

**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 NUMBER: 10 OF 2024/2025**

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**INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT BY THE  
FUNCTIONARIES OF THE GAUTENG DEPARTMENT OF INFRASTRUCTURE  
DEVELOPMENT AND THE GAUTENG DEPARTMENT OF EDUCATION IN  
CONNECTION WITH THE CONSTRUCTION OF MAYIBUYE PRIMARY SCHOOL**

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## LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS AND ABBREVIATIONS	DESCRIPTIONS
AO	Accounting Officer
BAC	Bid Adjudication Committee
BEC	Bid Evaluation Committee
BoQ	Bill of Quantities
CA	Chief Architect
CA	Competent Authority
CE	Compensation Event
CoJ	City of Johannesburg Metropolitan Municipality
CPAC	Contract Price Adjustment Provisions
CPM	Construction Project Manager
DDG	Deputy Director General
DFFE	Department of Forestry, Fisheries, and the Environment
DWS	Department of Water and Sanitation
EAP	Environmental Assessment Practitioner
ECDC	Early Childhood Development Centre
ECE	Environmental Control Engineering
ECSA	Engineering Council of South Africa
EIA	Environmental Impact Assessment
GDARDE	Gauteng Department of Agriculture, Rural Development and Environment
GDE	Gauteng Department of Education
GDID	Gauteng Department of Infrastructure Development
GDRT	Gauteng Department of Roads and Transport
GIS	Geographical Information System
GPT	Gauteng Provincial Treasury
HVAC	Heating, ventilation, and air conditioning

ICT	Information Communications Technology
IDMS	Infrastructure Delivery Management System
INVESTIGATION TEAM	Investigation Team of the Public Protector
IPM	Internal Project Manager
ISO	International Organisation for Standardisation
JRA	Johannesburg Roads Agency
JW	Johannesburg Water
NEMA	National Environmental Management Act, 1998
NHRBC	National Home Builders Registration Council
NWA	National Water Act, 1998
OHS	Occupational Health and Safety, 1993
PEP	Project Execution Plan
PFMA	Public Finance Management Act, 1999
PPA	Public Protector Act, 1994
PRM	Project Readiness Matrix
PTO	Permission to Occupy (the land)
PVC	Polyvinyl Chloride
QS	Quantity Surveyor
RFP	Request for Proposals
RFS	Request for Service
SABS	South African Bureau of Standards
SAHRC	South African Human Rights Commission
SARTSM	South African Road Traffic Signs Manual
SLA	Service Level Agreement
TIS	Traffic Impact Study
WULA	Water Use License Authorisation

## EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations that the functionaries of the Gauteng Department of Infrastructure Development (GDID) and the Gauteng Department of Education (GDE) improperly constructed Mayibuye Primary School on an old sewer line; without conducting a wetland study; and spent over eighty-two million rand (R82 000 000) on an incomplete project.
- (iii) The investigation originates from a complaint lodged by Mr Mmusi Maimane (the Complainant), on 16 September 2020.
- (iv) In the main, the Complainant alleged that:
  - (a) The GDID constructed a new school, called Mayibuye Primary School in Rabie Ridge/Midrاند on an old sewer line, and without conducting a wetland study;
  - (b) The GDID spent R82 000 000 on the construction of the school equipped to cater for one thousand two hundred (1200) primary school learners/children, however, the school has at the time of the lodgement of the complaint not been utilised as it cannot obtain an occupancy certificate due to the dangerous terrain on which it was built;

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- (c) Mayibuye Primary School is “*flowing with raw sewerage*” (*sic*);
- (d) The infrastructure is crumbling, and the school is a hazardous zone that cannot safely accommodate children. Learners are forced to attend school in prefabricated containers and wendy houses a few hundred meters down the road; and
- (e) Mayibuye Primary School’s building plans were approved, and the school was built. However, it was only after the school had been constructed, that a wetland investigation was conducted by the GDID, which discovered an old sewer line that had been leaking for years.
- (v) Based on the analysis of the complaint, the following issues were considered and investigated:
- (a) Whether the functionaries of the Gauteng Department of Infrastructure Development and the Gauteng Department of Education failed to comply with applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act,1994; and
- (b) Whether the functionaries of the Gauteng Department of Infrastructure Development improperly constructed Mayibuye Primary School prior to conducting a wetland study thus resulting in undue delays in completing the project, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act,1994.

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- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law, and related prescripts.
- (vii) Notices in terms of section 7(9)(a) of the Public Protector Act (the Notice/s) were issued to all the following implicated and/or affected parties to provide them with an opportunity to respond to the proposed provisional findings and remedial action from 07 May 2024 to 12 June 2024:
- (a) The Complainant;
  - (b) Premier of Gauteng, Mr Panyaza Lesufi (the Gauteng Premier);
  - (c) Member of Executive Council (MEC) for Human Settlements and Infrastructure Development, Mr Lebogang Maile;
  - (d) MEC for Education, Mr Matome Chiloane;
  - (e) MEC for Finance, Mr Jacob Mamabolo;
  - (f) Ms Masabata Mutlaneng (Ms Mutlaneng), the Head of Department (HoD) for GDID;
  - (g) Mr Rufus Mmutlana (Mr Mmutlana), HoD for GDE;
  - (h) Ms Ncumisa Mnyani (Ms Mnyani), the HoD of Gauteng Provincial Treasury (GPT);
  - (i) Mr Dumisani Cebekhulu (Mr Cebekhulu), Business Unit Leader: Gauteng for the office of the Auditor General South Africa (AGSA);
  - (j) Mr Mashiane Samuel Dipela (Mr Dipela), former Internal Project Manager at GDID;
  - (k) Mr Ronald Sithole (Mr Sithole), former Internal Project Manager at GDID;
  - (l) Mr Mmakwena Selepe (Mr Selepe), Deputy Director General (DDG) Education and Stars at GDID;
  - (m) Mr Khululekile Mase (Mr Mase), acting HoD of Gauteng Department of Agriculture, Rural Development and Environment (GDARDE); and

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- (n) Dr Sean Phillips (Dr Phillips), Director General (DG) of the Department of Water and Sanitation (DWS)
- (viii) Written responses to the Notices were received between 17 May and 24 June 2024 from Mr Dipela, Mr Sithole, Mr Selepe, Mr Mukwevho, Ms Mnyani, Ms Mutlaneng, Dr Phillips, Auditor General Ms Tsakani Maluleke (Ms Maluleke), Mr Mmutlana, Mr Mase, and the Office of the Premier.
- (ix) The responses and information/evidence submitted by the respondents were duly considered by the Public Protector.
- (x) Having regard to the evidence and regulatory framework determining the standard that should have been complied with by GDID and GDE, the Public Protector makes the following findings:
- (a) **Whether the functionaries of the Gauteng Department of Infrastructure Development and the Gauteng Department of Education did not comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act, 1994**
- (aa) The allegation that the functionaries of GDID and GDE did not comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School, **is substantiated.**
- (bb) The investigation by the Public Protector revealed various forms of maladministration, undue delays, and irregularities, which occurred during the construction of Mayibuye Primary School such as the following:



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- (i) The Contractor namely, Basic Blue/Nebavest was appointed by GDID on 22 August 2015, but the PTO for the site was obtained from the landowner, City of Johannesburg Metropolitan Municipality (CoJ) on 22 September 2016, which was 13 months after the award of the contract or tender;
  - (ii) The GDE amended the scope of the contract four days after the contractor was appointed to include amongst other things, smart school requirements. These required additional funding from GPT and resulted in increased costs and further delays to get approvals from the relevant GPT;
  - (iii) The handing over of the site to the Contractor was also unduly delayed as it only happened on 12 May 2017. As a direct result of the delays, the GDID and GDE incurred Compensation Events (CEs) to the value of ten million and sixty-one thousand rand five hundred nineteen rand and seventy-three cents (R10 060 519, 73) towards the Contractor for “*standing time*”;
  - (iv) Poor project management by the GDE and GDID resulted in their inability to identify shortcomings that existed on the site such as the revision of the scope of the project by GDE to incorporate smart school’s requirements, the diversion of sewer lines and the encroaching properties on site;
  - (v) GDE and GDID failed to ensure that undue delays experienced in this project are prevented or avoided through proper planning, project management by coordinating their actions through coherent governance, consultation with one another and cooperation as contemplated in section 41(1) of the Constitution;
  - (vi) All the delays detailed above could have been avoided if both the functionaries of GDID and GDE collaborated and cooperated effectively to satisfy themselves about the permission to occupy site and the availability land to build the school prior to awarding the tender to the Contractor. As a result of the apparent lack of collaboration and coordinated project

management by these two departments, undue delays ensued and both GDID and GDE incurred cost overruns and expenditure prohibited in terms sections 38(1)(c)(ii) and (iii) of the PFMA and 45(c) of the PFMA;

- (vii) The GDID's own internal investigation, the AGSA's and GPT's findings confirmed that there was irregular expenditure in the project caused by amongst other things poor contract management and planning by GDID's officials. This irregular expenditure flagged by GDID's own internal investigation, AGSA and GPT is also in direct violation of sections 38(1)(ii) and 45(c) of the PFMA;
- (viii) Consequent to the scope changes, GDID applied *ex post facto* to GPT for approval of CEs, of which some were already partially implemented at the school by the Contractor. GDID's application for approval of CEs that exceeded 20% threshold and lacked sufficient information to substantiate for exceptional circumstances, which GPT rejected, thus contributing to more delays and stoppages on the project;
- (ix) The variations exceeded 20% of the original contract, which is prohibited by Clause 9.1 of the National Treasury Instruction Supply Chain Management (SCM) Note 3 of 2016/17;
- (x) The CEs or costs incurred by GDID and GDE towards the Contractor for "*standing or idling time*" are all irreconcilable with the prohibited expenditure in terms section 38(1)(c)(ii) and (iii) of Public Finance Management Act, 1999 (PFMA) and section 45(c) of the PFMA as well as in direct contravention of the efficient, economic, and effective use of resources envisaged in section 38(1)(b) of PFMA, section 45(b) of PFMA and section 195(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution);
- (xi) By their own admission, the functionaries of the GDID made a number of requests for variation, which were above the 20% threshold. Upon realising

that this would not be approved, the functionaries deliberately limited the variations to 19.9%. This was done to avoid having to request approval from the GPT. Such conduct cannot be said to represent the ethical standards required of persons within the public administration;

- (xii) As a result, GPT raised the suspicion and concluded that the split of the CEs was made by GDID intentionally to bypass obtaining prior approval from GPT for the full amount. It follows therefore that the conduct of splitting the CEs by both GDE and GDID is irreconcilable with the sound principles of cooperative governance and high standard of professional ethics required for effective project management and financial prudence; and
- (xiii) Aggregated against the prescripts that regulate the standard that should have been met by the GDID and GDE during the construction of Mayibuye Primary School, the conduct of the functionaries of these two departments is at variance with the obligations imposed by section 41(1) of the Constitution, section 195(1) of the Constitution, section 38 and section 45 of the PFMA, Paragraph 9.1 and 9.2 of the National Treasury Instruction SCM Note 3 of 2016/2017.
- (cc) Having examined all the available evidence and information, it follows that the conduct of the functionaries of the GDID and GDE did not comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School at Commercia Rabie Ridge/Midrand.
- (dd) Therefore, the Public Protector finds that such conduct by the functionaries of the GDID and GDE constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, maladministration, and undue delay in terms of section 6(4)(a)(i) and (ii) of the Public Protector Act.
- (b) **Whether the functionaries of the Gauteng Department of Infrastructure Development improperly constructed Mayibuye Primary School prior**

**to conducting a wetland study thus resulting in undue delays in completing the project, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act**

- (aa) The allegation that the functionaries of the Gauteng Department of Infrastructure Development improperly constructed Mayibuye Primary School at Commercia Rabie Ridge/Midrand prior to conducting a wetland study, thus resulting in overspending, costs overruns and undue delays in completing the project, **is substantiated.**
- (bb) The south-eastern edge of Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand, where the School's Hall and the Tennis Courts are constructed, is underlain by presence of a wetland conditions and signs, which superimpose from the adjacent Erf 2328.
- (cc) Dr Gouws of Index (Pty) Ltd was commissioned for the wetland study after construction had already commenced on site.
- (dd) Even without the certainty due to the modifications already done in preparation for building on the northern portion of Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand, all the school buildings are without a doubt within 500 metres radius of a wetland. No water use license authorisation application was submitted in relation to the construction of Mayibuye Primary School on Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand. This was not in line with section 21(c) and (i) of National Water Act, 1998.
- (ee) Mayibuye Primary School is affected by a 30-metre buffer zone measuring from the edge of the 'watercourse' as it superimposes from an Unchanneled Valley Bottom Wetland on the neighbouring Erf 2328.

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- (ff) GDARDE have no record of an application or a decision for an environmental authorisation as a provincial department responsible for environmental affairs in the Gauteng province from GDID as contemplated in NEMA Regulations and in terms of Version 13 of GDARDE's March 2014 Minimum Requirements in connection with the development footprint activities for the site where Mayibuye Primary School is constructed.
- (gg) It is immaterial at this stage whether the wetland is natural or artificial (due to leaking sewer being the main hydrological driver of the existing wetland on site), because it exists now and probably became much bigger and wetter due to human activities/disturbances that took place on site. The current condition of the area still warrants rehabilitation or mitigating engineering solutions.
- (hh) Accordingly, the Public Protector finds that the conduct of the functionaries of GDID in relation to the allegations of improperly constructing Mayibuye Primary School at Commercia Rabie Ridge/Midrand prior to conducting a wetland study, thus contributing to undue delays in completing the project constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, maladministration, and undue delay in terms of section 6(4)(a)(i) and (ii) of the Public Protector Act.
- (ii) Having regard to the evidence, the regulatory framework determining the standard that GDID and GDE should have complied with, the Public Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution:

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**Premier of Gauteng**

- (aa) Take cognisance of this report and in line with his executive powers envisaged in section 125(2) of the Constitution and exercise oversight on the implementation of the remedial action;

**Member of the Executive Council for Gauteng Human Settlements and Infrastructure Development**

- (bb) Take cognisance of this report in line with powers contemplated in section 63(1)(a) of the PFMA and ensure implementation of the remedial actions as contemplated in paragraph(s) below, by GDID;

**Member of the Executive Council for Gauteng Department of Education**

- (cc) Take cognisance of this report in line with powers contemplated in section 63(1)(a) of the PFMA and ensure implementation of the remedial action as contemplated in paragraph(s) below, by GDE.

**Member of the Executive Council for Gauteng Department of Finance**

- (dd) Take cognisance of this report in line with powers contemplated in section 63(1)(a) of the PFMA and ensure implementation of the remedial action as contemplated in paragraph below.

**Auditor General of South Africa**

- (ee) In terms of section 6(4)(c)(ii) of the Public Protector Act, the Public Protector hereby refers this report to the AGSA in line with its mandate.

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### The Head of Department of GDID

- (ff) Within **sixty (60) calendar days** from the date of receipt of this report, provide the Public Protector with a Project Plan, in accordance with the MEC's bilateral meeting convened on 25 January 2024 where an executive decision was reached that GDID will only implement the external civil works. The Project Plan must indicate how and when the completion of the remaining external civil works will be finalised to ensure that Mayibuye Primary School is fully operational in line with the efficient and economic management of the working capital as contemplated in terms of section 38(1)(c)(iii) of the PFMA and to enable learners to fully access and utilise all the facilities of the school during 2024;
- (gg) Within **sixty (60) calendar days** of receipt of this report, provide the Public Protector, and the MEC for Human Settlements and Infrastructure Development with a progress report, in respect of the implementation of the recommendations set out in the GDID's internal investigation dated 28 April 2022, as contemplated in terms of section 38(1)(h) of the PFMA.
- (hh) Within **sixty (60) calendar days** from the date of this report provide the Public Protector, and the MEC for Human Settlements and Infrastructure Development with the Project Plan indicating how GDID shall work collaboratively with GDE in line with the principles of cooperative governance as contemplated in section 41(1)(h) of the Constitution to initiate a water use authorisation application process as recommended by DWS to ensure compliance with sections 21 and 22 of the National Water Act, 1998 and NEMA Regulations, 2017.

### **The Head of the Gauteng Department of Education**

- (ii) Ensure continuous compliance and strict monitoring mechanisms of the Project Plan already provided to the Public Protector on 14 June 2024 to ensure that the school is fully operational in line with the efficient and economic management of the working capital in terms of section 38(1)(c)(iii) of the PFMA.
  
- (jj) Within **sixty (60) calendar days** from the date of receipt of this report, provide the relevant Treasury with a report envisaged in paragraph 3.2 (iv) of Treasury Instruction 2 of 2015/16: Cost Control Measures for the Construction of New Primary and Secondary Schools and the Provision of Additional Buildings at Existing Schools to enable the Treasury to interrogate costs overruns, project status, track expenditure trends and take necessary corrective action to ensure the full completion of Mayibuye Primary School project.
  
- (kk) Within sixty **(60) calendar days** from the date of this report provide the Public Protector, and the MEC for Education with the Project Plan indicating how GDE will work collaboratively with GDID in line with the principles of cooperative governance as contemplated in section 41(1)(h) of the Constitution to initiate a water use authorisation application process as recommended by DWS to ensure compliance with sections 21 and 22 of the National Water Act, 1998 and NEMA Regulations, 2017.

### **The Head of the Gauteng Provincial Treasury**

- (ll) Within sixty **(60) calendar days** upon receipt of a report from GDE envisaged in Paragraph 3.2 (iv) of Treasury Instruction 2 of 2015/16: Cost Control Measures for the Construction of New Primary and Secondary Schools and Provision of Additional Buildings at Existing Schools, provide the Public Protector with monitoring mechanisms or measures to be put in



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place to prevent irregular and fruitless expenditure in relation to this project, in line with the provisions of Paragraph 3.3 of Treasury Instruction 2 of 2015/16: Cost Control Measures for the Construction of New Primary and Secondary Schools and the Provision of Additional Buildings at Existing Schools, section 18(1)(b) and (c) as well as section 18(2)(f) of the PFMA.

## 1. INTRODUCTION

1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution and section 8(1) of the Public Protector Act.

1.2 This report is submitted in terms of sections 8(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant), for such persons to note the outcome of the investigation and to implement the remedial action.

1.3 The report is submitted to the following persons:

1.3.1 The Gauteng Premier, Mr P Lesufi;

1.3.2 MEC for Human Settlements and Infrastructure Development, Mr Lebogang Maile;

1.3.3 MEC for Education, Mr Matome Chiloane;

1.3.4 MEC for Finance, Mr Jacob Mamabolo;

1.3.5 HOD of the Gauteng Department of Infrastructure and Development, Ms Mutlaneng;

1.3.6 HoD for GDE, Mr Mmutlana;

1.3.7 The HoD of GPT, Ms Mnyani;

1.3.8 The Auditor General, Ms T Maluleke;

1.3.9 Former Internal Project Manager at GDID, Mr Dipela;

1.3.10 Deputy Director General (DDG) Education and Stars at GDID, Mr Selepe;

- 1.3.11 Former Internal Project Manager at GDID, Mr Sithole;
  - 1.3.12 The Minister for DWS, Mr Senzo Mchunu;
  - 1.3.13 Mr Mase acting HoD of Gauteng Department of Agriculture, Rural Development and Environment (GDARDE); and
  - 1.3.14 The Complainant.
- 1.4 This report relates to an investigation into allegations that the functionaries of the GDID and the GDE improperly constructed Mayibuye Primary School on an old sewer line, without conducting a wetland study and spent over eighty two million rands (R82 000 000) on an incomplete project.

## **2. THE COMPLAINT**

- 2.1 The investigation originates from a complaint lodged by Mr Mmusi Maimane, on 16 September 2020.
- 2.2 The Complainant alleged *inter alia*, that:
- 2.2.1 The GDID constructed a new school, called Mayibuye Primary School in Rabie Ridge/Midrand on an old sewer line, without conducting a wetland study;
  - 2.2.2 The GDID spent R82 000 000 on the construction of the school equipped to cater for one thousand two hundred (1200) primary school learners/children, however, the school has at the time of lodgement of the complaint not been utilised as it cannot obtain an occupancy certificate due to the dangerous terrain on which it was built;
  - 2.2.3 Mayibuye Primary School is “*flowing with raw sewerage*” (*sic*);

2.2.4 The infrastructure is crumbling, and the school is a hazardous zone that cannot safely accommodate children. Learners are forced to attend school in prefabricated containers and wendy houses a few hundred meters down the road; and

2.2.5 Mayibuye Primary School's building plans were approved, and the school was built. However, it was only after the school had been constructed, that a wetland investigation was conducted by the GDID, which discovered an old sewer line that had been leaking for years.

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

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

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

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

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

*(b) to report on that conduct; and*

*(c) to take appropriate remedial action.”*

3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector's powers are regulated and amplified by the Public Protector Act, which states amongst others, that the Public Protector has the powers to

investigate and redress maladministration and related improprieties in the conduct of state affairs.

### 3.4 **Special circumstances in terms of section 6(9) of the Public Protector Act**

3.4.1 Where an incident or matter reported to the Public Protector occurred more than two years prior to the reporting of the matter to the Public Protector, he/she is expected to exercise his/her discretion in terms of section 6(9) of the Public Protector Act to entertain the complaint based on special circumstances as envisaged in Rule 10(1) of the Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018 as amended<sup>1</sup> (Public Protector Rules). Section 6(9) of the Public Protector Act states that:

*“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.”*

3.4.2 The Public Protector exercised her discretion referred to in terms of section 6(9) of the Public Protector Act to entertain this complaint, based on the *special circumstances*<sup>2</sup> as envisaged in Rule 10(1) of the Public Protector Rules:

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<sup>1</sup> Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

<sup>2</sup> In *Gordhan v Public Protector and Others* [2019] JOL 45246 (GP) and *Gordhan and Others v Public Protector and Others* (36099/2098) [2020] ZAGPPHC 777 (17 December 2020), the Supreme Court of Appeal (the SCA) and the High Court in Pretoria respectively, held that, it is only where special circumstances exist, that complaints that are older than two years can be entertained, and that, the particulars of the special circumstances must be succinctly set out.

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### **Nature of the complaint and seriousness of the allegations**

- 3.4.2.1 The school remained unoccupied at the lodgement of this complaint since the construction commenced around May 2017;
- 3.4.2.2 A huge amount of public funds, amounting to multi-millions of rands have been spent on the construction of a school project which remains incomplete;
- 3.4.2.3 The public interest generated by this project as reported in the media<sup>3</sup> was also considered; and
- 3.4.2.4 The learners of Mayibuye Primary School are continuously prejudiced by the non-completion of the school since they are still accommodated in prefabricated containers and face overcrowding in the class rooms.

### **Likelihood of being able to investigate the matter due to the delay having regard to the allegations and the availability of information, evidence, witnesses, and records**

- 3.4.2.5 The Public Protector considered that the information / evidence that may be required during the investigation would still be readily available since it was established during the analysis of the complaint that the project is ongoing and enable the finalisation of this investigation; and

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<sup>3</sup> Riyaz Patel "Millions blown on school built on wetland in Tembisa." Available on <https://www.thesouthafrican.com> as reported on 09-09-2020.

- 3.4.2.6 Furthermore, relevant evidentiary material required from the functionaries would still be available and retained in line with relevant provisions of the National Archives and Records Service of South Africa Act, 1996, its Regulations and the Public Finance Management Act, 1999.

**Whether the outcome of an investigation could rectify a systemic problem in the public administration**

- 3.4.2.7 The investigation of the matter would be in the interest of justice as it could provide an opportunity to identify potential maladministration, systemic deficiencies, prejudice, or injustice if any, to remedy the same within the affected organs of state.

- 3.5 The GDID and GDE are organs of state in terms of section 239 of the Constitution and their conduct amounts to conduct in state affairs. As a result, the Public Protector is satisfied that the complaint falls within its competency to investigate as envisaged in section 182(1)(a) of the Constitution and section 6(4) of the Public Protector Act. The jurisdiction of the Public Protector in this matter was not disputed by GDID and GDE.

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

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

- 4.1.1 Whether the functionaries of the Gauteng Department of Infrastructure Development and the Gauteng Department of Education failed to comply with applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and constitutes maladministration as

well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act, 1994; and

- 4.1.2 Whether the functionaries of the Gauteng Department of Infrastructure Development improperly constructed Mayibuye Primary School prior to conducting a wetland study thus resulting in undue delays in completing the project, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act, 1994.

## **5. THE INVESTIGATION**

### **5.1 Methodology**

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

- 5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to investigate with due regard to the circumstances of each case.

### **5.2 Approach to the investigation**

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

- 5.2.2 The investigation was approached using an enquiry process that seeks to determine:



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

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this case, the factual enquiry principally focused on whether the alleged conduct by GDID and GDE was inconsistent with the applicable process.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the GDID and GDE in the construction of the school.

5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration.

5.2.6 In the matter of the *Public Protector and Others v President of the Republic of South Africa and Others*<sup>4</sup> Jafta J stated, quoting from the Supreme Court of Appeal in the *Public Protector v Mail and Guardian Ltd and Others*<sup>5</sup> by emphasising that investigations by the Public Protector should be conducted with an "*open and enquiring mind*" as follows:

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4 (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021) at paragraph 140.

5 *Public Protector v Mail & Guardian Ltd and Others* (2011 (4) SA 420 (SCA)) [2011] ZASCA 108; 422/10 (1 June 2011) at paragraph 22.

*"I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious, but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place... How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring."*

5.2.7 The Constitutional Court<sup>6</sup> also noted that the judgement in the *Mail & Guardian* case makes plain that the duty of the Public Protector is not only to discover the truth but also to inspire public confidence that in each investigation, the truth has been discovered. Where the evidence is inconclusive or incongruent, the Public Protector *"is obliged to carefully evaluate it to determine the truth."*

5.2.8 In terms of section 181(2) of the Constitution, the Public Protector exercises his or her powers and functions subject to the Constitution and the law. The truth is therefore established by facts that are placed before the Public Protector through reliable, lawful, and admissible evidence and information. This standard calls for the investigation to be thorough and to leave no stone unturned; to be fair to the parties including the respondents; and to be conducted within the bounds of the Constitution and the law. Further, this calls on the Public Protector to see to it that the investigation is not only carried out independently; impartially and without fear, favour, or prejudice but also that the Public Protector is *seen* to be carrying it out independently; impartially and without fear, favour, or prejudice.

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<sup>6</sup> *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021) at paragraph 77.

### 5.3 **The Investigation Process**

5.3.1 The investigation process included a variety of methods such as an exchange of documentation with GDID, GDE, GPT and various other state institutions including DWS, GDARDE, Johannesburg Water, AGSA and the Gauteng office of the Premier. It also included meetings and site inspections with a wetland specialist, as well as other individual witnesses, who are in possession of information which has a bearing on the investigation of this matter.

5.3.2 The Public Protector has concluded the investigation and based on the information and evidence obtained during the course thereof, the Public Protector is now in a position to make findings and take appropriate remedial action to address the improper conduct and maladministration of the GDID and GDE.

### 5.4 **Key sources of information**

#### 5.4.1 **Correspondence exchanged**

5.4.1.1 Complaint letter received from Mr Maimane, dated 16 September 2020;

5.4.1.2 Allegations letter from the Public Protector to the then Member of the Executive Council (MEC) of GDID, Ms Tasneem Motara (Ms Motara) dated 01 February 2021;

5.4.1.3 A response letter in the form of an affidavit from Ms Motara to the Investigation Team, dated 04 March 2021;

5.4.1.4 Allegations letter from the Public Protector to the former HoD of GDE, Mr Edward Mosuwe (Mr Mosuwe), dated 25 November 2021;

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- 5.4.1.5 Allegations letter from the Public Protector to Ms Mnyani, dated 25 November 2021;
  - 5.4.1.6 A response letter from Ms Mnyani to the Investigation Team, dated 15 December 2021;
  - 5.4.1.7 A further request for information letter from the Investigation Team to the then HoD at GDID, Dr Thulani Mdadane (Dr Mdadane), dated 02 January 2022;
  - 5.4.1.8 A response letter from the Director of Legal Services at GDE, Ms Nombesho Ngcobozi (Ms Ngcobozi) to the Investigation Team, dated 25 January 2022;
  - 5.4.1.9 A response letter in the form of an affidavit, from Ms Motara to Investigation Team, dated 21 February 2022;
  - 5.4.1.10 Email correspondence requesting additional information from the Investigation Team to the GDID, dated 23 May 2022;
  - 5.4.1.11 A response from the acting MEC at GDID to the Investigation Team, dated 31 May 2022;
  - 5.4.1.12 Correspondence submitting additional evidence to the Investigation Team from the then Director in the office of the HoD of GDID, Mr Muzi Sithebe, on 09 and 10 September 2022;
  - 5.4.1.13 Email correspondence requesting an update on the outstanding work to be conducted at the school from the Investigation Team to the acting Director in the office of the HoD, Mr Thuthuka Ntuli (Mr Ntuli), dated 23 May 2023;
  - 5.4.1.14 Email correspondence requesting clarity on the GDID internal investigation report from the Investigation Team to the Project Manager, Mr Dipela, dated 19 June 2023;

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- 5.4.1.15 Email response from Mr Dipela to the Investigation Team, dated 20 June 2023;
  - 5.4.1.16 A request letter from the Investigation Team to Mr Cebekhulu, requesting information on the audit outcomes dated 20 July 2023;
  - 5.4.1.17 A response letter from Mr Cebekhulu to the Investigation Team, dated 14 August 2023;
  - 5.4.1.18 Allegations letter from the Public Protector to Mr Floyd Brink, City Manager of CoJ, dated 13 November 2023;
  - 5.4.1.19 Allegations letter from the Public Protector to the HoD for GDARDE, Ms Matilda Gasela (Ms Gasela), dated 20 November 2023;
  - 5.4.1.20 Allegations letter from the Public Protector to Dr Phillips, dated 20 November 2023;
  - 5.4.1.21 The Wetland report from Ms Happy Khumalo (Ms Khumalo) of GDARDE to the Investigation Team received on 21 November 2023;
  - 5.4.1.22 Email requesting clarity on the Wetland report from the Investigation Team to Ms Khumalo, dated 21 November 2023;
  - 5.4.1.23 Email response from Ms Khumalo to the Investigation Team, dated 21 November 2023;
  - 5.4.1.24 Email submitting an explanatory note on the wetland, from Dr Gouws to the Investigation Team, dated 21 November 2023;
  - 5.4.1.25 Allegations letter from the Public Protector to Mr Rakesh Maghnath (Mr Maghnath), Operations Manager at Johannesburg Water SOC Limited, dated 21 November 2023;

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- 5.4.1.26 A response letter from the Building Control Officer at CoJ, Mr Maruping Broderick Chiloane, on behalf of Mr Brink, to the Investigation Team, dated 29 November 2023;
- 5.4.1.27 A response letter from Dr Phillips to the Investigation Team, dated 06 December 2023;
- 5.4.1.28 Email from the Investigation Team to Dr Phillips, requesting the site inspection report of the school, dated 06 December 2023;
- 5.4.1.29 A response letter from Dr Phillips to the Investigation Team, dated 07 December 2023;
- 5.4.1.30 Allegations letter from the Public Protector to Vumesa (Pty) Ltd, dated 21 December 2023;
- 5.4.1.31 A response letter from Mr Andreas Melusi Ndlovu (Mr Ndlovu), a Director and a Professional Engineer at Vumesa (Pty) Ltd, to the Investigation Team, dated 03 January 2024;
- 5.4.1.32 A response letter from Managing Director of Johannesburg Water, Mr Ntshavheni Mukwevho (Mr Mukwevho) to the Investigation Team, dated 08 February 2024.
- 5.4.2 **Documents received**
- 5.4.2.1 Request for Service letter dated 25 July 2014;
- 5.4.2.2 Project Execution Plan, approved 04 August 2014;
- 5.4.2.3 Tender notice and Invitation to tender, dated 29 August 2014;

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- 5.4.2.4 Email correspondence regarding unavailability of PTO, dated 11 February 2015;
  - 5.4.2.5 Geotechnical Investigation Report conducted by the Southern Geotechnical Engineers, dated 23 March 2015;
  - 5.4.2.6 The Contractor's appointment letter, dated 22 August 2015;
  - 5.4.2.7 Memorandum for scope changes, dated 26 August 2015;
  - 5.4.2.8 Letter titled "Challenges with regard to the construction of the new Mayibuye Primary School," dated 08 February 2016;
  - 5.4.2.9 Letter titled "Request to acquire Erf 2326 Commercia for the development of the Mayibuye Primary School by the GDE", dated 22 September 2016;
  - 5.4.2.10 The Specialist's study into the wetland investigation, dated 22 June 2017;
  - 5.4.2.11 Compensation Event number 3 submission with subject heading "*Mayibuye Primary School: extension of time: compensation event number 3*", dated 25 June 2018;
  - 5.4.2.12 Compensation Event Number 4 submission with subject heading "*Mayibuye Primary School: cost-related: compensation event number 4*", dated 28 August 2018;
  - 5.4.2.13 Compensation Event Number 5 undated submission with the subject heading "*Mayibuye Primary School: Approval to implement compensation event above Treasury threshold of 20% and/or 20 million*";
  - 5.4.2.14 AGSA's Consolidated General Report on national and provincial audit outcomes for 2017/18;
  - 5.4.2.15 PTO agreement between the CoJ and the GDE, dated 15 August 2019;

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- 5.4.2.16 Letter titled “Consent for site development plan for Erf 2326 Commercial Extension 34”, dated 18 October 2019;
- 5.4.2.17 Memorandum titled “Civil and structural visual assessment at Mayibuye Primary School,” dated 14 September 2020;
- 5.4.2.18 Letter titled “*Request for approval of compensation event for additional works and extension of time exceeding 20% threshold for new Mayibuye Primary School*”, dated 13 October 2020;
- 5.4.2.19 Approval notice for building plan application no: 2020/09/1620, dated 22 October 2020;
- 5.4.2.20 The internal memorandum compiled by Mr Hudson Baloyi requesting the HOD to sign a letter of response to the GDID, dated 02 December 2020;
- 5.4.2.21 Letter titled “*Re-submission of request for approval of compensation event for additional works and extension of time exceeding 20% threshold for new Mayibuye Primary School*”, dated 04 December 2020;
- 5.4.2.22 Letter titled “*New Mayibuye Primary School conditional approval of compensation event (CE) no 2*”, dated 15 March 2021;
- 5.4.2.23 Summons issued by the contractor to GDID, dated 30 March 2022;
- 5.4.2.24 The internal investigation report on irregular expenditure, dated 28 April 2022;
- 5.4.2.25 The condition assessment report, dated 08 July 2022;
- 5.4.2.26 Report from GDARDE titled “*Site inspection report: Mayibuye Primary School, Rabie Ridge/Midrind, City of Johannesburg*” dated 20 September 2023;



- 5.4.2.27 Explanatory and supplementary note regarding the wetlands by Dr Gouws, dated 21 November 2023;
- 5.4.2.28 DWS's investigation report signed by Director T Khosa, dated 07 December 2023;
- 5.4.2.29 Copies of CE3, CE4 and CE5;
- 5.4.2.30 Notice of intention to issue a directive in terms of the National Water Act, 1998 dated 15 December 2023;
- 5.4.2.31 Environment and Audit Report, dated 23 January 2024;
- 5.4.2.32 The hydro-pedological assessment report, dated 24 January 2024;
- 5.4.2.33 Letter from DWS to GDID informing GDID of the water use authorisation, dated 10 April 2024; and
- 5.4.2.34 GDID and GDE Recovery plan towards the completion of outstanding work at the school, undated.

#### 5.4.3 **Meetings and Interviews held**

- 5.4.3.1 Interview with Mr Dipela, on 12 September 2022;
- 5.4.3.2 Interview with Mr Nkululeko Xulu (Mr Xulu), on 12 September 2022;
- 5.4.3.3 Interview with Mr Bethuel Netshiswinzhe (Mr Netshiswinzhe), on 20 September 2022; and
- 5.4.3.4 Interview with Dr Gouws, on 20 November 2023.

#### 5.4.4 **Site Inspections**

- 5.4.4.1 The first site inspection was conducted on 30 March 2022 by the Investigation Team at Mayibuye Primary School;

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- 5.4.4.2 The second site inspection was conducted on 23 May 2023 by the Investigation Team and GDID's officials at Mayibuye Primary School; and
- 5.4.4.3 A site inspection and assessment were conducted on 21 December 2023, and attended by the Investigation Team, Dr Gouws, DWS, GDARDE, Johannesburg Water and Professional Services Provider (PSP), GDID and GDE.
- 5.4.5 **Legal framework**
- 5.4.5.1 Constitution of the Republic of South Africa, 1996;
- 5.4.5.2 National Building Regulations and Building Standards Act, 1977;
- 5.4.5.3 National Environmental Management Act, 1998;
- 5.4.5.4 National Environmental Management Amendment Act, 2004;
- 5.4.5.5 National Water Act, 1998;
- 5.4.5.6 Public Finance Management Act, 1999;
- 5.4.5.7 NEMA Regulations, dated 7 April 2017;
- 5.4.5.8 National Treasury Instruction SCM Note, 2016/2017;
- 5.4.5.9 CPAP Indices Application Manual, 1 January 2018;
- 5.4.5.10 GDARDE's Minimum Requirements for Biodiversity Guidelines, March 2014, Version 3.

#### 5.4.6 Case Law

- 5.4.6.1 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017);
- 5.4.6.2 *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* (ZASCA 12; [2002] 1 All SA 384 (A) (13 March 2001);
- 5.4.6.3 *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021); and
- 5.4.6.4 *The Public Protector v Mail & Guardian Ltd and Others* (2011 (4) SA 420 (SCA)) [2011] ZASCA 108; 422/10 (1 June 2011).

#### **Notices issued in terms of section 7(9)(a) of the Public Protector Act**

- 5.4.7 Notices in terms of section 7(9)(a) of the Public Protector Act (the Notice/s) were issued to the following implicated and/or affected parties to provide them with an opportunity to respond to the proposed findings and remedial action during the period 07 May 2024 to 12 June 2024:

- (a) The Complainant;
- (b) Mr Panyaza Lesufi;
- (c) Mr Lebogang Maile;
- (d) Mr Matome Chiloane;
- (e) Mr Jacob Mamabolo;
- (f) Ms Mutlaneng;
- (g) Mr Mmutlana;
- (h) Ms Mnyani;
- (i) Mr Cebekhulu;

- (j) Mr Dipela;
- (k) Mr Sithole;
- (l) Mr Selepe;
- (m) Mr Mase; and
- (n) Dr Phillips.

**Responses received to the Notice issued in terms of section 7(9) of the Public Protector Act**

5.4.8 Responses to the Notice were received from the following persons:

5.4.8.1 Mr Dipela, on 17 May 2024;

5.4.8.2 Mr Sithole, on 18 May 2024;

5.4.8.3 Mr Selepe, on 20 May 2024;

5.4.8.4 Mr Mukwevho, on 21 May 2024;

5.4.8.5 Ms Mnyani, on 05 June 2024;

5.4.8.6 Ms Mutlaneng, on 07 June 2024;

5.4.8.7 Dr Phillips, on 12 June 2024;

5.4.8.8 Ms Maluleke, on 14 June 2024;

5.4.8.9 Mr Mmutlana, on 14 June 2024;

5.4.8.10 Mr Mase, on 21 June 2024; and

5.4.8.11 Mr Edward Mosuwe (Mr Mosuwe), the Director General (DG) in the Office of the Premier, on 24 June 2024.

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

**6.1 Whether the functionaries of the Gauteng Department of Infrastructure Development and the Gauteng Department of Education failed to comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act, 1994**

*Common cause*

6.1.1 The mandate of the GDID is to develop and maintain a socio-economic infrastructure that allows the residents of Gauteng to gain better and faster implementation of all infrastructure development programmes and projects in communities such as schools, hospitals, clinics, early childhood development, integrated social facilities and recreation facilities.<sup>7</sup>

6.1.2 The GDE is the client department of GDID, which is the implementing agent on this project. The GDE was responsible for identifying its needs, specifications, analysis and providing the scope or function of the project.

6.1.3 The GDID awarded a tender for the construction of Mayibuye Primary School in Midrand to Basic Blue/Nebavest JV (the Contractor) on 22 May 2015.<sup>8</sup> Construction related activities at the school commenced in May 2017.

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<sup>7</sup> DID's Annual Report 2020/2021 at page 21.

<sup>8</sup> As indicated in the affidavit of the then MEC for GDID, Ms Tasneem Motara dated 04 March 2021.

6.1.4 Mayibuye Primary School was designed to accommodate one thousand two hundred (1200) learners from Grade R to Grade 7.

6.1.5 The issue for the Public Protector's determination is whether the functionaries of the GDID and GDE conducted due diligence and a feasibility study prior to embarking on the project of constructing Mayibuye Primary School and followed the relevant procurement regulatory framework in executing the task.

*The Complainant's version*

6.1.6 The Complainant stated that:

6.1.6.1 The GDID spent R82 000 000 on the construction of the school equipped to cater for 1200 primary school learners/children, however, the school has at the time of lodgement of the complaint not been utilised as it cannot obtain an occupancy certificate due to the dangerous terrain on which it was built. The Complainant also alleged that the school was built on a sewer line and requested the Public Protector to investigate the project.

*The version of GDID*

6.1.7 The Public Protector sent an allegations letter dated 01 February 2021, to the then MEC for GDID, Ms Motara. A response in the form of an affidavit, dated 04 March 2021 was received from Ms Motara.

6.1.8 Ms Motara stated as follows in her affidavit:

- 6.1.8.1 The scope of the project was the construction and delivery of Mayibuye Primary School under project number RFP24/08/2014. The contract type was an NEC 3 Option A: Design and Build (Turnkey);<sup>9</sup>
- 6.1.8.2 GDID received a Request for Service (RFS) letter from GDE confirming budget availability to implement the project. A Project Execution Plan (PEP) was prepared by GDID and submitted to GDE for approval. GDE subsequently approved same;
- 6.1.8.3 On 22 May 2015, GDID appointed Basic Blue/Nebavest JV as the Contractor for the project. The original contract value was eighty-eight million eight hundred and twenty-three thousand one hundred eighty rand and sixty-seven cents (R88 823 180.67). The estimated revised contract amount was one hundred and six million five hundred and eighty-seven thousand eight hundred sixteen rand and eighty cents (R106 587 816.80);
- 6.1.8.4 After the appointment of the Contractor, the site could not be handed over to the Contractor to commence with construction work because Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand belonged to the CoJ, as there was no permission to occupy land from CoJ. The PTO letter was only obtained on 22 September 2016;
- 6.1.8.5 After the CoJ granted the PTO authorising the land occupation, the construction work could not commence because there were encroaching properties on the site. The owners of those properties were identified and engaged regarding the encroachments;

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<sup>9</sup> According to the National Treasury Republic of South Africa Government Procurement: General Conditions of Contract, dated July 2010 definition of “turnkey” means a procurement process where one service provider assumes total responsibility for all aspects of the project and delivers the full product / service required by the contract.

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- 6.1.8.6 The property owners resisted the demolition of their structures and as a result, a meeting was held on 10 May 2017 between the community and GDID wherein an agreement was reached that the encroachments would be demolished either by the owners of those properties or by the community;
- 6.1.8.7 The site was eventually handed over to the Contractor on 12 May 2017;
- 6.1.8.8 The project received approvals from Johannesburg Roads Agency (JRA) and CoJ, who approved the Site Development Plan<sup>10</sup> (SDP);
- 6.1.8.9 The construction of the main entrance was delayed because of additional encroachments onto the school property. Even though the property owners gave way for the construction of the entrance, the space was inadequate, as their concession offered six meters instead of the required eight-meters servitude;
- 6.1.8.10 A consultation meeting was held with GDE, wherein an agreement was reached to move the entrance to the eastern side of the school into a current *cul-de-sac*;
- 6.1.8.11 The construction of the proposed new entrance was protracted, as it required a traffic circle and drop-off zones. The proposed new entrance caused further delays, as it resulted in an increase in the construction period and budget;
- 6.1.8.12 The project experienced unforeseen delays and circumstances during the implementation of the project, such as:

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<sup>10</sup> City of Johannesburg's Site Development Plan, Application form 12 version 3 of 5/2019 states that the purpose of an SDP is to determine at an early stage (pre-development) whether a proposed development complies with the legislative requirements and control measures.



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- (a) Community stoppage on 21 June 2017, members of the community went on-site and stopped work. The stoppage affected the execution of the project from 21 to 23 June 2017, as a result the Contractor applied for an extension of time due to this disruption;
  - (b) On 28 June 2017, members of the local business forum and labour desk went on-site and stopped the project again, demanding a meeting with the directors of the construction company. This affected the execution of the project from 28 June 2017 to 04 July 2017 and the Contractor applied for an extension of time due to the disruption;
  - (c) On 25 August 2017, members of the local businesses interrupted work on-site again. The community wanted the local Councillor to address them on the applicable labour rates. They argued that the Contractor was underpaying them, and this affected the execution of the project, as a result, the Contractor applied for an extension of time due to the disruption;
  - (d) A series of meetings took place between the local business forum, labour desk and the Contractor from 09 October 2017 to 19 October 2017;
  - (e) The local business forum and labour desk were aggrieved with the Contractor using its plant instead of hiring the local plant and they also wanted the Contractor to employ local people and allocate work to local subcontractors before commencing with work;
  - (f) The members of the local community and the labour desk interrupted work on-site indicating that work would not resume until the Contractor had addressed their grievances. The follow-up meeting held on 24

October 2017 was unsuccessful despite the Contractor addressing the grievances;

- (g) The local business forum and the labour desk brought in the workers who lodged grievances, and the local community concluded that the site would remain closed until the resolution of workers' grievances; and
- (h) The above-affected execution of the project from 19 October 2019 to 06 November 2019, as a result, the Contractor applied for an extension of time due to the disruptions.

6.1.8.13 During the execution of the project, GDE revised the scope of the project to incorporate the smart schools' requirements,<sup>11</sup> which required additional funding and the approval of a CE3;<sup>12</sup>

6.1.8.14 The changes altered the school design into a modern information technology-based facility based on a prototype that incorporates the Department of Education National Schools Infrastructure Norms and Standards;

6.1.8.15 GDID sent a request for additional funding to GDE, but it was rejected on the basis that GDE could not approve a CE beyond the 20% threshold, and this resulted in more delays, hence the current state of the project;

6.1.8.16 The overall work in all the building blocks was almost complete at 90%;

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<sup>11</sup> A smart school is a school that incorporates technology and innovation in its teaching and learning processes to improve the quality of education. Smart schools use various technologies such as interactive whiteboards, and online learning platforms to enhance the learning experience of students.

<sup>12</sup> According to Paragraph 6 of the *Framatome vs Eskom Holdings Soc Limited 357/2021* Compensation Events are events which, should they occur, and provided they do not arise from the contractor's fault, entitle the contractor to be compensated for any effect the event has on the prices and the contractual sectional completion date(s) or key date(s)

6.1.8.17 The table below demonstrates the progress per block:

BLOCK	DESIGNATION	COMPLETION	ACTIVITIES
A	Administration	95%	Finishes Done, Information Communications Technology (ICT) Outstanding
B	Grade R	95%	Finishes Done, ICT outstanding
C	Foundation Grades	90%	Floors in progress. Final Fixes and ICT outstanding
D/F	Senior Grades	90%	Floors and plumbing second fixes are in progress
E	Lib/Laboratories	86%	Final Fixes and ICT outstanding
I	Sports Facilities	96%	Final Fixes, stormwater drainage and cleaning out outstanding
L	School Hall	78%	Ceilings, floors, mechanical and electrical works in progress
K	Refuse/Generator Room	99%	Complete, generator purchased and being kept off-site
J	Guard House	80%	Finishes, Electrical and ICT outstanding
	External Works	89%	Additional sewerage, roads, and attenuation pond outstanding

6.1.8.18 The project is incomplete due to:

- (a) The incorporation of the smart schools' requirement, which attracted additional costs and time resulting in a CE for scope changes;
- (b) The illegal encroachments that caused delays to the commencement of the project;
- (c) The proposed new entrance location which also attracted additional costs for the project because it required a road upgrade to cater for additional traffic; and

(d) The diversion of the sewer line and standing time.

- 6.1.8.19 The project experienced challenges, such as the availability of land, encroachment by the neighbouring properties, work stoppages, the sewage issue, the requirement for additional funding for the incorporation of the smart school, the widening of the road as well as the new entrance including the diversion of the sewer line, however, there was no maladministration during the construction of the project;
- 6.1.8.20 The total funds required to complete all the outstanding work was above the prescribed 20% threshold or twenty million rand (R20 000 000.00) of the original contract amount, and as such it required Treasury's approval;
- 6.1.8.21 The situation at the school requires a speedy resolution by both GDID and GDE. GDID is ready to complete the project once the funding is made available; and
- 6.1.8.22 The Contractor cannot resume construction work and complete the school until the resolution of all contractual hurdles.

*Submission by the HoD of GDID*

- 6.1.9 The Investigation Team sent a letter dated 02 January 2022, requesting additional information to the then Head of Department (HoD) at GDID, Dr Thulani Mdadane (Dr Mdadane). No response was received from Dr Mdadane, instead a response in the form of an affidavit, dated 21 February 2022 was received from Ms Motara on 02 March 2022. She stated as follows in her affidavit:
- 6.1.9.1 Five (05) CEs were approved during the project and the CEs below the 20% threshold were approved by the HoD, while the CE above 20% was submitted to GPT for approval;

6.1.9.2 The above-mentioned five (05) CEs are captured in the table below:

Compensation Event	Amount Including 15%VAT	Compensation Event Status/Approver/ Date	Gauteng Treasury Approval Requirement	CE Percentage (Cumulative)
CE1: Revising the completion date	0	Approved-GDID HoD	No GPT approval requirement	0%
CE2: Extension of Time	0	Approved-GDID HoD Date: 23 March 2018	No GPT approval requirement	0%
CE3: Extension of Time	0	Approved-GDID HoD Date: 28 June 2018	No GPT approval requirement	0%
CE4: Contract Price Adjustment Provisions (CPAP)	R11 848 970. 16	Approved-GDID HoD Date: 09 November 2018	No GPT approval requirement	13.3%
CE5: Design changes and scope increase	R5 329 390.8 4	Approved-DID HoD	No GPT approval requirement	19.9%
CE5: Design changes and scope increase with standing time	R32 232 443. 29	Approved-GPT	GPT approval required	36.29%

6.1.9.3 Treasury Instruction Note 03 of 2016/17, clause 9 states that, “the Accounting Officer/Authority must ensure that contracts are not varied by more than 20% or twenty million rand (R20 000 000) (including Value Added

*Tax (VAT) for construction goods, works and/or services and 15%- or fifteen-million-rand R15 000 000.00) all goods, works and/or services of the original contract value”;*

- 6.1.9.4 Any deviation above the prescribed threshold of 20% or R20 000 000 is only permissible in exceptional cases, subject to prior written approval by GPT;
- 6.1.9.5 In this case, only CE5 was above the 20% prescribed threshold and as such, it required GPT approval;
- 6.1.9.6 There were various challenges during the construction of the school, such as:
- (a) Delays in handing over the site, which could have been avoided by securing the site before the tender was advertised;
  - (b) The community disruptions were unforeseen events and could not have been predicted;
  - (c) Equally, the encroachments were regarded as unforeseen as the site was only secured after the Contractor was appointed; and
  - (d) Same with the scope change instruction by GDE, it was unforeseen, as the instruction was received after the appointment of the Contractor. The scope changes by GDE stemmed from the introduction of the smart school concept which required the incorporation of an ICT based smart concept in all new facilities.
- 6.1.9.7 GDID investigated the alleged irregular expenditure that arose from the project and the investigation was concluded. The final draft report was submitted to Dr Mdadane, for his consideration and approval (at the time);

- 6.1.9.8 The project is incomplete due to delays in budget allocation and there has been no activity on site since 2019. The school has not been maintained thus leading to the deterioration of infrastructure due to weather elements, and vandalism. GDID decided to terminate the contract to curb the increasing standing costs from the Contractor;
- 6.1.9.9 On 15 November 2021, a meeting was held between the HoDs (GDE and GDID), and an agreement was reached that there will be a budget allocation during the budget adjustment period. The budget allocation would have allowed for the appointment of a new PSP to conduct an assessment and produce contract documents for the appointment of a Contractor who would complete the project;
- 6.1.9.10 The rerouting of the sewer line forms part of the outstanding works that require confirmation of budget; and
- 6.1.9.11 GDID was informed by GDE *via* a letter dated 15 March 2021, that GPT allocated twenty-three million rand (R23 000 000) towards the completion of the project.

*Further correspondence with GDID*

- 6.1.10 On 23 May 2022, an email was sent to GDID requesting further information and on 02 June 2022, a response dated 31 May 2022 was received from the acting MEC at the time, Mr Jacob Mamabolo. He provided the information below in bold, *i.e.* names of the officials at GDID who approved the CEs as captured in the table below:
- 6.1.10.1 Table 1 below lists the CEs on the project and the approving authority:

Compensation Event	Amount Including 15%VAT	Compensation Event Status/Approver/ Date	Gauteng Treasury Approval Requirement	CE Percentage (Cumulative)
CE1: Revision of completion date	0	Approved-GDID HoD <b>IPM-Mr Ronald Sithole.</b> Date 12 May 2017	No GPT approval requirement	0%
CE2: Extension of Time	0	Approved-GDID HoD <b>Mr Bethuel Netshiswinzhe</b> Date: 23 March 2018	No GPT approval requirement	0%
CE3: Extension of Time	0	Approved-GDID HoD <b>Mr Bethuel Netshiswinzhe</b> Date: 28 June 2018	No GPT approval requirement	0%
CE4: CPAP	R11 848 970.16	Approved-GDID HoD <b>Mr Bethuel Netshiswinzhe</b> Date: 09 November 2018	No GPT approval requirement	13.3%
CE5: Design changes and scope increase	R5 329 390.84	Approved-DID HoD <b>Acting HoD: Mr Richard Makhumisani</b>	No GPT approval requirement	19.9%



CE5: Design changes and scope increase with standing time	R32 232 443. 29	Approved- <b>GPT</b>  (R23 million Approved)	<b>GPT approval required</b>	36.29%
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6.1.11 Mr Mamabolo clarified as follows in his response dated 31 May 2022:

6.1.11.1 The first CE was issued by the then Internal Project Manager (IPM), Mr Sithole, through the site access certificate and the project duration of eight (08) months was revised to twelve (12) months; and

6.1.11.2 The allocated amount of R23 000 000 had not been utilised pending the outcome of the investigation into possible irregular expenditure.

*The version of GPT*

6.1.12 The Public Protector sent an allegations letter dated 25 November 2021, to the HoD of GPT, Ms Mnyani, and a response was received on 15 December 2021. In her response, Ms Mnyani stated as follows:

6.1.12.1 Mayibuye project predates her appointment as the HoD at GPT and some of the information was extracted from various units across GDID. As a result, she could not depose an affidavit as the information presented in her response is secondary information;

6.1.12.2 GDE was the initiator of the infrastructure project and GPT's role in the process was only limited to the continuation of the project. All administrative, contractual, and infrastructure-related information should be sourced from GDE and/or the implementing agent, GDID;

6.1.12.3 In terms of section 9 of the National Treasury Instruction Supply Chain Management Instruction Note 3 of 2016/17 (NT SCM Instruction Note 03 of

- 2016/17) - Prevention and Combating Abuse in the Supply Chain Management system, the role of GPT is to assess requests for CEs or deviations and where appropriate, approve or not approve the request;
- 6.1.12.4 GPT is required to approve variations whereby the original contract value is above or expected to be above 20% and/or R20 000 000 inclusive of VAT. It is a requirement of paragraph 9 of NT SCM Instruction Note 03 of 2016/17 that approval is sought from GPT during those exceptional cases and not *ex post facto*;
- 6.1.12.5 GPT's role in this project included providing guidance, (in writing) to the department responsible for infrastructure delivery in the Gauteng province regarding the minimum requirements for preparation, and submission of CE to GPT, to ensure compliance with the regulatory framework;
- 6.1.12.6 The guidance by GPT in this instance included an assessment of the CE requirements to justify the additional costs and a demonstration of all possible steps taken to avoid such unnecessary costs, as well as evidence of consequence management implemented if costs incurred are due to poor performance by the PSP's, Contractors and/or officials as well as copies of relevant minutes signed by the Bid Adjudication Committee (BAC);
- 6.1.12.7 In addition, a CE must be due to unforeseen scope of works, acts of God (*force majeure*), and not poor planning;
- 6.1.12.8 A CE is not applicable in respect of an expired contract, and GPT can only approve a CE in terms of the NT SCM Instruction Note, 03 of 2016/17, which has arisen from exceptional circumstances, and approval from GPT is required before the implementation of any CE;
- 6.1.12.9 On 22 September 2020, GPT received motivation from GDID requesting approval of a CE in terms of NT SCM Instruction Note 03 of 2016/17. The

CE related to the construction contract of Mayibuye Primary School. On review of the request, it was evident that:

- (a) GDID submitted CEs which were already implemented at the school by the Contractor to GPT for approval, and
- (b) There was insufficient information to substantiate exceptional circumstances for the CEs.

6.1.12.10 Considering the above, GPT informed GDID *via* a letter dated 13 October 2020, that its request was declined on the basis that it was an *ex post facto* submission, which cannot be considered in terms of the NT SCM Instruction Note 03 of 2016/17; and

6.1.12.11 GPT informed GDID in writing of the reasons for the rejection of its submission and what was required from GDID for the reconsideration of same.

*The GDE's version*

6.1.13 The Public Protector sent an allegations letter dated 25 November 2021, to the then HoD of GDE, Mr Mosuwe, and a response letter dated 25 January 2022, was received from the Director of Legal Services at GDE, Ms Ngcobozi. She stated as follows:

6.1.13.1 In Gauteng, the replacement and construction of new schools is an important provincial school-building programme as it addresses challenges related to overcrowding and growth caused by relocation into the province;

6.1.13.2 The existing Mayibuye Primary School was overcrowded and consisted of mobile structures (prefabricated containers); thus, the new school is one of the initiatives aimed at alleviating issues of overcrowding;

6.1.13.3 The project entailed the design, engineering, procurement, construction, furnishing and delivery of a new brick-and-mortar primary school at Erf 2326 Commercia, Extension 34 Township Rabie Ridge/Midrand;

6.1.13.4 The project was detailed as follows:

Contract award date	May 2015
Contractor	Basic Blue/Nebavest JV
Professional Service Provider (PSP)	Basic Blue/Nebavest JV Turnkey
Date of site access	12 May 2017
Contract duration	52 weeks
Original contract end date	11 May 2018
Revised contract end date	19 April 2019
Original contract amount	R 88 823 180.67
Revised contract amount	R100 672 150.80
Total expenditure (as of 31 October 2021)	R98 766 350.08

6.1.13.5 GDID appointed Basic Blue/Nebavest as the service provider to deliver a school that conforms to current norms and standards to GDE;

6.1.13.6 Mayibuye Primary School was designed to accommodate 1200 learners from Grade R to Grade 7, and the language of learning and teaching is English;

6.1.13.7 The school is a modern information technology-based facility designed based on a prototype that incorporates the Department of Education's National Schools' Infrastructure Norms and Standards;

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- 6.1.13.8 A standard school consists of twenty-eight (28) classrooms, and Mayibuye Primary School's design is the same;
- 6.1.13.9 The initial plan was to build one mega school to accommodate all one thousand five hundred (1500) learners at the time, however, the school's enrolment numbers increased to two thousand (2000) learners. Having considered the above, GDE decided that it would not be sensible to build a school of this magnitude, as a result, they decided to construct a standard school of 28 classrooms;
- 6.1.13.10 The learner enrolment capacity of the new school building is one thousand one hundred and twenty (1120) and the current school's learner enrolment is two thousand and eleven (2011), meaning the new school will accommodate approximately half the number of learners of the old school (existing school);
- 6.1.13.11 Some learners would occupy the new school building while others would remain in the prefabricated containers until the construction of another new school;
- 6.1.13.12 The site was handed over to the Contractor on 12 May 2017 after the land ownership and encroachments by third parties' challenges were resolved;
- 6.1.13.13 The resolution of the above gave way to the commencement of construction-related activities and by the time construction commenced, GDE had concluded the ICT infrastructure requirement or specifications and notified GDID;
- 6.1.13.14 At the time the Contractor was appointed, a portion of the scope was not finalised and some of the encroachments were still on site;
- 6.1.13.15 The table below describes the implementation challenges and the proposed remedial action:

ITEM	CHALLENGES	REMEDIAL ACTION
1	<p><u>Physical</u></p> <ul style="list-style-type: none"> <li>• Poor workmanship regarding the work done on site.</li> <li>• Incomplete construction works affecting project completion and the issuance of a completion certificate.</li> </ul>	<p><u>Physical</u></p> <ul style="list-style-type: none"> <li>• A new PSP team and Contractor will be appointed to remedy the defective work and complete all outstanding construction works.</li> </ul>
2	<p><u>Contractual</u></p> <ul style="list-style-type: none"> <li>• A CE for additional work and extension of time was partially approved due to the Contractor's inability to provide the relevant supporting documentation, the CE also consisted of completed and outstanding works on-site.</li> </ul>	<p><u>Contractual</u></p> <ul style="list-style-type: none"> <li>• The GPT has since availed an amount of R23 041 000 in the 2021/22 financial year in favour of completing the project.</li> <li>• GDID and the Contractor reached a mutual agreement to terminate the contract.</li> <li>• The Contractor's lack of capacity to complete the remaining work has led to a mutual agreement to terminate the contract, as part of the termination process, the GDID will remunerate the Contractor for the outstanding payments for completed work.</li> <li>• GDID has decided to utilise the amount of R23 041 000 to settle the unpaid work and any other amounts due to the Contractor in line with the termination process.</li> </ul>
3	<p><u>Financial</u></p> <ul style="list-style-type: none"> <li>• Additional funding will be required to complete the project including the appointment of a new PSP and Contractor.</li> </ul>	<p><u>Financial</u></p> <ul style="list-style-type: none"> <li>• GDE will be required to source the necessary funding for the completion of the project once the extent of the outstanding works is established, most likely in the 2022/23 financial year.</li> </ul>

	<ul style="list-style-type: none"> <li>• Irregular expenditure was potentially incurred in terms of the Public Finance Management Act (PFMA).</li> </ul>	<ul style="list-style-type: none"> <li>• GDID has noted that its Risk Management unit has investigated the possibility of irregular expenditure in this entire process, as recommended by the GPT and has committed to sharing the outcome of this investigation with all the relevant parties.</li> <li>• GPT indicated that the onus remained on GDID as the implementing agent to complete and hand over a new functional school to GDE as promptly and efficiently as possible, and at the best value for money.</li> </ul>
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6.1.13.16 The request for approval of CE for additional works and extension of time exceeded the prescribed 20% threshold;

6.1.13.17 On 05 March 2019, GDE received a request for approval of a CE to the value of twenty-six million five hundred and eighty-three thousand seven hundred eleven rand and fifty cents (R26 583 711.50) inclusive of VAT from GDID;

(a) GDE rejected the request citing a lack of information and the incorrect application of cost inflation.

6.1.13.18 On 03 August 2020, GDID submitted another revised CE *via* email valued at thirty-seven million two hundred ninety-six thousand seven hundred twenty-five rand and seventeen cents (R37 296 725.17) VAT included, for GDE's consideration. Based on the information received from GDID, GDE determined that the acceptable value of the CE to be twenty-two million forty-five hundred thousand six hundred seventeen rand and ninety-nine cents (R22 045 617.99) including VAT;

- 6.1.13.19 GDE advised GDID that they could only support the approval of a CE of 19.99%, equivalent to seventeen million seven hundred fifty-five thousand seven hundred fifty-three rand and eighty-one cents (R17 755 753.81) of the original project value of R88 823 180.67 VAT included, as per the Treasury Regulations;
- 6.1.13.20 The approval of any additional funding beyond the value of R17 755 753.81 was left to the discretion of GPT;
- 6.1.13.21 On 16 November 2020, GDE received another revised CE submission from GDID dated 12 November 2020, valued at thirty-two million two hundred and thirty-two thousand four hundred forty-three rand and twenty-nine cents (R32 232 443.29) VAT included, and GDE reiterated that they would not approve any CE beyond 19.99%;
- 6.1.13.22 The construction process was halted in late 2018 while awaiting approval of the CE, which was under consideration for the additional works that did not form part of the original works;
- 6.1.13.23 The Contractor stopped working on the site due to uncertainties associated with the approval of the additional funding and the school is in disrepair due to poor workmanship and neglect;
- 6.1.13.24 GPT was willing to approve the CE in its current form at the value of twenty-three million forty-one-thousand-rand (R23 041 000) VAT included, in the interest of the project progressing and service delivery. GPT further indicated that they will approve the CE on condition that GDID will take full responsibility and accountability for any associated expenditure thereof;
- 6.1.13.25 GDE indicated that GDID may proceed with the outstanding project processes once GPT submits a written approval. GDID was expected to



finalise any outstanding contractual matters with the current Contractor and settle all amounts due to the Contractor;

6.1.13.26 A new PSP team would be appointed to assist with the planning and scoping of the remaining works, while a new Contractor would be responsible for the incomplete works;

6.1.13.27 The estimated timelines for the completion of the project remain unknown and will be determined once the new PSP team has completed the assessment of the outstanding works;

6.1.13.28 The estimated physical progress of the works can be summarised as follows:

STRUCTURE	Progress %	Comments
Block A- Administration	85%	Finishes in progress, ICT infrastructure outstanding, poor workmanship to be addressed.
Block B- Grade R	85%	Finishes complete, ICT infrastructure outstanding, poor workmanship to be addressed.
Block C- Foundation Grades	80%	Floors in progress, ICT infrastructure outstanding, poor workmanship to be addressed.
Block D &F- intermediate and Senior phase	80%	Floors in progress and poor workmanship to be addressed.
Block E- Lib/Laboratories	86%	Final Fixes, ICT infrastructure outstanding, poor workmanship to be addressed and ICT outstanding.
Block I-Sports Facilities	86%	Final Fixes, stormwater drainage, and cleaning out outstanding and poor workmanship to be addressed.

Block L- Multipurpose Hall	78%	Ceilings, floors, mechanical and electrical works in progress, and poor workmanship are to be addressed.
Block K-Refuse Yard and Generator Room	89%	Complete, generator purchased and being kept off-site.
Block J- Guard House	80%	Finishes, Electrical and ICT infrastructure outstanding.
External Works	87%	Additional sewerage, roads, and attenuation pond outstanding.

6.1.13.29 On 12 May 2021, a site visit was held between all the relevant stakeholders to resolve this matter.

*Status of the project*

6.1.14 On 19 June 2023, the Investigation Team sent an email to Mr Dipela requesting further information regarding the status of the project. He responded by email on 20 June 2023 and advised as follows:

6.1.14.1 There were contractual disputes between the Contractor and GDID, as a result, the contract was terminated on 30 August 2021;

6.1.14.2 In May 2022, GDID appointed a new PSP responsible for the planning and implementation of the completion of the project;

6.1.14.3 On 17 April 2023, GDID sent a tender document report to GDE for approval and a new Contractor would be appointed to finish the project once the procurement documents are approved by GDE; and

6.1.14.4 The PSPs are appointed using GDID's panel of professional service providers and they are new, independent, and unrelated to the Contractor.

*The version of the AGSA*

- 6.1.15 On 20 July 2023, a request for information letter was sent to Mr Cebekhulu regarding AGSA's findings in respect of Mayibuye Primary School project.
- 6.1.16 On 16 August 2023, Mr Cebekhulu advised that AGSA made adverse findings regarding the delays in completing the project, and not specifically in relation to the allegations of the construction of the school on a sewer line, or without conducting a wetland study.
- 6.1.17 AGSA's Consolidated General Report on national and provincial audit outcomes for 2017/18 stated as follows under the subheading Education:
- 6.1.17.1 There is a lack of improvement and progress on the 2016/17 findings concerning the planning, commissioning, and maintenance of infrastructure projects at Mayibuye Primary School (as well as Everest and Nokuthula Primary Schools);
- 6.1.17.2 Poor project management was the cause for the non-achievement of the planned targets at Mayibuye Primary School;
- 6.1.17.3 The accounting officers and senior management responsible for the projects were slow to implement corrective action to address internal control deficiencies in these key projects;
- 6.1.17.4 There must be accountability by senior management towards the implementation of sound project management principles by accounting officers, for purposes of ensuring that government funds are well spent. Furthermore, senior management should be held accountable to ensure that there is effective planning and monitoring of project plans;

- 6.1.17.5 There is a need to improve intergovernmental coordination and oversight by the political and administrative leadership to ensure that provincial and local government auditees take responsibility for the successful delivery of key projects, which will ultimately result in a better life for citizens; and
- 6.1.17.6 Accounting officers will need to supervise and manage the operational plans to ensure that senior managers are methodical in preventing breaches in the basic control environment.

*Documentary Evidence obtained from GDID*

- 6.1.18 **Request for Service (RFS)** dated 25 July 2014 containing the prototype drawings from the Chief Director: Infrastructure Management at GDE, Ms Pheladi Kadiaka (Ms Kadiaka), initiating the implementation of Mayibuye Primary School project.
- 6.1.19 **Project Execution Plan (PEP)** and RFS from GDE, advising GDID to undertake an investigation and a feasibility study on the implementation of the project (*i.e.* the construction of a primary school on site location Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand). The PEP stated that the school design was created from the prototype layouts issued by GDE and the site location is Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand.
- 6.1.20 The design of the school should minimise the disruption to the natural environment, flora, fauna and hydrology through careful design, construction, and site restoration. The PEP indicated that the minutes of the client review meeting held on 3 April 2014 stated that GDID must assume that the project is implementable as an ordinary GDID turnkey project and that the site will be ready and available.

- 6.1.21 According to the PEP, due to the nature of the contract, the specialised studies would be conducted by the Contractor with the professional team, namely:
- (a) Geo-technical report-soil tests should determine the site geology and foundation conditions for the proposed construction;
  - (b) The investigation should determine whether the flood line does not affect the property. The drainage design and the road system should prevent local flooding;
  - (c) An Environmental Impact Assessment (EIA) report is required to determine if the scope of works, and the site falls within the categories listed in the list of activities prescribed that require an EIA;
  - (d) The drainage system should protect the foundations of the building from groundwater;
  - (e) A Traffic Impact Study is required to determine the proposed scope of the work on vacant land and to offer recommendations concerning the reduction of traffic;
  - (f) The project must obtain statutory, utility, and local authority permissions. Preventative and periodic maintenance is required for some components, such as roof cladding, while *ad hoc* maintenance will be applied or effected when necessary. The client (GDE) must always be informed of any CE at the time of occurrence; and
  - (g) The PEP was approved on 4 August 2014, by Ms Kadiaka of GDE.

- 6.1.22 **Tender Notice Documents** dated 29 August 2014 titled “*Tender notice and Invitation to tender*” as it appeared on the Government Tender Bulletin. The tender bulletin called for requests for proposals (RFP) for the design engineering, procurement, construction, furnishing and delivery of Mayibuye Primary School. The tender number was RFP 24/08/2014, closing on 25 September 2014.
- 6.1.23 **The availability of the land** was addressed in an email dated 11 February 2015, wherein Mr Neo Moatshe of the Land and Property Management at GDE, conveyed to the Construction Project Manager at GDID, Mr Richard Tshabalala, that the site was owned by CoJ and that there was no PTO for the land at the time. The letter dated 08 February 2016, signed by the Director of Education Infrastructure, Ms Nombuso Nzuzza (Ms Nzuzza), at GDID, affirmed that construction work could not commence as there was no PTO.
- 6.1.24 **The appointment letter of the Contractor** dated 22 August 2015 signed by the then HoD, Mr Netshiswinzhe, addressed to Basic Blue/Nebavest JV, indicates that the Contractor was appointed on 22 August 2015 and not 22 May 2015, as referred to in the response by Ms Motara.
- 6.1.25 **Change of scope:** The memorandum dated 26 August 2015 from Ms Kadiaka to Mr Selepe, discusses the smart school prototypes, the implementation of design changes and specifications and stated that:
- 6.1.25.1 GDE was requesting GDID to implement the additional design changes and specifications. The design changes were discussed as far back as 07 May 2015; and
- 6.1.25.2 The specifications included architectural, electrical, mechanical, and structural design changes.

6.1.26 **Permission to Occupy:** On 22 September 2016, CoJ granted GDE a PTO and this was communicated *via* a letter from the Senior Manager of Acquisitions, Ms Sizeka Tshabalala, titled "*The request to acquire Erf 2326 Commercia for the development of Mayibuye Primary School by the Gauteng Department of Education*". According to the letter, GDE submitted a building plan to CoJ and same was approved. The letter further granted GDE the authority to take immediate occupation of the property for the development of the school. The letter further indicated that the permission to occupy and build agreement was concluded and signed on 15 August 2019, between GDE and JPC.

*CEs obtained GDID*

6.1.27 **CE number 3:** In terms of the submission dated 25 June 2018 from Mr Dipela addressed to Mr Netshiswinzhe, with the subject heading "*Mayibuye Primary School: extension of time: compensation event number 3*", it is indicated that:

6.1.27.1 The purpose of the submission was to request Mr Netshiswinzhe to approve the time related CE for the design, engineering, procurement, construction, furnishing and delivery of the New Mayibuye Primary School that resulted due to unforeseen circumstances;

6.1.27.2 In terms of the background, the contract start date and date of site access was 12 May 2017;

6.1.27.3 The contract period was 52 weeks, the original completion date was 11 June 2018 and the revised completion dated was 30 November 2018;

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- 6.1.27.4 According to the motivation, Basic Blue/Nebavest JV were handed over the site for the design, engineering, procurement, construction, furnishing and delivery of the New Mayibuye Primary School on 12 May 2017;
- 6.1.27.5 The following unforeseen circumstances were experienced during the implementation of the project:
- (a) On 20 April 2018, it was noticed that the Contractor failed to apply for bulk services connections because authorities wanted a Power of Attorney for the applications to be considered. A request was put to GDE for this document, and it was only received on 4 June 2018;
  - (b) A wayleave (or right of way) could not be obtained from the Council because there was no Power of Attorney. There was an issue regarding the waterlogged conditions of the eastern parts of the construction site. The solution agreed to was to re-route the existing sewer line as this was the major cause of the problem due to blockages and seepage. However, the work had not commenced because the wayleave had not been obtained;
  - (c) Encroachment: the work on the main entrance to the school could not commence because of encroachments. The resolution to relocate the main entrance was made during the risk assessment meeting and the proposed circle and drop off zone would increase the construction period by four (04) weeks; and
  - (d) The CE regarding the above changes and inclusion of the ICT components were still being assessed.
- 6.1.27.6 In terms of time implications, the project was delayed by approximately sixty (60) working days. An extra forty (40) days was allocated to consider processes that are taken by the Council to approve and install electrical



transformers as well as approval of bulk service connections. The project needed to be extended from 11 June 2018 to 30 November 2018;

6.1.27.7 Under financial implications, it was indicated that the cause of the events that warrant the extension of time are beyond both the Contractor's and GDID's control. In that regard, the Contractor is entitled to extension of time only, with no cost implications. This was communicated to the Contractor on 13 June 2018; and

6.1.27.8 Mr Netshiswinzhe approved the above-mentioned CE on 5 July 2018.

*Compensation Event Number 4*

6.1.28 In terms of the submission dated 28 August 2018 from Mr Dipela addressed to Mr Netshiswinzhe, with the subject heading "*Mayibuye Primary School: cost-related: compensation event number 4*". It is indicated that:

6.1.28.1 The purpose of the submission was to request Mr Netshiswinzhe to approve the incorporation of the Contract Price Adjustment Provisions (CPAP) on the contract of Mayibuye Primary School;

6.1.28.2 In terms of the submission, the value of the CE was eleven million eight hundred and forty-eight thousand nine hundred seventy rand and sixteen cents (R11 848 970.16) including VAT and the percentage value was 13.3%;

6.1.28.3 The reason for the CE was site unavailability and lack of PTO from CoJ authorising GDE to occupy the land and commence with construction work;

6.1.28.4 The delays from 22 May 2015 to 12 May 2017 contributed to conditions beyond the Contractor's control, as a result, GDID applied for the incorporation of a CPAP on the original contract of R88 823 180.67;

- 6.1.28.5 The total value of the CPAP to be incorporated is R11 848 970.16 VAT included, constituting 13.3% of R88 823 180.67.
- 6.1.28.6 The revised contract value would be one hundred million two hundred and fifty-six thousand five hundred rand and seventy-one cents (R100 256 500.71) after incorporating the CPAP; and
- 6.1.28.7 Mr Netshiswinzhe to approve the incorporation of the CPAP valued at R11 848 970.16 to the contract awarded and to revise the contract value from R88 823 180.67 to one hundred million six hundred and seventy-two thousand one hundred fifty rand and eighty-three cents (R100 672 150.83) VAT inclusive. On 09 November 2018, Mr Netshiswinzhe approved the above-mentioned request.

*Compensation Event Number 5*

- 6.1.29 In an undated submission from Mr Dipela addressed to the BAC, with the subject heading "*Mayibuye Primary School: Approval to implement compensation event above Treasury threshold of 20% and/or 20 million*", it is indicated that:
- 6.1.29.1 The purpose of the submission was to request the HoD to support the following:
- (a) implementation of the compensation event above Treasury threshold of 20% limit or R20 000 000;
  - (b) implementation of the works amounting to thirty-one million seven hundred thirty-four nine hundred ninety-one rand and thirty-five cents (R31 734 991,35) which translates to 35,73% above the original contract amount of R88 823 180,67 subject to Treasury approval;

- (c) Support the revision of the contract amount from one hundred and six million one thousand five hundred and forty-one rand and sixty-seven cents (R106 001 541.67) to one hundred and thirty-seven million eight hundred and forty nine thousand four hundred forty two rand and eighty nine cents (R137 849 442,89);
- (d) Project Information is captured in the table below:

Contractor	Basic Blue/Nebavest
Date of site access	12 May 2017
Contract period	52 weeks
Contract end date	11 May 2018
Approved Revised Contract End Date	30 November 2018
Anticipated Contract End Date	To be revised when the Contractor goes back to site
Original Contract amount	R88 823 180.67
Revised contract amount	R100 672 150.63
CE 1 (EOT)	No cost
CE 2 (CPAP)	R11 849 970.16 (13.3%)
CE 3 (EOT)	No cost
Submitted CE 4	R5 329 390.84 (6.6%)
Estimated Revised Contract Amount	R106 001 541,67 (35,86%)

6.1.29.2 The submission further indicated that the Contractor for the design, engineering, procurement, construction, furnishing and delivery of the new Mayibuye Primary School was appointed on 22 May 2015. The site could not be handed over to the Contractor because the land belonged to CoJ

and there was no agreement or permission issued by CoJ to GDE permitting the construction of the school. CoJ provided the PTO on 22 September 2016;

6.1.29.3 There was an escalation in the contract amount and the calculations indicated that the escalation amounted to ten million three hundred and three thousand four hundred fifty-two rands and thirty one cents (R10 303 452,31) (excluding VAT). The cost implications on the contract because of the escalation would be R11 848 970.16 VAT included.

6.1.29.4 Under the heading design changes and scope increase, it was indicated that:

(a) During the project, GDE revised the scope of the project to incorporate the smart school's requirements and these needs were directed to the Contractor.

(b) The following are the changes that emanated from the revised scope which resulted in the CE:

- (i) Install blinds on windows;
- (ii) Mechanical ventilation;
- (iii) IT related works;
- (iv) Change of electrical works;
- (v) Anti-vandalism mesh in ceilings to all buildings;
- (vi) Gas installation central manifold;
- (vii) Change to smart school furniture;
- (viii) Retaining walls for safety;
- (ix) Widening of the road and construction of traffic circle;
- (x) Diversion of the sewer line; and
- (xi) Standing time.

(c) The GDID’s professional team was requested to determine the costing of the above-mentioned additional works. The estimate for all items was twenty-seven million five hundred one thousand three hundred thirteen rand and forty cents (R27 501 313.40) including VAT, and five million three hundred twenty-nine thousand three hundred ninety rand and eighty four cents (R5 329 390.84) of the R27 501 313.40 was approved by Mr Richard Makhumisani (Mr Makhumisani) on an unspecified date.

6.1.29.5 Extension of Time (EOT): The contract would be extended from 30 November 2018 to the time of completion due to changes in scope, additional to scope and delays of approval by GDE. The time of completion will depend on the approvals of the CE. However, it was negotiated between GDID and GDE that the Contractor will only claim time with cost implications from 30 November 2018 to 25 March 2020. The EOT was valued at ten million fifty thousand five hundred nineteen rand and seventy-three cents (R10 050 519,73) VAT included.

6.1.29.6 Financial implications: The total variance on the project amounted to forty-nine million four hundred ten thousand eight hundred four rand and twenty-nine cents (R49 410 804.29) including VAT. GDE approved seventeen million six hundred seventy-five eight hundred twelve rand and ninety-five (R17 675 812,95) including VAT, which is 19,9% of the original contract amount. An additional amount of thirty-one million eight hundred forty-seven nine hundred one rand and twenty cents (R31 847 901,22) which constitutes 35,86% of the contract amount is required to complete the school, and GDE must apply for Treasury approval. The required additional amount is made up of the following:

Item	Amount Excluding VAT	Amount Including VAT
CPAP	R10 303 452,32	R11 848 970,16

Design Changes and Scope Increase	R18 945 549,12	R21 787 381,49
Design Changes and Scope Increase	R4 634 252,04	R5 329 390,84
Extension of Time	R8 748 278,03	R10 060 519,73
Less approved CEs	-R 15 370 272,13	-R17 675 812,95
Total	R 27 595 644,65	R31 847 901,22

6.1.29.7 The required additional amount of R31 734 991,35 VAT included, translates to 35,86% above the original contract amount of R88 823 180,67, VAT included. It is therefore recommended that Treasury approves the implementation of the CE amounting to R31 734 991,35 to enable the issuance of occupation certificate by CoJ.

6.1.29.8 Mr Makhumisani recommended the following, subject to Treasury's approval on 13 September 2020:

- (a) implementation of the CE above Treasury threshold of 20% limit or R20 000 000;
- (b) implementation of the works amounting to R31 734 991,35 which translates into 35,73% above the original contract amount of R88 823 180,67 subject to Treasury approval;
- (c) The revising of the contract amount from R106 001 541.67 to R137 849 442,89.

*Documentary Evidence obtained from GDID*

- 6.1.30 A copy of the Excel sheet **summary of the CEs** and their cost implication as shown below:

Mayibuye PS Project						
CE No	Initial contract value	CE amount	Revised contract value	% Variation	% Cumulative variation	HoD
1	88 823 180,67	-	88 823 180,67	0%	0%	B Netshiswinzhe
2	88 823 180,67	-	88 823 180,67	0%	0%	B Netshiswinzhe
3	88 823 180,67	0	88 823 180,67	0%	0%	B Netshiswinzhe
4	88 823 180,67	11 848 970,16	100 672 150,83	13,3%	13,3%	B Netshiswinzhe
5	88 823 180,67	37 177 292,06	137 849 442,89	41,86%	55,2%	R Makhumisani
		49 026 262,22				

*Documentary Evidence obtained from GPT*

- 6.1.31 The then HoD at GPT, Ms Nomfundo Tshabalala (Ms Tshabalala), addressed a letter to the Acting HoD at GDID, Mr Makhumisani, dated 13 October 2020. In this letter, GPT rejected the request to approve the CEs, and informed GDID of the reasons for the rejection and advised them what is required to have their submission reconsidered.

*Letter from Ms Tshabalala of GPT addressed to Mr Makhumisani of GDID, dated 04 December 2020*

- 6.1.32 On 04 December 2020, GPT addressed a letter to GDID responding to their submission and expressed the following:
- 6.1.32.1 GDID received a request for scope and design changes from GDE in August 2015;

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- 6.1.32.2 The additional cost identified for scope and design changes, retaining walls, and road improvements identified, amounted to twenty-seven million five hundred and one thousand, three hundred fourteen rand and forty cents (R27 501 314.40) including VAT, was submitted to GDE in January 2019;
- 6.1.32.3 The additional cost for standing time from December 2018 to March 2020, amounted to ten million sixty thousand five hundred nineteen rand and seventy-three cents (R10 060 519,73); and
- 6.1.32.4 The above will increase the total contract amount from R88 823 180.67 to one hundred and thirty-eight million two hundred thirty-three thousand nine eighty-four rand and ninety-six cents (R138 233 984.96), constituting 56.6% of the original contract amount;
- 6.1.32.5 GPT reviewed the submission of additional information by GDID and communicated the following concerns:
- (a) The GDID in its request for approval of a variation by the Accounting Officer (AO), dated 15 September 2020, identified the total CE amount as thirty-seven million five hundred sixty-one thousand eight hundred thirty-four rand and thirteen cents (R37 561 834.13). However, GDID requested the AO to approve a sum of five million eight hundred and twenty-six thousand eight hundred forty-two rand and seventy-nine cents (R5 826 842.79) (6.6%) which would be within the 20% prescribed threshold value;
  - (b) GPT was requested to approve the CE valued at R31 734 991,35 including VAT;
  - (c) GDID was aware that the required total CE amount would exceed the prescribed value of 20% but requested the AO to approve part of the



amount to remain within the prescribed value instead of requesting approval from GPT for the total CE amount;

- (d) GPT concluded that GDID intentionally split the CE percentage which exceeded 20%, as a single transaction and partially implemented the CE without obtaining prior approval from GPT for the full amount;
- (e) GPT referred GDID to paragraph 6.1 of the GPT guidelines for deviation and indicated that the circumstances under which a deviation may not be considered are specified in the said paragraph, such as instances where “*a CE for a single transaction exceeds the prescribed threshold and AO/AA approves the CE within his/her authority (15% or 20%) and request GPT’s prior approval for the remainder*”;
- (f) GDE communicated the scope changes to GDID in the letter dated 26 August 2015, however, the request was only processed in January 2019. The above constitutes poor contract management by GDID;
- (g) Whilst the AO had granted approval for CE4 amounting to R5 826 842, 79 on 15 September 2020, it was noticed that most of the items in this CE have already been completed on-site, and therefore this should be treated as *ex post facto*;
- (h) The CE was implemented without obtaining approval from the delegated authority, which may result in irregular expenditure;
- (i) The approval of CPAP CE that emanated from a two (02) year delay in handing over the site and the discovery of the encroaching properties on-site was implemented in November 2018, eighteen (18) months later, even though the site was handed over in May 2017. The

above reflected poor contract management by GDID, and the AO approved the CE based on the above-mentioned reasons;

- (j) The above was avoidable had GDID not awarded a tender without satisfying itself that the land to build the school was available, since GDID was aware three (03) months before the appointment of the Contractor that there was no site available for the construction of Mayibuye Primary School;
- (k) Regarding the claim for standing time from December 2018 to March 2020, GPT could not consider the request as it is not regarded as a contract CE, since provision ought to have been made for such in the contract. Furthermore, the request does not meet the requirement of *prior approval* in terms of NT SCM Instruction Note 03 of 2016/17 as the event has already happened;
- (l) Paragraph 5.3 of the GPT guideline for deviation indicates that "*GPT will only consider the request for approval in **exceptional circumstances**,<sup>13</sup> this excludes requests for payment of scope **already**<sup>14</sup> rendered and extension of time after contract expiry date;*"
- (m) GDID did not address the discrepancies in the CEs in their submission, and there is a significant gap between the costs for the CEs verified and approved by GDE and the much higher costs indicated by GDID. Despite the above, GDID stated that "*both GDID and GDE agree to the amounts*" and that was incorrect as it brought into question the implementing agent's assessment of the CEs. It is unclear why GDID has not acknowledged and/ or addressed the gap

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13 Own emphasis.

14 Own emphasis.

instead of asserting that both they and GDE agreed on the calculation of the costs and financial impact of the CE; and

6.1.32.6 GPT further noted the following omissions in the submission of the GDID:

- (a) The CEs do not include any line items for works identified as civil work, the retaining walls for safety, and road improvements in the summary tables of the CEs or the breakdown of the CE costs submitted;
- (b) GPT was concerned about the potential future CEs that may arise from the retaining walls, and road improvements, which must still be addressed by GDID; and
- (c) A generator room was constructed on site but was not in the original contract and it is not in the summary tables of CEs or the breakdown of CE costs.

6.1.32.7 Based on the above, GPT was unable to consider the request for approval of CE, as the request is not in line with NT SCM Instruction Note 03 of 2016/17. In addition, GDID partially implemented some of the items for the required CE without obtaining prior approval from GPT. Furthermore, the AO is the relevant authority to approve the extension of time as it is included in the contract, and relevant allowance should have been made in the contract;

6.1.32.8 The AO of GDID was advised to investigate possible irregular expenditure emanating from the CEs on this project and to implement the relevant processes in terms of the irregular expenditure framework.

*Documentary Evidence obtained from GDID*

*Memorandum regarding different project costs of both GDE and GDID*

6.1.33 The internal memorandum dated 02 December 2020, compiled by Mr Hudson Baloyi (Mr Baloyi), Chief Director of Physical Resource Planning and Property Management of GDE addressed to Mr Mosuwe, highlights that:

6.1.33.1 The original contract amount was R88 823 180.67 VAT included, and based on GDE's assessment; the original allocation will increase the value by 38.16% because of the cumulative value of all the CEs under the contract;

6.1.33.2 The CE no. 2 constitutes 24.82% of this cumulative amount, however, GDE has opted to approve only 19.99% of the control budget revising the contract amount to R106 587 816.80, including VAT. The memorandum further stated that considering the above, GDID will have to make a further application to GPT for approval of the remaining amounts which would likely exceed the 20% threshold;

6.1.33.3 The table below illustrates the different amounts:

Description	Amount	% of the original contract sum	Amount	% of the original contract sum
Original contract sum	R88 823 180.67	N/A	R 88 823 180.67	N/A
Add: CE No:1 CPAP (escalation)	R 11 848 970.16	13.34%	R 11 848 970.16	13.34%
Add CE No:2	R37 296 725.17	41.99%	R22 045 617.99	24.82%

Additional work and extension of time				
Revised contract value	R137 968 876.00	155.33%	R122 717 768.62	138.16%

*GDID’s internal investigation report into irregular expenditure dated 28 April 2022.*

6.1.34 The Risk Management Unit within GDID investigated irregular expenditure to determine whether correct procedures were followed by GDID’s officials during the approval of the CEs incurred in Mayibuye Primary School project in line with NT SCM Instruction Note 03 of 2016/17.

6.1.35 The GDID investigation under the signature of the Acting Director: Risk Management, Mr Ntsizi, recommended *inter alia* the following:

- (a) *"On 07 May 2015, GDE changed the scope of the project after the contractor was already awarded the contract on 22 August 2015, and this resulted in compensation events that had cost and time implications and GDE changed the scope of the project on 26 August 2015"* (sic);
- (b) The PTO was obtained from CoJ on 22 September 2016, hence there was a delay in handing over the site to the Contractor and to commence with construction work as the land belonged to CoJ;
- (c) The site availability issues were resolved in May 2017 and on 12 May 2017, the site was finally handed over to the Contractor;

- (d) The geotechnical investigation was conducted before the tender submission;
- (e) The notification of the first CE for an extension of time was issued to the then internal Project Manager, Mr Sithole, on 25 June 2017 by the Contractor;
- (f) Mr Sithole submitted the CE to the AO for approval on 16 January 2018, which was approximately six (06) months later. No explanation was obtained from him why the CE was not submitted immediately as he is no longer with the GDID;
- (g) The Contractor issued another separate notification to Mr Sithole on 20 September 2017, for CE3 and as stated above, he is no longer with GDID;
- (h) Mr Dipela submitted CE3 to the AO nine (09) months later, on 27 June 2018, and he could not explain why he did not submit the CE3 to the AO immediately for approval;
- (i) Mr Dipela submitted the CE4 to the AO nine (09) months later on 30 August 2018, and he could not explain why he did not submit it to the AO immediately for approval;
- (j) The delays in handing over the site to the Contractor resulted in CE4 for CPAP valued at R11 848 970.16 being incorporated into the contract, which resulted in a 13.33% increase in the value of the original contract value;
- (k) The incorporation and inclusion of the CPAP revised the contract value from R88 823 180.67 to R100 672 150.83;

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- (l) The standing time from December 2018 to March 2020 resulted in additional charges by the Contractor valued at ten million sixty thousand five hundred and nineteen rand seventy-three cents (R10 060 519.73) including VAT;
  - (m) During the implementation of the contract, GDE issued an instruction to convert the school to a smart school, which resulted in several changes, such as additional civil works design and construction, roadwork, and traffic measures for an estimated amount of R27 501 314.40 including VAT;
  - (n) The following items were completed on-site by the Contractor as an *ex post facto*, such as fencing, landscaping, and paving, re-routing of sewer pipes, blinds, and professional fees to an estimated amount of R5 826 842.79 including VAT;
  - (o) On 10 September 2020, Mr Dipela submitted a request to the BAC seeking approval of the CE of 6.6% for an amount of five million three hundred and twenty-nine thousand three hundred and ninety rand eighty-four cents (R5 329 390.84) including VAT;
  - (p) The above-mentioned request was approved by Mr Makhumisani on 15 September 2020, and it revised the contract amount from R100 672 150.83 to R106 001 541.67 VAT included, bringing the total value of the approved CE to 19.9% of the contract amount;
  - (q) The above-mentioned submission was only sent to GDE in January 2019;
  - (r) On 27 August 2020, Mr Mosuwe approved the request for seventeen million six hundred and seventy-five thousand eight hundred- and

thirteen-rand (R17 675 813.00) VAT included, varying the contract by 19.9% and bringing the revised contract value to R106 587 816.80;

- (s) The CE5 request for additional works and standing time for an estimated amount of R32 232 443.29 required Treasury's approval as it was above the threshold of 20% and R20 000 000 of the original contract amount;
- (t) GDID submitted a request for approval of CE5 to the then HoD of GPT, Ms Tshabalala, on 22 September 2020, and Ms Tshabalala responded on 04 December 2022. She advised GDID that they cannot consider CE orders that have already been implemented even though not yet paid as such requests do not comply with NT SCM Instruction Note 03 of 2016/17 and such requests should not be submitted to GPT for consideration;
- (u) In February 2021, GPT approved R23 000 000 towards the completion of the project, instead of the requested amount of thirty-two million two hundred and thirty-two thousand four hundred and forty-three and twenty-nine cents (R 32 232 443.29);
- (v) The R23 000 000 has not been utilised yet, as it was awaiting approval by the HoD; and
- (w) GPT has confirmed a budget of thirty million rand (R30 000 000) for the 22/23 financial year towards the completion of the project.

6.1.36 The report concluded that:

6.1.36.1 GDID failed to properly plan for this project as they should have ensured that permission to occupy the land was granted to GDE by CoJ before awarding the tender to Basic Blue/Nebavest JV;



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- 6.1.36.2 On 22 August 2015, Mr Netshiswinzhe, appointed Basic Blue/Nebavest as the turnkey Contractor as per the signed appointment letter. The Contractor was unable to commence construction work for a period of a year and nine (09) months after being appointed;
- 6.1.36.3 GDID did not appoint their own Professional Services Provider (PSP), and this has resulted in poor planning for this project;
- 6.1.36.4 CEs 1 to 4 were implemented within the prescribed threshold of 20% or twenty million rand (R20 000 000) including VAT for construction-related goods, works and /or services as per National Treasury Practice Note number 3 of 2016/17;
- 6.1.36.5 Messrs Sithole and Dipela failed to ensure the timeous submission of CEs (1-4) to the HoD for approval and they also failed to properly manage the project to prevent unnecessary delays in service delivery;
- 6.1.36.6 GDID failed to follow the correct protocol when they implemented some items of CE5 before obtaining relevant approval from GDE and GPT at the time. Furthermore, CE5 was submitted late to GPT, and this resulted in the Contractor claiming for standing time from December 2018 to March 2020, at an estimated amount of R10 060 519.73 including VAT; and
- 6.1.36.7 Mr Selepe failed to properly manage the project to ensure that it was completed on time as per section 38(1)(a)(iv) of the PFMA, which requires the Accounting Officer for a department, trading entity or constitutional institution to ensure that it maintains a system for properly evaluating all major capital projects before the final decision on the project.
- 6.1.37 The report recommended that:

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- 6.1.37.1 GDID should not use the turnkey contracting methods and must appoint their PSPs to avoid poor planning of projects and the Department could save on costs;
- 6.1.37.2 Mr Selepe must be disciplined for failing to manage the project properly and ensuring that the project is completed on time;
- 6.1.37.3 The submission sent by the BAC to the HoD recommending the settling of final accounts be approved by the HoD;
- 6.1.37.4 The HoD approves the submission to appoint PSPs;
- 6.1.37.5 The outstanding payment to an estimated amount of twenty seven million rand (R27 000 000) must be made to Basic Blue/Nebavest for services rendered at Mayibuye Primary School and, from the R27 000 000, only R4 000 000 will result in irregular expenditure since Treasury approved R23 000 000 as prescribed by the NT SCM Instruction Note 03 of 2016/17, clause 9.2 which states that any deviation above the prescribed thresholds will only be allowed in exceptional cases subject to prior written approval from the relevant treasury; and
- 6.1.37.6 Upon processing of the above-mentioned payment to the Contractor, the HoD is to write to the GPT requesting a condonation of this irregular expenditure of R4 000 000 as per the provision given in the guidelines of irregular expenditure.

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*Additional Documentary Evidence obtained from GDID*

- 6.1.38 **Summons dated 30 March 2022:** Basic Blue/Nebavest issued summons<sup>15</sup> against GDID for outstanding payments in respect of services rendered towards the construction of Mayibuye Primary School.

*Interview with Mr Dipela*

- 6.1.39 During an interview between the Investigation Team and Mr Dipela, on 12 September 2022, he advised as follows:
- 6.1.39.1 He participated in the project when it was 80% complete and according to him, the project halted because of the exhaustion of funds, not because of the wetland;
- 6.1.39.2 The tender for the construction of the school was advertised in 2014 and awarded in 2015. At the time of awarding of the contract, there was no land available and as a result, the Contractor could not commence construction from 2015 to 2016;
- 6.1.39.3 After the resolution of the land issue in May 2017, the Contractor commenced construction. After the awarding of the tender, GDE changed the scope, which led to an increase in the cost of the contract;
- 6.1.39.4 The scope changes created a different tender from the one advertised in 2014 as the new design introduced ICT infrastructure, the use of a clear view fence instead of palisades, and the furnishings and the doors changed. They had to build a server room and install acoustic ceilings;

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As per Gauteng Division Johannesburg Court Case Number 22/12709.

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- 6.1.39.5 The turnkey process requires the appointed Contractor to design and build, unlike a traditional process whereby the GDID or GDE would have a detailed design;
- 6.1.39.6 With a turnkey process, the Contractor brings its own PSP and the PTO had to be obtained before the commencement of construction;
- 6.1.39.7 Turnkey is not suitable for government and is best suited for the private sector;
- 6.1.39.8 Considering the challenges experienced, such as the unavailability of land, GDID should have considered terminating the contract;
- 6.1.39.9 The role of the Project Manager is to coordinate activities and ensure timeous execution. Everyone must perform due diligence within their scope of work;
- 6.1.39.10 Most contracts have a CPAP provision, but in this case, it was omitted hence, the CPAP was treated as a CE which was not supposed to have occurred;
- 6.1.39.11 All the CEs approved were within the prescribed threshold;
- 6.1.39.12 The allegations of poor workmanship are disputed by GDID;
- 6.1.39.13 In 2019, the Contractor required only seven million rand (R 7 000 000) to complete the project, but because of the unavailability of funds, the project is incomplete; and
- 6.1.39.14 The lack of maintenance has resulted in the infrastructure deteriorating.

*Interview with Mr Netshiswinzhe*

- 6.1.40 During the interview held by the Investigation Team on 20 September 2022 with Mr Netshiswinzhe, he advised as follows:
- 6.1.40.1 As of December 2019, he was no longer the HoD of GDID and in January 2020, an acting HoD was appointed. When he joined GDID in 2013, there was a backlog in the provision of schools;
- 6.1.40.2 Considering the challenges with the backlog, the GDID introduced a turnkey approach to fast-track delivery of schools. The turnkey process followed an open tender process;
- 6.1.40.3 GDE identified the need for a school and presented it to GDID. GDE also identified the site for the construction of Mayibuye Primary School;
- 6.1.40.4 GDID adopted the turnkey approach due to a lack of capacity within GDID to build and deliver schools on time;
- 6.1.40.5 There was a delay by GDE to obtain the PTO from the CoJ to facilitate access to the site;
- 6.1.40.6 The school was a construction project approved by the DDG of GDID, Mr Selepe and the DDG is responsible for monitoring the execution of the project; and
- 6.1.40.7 The CPAP should have been incorporated into the contract, but in this case, it was not. There was an issue of land encroachment by the community onto the school site, which led to a delay in obtaining access to the site, the GDID had to do a variation of the contract amount.

*Applicable Law*

**The Constitution of the Republic of South Africa, 1996**

6.1.39 Section 195(1) of the Constitution provides, *inter alia*, that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) *A high standard of professional ethics must be promoted and maintained;*
- (b) *Efficient, economic, and effective use of resources must be promoted...*

6.1.40 Section 217 of the Constitution provides amongst other things that when an organ of state contracts for goods and services, it must do so in a manner that it cost efficient, transparent, in a competitive manner.

6.1.41 Section 41(1) of the Constitution states that:

*“All spheres of government and all organs of state within each sphere must—*

*...;*

*(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, or institutional integrity of government in another sphere; and*

*(h) co-operate with one another in mutual trust and good faith by—*

*(i) fostering friendly relations;*

*(ii) assisting and supporting one another;*

*(iii) informing one another of, and consulting one another on, matters of common interest;*

*(iv) coordinating their actions and legislation with one another;*

*(v) ...;*

## Public Finance Management Act, 1999 (PFMA)

6.1.42 Section 1 of the PFMA states that:

**“Unauthorised Expenditure”** means overspending of a vote or a main division within a vote and expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division.

**“Fruitless and Wasteful Expenditure”** means expenditure which was made in vain and would have been avoided had reasonable care been exercised.

**“Irregular Expenditure”** means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

6.1.43 Guideline on Fruitless and Wasteful Expenditure<sup>16</sup>

*“The words in vain as contained in the definition of fruitless and wasteful refers to a transaction, event or condition which was undertaken without value or substance, and which did not yield any desired results or outcome. Reasonable care means applying due diligence (careful application, attentiveness, caution) to ensure that the probability of a transaction, event or condition not being achieved as planned is being managed to an acceptable level.”*

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<sup>16</sup>

Office of the Accountant-General dated May 2014.

6.1.44 Section 38(1)(c)(iii) of PFMA states that:

*“(1) The accounting officer for a department, trading entity or constitutional institution must*

*(a) ...;*

*(b) ...;*

*(c) take effective and appropriate steps to*

*(i) ...;*

*(ii) prevent unauthorised, irregular, and fruitless and wasteful expenditure and losses;*

*(iii) manage available working capital efficiently and economically.”*

6.1.45 Section 38(1)(a)(iv) states that:

*“(1) The accounting officer for a department, trading entity or constitutional institution—*

*(a) must ensure that that department, trading entity or constitutional institution has and maintains a system for properly evaluating all major capital projects prior to a final decision on the project.”*

6.1.46 Section 38(1)(g) of PFMA states that:

*“The accounting officer for a department, trading entity or constitutional institution on the discovery of any unauthorised, irregular, or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury, and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board”.*



6.1.47 Section 38(1)(h)(i), (ii) and (iii) of PFMA states that:

*“The accounting officer for a department, trading entity or constitutional institution must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—*

- (i) contravenes or fails to comply with a provision of this Act;*
- (ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or*
- (iii) makes or permits an unauthorised expenditure, irregular expenditure, or fruitless and wasteful expenditure.”*

6.1.48 Section 45 of the PFMA stipulates amongst other things that an official in a department-

- (a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;
- (b) is responsible for the effective, efficient, economical, and transparent use of financial and other resources within that official’s area of responsibility;
- (c) must take effective and appropriate steps to prevent, within that official’s area of responsibility, any unauthorised expenditure, irregular expenditure, and fruitless and wasteful expenditure and any under collection of revenue due.

6.1.49 Section 18(1)(b) and (2) (g) of PFMA states that:

*“(1) A provincial treasury must—*

*(a) ...;*

*(b) exercise control over the implementation of the provincial budget;*

*(c) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities;*

*(d) ...;*

*(2) A provincial treasury —*

*(a) ...;*

*(b) ...;*

*(c) ...;*

*(d) ...;*

*(e) ...;*

*(f) may investigate any system of financial management and internal control applied by a provincial department or a provincial public entity;*

*(g) intervene by taking appropriate steps, which may include the withholding of funds, to address a serious or persistent material breach of this Act by a provincial department or a provincial public entity...;*

6.1.50 Section 43(4)(c) of the PFMA does not authorise the utilisation of a saving in an amount appropriated for capital expenditure in order to defray current expenditure.

### **National Treasury Instruction SCM Note 3 of 2016/2017**

6.1.51 Clause 9.1 of the National Treasury Instruction SCM Note 3 of 2016/17 states that:

*“Accounting Officers must ensure that contracts are not varied by more than 20% or R20 million (including VAT) for construction-related goods, works and/or services and 15% of R15 million (including VAT) for all other goods and/or services of the original contract value.”*

6.1.52 Clause 9.2 of the National Treasury Instruction SCM Note states that:

*“any deviation in excess of the prescribed thresholds will only be allowed in exceptional cases subject to prior written approval from the relevant treasury.”*

#### **National Building Regulations and Building Standards Act, 1977**

6.1.53 Section 4(1) of the National Building Regulations and Building Standards Act, 1977 (as amended) states that:

*“No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.”*

6.1.54 Section 14(1)(a) of the National Building Regulations and Building Standards Act, 1977 (as amended) states that:

*“(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building-*

*(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7, and if certificates issued in terms of the provisions of subsection (2)*

*and where applicable, subsection (2A), in respect of such building have been submitted to it;”*

**CPAP Indices Application Manual, 1 January 2018**

- 6.1.55 Paragraph 2.1 of the CPAP Indices Application Manual for use with indices published by Statistics South Africa (CPAP Indices Application Manual) states that:

*“The CPAP provides for reimbursement of price fluctuations on an average basis with the proportions and indices applied being indicative of average price movements. Such fluctuations in costs shall be for the contractor’s account subject to the contract value being adjusted by the sum of the amounts calculated in respect of each payment certificate according to the conditions described hereunder:*

*2.2 The CPAP provides for the adjustment of contracts in respect of:*

*2.2.1 General building work;*

*2.2.2 Subcontract work; and*

*2.2.3 Direct contractor’s work.”*

**Responses to the Notice issued in terms of section 7(9) of the Public Protector Act**

*Mr Dipela’s response*

- 6.1.56 Mr Dipela responded to the Notice on 17 May 2024, and stated that he is no longer with GDID as of October 2023 and that the Investigation Team should direct any matters regarding this project to the current project manager.

*Mr Sithole's response*

- 6.1.57 Mr Sithole responded to the Notice on 18 May 2024, and stated that he was not involved in the procurement or supply chain management processes of this project, as such he cannot comment on the issues.

*Mr Selepe's response*

- 6.1.57.1 Mr Selepe responded to the Notice on 20 May 2023, and rejected the findings of the GDID's internal investigation stating that they are without merit. As a result, he requested the Public Protector not to make an adverse finding against him in the final report.

*Ms Mnyani's response*

- 6.1.58 Ms Mnyani responded to the Notice on 05 June 2024 and stated *inter alia* that:
- 6.1.58.1 She studied the Notice, and the GPT's observation is that the outcome of the investigation as documented in the Notice is comprehensive and that GPT concurs with the findings and proposed remedial action in the Notice;
- 6.1.58.2 She further stated that GPT indicated that they noticed that their remedial action is subject to GDE providing them with a report envisaged in paragraph 3.2 (iv) of Treasury Instruction 2 of 2015/16. As a result, she indicated that they (GPT) would comply with the remedial action in the Notice and report the monitoring mechanisms or measures to be put in place to prevent irregular and fruitless expenditure concerning this project to the Public Protector within sixty (60) calendar days after receiving a final report from GDE; and

6.1.58.3 She confirmed that GPT also reported to the MEC for Finance to ensure compliance with the remedial action in the Notice.

*Ms Mutlaneng's response*

6.1.59 Ms Mutlaneng responded to the Notice on 07 June 2024, and stated *inter alia* that:

6.1.59.1 GDE was responsible for the project's necessity and feasibility, including securing the land while GDID was accountable for the approval of procurement, which is not delegated;

6.1.59.2 Regarding the issue of CEs, she stated that they followed standard protocol, and GDID formally requested additional funds from the GDE to cover the cost of a specific CE, which had the potential to surpass the 20% threshold, necessitating further approval from the GPT. However, the GDE opted to approve only an amount that would keep the total CE expenditure just below the threshold at 19.9%;

6.1.59.3 CEs were integral in a live project, and their timely processing was essential to manage and mitigate against risk because any delays could have prejudiced the project timeline;

6.1.59.4 During the MEC's bilateral meeting convened on 25 January 2023, there was an executive decision that GDE will implement the Mayibuye Primary School completion contract main scope, and GDID will only implement the external civil works. As a result, GDID is responsible for all the works outside the school boundary fence, which includes widening the entrance road as per JRA requirements and rerouting the sewer line and water connection. Therefore, GDID would issue a project plan related to the scope of work outside the boundary of the school fence only;

- 6.1.59.5 As far as the implementation of the internal investigation report, she indicated that GDID does not currently use the Turnkey method but cannot rule out that future requirements may require its usage since it is a CIDB-accepted construction procurement method. However, if circumstances require GDID to use turnkey, it will ensure that it has sufficient controls in place to mitigate the identified risks; and
- 6.1.59.6 GDID cannot adhere to the timeline for providing the full particulars of the irregular expenditure to GPT, considering that the final account for the project is still pending before the court. However, once the court process is completed, GDID will share the outcome and the full particulars of the irregular expenditure with GPT.

*Response from Auditor General, Ms Maluleke*

- 6.1.60 Ms Maluleke responded to the Notice on 14 June 2024 and indicated that she has no objection to the remedial action and welcomes the referral. She further appreciates the constructive collaboration between the Public Protector South Africa and Auditor General South Africa.

*Response from HoD of GDE, Mr Mmutlana*

- 6.1.61 Mr Mmutlana responded to the Notice on 14 June 2024, and stated *inter alia* that:
- 6.1.61.1 Phase 1 of the project plan aimed at ensuring that the school was habitable and completed on 11 January 2024, while phase 2 covers the auxiliary works which are ongoing and due for completion on 15 August 2024;
- 6.1.61.2 Regarding the provision of a report to GPT in line with paragraph 3.2 (iv) of Treasury Instruction 2 of 2015/16 in connection with the expenditure towards completion of Mayibuye Primary School project, GDE advised that

in 2023, they submitted an approved condition assessment report to GPT, which GPT advised that it was sufficient. Considering the above, GDE is of the view that they have already complied the remedial action proposed by the Public Protector; and

- 6.1.61.3 Insofar as the collaborative work between GDE and GDID towards the completion of the project, the recovery plan has a scope demarcation which outlines each parties' roles and responsibilities towards the completion works.

*Documentary Evidence accompanying GDE's response to a Notice*

*Recovery plan*

- 6.1.62 The recovery plan confirms that GDID has completed its works while GDE's works are still ongoing. Most of the items in phase 1 are over 96% completed whilst phase 2 has the lowest completion level of 2%.
- 6.1.63 The outstanding works required to complete the school are fixing the leaks, completing electrical finishes, finalising plumbing and Heating, ventilation, and air conditioning (HVAC), installation of fire line and external works. The phase 2 is due for completion on 15 August 2024.

*Response from the Gauteng Premier's Office*

- 6.1.64 Mr Mosuwe, the DG in the office of the Premier responded to the Notice on 24 June 2024, and stated that they shared the Notice with GDE, GDID, GDARDE and GPT and requested them to implement the proposed remedial action. The office of the Premier also undertook to provide the Public Protector with progress regarding implementation of the remedial action.



### *Analysis*

- 6.1.65 The evidence before the Public Protector shows that the Contractor namely, Basic Blue/Nebavest was appointed on 22 August 2015, to design, and construct Mayibuye Primary School, with a contract period of 52 weeks, under contract type NEC3 Option A, which includes design, construction, and turnkey.
- 6.1.66 The GDE as the client department, was responsible for identifying its needs, specifications, analysis and providing the scope or function of the project. The GDID was the implementing agent on this project.
- 6.1.67 A PTO was obtained from CoJ on 22 September 2016, 13 months later. The site was handed over to the Contractor on 12 May 2017, which further stretched the delay to commence with construction to a total of 21 months.
- 6.1.68 GDID incurred a CE to the value of ten million and sixty-one thousand rand five hundred nineteen rand and seventy-three cents (R10 060 519, 73) towards the Contractor for “*standing time*” which is irreconcilable with the efficient, economic, and effective use of resources envisaged in section 195(1)(b) of the Constitution, section 38(1)(b) and 45(b) of the PFMA. This expenditure is also prohibited in terms of section 38(1)(c)(ii) and 45(c) of the PFMA.
- 6.1.69 The evidence further indicates that on 26 August 2015, the GDE communicated scope changes to GDID to include amongst other things *smart school requirements*, four (04) days after the Contractor was appointed, which required additional funding.
- 6.1.70 In this instance, the GDID ought to have cancelled, and re-issued the tender with the revised specification which included the Smart School

requirements, particularly because the GDE at that stage, had not received the PTO in respect of the land to be utilised for the project. The amendment of the scope of work, after a tender has been awarded is at variance with section 217 of the Constitution, in that it denied other service providers an opportunity to fairly compete in line with the new scope.

- 6.1.71 Furthermore, the Public Protector notes with concern, the fact that the GDE amended the specification of such a significantly large project, precisely four days after the tender was awarded.
- 6.1.72 The evidence before the Public Protector, also indicates that, at the time of the awarding of the tender, the GDE had not acquired the land on which the Mayibuye Primary School was supposed to be built.
- 6.1.73 It is inconceivable that the GDE expected the GDID to procure the services of a service provider, to build a school before they (GDE) had even fully acquired the land, which at the time, was not available for construction.
- 6.1.74 Notably, the existence of encroachers, which ultimately resulted in undue delays and an escalation of costs, indicates that it is unlikely that a proper site inspection was conducted by the GDE or the GDID, prior to undertaking the procurement process. Had a site inspection been conducted, the existence of encroachers, would not have presented itself as an unforeseen circumstance.
- 6.1.75 Furthermore, no proper assessment was conducted, this resulted in the necessity to relocate the entrance from the main road to the eastern side of the school, due to inadequate space in the area where it was originally located. Section 38(1)(a)(iv) of the PFMA places an obligation on the AO to ensure a system for properly evaluation of all major capital projects prior to

a final decision been taken on the project. The evidence indicates that such an evaluation did not occur in these circumstances.

- 6.1.76 The above in its totality is irreconcilable with sections 38(1)(b) and 45(b) of the PFMA, which expressly require the efficient, economic, and effective use of resources and is thus prohibited expenditure in terms of section 38(1)(c)(ii) and 45(c) of the PFMA.
- 6.1.77 Evidence before the Public Protector indicates that the GDID made a number of requests to the GDE for variations in respect of CEs during the subsistence of the contract.
- 6.1.78 Clause 9.1 of the National Treasury Instruction SCM Note 3 of 2016/17. clearly envisages a variation of 20% of the original contract amount, wherein it prescribes that accounting officers must ensure that contracts are not varied by more than 20% or R20 000 000 (including VAT) for construction-related goods in terms of the above-mentioned, without obtaining approval from National Treasury.
- 6.1.79 In this instance, the GDID sought to obtain variations on three occasions, which were all approved. These variations cumulatively exceeded the threshold of 20% of the original contract amount and were in excess of R20 000 000.
- 6.1.80 Furthermore, the evidence indicates that the GDID split the CE variation percentages which exceeded 20% and kept them at 19.9% to avoid seeking approval from the GPT for the total CE amount. GPT also concluded that GDID intentionally split the CE percentage to bypass obtaining prior approval from them for the full amount.

- 6.1.81 It is also important to note that there were inconsistencies with the amounts provided by the GDE and GDID in respect of some of the variations. This was also flagged by the GPT.
- 6.1.82 The evidence before the Public Protector indicates that the AGSA made adverse findings which were contained in the AGSA's Consolidated General Report on national and provincial audit outcomes for 2017/18, regarding the delays in completing the project. The AGSA lamented that there has been a lack of improvement and progress on the 2016/17 findings concerning the planning, commissioning, and maintenance of infrastructure projects at Mayibuye Primary School, and further that management were slow to implement corrective action to address internal control deficiencies in these key projects. The *inspection in loco* of the Public Protector revealed that the project remains incomplete and the amount that was budgeted for the project was depleted and additional costs are being incurred.
- 6.1.83 The Public Protector cannot ignore the submission by the GDE that GDID intends to make use of R23 041 000 approved by the GPT in respect of CE5, to defray an existing debt. This variation was requested and approved for the completion of the project and not to settle outstanding debt. It would appear that proceeding in this course of action would be in flagrant violation of section 43(4)(c) of the PFMA which prohibits the utilisation of a saving in an amount appropriated for capital expenditure in order to defray current expenditure.
- 6.1.84 The Public Protector has considered Ms Mutlaneng's response clarifying that the standard protocol was followed to request for additional funding from GDE which had a potential to surpass 20%, but GDE only approved funding below the 20% threshold. However, it is the Public Protector's view that these would have been avoided had the contract been managed in accordance with section 217 of the Constitution and 38 of the PFMA.

Further, the functionaries of GDID ought to have known that the request was contrary to the provisions of National Treasury SCM, Instruction Note 3 of 2016/2017.

- 6.1.85 The Public Protector noted that the Premier of Gauteng Province, Mr Panyaza Lesufi, together with the MEC for Education, Mr Matome Chiloane, and the MEC for Human Settlements, Mr Lebogang Maile, officially opened Phase One of Mayibuye Primary School on Wednesday, 07 February 2024 and that the school is now partially operational.<sup>17</sup>
- 6.1.86 According to the evidence before the Public Protector the GPT only became aware of the irregular expenditure when GDID applied for approval for variation of the contract and GPT further noticed that other variations were submitted to them after the fact in contravention of Clause 9.1 of the National Treasury Instruction SCM Note 3 of 2016/17.
- 6.1.87 The Public Protector notes that the GPT has discharged its duty in terms of section 18 of the PFMA and intervened by instructing GDID to investigate irregular expenditure after they received a request for a variation that exceeded the 20% threshold.

### *Conclusion*

- 6.1.88 Based on the evidence at the disposal of the Public Protector and the application of the law thereto, it is concluded that the functionaries of GDID and GDE did not comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School.

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<sup>17</sup> Kamogelo Moichela "Multi-Million Rand State-of-the-Art Gauteng School Opens After Seven Year Delay." Available on <https://www.iol.co.za> accessed on 10 February 2024.

- 6.1.89 Furthermore, the evidence clearly indicates that Mayibuye Primary School project has not been properly managed from its inception throughout its execution, hence the project remains incomplete whilst the expenditure continues to escalate.
- 6.1.90 The legal obligations of GDID and GDE as they flow from the legislation discussed above, show that GDID and GDE are obligated to ensure compliance with the duties imposed on them by sections 41(1) and 195(1)(b) of the Constitution, section 38 and 45 of the PFMA, Paragraph 9.1 and 9.2 of the National Treasury Instruction SCM Note 3 of 2016/2017.
- 6.1.91 Section 41(1) of the Constitution places an obligation on organs of state to collaborate and assist one another in mutual trust and good faith. In this instance there is a cooperative governance obligation on GDE and GDID to work collaboratively towards improving the successful completion and delivery of Mayibuye Primary School.
- 6.1.92 Accordingly, the conduct of the functionaries of the GDID and the GDE regarding the construction of Mayibuye Primary School was in contravention of sections 195 and 217 of the Constitution, sections 38, 43 and 45 of the PFMA, as well as National Treasury Instruction SCM Note 3 of 2016/2017.
- 6.2 **Whether the functionaries of the Gauteng Department of Infrastructure Development improperly constructed Mayibuye Primary School prior to conducting a wetland study thus resulting in undue delays in completing the project, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act, 1994**

*Common cause*

- 6.2.1 The GDID awarded a tender for the construction of Mayibuye Primary School in Midrand to Basic Blue/Nebavest JV (the Contractor) on 22 August 2015.<sup>18</sup>
- 6.2.2 The project entailed the design, engineering, procurement, construction, furnishing and delivery of a new brick-and-mortar primary school in Erf 2326 Commercia Extension 34 Township at Rabie Ridge/Midrand.

*Issue in dispute*

- 6.2.3 The issue for the Public Protector's determination is whether the functionaries of the GDID conducted due diligence prior to embarking on the project of constructing Mayibuye Primary School project at Commercia Rabie Ridge/Midrand.

*The Complainant's version*

- 6.2.4 The Complainant asserted that:
- 6.2.4.1 GDID embarked on a construction of Mayibuye Primary School without conducting a wetland study to assess if the area is suitable for building a school. As a result, the school is not in use as it cannot obtain an occupancy certificate from the CoJ at the time of lodgement of the complaint due to the dangerous terrain on which it is constructed.

*The version of the MEC for GDID*

- 6.2.5 The Investigation Team sent an allegations letter dated 01 February 2021, to Ms Motara. A response in the form of an affidavit, dated 04 March 2021 was received from Ms Motara in which she stated *inter alia* that:

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<sup>18</sup> As indicated in the affidavit of the then MEC for GDID, Ms Tasneem Motara dated 04 March 2021.

- 6.2.5.1 GDE conducted the feasibility study while the technical feasibility study was done by GDID, which included:
- (i) Traffic impact assessment studies (TIS);
  - (ii) Geotechnical investigation; and
  - (iii) Wetland study.
- 6.2.5.2 There is nothing in the wetlands study<sup>19</sup> and the geotechnical report<sup>20</sup> that states that the land on which the school is constructed is unsuitable. The assertion that the school cannot safely accommodate children is inaccurate;
- 6.2.5.3 The allegations of poor workmanship are unfounded and the work on site was assessed by the professional team and the Contractor. The quality management system<sup>21</sup> assessed the quality of work to ensure that the correct standards are applied to materials and construction. There was compliance with the approved and recognised construction and building standards;
- 6.2.5.4 The assertion that the school infrastructure is crumbling is disputed, as a professional structural engineer Mr Xulu, on 14 September 2020, assessed the school and concluded that the building was structurally sound, except for defects that require rectification by the Contractor once work resumes on site;
- 6.2.5.5 The allegation that the school cannot obtain an occupancy certificate because it is built on dangerous terrain is refuted. The school cannot obtain

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<sup>19</sup> Specialist Study prepared by the Directors of Index (Pty) Ltd and signed by the Specialist, Dr Gouws in July 2017.

<sup>20</sup> Compiled by Southern Geotechnical Engineering in 2015.

<sup>21</sup> The quality management report dated 30 November 2017 signed by Stanley George was produced and implemented at Mayibuye Primary School.



an occupancy certificate because it is incomplete. GDID will apply for an occupation certificate once construction is completed; and

- 6.2.5.6 The existing school has always been in prefabricated containers at a different site, and not on the site where the new school is being constructed, as such, the construction of the new school did not interfere with the learning environment of the learners.

*Interview with Mr Xulu, Structural Engineer GDID*

- 6.2.6 The Investigation Team held an interview with Mr Xulu on 12 September 2022, wherein he advised that in 2020, the GDID requested him to perform a conditional assessment at Mayibuye Primary School. After the inspection, he compiled a memorandum to the GDID detailing the following:

- 6.2.6.1 The structure is in good condition;
- 6.2.6.2 There are no major cracks that would signal poor workmanship from a civil engineering point of view, although there were some defects;
- 6.2.6.3 There is a challenge with poor drainage and the sewer, as a result, the area is soaked;
- 6.2.6.4 The area by the school hall is soaked or wet, which leads to water concentration within the area. This can be attributed to poor design because it appears that the school hall was constructed without addressing the sewer and drainage problems;
- 6.2.6.5 The team working on site ought to have improved the underground system to resolve the sewer and poor drainage challenges;
- 6.2.6.6 The purpose of the geotechnical study is to assess the condition of the surface to inform the manner or method of construction;

6.2.6.7 A turnkey means that the team appointed does all the designs and delivers a completed project to the client. It appears that the GDID's team was not actively involved in the process; and

6.2.6.8 In 2020, the school was habitable provided that the conditions were improved by re-routing the sewer and redesigning the stormwater drainage, but currently, the conditions at the school have deteriorated mainly due to vandalism.

*Interview with Mr Dipela, the former Internal Project Manager GDID*

6.2.7 The Investigation Team conducted an interview with Mr Dipela on 12 September 2022, wherein he advised that the area where the school was constructed is not a wetland and the lack of an occupancy certificate is due to incomplete construction, not because of the dangerous terrain.

*Second site inspection by the Investigation Team*

6.2.8 On 23 May 2023, the Investigation Team and GDID's officials, Mr Tiaan Englin, Ms Lindelwa Mhlangu, Mr Xulu, Mr Stephen Van Zijl, Mr Dipela, Mr Lindo Phungula and Mr Nape Monekedi, conducted a site inspection at the school and observed the following:

6.2.8.1 There has been no activity on site since 2019 and the school is still unoccupied;

6.2.8.2 During the inspection, Mr Dipela indicated that when the Contractor left the site in 2019, GDID organised a security team to guard the school to prevent vandalism and theft. The security team is paid by GDID from their budget pending the delivery of the school to GDE once completed;

- 6.2.8.3 The Investigation Team observed that there are security personnel guarding the school. The school structure has deteriorated due to vandalism and lack of maintenance at the school. The ceilings in some of the classrooms and the school hall were vandalised by thieves seeking to steal electrical cables;
- 6.2.8.4 The Investigation Team discovered that the recommendations made by Mr Xulu in his memorandum of 14 September 2020, regarding the improvement and rectification of the drainage and stormwater system, have not been actioned by GDID yet;
- 6.2.8.5 The GDID's team maintained that the school is neither built on a wetland nor on top of an existing sewer line and they further stated that the sewer line runs along the boundaries of the school premises on the adjacent open land;
- 6.2.8.6 GDID officials also stated that the sewer overflows into the school's grounds creating the impression that the sewer line is within the school premises. GDID's team further contended that the school infrastructure would not be in good condition six (06) years later if it were built on a wetland;
- 6.2.8.7 The Investigation Team was able to observe a sewer manhole that runs along on the adjacent land to the boundary of the school grounds, as a result, the land outside the school hall was covered in sewerage; and
- 6.2.8.8 The Investigation Team did not observe any cracks in the school structure during the site inspection.

*Technical reports received from GDID*

*The Geotechnical Study Report*

- 6.2.9 The Investigation Team is in possession of a copy of the Geotechnical Investigation Report conducted by the Southern Geotechnical Engineers, on the site where Mayibuye Primary School is built, dated 23 March 2015. This geotechnical study was conducted by Professor P. Oosthuizen, a professional engineer. The study related to a detailed soil profile test and not necessarily to a wetland study or whether there are sewer pipes at the site or not. This report highlights *inter alia* the following:
- 6.2.9.1 As far as Proposed Development is concerned, the report indicates that the south-eastern corner of the stand is excluded from development;
- 6.2.9.2 Regarding the site-specific geology, the report indicates that thin layers of *fill* materials were encountered at test pits 2 (0,4m thick) and 4 (0,7m thick) and this material was typically described as moist, dark grey to yellow brown, loose to medium dense, clayey silty sand with plastic, glass, granite gravel and other foreign matter. The remainder of the site where no fill materials were encountered, is covered by a surface layer of transported soil of colluvium<sup>22</sup> origin. This material is typically moist, pale light grey with few reddish orange blotches, loose to very loose voided silty sand;
- 6.2.9.3 The report revealed that groundwater was encountered at test pits 1, 3, 5 and 6 generally at the level just above the base of the excavation. It was indicated that the site is underlain by relatively shallow (around 1.2 m to 1.5 m deep on average) and perched groundwater. The volume and level of groundwater may fluctuate throughout different periods of the year coinciding with rainfall events;
- 6.2.9.4 According to the report, based on laboratory test results, the site is not underlain by highly expansive soil formations such as to necessitate extensive remedial measures;

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<sup>22</sup> Colluvium (also colluvial material or colluvial soil) is a general name for loose, residual, unconsolidated sediments that have been deposited at the base of hillslopes by either rain-wash, sheetwash, slow continuous downslope creep.

- 6.2.9.5 The report revealed that although no collapse potential tests were undertaken, it is known that transported soils and underlying residual granite soils frequently display a voided soil structure and can hence be regarded as potentially collapsible. The report stated that the potentially collapsible nature of the *in-situ* soils is further exacerbated by the apparent shallow perched groundwater level on site. The report concludes that the *in-situ* soils are thus considered generally collapsible, and this mode of distress would be reflected in the National Home Builders Registration Council (NHRBC) site class designation.
- 6.2.9.6 The report also indicated that based on the collated information, it is recommended that strategically placed subsurface cut-off drains, (especially along the peripheral areas of the site) surface drains, drainage elements behind retaining structures and damp proofing of structures be considered as part of the final design. This report further recommended bulk earthworks such as the removal of topsoil, organic matter and the use of the *pad and strip footing foundation* for the site.

#### *The Wetland Study Report*

- 6.2.10 The Specialist Study into the Wetland<sup>23</sup> drafted by Dr Gouws, indicates that a site visit was conducted on 22 June 2017, after Index (Pty) Ltd was requested by Delron Consulting (Pty) Ltd to delineate the wetland boundaries of the land where Mayibuye Primary School would be constructed.
- 6.2.11 In terms of the research findings,<sup>24</sup> *“the site falls within the headlands of a poorly defined watercourse. Rainwater drains through lateral surface flow*

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<sup>23</sup> The specialist study prepared by the Directors of Index (Pty) Ltd and signed by the Specialist, Dr Gouws in July 2017 in terms of the National Water Act.

<sup>24</sup> As recorded in page 16 of the Wetland Specialist report.

*that is concentrated in the southern boundary where it then leaves the site through a culvert. Much of the northern portion is being backfilled and does not contribute water to the watercourse.”*

6.2.12 On the *Wetland Boundary*, this report concluded amongst other things, that gleyed soils were on a small piece of the land on the southern portion of the site and that the middle southern section of the site is a wetland, with only the portion affected by a broken sewer line that was waterlogged at the time of the study/visit. The wetland portion that is characterised by Katspruit soils is overgrown with kikuyu and scattered with plastic and other rubbish. *“With the construction now taking place, it is very likely that the subsoil will dry out and the kikuyu will disappear. The watercourse is no longer functional due to its present state and an engineering solution should be found that channels and controls runoff.”*<sup>25</sup>

6.2.13 The study further indicated that most of the western portion of the site has been levelled in preparation for construction, with the eastern and the northern part being backfilled. A narrow strip between the two sites is vacant, the southern portion is waterlogged because of soil conditions, but exacerbated by a leaking sewer line, bubbling from the manhole cover during the site visit.<sup>26</sup>

#### *Condition Assessment Report*

6.2.14 On 23 May 2023, the Investigation Team sent an email to the acting Director in the office of the HoD at GDID, Mr Ntuli, requesting a copy of the Condition Assessment Report and same was received. GDID provided a copy of the Condition Assessment Report compiled by the engineer Mr Xolani Nxumalo (Mr Nxumalo), of Gudunkomo Investments & Consulting (Pty) Ltd, dated 08 July 2022. The purpose of the Condition Assessment Report was to review

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25 Page 18 of the Specialist Wetland Study report at Paragraph 6.2.3

26 Page 18 of the Specialist Wetland Study report at Paragraph 7.

the works executed at the school, and to determine the outstanding works required to have the school completed. The Condition Assessment Report highlighted the following:

- 6.2.14.1 A new professional team has been assembled by GDID to complete all outstanding work required for the school to be occupied;
- 6.2.14.2 Mayibuye Primary School requires minor fittings to be completed and the non-occupancy of the school has led to minor damages caused by vandalism and theft;
- 6.2.14.3 The drainage on the site needs to be improved so that it can channel and remove both surface water and groundwater. The design of the earthworks and drainage should prevent the concentration of stormwater or groundwater anywhere on the site, both during and after the development;
- 6.2.14.4 The main issue with the stormwater is that the water is not well channelled to the drains to stop it from flowing around the school. There appears to be a lot of water flowing underneath the paving which has allowed vegetation to grow;
- 6.2.14.5 A Geotechnical Report, which was drafted by Southern Geotechnical Engineering in 2015 as commissioned by Ditlou Consulting Engineers, noticed the following:
  - i. *No test pits were completed within most building areas, the focus was mainly on the areas that are now the Main Hall, Tennis Courts, and Parking. The areas which now have multi-storey buildings were not investigated so material variance and water table cannot be confirmed.*

- 6.2.14.6 The preliminary review of the Wetland Study, completed by Index (Pty) Ltd in 2017 as commissioned by Delron Consulting (Pty) Ltd, noticed the following:
- (i) There is no river or stream on site;
  - (ii) No depressions were found on the site that could be classified as watercourses or wetlands;
  - (iii) The site is located on headlands of the topography that is drained by surface flow towards the south. Although the soil is wet in the northern part, only a small portion is waterlogged;
  - (iv) There is a blocked sewerage line in the middle of the site from which raw sewage bubbles from a manhole. This has caused the land further down to be waterlogged;
  - (v) The drainage on the northern portions of the site and the sewer overflow has caused a temporary wetland on the southern edge of the site. The southern edge is the area where the school hall and the tennis courts are found; and
  - (vi) The sewer leakage has caused the water levels on site to rise.
- 6.2.14.7 The Condition Assessment Report confirmed the Norms and Standards for schools as stipulated in the South African Schools Act, 1996 Regulation Gazette No. 37081 of 29 November 2013;
- 6.2.14.8 The Condition Assessment Report outlined and itemised the remaining works, as well as the costs implication thereof, including the timeframes towards the completion of the project. It was estimated that the duration of the programme will be 260 days; and



- 6.2.15 The estimated cost of the project would be seventy-one million four hundred and seventy-two thousand seven hundred and fourteen rand fifty-nine cents (R 71 472 714, 59) to complete Mayibuye Primary School. The costs include the construction of new works, specialist services, preliminary and general items, and professional fees, including VAT.

*Interview and Supplementary Notes by Dr Gouws*

- 6.2.16 On 20 November 2023, the Investigation Team interviewed Dr Gouws to seek clarity in respect of his Wetland Study Report. On 21 November 2023, Dr Gouws submitted an explanatory and supplementary note on his Wetland Study compiled in 2017 and stated *inter alia* that:

6.2.16.1 Construction at the site had already started when he was commissioned for the study. There were many construction vehicles on site and building platforms were being constructed;

6.2.16.2 The platforms were 500mm high in places and already compacted, making it impossible to assess in terms of soil conditions. Soil was dumped in the northern section in anticipation of levelling it out for construction at some stage;

6.2.16.3 In essence, the site was already highly disturbed, and it is doubtful that the wetland was even considered in the design and layout of the school;

6.2.16.4 There is a wetland on the site and the accompanying maps indicates the boundary of the wetland. Wetlands normally provide services to the environment, like removing nutrients that could enrich runoff water and cause unwanted organisms to flourish (like the Hyacinths in the Hartbeespoort dam), the retarded flow of stormwater could cause erosion, flooding, and trap sediments. It was stated in the report that due to human

actions, such as construction, pollution and the release of sewer effluent, the normal functioning of the wetland to provide these services was hampered;

- 6.2.16.5 Raw sewerage was spilling over and running uncontrolled downslope towards the south. This has contaminated the wetland and caused the water table of the soil to become perched (elevated). The position of the sewer leak was indicated in his report; and
- 6.2.16.6 The National Water Act, controls water uses and prescribes conditions and provides approvals for activities within the Regulated Areas (all land within 500m of a wetland). This land falls within the 500m of the regulated area. Accordingly, the developer must apply for a Water Use License Authorisation (WULA) to do construction. The Department of Water and Sanitation (DWS) provides wetland specialists with guidelines on how to conduct a wetland study and how to scientifically determine a buffer around the wetland that could protect the activities of animals, insects, and plants.
- 6.2.17 Dr Gouws provided the Investigation Team with an aerial image/picture below, which depicts the delineated wetland, with an unchanneled valley bottom wetland and a 32m buffer zone, taken by a drone during the site survey. The picture further shows construction platforms and ground dumps on the northern parts of the site:



*Figure 1. Indicating the wetland and 32m buffer on the drone image taken during the time of the survey (indicating the construction of the platforms and ground dumps in the northern part of the site)*

6.2.18 Dr Gouws further furnished the Investigation Team with the following aerial photograph, which depicts the position of the wetland currently, as it superimposes on the southern section of the location where Mayibuye Primary School is built:



Figure 2. Wetland superimposed on the 2023 Google image

*The version of the Gauteng Department of Agriculture, Rural Development and Environment (GDARDE)*

6.2.19 On 20 November 2023, the Investigation Team wrote a letter to the HoD for GDARDE, Ms Gasela seeking clarity on their role and/or reports in respect of this matter. On 21 November 2023, Ms Khumalo of GDARDE, who is also a Wetland Scientist, responded and submitted a report to the Investigation Team, titled “*Site inspection report: Mayibuye Primary School,*

*Rabie Ridge/Midrind, City of Johannesburg dated 20 September 2023*": Ms Khumalo's report made the following conclusions and recommendations:

*Conclusions of GDARDE's report*

- 6.2.19.1 During the field assessment undertaken on 20 of September 2023, a saturated area was identified on site confirming the findings of studies conducted in 2015 and 2017;
- 6.2.19.2 The leaking sewer from manholes that were identified in the 2017 study was still leaking at time of Ms Khumalo's visit on site. Furthermore, the saturated area identified has been impacted by infilling (material, litter, and sewer), drainage channel, alien vegetation infestation and stormwater ingress from the greater catchment;
- 6.2.19.3 Due to the extent of vegetation clearance that occurred during the construction of the school, soil disturbance, infilling within and around the saturated zone, it resulted in the transformation of vegetation community composition and hydrology. Although the soil is waterlogged, Kikuyu grass was observed to be the dominant species on site; and
- 6.2.19.4 An opportunity therefore exists to not develop the southern portion that is waterlogged and improve habitat through the removal of existing infill material, control of alien plant species and stormwater control and the area be left as an open space adjacent to the school. The rehabilitation will also contribute towards enhancing the aesthetic value of the site.

*Recommendations GDARDE's report*

- 6.2.19.5 The wetland was confirmed to be present on site although highly impacted and hydrologically driven by a leaking sewer. The findings of this site

investigation correlate with the findings of both the Geotech and wetland assessment studies that were undertaken in 2015, and 2017, respectively;

- 6.2.19.6 The wetland specialist (Dr Gouws) is of the opinion that the identified '*watercourse*' is not a functional watercourse due to its Present Ecological State (PES) and that an engineering solution should be found to control and channel runoff;
- 6.2.19.7 The soil observation map of the wetland assessment report by Dr Gouws shows that the area where the school was built is not affected by the wetland area. However, it is affected by a 30m buffer zone measuring from the edge of the '*watercourse*';
- 6.2.19.8 As to whether it is natural or artificial is immaterial at this stage because it exists now and probably became much bigger and wetter due to human activities/disturbances that took place on site;
- 6.2.19.9 The school is already constructed and there is an already existing development on the southern-eastern corners as well. Should the wetland dry out following the relocation of the pipeline, that will be conclusive evidence that shows that a leaking sewer is/was the main hydrological driver of the existing wetland on site. However, the current condition of the area still warrants rehabilitation and removal of sludge before the school can become operational; and
- 6.2.19.10 According to GDE, recommendations were previously made before the commencement of the development to re-direct the leaking sewer pipeline away from the school hall and sports fields and that recommendation is supported. The site was not listed in terms of Environmental Impact Assessment (EIA) regulations. It is thus recommended that future expansion plans of the school should take the currently existing '*wetland*' on site into consideration.

- 6.2.20 On 21 November 2023, the Investigation Team sent an e-mail to Ms Khumalo seeking clarity on the process that must be followed prior to construction being undertaken and she replied on even date per email explaining that:
- 6.2.20.1 The development (school) was supposed to be preceded by prior approval. GDARDE is the Competent Authority (CA) responsible for issuing Environmental Authorisations through the Impact Management Directorate;
- 6.2.20.2 The Biodiversity Management Directorate within GDARDE as the conservation authority, is responsible for ensuring that all environmental sensitivities such as wetlands are protected from any proposed development;
- 6.2.20.3 She only became involved in the project recently as indicated in the site inspection report. She was appointed in May 2017 as a wetland Scientist and is not sure whether any report was issued by her predecessor or not. However, the recommendations from Biodiversity Management (if there were any) would have been forwarded to the Impact Management Directorate for consideration before issuing an Environmental Authorisation;
- 6.2.20.4 For any development in Gauteng, the applicant needs to appoint an Environmental Assessment Practitioner (EAP) who will be responsible for the Environmental Assessment application on behalf of the developer at GDARDE. The competent authority (impact management) will then facilitate the process within a specific timeframe. One of the requirements is that an environmental screening tool (from the Department of Forestry, Fisheries, and the Environment (DFFE) results indicating all environmental sensitivities of the site to be developed needs to accompany the application as part of supporting documents;

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- 6.2.20.5 Once the project officer/manager picks up biodiversity sensitivities within the study area during his or her desktop assessment process, a request is sent to Biodiversity Management (conservation authority) for recommendations;
- 6.2.20.6 Biodiversity Management will then conduct a site inspection and a site inspection report with recommendations will then be forwarded to impact management for consideration. EIA process considers a variety of information submitted including comments/recommendations from Biodiversity Management;
- 6.2.20.7 GDARDE, specifically Biodiversity Management is mandated to protect wetlands in Gauteng. The Department developed a guideline (GDARDE minimum requirements for biodiversity assessments) that needs to be considered by the EAP and or specialist that will be responsible for carrying out freshwater assessment studies. The guideline clearly stipulates that a wetland and its 30m buffer (within an urban area) must not be encroached by the development footprint. In this case, it is hard to tell at this late stage whether an area that was infilled with soil and compacted for foundation formed part of the wetland area. However, satellite imagery before development can also shed some light; and
- 6.2.20.8 The 2017 study that was commissioned by the developer, also shows that the study was done after the fact. The soil compacted for development/foundation was already on site. Judging from the 2015 Geotech study, the wetland and its 30m buffer were not observed. Even though wetland assessment was not the aim of why the study was conducted, the study shows that wetland soils were encountered east of where the school was developed.



*The version of DWS*

- 6.2.21 On 20 November 2023, the Investigation Team wrote to Dr Phillips requesting clarity and his submission in connection with this matter, as the regulator for water resources and water courses. On 06 December 2023, Dr Phillips responded through a letter stating *inter alia* that:
- 6.2.21.1 Based on the site inspection conducted by DWS on 22 November 2023 and the review of the Wetland Study report provided by the Office of the Public Protector, the presence of a wetland on site is confirmed;
  - 6.2.21.2 Accordingly, the school should have been authorised prior to construction in line with Section 21(c) and (i) water uses indicated in the National Water Act, 1998;
  - 6.2.21.3 According to the DWS' records, neither a water use license authorisation application was submitted nor was an authorisation issued for Erf 2326 Commercia Extension 34 Township, Rabie Ridge/Midrand; and
  - 6.2.21.4 The DWS' role is to regulate the economic and social development activities that trigger water uses in terms of section 21 of the National Water Act, 1998 by means of processing applications when submitted, monitor compliance with the Act and its tools, and take the necessary action where non-compliance is identified.
- 6.2.22 On 06 December 2023, the Investigation Team sent follow-up questions to DWS and sought further clarity and a copy of DWS' investigation report. On 07 December 2023, Dr Phillips responded through another letter and further attached the investigation report detailing the findings and observations of DWS. In this letter, Dr Phillips clarified *inter alia* that:

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- 6.2.22.1 Google images and onsite photos show that the site is completely transformed, and buildings are already constructed. Even in the July 2017 Wetland Report, platforms can be seen that were already prepared for sections of the school;
- 6.2.22.2 The best baseline data available is the delineation report (Wetland Report) that confirmed the presence of an Unchanneled Valley Bottom Wetland;
- 6.2.22.3 It is not possible to determine the historic extent of the wetland after that extensive transformation that has occurred on the site. The wetland was delineated, and the extent was indicated in the July 2017 Wetland Report;
- 6.2.22.4 All the constructed sites fall within a 500m radius from the boundary of the delineated wetland and as such, a water use authorisation is required in terms of section 21(c) and (i) of the National Water Act, 1998;
- 6.2.22.5 By comparing the google imagery and the wetland delineation report, a section of the school was constructed over a small part of the wetland and a section of the wetland has not been affected;
- 6.2.22.6 The waterlogging observed during the site inspection did coincide with the area where the wetland was delineated. Other shallow water tables observed onsite could be because of various impacts, like perched water tables following the rain;
- 6.2.22.7 Retrospective assessment is very difficult and would require a rigorous assessment from different scientific disciplines. However, according to the delineation wetland report, a wetland exists on site and the google map from the report indicates the section of the school that was constructed on a wetland; and

- 6.2.22.8 DWS' records indicate that there was no application lodged with DWS or (Water Use Licence Application) WULA issued in respect of any activity taking place within or in the vicinity of the wetland.

*Investigation Report by DWS*

- 6.2.23 The investigation Team has in its possession the DWS' investigation report signed by Director T Khosa, dated 07 December 2023. The findings in terms of the report are essentially the same as the information already captured in the two letters canvassed above. It is not necessary to repeat all the findings, save to indicate that the leaking sewer pipes were said to be discharging at an alarming rate and contributing to the waterlogging of the area;
- 6.2.24 The DWS report also highlighted statutory contraventions related to sections 19(1) and 22(1) of the National Water Act, 1998 for pollution of water resources and engaging in water uses without authorisation.
- 6.2.25 In terms of the recommendations, the DWS' report stated the following:
- 6.2.25.1 DWS shall issue a notice to issue a directive against the Johannesburg Water Soc Ltd in terms of section 19(3) of the National Water Act, 1998 for failure to take reasonable measures to prevent pollution that is taking place due to continuous sewer leak into the street, wetland, and stormwater system on Erf 2326 and 2328 Commercia Extension 34 Township;
- 6.2.25.2 A notice to issue directive shall be issued to the GDID and GDE in terms of section 53(1) of the National Water Act, 1998 for engaging in water use activities without authorization on Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand; and

- 6.2.25.3 Other remedial action to be recommended must be in line with the benefit of the wetland system. For example, does the remaining part of the wetland still serve any ecological importance on site.

*The version of the Professional Service Provider, Vumesa Engineering Consultants (Pty) Ltd*

- 6.2.26 On 22 December 2023, the Investigation Team sent a letter to Vumesa (Pty) Ltd,<sup>27</sup> which was appointed by GDID as an engineering Professional Service Provider for the completion of Mayibuye Primary School project, requesting clarity regarding their observations and engineering solutions being made to sustain or complete the project. Mr Ndlovu, a Director, and a Professional Engineer at Vumesa (Pty) Ltd, responded in a letter dated 03 January 2024 and he advised *inter alia* as follows:

- 6.2.26.1 Vumesa (Pty) Ltd was appointed by GDID on 13 April 2022 for the completion of Mayibuye Primary School. The scope of their services entailed a conditional assessment to assess the work already done on site, the work required to complete the school and the reason for the overgrown area which has been associated with a wetland;

- 6.2.26.2 The key observations by Vumesa (Pty) Ltd were based on information received from specialist studies such as Geotechnical Investigation undertaken by *Southern Geotechnical Engineering* (2015) and Wetland Assessment undertaken by Index (Pty) Ltd (2017) for review and consideration, including own visual observations;

- 6.2.26.3 As civil engineers, Vumesa (Pty) Ltd is not able to definitively provide clarity other than to confirm the presence of an artificial wetland in accordance with the wetland specialists' report. According to the conclusion reached in the wetland assessment report conducted in 2017, the southern portion of the

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<sup>27</sup> Now known as Kufanikiwa Consulting (Pty) Ltd.

site contains wetland soils, but it was noted that the land no longer controls runoff as natural and wetland plants were absent. Instead, it was noted that the portion investigated was covered by kikuyu which posed a health hazard.

6.2.26.4 Based on Vumesa's visual inspection, there was no indication to lead them to believe that a request for an additional specialist report other than the one undertaken by a competent wetland specialist in Index (Pty) Ltd, is required. However, the relevant government authority or an environmental practitioner would be better positioned to confirm this.

6.2.26.5 The Geotechnical Investigation undertaken by *Southern Geotechnical Engineering* (2015) which was commissioned by Ditlou Consulting Engineers was reviewed and formed a basis for assumptions made regarding geotechnical engineering functions. A detailed report is available for further review, but a high-level summary highlighted amongst other things the following on site:

- (a) A high-water table has been found on site, and based on the pit depths the height is estimated at 1.2m deep on average;
- (b) The material on site has displayed a voided soil structure meaning that there is a risk of settlement, and this would be further exacerbated by the high-water table and potential leaking services in the area;
- (c) Subsurface drainage measures were proposed for the site to limit the adverse impact of the high-water table which may include but is not limited to rising damp and settlements; and
- (d) Surface run-off must not be allowed to pond against, near or below the structure and foundations, and thus will need mitigation measures to prevent this.

*Applicable Law*

**National Water Act, 1998**

6.2.27 Section 1(1)(xxix) of the National Water Act, 1998 (NWA) states that:

*“Wetland means land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil.”*

6.2.28 Section 2 (2)(g) and (h) of the NWA, provides that the purpose of the Act is to ensure that the nation and water resources are protected, used, developed, conserved, managed, and controlled in ways which consider amongst other factors *“protecting aquatic and associated ecosystems and their biological diversity and reducing and preventing pollution and degradation of water resources”*.

6.2.29 Section 3(3) of the NWA states that the National Government acting through the Minister, has the power to regulate the use, flow, and control of all water in the Republic.

6.2.30 Section 19 of NWA stipulates amongst other things that an owner of land, a person in control of land or a person who occupies or uses the land on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing, or recurring.

- 6.2.31 Section 21(c) and (i) of the NWA states that for the purposes of this Act, water use includes impeding or diverting the flow of water in a watercourse or altering the bed, bank course or characteristics of a watercourse.
- 6.2.32 Section 22 of the NWA sets out the conditions under which water use is permissible and water use authorisation may be granted.
- 6.2.33 Section 53 of the NWA provides for rectification of contraventions of the NWA and states amongst other things that the responsible authority shall take any other action necessary, including issuing written notices or directives against the contravening party to rectify the contravention. A responsible authority may also carry out any works to rectify the contravention and recover its reasonable costs from the person on whom the notice was served or apply to a competent court for appropriate relief.

### **National Environmental Management Act, 1998**

- 6.2.34 Section 2(2), (3) and (4) of National Environmental Management Act <sup>28</sup> (NEMA) provides *inter alia*:

“(2) *Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural, and social interests equitably....*

(3) *Development must be socially, environmentally, and economically sustainable.*

(4) (a) *Sustainable development requires the consideration of all relevant factors including the following:*

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<sup>28</sup> Act 107 of 1998

- (i) *That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised, and remedied;*
- (ii) *That pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised, and remedied;*
- (iii) .....;
- (iv) *that the waste is avoided or where it cannot be altogether avoided, minimised, and re-used or recycled where possible and otherwise disposed of in a responsible manner.*

*NEMA Amendment Act, 2004*

6.2.35 Section 24G deals with the rectification of unlawful commencement or continuation of listed activity. It further provides *inter alia* that:

- (1) On application by a person who has committed an offence in terms of section 24F(2) the Minister or MEC, as the case may be, may direct the applicant to-
  - (a) compile a report containing-
    - (i) an assessment of the nature, extent, duration, and significance of the impacts of the activity on the environment, including the cumulative effects;
    - (ii) a description of mitigation measures undertaken or to be undertaken in respect of the impacts of the activity on the environment;
    - (iii) ...;
    - (iv) an environmental management plan;



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### **GDARDE's Minimum Requirements for Biodiversity Guidelines, March 2014, Version 3**

6.2.36 The above guidelines state *inter alia* that if the wetland is degraded, a rehabilitation plan must be included in the application for environmental authorisation (all wetlands must be conserved and rehabilitated if necessary; their destruction for development purposes will not be supported). The guidelines further state that the application for environmental authorisation must include a plan indicating how the stormwater that will be generated by the proposed development within or in the vicinity of a wetland will be managed.<sup>29</sup>

### **NEMA Regulations, 7 April 2017**

6.2.37 The NEMA Regulations, 2017 are issued in terms of sections 24(5) and 44 of the NEMA and gazetted under No. 40772 219.

6.2.38 According to Regulation 2, the purpose of these Regulations is to regulate the procedure and criteria as contemplated relating to the preparation, evaluation, submission, processing, and consideration of, and decision on, applications for environmental authorisations for the commencement of activities to avoid or mitigate detrimental impacts on the environment, and to optimise positive environmental impacts, and for matters pertaining thereto.

6.2.39 Regulation 16 of NEMA states that an application for an environmental authorisation must be made on an official application form obtainable from the relevant competent authority.

6.2.40 Regulation 4 of NEMA indicates that after a competent authority has reached a decision on an application, the competent authority must, in

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<sup>29</sup> GDARDE's Minimum Requirements for Biodiversity Guidelines, March 2014, Version 3 at page 11.

writing and within five (5) days provide the applicant with the decision and give reasons for the decision to the applicant.

### *Case Law*

- 6.2.41 In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*<sup>30</sup> the court dealt with the approach to analyse expert evidence, which should be adopted by the courts. The court reaffirmed the principles that what is required in the evaluation of such evidence is to determine whether and to what extent the opinions advanced by the expert witness are founded on logical reasoning. The approach in assessing the expert scientific evidence, is that the court must be satisfied that such expert opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached a defensible conclusion. Only where the opinion of the expert scientific witnesses cannot be logically supported at all, will it fail to provide the benchmark by reference to which the Respondent's conduct falls to be assessed.

### **Responses to Notice in terms of section 7(9) of the Public Protector Act**

#### *Mr Sithole's response*

- 6.2.42 Mr Sithole responded to the Notice on 18 May 2024, and disputed the existence of the wetland. He contended that when construction commenced, the waterlogging condition that came with the blockage of the existing sewer pipe was non-existent. Further, during the construction of Mayibuye Primary School, the existing sewer pipe was continuously blocked, and CoJ came to unblock it; and

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<sup>30</sup> (ZASCA 12; [2002] 1 All SA 384 (A) (13 March 2001) at paragraph 36 to 37.

- 6.2.43 The alleged delay in completing the project was due to the capacity and capability of the Contractor to finish the project, including other contractual matters and not the existence of the waterlogging condition.

*Ms Mutlaneng's response*

- 6.2.44 Ms Mutlaneng responded to the Notice on 07 June 2024, and stated *inter alia* that:

- 6.2.44.1 GDE would coordinate the process of compiling the application as per the recommendations from DWS as it affects the internal works, which is the responsibility of GDE arising from the executive decision taken on 25 January 2023. However, GDID will be available for any collaborative input requirement.

*Documentary evidence received from GDID*

*Notice of intention to issue a directive in terms the National Water Act, 1998, dated 15 December 2023*

- 6.2.45 In terms of this Notice of 15 December 2023, DWS issued GDID with a directive in terms of sections 19(3) and 53(1) of the National Water Act, 1998 (Act No. 36 of 1998) for engaging in water uses in terms of section 21 of the Act without an authorisation during the development of Mayibuye Primary School.
- 6.2.46 DWS further determined that the waterlogging aligns with the delineated wetland, and Mayibuye Primary School is constructed within a 500m radius of a wetland. As a result, GDID is in contravention of section 21 (c) and (i) of the National Water Act because DWS has no record of an application for

water use authorisation and neither did they receive technical documents about the project.

*Letter from DWS to GDID, dated 10 April 2024*

- 6.2.47 In terms of this letter of 10 April 2024, DWS determined that a section 21 (c)(i) of the National Water Act authorisation was required for the construction of Mayibuye Primary School and the diversion of the sewer line within a 500m radius of a wetland. Therefore, GDID was directed to initiate a formal water use authorisation process.

*Hydropedological assessment report dated 24 January 2024*

- 6.2.48 Wallace and Green Environmental Consulting (Pty) Ltd appointed Biodiversity Company to conduct a specialist hydropedological assessment, and they recommended:
- 6.2.48.1 Stopping the initial sewage spills from the manholes towards the stormwater drainage line;
  - 6.2.48.2 General application of hydrated lime to reduce the bacteria levels in the initial affected spillage areas;
  - 6.2.48.3 Characterization of untreated faecal sludge, soils along the spill area and surface water quality sources for monitoring purposes;
  - 6.2.48.4 Vegetation management and removal of alien invasive species;
  - 6.2.48.5 Removal of silt downstream and stormwater drainage cleaning maintenance:

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- 6.2.48.6 Conducting monitoring phase, a month after the infrastructure upgrades on the soil and water quality sampling and determinations. The seasonal monitoring of areas which have a high concentration of inorganic and organic contaminants for surface water quality; and
- 6.2.48.7 The placement or use of sandbags, earth, or plastic sheeting along watercourses to contain or reduce the high levels of bacteria and nutrients in the water sources. The use of sandbags placed along the water channels, and the sand acts as an infiltration matrix, trapping the bacteria and nutrients.
- 6.2.49 The report concluded that:
- 6.2.49.1 The three hillslope types identified include the presence of recharge (shallow), interflow (Soil/Bedrock) and responsive saturated hydrogeological types. The Mayibuye School Project and associated infrastructure had some effect on the hillslope hydrology due to the extent of the development building concrete foundations, associated sewage pipelines (leakages) and other infrastructures. Some of the hillslopes with recharge dominating throughout, as well as the size of the catchment, have acceptable impacts;
- 6.2.49.2 Lateral flow changes occurred in the hillslopes with increased surface run-offs, surface return flows, and overland flows. However, their effects will have acceptable impacts on the total streamflow of watercourses in the larger catchment as both lateral and vertical flow paths will occur in response to the flow impediment; and
- 6.2.49.3 The Mayibuye School Project requires the implementation of mitigation measures to address the expected impacts on certain hillslopes in the assessment area. These measures will focus on managing changes in the flow paths of soils resulting from the development and construction of

associated infrastructure. Flow impediment can be managed well to minimise saturation conditions and surface return flows to promote subsurface groundwater recharge and storage. Valley bottom soils are responsive hydromorphic soils due to long periods of saturation. Usually, development should avoid areas with responsive (saturated) hydrogeological soil types mainly associated with and found within wetlands, which act as water regime receptors for the water balance in the hillslopes` catchment. These soils are susceptible to the promotion of the migration of inorganic and organic (faecal bacteria) from faecal effluents or sludges towards water resources. In the current project, infrastructure is located on such soils, also associated with sewage effluent leakages, which can pose a health risk. Measures are needed to ensure that quality water is re-applied into the catchment.

*Environmental Audit Report dated 23 January 2024 prepared by the Biodiversity Company*

- 6.2.50 The findings of the environment audit report are as follows:
- 6.2.50.1 Two (02) areas have been identified and defined for the process. The Contractor is responsible for any impacts and their remediation in the school project area, while the second catchment area is assumed to be the responsibility of the local municipality and excludes the school development area;
  - 6.2.50.2 The impact assessment shows that both the school development project and the general development of the surrounding area have led to mainly moderate residual impacts on the wetland system. The most significant impact is caused by the leaking sewer infrastructure, resulting in a high residual effect on the altered hydrology of the system and the deterioration of the water quality;

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- 6.2.50.3 The environment and audit report recommended the following monitoring measures for the school development project;
- 6.2.50.4 The removal of all materials from the area post-construction of the project;
- 6.2.50.5 The shaping and landscaping of all disturbed areas within the school development and adjacent catchment area; and
- 6.2.50.6 The efficiency and suitability of stormwater infrastructure.
- 6.2.51 The environment and audit report recommended the following monitoring measures for the catchment area:
- 6.2.51.1 The monitoring of the leaking sewer infrastructure;
- 6.2.51.2 The shaping and landscaping of the catchment area. Including the formalising of stormwater measures for Senamorula Street; and
- 6.2.51.3 The stormwater infrastructure on Theresa Street is being upgraded to enable the discharge of water from the catchment area.
- 6.2.52 The environment and audit report concluded as follows:
- 6.2.52.1 The development of the local area and the school project had a significant impact on the wetland system. An assessment in 2017 classified the health of the wetland system as critical (class F). The main contributor to this impact is the leaking sewer infrastructure, which has altered the hydrology and water quality of the wetland. While the school project has also had some effect on the wetland, the most significant issues emanated from the failing sewer infrastructure and inadequate stormwater displacement.

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- 6.2.52.2 To remedy these issues, the following measures must be implemented on-site:
- (a) Replace/upgrade failing sewer infrastructure to cease the leaking of sewerage into the catchment; and
  - (b) The upgrading of stormwater infrastructure at Theresa Street to manage the stormwater for the catchment area is likely to increase further due to the school development project. The school infrastructure in the area could be affected due to the inability to manage this stormwater, as it is in a saturated zone.
- 6.2.53 The environment and audit report recommended the following if the above are not yet available:
- 6.2.53.1 Compilation and implementation of a rehabilitation plan, considering the delineated wetland and the local catchment area;
  - 6.2.53.2 Department to implement the stormwater management plan approved by the Department for the school development project and the local catchment area;
  - 6.2.53.3 The monitoring of the leaking sewer infrastructure;
  - 6.2.53.4 The shaping and landscaping of the catchment area. Including the formalising of stormwater measures for Senamorula Street; and
  - 6.2.53.5 The upgrading of the stormwater infrastructure for Theresa Street to responsibly discharge water from the catchment area.



*DWS's response*

*Dr Phillip's response*

- 6.2.54 Dr Phillips responded to the Notice on 12 June 2024, and stated *inter alia* that:
- 6.2.54.1 GDID confirmed in the letter of 30 January 2024 that there are no records of water use authorisation issued by the DWS. DWS noticed that designs for the proposed relocation of Johannesburg Water sewer infrastructures was approved on 09 September 2022 and the sewer relocation project was underway during the site meeting of 21 December 2023;
- 6.2.54.2 After reviewing the information received on 22 February 2024, DWS found that a water use authorisation is needed. They instructed GDID to start the water use license application with DWS within 30 days of receiving the letter. However, GDID did not comply with this directive;
- 6.2.54.3 On 06 June 2024, DWS conducted a follow-up inspection at Mayibuye Primary School, and thereafter, issued a directive dated 07 June 2024 to GDID to apply for a water use authorisation to address the newly relocated sewer line around Mayibuye Primary School that was constructed within 500m radius of a wetland;
- 6.2.54.4 DWS decided not to issue a directive against Johannesburg Water because they have complied with the Notice of intention to issue the directive. However, there are still some documents that need to be submitted to DWS for record purposes; and
- 6.2.54.5 During the follow-up inspection, DWS observed that there were no sewer spillages or water leaks on site. The new sewer line constructed by GDID

has been commissioned, and the old sewer along the fence of the school has been decommissioned.

*Documentary evidence accompanying DWS' response to the Notice*

*Notice of intention to issue a directive in terms of the National Water Act, to GDID dated 30 January 2024*

- 6.2.55 In terms of the Notice of 30 January 2024, GDID confirmed that there is no record of a decision issued by the DWS regarding a Water Use License.

*Directive in terms of the National Water Act, 1998 to GDID for engaging in water use without authorisation, dated 07 June 2024*

- 6.2.56 In terms of this directive, DWS issued GDID with a notice in terms of sections 19(3) and 53(1) of the National Water Act, 1998 (NWA), for engaging in water uses without authorisation and the effects of the above on the watercourse.

*GDARDE's response*

*Mr Mase's response*

- 6.2.57 Mr Mase responded to the Notice on 21 June 2024, and stated *inter alia* that:

- 6.2.57.1 They are in broad agreement with the findings of the Public Protector pertaining to the existence of a wetland on the site. GDARDE also agrees that the southern portion of the development area is affected by the wetland and its associated 30 metre buffer;

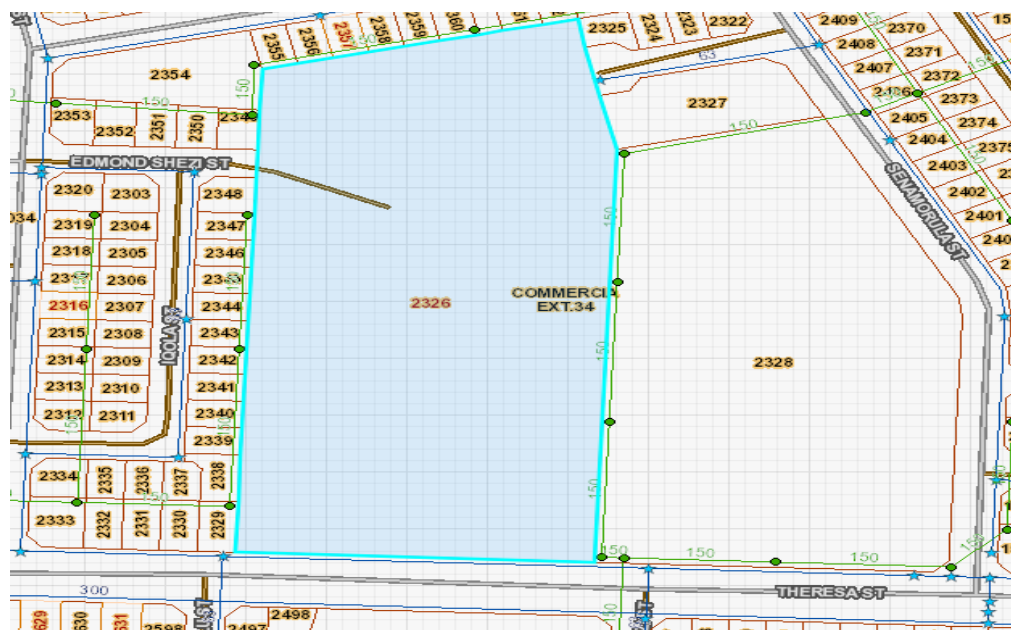
- 6.2.57.2 The wetland is heavily impacted and is also mainly driven by the leaking sewer infrastructure. GDARDE also confirmed that the wetland may likely disappear with appropriate fixing of the leaking sewer on the site as it is currently not functional because of anthropogenic activities on the site;
- 6.2.57.3 Considering the above, GDARDE confirms that the construction of Mayibuye Primary School within a watercourse (wetland) potentially triggered Activity 19 of Listing Notice 1 and Activity 14 of Listing Notice 3 of the EIA Regulations, 2014;
- 6.2.57.4 Taking into account the fact that Mayibuye Primary School was constructed in part, within watercourse triggering activities, the applicant or the person/entity responsible for the development construction of the school commenced with a listed activity prior to obtaining the necessary authorisation, thus contravening section 24F(1) of the NEMA and therefore potentially guilty of an offence in terms of Section 49A(1) of the NEMA; and
- 6.2.57.5 It must, however, be pointed out that GDARDE is not legally empowered to force a person or entity to submit a section 24G application as this is a voluntary application by the said person or entity that has illegally commenced with a listed activity. When a person or entity seeks rectification in terms of section 24G of the NEMA, such person or entity must be issued an administrative fine currently set at a maximum of R10 million.

### *Analysis*

- 6.2.58 The evidence before the Public Protector shows that the construction of the school commenced before the wetland study was commissioned as evidence revealed that there were many construction vehicles on site and the building platforms were already in place and being constructed when Dr Gouws visited the site in 2017;

- 6.2.59 Factual evidence, such as aerial photographs and google maps, revealed amongst other things that the south-eastern edge of Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand, where the School Hall and the Tennis Courts were constructed, are positioned within a delineated wetland, which superimposes on the southern section of the school premises;
- 6.2.60 An area of the school premises has visible signs of a wetland and same was confirmed by the presence of the Unchanneled Valley Bottom Wetland on Erf 2328, which superimposes on the south-eastern edge of Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand, which is where the school's Main Hall and the Tennis Courts school were constructed;
- 6.2.61 All the school buildings are within a five hundred (500) metres radius of a wetland, which triggers water use authorisation in terms of section 21(c) and (i) of the National Water Act, 1998 prior to construction;
- 6.2.62 The evidence before the Public Protector indicates that the observations made by the wetland specialist (Dr Gouws) were essentially corroborated by other experts from the GDARDE as well as DWS, who both confirmed the wetland to be present on the south-eastern edge of the site although highly impacted and hydrologically driven by a leaking sewer:
- 6.2.62.1 Ms Motara confirmed that the sewer line is not on the school grounds, but it flows along the boundaries of the school. The sewer line is constantly blocked, causing an overflow of sewage waste onto the school grounds, and that this issue will be resolved through diversion of the line from the school grounds;
- 6.2.62.2 The GDE acknowledged that the recurring sewer spillage is harmful to the community's health and safety, thus they recommend that all outstanding works be completed at the school which includes the rerouting of the sewer.

6.2.62.3 The CoJ provided the below map, which clearly depicts the location of the sewer line, as running alongside the boundaries of Erf 2326 Commercial Extension 34 Township, Rabie Ridge/Midrand. Therefore, it is clear that the sewer line runs on the adjacent property being Erf 2328.



Sewer Map depicting sewer line (green line)<sup>31</sup>

6.2.63 The CoJ further submitted that the school is not built on dangerous terrain, however a portion of the school specifically the tennis courts and not the entire school, overflows with sewerage which emanates from the manhole due to overload.

6.2.64 The CoJ stated that there are other Contractors on site constructing a new sewer line to augment the current overloaded one.

6.2.65 Johannesburg Water has approved sewer pipeline designs to re-route and relay the sewer pipeline outside Erf 2328, along Senamorula Street and

<sup>31</sup> The green line is the thin line which runs between erf 2326 and erf 2328. It circumvents erf 2328 running alongside Theresa Street and splitting Erf 2328 and Erf 2327.

Theresa Street. The pipeline is being constructed under the supervision of Johannesburg Water;

6.2.66 Furthermore, Johannesburg Water is in constant communication with the Contractor on site, to supervise and monitor progress on site, with regards to the laying of the new sewer pipeline. Johannesburg Water is of a view that the re-routing of the pipeline is sufficient and will foster a habitable environment within the school.

6.2.67 Lastly, Dr Gouws, in his supplementary notes also acknowledges that sewerage was spilling over and running uncontrolled downslope towards the south. This has contaminated the wetland and caused the water table of the soil to become perched (elevated).

6.2.68 The views and opinions of the scientific experts appear to be founded on logically supported reasoning, having considered the following comparative risks and characteristics to reach their conclusions that the site(s) qualify as a potential wetland:

- (a) Topography or terrain of the site;<sup>32</sup>
- (b) Soil conditions, matrix, texture, and colour thereof on site;<sup>33</sup>
- (c) Vegetation or plant types on site;<sup>34</sup> and
- (d) Hydrology.<sup>35</sup>

6.2.69 From the analysis of the legal obligations of GDID as they flow from the legislation discussed above, it is clear that GDID had a duty to comply with statutory requirements in terms of section 21 of the National Water Act, section 2(4) of the NEMA, Regulation 16 of NEMA and GDARDE's Minimum

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<sup>32</sup> Unchanneled gully bottom type of a terrain was observed.

<sup>33</sup> Wet gleyed soil was detected and used as a determinant for assessment.

<sup>34</sup> Southern part of the site is overgrown with Kikuyu grass and reeds.

<sup>35</sup> The site falls within the headlands of a poorly defined watercourse and rainwater drains through a lateral surface flow that is concentrated on the southern boundary, where it leaves the site through a culvert.

Requirements for Biodiversity Guidelines, March 2014, Version 3, before embarking on the construction of Mayibuye Primary School on Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand.

- 6.2.70 The rectification procedure to be embarked upon by person where construction activity has occurred without compliance with statutory requirements is set out in section 24G of NEMA Amendment Act.
- 6.2.71 According to the DWS and the GDARDE, there are no records for water use license authorisation and an environmental authorisation application ever submitted in relation to the construction of Mayibuye Primary School on Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand;
- 6.2.72 It further became clear from the expert evidence contained in the Environmental Audit Report dated 23 January 2024 and Hydropedological Assessment *report dated 24 January 2024* that the development of Mayibuye Project and the general development of the surrounding area have led to mainly moderate residual impacts on the wetland system. These experts report also concluded that most significant impact is caused by the leaking sewer infrastructure, resulting in a high residual effect on the altered hydrology of the system and the deterioration of the water quality.
- 6.2.73 As indicated by the court in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*, the approach to analysing expert evidence is to ensure that it is logically supported and provides a benchmark for a defensible conclusion.

#### *Conclusion*

- 6.2.74 Based on the evidence at the disposal of the Public Protector and the application of the law thereto, there is reasonable cause to conclude that the allegation of improper conduct and maladministration by the

functionaries of the GDID regarding the construction of Mayibuye Primary School on a wetland before conducting a wetland study, is well founded.

- 6.2.75 Construction had already commenced when the expert was commissioned for the wetlands study. The site was already highly disturbed, and it is doubtful that the wetland was even considered in the design and layout of the school;
- 6.2.76 Signs of a wetland, whether artificial or natural were confirmed by the presence of the Unchanneled Valley Bottom Wetland, soil conditions, topography, vegetation or plant types and hydrology on Erf 2328, which superimposes on the south-eastern edge of Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand, which is where the School's Main Hall and Tennis Court are constructed.
- 6.2.77 Accordingly, the functionaries of the GDID improperly constructed Mayibuye Primary School prior to conducting a wetland study thus resulting in undue delays in completing the project and further culminated in contravention of the National Water Act, National Environmental Management Act, NEMA Regulations and GDARDE's Minimum Requirements for Biodiversity Guidelines, March 2014, Version 3.
- 6.2.78 It is clear from the evidence above, that Mayibuye Primary School is not built on an old sewer line, but rather, alongside it. However, the wetland, is exacerbated by a leaking sewer. Its existence is unsightly, and hazardous to the entire community surrounding the construction site of Mayibuye Primary School. Furthermore, the need to divert the sewer line, after construction of the school commenced, has escalated the costs associated with the project. In the view of the Public Protector, this unfortunate reality could have, and would have been prevented, had the GDID and the GDE, duly conducted the necessary wetland study prior to commencement of the project.



## 7. FINDINGS

Having regard to the evidence, the regulatory framework determining the prejudice suffered, the Public Protector makes the following adverse findings:

### 7.1 **Whether the functionaries of the Gauteng Department of Infrastructure Development and the Gauteng Department of Education did not comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act, 1994**

7.1.1 The allegation that the functionaries of GDID and GDE did not comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School, **is substantiated.**

7.1.2 The investigation by the Public Protector revealed various forms of maladministration, undue delays, and irregularities, which occurred during the construction of Mayibuye Primary School such as the following:

7.1.2.1 The Contractor namely, Basic Blue/Nebavest was appointed by GDID on 22 August 2015, but the PTO for the site was obtained from the landowner, City of Johannesburg Metropolitan Municipality (CoJ) on 22 September 2016, which was 13 months after the award of the contract or tender.

7.1.2.2 The GDE amended the scope of the contract four days after the contractor was appointed to include amongst other things, smart school requirements.

These required additional funding from GPT and resulted in increased costs and further delays to get approvals from the relevant GPT.

- 7.1.2.3 The handing over of the site to the Contractor was also unduly delayed as it only happened on 12 May 2017. As a direct result of the delays, the GDID and GDE incurred CEs to the value of ten million and sixty-one thousand rand five hundred nineteen rand and seventy-three cents (R10 060 519, 73) towards the Contractor for “*standing time*”.
- 7.1.2.4 Poor project management by the GDE and GDID resulted in their inability to identify shortcomings that existed on the site such as the revision of the scope of the project by GDE to incorporate smart school’s requirements, the diversion of sewer lines and the encroaching properties on site.
- 7.1.2.5 GDE and GDID failed to ensure that undue delays experienced in this project are prevented or avoided through proper planning, project management by coordinating their actions through coherent governance, consultation with one another and cooperation as contemplated in section 41(1) of the Constitution.
- 7.1.2.6 All the delays detailed above could have been avoided if both the functionaries of GDID and GDE collaborated and cooperated effectively to satisfy themselves about the permission to occupy site and the availability land to build the school prior to awarding the tender to the Contractor. As a result of the apparent lack of collaboration and coordinated project management by these two departments, undue delays ensued and both GDID and GDE incurred cost overruns and expenditure prohibited in terms sections 38(1)(c)(ii) and (iii) of the PFMA and 45(c) of the PFMA.
- 7.1.2.7 The GDID’s own internal investigation, the AGSA’s and GPT’s findings confirmed that there was irregular expenditure in the project caused by amongst other things poor contract management and planning by GDID’s officials. This irregular expenditure flagged by GDID’s own internal

investigation, AGSA and GPT is also in direct violation of sections 38(1)(ii) and 45(c) of the PFMA.

- 7.1.2.8 Consequent to the scope changes, GDID applied *ex post facto* to GPT for approval of CEs, of which some were already partially implemented at the school by the Contractor. GDID's application for approval of CEs that exceeded 20% threshold and lacked sufficient information to substantiate for exceptional circumstances, which GPT rejected, thus contributing to more delays and stoppages on the project.
- 7.1.2.9 The variations exceeded 20% of the original contract, which is prohibited by Clause 9.1 of the National Treasury Instruction Supply Chain Management (SCM) Note 3 of 2016/17.
- 7.1.2.10 The CEs or costs incurred by GDID and GDE towards the Contractor for "*standing or idling time*" are all irreconcilable with the prohibited expenditure in terms section 38(1)(c)(ii) and (iii) of Public Finance Management Act, 1999 (PFMA) and section 45(c) of the PFMA as well as in direct contravention of the efficient, economic, and effective use of resources envisaged in section 38(1)(b) of PFMA, section 45(b) of PFMA and section 195(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 7.1.2.11 By their own admission, the functionaries of the GDID made a number of requests for variation, which were above the 20% threshold. Upon realising that this would not be approved, the functionaries deliberately limited the variations to 19.9%. This was done to avoid having to request approval from the GPT. Such conduct cannot be said to represent the ethical standards required of persons within the public administration.
- 7.1.2.12 As a result, GPT raised the suspicion and concluded that the split of the CEs was made by GDID intentionally to bypass obtaining prior approval from GPT for the full amount. It follows therefore that the conduct of splitting

the CEs by both GDE and GDID is irreconcilable with the sound principles of cooperative governance and high standard of professional ethics required for effective project management and financial prudence.

7.1.2.13 Aggregated against the prescripts that regulate the standard that should have been met by the GDID and GDE during the construction of Mayibuye Primary School, the conduct of the functionaries of these two departments is at variance with the obligations imposed by section 41(1) of the Constitution, section 195(1) of the Constitution, section 38 and section 45 of the PFMA, Paragraph 9.1 and 9.2 of the National Treasury Instruction SCM Note 3 of 2016/2017.

7.1.3 Having examined all the available evidence and information, it follows that the conduct of the functionaries of the GDID and GDE did not comply with the applicable legal prescripts and procedures regulating procurement or supply chain management processes during the construction of Mayibuye Primary School at Commercia Rabie Ridge/Midrand.

7.1.4 Therefore, the Public Protector finds that such conduct by the functionaries of the GDID and GDE constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, maladministration, and undue delay in terms of section 6(4)(a)(i) and (ii) of the Public Protector Act.

7.2 **Whether the functionaries of the Gauteng Department of Infrastructure Development improperly constructed Mayibuye Primary School prior to conducting a wetland study thus resulting in undue delays in completing the project, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act**

- 7.2.1 The allegation that the functionaries of the Gauteng Department of Infrastructure Development improperly constructed Mayibuye Primary School at Commercia Rabie Ridge/Midrand prior to conducting a wetland study, thus resulting in overspending, costs overruns and undue delays in completing the project, **is substantiated**.
- 7.2.2 The south-eastern edge of Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand, where the School's Hall and the Tennis Courts are constructed, is underlain by presence of a wetland conditions and signs, which superimpose from the adjacent Erf 2328.
- 7.2.3 Dr Gouws of Index (Pty) Ltd was commissioned for the wetland study after construction had already commenced on site.
- 7.2.4 Even without the certainty due to the modifications already done in preparation for building on the northern portion of Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand, all the school buildings are without a doubt within 500 metres radius of a wetland. No water use license authorisation application was submitted in relation to the construction of Mayibuye Primary School on Erf 2326 Commercia Extension 34 Township Rabie Ridge/Midrand. This was not in line with section 21(c) and (i) of National Water Act, 1998.
- 7.2.5 Mayibuye Primary School is affected by a 30-metre buffer zone measuring from the edge of the '*watercourse*' as it superimposes from an Unchanneled Valley Bottom Wetland on the neighbouring Erf 2328.
- 7.2.6 GDARDE have no record of an application or a decision for an environmental authorisation as a provincial department responsible for environmental affairs in the Gauteng province from GDID as contemplated in NEMA Regulations and in terms of Version 13 of GDARDE's March 2014

Minimum Requirements in connection with the development footprint activities for the site where Mayibuye Primary School is constructed.

- 7.2.7 It is immaterial at this stage whether the wetland is natural or artificial (due to leaking sewer being the main hydrological driver of the existing wetland on site), because it exists now and probably became much bigger and wetter due to human activities/disturbances that took place on site. The current condition of the area still warrants rehabilitation or mitigating engineering solutions.
- 7.2.8 Accordingly, the Public Protector finds that the conduct of the functionaries of GDID in relation to the allegations of improperly constructing Mayibuye Primary School at Commercia Rabie Ridge/Midrand prior to conducting a wetland study, thus contributing to undue delays in completing the project constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, maladministration, and undue delay in terms of section 6(4)(a)(i) and (ii) of the Public Protector Act.

## **8. REMEDIAL ACTION**

- 8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report.
- 8.2 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*, the Constitutional Court per Mogoeng, CJ held that the remedial action taken by the Public Protector has a binding effect.
- 8.3 Having regard to the evidence and the regulatory framework determining the standard the GDID and GDE should have complied with, the Public

Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution:

**Premier of Gauteng**

- 8.3.1 Take cognisance of this report and in line with his executive powers envisaged in section 125(2) of the Constitution and exercise oversight on the implementation of the remedial action;

**Member of the Executive Council for Gauteng Human Settlements and Infrastructure Development**

- 8.3.2 Take cognisance of this report in line with powers contemplated in section 63(1)(a) of the PFMA and ensure implementation of the remedial actions as contemplated in paragraph 8.3.6 – 8.3.8 below, by GDID;

**Member of the Executive Council for Gauteng Department of Education**

- 8.3.3 Take cognisance of this report in line with powers contemplated in section 63(1)(a) of the PFMA and ensure implementation of the remedial action as contemplated in paragraph 8.3.9 – 8.3.11 below, by GDE.

**Member of the Executive Council for Gauteng Department of Finance**

- 8.3.4 Take cognisance of this report in line with powers contemplated in section 63(1)(a) of the PFMA and ensure implementation of the remedial action as contemplated in paragraph 8.3.12 below.

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### **Auditor General of South Africa**

8.3.5 In terms of section 6(4)(c)(ii) of the Public Protector Act, the Public Protector hereby refers this report to the AGSA in line with its mandate.

### **Head of Department of GDID**

8.3.6 Within **sixty (60) calendar days** from the date of receipt of this report, provide the Public Protector with a Project Plan, in accordance with the MEC's bilateral meeting convened on 25 January 2024 where an executive decision was reached that GDID will only implement the external civil works. The Project Plan must indicate how and when the completion of the remaining external civil works will be finalised to ensure that Mayibuye Primary School is fully operational in line with the efficient and economic management of the working capital as contemplated in terms of section 38(1)(c)(iii) of the PFMA and to enable learners to fully access and utilise all the facilities of the school during 2024;

8.3.7 Within **sixty (60) calendar days** of receipt of this report, provide the Public Protector, and the MEC for Human Settlements and Infrastructure Development with a progress report, in respect of the implementation of the recommendations set out in the GDID's internal investigation dated 28 April 2022, as contemplated in terms of section 38(1)(h) of the PFMA.

8.3.8 Within **sixty (60) calendar days** from the date of this report provide the Public Protector, and the MEC for Human Settlements and Infrastructure Development with the Project Plan indicating how GDID shall work collaboratively with GDE in line with the principles of cooperative governance as contemplated in section 41(1)(h) of the Constitution to initiate a water use authorisation application process as recommended by DWS to ensure compliance with sections 21 and 22 of the National Water Act, 1998 and NEMA Regulations, 2017.



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### Head of the Gauteng Department of Education

- 8.3.9 Ensure continuous compliance and strict monitoring mechanisms of the Project Plan already provided to the Public Protector on 14 June 2024 to ensure that the school is fully operational in line with the efficient and economic management of the working capital in terms of section 38(1)(c)(iii) of the PFMA.
- 8.3.10 Within **sixty (60) calendar days** from the date of receipt of this report, provide the relevant Treasury with a report envisaged in paragraph 3.2 (iv) of Treasury Instruction 2 of 2015/16: Cost Control Measures for the Construction of New Primary and Secondary Schools and the Provision of Additional Buildings at Existing Schools to enable the Treasury to interrogate costs overruns, project status, track expenditure trends and take necessary corrective action to ensure the full completion of Mayibuye Primary School project.
- 8.3.11 Within sixty **(60) calendar days** from the date of this report provide the Public Protector, and the MEC for Education with the Project Plan indicating how GDE will work collaboratively with GDID in line with the principles of cooperative governance as contemplated in section 41(1)(h) of the Constitution to initiate a water use authorisation application process as recommended by DWS to ensure compliance with sections 21 and 22 of the National Water Act, 1998 and NEMA Regulations, 2017.

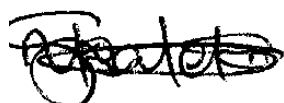
### Head of the Gauteng Provincial Treasury

- 8.3.12 Within sixty **(60) calendar days** upon receipt of a report from GDE envisaged in Paragraph 3.2 (iv) of Treasury Instruction 2 of 2015/16: Cost Control Measures for the Construction of New Primary and Secondary Schools and Provision of Additional Buildings at Existing Schools, provide

the Public Protector with monitoring mechanisms or measures to be put in place to prevent irregular and fruitless expenditure in relation to this project, in line with the provisions of Paragraph 3.3 of Treasury Instruction 2 of 2015/16: Cost Control Measures for the Construction of New Primary and Secondary Schools and the Provision of Additional Buildings at Existing Schools, section 18(1)(b) and (c) as well as section 18(2)(f) of the PFMA.

## 9 MONITORING

- 9.1 The Heads of Departments to submit action plans to the Public Protector within **thirty (30) calendar days** from the date of this report on the implementation of the remedial action referred to in paragraph 8 above.
- 9.2 The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.
- 9.3 In line with the Constitutional Court Judgement in the matter of *Economic Freedom Fighters*, and to ensure the effectiveness of the Office of the Public Protector, the remedial action prescribed in this Report are legally binding on GDE and GDID unless there is an Interim Interdict or Court Order directing otherwise.



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**ADV. KHOLEKA GCALEKA**  
**PUBLIC PROTECTOR**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE: 30 JUNE 2024**

*Assisted by: Ms N Motsitsi*

*Executive Manager: PII Inland*