding of the contract.
- (vi) The investigation process was conducted through meetings and interviews with relevant former and current officials from the ADM and other individuals who were believed to have information relevant to the investigation; as well as an inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.
- (vii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the ADM were principally those imposing administrative standards that should have been upheld by the ADM. Those are the following: -

- a) Section 217 of the Constitution of the Republic of South Africa, 1996, which sets out the standard to be upheld in State procurement or Supply Chain Management processes, to ensure a fair, equitable, transparent, competitive and cost effective public procurement system; and
- b) The Municipal Finance Management Act, 2003, as well as its concomitant Regulations, which regulates the procurement of goods and services by Municipalities, as well as its financial accountability.

(viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:

a) Regarding whether there were irregularities in the awarding of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM and if so, whether such conduct constitutes improper conduct and maladministration: -

- (aa) The allegation that there were irregularities in the award of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM, is substantiated;
- (bb) The ADM asserted that, during the evaluation of bids, there was a decision not to award the installation component of the tender because of the big differences in price for the installation component by the bidders. The evidence however suggested that the decision was already made when the Compulsory Briefing Session was held prior to the closing date of the tender. The decision not to award the installation component never went back to the Bid Specification Committee (BSC) to approve the change in scope and to amend the Terms of Reference;

- (cc) Izwelethu Cemforce attained negative evaluation points during the evaluation phase but was not disqualified during that stage, instead the ADM decided to enter into price negotiations with the entity and ultimately appointed it;
- (dd) The conduct of the ADM in the initial award of the tender for the supply, delivery and installation of VIP top structures was in violation of section 217 of the Constitution and the LGMFMA, as it failed to procure the services in accordance with a system which is fair, equitable, transparent, competitive and cost effective;
- (ee) The conduct of the ADM constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;
- (ff) In the matter between **Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza v Amathole District Municipality**,¹ the Eastern Cape Circuit Court, situated in East London, found that the agreement concluded between the ADM and Siyenza on 12 September 2014 entitled **Confirmation of Contractual Terms**, was unconstitutional, invalid and void *ab initio*;
- (gg) The conduct of the ADM in the award of the tender to Siyenza was in violation of section 217 of the Constitution and the LGMFMA, as it failed to procure the services of Siyenza in accordance with a system which is fair, equitable, transparent, competitive and cost effective;
- (hh) The conduct of the ADM constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

¹ (EL881/15;ECD1681/15) [2015] ZAECELLC 16; 24 November 2015.

- (ii) The former Municipal Manager (MM) of the ADM, Mr Chris Magwanqana, failed to manage the financial administration of the ADM and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the ADM, in contravention of the provisions of sections 61 and 62 of the LGMFMA;
 - (jj) The conduct of the former MM constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- b) Regarding whether political influence played a role in the award of the contract and if so, whether such conduct constitutes improper conduct and maladministration: -**
- (aa) The allegation that political influence played a role in the award of the contract, is unsubstantiated;
 - (bb) No evidence could be found which suggested that the tender was awarded to Siyenza because of political influence from those close to Ms Mantashe; Mr Itholeng or Mr Sambudla. However I cannot ignore that this was one of the biggest infrastructure tenders where utmost care and diligence should have been exercised to fully comply section 217 of the Constitution and Regulation 32 of the Municipal Supply Chain Regulations, especially since it was also subsequently discovered that Siyenza submitted a false Tax Clearance Certificate when it submitted a tender in the Northern Cape. The fact that this tender did not comply with section 217 of the Constitution and Regulation 32 of the MFMA Regulations justifiably raises suspicion that there was an intention to manipulate SCM processes to the benefit of certain individuals who happen to have political links. A question can be raised whether the Municipality would have acted in the same way had

beneficiaries been ordinary citizens with the same credentials but without political links.

c) Regarding whether the ADM incurred any irregular, fruitless and wasteful expenditure as a result of the awarding of the contract: -

- (aa) The allegation that the ADM incurred any irregular, fruitless and wasteful expenditure as a result of the awarding of the contract, is substantiated;
- (bb) The Resolution adopted by the Council of the ADM on 23 May 2014 approving the frontloading project, was *ultra vires*, as the ADM had at that stage not followed due process in terms of section 46 of the LGMFMA, read with section 21A of the Municipal Systems Act;
- (cc) The payments which were made to Siyenza on 26 September 2014 in the amount of R31 587 782.78 and on 01 December 2014 in the amount of R63 184 003.56 were made in the absence of any contractual provision providing for the payment of P&G's; and with no guarantee in place as per the requirements of paragraph 11 of the JBCC;
- (dd) The ADM thus incurred irregular expenditure in the amount of R94 771 786.34 in terms of the relevant provisions of the LGMFMA;
- (ee) In addition, the ADM paid a further amount of R9 million to Siyenza during May 2015, despite having received information that the Tax Clearance Certificate submitted by Siyenza to the MISA for the Northern Cape project was suspected to be fraudulent and under investigation;
- (ff) The ADM incurred irregular expenditure in the amount of R9 million in terms of the relevant provisions of the LGMFMA;

- (gg) The former MM of the ADM, Mr Chris Magwanqana, committed an act of financial misconduct as envisaged in section 171(1)(c) of the LGMFMA.
- (ix) The appropriate remedial action I am taking in pursuit of section 182(1)(c), with the view to remedying the improper conduct and maladministration, is the following:**

The Municipal Manager of the ADM to ensure that: -

- (aa) Within fifteen (15) working days from the date of this report, submit to the Public Protector an Action Plan outlining how the remedial action in this report will be implemented;
- (bb) Within thirty (30) working days of this report, revise its current SCM Policy to include a framework outlining how future procurement in terms of Regulation 32 of the Municipal Supply Chain Management Regulations must be done. The Policy should take into account the requirements for procurement in terms of Regulation 32 as laid down by the Court in the matter between *Blue Nightingale Trading 397 Ltd t/a Siyenza Group v Amathole District Municipality*;
- (cc) Within thirty (30) working days after adoption of such SCM Policy ensure that Municipal officials of the ADM involved in SCM are properly trained in the provisions of the MFMA and the ADM Supply Chain Management Policy;
- (dd) Within ninety (90) working days of the date of this report, take appropriate disciplinary action against all members of the BAC who were involved in the award of bid 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM, and who were responsible for exposing the Municipality to acts of maladministration and financial risk in violation of the Municipal supply chain management and procurement processes and procedures, in relation to the appointment of the suppliers under bid 8/2/337/2012-2013;

- (ee) Within hundred and twenty (120) working days from date of this report, adopt Terms of Reference for a process in terms of which all service providers appointed under bid 8/2/337/2012-2013 are allowed to submit any outstanding invoices and / or claims to the ADM, where after the ADM will embark on an audit process to determine the validity of any such claims submitted;
- (ff) Within thirty (30) working days after the conclusion of such audit process, effect payment to each service provider in terms of all valid claims;
- (gg) Within hundred and twenty (120) working days from date of this report, ensure that the ADM, through a civil litigation claim and in line with the provisions of section 176(2) of the MFMA, recover any irregular expenditure identified in this report from Mr Magwangqana in his personal capacity, for the financial misconduct identified in this report. The actual amount recoverable to be determined by the Municipal Council following a thorough verification of the financial losses emanating from the procurement and the misconduct identified in this report; and
- (hh) The matter is referred to the Directorate for Priority Crime Investigation (DPCI) and the Asset Forfeiture Unit (AFU) in terms of section 6(4)(c)(i) and (ii) of the Public Protector Act, 1994, to investigate any commission of an offence in this matter by all the implicated parties including those who are politically connected.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, CORRUPTION AND TENDER IRREGULARITIES IN CONNECTION WITH THE PROCUREMENT AND AWARDING OF A CONTRACT AMOUNTING TO R631 MILLION TO SIYENZA BY THE AMATHOLE DISTRICT MUNICIPALITY FOR THE BUILDING OF TOILETS WITHOUT FOLLOWING DUE PROCESS

1. INTRODUCTION

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

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

1.1.1 Cllr. Nomfusi Winnie Nxawe, the Executive Mayor of the ADM;

1.2.3 Cllr. Nceba Ndikinda, the Speaker of the ADM Council;

1.1.2 Mr. Thandekile Mnyimbha, the Municipal Manager of the ADM;

1.1.3 Mr. Chris Magwangqana, the former Municipal Manager of the ADM; and

1.2.5 Mr. Bongani Mpeluza, the Director of Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza.

1.2.6 The Complainants in the matter, Messrs. Simcelile Rubela; Mmusi Maimane and the Non-Profit Organisation (NPO) Accountability Now.

- 1.3 Section 7(9) Notices were previously sent to the following individuals to enable them to respond to my intended findings: -
- 1.3.1 Cllr. Nomfusi Winnie Nxawe, the Executive Mayor of the ADM;
- 1.3.2 Cllr. Nceba Ndikinda, the Speaker of the ADM Council;
- 1.3.3 Mr. Thandekile Mnyimbha, the Municipal Manager of the ADM;
- 1.3.4 Mr. Chris Magwangqana, the former Municipal Manager of the ADM; and
- 1.3.5 Mr. Bongani Mpeluza, the Director of Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza.
- 1.4 The report relates to an investigation into allegations of maladministration, corruption and tender irregularities in connection with the procurement and awarding of a contract amounting to R631 million to Siyenza by the Amathole District Municipality for the building of toilets without following due process.

2 THE COMPLAINT

- 2.1 I received three complaints relating to allegations which surfaced in the media, specifically as reported in the *Daily Dispatch* and *Saturday Dispatch* newspapers in early 2015, in connection with the alleged irregular award of a tender by the ADM to a company by the name and style, Siyenza. In essence, these media reports suggested that during or about October 2014, the ADM awarded a contract to Siyenza, a company owned by a certain Mr Bongani Mpeluza, who was alleged to have strong links with a group of politically connected individuals, to build sixty-six thousand (66 000) toilets at a cost to the Municipality of R631 million. The contract was further alleged to have been awarded to Siyenza without following the

Municipality's supply chain management processes and procedures, and despite same having been awarded to four other entities in August 2014.

2.2 The first complaint was received on 02 March 2015 from **Mr Simcellile Rubela**, the Provincial Co-Ordinator for the Economic Freedom Fighters (EFF) in the Eastern Cape. In his complaint, he alleged that the tender awarded to Siyenza was irregular as the ADM did not follow proper supply chain management processes, and in addition, that political influence played a role in the award of the tender. He alleged that the newspaper reported that Ms Nolwande Mantashe, the wife of Mr. Gwede Mantashe, and their son, Buyambo Mantashe, benefitted from the irregular award of this tender. It was further alleged that Mr Boitumelo Itholeng, the son of Minister Lindiwe Zulu, MP, was part of the Siyenza Group and had also benefitted from the irregular award of the tender. Another person who was alleged to have been linked to the company Siyenza, was the son in law of former President Jacob Zuma, Mr Lonwabo Sambudla. Mr Rubela requested my office to investigate these allegations and to specifically determine whether political influence had been used to push the Municipality to award the tender to Siyenza using flawed supply chain management processes and to benefit ANC-linked individuals.

2.3 I received a second complaint on 03 March 2015 from **Mr Mmusi Maimane**, MP and Leader of the Democratic Alliance. In his complaint, he requested me to investigate alleged irregularities surrounding the awarding of the tender by the ADM to Siyenza. He alleged that the contract was awarded to Siyenza in October 2014, two months after it was awarded to four other companies. It was further alleged that Siyenza was awarded the contract without due process having been followed and as a result of the ties the group has with high-ranking ANC officials. Mr Maimane indicated that the newspaper reports suggested that an amount of approximately R60 million had been paid to Siyenza for work already done by them, despite very little evidence suggesting that substantial work had been performed on the ground. Mr Maimane requested me to investigate: -

- a) The justification for appointing Siyenza without going on tender;
- b) Why the contract was given to Siyenza when the same contract had been awarded to four existing suppliers having previously been appointed;
- c) The reasons why Siyenza was deemed to be uniquely qualified to build the toilets; and
- d) Whether forward payments to Siyenza corresponded with work already completed on the project.

2.4 The third complaint was received from the Non-Profit Organisation **Accountability Now**. In its complaint, it alleged that the procurement of the toilets by the ADM was unconstitutional because of non-compliance with section 217 of the Constitution, and requested me to investigate the allegations regarding the awarding of the tender which surfaced in the media.

2.5 On analysis of the complaints received, as well as the media reports relating to the matter, I determined that the following allegations were made against the ADM: -

2.5.1 The ADM initially awarded the contract to the following four entities; Betram, Rocla, Concretex and Izwelethu Cemforce, in August 2014. The said entities were divided into clusters and allocated areas within the district that they were going to service. However, in a meeting held on 17 September 2014, which was attended by the former Chief Financial Officer of the ADM, Mr Nkosinathi Soga, and the former Director responsible for Engineering Services, Mr Mpumelelo Shezi, the ADM introduced Siyenza to the four entities as Implementing Agents for the project. This was in breach of the agreement entered into with the appointed service providers and without following due process; as a

consequence of which, the ADM was alleged to have appointed the company notwithstanding that: -

2.5.1.1 The appointment was not made in accordance with a competitive bidding process, as envisaged by section 217 of the Constitution, the Municipal Finance Management Act (MFMA), and the related Supply Chain Management prescripts which require organs of state to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective;

2.5.1.2 The ADM did not conduct due diligence prior to the appointment of Siyenza, as the entity was appointed despite not being registered with the Companies and Intellectual Property Commission (CIPC), as well as the Construction Industry Development Board (CIDB). It was allegedly not in possession of the requisite CIDB grading, and as such, did not qualify to render the services it was appointed to deliver;

2.5.1.3 Notwithstanding these allegations, the ADM paid amounts totaling approximately R94 million to the Siyenza Group during the period September 2014 to December 2014, prior to the entity's appointment and delivery of any services, despite the fact that the Development Bank of Southern Africa (DBSA) had not, at that stage, transferred the allocated grant to the Municipality. The grant was alleged to have been transferred in January 2015. It was thus alleged that, effectively, the ADM disbursed funds that were budgeted for other purposes, out of its own coffers, to the toilet project managed by the Siyenza; and

2.5.2 In addition to the above payments, a further amount totaling approximately R19 million was paid to the Siyenza Group in January 2015, despite the fact that there was allegedly little delivery by the company to an extent that it was doubtful whether they would have met the deadline of June 2015.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

“The Public Protector has the power as regulated by national legislation –

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

(b) to report on that conduct; and

(c) to take appropriate remedial action.”

3.3 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*² the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

3.3.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;³

3.3.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced;⁴

² CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.

³ Para [65].

⁴ Para [67].

- 3.3.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was 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;⁵
- 3.3.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow;⁶
- 3.3.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to;⁷
- 3.3.6 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 the investigation and the type of findings made;⁸
- 3.3.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise

⁵ Para [68].

⁶ Para [69].

⁷ Para [70].

⁸ Para [71].

of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;⁹

3.3.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation;¹⁰

3.3.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case.¹¹

3.3.10 The remedial action taken by the Public Protector has a binding effect.¹² The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*¹³

3.4 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.5 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 (ADR) mechanism.

⁹ Para [71(a)].

¹⁰ Para [71(d)].

¹¹ Para [71(e)].

¹² Para [76].

¹³ *Ibid* para [73].

- 3.6 The ADM is an organ of state and its conduct amount to conduct in state affairs, and as a result, the matter falls within the ambit of the Public Protector's mandate.
- 3.7 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.
- 3.8 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 constitute '*special circumstances*' depends on the merits of each case.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector

the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The complaint was classified as a Good Governance and Integrity complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

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:

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
- In the event of maladministration what would it take to remedy the wrong occasioned by the improper conduct and maladministration?

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 to what extent the ADM fulfilled its statutory responsibilities.

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 Department or organ of state to prevent improper conduct and maladministration. In this case, key reliance was placed on legislation, prescripts and policies regulating financial management and procurement by Municipalities.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration.

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

4.3.1 Whether there were irregularities in the awarding of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM and if so, whether such conduct constitutes improper conduct and maladministration;

4.3.2 Whether political influence played a role in the award of the contract and if so, whether such conduct constitutes improper conduct and maladministration; and

4.3.3 Whether the ADM incurred any irregular, fruitless and wasteful expenditure as a result of the awarding of the contract.

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 Response to a Parliamentary Internal Questions No. 29 of 2014, Oral Question 6 posed by Ms D Matikinca to the MEC responsible for Local Government and Traditional Affairs, dated 18 March 2015;

4.4.1.2 Documents received from Betram Amalooloo, undated;

4.4.1.3 Formal response with supporting documents received from the Municipal Infrastructure Support Agent (MISA), dated 31 March 2015;

4.4.1.4 Formal response with supporting documents received from the Development Bank of Southern Africa (DBSA), dated 09 April 2015;

4.4.1.5 Written response and supporting documents received from Concretex dated 10 April 2015 and 14 April 2015 respectively;

- 4.4.1.6 Written response, with supporting documents received from the ADM dated 14 April 2015;
- 4.4.1.7 Ruling by the Press Ombudsman and a Panel of Adjudicators in the matter of *African National Congress (ANC) v Daily Dispatch*, dated 20 April 2015;
- 4.4.1.8 Written response with supporting documents received from Mr Mpeluza of Siyenza dated 20 April 2015;
- 4.4.1.9 Written response together with supporting documents received from Weavind & Weavind, acting on behalf of Rocla (Pty) Ltd, dated 24 April 2015;
- 4.4.1.10 Letter from the ADM entitled **“PAYMENT OF SUPPLIERS ON THE AMATHOLE DISTRICT MUNICIPALITY’S SANITATION PROJECT”** dated 29 September 2015;
- 4.4.1.11 Forensic Investigation Report compiled by Sizwe Ntsaluba Gobodo on behalf of the National Treasury in connection with the Sanitation Project implemented by the Amathole District Municipality, dated 18 April 2017;
- 4.4.1.12 Documents received electronically from Mr Neville Armstrong, the Senior Manager: Legal and Integrity Services of the ADM on 19 November 2018;
- 4.4.1.13 Documents received from the ADM during the hearing held with the Executive Mayor, Cllr. Nxawe, on 27 August 2018;
- 4.4.1.14 Documents received from ABSA on 28 August 2018;
- 4.4.1.15 Documents received from Standard Bank dated 04 September 2018;
- 4.4.1.16 Documents received from FNB dated 20 September 2018;
- 4.4.1.17 Documents received from Mr Werner Viljoen of Eldocrete and Eldofox on 27 November 2018;
- 4.4.1.18 Affidavit received from Mr Lonwabo Sambudla dated 22 February 2019;
- 4.4.1.19 Documents received from Ms Nolwande Mantashe on 26 March 2019;

4.4.2 Interviews conducted

- 4.4.2.1 Meeting with the former Municipal Manager, Mr Chris Magwangqana and relevant officials of the ADM on 14 May 2015;

- 4.4.2.2 Meeting held with officials from the Office of the Accountant-General on 23 February 2018;
- 4.4.2.3 Hearing held with the Executive Mayor of the ADM, Cllr, Nxawe, on 27 August 2018;
- 4.4.2.4 Hearing held with Messrs. Robbins and Labuschagne of Rocla (Pty) Ltd on 04 September 2018;
- 4.4.2.5 Hearing held with Messrs. Mark and Justin Ryan of Paveprint on 04 September 2018;
- 4.4.2.6 Hearing held with Messrs. Lukas and Lumar Fourie of Betram Amalooloo on 03 October 2018;
- 4.4.2.7 Hearing held with Mr Wicus Diedericks of Izwelethu Cemforce on 03 October 2018;
- 4.4.2.8 Hearing held with Mr Neville Armstrong, Senior Manager: Legal and Integrity Services of the ADM on 22 October 2018;
- 4.4.2.9 Hearing held with Mr Chris Magwangqana, the former Municipal Manager of the ADM on 22 October 2018;
- 4.4.2.10 Interview held with Mr Werner Viljoen of Eldofox and Eldocrete on 27 November 2018;
- 4.4.2.11 Hearing held with Mr Bongani Mpeluza of Siyenza on 13 December 2018;
- 4.4.2.12 Hearing held with Mr Vincent Shezi, former Director: Engineering of the ADM, on 07 February 2019;
- 4.4.2.13 Hearing held with Ms Nolwande Mantashe on 18 February 2019;
- 4.4.2.14 Interview held with Mr Clayton Bhana, former General Manager: Supply Chain Management of the ADM on 26 February 2019;
- 4.4.2.15 Hearing held with Mr Boitumelo Itholeng's legal team from Messrs. Stockenström Fouché Incorporated on 26 February 2019;
- 4.4.2.16 Reconvention of the hearing scheduled for 26 February 2019 with Mr Boitumelo Itholeng on 04 March 2019.

4.4.3 Correspondence sent and received

- 4.4.3.1 Letter from the Public Protector to Mr Chris Magwangqana, the then Municipal Manager of the ADM on 23 March 2015;
- 4.4.3.2 Letter from the Public Protector to Mr Bongani Mpeluza, the Chief Executive Officer of Siyenza, dated 24 March 2015;
- 4.4.3.3 Letter from the Public Protector to Mr Simon Wells, the Operations Executive of Rocla Sanitation, dated 24 March 2015;
- 4.4.3.4 Letter from the Public Protector to Mr Lodewicus Diedericks, the Chief Executive Officer of Izwelethu Cemforce, dated 24 March 2015;
- 4.4.3.5 Letter from the Public Protector to Mr Dumisa Jele, the Chief of Staff in the Ministry, Department of Co-Operative Governance and Traditional Affairs, dated 24 March 2015;
- 4.4.3.6 Letter from the Public Protector to Mr Ernest Dietrich, the Acting Group Executive: SA Financing at the Development Bank of Southern Africa, dated 24 March 2015;
- 4.4.3.7 Letter from the Public Protector to Mr Lukas Fourie, the Chief Executive Officer of Betram Amalooloo, dated 24 March 2015;
- 4.4.3.8 Letter from the Public Protector to Mr Justin Ryan, the Chief Executive Officer of Paveprint t/a Concretex, dated 24 March 2015;
- 4.4.3.9 Letter received from Weavind & Weavind, acting on behalf of Rocla (Pty) Ltd, dated 22 November 2017;
- 4.4.3.10 Letter from the Public Protector to Cllr. Nxawe, the Executive Mayor of the ADM dated 31 January 2018;
- 4.4.3.11 Letter from the Public Protector to Mr. Mnyimbha, the Municipal Manager of the ADM dated 31 January 2018;
- 4.4.3.12 Letter from the Executive Manager: PPSA to Mr Willie Mathebula, the Acting Chief Procurement Officer, dated 15 February 2018;
- 4.4.3.13 Email correspondence received by the PPSA investigator from Mr Levy Moshoeite, the Acting Chief Director: Specialised Audit Services at the Office

- of the Accountant-General, dated 22 February 2018; as well as the response from the PPSA investigator dated 22 February 2018;
- 4.4.3.14 Email correspondence received by the PPSA investigator from Lt. Col. Luis of the DPCI Anti-Corruption Task Team dated 26 February 2018;
- 4.4.3.15 Email received by the PPSA investigator from Mr Neville Armstrong, the Senior Manager: Legal and Integrity Services of the ADM, dated 10 August 2018;
- 4.4.3.16 Email received by the PPSA investigator from Mr Neville Armstrong dated 13 August 2018;
- 4.4.3.17 Email from the PPSA investigator to Mr Neville Armstrong of the ADM dated 15 August 2018;
- 4.4.3.18 Email from Lt. Col. Luis of the DPCI Anti-Corruption Task Team to Mr Neville Armstrong of the ADM, copied to the PPSA investigator, dated 20 August 2018;
- 4.4.3.19 Email received by the PPSA investigator from Mr Neville Armstrong of the ADM dated 22 August 2018;
- 4.4.3.20 Letter from the Public Protector to Lt. Col. Luis of the DPCI Anti-Corruption Task Team dated 01 October 2018;
- 4.4.3.21 Electronic correspondence received by the PPSA investigator from Mr Diedericks of Cemforce dated 03 October 2018;
- 4.4.3.22 Email received by the PPSA investigator from Lt. Col. Luis of the DPCI Anti-Corruption Task Team dated 05 October 2018;
- 4.4.3.23 Email received by the PPSA investigator from Lt. Col. Luis of the DPCI Anti-Corruption Task Team dated 09 October 2018;
- 4.4.3.24 Letter received by the PPSA investigator from Mr Neville Armstrong of the ADM dated 11 October 2018;
- 4.4.3.25 Letter from the Public Protector to the National Head of the DPCI, Lt. Gen. Lebeya dated 16 October 2018;
- 4.4.3.26 Email sent from the PPSA investigator to Mr Neville Armstrong of the ADM dated 19 November 2018;

- 4.4.3.27 Email received from Mr Shezi, the former Director: Engineering of the ADM dated 07 December 2018 and subsequent response from the PPSA investigator dated 10 December 2018;
- 4.4.3.28 Email to Mr Mpeluza, the CEO of Siyenza from the PPSA investigator dated 10 December 2018;
- 4.4.3.29 Electronic correspondence exchanged between the PPSA investigator and Mr Shezi dated 10 December 2018;
- 4.4.3.30 Email sent to Mr Shezi from the PPSA investigator dated 11 December 2018;
- 4.4.3.31 Email from the PPSA investigator to Mr Shezi dated 21 January 2019;
- 4.4.3.32 Email from the PPSA investigator to Mr Shezi dated 22 January 2019;
- 4.4.3.33 Email to the Office of the Municipal Manager of the ADM dated 22 January 2019;
- 4.4.3.34 Email to the Office of the Municipal Manager of the ADM dated 23 January 2019;
- 4.4.3.35 Email received by the PPSA investigator from Mr Shezi dated 23 January 2019;
- 4.4.3.36 Electronic correspondence exchanged between the PPSA investigator and Mr Mpeluza dated 23 January 2019;
- 4.4.3.37 Email from the PPSA investigator to Ms Dyushu of the ADM dated 24 January 2019;
- 4.4.3.38 Letter received from Messrs Gary Mazaham Attorneys, acting on behalf of Mr. Lonwabo Sambudla, dated 28 January 2019;
- 4.4.3.39 Email from the PPSA investigator to Ms Dyushu of the ADM dated 29 January 2019;
- 4.4.3.40 Letter received from the Municipal Manager of the ADM, Mr Mnyimba, dated 29 January 2019 and electronically transmitted 31 January 2019;
- 4.4.3.41 Email sent by the PPSA investigator to Mr Clayton Bhana, former Manager: Supply Chain of the ADM, dated 07 February 2019;
- 4.4.3.42 Letter from the Executive Manager: PPSA to Messrs. Gary Mazaham Attorneys dated 08 February 2019;

- 4.4.3.43 Email received by the PPSA investigator from Ms Mantashe dated 12 February 2019;
- 4.4.3.44 Email received by the PPSA investigator from Mr Boitumelo Itholeng dated 15 February 2019 and subsequent response of even date;
- 4.4.3.45 Letter received from Messrs. Gary Mazaham Attorneys dated 15 February 2019;
- 4.4.3.46 Email from the PPSA investigator to Ms Mantashe dated 18 February 2019;
- 4.4.3.47 Letter received from Messrs. Stockenström Fouché Incorporated, on behalf of Mr Itholeng, dated 19 February 2019;
- 4.4.3.48 Letter from the Chief Investigator: PPSA to Messrs. Stockenström Fouché Incorporated dated 21 February 2019;
- 4.4.3.49 Letter received from Messrs Stockenström Fouché Incorporated dated 22 February 2019;
- 4.4.3.50 Letter received from Messrs Gary Mazaham Attorneys dated 22 February 2019 and electronically transmitted on 25 February 2019;
- 4.4.3.51 Email received by the PPSA investigator from Ms Mantashe dated 01 March 2019;
- 4.4.3.52 Email received by the PPSA investigator from Ms Mantashe dated 26 March 2019;
- 4.4.3.53 Email received from Ms Nomakwezi Zondani of the Enoch Mgijima Municipality dated 11 April 2019;
- 4.4.3.54 Email received from Messrs Makhanya Attorneys, on behalf of Mr Bongani Mpeluza dated 16 April 2019;
- 4.4.3.55 Letter from the Public Protector to Messrs. Makhanya Attorneys, dated 17 April 2019 and electronically transmitted on 18 April 2019;
- 4.4.3.56 Email from the PPSA investigator to Messrs Makhanya Attorneys dated 27 April 2019;
- 4.4.3.57 Email received by the PPSA investigator from Messrs Makhanya Attorneys dated 29 April 2019, as well as the response thereto on even date;

- 4.4.3.58 Letter from the PPSA Chief Operations Officer to Messrs Makhanya Attorneys dated 29 April 2019;
- 4.4.3.59 Email received by the PPSA investigator from Messrs Makhanya Attorneys dated 29 April 2019;
- 4.4.3.60 Letter received by the PPSA investigator from Messrs Makhanya Attorneys dated 02 May 2019.

4.4.4 Legislation and other prescripts

- 4.4.4.1 The Constitution of the Republic of South Africa, 1996;
- 4.4.4.2 The Local Government: Municipal Finance Management Act, 56 of 2003;
- 4.4.4.3 The Municipal Supply Chain Management Regulations, GG 27636, 30 May 2005;
- 4.4.4.4 The Local Government: Municipal Systems Act, 32 of 2000; and
- 4.4.4.5 The ADM Supply Chain Management Policy, 2014.

4.4.5 Case Law

- 4.4.5.1 *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* [2016] ZACC 11, 31 March 2016;
- 4.4.5.2 *SA Container Stevedores v Transnet Port Terminals* [2011] ZAKZDHC 22, 30 March 2011; and
- 4.4.5.3 *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza v Amathole District Municipality* (EL881/15; ECD1981/15) [2015] ZAECELLC 16, 24 November 2015.

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

5.1 Regarding whether there were irregularities in the awarding of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM and if so, whether such conduct constitutes improper conduct and maladministration:

Common cause facts

5.1.1 It was not disputed that the ADM advertised bid 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures, including site support, as part of its accelerated sanitation programme. The advert was placed on 09 July 2013, a site inspection was held on 17 July 2013 and the closing date for submission of bids was 08 August 2013.

5.1.2 The bid was awarded to Messrs. Newshelf 1265 (Pty) Ltd t/a Rocla (Pty) Ltd; Messrs Betram (Pty) Ltd; Messrs. Paveprint cc t/a Concretex and Messrs. Izwelethu Cemforce during March 2014.

5.1.3 On 17 September 2014, the ADM introduced Siyenza to the four suppliers as the Implementing Agents for the project.

Issues in dispute

5.1.4 The Complainants alleged that the award by the ADM to a company by the name and style, Siyenza did not comply with the provisions of section 217 of the Constitution, as the tender was awarded without following procurement

processes and procedures. In addition, it was alleged that the same tender was awarded to four (4) other entities prior to the award which was made to Siyenza.

The formal response to the allegations provided by the ADM

- 5.1.5 The ADM explained that, as a Water Services Authority (WSA), it was responsible for the provision of water and sanitation in the District Municipality, which incorporates the Local Municipalities of Amahlathi; Great Kei; Mbhashe; Mnquma; Ngqushwa; Nkonkobe and Nxuba. These are largely rural based Municipalities with substantial sanitation backlogs, which impacted on the health and dignity of people living in these areas. The ADM then initiated an ambitious flagship sanitation programme seeking to eradicate the backlog as quickly as possible.
- 5.1.6 To implement the programme without delay, the ADM approached the National Treasury for permission to pledge its Municipal Infrastructure Grant (MIG) allocations for those years up to 2017. The ADM also approached the Development Bank of Southern Africa (DBSA) to provide funds up front equal to the grant funding pledged. The agreement with the DBSA provided for the release of funding allowing for implementation without delay, a concept known as “front loading”.
- 5.1.7 The initial allocation of toilets for the project with the total project budget, was as follows:

Name of project	No of units	Project amount
Mnquma Region 1B Wards 7,8,9,10,12,20,21,22	16 745	R158 622 003.85
Amahlathi Region 1A and 1B Wards 1,2,3,16	4 227	R40 041 587.73



Great Kei Wards 1,2,3,4,6	5 256	R49 789 114.06
Mnquma Region 2B	3 697	R35 020 934.50
Mbhashe Region 2A	5 901	R55 898 981.47
Mnquma Region 2	6 624	R62 747 814.00
Nkonkobe Region 2A	10 407	R98 583 429.60
Ngqushwa Region 2	13 843	R131 131 970.40
TOTAL:	66 700	R631 835 837.00

5.1.8 Due to the size of the project, the ADM approached the Municipal Infrastructure Support Agent (MISA) during its planning stages. During these engagements, the ADM established that MISA was implementing a similar sanitation backlog eradication projects in the Northern Cape. In that project, MISA had appointed Siyenza following a competitive bidding process. The ADM further submitted that MISA was satisfied with the performance of Siyenza who appeared to have the necessary capacity for implementing such projects.

5.1.9 The ADM and MISA then agreed that it would make practical sense for the ADM to participate in the contract already awarded by MISA to Siyenza utilising the process outlined in Regulation 32 of the Municipal Supply Chain Management Regulations.

5.1.20 The ADM deemed it appropriate to utilise Regulation 32, as to do so would:

5.1.20.1 reduce the time for the implementation of the programme, thereby fast tracking the delivery of toilets to thousands of households;

5.1.20.2 reduce the financial risks of failing to implement the programme within the tight timeframes of the programme;

5.1.20.3 the participation by organs of state in contracts awarded by other organs of state is encouraged by the National Treasury and is extensively utilised in the

public sector as it has significant benefits in allowing for the fast-tracking of service delivery projects.

5.1.21 The ADM further contended that it was incorrect to state that it awarded the tender without following a procurement process, as it was clear from Regulation 32 that only contracts awarded following a competitive bidding process may be utilised in the matter envisaged by the said Regulation, and that the ADM believed that it fully complied with the requirements of the Regulation.

5.1.22 The ADM further indicated that: -

“It must be stressed that the ADM never awarded Siyenza the tender over other companies as have been suggested. The ADM is participating in a contract that was already awarded by MISA to Siyenza for the provision of sanitation services in the Northern Cape. In terms of this contract a competitive bidding process was followed. This was confirmed in writing to the Municipality by MISA. MISA further approved in writing that the ADM participate in this contract. Therefore the Municipality had no reason to believe that the contract was not validly procured. The ADM believes that it has adhered to the requirement of Regulation 32, utilising the service of Siyenza (sic) in respect of its sanitation programme”.

5.1.23 In addition, the ADM submitted that Siyenza was indeed registered with the Companies and Intellectual Property Commission (CIPC) as Blue Nightingale Trading 397 t/a Siyenza, with registration number 2005/000948/07. It further alleged that CIDB legislation did not apply to contracts of this nature, which primarily consisted of the provision of supplies and labour. The ADM had, in the past, implemented similar contracts (VIP toilets) and had not applied the CIDB legislation in these contracts. The ADM further alleged that it **“satisfied itself that for the services that Siyenza is required to performed (sic) in respect of the programme, is exempted from having to be CIDB registered.”**

- 5.1.24 Although Siyenza was not required to be CIDB registered due to the nature of the project, during the original tender process undertaken by MISA, MISA requested companies to provide proof that they had some form of CIDB registration and experience during the Evaluation of the tender. MISA obtained proof from Siyenza, who tendered as a consortium, that one of the members in their group of companies was registered with the CIDB as a Grade 5 contractor. The company was TAJ Consortium.
- 5.1.25 The ADM further indicated that it undertook a competitive bidding process to identify manufacturers of the Ventilated Improved Pit Latrines (VIP), in which four companies were eventually contracted to supply and deliver VIP's. It submitted that, **although the initial tender was for the supply, delivery and installation of VIP's it was decided that the four companies appointed would not be responsible for the installation, following negotiations on price.** Consequently, **the ADM only appointed for the supply and delivery** of VIP's to the various sites, and not for the installation thereof. Siyenza then contracted with most of the abovementioned suppliers for the supply of materials to site.
- 5.1.26 Regarding where the budget for the project came from, the ADM indicated that it secured a loan through the DBSA on 18 March 2014, subject to the approval of the National Treasury. A business case was prepared in conjunction with the DBSA to be submitted to the National Treasury for approval. A presentation was then made to the National Treasury on 10 July 2014 relating to the urgent need for this project to be fast-tracked. The loan was approved by the National Treasury on 22 August 2014, and the loan agreement was signed on 18 November 2014.
- 5.1.27 According to the ADM, the approval of the business case was subject to the condition that the project had to be completed before the end of the 2015 financial year, in other words, within a period of ten (10) months. The start date

of the project was thus set to be 01 September 2014. Due to the stringent timeframes, the ADM's Engineering Department motivated that the loan be bridged with funds from the ADM's Investment Accounts. The Council approved the budget in May 2014, and in October 2014. It approved the final Adjustment Budget relating to the programme.

5.1.28 The ADM further noted that Siyenza appointed eighty (80) sub-contractors on the project to assist with the installation of the VIP's. This allowed small, developing contractors to also benefit from the programme. These subcontractors were paid once a specific number of toilets, as agreed, had been installed satisfactorily.

5.1.29 After inspection by both Siyenza and the ADM, a "happy letter" was signed by the beneficiary indicating his/her satisfaction with the VIP installed.

The initial award to the entities under bid 8/2/337/2012-2013

5.1.30 During my interview with Mr Clayton Bhana, former General Manager: Supply Chain Management of the ADM on 26 February 2019, he indicated that, following the advert of the ADM on 09 July 2013, thirteen (13) bids were received. Two (2) bids were non-responsive, and five (5) bids were rejected because they did not meet the qualification criteria. This resulted in six (6) bids to be evaluated on the technical specifications.

5.1.31 An undated Bid Report prepared by the Engineering Department described the scope of the tender as follows: -

"SCOPE OF WORK

The scope of work for the bid includes supply, delivery and site support for the erecting of VIP top structures to the value of the available budget for Amathole District Municipality accelerated sanitation programme.

The following summarises the scope of Work:

- ❖ Supply a toilet top structure that can be moved or relocated over a second pit when the first pit is full;
- ❖ Deliver materials for the toilet structures to the sites of erection;
- ❖ Provide relevant technical support to ISD and construction service providers related to the product of the supplier on site;
- ❖ Suppliers are encouraged to establish a production plant in the Amathole District Municipality area.

The Supplier will normally not be required to erect the structures but to give technical support to the independently appointed labour contractors. However, allowance has been made for exceptional emergency cases for suppliers to provide construction services”.

5.1.32 The same document outlined the evaluation process, *inter alia* as follows:

“BIDS TO BE EVALUATED

TABLE OF BIDS TO BE EVALUATED			
BIDDER	BID AMOUNT (Including VAT PER UNIT)	PROJECT TIME PERIOD STIPULATED IN WEEKS	POINTS
Newshelf 1265 (Pty) Ltd t/a Rocla (Pty) Ltd	R6 846.84	144 weeks	85.19
Conrite Walles (Pty) Ltd	R6 499.23	144 weeks	90.00
Betram (Pty) Ltd	R8 706.45	144 weeks	59.43
Paveprint cc t/a Concretex	R10 721.45	144 weeks	31.53
Amanzi' Abantu Services / Everite JV	R12 372.47	144 weeks	8.67



Izwelethu Cemforce	R37 018.08	144 weeks	-320.62
RECOMMENDED BIDDERS:			
1. Messrs. Conrite Walles (Pty) Ltd			
2. Messrs. Newshelf 1265 (Pty) Ltd t/a Rocla (Pty) Ltd			
3. Messrs. Betram (Pty) Ltd			

5.1.33 From the Minutes of the Bid Evaluation Committee (BEC) meeting held on Monday 13 January 2014, it appears as if the BEC resolved to recommend to the Bid Adjudication Committee (BAC) the following: -

“That Bid No. 8/2/337/2012-2013 for the Supply and Delivery of VIP Top Structures Including Site Support for Amathole District Municipality Accelerated Sanitation Programme be awarded as follows:

- [a] That Messrs Newshelf 1265 (Pty) Ltd t/a Rocla (Pty) Ltd be appointed to produce toilets units aligned to the quotation of funding availability in any particular year at a unit rate of R6 846.84 including contingencies, escalation and VAT, on a period of 36 months.***
- [b] Messrs Conrite Walles (Pty) Ltd as per attached unit price appointed to produce toilets units aligned to the quotation of funding availability in any particular year at a unit rate of R6 499.23 including contingencies, escalation and VAT, on a period of 36 months.***
- [c] Messrs Betram (Pty) Ltd as per attached unit price appointed to produce toilets units aligned to the quotation of funding availability in any particular year at a unit rate of R8 706.45 including contingencies, escalation and VAT, on a period of 36 months. (See attached Annexure- “M”) subject to negotiation to reduce the price”.***

5.1.34 Mr Bhana further explained that during the evaluation process, the ADM realised that there was a big difference in the pricing of the bidders. The discrepancy was specifically around the installation component of the tender. The BEC suggested to the BAC to drop the labour component of the tender and recommended that the Municipality make use of its Incubator Programme. The BAC then entered into price negotiations with the bidders. He indicated that the ADM was entitled to do so, as the Terms of Reference provided for an award in whole or in part.

5.1.35 The Minutes of the BAC meeting held on 03 March 2014, reflects the following: -

“At the Bid Adjudication Committee meeting held on Monday, 3 March 2014, the item for finalising the appointment of suppliers for the VIP top structures after negotiations with the bidders was discussed and recommended to the Municipal Manager for approval. As per the resolutions of the special BAC meeting of 22 January 2014, all the evaluated bidders who have priced their bids be considered for appointment, but other two suppliers, Messrs Amanz’ abantu Services and Concrete Walls were excluded because of the poor quality of toilets they produced, as advised by the ADM inspection team.

RESOLVED TO RECOMMEND TO THE MUNICIPAL MANAGER

[a] *That resolution 5.3.5 (d) of the Special BAC Meeting held on 22 January 2014 be rescinded and approved as follows:*

That all the evaluated bidders who have priced their bids be considered for appointment, but subject to negotiating the unit price to be in line with the highest point scorer.

- *Messrs Paveprint cc t/a Concretex;*
- *Betram (Pty) Ltd;*

– Messrs Izwelethu Cemforce

- [b] That the approval of the Special BAC Meeting held on 22 January 2014 under item 5.3.5 resolution (b) **be rescinded**:

Resolution (b) of item 5.3.5:

‘Messrs Conrite Walls (Pty) Ltd as per the attached unit price be appointed to produce toilets units aligned to the quotation of funding availability in any particular year at a unit rate of R6 499.23 including contingencies, escalation and VAT, for a period of 36 months’.

- [c] **Messrs Betram (Pty) Ltd, be appointed to produce toilets units aligned to the quotation of the funding availability in any particular year at a unit rate of R5 871.00 including contingencies, escalation and VAT, for a period of 36 months at the negotiated rates.**
- [d] **Messrs Paveprint cc t/a Concretex be appointed to produce toilets units aligned to the quotation of funding availability in any particular year at a unit rate of R4 200.90 including contingencies, escalation and VAT, for a period of 36 months at the negotiated rates.**
- [e] **Messrs Izwelethu Cemforce be appointed to produce toilets units aligned to the quotation of funding availability in any particular year at a unit rate of R4 930.50 including contingencies, escalation and VAT, for a period of 36 months at the negotiated rates”.**

5.1.36 Initially, on 18 March 2014, the ADM issued appointment letters to the entities which suggested that the installation component of the tender was also awarded. A second appointment letter was seemingly issued on 31 March 2014.

in which appointment letter the service providers were only appointed for the supply of the VIP units.

5.1.37 Yet, when the MM of the ADM wrote to the Chief Director at the National Treasury (NT) on 24 April 2014 in connection with the bridging of its MIG, he alluded that:

“The municipality is in the process of concluding supplier and contractor agreements in preparation for commencement of project implementation on 01 July 2014.”

5.1.39 According to the Minutes of the Compulsory Briefing Session which was held on 17 July 2013, the following however, seemingly transpired during this session: -

“Mr Salie Peck opened the session and welcome (sic) all present. It was explained to the attendees that the first paragraph in the advert that appeared in the newspaper was not complete as it left out the part that indicated that Amathole District municipality (ADM) is seeking manufacturers to supply structures for a 3-year appointment”.

5.1.40 And later: -

“On the question whether ADM can separate the manufacture and supply from the installation, and call for two separate tenders, the response is that on this manufacturer tender the implementation will only be done on an emergency basis and in those cases ADM will issue a written request, all other sanitation projects will still go through the normal route of tendering for the appointment of contractors for installation, nothing will change from current practice.”

- 5.1.41 The evidence thus suggests that the ADM already decided by the time it held the Compulsory Briefing Session in July 2013, that it will not award the installation component of the tender. It thereafter issued appointment letters which suggested that the installation component had also been awarded, only to issue other appointment letters days thereafter, appointing only for manufacturing. The evidence further suggests that even though the Municipality appeared to have only awarded for the supply, it misrepresented this fact to the DBSA when it applied for the bridging of its MIG.
- 5.1.42 During an interview with Messrs Robins and Labuschagne of Rocla on 04 September 2014, there was a suggestion that even tenderers which were rejected on the technical component during the bid process, ended up supplying the ADM. The evidence suggested that ultimately, the ADM appointed Messrs. Izwelethu Cemforce despite the fact that the company scored negative evaluation points.
- 5.1.43 The ADM then seemingly, held a meeting on 17 September 2014, during which it introduced Siyenza to the appointed suppliers as the Implementing Agents for the project.
- 5.1.44 During the interviews which the Investigation team had with the former Municipal Manager of the Municipality, Mr Magwanqana on 22 October 2018 and with the former Director: Engineering of the Municipality, Mr Shezi on 07 February 2019, it was suggested that the ADM appointed the suppliers on MIG programmes which were running, and which included the installation component. It was suggested that the Municipality did not appoint any service providers on the frontloading programme prior to the appointment of Siyenza through the use of Regulation 32.
- 5.1.45 During my interviews with the service providers involved in the tender, some of them , specifically Mr Diedericks of Cemforce and Mr Ryan of Concretex,

indicated that the ADM, during the 17 September 2014 meeting suggested that Siyenza was brought into the project **as the source of funding for the project changed.** From the evidence provided, it appeared that the ADM suggested that the contract was initially concluded on the basis that the necessary funding would be provided from the MIG funding over a three year period, but that the funding would from then on, be provided by the DBSA.

5.1.46 During my interview with Mr Bongani Mpeluza of Siyenza on 13 December 2018, he also indicated that it was clear during that first meeting with the ADM's suppliers that the four companies which were appointed by the Municipality had a different idea about the scope of their appointment. The companies were seemingly under the impression that they were appointed to do the installation as well. He further questioned how some of the companies got involved in a tender requiring installation as well, as companies such as Betram and Concretex were only manufacturers of VIP's.

5.1.47 In addition, it seemed as if very few, alternatively no VIP's were supplied until after the appointment of Siyenza. In a letter dated 31 October 2014, Mr Fourie of Betram, wrote to the ADM indicating *inter alia*:

"We refer to our appointment received on the 31st of March 2014 and our acceptance thereof in respect of the above contract.

From date of appointment, we have not received any further documentation or correspondence pertaining to the commencement of the project or of who the appointed contractors are."

5.1.48 A letter to the same effect was written by Rocla (Pty) Ltd on the same date.

5.1.49 During my interviews, most of the suppliers highlighted the financial losses which they suffered as a result of the termination of the contract between the ADM and

Siyenza. Some of the suppliers indicated that they continued to supply materials to the ADM even after it terminated Siyenza's services, and that the ADM later refused to pay them for such supplies.

The ADM approached the MISA to participate in the Northern Cape sanitation project using Regulation 32

5.1.50 During the same time that the ADM was embarking on a tender process to appoint service providers for the supply, delivery and installation of VIP Top Structures, it appeared that around 15 November 2013, the ADM approached the MISA requesting financial and project management support towards addressing its sanitation backlog. This correspondence led to a meeting between the ADM and the MISA on 05 December 2013 in Centurion.

5.1.51 Consequently, another meeting was convened by the ADM in January 2014, and attended by, the MISA and the DBSA. During the said meeting, the ADM was alleged to have briefed the meeting about the sanitation backlog in the Municipality, and its endeavours to address the sanitation infrastructure backlogs. For this purpose, the ADM alluded that it was in the process of applying to the DBSA and the NT for a bridge financing facility front loading its Medium Term Expenditure Framework (MTEF) MIG allocations for the 2014 to 2016 financial years. The ADM sought a partnership between the three (3) parties to support the implementation of the programme through the deployment of technical support and the possibility of implementing agents' arrangements. MISA recommended that a tripartite agreement be entered into between the parties to define roles and responsibilities.

5.1.52 Whilst the parties were negotiating the terms and conditions of a draft Memorandum of Understanding (MoU), the ADM wrote to the MISA on **08 April 2014**, indicating that it is embarking on a sanitation backlog eradication

programme. It further indicated that the **first phase of the programme** was already underway, and that it had come to the ADM's attention that MISA was implementing a similar project and had appointed contractors through a competitive bidding process. It thereafter wanted MISA's permission to participate in the contract between MISA and any of the contractors implementing the contract on its behalf, in accordance with Regulation 32 of the Municipal Supply Chain Management Regulations, and Regulation 16A6.6 issued under the Public Finance Management Act (PFMA).

5.1.53 In its response letter dated 11 April 2014, MISA indicated that it had two contractors implementing a sanitation bucket eradication programme in the Northern Cape, namely ***Siyenza Group*** and ***Xigombe Business Enterprise***. These contractors were appointed following a competitive bidding process. It further indicated that it had no objection to the ADM participating in the contract.

5.1.54 The ADM subsequently convened a follow-up meeting with the MISA on 22 April 2014. During the said meeting, the ADM conveyed its support needs to the MISA, which included support for project management capacity through the deployment of engineers and qualified project managers and direct delivery support through implementing agent arrangements. On 28 August 2014, the ADM wrote to the MISA, informing it of its decision to appoint the MISA as Implementing Agents to the project. An extract of the said letter reads as follows:

“Having perused such documentation, enquired with progress made on the project to date and finally secured the approval of Front-loading facility from the National Treasury we wish to advise that the following decision(s) have since been made. (sic)

1. *That MISA is hereby appointed as an Implementing Agent of this programme;*
and

2. *That the Siyenza Group is henceforth appointed as a service provider in terms of section 32 of the Local Government: Municipal Systems Act to deliver the long-awaited programme”.*
- 5.1.55 According to the MISA, a number of meetings were thereafter held between the ADM, the MISA and the DBSA, **during which it transpired that the ADM had appointed Siyenza as the main contractor for the whole project.** The MISA then decided that it could no longer play the role of an Implementing Agent, as was initially proposed, but instead will, together with the DBSA, only render technical support to the ADM to ensure the successful implementation of the project.
- 5.1.56 During an interview with Mr Armstrong, the Senior Manager: Legal and Integrity Services of the ADM on 22 October 2018, he indicated that around February 2014, he was introduced to the CEO of MISA. He was required to draft a Memorandum of Understanding between the ADM, the MISA and the DBSA. During the interaction, he was under the impression that the roles and responsibilities of the parties would entail that the ADM would identify needs, the DBSA would provide funding through a loan and that the MISA would implement the project. During this process, there was uncertainty as to who would undertake the procurement. He was of the opinion that, as the MISA would act as the Implementing Agent for the project, the MISA had to do the procurement and it was as such incorporated into the draft Memorandum of Understanding (MoU) circulated to the parties.
- 5.1.57 From the draft MoU which was submitted to my investigation team as evidence, it appeared that at all relevant times, the MoU provided for the MISA to act as the Implementing Agent for the projects. It had the responsibility to appoint contractors and other service providers required for the successful

implementation of the projects and was further responsible for the day to day monitoring of the rolling out of the projects.

- 5.1.58 It was further unclear why the ADM decided not to appoint both contractors which had been appointed by the MISA. The explanation provided by Mr Shezi, the former Director: Engineering during an interview with the Investigation team on 07 February 2019, he stated that, on the appointment of one of the two companies, Siyenza, and not both was because of the performance issues surrounding the other service provider in the Northern Cape, Xigombe Business Enterprise.
- 5.1.59 On 13 December 2018, my investigation team had an interview with Mr Bongani Mpeluza, the Director of Siyenza. He indicated that he received a call from the Office of the Municipal Manager of the ADM, indicating that the ADM had meetings with the MISA, and that the ADM wanted to participate in the contract as it was undertaking a similar project to the one which was conducted in the Northern Cape. He thereafter received an email from the ADM inviting Siyenza to work in the ADM, using Regulation 32. According to Mr Mpeluza, he then called the CEO of the MISA enquiring about the process and the implications, where after he wrote to the ADM accepting the offer.
- 5.1.60 From the evidence submitted to my investigation team, it emerged that Siyenza was issued with an appointment letter on 04 September 2014, even though the ADM only signed the **CONFIRMATION OF CONTRACTUAL TERMS** on 12 September 2014 . From the evidence submitted by Mr Armstrong specifically, it appeared as if there was haste on the side of the parties to have the agreement signed. He indicated that he was called to the Municipal Manager's office on 10 September 2014 to meet with Mr Bongani Mpeluza of Siyenza, who visited the office for the purpose of signing the agreement. At that stage, he had not been briefed by the Municipal Manager.

- 5.1.61 The only conclusion that I could reach regarding the haste to sign the agreement between the parties emanated from the fact that the agreement between the MISA and Siyenza was coming to an end on 24 September 2014.
- 5.1.62 In addition, Mr Mpeluzi acknowledged that Siyenza was not in possession of a CIDB certificate. He indicated that when Siyenza submitted its bid to the MISA, it tendered as a consortium. One of the companies in the consortium, namely Taj Consortium, was registered with the CIDB. He indicated further that Siyenza did not assemble any VIP unit, the units were assembled by subcontractors.

The award which was made to Siyenza

- 5.1.63 In the matter between ***Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza v Amathole District Municipality***,¹⁴ the Eastern Cape Circuit Court, situated in East London, found that the agreement concluded between the parties on 12 September 2014 entitled ***Confirmation of Contractual Terms***, was unconstitutional, invalid and void *ab initio*.
- 5.1.64 The Court found that the procurement of the services of Siyenza by the ADM did not meet essential requirements under Regulation 32 of the Municipal Supply Chain Management Regulations, issued under the Local Government: Municipal Finance Management Act (LGMFMA), and therefore did not meet the constitutional imperatives under section 217 of the Constitution. In this regard, the Court held that the requirements under Regulation 32 had not been met as:
- 5.1.64.1 The ADM contracted directly with the service provider and not with the “*other organ of state*” as required by Regulation 32;
- 5.1.64.2 The scope of the two contracts differed, as MISA required the supply and installation of prefabricated toilet structures of dry and

¹⁴ (EL881/15;ECD1681/15) [2015] ZAECELLC 16 24 November 2015.

waterborne systems, whilst the ADM required the supply and installation of Ventilated Improved Pit latrines;

5.1.64.3 The contract amount differed – MISA contracted for R119 228 500.00, whilst the ADM contracted for R631 835 837.00; and

5.1.64.4 The duration of the two contracts differed.

Siyenza's response to the Public Protector's Notice in terms of section 7(9) of the Public Protector Act, 1994

5.1.65 Siyenza submitted its response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, through its attorneys, Messrs Makhanya Attorneys, on 02 May 2019.

5.1.66 It submitted that it was common cause that Siyenza was appointed by the Municipal Infrastructure Support Agent (MISA), which is an organ of state, to implement a project for the eradication of sanitation backlog. These were the same services and goods Siyenza was required to deliver at the ADM.

5.1.67 The ADM was responsible for the provision of water and sanitation services in the District Municipality, which included the Local Municipalities of Amahlathi, Great Kei, Mbhashe, Mnquma, Ngqushwa, Nkonkobe and Nxuba. These are largely rural based Municipalities with substantial sanitation backlogs and which impacted on the health and dignity of the people living in these areas.

5.1.68 The contract price of Siyenza in the Northern Cape project was R119 228 500.00, and the contract price for the ADM project was about R230 800 000.00 (seemingly calculated as R9460.27 - 6000x 66 700 units), and not R631 million as suggested.

- 5.1.69 The responsibilities of Siyenza was more project related, as the responsibility of appointing and paying suppliers was already fulfilled by the ADM. All that had to be demonstrated in a procurement of such nature, was that, firstly, the contract concluded by the first organ of state must have been secured by that organ of state by means of a competitive bidding process. In this regard, Siyenza submitted that it was common cause that it was procured by the MISA by means of a competitive bidding process. Siyenza alluded that due diligence was undertaken to determine the validity of its Tax Clearance Certificate. A service provider was appointed by the MISA to undertake this due diligence process, which found that all the documents submitted by Siyenza were valid, including its Tax Clearance Certificate. Siyenza further submitted that the Internal Audit Committee of the MISA had the responsibility to make such determinations as well, and that this was surely done.
- 5.1.70 The second requirement for procurement of this nature, was that the second organ of state had no reason to believe that such contract was not validly procured. In this regard, Siyenza submitted that the ADM had no reason whatsoever to believe that the Northern Cape contract was invalid. Invalidity of this contract was never proved in any forum or court of law. The termination of the contract between Siyenza and the MISA was by mutual consent. The contention that the Siyenza's Tax Clearance Certificate was invalid, was never proved by the MISA.
- 5.1.71 The third requirement is that there should be demonstrable discounts for the Municipality to do so. The ADM needed the eradication of sanitation backlogs as a matter of urgency and the Northern Cape had a similar project. Costs for advertising of the tender and drawing specifications using Consultants and any further costs normally involved in the procurement process and delays on the evaluation and adjudication and disputes arising therefrom, were avoided. The ADM also benefitted in value, as it received delivery of a toilet at R9 460.27,

whilst at the time the toilets were being delivered at R11 000.00 at OR Tambo District Municipality and other districts. This substantially benefitted the ADM.

5.1.72 The fourth requirement was that the first organ of state had to consent to such procurement in writing. In this regard, there was a written contract for the three parties involved – the MISA, the ADM and Siyenza; in which the MISA and Siyenza consented in writing to the procurement.

5.1.73 Implicit in the Regulation 32 procurement was the fact that the onus to ensure that the procurement complied with the requirements of the said Regulation vested in the Accounting Officer of the second organ of state, and not with Siyenza. All that was required from Siyenza, was to consent to the procurement in writing, which occurred.

5.1.74 It was further sufficient for the ADM to prove that the terms and conditions, as well as the contract price, were not materially different. This meant that it was not necessary that the first and second contract had to be similar in every respect, as such would be impossible to occur. According to Siyenza, it sufficed to state that the two contracts should not have been materially different.

5.1.75 Siyenza then alluded that: -

“For instance it smacks of an exercise in semantics for the High Court in the judgment delivered on 12 September 2014 to find that MISA required the supply and installation of prefabricated toilet structures of dry and waterborne systems whereas ADM required the supply and installation of Ventilated Improved Pit latrines. Where is the difference?!”

5.1.76 Siyenza then indicated that it was for this reason that they intend to appeal against the judgment of the High Court to a Full Bench of the Eastern Cape High Court.

- 5.1.77 Siyenza further indicated that the supplier who provided the toilet material in the Northern Cape and the ADM was the same. It was for this reason that Siyenza complained to the ADM about the inflation of the price for the supply of this material from R3 800.00 in the Northern Cape to R6 000.00 at the ADM, whilst the difference in distance from Pretoria to Northern Cape and Pretoria to Eastern Cape was a mere 300 kilometres.
- 5.1.78 This caused problems for Siyenza as everybody turned against Siyenza and worked tirelessly to ensure that the contract was cancelled. Siyenza thus suggested that, had it not raised the issue of the exorbitant price, it would have probably completed the project.
- 5.1.79 Except for the Facilitator who charged R420 per each beneficiary to do social facilitation and training of the beneficiaries on the use of the said toilets, the rest of the subcontractors (81), were already in the database of the ADM prior to the arrival of Siyenza, and were procured at a rate of R3 200.00 each to install the units. Siyenza negotiated these rates and settled with the ADM and subcontractors on R2 200.00.
- 5.1.80 Siyenza was instructed to work with the suppliers already appointed by the ADM, of which there were four, and they were charging a sum of R6 000.00 per toilet and the lowest price being charged was R4 800.00 (excl. VAT) per toilet.
- 5.1.81 In the premise, the price per toilet was R9 460.00 and the contract was divided as follows: -
- 5.1.81.1 Suppliers were procured by the ADM through a competitive bidding process. They charged between R4 800.00 and R6 000.00. Only a sum of R3 460.00 per unit was the contract price for the other components of the toilet price.

- 5.1.81.2 Subcontractors were appointed by the ADM, which Siyenza was compelled to use in the interest of Local Economic Empowerment. Each charged R2 200.00 for the installation of the toilets.
- 5.1.81.3 Siyenza's contracting price amounted to R1 360 per toilet, inclusive of VAT, of which R420.00 was paid for the social facilitation fee.
- 5.1.82 During June 2015, the ADM terminated the contract with Siyenza on the basis that the contract with the MISA had terminated. This decision, Siyenza contended, was invalid. Siyenza alleged that it had not accepted such termination but was forced by the ADM to vacate site. This despite its pleas that the site should be secured.
- 5.1.83 According to Siyenza, the ADM misconstrued the legal effect of Regulation 32, as it did not depend on the continued existence of the first contract for it to persist. Once the four requirements have been complied with at the procurement stage and a written contract was concluded between the parties, the second organ of state substituted the first as the contracting party for the second contract. The second contract, so it alleged, then was supposed to run its course independent of the first contract.
- 5.1.84 It was for this reason that Siyenza applied for an urgent application for the appointment of an arbitrator to deal with numerous issues, which included: -
- 5.1.84.1 The immediate security of the site to protect material on site as well as work done, and for the ADM to exercise its lien over material and work on site in view of its decision that Siyenza should immediately vacate site. As the ADM spent a lot of money on site establishment, it should have co-operated in this regard;

- 5.1.84.2 The immediate vacation of the sites was not well thought through by the leadership of the ADM, as it exposed the sites to theft of material and vandalism of the toilets.
- 5.1.85 At that stage, Siyenza had tendered invoices to the ADM in the amount of R28 million for work done on site.
- 5.1.86 Siyenza further denied that the contract between itself and the ADM had been unlawfully procured, and suggested that, even if it was so, that I should take remedial action that the ADM should pay all outstanding Payment Certificates to Siyenza.

Application of the relevant law

- 5.1.87 Section 217 of the Constitution of the Republic of South Africa, 1996, obliges any organ of state, in the national, provincial and local sphere of government to, when it procures goods and services, do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 5.1.88 Section 195 enjoins the ADM the responsibility to ensure efficiency and effectiveness in public administration. It specifically provides that public administration must be governed by democratic values and principles enshrined in the Constitution, specifically that a high standard of professional ethics must be promoted and maintained, services must be provided impartially, fairly, equitably and without bias and that public administration must be accountable.
- 5.1.89 In terms of section 60 of the Local Government: Municipal Finance Management Act, 2003, (LGMFMA) the Municipal Manager is the Accounting Officer of a Municipality.
- 5.1.90 Section 61 of the LGMFMA provides that:

- “(1) The accounting officer of a municipality must-*
- (a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;*
 - (b) disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way may influence the decisions or actions of the council or the mayor; and*
 - (c) seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality.*
- (2) An accounting officer may not-*
- (a) act in any way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of this Act; or*
 - (b) use the position or privileges of, or confidential information obtained as accounting officer for personal gain or to improperly benefit another person.”*

5.1.91 In addition, section 62 provides that: -

- “(1) The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure: –*
- (a) that the resources of the municipality are used effectively, efficiently and economically;*
 - (b) that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards;*

(c) that the municipality has and maintains effective, efficient and transparent systems-

- (i) of financial and risk management and internal control; and*
- (ii) of internal audit operating in accordance with any prescribed norms and standards;*

(d) that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;

(e) that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15;”

5.1.92 Section 111 of the Local Government: Municipal Finance Management Act, 2003, obliges a Municipality to have and implement a supply chain management Policy. In terms of section 112 of the LGMFA, Supply Chain Management Policy of a Municipality must be fair, equitable, transparent, competitive and cost-effective and must comply with the prescribed regulatory framework for Municipal supply chain management.

5.1.93 Regulation 32 of the Municipal Supply Chain Management Regulations, GG 27636, 30 May 2005, provides that: -

- (1) A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if –*

- (a) the contract has been secured by that organ of state by means of a competitive bidding process applicable to that organ of state;*
- (b) the municipality or entity has no reason to believe that such contract was not validly procured;*
- (c) there are demonstrable discounts or benefits for the municipality or entity to do so; and*
- (d) that other organ of state and the provider have consented to such procurement in writing.”*

5.1.94 The ADM's SCM Policy contains a similar provision in section 61.

5.1.95 Regulation 43, in addition, provides that the Supply Chain Management Policy of a Municipality must state, irrespective of the procurement process followed, that the Municipality may not make any award above R15 000 to a person whose tax matters have not been declared to be in order by the South African Revenue Service. In addition, a Municipality is obliged to, before making an award to a person, check with SARS whether the person's tax matters are in order.

5.1.96 Section 4(1) of the ADM's Supply Chain Management Policy (SCM Policy) indicates that the ADM resolved to have and implement an SCM Policy that gives effect to section 217 of the Constitution, which is fair, equitable, transparent, competitive and cost effective.

5.1.97 Section 36(2) of the ADM's Supply Chain Management Policy states that the Accounting Officer may negotiate the final terms of a contract with bidders identified through a competitive bidding process as preferred bidders, provided that such negotiation does not allow any preferred bidder a second or unfair opportunity.

5.1.98 Section 52(1) of the Policy obliges the ADM to award a contract to the highest scorer, unless an objective criteria justifies the award to another tenderer. Section 54 further provides that the ADM may not award a bid unless the service provider had submitted a valid Tax Clearance Certificate indicating a tax clearance certificate number.

5.1.99 In *SA Container Stevedores v Transnet Port Terminals*,¹⁵ the court noted that post-tender negotiations is not uncommon in public tender dealings and has been found to be a legally acceptable practice as long as, it seems to me, it is included in the tender document as a requirement in the tender process. Later in the same judgment the court found that: -

“An organ of state has discretion to accept or reject a particular tender, but in exercising this discretion it must act fairly, responsibly and honestly, and in a manner that is procedurally fair.”¹⁶

Conclusion

5.1.100 Based on the information and evidence obtained during the investigation, the legal framework and the court order in the case of ***Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza v Amathole District Municipality*** it can be concluded that there were irregularities in the award of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM.

5.1.101 It can further be concluded that ADM did not follow a process that is fair, equitable, transparent and competitive as envisaged in section 217 of the Constitution.

¹⁵ [2011] ZAKZDHC 22, 30 March 2011 at [72].

¹⁶ Para [110].

5.2 Whether political influence played a role in the award of the contract and if so, whether such conduct constitutes improper conduct and maladministration:

Issues in dispute

5.2.1 In essence, the Complainants alleged that Siyenza was brought on board in the ADM's sanitation project because of the company's links with high-ranking ANC officials. Specifically, it was alleged that Ms Nolwande Mantashe (the wife of Minister Gwede Mantashe, MP), Mr Boitumelo Itholeng (the son of Minister Lindiwe Zulu, MP) and Mr Lonwabo Sambudla (the son in-law of former President Zuma) benefitted from the irregular award of the tender to Siyenza.

5.2.2 Mr Bongani Mpeluza explained that the allegation was that Mr. Gwede Mantashe wanted to topple the then President, Mr Zuma, and for this he needed funding, which funding would be channelled to a fund established for this purpose using Ms Mantashe's company.

5.2.3 My investigation team interviewed Ms Mantashe on 18 February 2019. During the interview, she indicated that she was the Director of a company by the name and style Siphamba Consulting, a company which she co-owned with a gentleman by the name of Mr Vuyani Gaga. She knew Mr Gaga as they came from the same area. She explained that she was a Transformation Executive and Government Relations at PPC Cement. She indicated that she was highly experienced in the area of social facilitation. Before this, she also worked for Goldfields Mine, where she did mostly compliance work.

5.2.4 She indicated that she was aware that her colleague, Mr Gaga, was involved in a sanitation project in the Northern Cape. She was later informed that the project

was extended to the Eastern Cape, but she was not aware of the logistics surrounding this extension. She was further informed that the project was different in a sense that the funding came from the DBSA, which it required social facilitation. Because of the need for a Social Facilitator, Siyenza approached her, and gave her a subcontract.

5.2.5 She indicated that mostly, Siphamba was represented by Mr Gaga, and that she only attended two meetings, one where Siphamba was introduced to the DBSA as the Social Facilitator for the project and another one where Siphamba was introduced to the subcontractors. I have to take cognisance of the fact that Mr Gaga was, at all relevant times part of the Siyenza Consortium which submitted a bid for the sanitation project in the Northern Cape by the MISA, and was thereafter appointed by the ADM in the Eastern Cape. Mr Gaga was also a Director, coincidentally of the company which Siyenza decided to subcontract to conduct its social facilitation work in the project. I must also mention that Siphamba was registered in March 2014, just months before the ADM awarded the contract to Siyenza in September 2014.

5.2.6 Her role was mainly to conduct training. She appointed a trainer who trained numerous other trainers in line with a Manual received from the DBSA. These trainers in turn trained community members who would go door to door and train households on rules and hygiene related to the erection of the toilets. In addition, they were required to produce pamphlets which would appear at the back of the VIP units' doors. After the erection of a VIP unit, they would go back and the household would be required to sign a "Happy Letter".

5.2.7 Siphamba was paid R450 per household and payment was only received once the "Happy Letter" was signed. She could not recall at the time of the interview how many "Happy Letters" were signed.

5.2.8 Mr Sambudla submitted a detailed affidavit to my investigation team on 25 February 2019. In his affidavit, he indicated that: -

- “7. *I deny any involvement with or having influenced in any manner the awarding of the contract.*

8. *I have known Mr Mpeluza since approximately 2008.*

9. *I am currently married to and in the process of divorcing from Mrs Duduzile Zuma-Sambudla, a daughter of the former President of the Republic of South Africa, Mr Jacob Zuma.*

4. *I categorically deny, however that my relationship by virtue of my marriage to my wife and consequently the relationship with my father in-law in any manner influenced or had a bearing upon the awarding of the contract.”*

5.2.9 He further indicated that, in his capacity as a director of the Impuna Group, he conducted his business from Bongani House, 28 Impala Road, Chiselhurst, Sandton, which was also the registered business address of Siyenza. He explained that his attorneys enquired from Mr Mpeluza regarding the utilisation of this address, and was informed that after Siyenza vacated premises in Sandton Towers in October 2014, his wife afforded Mr Mpeluza the use of a small portion of the premises which he (Mr Sambudla) had until then occupied.

5.2.10 Mr Sambudla further explained that he was also the Director of an engineering consulting practice, SDM Consulting Engineers and Project Managers (Pty) Ltd, which previously contracted Siyenza, as an accounts cost consultant on an *ad hoc* basis. Siyenza’s services were however, no longer utilised after the articles which were published in the Daily Dispatch around February 2015.

5.2.11 According to him, his attorney had sight of hundreds of documents relating to the subsequent litigation and / or criminal prosecution, and at no stage in any of the civil or criminal proceedings was any evidence adduced or any statement made suggesting that political influence adversely or unfairly directed the award of the contract. Mr Sambudla further referred my investigation team to the adjudication of the matter by the Press Ombudsman on 20 April 2015, which found that *“Daily Dispatch...failed to verify the link between the awarding of the tender and the influence by ANC leaders mentioned in the story and depicted pictures”*.

5.2.12 My investigation team interviewed Mr Boitumelo Itholeng, the son of Minister Lindiwe Zulu, on 04 March 2019. He indicated that his friendship with Mr Mpeluza started around 2009 or 2010, he was still at school at the time. Late 2013, the MISA advertised a tender, and they as four friends decided to form a management company, Siyenza Prospectus, under what he described as a *“Gentleman’s Agreement”*. Siyenza, under the auspices of Siyenza Prospectus, submitted a bid (he also acknowledged that Mr Vuyani Gaga was one of the friends). He indicated that they were awarded the R112 million tender by the MISA. They were dealing with nine (9) Municipalities and the project related to the installation of prefabricated structures.

5.2.13 According to him, no CIDB registration was required, as they were not building anything. He did confirm, however, that the company Taj Consortium did have a CIDB grading at that time. At some stage during the project, the scope changed to the installation of waterborne systems. The project was implemented successfully. Despite changing the scope, they managed to complete the project within the timeframe and budget allocated. He described the role of Siyenza as that of a Project Manager. In the Eastern Cape Siyenza was responsible for project management and installation.

5.2.14 According to Mr Itholeng, Siyenza started its work in the ADM prior to the payment of the R94 million. Due of the previous relationship between Siyenza and Betram, Betram provided Siyenza with a credit line and delivered prior to payment.

5.2.15 With regard to the allegation that the tender was awarded to individuals with political connections, Mr Itholeng acknowledged that his mother is currently a Minister, but indicated that when the tender was awarded to Siyenza, she was working in the Presidency. He reiterated that the news articles had a negative impact on him as the perception which was created was that they stole R600 million.

Conclusion

5.2.16 No evidence could be found suggesting that political influence played a role in the award of the tender to Siyenza.

5.3 Whether the ADM incurred any irregular, fruitless and wasteful expenditure as a result of the awarding of the contract:

Issues in dispute

5.3.1 Regarding the payments which were made by the ADM, the Complainants alleged that the ADM paid amounts totaling approximately R94 million to the Siyenza Group during the period September to December 2014, which was paid prior to the entity's appointment and delivery of any services, and despite the fact that the Development Bank of Southern Africa (DBSA) had not, at that stage, transferred the allocated grant to the Municipality.

5.3.2 The grant was alleged to only have been transferred in January 2015. It was thus alleged that, effectively, the ADM disbursed funds that were budgeted for other

purposes, out of its own coffers, to the sanitation project managed by the Siyenza Group.

- 5.3.3 In addition to the above payments, a further amount totaling approximately R19 million was paid to the Siyenza Group in January 2015, despite the fact that there was allegedly little delivery by the company to an extent that it was doubtful whether they would have met the deadline of June 2015.
- 5.3.4 Regarding the initial R94 million payments which were made, the ADM indicated that it was normal practice in the construction industry that contractors submit their first claims for site establishment, which is usually a percentage of the contract value, referred to as preliminary and general costs (P&G's). Siyenza's initial claims was for P&G's, which amongst others, had to ensure that Siyenza had sufficient materials to commence with implementation without delay. Subsequent claims were for the actual work done.
- 5.3.5 It submitted further that the first claim of Siyenza amounted to 5% of the contract value, and thus an amount of R31 587 782 was paid to Siyenza at the end September 2014 for P&G's. A second claim of 10% of the contract value, R63 184 003, was paid to Siyenza to cover P&G's in December 2014. These payments were mainly to ensure that Siyenza was able to establish sites in respect of all the project areas and purchase materials to allow for implementation without delays.
- 5.3.6 A third claim in the amount of R19 158 357 was paid in January 2015 as per the progress on site.
- 5.3.7 The documentary evidence in my possession suggests that the Director: Engineering Services of the ADM submitted a memorandum to the Executive Mayor and the Municipal Manager of the ADM on **23 September 2014**, requesting the Municipality to make available a budget for the payment of the

service provider implementing the frontloading projects whilst waiting for the transfer from the DBSA. This memorandum served as motivation for the Municipality to make available an amount of R31 587 782.78 for payment to the contractor whilst the transfer from the DBSA was awaited. An extract of the said memorandum reads as follows:

“MOTIVATION

In order for the Institution to be able to complete the budget within 10 months as prescribed by National Treasury, planning had to take place prior to the budget being transferred by DBSA.

There are already invoices in hand received from the Service Provider that will also assist with the site establishment of Contractors as well as delivery of materials on site in time to avoid delays during the implementation.

This serves as a motivation for the Institution to make available the funding in the mean time for the payment of the received claims as the DBSA has not yet made the transfer. The budget utilized will be payed (sic) back to the municipality as soon as the transfer has been done by DBSA. It is anticipated that DBSA will make the transfer during October 2014.”

5.3.8 This amount was then paid to Siyenza on 26 September 2014. A second request of similar nature, requesting the ADM to bridge finance to an amount of R63 184 003.56 whilst awaiting the transfer of monies from the DBSA, was submitted on 01 December 2014.

5.3.9 Mr Armstrong, the Senior Manager: Legal and Integrity Services of the ADM was interviewed on 22 October 2018. He indicated that he was approached around May 2014 to comment on an item which was to go to Council for the approval of the frontloading. At that stage, he advised that the prescripts of the LGMFMA had not been followed, and as such, it was premature for the item to serve before

Council. He further indicated that he later learnt that the item did in fact serve before Council and was approved. According to him, the decision of Council was *ultra vires*, but was later rectified when the matter served before Council again later in 2014.

5.3.10 The documentary evidence submitted during the investigation confirms that indeed on **23 May 2014**, Council resolved to approve the DBSA MIG Funding Pledging / Frontloading of R715 million of the 2014/15 and 2015/16 financial years. The Information Statement calling for public comment was only placed in the *Daily Dispatch* on **24 September 2014**.

5.3.11 Thereafter, on **17 October 2014**, Council adopted a Resolution in, *inter alia* the following terms: -

- "a) That the request for Council to rescind the approved resolution of the 23rd of May 2014 with respect to the DBSA MIF Funding Pledging/Frontloading of R715 million of the 2014/15 and 2015/16 financial year for the Amathole District Municipality (ADM) be approved.
- b) That the National Treasury approval of the ADM's DBSA MIG Funding Pledging/Frontloading of R631 835 837.00 of the 2014/15 and 2015/16 financial years for the Amathole District Municipality (ADM) be adopted."

5.3.12 During his interview, Mr Armstrong further indicated that the ADM entered into a unitary agreement with Siyenza. Siyenza was to be paid as per the VIP installed. He learnt from the media reports **towards the end of February 2015** that payments had been made to Siyenza, and was informed by his colleagues that approximately R94 million was paid to Siyenza. He was then informed that Siyenza was entitled to payments up to 15% of the contract value as P&G's. According to him, these payments, in actual fact, constituted upfront payments

and were made with no agreement in place regarding repayments, and with no guarantee in place.

5.3.13 The Service Level Agreement entered into between the MISA and Siyenza did not make any provision for the payment of P&Gs, save to indicate that the MISA shall consider and approve the payment thereof for site establishment. The **CONFIRMATION OF CONTRACTUAL TERMS** entered into between the ADM and Siyenza also did not make provision for the payment of P&Gs.

5.3.14 Mr Armstrong indicated that he then drafted an Addendum to the contract, which made provision for the Municipality to recoup the advance payments as work was completed. The Addendum *inter alia* provided: -

"Whereas

(a) The Contractor has requested that the terms and conditions of payment as stipulated in the Confirmation of Contractual Terms read with the Contract, be adjusted to allow for the payment of up-front claims for Preliminary and General cost (P&Gs)".

NOW THEREFORE the Parties have reached agreement in respect to the following payment variation, consistent with paragraph 6 of the Bill of Quantities:

1. PAYMENT OF P&GS

1.1 Upon site establishment, the Contractor shall be entitled to claim as Provisional and General costs an amount equal to 15% of the Contract Amount or to an amount equal to R1 420.95 per toilet unit.

1.2 Should the Contractor elect to claim as provided for in terms of clause 1.1 above, the unit cost per toilet erected shall be reduced by 15% from R9 472.80 (inclusive of VAT) to R8 051.88 (inclusive of VAT).

BY THEIR SIGNATURES BELOW, THE PARTIES CONFIRM IN WRITING THE AGREEMENT REACHED BETWEEN THE PARTIES REGARDING THE PAYMENT OF P&Gs OPERATIVE FROM 22 SEPTEMBER 2014”.

5.3.15 From the invoices and proof of payments submitted, the ADM eventually did commence with the deduction of the 15% on invoices submitted by Siyenza from **29 January 2015**.

5.3.16 During an interview held with Mr Mpeluza, on 13 December 2018, he explained that the President was invited to launch the project. One hundred and twenty (120) VIP units had to be installed as part of the launch. He explained that he still had issues with some of the suppliers negotiating prices, and it was then that the possibility of payments for site establishment was discussed with the ADM. The payment for site establishment constituted 15% of the contract value, which he received in two (2) batches, namely 5% and 10% respectively. He further reiterated that no free money was given.

5.3.17 It appears that on 20 March 2015, the *status quo* of the project and the payments already made to Siyenza was recorded as follows by Mr Armstrong to the then Municipal Manager: -

“The ADM paid the R90 million to Siyenza for site establishment and to allow the contractor to purchase necessary the materials, which in this case, would largely be units of VIP top structures from the suppliers. This amount represents 15% of the project value and is within the normal range for P&G costs normally provided for site establishment in construction projects. The ADM has allowed this payment on condition that over the duration of the project, it will recover the 15%

*from each toilet built by Siyenza. This means that whereas the ADM would have paid R9 472.80 per toilet, this amount had been reduced to R8 051.88 per toilet (including VAT). **Hence for the ADM to recover the full 15% paid out up-front, all 66700 toilets need to be built.**" (own emphasis)*

5.3.18 Mr Armstrong then indicated, in the same email, that Siyenza must be requested to confirm how many sites have been established and where they were located, as well as how many VIP units and other necessary materials / equipment were purchased from the R90 million paid by the ADM. In addition, that Siyenza had to be required to provide guarantees or securities to the ADM in respect of the balance of the R90 million advanced, in the event that all 66 700 toilets were not delivered by the end of June 2015. Alternatively, it was suggested that an agreement be reached that at least 40% be recouped per toilet built going forward until the full upfront payment was recovered.

5.3.19 On **29 April 2015**, the ADM was informed by the MISA that Siyenza was alleged to have submitted a fraudulent Tax Clearance Certificate with its bid documents when it tendered for the Northern Cape project, and that the matter was being investigated. Following this correspondence, Mr Armstrong agreed with the then Acting Municipal Manager that no further payments could be made to Siyenza. It appeared however, that on **18 May 2015**, a payment to the tune of approximately R9 million was made to Siyenza, seemingly at the instruction of the Municipal Manager who was unhappy that payments to Siyenza were stopped.

5.3.20 This evidence was largely corroborated by Mr Bhana. He suggested that he prompted the then Acting Municipal Manager to request a reconciliation specifically regarding the upfront payments which were paid in the project, but realised later that two (2) further payments were made to Siyenza, one of R7.1 million and one of R1.9 million.

5.3.21 Following the discovery of the R9 million which was paid to Siyenza after the ADM received knowledge of the fraudulent Tax Clearance Certificate which was submitted for the MISA tender, Mr Armstrong then communicated by email to the Municipal Manager of the ADM on 18 May 2015. In his email, he indicated that: -

“As per our discussion earlier with the CFO and Mr Shezi, regarding the subcontractors, I understand the reasoning for making payment to Siyenza in order to ensure that subcontractors (who have diligently provided services) receive some payment for their efforts, which will also avoid the real possibility of toilets being damaged or destroyed if sub-contractors are not paid.

The subcontractors are contracted to Siyenza, therefore legally, non-payment is an issue between Siyenza (the contractor) and the sub-contractors. In essence, Siyenza, who have already received an advance payment of R94 million from the ADM, should reasonably be in a position to pay the subcontractors what is due to them. Hence Siyenza saying that they cannot pay the subcontractors because the ADM has not paid Siyenza, ignores the R94 million already advanced to Siyenza over and above payments made for actual toilets built.

As this is a unitary contract whereby payment is made strictly per toilet installed, it will be expected by, among others, the DBSA and the Public Protector, that the ADM:

- a) Justify the R94 million (P&G) advanced to Siyenza,
and*
- b) Demonstrate prudent financial management by indicating the measures put in place to secure the repayment or recouping of this money. In this regard, it might have been expected that the ADM insist on Siyenza providing securities/guarantees for sum of money advanced – which to-date Siyenza (despite request) has not provided, and/or these monies be recouped from Siyenza as soon as practically possible. The parties have agreed that 15% be deducted by the ADM from ever (sic) payment to*

Siyenza as a mechanism to recoup the advance payment. To-date about R20 million has been recouped in this manner leaving a balance of R74 million.

The sudden events of the last two weeks, whereby there is now a real possibility of MISA's imminent cancellation of the Siyenza contract, means that the ADM has to now recoup the outstanding R74 million urgently to avoid having to try and collect this substantial amount through the courts, which – even in the event of successful litigation – will be costly and unlikely to result in the full recovery of these monies, given the amount involved.

Hence the decision made to withhold any payment to Siyenza pending the decision of MISA, based on the fact that Siyenza owe the ADM R72 million. This has also meant that suppliers have not been paid as their payment in terms of cession agreements can only be made if monies are due and owing to Siyenza which is clearly not the case.

My concern is that if the contract is cancelled and we have not recovered the full amount advanced or alternatively we are not able to show that the value on the ground (installed toilets and supplies) justifies what has already been paid to Siyenza (about R215 million), we are exposing ourselves to charges of financial mismanagement or maladministration – more so if the ADM continues to pay Siyenza, knowing that the contract is likely to be cancelled.”

5.3.22 The DBSA submitted to my office that financing municipal infrastructure was a core strategic function of the DBSA with special emphasis placed on supporting under-resourced Municipalities who ordinarily would not have access to debt funding necessary to provide accelerated access to basic services.

- 5.3.23 One of the DBSA's products, developed jointly with the National Treasury (NT), was to bridge finance of future conditional grants. This was developed following the provisions of Circular 51 of the MFMA, which has the primary aim to enable Municipalities to bridge finance future provisional grants through loan funding from the DBSA. This product was mainly targeted at under-resourced Municipalities with no, or limited debt absorption capacity.
- 5.3.24 In the ADM, it was submitted, most of the districts are compounded by water scarcity, the wide dispersion of human settlements and typical mountainous terrain. As a result, VIP's had been identified as an optimal solution for the delivery of basic sanitation services.
- 5.3.25 Following engagements with the NT and the DBSA, the ADM formally engaged the DBSA in January 2014 regarding opportunities to accelerate the redressing of infrastructure backlogs through bridge financing future MIG allocations.
- 5.3.26 On 18 March 2014, the DBSA approved a bridge facility of R714 million towards financing eight (8) sanitation projects, one (1) water supply project and one (1) waste water treatment project. The approval was based on the capacity of the ADM to implement the projects, complemented by the technical support which would be provided by DBSA and MISA. In a parallel process, the ADM had to simultaneously seek approval from the NT to pledge its future allocations of conditional grants.
- 5.3.27 In this respect, the ADM submitted a business case to the NT on 26 June 2014 for the pledging of its conditional grant allocations, which was approved by the NT on 29 August 2014 to the aggregate of R631.8 million, solely for the sanitation projects. These projects entailed the construction of 66 700 VIP units. As a result, the DBSA bridge facility was automatically reduced to the same amount, and limited to the same sanitation project.

5.3.28 In essence, it appeared that the ADM obtained a long term loan from the DBSA, secured by a pledge of its future MIG funding.

5.3.29 Regarding implementation of the project and payments made, the DBSA wrote to the MM of the ADM on **24 November 2014**, in which letter it was indicated that: -

*“Twelve (12) weeks (25%) of the construction period have elapsed. The assessment of work done to-date indicates that **less than 5% of the contracted scope of work has been achieved.**” (own emphasis)*

5.3.30 On **26 January 2015**, the DBSA wrote to the MM of the ADM indicating *inter alia*:

“On the strength of the assurance provided by ADM confirming that the programme will recover on the delays during the festive season, the DBSA subsequently disbursed approximately R286 million in December 2014. The purpose of the disbursement was to ensure that the programme has sufficient funds to expedite the acceleration of the works.

However, to date, the DBSA has not received any formal report in respect of the actions agreed upon during the meeting including on matters articulated above. As of 10 December 2014, approximately 2.6% (1 730 units) of work required to complete the programme had been done against a target of approximately 25 000 units. If the delivery up to December is projected forward, it is anticipated that there will be no significant improvement in the progress of work for the period ending January 2015. At the current delivery pace, less than 5% of the work would be completed whereas 50% of the time for the execution of the programme would have lapsed”.

5.3.31 By 18 February 2015, the ADM reported to the Project Steering Committee that it had expended R113 930 144.00 on the project.

5.3.32 Whether the ADM derived value for money from the contract was one of the issues which formed part of the forensic investigation conducted by the NT, and following the outcome of this investigation, the matter was handed over to the Directorate for Priority Crime Investigation (DPCI) for further handling. Therefore, I abstained from further investigating this issue.

Siyenza's response to the Public Protector's Notice in terms of section 7(9) of the Public Protector Act, 1994

5.3.33 Siyenza submitted that it had to do site establishment. This ensured that members of the public and all involved were aware of the location of the sites, which had to be visible and fenced; and material was also purchased to establish the site. The site then became a point of contact and site management, where meetings, appointment of staff, deliveries etc. took place.

5.3.34 It indicated that site establishment cannot be done in a piece meal fashion, it had to be done for the whole area where installation of toilets were to take place and for the lifespan of the project. It was therefore not a correct interpretation of the law to say that the site establishment fees which were paid to Siyenza, had to be reduced.

5.3.35 As per the norm, fifteen (15) percent of the whole project value was paid to Siyenza, and therefore the R94 million was validly paid to Siyenza for site establishment. When Siyenza was appointed, it accepted the work in good faith. Siyenza knew that it was appointed for the full value of R631 million, although its own contract price was R1 360 per unit. Then, after the launch of the project, Siyenza was introduced to the suppliers and the subcontractors. When Siyenza accepted the site establishment, it was for the execution of the full contract value.

5.3.36 In addition, Siyenza indicated that no guarantee was required from it, the subject was only introduced much later in the process, and by then, Siyenza had already offered a 15% deduction on each invoice, as a way of amortising the amount throughout the project. Siyenza did not receive this money as a favour or as free money. Siyenza further submitted that these guarantees would have been required from the subcontractors by the ADM and not from Siyenza, because the subcontractors were so many and were SMME's, but it was assumed that this was not pursued.

5.3.37 Siyenza further indicated that it was unlawful for the ADM to have deducted any sum of money from the invoices submitted to the ADM in lieu of the payment of R94 million for site establishment. Siyenza contended that it was the responsibility of the ADM to have taken over the site and to calculate the actual value on site, inclusive of work in progress, which it alleged was that 33 000 toilets had been completed and 33 700 were at work in progress stages of completion.

Application of the relevant law

5.3.38 Section 1 of the Local Government: Municipal Finance Management Act, 2003, (MFMA) defines fruitless and wasteful expenditure as expenditure that was made in vain and would have been avoided had reasonable care been exercised.

5.3.39 Irregular expenditure is defined as expenditure incurred by a Municipality in contravention of the provisions of the MFMA, which had not been condoned, or expenditure incurred by a Municipality in contravention of a requirement of its Supply Chain Management Policy, or a By-law giving effect to such Policy, and which had not been condoned in terms of such Policy or By-law.

5.3.40 A long term debt is defined as a debt repayable over a period exceeding one year.

5.3.41 Section 32(1)(b) of the Act provides that, without limiting liability in terms of the common law or other legislation, the Accounting Officer is liable for unauthorised expenditure deliberately or negligently incurred by the Accounting Officer.

5.3.42 In addition, subsection (1)(c) provides that any political office bearer or official of the Municipality who deliberately or negligently made or authorised an irregular expenditure is liable for that expenditure.

5.3.43 Section 32(2) of the MFMA obliges a Municipality to recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure. It provides that: -

“(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 committee, certified by the council as irrecoverable and written off by the 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”.

5.3.44 In terms of section 46 of the MFMA, a Municipality may incur long-term debt only for the purpose of capital expenditure on property, plant or equipment to be used for the purpose of achieving the objectives set out in section 152 of the Constitution, or for the purpose of re-financing existing long-term debt. The long-

term debt may be incurred only if the Municipal Council had adopted a Resolution, signed by the Mayor, to that effect; and if the Accounting Officer had signed the agreement or other document which creates or acknowledges the debt.

5.3.45 In addition, the Accounting Officer must, in line with section 21A of the Municipal Systems Act, publish an information statement setting out the particulars of the proposed debt, the purpose for which the debt is to be incurred and the particulars of the security which has to be provided, at least 21 days prior to the sitting of Council; and invite the public, the NT and the relevant Provincial Treasury to submit written comments and / or representations to the Council in connection with the proposed debt.

5.3.46 Section 47 of the MFMA provides that a Municipality may only incur a debt if the debt is denominated in Rand and is not indexed to, or affected by, fluctuations in the value of the Rand against any foreign currency; and if security is to be provided by the Municipality, compliance with section 48(3). In terms of section 48, a Municipality may, by way of a Council Resolution, provide security for any of its debt obligations, by giving a lien on, or pledging, mortgaging, ceding or otherwise hypothecating an asset or right.

5.3.47 Section 48(3) provides that: -

“A council resolution authorising the provision of security [...] –

(a) must determine whether the asset or right with respect to which the security is to be provided, is necessary for providing the minimum level of basic municipal services; and

(b) if so, must indicate the manner in which the availability of the asset or right for the provision of that minimum level of basic municipal services will be protected”.

5.3.48 Section 49 of the MFMA further provides that: -

“(1) Any person involved in the borrowing of money by a municipality must, when interacting with a prospective lender or when preparing documentation for consideration by a prospective investor: –

- (a) disclose all information in that person’s possession or within that person’s knowledge that may be material to the decision of that prospective lender or investor; and*
- (b) take reasonable care to ensure the accuracy of the information disclosed.*

(2) A lender or investor may rely on written representations of the municipality signed by the accounting officer, if the lender or investor did not know and had no reason to believe that those representations were false or misleading”.

5.3.49 In terms of section 62, the Accounting Officer of a Municipality is responsible for managing the financial administration of the Municipality, and must for this purpose, take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented, and take disciplinary action or, when appropriate, institute criminal proceedings against any official of the Municipality who has allegedly committed an act of financial misconduct.

5.3.50 Section 171(1)(c) of the MFMA provides that the Accounting Officer of a Municipality commits an act of financial misconduct if that Accounting Officer deliberately or negligently makes or permits, or instructs another official of the Municipality to make an unauthorised, irregular or fruitless and wasteful expenditure.

5.3.51 According to the JBCC Principle Agreement,¹⁷ specifically paragraph 11 thereof, states that: -

"The contractor shall:

11.1.1 provide to the employer a JBCC guarantee for construction, where applicable (CD) within fifteen (15) working days of acceptance of the contractor's offer and chose.

11.1.2 A JBCC guarantee for construction-(variable)(CD) initially equal to ten percent (10%) of the contract sum and keep such security valid and enforceable until the final payment certificate has been issued by the contractor.

Or

11.1.3 A JBCC Guarantee for Construction-(fixed) set at five percent (5%) of the contract sum (CD) and a payment reduction of 5% of the value of each payment certificate up to a maximum of five percent (5%) of the contract sum (25.3.3). The contractor shall keep such security valid and enforceable until the only or last certificate of practical completion has been issued.

11.1.4 A JBCC Guarantee for Advance Payment where an advance payment is required equal in value to the aggregate amount of all such advance payment is required equal in value to the aggregate amount of all such advance payment (CD). The contractor shall keep such security valid and enforceable until the advance payment is repaid."

Conclusion

¹⁷ Edition 6.1, March 2014.

5.3.52 Based on the information and evidence obtained during the investigation, it can be concluded that the ADM incurred irregular, fruitless and wasteful expenditure as a result of the awarding of the contract.

6. FINDINGS

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

6.1 Regarding whether there were irregularities in the awarding of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM and if so, whether such conduct constitutes improper conduct and maladministration: -

- (aa) The allegation that there were irregularities in the award of tender number 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM, is substantiated;
- (bb) The ADM asserted that, during the evaluation of bids, there was a decision not to award the installation component of the tender because of the big differences in price for the installation component by the bidders. The evidence however suggested that the decision was already made when the Compulsory Briefing Session was held prior to the closing date of the tender. The decision not to award the installation component never went back to the BSC to approve the change in scope and to amend the Terms of Reference;
- (cc) Izwelethu Cemforce attained negative evaluation points during the evaluation phase but was not disqualified during that stage, instead the ADM decided to enter into price negotiations with the entity and ultimately appointed it;
- (dd) The conduct of the ADM in the initial award of the tender for the supply, delivery and installation of VIP top structures was in violation of section 217 of the

- Constitution and the LGMFMA, as it failed to procure the services in accordance with a system which is fair, equitable, transparent, competitive and cost effective;
- (ee) The conduct of the ADM constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;
- (ff) In the matter between **Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza v Amathole District Municipality**,¹⁸ the Eastern Cape Circuit Court, situated in East London, found that the agreement concluded between the ADM and Siyenza on 12 September 2014 entitled **Confirmation of Contractual Terms**, was unconstitutional, invalid and void *ab initio*;
- (gg) The conduct of the ADM in the award of the tender to Siyenza was in violation of section 217 of the Constitution and the LGMFMA, as it failed to procure the services of Siyenza in accordance with a system which is fair, equitable, transparent, competitive and cost effective;
- (hh) The conduct of the ADM constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;
- (ii) The former Municipal Manager (MM) of the ADM, Mr Chris Magwanqana, failed to manage the financial administration of the ADM and execute his fiduciary duties as the Accounting Officer with fidelity, honesty and in the best interests of the ADM, in contravention of the provisions of sections 61 and 62 of the LGMFMA;
- (jj) The conduct of the former MM constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

¹⁸ (EL881/15;ECD1681/15) [2015] ZAECELLC 16; 24 November 2015.

6.2 Regarding whether political influence played a role in the award of the contract and if so, whether such conduct constitutes improper conduct and maladministration: -

- (aa) The allegation that political influence played a role in the award of the contract, is unsubstantiated;
- (bb) No evidence could be found which suggested that the tender was awarded to Siyenza because of political influence from those close to Ms Mantashe; Mr Itholeng or Mr Sambudla. However I cannot ignore that this was one of the biggest infrastructure tenders where utmost care and diligence should have been exercised to fully comply section 217 of the Constitution and Regulation 32 of the Municipal Supply Chain Regulations, especially since it was also subsequently discovered that Siyenza submitted a false Tax Clearance Certificate when it submitted a tender in the Northern Cape. The fact that this tender did not comply with section 217 of the Constitution and Regulation 32 of the MFMA Regulations justifiably raises suspicion that there was an intention to manipulate SCM processes to the benefit of certain individuals who happen to have political links. A question can be raised whether the Municipality would have acted in the same way had beneficiaries been ordinary citizens with the same credentials but without political links.

6.3 Regarding whether the ADM incurred any irregular, fruitless and wasteful expenditure as a result of the awarding of the contract: -

- (aa) The allegation that the ADM incurred any irregular, fruitless and wasteful expenditure as a result of the awarding of the contract, is substantiated;
- (bb) The Resolution adopted by the Council of the ADM on 23 May 2014 approving the frontloading project, was *ultra vires*, as the ADM had at that stage not followed

- due process in terms of section 46 of the LGMFMA, read with section 21A of the Municipal Systems Act;
- (cc) The payments which were made to Siyenza on 26 September 2014 in the amount of R31 587 782.78 and on 01 December 2014 in the amount of R63 184 003.56 were made in the absence of any contractual provision providing for the payment of P&G's; and with no guarantee in place as per the requirements of paragraph 11 of the JBCC;
 - (dd) The ADM thus incurred irregular expenditure in the amount of R94 771 786.34 in terms of the relevant provisions of the LGMFMA;
 - (ee) In addition, the ADM paid a further amount of R9 million to Siyenza during May 2015, despite having received knowledge that the Tax Clearance Certificate submitted by Siyenza to the MISA for the Northern Cape project was suspected to be fraudulent and under investigation;
 - (ff) The ADM incurred irregular expenditure in the amount of R9 million in terms of the relevant provisions of the LGMFMA;
 - (gg) The former MM of the ADM, Mr Chris Magwanqana, committed an act of financial misconduct as envisaged in section 171(1)(c) of the LGMFMA.

7. REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of addressing the improper conduct and maladministration, is the following:

The Municipal Manager of the ADM to ensure that: -

- (aa) Within fifteen (15) working days from the date of this report, submit to the Public Protector an Action Plan outlining how the remedial action in this report will be implemented;

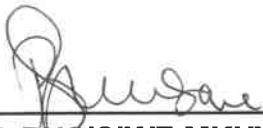
- (bb) Within thirty (30) working days of this report, revise its current SCM Policy to include a framework outlining how future procurement in terms of Regulation 32 of the Municipal Supply Chain Management Regulations must be done. The Policy should take into account the requirements for procurement in terms of Regulation 32 as laid down by the Court in the matter between *Blue Nightingale Trading 397 Ltd t/a Siyenza Group v Amathole District Municipality*;
- (cc) Within thirty (30) working days after adoption of such SCM Policy ensure that Municipal officials of the ADM involved in SCM are properly trained in the provisions of the MFMA and the ADM Supply Chain Management Policy;
- (dd) Within ninety (90) working days of the date of this report, consider taking appropriate disciplinary action against all members of the BAC who were involved in the award of bid 8/2/337/2012-2013 for the supply, delivery and installation of VIP top structures by the ADM, and who were responsible for exposing the Municipality to acts of maladministration and financial risk in violation of the Municipal supply chain management and procurement processes and procedures, in relation to the appointment of the suppliers under bid 8/2/337/2012-2013;
- (ee) Within hundred and twenty (120) working days from date of this report, adopt Terms of Reference for a process in terms of which all service providers appointed under bid 8/2/337/2012-2013 are allowed to submit any outstanding invoices and / or claims to the ADM, where after the ADM will embark on an audit process to determine the validity of any such claims submitted;
- (ff) Within thirty (30) working days after the conclusion of such audit process, effect payment to each service provider in terms of all valid claims;
- (gg) Within hundred and twenty (120) working days from date of this report, ensure that the ADM, through a civil litigation claim and in line with the provisions of section 176(2) of the MFMA, recover any irregular expenditure identified in this

report from Mr Magwangqana in his personal capacity, for the financial misconduct identified in this report. The actual amount recoverable to be determined by the Municipal Council following a thorough verification of the financial losses emanating from the procurement and the misconduct identified in this report; and

- (hh) The matter is referred to the Directorate for Priority Crime Investigation (DPCI) and the Asset Forfeiture Unit (AFU) in terms of section 6(4)(c)(i) and (ii) of the Public Protector Act, 1994, to investigate any commission of an offence in this matter by all the implicated parties including those who are politically connected.

8. MONITORING

- 8.1 I shall monitor the implementation of my remedial action on a monthly basis until such time as it has been complied with in full.
- 8.2 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied within the stated period.



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

DATE: 02/06/2019