

## NELSON MANDELA BAY'S IPTS SYSTEM- ITS HISTORY OF MISMANAGEMENT AND CRIMINALITY.

On 16 October 2019 Ms Malijeng Ngqaleni, Deputy Director-General: Intergovernmental Relations of South Africa's National Treasury, addressed a letter to Ms Nobuntu Mgoshe, the acting City Manager of the Nelson Mandela Bay Municipality(NMBM).

The letter expressed concerns about the persistent non-compliance of the NMBM with the Integrated Public Transport Systems Grant and related governance issues that have ensued. In particular, the quality of the NMBM's reporting around progress on issues that emerged from the Deloitte and Touche's (Deloitte's) report on illegalities in the NMBM's Integrated Public Transport System (IPTS), and the reporting on the ballooning irregular expenditure in the NMBM's financial statements, were felt to be inadequate.

The letter was the third National Treasury had addressed to the NMBM in this regard, and noted that previous replies from the NMBM were inadequate. This letter put the NMBM on terms-the NMBM was given 14 days to prepare itself for the withdrawal and recall of all transfers received by the NMBM since the inception of the IPTS conditional grant application.

Such an eventuality would be dramatic- it would liquidate the NMBM's cash holdings, endangering the NMBM's ability to be a going concern. Further, as much of the large NMBM cash holding of R3,2bil (30 September 2019) is committed to various provisions etc, such an event would see these provisions left without cash backing. The NMBM would be plunged into a liquidity crisis from which it could not be expected to recover.

Further, in late October 2019 the MEC for COGTA in the Eastern Cape Province has stated that he is to put the NMBM into Section 139 dissolution. His reasons include:

- \*The letter from National Treasury and the dramatic consequences that will follow from the stated actions therein;
- \*The fact that the NMBM council has not been meeting;
- \*The lack of cooperation from the NMBM in working with the provincial government to resolve these issues;
- \*The non-explanation of the NMBM to the IPTS issues raised in National Treasury's letter;
- \*The return to executive positions of individuals accused of irregularities in the Deloitte report; and
- \*The executive mayor's promise of R500mil to small, medium and micro enterprises despite a lack of budgetary provision of this amount.

The Chief Whip of council requested the African National Congress's whip on the Budget and Treasury Committee to draft a reply to the questions put by National Treasury, and related issues.

Hence this document.

## 1- THE BACKGROUND IN 17 LINES.

\*The Constitution of the Republic of South Africa in Part B of Schedule 4 places the responsibility on local government to provide “municipal public transport”.

At the time the Constitution was adopted the municipalities that today constitute the Nelson Mandela Bay Municipality (NMBM) had no profile in public transport- this was then, as now, provided by the Algoa Bus Company, a Pty Ltd Company with three private sector directors, and the omnipresent taxi industry.

\*South Africa’s Cabinet approved a Public Transport Strategy and Action Plan in 2007. This envisaged a phased roll-out of public transport systems between 2007 and 2020, funded from the National Treasury through the Department of Transport.

\*NMBM was selected as a municipality to put in place a rapid bus transport system. This was to be test run as a partial service over the 2010 Football World Cup, whereafter the lessons learned were to be incorporated into a fuller system to provide a world-class integrated public transport system on an ongoing basis over the Metro.

\*The NMBM applied for conditional grants made available by South Africa’s national government, and allocations were approved from 2007 onwards. By 2015 over R2 billion had been allocated to the NMBM, an amount that has today grown to nearly R3 billion. These conditional grants have been the principal source of funding for the NMBM’s IPTS system.

## 2- INITIAL CONTROVERSIES.

Controversy dogged the project from the beginning.

\*In the Auditor-General’s (AG) report on the NMBM Financial Statements for the year 2011/12, the AG reported that some IPTS grants were not utilised for the purpose stipulated in the grant framework.

\*Annually thereafter the AG reported contraventions that were both administrative errors, and contraventions of the grant conditions.

\*The NMBM, pushed by these reports and endless press criticism, appointed the former head of the National Prosecuting Authority, Adv Vusi Pikoli, to conduct a forensic audit of the IPTS grant money in 2012.

\*This report was delivered to the NMBM in early 2013. Its conclusions were far-reaching and very critical, and included, inter alia:

- + That payments to the company created to consolidate the taxi industry's interests in the IPTS project were inadequately controlled and led to that company paying excessive directors fees, and incurring many other contraventions of approved financial policy;

- + A music concert, the idea for which came from Ms Nadia Gerwel on the NMBM Treasury and which was to be put together by a friend of Ms Gerwel, never happened despite R4,6mil of IPTS money being spent on it- this was, for Adv Pikoli, plainly fraud;

- + There was a corrupt series of relationships between officials in the NMBM treasury, its IPTS office and a number of companies including two owned by Mr Fareed Fakir, Heerkos and Lumen Technologies, which companies were anyway incapable of effecting the projects entrusted to them.

\*As with all forensic reports, much of Adv Pikoli's work was vigorously contested. The taxi industry company had had years of unqualified audits from PWC which had not flagged the directors fees as questionable, etc.

\*Faced with a high level of denial, the NMBM did two things: firstly it reported the issues around the music concert to the SAPS, and then, in October 2014, instructed the then City Manager, Mr Mpilo Mbambisa, to request National Treasury to provide assistance for a more extensive forensic audit of the IPTS project. National Treasury then mandated its Specialized Audit Services to do this work with the assistance of Deloitte, the international audit and consultancy firm. The allegations against various municipal officials and IPTS service providers were made known to the NMBM after Phase 1 of the Deloitte Report was presented to Mr Mbambisa in February 2015. Phase 2 was presented to the then newly appointed Executive Mayor, Cllr Danny Jordaan, during August 2015. It is to this report that we will now turn.

### 3- THE "DELOITTE FORENSIC".

In short summary, the Deloitte Forensic revealed that the conditional grants funded by National Treasury had been fraudulently used by certain officials of the NMBM along with service providers whose services had often been procured irregularly and illegally.

On arrival the Deloitte Forensic was sent by the City Manager to the firm of attorneys who were handling a variety of legal and disciplinary matters for the NMBM, Messrs Gray Moodliar, with the instruction to brief the City Manager and the then Mayor, Cllr Danny Jordaan, of whatever action they recommended Council to take in the light of the transgressions exposed therein. Gray Moodliar in turn briefed junior counsel (Adv Graham Richards, previously City Manager of NMBM) and senior council to assist and advise in these complex and varied matters.

The core of this Deloitte report is an 11 page executive summary followed by ten chapters, each dedicated to individual companies which, in Deloitte's opinion, have been involved in

one level of transgression or another. We will treat each chapter separately below, including reporting on the remedial actions taken by the NMBM.

### 3-1. Chapter 7: The Paul Fouche Trust.

The Paul Fouche Trust is the trust account of an attorney who represented his client, Moko Construction. The trust was only involved as it was the recipient of monies pursuant to an agreement of settlement of litigation reached between Moko Construction and the NMBM.

Moko had rendered services to the NMBM that was unrelated to the IPTS contract. There was a dispute around payment and Moko approached the courts. A settlement agreement was made an order of court. In terms of the order, the NMBM was required to pay Moko just over R12mil.

When the court order was referred to the relevant treasury official, Ms Gerwel, she allocated this to the IPTS account, and later said that she intended to reverse this at a later date when other accounts had the required funds as, at the time of the arrival of the court order, only the IPTS account had the required balance.

Deloitte noted that she only reversed this when the fraudulent allocation was exposed. They recommended criminal and disciplinary action against Ms Gerwel, and could find no other staff in any way significantly complicit.

Ms Gerwel was both charged through the SAPS, put into a disciplinary procedure and suspended from duty. After dragging the disciplinary charges out, she resigned at the door of the disciplinary chamber and is thus no longer in service. Further she is in court, charged in the matter of the music concert, and these procedures are underway.

### 3-2. Chapter 8: Afrisec Strategic Solutions (Pty) Ltd.

Afrisec Strategic Solutions (Pty) Ltd is a long standing supplier to the NMBM of an enterprise facilities management system (ie CCTV cameras and what goes with that). At the time of their work with the IPTS, they operated under a letter of appointment that stipulated that the letter required to be underpinned by a formal contract. This the NMBM never drafted nor supplied same to Afrisec for signature. Orders were nevertheless placed with Afrisec, product delivered, receipt ratified by the NMBM, and payment made to Afrisec over a period of nearly 3 years in terms of the letter of appointment.

Then, (and this has not yet been ratified in the courts), Afrisec claim that they were approached by the NMBM and told that the NMBM had grant money that they needed to urgently spend or return- an order was placed for nearly R90mil of goods. Afrisec claimed to have bought in the goods in good faith. They were requested to store them until the NMBM needed them, which Afrisec claims they did.

Their invoice was certified by the NMBM as having been received and as such presented by the receipting official to treasury for payment. Mr Trevor Harper had only been CFO for a few months when he received an email from a treasury colleague advising him not to certify payment as the amount claimed greatly exceeded the cap on the Afrisec contract. He requested the advice of both the NMBM's internal audit department and its legal

department. Internal audit did not reply, and the legal officer responsible, Ms Mgogoshe, advised payment. This Harper then did.

Deloitte notes that the official who was the custodian of the Afrisec contract (Mr Keble) did not apply due care and diligence in supervising the contract. They made similar findings against Mr Madatt, his successor (Mr Keble left the NMBM in 2013). Further they recommend that an enquiry be registered with the SAPS to access bank accounts of Mr Keble and Afrisec. They recommended nothing further.

The NMBM instituted a High Court action under case number 3712/16 against the following defendants: Afrisec, Adv Tshamase, Messrs Harper, Keble, Madatt, Nkanjeni and Ndozana, and Ms Mgogoshe.

Senior Counsel advised that the NMBM had good prospects of success on the basis of unjustified enrichment of the first defendant. This is based on the belief that payments were made unlawfully to the first defendant in circumstances where no agreement under contract enquiry SCM 142/S was ever concluded between the NMBM and Afrisec, alternatively, the work done and goods allegedly supplied as described in the Afrisec's invoices did not fall within the scope of contract SCM 142/S.

Senior Counsel advised that a value for money audit be performed to assist in determining quantum. Africoast Engineers are undertaking this.

Afrisec have lodged a counter claim contending that the NMBM received value for the payments made.

The amount of damages claimed by the NMBM is about R92mil.

The claim against the abovementioned individuals arises from their alleged failure, as employees of the NMBM, to perform their functions with due care.

Adv Tshamase and Messrs Harper, Keble and Ndozana no longer work with the NMBM (Mr Ndozana was dismissed). Mr Nkanjeni was suspended but this was overturned in a disciplinary process. He is now on trial for an unrelated matter.

Ms Mgogoshe was brought to a disciplinary process. She was charged with providing the Chief Finance Officer, Mr Harper, with advice to pay Afrisec. This was, the charges read, grossly negligent amongst other descriptions.

On 4 December 2017 the chairperson found her guilty and dismissed her.

She appealed to the SA Local Government Bargaining Council, as was her right. On 11 June 2018 the commissioner overturned the dismissal and returned her to her position., with backpay of R342000.

She has returned to work at the NMBM.

### 3-3. Chapter 9: Access Facilities and Leisure Management (Pty) Ltd.

Deloitte uncovered 7 payments from the NMBM to Access Management, the company appointed by the NMBM to run the 2010 Football Stadium that were fraudulent: invoice amounts of R5,2mil, R0,3mil, R0,4mil, and R3,0mil (round figures- exact amounts are on page 70 of Deloitte's report) were paid for "miscellaneous recoveries", which was explained by NMBM treasury official authorising the payment, Ms Nadia Gerwel, as repairs to the stadium for water damage caused by the IPTS roadworks outside. In fact the money was paid to Zeranza 299 (Pty) Ltd, a company appointed by Ms Gerwel to run the music concert that never happened. The invoices were solicited from Access by Ms Gerwel.

The final invoice for R3,0mil was paid to Access for on payment to EP Rugby for a debt unrelated to the IPTS.

Two further smaller invoices, totalling R 0,1mil, were also solicited from Access by Ms Gerwel, for “capital recovery”, which is unexplained.

In total here, Access fraudulently invoiced the NMBM about R11mil, and the NMBM incorrectly charged these amounts to the IPTS account.

In this regard, the NMBM has brought an action in the High Court under case number 4085/16 against Access and its staff Mr MA Oberholzer and Ms C du Pisani; NMBM treasury official Ms Gerwel; and Zeranza 299 and its director Ms Wessels.

Senior Counsel has advised that the NMBM has reasonable prospects of success against the defendants on the grounds of fraud or negligent misrepresentation, and/or breach of contract.

The NMBM has compounded the IPTS claim with other issues and is claiming R220mil in damages.

Access is no longer running the stadium for the NMBM, and Ms Gerwel has resigned and is in court on this matter.

#### 3-4. Chapter 10: Heerkos Projects cc t/a INTPS.

Heerkos, a close corporation whose two members are the Koh-I-Noor Trust and Mr Fareed Fakir, tendered an invoice to the NMBM for almost R10mil for an eTendering contract system on 14 April 2014. The payment was approved by the IPTS accountant Mr Mzukisi Skade, who verified that the goods/services had been supplied. The invoice was paid and allocated to the IPTS budget on the authority of an Adjudication Committee meeting of 25 November 2010 which imposed a cap of R3,9mil and a delivery period of 36 months on the project.

Deloitte could find no Supply Chain documentation confirming Heerkos’s appointment, nor could they find any evidence that the eTendering system existed.

Deloitte concludes that the appointment of Heerkos was irregular, that the certification of the goods received was fraudulent as was the authority for the expenditure.

They conclude that as Adv Tshamase and Mr Skade no longer work for the NMBM discipline is not possible, but that cases of fraud should be opened against Tshamase, Skade and Fakir.

The NMBM is proceeding against Heerkos Fakir and Tshamase in the High Court for R9mil claiming that it did not receive value, whereafter the criminal charges will be lodged.

#### 3-5. Chapter 11: Le Roux Incorporated.

Le Roux Incorporated, a firm of attorneys, was appointed to provide services to the IPTS project with the approval of a deviation by the then City Manager on 18 September 2013. They in turn were required to appoint a number of sub-consultants to also provided services to the project. Deloitte believe this system of appointing sub-consultants was to avoid supply chain regulations.

While Le Roux is a firm of attorneys the services that they provided were mostly to assemble invoices from these sub-consultants, add a 10% handling fee, and submit these invoices for payment. They did not assess that work was done in terms of the invoices.

In this manner Jarami Projects cc (owned by Mr Fareed Fakir) was paid R13,6mil; Fredericks Incorporated Attorneys about R0,65mil; Rich Reward Associates R1,9mil. On these invoices Le Roux was paid about R1,6mil in handling fees. While the NMBM paid these amounts over to Le Roux, Deloitte was not given documentation from Le Roux to certify on-payment to the other sub-consultants.

As such this part of the project could be riddled with fraud. Certainly Deloitte believes that the 10% handling fee was not merited and could qualify as fraud.

Further, Mr Le Roux never declared that he and Adv Tshmashe were both trustees of the Mawela Trust- a clear conflict of interest.

The NMBM has approached the High Court in an action against Messrs David and Abraham Le Roux and Le Roux Inc to recover about R40mil from Le Roux and other of these sub-contractors. Included in this claim is an amount of R20 mil from Adv Tshamase and R1,8mil from Mr Mbambisa for fruitless and wasteful expenditure, breach of duty and other related issues.

### 3-6. Chapter 12: Distinctive Trading cc.

Distinctive was appointed to perform project management services to the IPTS project for a period of 12 months in September 2011. Nevertheless their services were employed and paid for for a considerable period thereafter. As R35mil was paid to Distinctive thereafter, Deloitte notes that this will constitute irregular expenditure. This is the most significant of the findings against Distinctive, and no criminal or civil charges are recommended in the forensic report.

Distinctive has issued summons against the NMBM for R27,7mil for alleged non-payment relating to the creation of a mobile application for the IPTS. The NMBM is defending the action on senior counsel's advice. The NMBM excepted to this summons, the applicant filed fresh particulars of claim which again the NMBM has excepted to. The matter now needs to be set down in court.

### 3-7. Chapter 13: Erastyle (Pty) Ltd trading as Stratcomm.

Erastyle, another company owned by Mr Fareed Fakir, was controversially appointed in February 2014 as lead consultant for communications and marketing strategy for the IPTS. The appointment was made by deviation as Distinctive was already appointed to do this work and, Adv Tshamase advised the acting City Manager Dr Chabula-Nxiweni at the time, to go to a tender for work already awarded to Distinctive could cause Distinctive to approach the courts- hence the deviation was necessary.

Ms de Scande in the NMBM treasury advised against this, and advised to call for a tender instead. This was agreed by the then City Manager, Mr Mbambisa. When he was away Adv Tshamase convinced the acting City Manager to appoint Erastyle by deviation. This was done in MMR 2191.

Deloitte believes that this appointment was thereby irregular, and the R5,3mil paid to Erastyle on the contract was thus also irregular. As Dr Chabula-Nxiweni has left the employ of the NMBM, disciplinary procedures are impossible.

The NMBM is suing Erastyle for R8mil, and the case is still to appear. Other defendants in this issue are Dr Chabula-Nxiweni and Messrs Mbambisa, Tshamase, Harper, Clay, Williams and Shaidi. None are still in the employ of the NMBM.

### 3-8. Chapter 14: Nadeson Consulting Services (Pty) Ltd.

Nadeson were appointed by a resolution of the then-acting City Manager on 18 September. They were variously described as “programme managers” and “project facilitators”.

As with Le Roux Inc, they were requested by Adv Tshamashe to appoint various sub-contractors, of which 4 were appointed.

Deloitte believes that this appointment was irregular, and with that, all payments (R11,3mil was paid to Nadeson) were also irregular.

They recommend only a value-for-money audit be performed on work allegedly carried out. Senior Counsel advised against pursuing a claim here.

### 3-9. Chapter 15: Axios Consulting (Pty) Ltd.

Axios was employed to perform negotiation and facilitation services between the NMBM and the taxi industry. They were originally appointed as a sub-contractor to BKS Engineers legally, and subsequently were also appointed by PD Naidoo Associates, also engineers, which appointment was, Deloitte believes, irregular.

Axios was paid R23,8mil for their services. The lawyers appointed by the NMBM to examine this contract believe that a claim would be difficult to sustain as the municipality had received value.

### 3-10. Chapter 16: Aurecon (previously Africon International).

Aurecon was appointed to provide professional services to the NMBM with regard the physical construction of the IPTS infrastructure and to run the operation of the Transport Operations Centre. They were paid R61,4mil over 5 years in this regard. R10mil of this was paid after the end of their appointment period and was thereby, Deloitte believes, irregular. The lawyers appointed by the NMBM to inspect this issue do not believe that a civil claim would be successful as value was plainly received. Further, as NMBM records were sparse, claiming irregular expenditure from the 4 officials involved (3 of whom have left the NMBM) would not be successful either.

### 3-11 CONCLUSIONS.

The above notes set out in summary the findings of the “Deloitte Forensic”. Thereafter is noted the remedial actions proposed by the legal team appointed by the NMBM to handle this work. This legal team, as has been noted, was coordinated by Gray Moodliar, a respected firm of attorneys who have 20 years of experience working for the NMBM. They were assisted by junior and senior counsel of their choice. The response from the legal team



was to first enrol the civil matters and let the courts decide thereon, and thereafter to set down the criminal matters when the cases would be greatly strengthened by the civil decisions. This advice has been followed.

We believe that this response, as outlined in the 10 sections of these notes, provides an exemplary and comprehensive response to the recommendations of Deloitte. And, as many of these matters are far advanced in their court dates, we feel confident that the interests of the NMBM would be well served by the remedial action underway.

However there have been developments over the last year that are the cause of the greatest concern. It is to these disquieting issues that we will now turn.

#### 4- THE EVENTS OF 2019.

##### 4-1: THE ATTEMPTS TO REMOVE THE NMBM'S MATTERS FROM GRAY MOODLIAR.

(All facts hereunder -unless noted otherwise- are drawn from the judgment of the High Court of South Africa, Eastern Cape Division, Grahamstown, by Acting Justice Margot Beard, as delivered on 18 June 2019).

The matter was between Gray Moodliar Inc (Applicant) and the NMBM and also the Speaker of this Council( First and Second Respondents) .

\*At the NMBM Council Meeting of 28 February 2019 the executive mayor of the municipality introduced a motion that resulted in the following resolution being adopted:

“That all cases being considered by (the applicant) be withdrawn from (the applicant) and that such cases be considered by the Legal Division in order to determine the way forward on (sic) each case”.

\*At the council meeting of 9 April, this resolution was amended to read:

“That all current cases, be it disciplinary and/or any other cases, and be it on 90% or 99% completion, must be withdrawn from the applicant with immediate effect”.

\*On 24 April the NMBM's chief operating officer wrote to the applicant requesting that it hand over the files in its possession by 26 April 2019. (The applicant then requested that its bills be paid in full before it was willing to comply. On 14 October the then acting city manager demanded these files immediately or risk the termination of Gray Moodliar's service level agreement –additional information not from Acting Justice Beard's judgment).

\*Acting Justice Beard notes that this was a decision taken against a law firm that had represented the NMBM's interests in matters spanning two decades, and that their services were rendered in terms of a service level agreement that was valid until June 2021.

\*The judgment begins by considering some items not relevant to this note, except to record that Acting Justice Beard dismissed the respondents' argument that this was a contractual matter between Gray Moodliar and the NMBM, and held that instead it is correctly the exercise of a public power, which must always be subject to constitutional control and the rule of law. As such the decisions of council must be rational, and based on undisputed fact and not unsubstantiated allegations.

\*She found that council's reasons for adopting the resolution were three fold, and all stemmed from information provided to council by the executive mayor:

Firstly that Gray Moodliar is a white firm;

secondly that Gray Moodliar had significantly overcharged the NMBM;

and thirdly that Gray Moodliar was in possession of files that the NMBM needed to finalize certain matters and to review others, and as such should provide these files to the NMBM.

\*Acting Justice Beard rejected all three of these arguments:

Firstly the acting judge held that Gray Moodliar is not a white firm- this was conceded by the respondents in the court papers;

secondly the acting judge found that there was no proof that Gray Moodliar had overreached in charging the NMBM;

and thirdly the acting justice held that, should the NMBM require the files for the reasons stated, they could simply have asked for copies.

\*The first argument could have been, and should have been, easily checked by the executive mayor before such damaging claims were made;

\*The second allegation appears to have been deliberately dishonest- the executive mayor made three different claims here – that Gray Moodliar had billed the NMBM R100mil, firstly in 1 year, secondly in 3 years and thirdly in 5 years. Further he claimed to have a report to establish this- when the amounts were categorically denied by Gray Moodliar in their court submissions under oath, the executive mayor did not provide this report.

\*The third statement, as we have noted, could have been easily satisfied by requesting copies.

\*Acting Justice Beard quotes Cloete JA: "a material mistake of fact should be the basis upon which a court can review an administrative decision". Which she then does: "I am of the view that the decision (by council to remove Gray Moodliar's mandates) was irrational and must therefore be set aside. Costs must follow the result".

\*Despite repeated demands from Gray Moodliar that it comply with this judgment, the NMBM appears initially not to have done so- after the judgment, the chief operating officer instructed the Legal Services directorate to distribute the matters entrusted to Gray Moodliar to other firms of attorneys. Gray Moodliar then successfully applied to the High Court for an enforcement order, and slowly this contempt eased. But, as we have noted, the NMBM remained determined to remove all

the files from Gray Moodliar, particularly the files relating to Erastyle (Pty) Ltd, Heerkos (Pty) Ltd, Le Roux Inc, Afrisec, Distinctive Services and Access Management.

In mid October, as noted earlier in this report, the NMBM continued to demand the delivery of the original files on the threat of the closing off of Gray Moodliar's service level agreement, and the then acting city manager, Mr M Mapu, instructed Gray Moodliar to hold all the matters in abeyance and to postpone any matters that have already been enrolled for hearing. Further, Mr Mapu instructed Gray Moodliar to tender costs for any possible postponement, creating the inevitability of fruitless and wasteful expenditure.

#### 4-2 IRREGULAR INTERVENTIONS IN THE DISCIPLINARY PROCESS OF Ms MGOGOSHE.

We have noted in section 3-2 of this report that in the Afrisec matter the NMBM charged Ms Mgogoshe( nee Mpongwana) who was thereafter dismissed. Ms Mgogoshe then approached the SA Local Government Bargaining Council in the matter, and was reinstated with backpay.

Unsatisfied in this matter, City Manager Mettler elected to institute review proceedings to the Labour Court, and to this end, commenced the process of lodging a security bond through ABSA bank.

The Executive Mayor then intervened with ABSA, claiming to the bank that there was no council decision to approach ABSA to issue the bond.

Mettler then laid criminal charges against the executive mayor for interfering in the administration of the NMBM under section 119 of the Municipal Systems Act, and for fraudulently representing that there was no council decision when in fact he had been at the meeting that passed the item in that regard.

Ms Mgogoshe has, as noted, returned to service at the NMBM, and has been appointed to the position of acting city manager without a council decision in this regard. Charges against her and the others mentioned in section 3-2 are still underway.

#### 4-3- ACTIONS REPORTED IN SECTION 3 OF THIS REPORT HAVE NOW BEEN PUT INTO ABEYANCE.

As mentioned earlier, on 9 October 2019 Mr M Mapu was appointed as acting city manager without council considering the matter. He immediately took the decision to hold in abeyance the following High Court civil matters instituted by the NMBM, or to postpone them if already enrolled for trial:

Erastyle (Pty) Ltd;

Heerkos (Pty) Ltd;

Le Roux and others;

Afrisec Strategic Solutions;

Distinctive Trading (Pty) Ltd; and

Access Management.

Despite being reinstated to this work by the High Court, Gray Moodliar is not receiving any instructions to proceed with these matters, and presumably costs are accumulating which will all be fruitless and wasteful expenditure.

#### 5- THE THREE COMMUNICATIONS FROM NATIONAL TREASURY AND THE REPLIES OF THE NMBM.

Ms Malijeng Ngqaleni, the Deputy Director General: Intergovernmental Relations of National Treasury has addressed three recent letters to the NMBM with regard the matters in the report above.

\*In June 2019 the letter recorded concern “with regard to the implementation of the recommendations of the forensic investigation against those people who have been found guilty of criminal conduct”.

Drawing from repeated mentions of irregularities by the Auditor-General that “point towards contraventions of the conditions outlined in the IPTS conditional grant framework”, and “as a result of the failure on the part of the municipality to implement the recommendations from the forensic investigation (i.e. re-appointing those individuals formally found guilty)”, the letter gives notice of Treasury’s intention “to withdraw and recall all transfers received by the city since the inception of the IPTS conditional grant allocation” , “if no satisfactory actions are taken to address the non-compliance”.

The NMBM replied to this letter under the hand of Mrs N Nqwazi, Acting City Manager .

Mrs Nqwazi requested further particulars with regard to offences committed, individuals implicated and management failures by the NMBM in this regard. National Treasury was referred to the NMBM’s December report, and stated that “most, if not all” of the NMBM’s employees “implicated in wrongdoing” are “no longer in the employ of the municipality”. Mrs Nqwazi then requests the “withdrawal of Treasury’s notice of intention to withdraw ....transfers received by the municipality” as “such notice is premature, irregular and unwarranted”.

\*National Treasury’s response to this is short and to the point- don’t ask us to provide you again with information that is clearly on the NMBM’s records. Confirm your own records, and then this correspondence can go further.

This time the NMBM’s response came from another acting city manager, now Mr Anele Qaba.

His reply of 1 October was more informed, but equally lacking in necessary detail. He notes that all staff implicated have been handed over to the SAPS; that all staff disciplinary issues have been

finalized and that only one staff member has been returned to duty, Ms Mgogoshe, who was reinstated by the SA Local Government Bargaining Council; and that civil proceedings are underway against Access Management, Afrisec, Erastyle and Distinctive Management. Further he notes that, while his attempts have thus far been unsuccessful, he is intent on meeting with the relevant SAPS officials for a fuller update.

\*National Treasury's Ms Malijeng Ngqaleni responded to this letter on 16 October 2019. (It is of note that her three letters have had to be addressed to three different acting city managers, which probably goes some way to explain the NMBM's threadbare replies to her correspondence).

Ms Ngqaleni again notes that Treasury has not had adequate updates "on the processes to recover any UIFW, by following through on the recommendations of the Forensic Investigation Report" which was commissioned "in the spirit of supporting the municipality in its commitments to ensure closure on matters relating to the investigation". Further, the NMBM letter of 27 June "indicates that at the highest level of the institution, there is limited understanding of the contents of the AG's reports". Further this letter revealed "deep institutional fault lines in the highest level of the institution".

She notes further that "the letter dated 1 October 2019 from the municipality would have taken the opportunity to provide a full briefing on appropriate actions being taken by the institution to deal with the issues at hand". However, "the response did not provide sufficient evidence that the municipality is dealing resolutely with issues that have compromised the integrity of the municipality". She concludes "To this end, the National Treasury is left with no option except to give notice of its intention to withdraw and recall all transfers received by the municipality since the inception of the IPTS grant allocation". The NMBM is given 14 days to prepare for this process.

#### 6-RECOMMENDED ACTIONS TO BE TAKEN BY THE NMBM TO RESOLVE THE ABOVE-OUTLINED ISSUES.

It is recommended that the NMBM pass a resolution of council to do the following remedial actions if this will resolve the tensions that have built up in the NMBM's relations with National Treasury and the Provincial Government of the Eastern Cape.

- 1- As the incumbent Executive Mayor has misled council and caused it to take an illegal decision that has had dramatic consequences, that a motion of council be put to remove him from office and replace him with an executive mayor that enjoys the confidence of council.
- 2- That the office of the City Manager be filled with a permanent member of staff as a matter of urgency, by one of the following routes:
  - \*That the Provincial or National Government be requested to second a suitable person until the disciplinary processes with Mr Mettler are concluded;
  - \*That negotiations with Mr Mettler be undertaken to settle a withdrawal package; or
  - \*That Mr Mettler be reinstated until his disciplinary processes are concluded.
- 3-That the positions of the Chief Finance Officer and the other Executive Directors be filled with urgency.

4-That council pass a resolution to reinstate Gray Moodliar to all of the cases that they have been handling for council.

5-That council appoint a Commission consisting of, at least, a Senior Counsel and a Chartered Accountant, both with municipal experience, to:

- \*determine, given the events outlined in section 4 hereof, if there are any NMBM staff or councillors that should be disciplined;

- \*determine if there are any NMBM staff or councillors who should be reported to the SAPS re criminal behaviour;

- \*determine whether any Fruitless and Wasteful expenditure has been caused by any of the events in section 4, and if so, from whom it should be recovered.

6-That National Treasury be approached and requested to consider withdrawing its provisions of their letter of 16 October in the light of the above proposed package of measures.

7-That the Provincial Government of the Eastern Cape likewise be approached to requested to withdraw the section 139 intervention in the light of this package of remedial actions.