

# MANDELA FUNERAL

REPORT OF THE PUBLIC PROTECTOR ON AN INVESTIGATION INTO ALLEGATIONS OF MISAPPROPRIATION OF PUBLIC FUNDS, IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHER ORGANS OF STATE IN CONNECTION WITH THE EXPENDITURE INCURRED IN PREPARATION FOR THE FUNERAL OF THE LATE FORMER PRESIDENT NELSON ROLIHLAHLA MANDELA, "AAH! DALIBHUNGA"

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SOUTH AFRICA

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**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**



**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE  
MISAPPROPRIATION OF PUBLIC FUNDS, IMPROPER CONDUCT AND  
MALADMINISTRATION BY THE EASTERN CAPE PROVINCIAL GOVERNMENT AND  
OTHER ORGANS OF STATE IN CONNECTION WITH EXPENDITURE INCURRED IN  
PREPARATION FOR THE FUNERAL OF FORMER PRESIDENT NELSON  
ROLIHLAHLA MANDELA**

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**LIST OF ACRONYMS**

<b>BCM</b>	<b>Buffalo City Metropolitan Municipality</b>
<b>CEO</b>	<b>Chief Executive Officer</b>
<b>CFO</b>	<b>Chief Financial Officer</b>
<b>Cllr</b>	<b>Councillor</b>
<b>Constitution</b>	<b>The Constitution of the Republic of South Africa, 1996</b>
<b>DEDEAT</b>	<b>Department of Economic Development, Environmental Affairs and Tourism</b>
<b>DG</b>	<b>Director-General</b>
<b>ECDC</b>	<b>Eastern Cape Development Corporation</b>
<b>ECPT</b>	<b>The Eastern Cape Provincial Treasury</b>
<b>ECPTA</b>	<b>Eastern Cape Parks and Tourism Agency</b>
<b>ECPG</b>	<b>Eastern Cape Provincial Government</b>
<b>Email</b>	<b>Electronic Mail</b>
<b>EXCO</b>	<b>Executive Council</b>
<b>GM</b>	<b>General Manager</b>
<b>HOD</b>	<b>Head of Department</b>
<b>KSD</b>	<b>King Sabata Dalindyebo Municipality</b>
<b>MM</b>	<b>Municipal Manager</b>
<b>MPAC</b>	<b>Municipal Public Accounts Committee</b>
<b>NMBMM</b>	<b>Nelson Mandela Bay Metropolitan Municipality</b>
<b>ORTDM</b>	<b>OR Tambo District Municipality</b>
<b>OTP</b>	<b>Office of the Premier</b>
<b>PFMA</b>	<b>Public Finance Management Act No. 1 of 1999</b>
<b>PMVS</b>	<b>Public Mourning Venues</b>
<b>SCM</b>	<b>Supply Chain Management</b>
<b>SG</b>	<b>Superintendent-General</b>
<b>Treasury Regulations</b>	<b>The Treasury Regulations and instructions for departments, tradi entities, constitutional institutions and public entities, issued in terms of the Public Finance Management, 1999</b>

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## Executive Summary

- (i) This is a report of the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act, 1994.
- (ii) It relates to an investigation into allegations of the misappropriation of public funds, improper conduct and maladministration by the Eastern Cape Provincial Government (ECPG) and other organs of state in connection with the expenditure incurred for the funeral of the late former President Nelson Rolihlahla Mandela (President Mandela) that was held in Qunu in the Eastern Cape Province on 15 December 2013.
- (iii) The Public Protector received several complaints in 2014 from members of the public in connection with reports that appeared in the print media about the misappropriation of public funds in the procurement of goods and services for the funeral of President Mandela.
- (iv) In essence, it was alleged that:
  - (a) The Buffalo City Metropolitan Municipality (BCM) paid an amount of R6 million to a service provider to transport mourners around East London and King Williams Town to attend memorial services from 10 to 12 December 2013;
  - (b) The King Sabata Dalindyebo Local (KSD) Municipality incurred expenditure in excess of R31 million to procure goods and services for President Mandela's funeral;

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- (c) An amount of R22 million was paid for the procurement of goods and services for the funeral from *“a R330 million infrastructure grant the provincial treasury channelled to the ECDC (Eastern Cape Development Corporation) as the department’s implementing agent after the mid -term budget adjustments last September.”*
- (d) The funds were meant for the provision of running water, electricity, sanitation, ablution facilities, replacement of mud-schools and refurbishing of hospitals.
- (e) *“Correspondence between provincial treasury head Marion Mbina-Mthembu to Mase makes it clear ECDC was the provincial ‘project host’ or ‘paymaster’ for the funeral and all related logistics;”*
- (f) Several members of the public filed complaints raising concerns about what they perceived as excessive, unconscionable and unnecessary use of public funds in the Eastern Cape in connection with the appointment of service providers to assist in the preparations for the funeral of the late President Mandela. The complaints were lodged between 14 January 2014 and 24 June 2014.
- (v) The Public Protector also took note of media reports alleging that public funds in the amount of R250 000 were deposited in the personal bank account of the former MEC for Provincial Planning and Treasury in the Eastern Cape, the Honourable, Mr. Phumullo Masualle.
- (vi) It was also reported that the Eastern Cape Parks and Tourism Agency (ECPTA) incurred irregular expenditure in excess of R2 million of public funds for the funeral.

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(vii) **On analysis of the complaints and the allegations contained therein, the following issues were identified and investigated:**

- (a) Whether the Eastern Cape Provincial Government (ECPG) improperly diverted public funds amounting to R300million placed in the custody of the ECDC, which were appropriated for purposes of accelerating social infrastructure delivery in the province, to use them for the memorial service and funeral of President Mandela and if so; whether such a conduct was improper and constitutes maladministration;
- (b) Whether the procurement process followed by the ECPG in the appointment of service providers to assist in the preparations for the funeral of President Mandela was in accordance with a system that is fair, equitable, transparent, competitive and cost effective;
- (c) Whether the Provincial Treasury irregularly transferred an amount of R250 000 of public funds into a personal bank account of MEC Phumulo Masualle and if so; whether such conduct was improper and constitutes maladministration;
- (d) Whether the ECDC acting in its official capacity as a Project Host and Paymaster caused the ECPG to incur irregular, fruitless and wasteful expenditure of public funds for the memorial service and funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration;
- (e) Whether the Eastern Cape Parks and Tourism Agency (ECPTA) incurred irregular and fruitless and wasteful expenditure in the procurement of goods and services relating to the funeral of President Mandela and if so, whether such conduct was improper and constitutes maladministration;

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- (f) Whether the Buffalo City Metropolitan Municipality (BC) improperly procured the services of and paid *Victory Ticket 750cc* an amount of R5 985 000.00 of public funds to transport mourners to four venues where the memorial services of President Mandela were to be held and if so, whether such conduct was improper and constitutes maladministration;
- (g) Whether the King Sabata Dalindyebo Local (KSD) Municipality incurred irregular and fruitless and wasteful expenditure of public funds in procuring the services of various service providers to assist in the preparations for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration;
- (h) Whether the OR Tambo District Municipality (ORTDM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration;
- (i) Whether the Nelson Mandela Bay Metropolitan Municipality (NMBMM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration;
- (viii) The investigation process was conducted through interviews with role players, inspection of relevant documentation; inspections *in loco*, analysis and application of the relevant laws, policies and related prescripts.
- (ix) Key laws and policies taken into account were principally those imposing the standards that should have been complied with by the organs of state involved and are the following:

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- (a) The Constitution of the Republic of South Africa, 1996 (the Constitution);
  - (b) The Public Protector Act, 23 of 1994 (the PPA);
  - (c) Local Government: Municipal Systems Act, 32 of 2000 (the Municipal Systems Act);
  - (d) Local Government: Municipal Structures Act, 117 of 1998 (the Municipal Structures Act);
  - (e) The Eastern Cape Development Corporation Act, 2 of 1997 (the ECDC Act);
  - (f) The Eastern Cape Parks and Tourism Agency Act, 2 of 2010 (the ECPTA);
  - (g) The Public Finance Management Act, 1 of 1999 (the PFMA);
  - (h) The Local Government: Municipal Finance Management Act, 56 of 2003 (the MFMA);
  - (i) Promotion of Administrative Justice Act, 3 of 2000 (PAJA);
  - (j) The Preferential Procurement Policy Framework Act, 5 of 2000 (the Preferential Procurement Framework);
  - (k) The Prevention and Combating of Corrupt Activities Act, 12 of 2004 (the PCCAA);
  - (l) The Eastern Cape Appropriation Act, 4 of 2013; and
  - (m) The Eastern Cape Adjustments Appropriation Act, 6 of 2013.

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**(x) The Public Protector made the following observations during the investigation:**

- (a) There was no properly coordinated plan for all the different role players in the funeral and related activities, from the level of National and Provincial Governments to Local Government and Public Entities.
- (b) Despite the fact that there were earlier discussions and a plan at national level for the funeral of President Mandela, it did not translate into advance and coordinated planning by the ECPG, the municipalities and public entities involved.
- (c) There was no operational centre where daily meetings were held and feedback was given on the status of the logistics.
- (d) Accordingly the related expenditure was not budgeted for resulting in the taking of what was regarded as emergency measures, both for funding and the procurement of goods and services. That was mainly the cause of unauthorised, irregular and fruitless and wasteful expenditure.
- (e) This weakness was explored and capitalized upon by some service providers that took advantage of the situation and inflated prices. Some submitted invoices and were paid for goods and services, the delivery of which was not or could not be verified. For an example the costs for t-shirts were inflated and it could not be verified whether they were actually delivered and where. The number of people that were transported to public mourning venues and memorial services could also not be verified.

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- (f) In some instances there appeared to have been improper collusion between officials and service providers at the expense of the organs of state involved.
- (g) Some of the service providers used were not on the list of registered suppliers (supplier database) and seemed to have appeared from nowhere.
- (h) Millions of Rands of public funds earmarked for service delivery and social infrastructure development were used for a state funeral because of a lack of coordinated planning and non-compliance with the legislation and other prescripts regulating procurement.
- (i) A similar occurrence of impropriety and maladministration can and should be avoided by all the organs of state that will be involved in state funerals in the future by ensuring that proper plans are made in advance, funds are accordingly appropriated and that the activities of everyone involved is properly coordinated and monitored.
- (xi) **Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:**
- (a) **Whether the ECPG improperly diverted public funds amounting to R300million placed in the custody of the ECDC, which were appropriated for purposes of accelerating social infrastructure delivery in the province, to use them for the memorial service and funeral of President Mandela and if so; whether such conduct was improper and constituted maladministration:**
- (aa) The allegation that the ECPG improperly diverted funds amounting to R300million appropriated to the ECDC for the acceleration of social infrastructure development to be used for the funeral of President Mandela, is substantiated.

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- (bb) The Head of the Department of Provincial Planning and Treasury, Ms Mbina-Mthembu recommended to Eastern Cape Provincial EXCO on 6 December 2013, that funds appropriated to the ECDC should be utilized for the funeral of President Mandela. Her advice to the Provincial EXCO was based on Treasury Regulation 6.1.3(c).
- (cc) However, Treasury Regulation 6.1.3(c) did not apply as it was reliant on the application of section 43 of the PFMA that required consideration and a decision by the Head of the DEDEAT in respect of the virement of funds between main divisions, as stipulated in the Eastern Cape Appropriation Act, 2013.
- (dd) **Two requirements had to be met in order to invoke the provisions of section 43:**
- (i) Firstly, there had to be a saving in the amount appropriated under a main division within a vote; and
  - (ii) Secondly, the virement must have been intended to defray excess expenditure under another main division within the same vote.
- (ee) Neither the Board of the ECDC, as the accounting authority, nor the Head of the DEDEAT was involved in Ms Mbina-Mthembu's decision to propose the variation of funds appropriated to the ECDC for social infrastructure development, for the purposes of expenditure to be incurred for President Mandela's funeral.
- (ff) The evidence does not show that there was any saving under a main division of an amount appropriated in terms of the Eastern Cape Appropriation Act, 2013.
- (gg) Further, the expenditure that the virement was supposed to cover, had not been incurred when the decision was taken and there could therefore not have been any "*defrayment of excess expenditure*", as contemplated by section 43(1) of the PFMA.

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- (hh) Ms Mbina-Mthembu accordingly misdirected the Eastern Cape Provincial EXCO in this regard. Her proposal was irrational and unlawful.
- (ii) This resulted in an irrational decision by the former Eastern Cape Provincial EXCO that culminated in an expenditure by the ECDC that was unauthorised as contemplated by the PFMA. (The funds were never voted for purposes that they were used for)
- (jj) Ms Mbina-Mthembu's conduct was improper and constituted maladministration.
- (b) Whether the procurement process followed by the ECPG in the appointment of service providers to assist in the preparations for the funeral of President Mandela was in accordance with a system that is fair, equitable, transparent, competitive and cost effective:**
- (aa) The allegation that the procurement process that was followed by the ECPG in the appointment of service providers to assist in the preparations for the funeral of President Mandela was not in accordance with a system that is fair, equitable, transparent, competitive and cost effective, is substantiated.
- (bb) The Head of the Department of Provincial Planning and Treasury, Ms Mbina-Mthembu was involved in discussions with other organs of state in connection with the planning of the funeral of President Mandela, from at least 2011.
- (cc) Yet, when President Zuma announced on 5 December 2013 that a state funeral would be held for President Mandela in the Eastern Cape, there was no provision for the associated expenditure in the provincial budget.
- (dd) There was also no costed plan in place for the procurement of goods and services by the ECPG that would be required for the arrangements and preparations for President Mandela's funeral.

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- (ee) This resulted, as concluded above, in a decision taken by the Eastern Cape Provincial EXCO on 6 December 2013, on the recommendation of Ms Mbina-Mthembu, to appoint the ECDC as paymaster for all the procurement of goods and services that had to be done in relation to the preparations for the funeral.
- (ff) It also resulted in Ms Mbina-Mthembu addressing an *instruction* to the Heads of Provincial Departments and the Municipal Managers of the KSD and OR Tambo on the procurement process that had to be followed.
- (gg) Due to the fact that there was no costed plan in place and no associated provision made in the provincial budget, and as the funeral was to take place in a matter of days, Ms Mbina-Mthembu decided that all procurement will have to be made in terms of a deviation process, based on urgency to be approved by the respective accounting officers and that all invoices had to be submitted to the Provincial Treasury for approval, upon which it would be presented to the ECDC for payment.
- (hh) Despite the fact that this was not adhered to, Ms Mbina-Mthembu instructed the ECDC to make payments.
- (ii) The conduct of Ms Mbina-Mthembu in approving and authorising procurement of goods and services relating to the funeral was in violation of the provisions of section 217 of the Constitution, section 38 of the PFMA, Treasury Regulations 8.1, 16A3.2, and 16A6.4.
- (jj) Her conduct was improper and constituted maladministration.
- (kk) There is no provision in any of the said legislation and other prescripts that allows for a situation where procurement of goods and services becomes the responsibility of the Provincial Treasury (except its own) and that it would be paid for by a public entity from funds that were appropriated for a different purpose.

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- (ll) It was also noted that the Board of the ECDC, as its accounting authority, played no role in the process that was followed to procure goods and services and the payment for it by the ECDC. There is no indication that it was ever raised with the Board by Mr Sentwa, who was at the time the Acting CEO, and CFO.
- (mm) The conduct of the CFO of the ECDC in approving and authorizing payments by the ECDC for goods and services procured by other organs of state was in violation of the provisions of section 217 of the Constitution, section 57 of the PFMA and Treasury Regulations 8.1 and 16A6.4.
- (nn) His conduct was improper and constituted maladministration.
- (c) Whether the Provincial Treasury irregularly transferred an amount of R250 000 of public funds into a personal bank account of MEC Phumulo Masualle and if so; whether such conduct was improper and constitutes maladministration:**
- (aa) The allegation that the Provincial Treasury irregularly transferred an amount of R250 000 into the personal bank account of MEC Masualle is substantiated.
- (bb) Ms Mbina-Mthembu, as the accounting officer of the Department of Provincial Planning and Treasury, approved an irregular payment of public funds into the personal bank account of the MEC and subsequently the opening of a special departmental account with a debit pay card issued to him, which gave him access to public funds.
- (cc) Neither of the two transactions are allowed by the provisions of the PFMA, the Treasury Regulations and the Ministerial Handbook.

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- (dd) Ms Mbina-Mthembu's conduct was therefore in violation of the provisions of section 38 of the PFMA and Treasury Regulation 8(1) and resulted in irregular expenditure.
- (ee) Her conduct was therefore improper and constitutes maladministration.
- (d) Whether the ECDC acting in its official capacity as Project Host and Paymaster caused the ECPG to incur irregular, fruitless and wasteful expenditure of public funds for the memorial services and funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**
- (aa) The allegation that the ECDC as the project host and paymaster caused the ECPG to incur irregular and fruitless and wasteful expenditure of public funds for the memorial services and funeral of President Mandela, is substantiated.
- (bb) The PFMA that regulates management of revenue expenditure, assets and liabilities of, *inter alia* government departments and public entities, includes the Treasury Regulations and is an Act of Parliament.
- (cc) Both the PFMA and the Treasury Regulations require of the accounting officer of a department and the accounting authority of a public entity to establish and maintain a proper competitive procurement system.
- (dd) Ms Mbina-Mthembu, the Head of the Department of Provincial Planning and Treasury and Mr Sentwa, who was the Acting CEO and the CFO of the ECDC at the time, held the view that the strict provisions of the Constitution, the PFMA and the Treasury Regulations pertaining to competitive procurement and expenditure management could be overruled by a resolution of a Provincial Executive Committee.

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- (ee) This misconception resulted in the acceptance of a process where the ECDC paid for procurement of goods and services that it had no control over, had not verified delivery of and had not approved. It relied on the approval of the Provincial Treasury that in some instances were not even involved in the procurement.
- (ff) It was found that expenditure incurred by the ECDC was unauthorised. Moreover, even if the expenditure was authorised, the payments by the ECDC would have constituted irregular expenditure as it was not in accordance with the PFMA and the Treasury Regulations.
- (gg) The Board of the ECDC as the accounting authority responsible for the expenditure, was not informed of the payments made under the authority of Mr Sentwa and at the request of Ms Mbina-Mthembu.
- (hh) As the CFO, he should have been aware that the payments were made in violation of the PFMA and the Treasury Regulations. Yet there is no indication that he raised alarm or his concern with the Board, to whom he was accountable.
- (ii) The funds from which the payments were made had not been transferred to the ECDC. At the time when the payments were made, the ECDC was therefore spending money that was allocated to them for different purposes in accordance with its mandate.
- (jj) When a reconciliation was eventually done, the ECDC lost more than R22 million that was originally appropriated to them to accelerate social infrastructure development in the Eastern Cape. Money intended to alleviate the plight of the poorest of the poor was accordingly spent on a state funeral.

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- (kk) There is no indication in the evidence that the ECPG received value for the R5 million that the ECDC paid to *Reagola Print and Mail*. It accordingly constitutes fruitless and wasteful expenditure, as contemplated by section 1 of the PFMA.
- (ll) Ms Mbina-Mthembu and Mr Sentwa acted in violation of the provisions of section 38 and 57 of the PFMA and Treasury Regulations 8.1 and 16A.
- (mm) Their conduct was improper and constitutes maladministration.
- (e) Whether the Eastern Cape Parks and Tourism Agency (ECPTA) incurred irregular and fruitless and wasteful expenditure in the procurement of goods and services relating to the funeral of President Mandela and if so, whether such conduct was improper and constitutes maladministration:**
- (aa) The ECPTA incurred irregular expenditure of R 500 000 and fruitless and wasteful expenditure in the amount of R970 000 in procuring goods and services relating to the preparations for the funeral of President Mandela.
- (bb) This conduct was improper and constitutes maladministration.
- (f) Whether the BCM improperly procured and paid *Victory Ticket 750cc* an amount of R5 985 000.00 of public funds to transport mourners to four venues where the memorial services of President Mandela were to be held and if so, whether such conduct was improper and constitutes maladministration:**
- (aa) The allegation that the BCM improperly procured the services of and paid *Victory Ticket 750 CC* an amount of R5 985 000 of public funds to transport mourners to four venues where the memorial services of President Mandela were to be held, is substantiated.

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- (bb) The Executive Mayor and Councillors Gomba and Simon-Ndzele of the BCM Municipal Council acted in violation of the Code of Conduct for Councillors by putting the interests of the ANC, instead of that of the BCM first. They acted dishonestly, without good faith and in a manner that compromised the integrity of the BCM.
- (cc) The CFO of the BCM, Mr V Pillay failed to distinguish between financial matters of the BCM and the interests of the ANC. He acted in violation of the provisions of the Municipal Supply Chain Management Regulations and the Supply Chain Management Policy of the BCM. His conduct constituted financial misconduct as contemplated by the MFMA and the Municipal Supply Chain Regulations resulting in irregular expenditure for the BCM.
- (dd) Mr Pillay's conduct was improper and constitutes maladministration.
- (g) Whether the King Sabata Dalindyebo Local (KSD) Municipality incurred irregular and fruitless and wasteful expenditure of public funds in procuring the services of various service providers to assist in the preparations for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**
- (aa) The KSD Municipality incurred unauthorised expenditure for the funeral of President Mandela in excess of R4,2 million.
- (bb) This expenditure would also have constituted irregular expenditure, if it was authorized.
- (cc) The KSD Municipality also incurred fruitless and wasteful expenditure of R1 470 812.

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- (dd) At the time when the KSD Municipality incurred the expenditure for the funeral of President Mandela, it was experiencing extreme financial constraints and was operating with a loan obtained from the ECPG.
- (ee) There is indication in the evidence that, the payment of goods and services to certain suppliers was based on procurement documentation, the contents of which were incorrect or that did not refer to the items that were ordered.
- (ff) The verification by the KSD Municipality of the delivery of the goods and services procured for the funeral was either not done, or was insufficient to have justified payment by the KSD Municipality.
- (gg) The conduct of the KSD Municipality was improper and constitutes maladministration.
- (h) Whether the OR Tambo District Municipality (ORTDM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**
- (aa) The ORTDM incurred unauthorised expenditure of R443 500 in respect of catering for the funeral of President Mandela.
- (bb) Even if the expenditure was authorized, it would have been irregular as it was in violation of a directive of the National Treasury and not in accordance with the MFMA.
- (cc) The conduct of the ORTDM was improper and constitutes maladministration.

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**(i) Whether the Nelson Mandela Bay Metropolitan Municipality (NMBMM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**

(aa) The NMBMM incurred unauthorised expenditure of R110 300 in respect of catering for events relating to the funeral of President Mandela.

(bb) Even if the expenditure was authorized, it would have been irregular as it was in violation of a directive of the National Treasury and not in accordance with the MFMA.

(xii) The tragedy of the passing on of former Presidents or the current President passing, even unexpectedly is a reality that requires government to be prepared for a state funerals and the associated expenditure at all times.

(xiii) State Funerals are also not only held for Presidents, but also for other current and former political leaders.

**(xiv) The Public Protector recommends in terms of section 6(4)(c)(ii) of the Public Protector Act that:**

(aa) The Minister of Finance, as the head of the National Treasury, establishes a Task Team consisting of all the role players at all levels of government to develop a coordinated plan for the eventuality of state funerals provided for in the Ministerial Handbook;

(bb) Once the coordinated plan is approved, the Minister of Finance directs that it is issued as an instruction to all organs of state in terms of section 76 of the PFMA, to ensure the unauthorised, irregular and fruitless and wasteful expenditure in respect of state funerals is avoided in the future;

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- (cc) It be compulsory that the coordination of any activities in respect of preparations for state funerals be located strictly in the Office of the Premier in the case of Provinces and the Executive Mayor in the case of Local Government; and
- (dd) It be compulsory that service providers appointed to assist in the preparations for state funerals are selected strictly from the supplier databases of the departments and municipalities involved.
- (ee) As the custodians of public funds, it be compulsory that the National Treasury provide funding for state funerals and give guidance on how the funds will be accessed and spent.
- (xv) **The Public Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution:**
- (aa) The Minister of Finance as the Head of the National Treasury, to request the President to issue a Proclamation in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act, 1996 to investigate the:
- 1.1 unlawful appropriation or expenditure of public money or property;
  - 1.2 unlawful, irregular or unapproved acquisitive acts, transactions, measures or practices; and
  - 1.3 intentional or negligent loss of public money by organs of state and referred to in this report, with a view to institute civil action for the recovery of the loss of public money by organs of state in the procurement of goods and services for the funeral of President Mandela.

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- (bb) The Provincial Treasury of the Eastern Cape to conduct an investigation into the financial misconduct conduct of Ms Mbina-Mthembu referred to in this report, in terms of Treasury Regulation 4.1.3, and to take the appropriate action;
- (cc) The Municipal Managers of the BCM, KSD Municipality, ORTDM and the NMBMM, in consultation and with the assistance of the National Treasury to investigate the financial misconduct of officials of the respective municipalities referred to in this report, in terms of section 171(4) of the MFMA, and to take the appropriate action;
- (dd) The Municipal Council of the BCM to appoint a special committee to investigate the conduct of Councillors Gomba and Simon-Ndzele referred to in this report in terms of the item 14.1 of the Code of Conduct for Councillors, provided for in the Local Government: Municipal Systems Act; 2000, and to take further action accordingly;

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE  
MISAPPROPRIATION OF PUBLIC FUNDS, IMPROPER CONDUCT AND  
MALADMINISTRATION BY THE EASTERN CAPE PROVINCIAL GOVERNMENT AND  
OTHER ORGANS OF STATE IN CONNECTION WITH EXPENDITURE INCURRED IN  
PREPARATION FOR THE FUNERAL OF FORMER PRESIDENT NELSON  
ROLIHLAHLA MANDELA**

**1. INTRODUCTION**

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

1.2 **This report is submitted, in terms of section 8 of the Public Protector Act, to the following people to note the outcome of this investigation:**

1.2.1 The President of the Republic of South Africa, His Excellency, President J G Zuma;

1.2.2 The Speaker of the National Assembly, Hon. B Mbete, MP;

1.2.3 The Chairperson of the National Council of Provinces, Hon. T Modise, MP;

1.2.4 The Minister of Finance, the Hon Mr Malusi Gigaba, MP;

1.2.5 The Premier of the Eastern Cape Province, the Hon Mr Phumulo Masualle;

1.2.6 The Speaker of the Eastern Cape Provincial Legislature, the Hon Ms. Noxolo Kiviet, MPL;

1.2.7 The Eastern Cape Member of the Executive Council responsible for Provincial Planning and Treasury, Mr Sakhumzi Somyo, MPL;

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- 1.2.8 The Eastern Cape Member of the Executive Council responsible for Cooperative Governance and Traditional Affairs, the Hon. Fikile Xasa, MPL;
- 1.2.9 The Chairperson of the ECDC Board, Mr. Nhlakanipho Dladla;
- 1.2.10 The Chairperson of the ECPTA Board, Ms. Vuyo Zitumane; and
- 1.2.11 The Executive Mayors of the BCM, KSD, NMBMM and OR Tambo Municipalities.
- 1.3 **Copies of the report are also circulated to:**
- 1.3.1 The Premiers of all the Provinces of the Republic of South Africa;
- 1.3.2 The Directors-General, Heads of Departments, and Chief Executive Officers of the organs of state referred to in paragraph 1.2 above;
- 1.3.3 The Municipal Managers of the Municipalities referred to in paragraph 1.2 above;
- 1.3.4 The Head of the Special Investigating Unit, Adv A J Mothibi;
- 1.3.5 The Auditor-General of South Africa, Mr. Kimi Makwetu; and
- 1.3.6 The Chief Procurement Officer of the National Treasury.
- 1.4 In addition, copies of the report are also provided to the complainants, to inform them about the outcome of this investigation.
- 1.5 The report relates to an investigation into allegations of the misappropriation of public funds, improper conduct and maladministration by the Eastern Cape Provincial Government (ECPG) and other organs of state in connection with expenditure incurred for the funeral of former President Mandela that was held in Qunu in the Eastern Cape Province on 15 December 2013.

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## 2. THE COMPLAINT

2.1 Several members of the public filed complaints with the Public Protector raising concerns about what they perceived as excessive, unconscionable and unnecessary use of public funds in the Eastern Cape in connection with the appointment of service providers to assist in the preparations for the funeral of President Mandela. The complaints were lodged between 14 January 2014 and 24 June 2014.

2.2 The first complaint was received on an anonymous basis on 14 January 2014 from a concerned South African citizen. He referred to an article published by the *Daily Dispatch* newspaper on 14 January 2014, titled “**BCM pays R6m for Madiba service taxis**” where it was reported that: -

*“An East London firm was paid R6-million by Buffalo City Metro to ferry mourners around the city over three days to four memorial services for former President Nelson Mandela. Victory Ticket 750cc, a company owned by Richard Mzwandile Sokwali and Busisiwe Boti, billed the metro R5 985 000.00 for services rendered on December 10, 11, and 12.”*

2.3 The Public Protector received another complaint on 15 January 2014 from Mr. Mike Loewe, requesting that an investigation be conducted into the highly suspicious R6m bill paid by the Buffalo City Municipality alleged spent for unspecified transport services to local memorial services for the late President Mandela. He referred the Public Protector to a *Daily Dispatch* media report published on 15 January 2014 under the heading “**Demands to probe R6m bill.**”

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- 2.4 In the article it was reported that opposition parties in the Buffalo City Municipal Council and local businesses were demanding that the payment by that Municipality of an amount of R6million to ferry mourners to President Mandela's memorial services in December 2013, must be investigated. The article was a follow up to the previous one referred to in paragraph 2.2 above, as it made reference to it.
- 2.5 Mr. Loewe attached to his complaint an invoice from Messrs *Victory Ticket 750cc*, dated 12 December 2013 and entitled "*BCM programme for the late Cde Nelson Rolihlahla Mandela*" which sought to claim from the Buffalo City Municipality, an amount of R5 985 000.00 in respect of transport services rendered by the company to ferry passengers to the zonal and regional memorial services for the late President Mandela, which were held at Gompo Hall in East London, King Williams Town War Memorial, Mdantsane Indoor Sport Centre and Buffalo City Stadium in East London.
- 2.6 On 24 June 2014, whilst attending the annual Youth Month stakeholder engagement with communities in Mthatha, the Public Protector received another written complaint from a member of the community who expressed his concern at what he believed to be excessive and unnecessary expenditure of public funds by the KSD Municipality despite the fact that the Municipality was, at the time, in dire financial constraints.
- 2.7 In this complaint, it was alleged that the KSD Municipality incurred expenditure in excess of R31million of public funds to hire different services for President Mandela's funeral. It was stated that R2.8million of that amount, was spent on hiring 267 catering companies despite the fact that in 2013, the municipality had applied for a "*bailout*" in the amount of R200m from the Province in an attempt to replenish its coffers. The complaint was also based on an article published by the *Daily Dispatch* on 19 March 2014, titled "***EXCLUSIVE: Madiba spending frenzy blown open***" where it was reported that: -

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*“A BILL of R22-million that includes takeaways and T-shirts shows how the provincial government diverted social funds to pay for Nelson Mandela’s memorials. The figure is set to grow to R90-million, to be paid from money transferred to Eastern Cape Development Corporation (ECDC) for projects in Transkei.*

*As much as R5-million was paid to a football boss in Cape Town to print thousands of shirts bearing Mandela’s face, R333360 was spent at McDonalds in Mthatha over four days, and R441560 at the town’s KFC. The spending contravened treasury regulations for Mandela events, which stipulated that the use of taxpayers’ money be confined to paying for transport and booking of venues.”*

- 2.8 With regard to the source of the funds to pay for the preparations for the funeral of President Mandela, it was reported in this media article that: -

*“The money comes from a R330-million infrastructure grant the provincial treasury channelled to ECDC as the department’s implementing agent after the mid-term budget adjustments last September.*

*The funds were meant for the provision of running water, electricity, sanitation, ablution facilities, replacement of mud-schools and refurbishing hospitals in the OR Tambo, Joe Gqabi and Alfred Nzo district municipalities and the eastern parts of the Amathole district.”*

- 2.9 According to the media report, the KSD Municipality received R11million from the funds that were meant to accelerate social infrastructure projects in areas around the OR Tambo District which were placed in the custody of the ECDC for this purpose. With regard to the role that was to be played by the entity, it was reported in the article that: -

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*“Correspondence between provincial treasury head Marion Mbina-Mthembu to Mase makes it clear ECDC was the provincial “project host” or “paymaster” for the funeral and all related logistics. “Before any funds are committed, endorsement must be received from the HoD of provincial treasury ... as allocations earmarked ... for a specific purpose may not be used for other purposes, except with its approval,”*

- 2.10 The Public Protector took note of subsequent media reports with regard to the public spending for the funeral. The *Daily Dispatch* reported on 12 May 2014 that public funds amounting to R250 000 were deposited in the personal bank account of the former MEC responsible for Planning and Treasury in the Eastern Cape, Hon Phumulo Masualle who was later appointed as the Premier of the Eastern Cape.
- 2.11 Media reports also pointed at other Municipalities and Public Entities, such as the ECDC, the ECPTA, the BCM, the ORTDM, the KSD and the NMBMM, that were alleged to have incurred what appeared to have been unnecessary and excessive expenditure of public funds for the funeral of President Mandela.
- 2.12 **In essence, the complaints had three critical components, as it was in the main, alleged that:**
- 2.12.1 Whilst austerity measures were in place, the ECPG and municipalities and in the Eastern Cape incurred excessive, unconscionable and unnecessary expenditure for the funeral of the President Mandela;
- 2.12.2 Public funds which were earmarked for purposes of accelerating social infrastructure delivery in the province were diverted by government and used to pay for the preparations for the funeral of the President Mandela; and

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2.12.3 The preparations for the funeral of President Mandela resulted in organs of state in the Eastern Cape incurring irregular, fruitless and wasteful expenditure.

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

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

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

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

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

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

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

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

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

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- 3.5 In terms of section 6(4)(c)(ii), the Public Protector shall be competent after an investigation to make any appropriate recommendation she deems expedient to the affected body or authority.
- 3.6 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*,<sup>1</sup> Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector: -
- 3.6.1 Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.6.2 An appropriate remedy must mean **an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.** (para 67);
- 3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, **she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint** (para 68);
- 3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their **nature, context and language**, to determine what course to follow (para 69);

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<sup>1</sup> CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.

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- 3.6.5 Every complaint requires a **practical or effective remedy** that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);
- 3.6.6 The Public Protector’s power to take appropriate remedial action **is wide** but certainly not unfettered. What remedial action to take in a particular case, will be informed by the **subject-matter of investigation** and the **type of findings made** (para 71);
- 3.6.7 Implicit in the words “*take action*” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that **she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence**; [para 71(a)];
- 3.6.8 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** [para 71(d)];
- 3.6.9 “*Appropriate*” means nothing less than effective, suitable, proper or **fitting to redress or undo the prejudice, impropriety, unlawful enrichment** or corruption, in a particular case [para 71(e)], and
- 3.6.10 The remedial action taken by the Public Protector has a binding effect (para 76). The Constitutional Court further held that: “*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences*” (para 73).

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- 3.7 The conduct of the organs of state complained of falls within the Public Protector's mandate to investigate.
- 3.8 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

#### **4. THE INVESTIGATION**

##### **4.1 Methodology**

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

##### **4.2 Approach to the investigation**

- 4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
- 4.2.1.1 What happened?
- 4.2.1.2 What should have happened?
- 4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

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- 4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong occasioned by the said maladministration or improper conduct?
- 4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on whether and to what extent the relevant organs of state fulfilled their responsibilities.
- 4.2.3 In the *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA)*, the Supreme Court of Appeal (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.
- 4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice. In this case, key reliance was placed on the legislation, prescripts and policies regulating financial management and procurement by organs of state.
- 4.2.5 The enquiry regarding remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct.
- 4.2.6 In the case of conduct failure as was the case in the complaints investigated, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

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- 4.3 **Based on the analysis of the complaints and the information that came to the attention of the Public Protector from various sources as well as media reports, the following issues were identified to inform and focus the investigation:**
- 4.3.1 Whether the ECPG improperly diverted public funds amounting to R300million placed in the custody of the ECDC, which were appropriated for purposes of accelerating social infrastructure delivery in the province, to use them for the memorial service and funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration;
- 4.3.2 Whether the procurement process followed by the ECPG in the appointment of service providers to assist in the preparations for the funeral of President Mandela was in accordance with a system that is fair, equitable, transparent, competitive and cost effective;
- 4.3.3 Whether the Provincial Treasury irregularly transferred an amount of R250 000 of public funds into a personal bank account of MEC Phumulo Masualle and if so; whether such conduct was improper and constitutes maladministration;
- 4.3.4 Whether the ECDC acting in its official capacity as Project Host and Paymaster caused the ECPG to incur irregular, fruitless and wasteful expenditure of public funds for the memorial services and funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration;
- 4.3.5 Whether the Eastern Cape Parks and Tourism Agency (ECPTA) incurred irregular and fruitless and wasteful expenditure in the procurement of goods and services relating to the funeral of President Mandela and if so, whether such conduct was improper and constitutes maladministration;

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- 4.3.6 Whether the BCM improperly procured and paid *Victory Ticket 750cc* an amount of R5 985 000.00 of public funds to transport mourners to four venues where the memorial services of the late President Mandela were to be held and if so, whether such conduct was improper and constitutes maladministration;
- 4.3.7 Whether the King Sabata Dalindyebo Local (KSD) Municipality incurred irregular and fruitless and wasteful expenditure of public funds in procuring the services of various service providers to assist in the preparations for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration;
- 4.3.8 Whether the OR Tambo District Municipality (ORTDM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration; and
- 4.3.9 Whether the Nelson Mandela Bay Metropolitan Municipality (NMBMM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration.
- 4.4 **Key Sources of information**
- 4.4.1 Documents received from the Office of the Premier of the Eastern Cape;
- 4.4.2 Documents received from the ECDC Board;
- 4.4.3 Documents received from the Head of the Department of Provincial Planning and Treasury;
- 4.4.4 Documents received from the ECPTA Board;
- 4.4.5 Documents received from the BCM;
- 4.4.6 Documents received from the NMBMM;
- 4.4.7 Documents received from the ORTDM; and
- 4.4.8 Documents received from the KSD Municipality.

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#### 4.5 Meetings and Interviews conducted

Interviews were conducted with:

- 4.5.1 The Premier of the Eastern Cape, the Hon. Phumulo Masualle on 2 August 2014;
- 4.5.2 The Speaker of the Eastern Cape Provincial Legislature and former Premier of the Eastern Cape, Hon. Noxolo Kiviet, on 30 November 2017.
- 4.5.3 The erstwhile Board of the ECDC, under the stewardship of the Acting Chairperson, Prof. Mkhalelwa Mazibuko, on 31 July 2014. The meeting was also attended by the former Chairperson, Ms. Nomfanelo Magwentshu;
- 4.5.4 The current ECDC Board, under the stewardship of the Chairperson, Mr. Nhlanganiso Dladla on 19 December 2014;
- 4.5.5 The following former and current officials of the Department of Provincial Planning and Treasury on 28 to 30 January 2015 as well as 4 and 6 February 2015: -
  - 4.5.5.1 The former Head of the Department and current DG in the Office of the Premier, Ms. Marion-Mbina Mthembu; Chief Director: Cash Management, Mr. Dominic Qhali; Chief Director: Financial Management, Mr. Julius Gqibani; the former Manager in the Office of the SG, Ms. Laurel Palesa Shipalana; and the Executive Assistant to the SG, Ms. San-Mari Badenhorst;
  - 4.5.5.2 A further interview was conducted with Ms Mbina-Mthembu on 15 November 2017;
- 4.5.6 The following former and current officials of the ECDC on 29 January 2015 and 5 February 2015, respectively: -

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- 4.5.6.1 The former CEO of the ECDC, Mr. Sithembele Mase; the CFO, Mr. Sandile Sentwa; the GM Operations, Ms. Luyanda Tsipa; the Executive Manager: Integrated Social Infrastructure, Mr. Graham Cowley; the Senior Manager: Finance, Mr. Mkhululi Lwana;
- 4.5.6.2 The Finance Manager, Ms. Gcobisa Siyo; and the Senior Accounts Manager, Mr. Rodgers Siyengo;
- 4.5.7 The following officials of the Department of Safety and Liaison on 5 and 6 February 2015 respectively: -
- 4.5.7.1 The Head of the Department, Ms. Ngaka Mosehana; and the Senior Manager Finance, Ms. Nwabisa Libala;
- 4.5.8 The Director of *Reagola Print and Mail*, Mr. Siviwe Mpengesi, accompanied by his legal advisers, on 10 February 2015;
- 4.5.9 Mr. Mzwandile Vena, the owner of the *State House* situated at Qunu Administrative Area in Mthatha, on 19 February 2015. The house was hired by the ECPTA to accommodate its staff and the provincial government officials who were responsible for the preparations for the funeral of the late President Mandela;
- 4.5.10 The ECPTA Board of Directors on 25 February 2015, under the leadership of its Chairperson, Ms. Vuyo Zitumane;
- 4.5.11 The following current and former officials of the ECPTA on 26 February and 4 March 2015 respectively: -
- 4.5.11.1 The former CEO, Mr. Luxolo Rubushe; a former Executive Director, Mr. Eddie Marafane; the Finance Manager and former CFO, Ms. Bukiwe Fokazi; and the current CEO, Mr. Luvuyo Dayimani;

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4.5.12 Meetings called upon by way of a subpoena in terms of sections 7(4) and (5) of the Public Protector Act, were held with the following former and current officials of the Buffalo City Municipality on 5 March 2015: -

4.5.12.1 The former Executive Mayor, Cllr. Zukiswa Veronica Ncitha; the current Proportional Representative Councillor representing the Pan Africanist Congress (PAC) in the Municipal Council, Cllr. Jerome Mdyolo; the former Municipal Manager, Mr. Andile Fani; the CFO, Mr. Vincent Pillay; and the GM: Executive Support, Ms. Ondela Mahlangu;

4.5.13 The Managing Director of *MM Communications*, Ms. Mandlakazi Sigcau was interviewed on 20 March 2015. *MM Communications* is an events management company that was appointed by the ECPTA to assist in project managing the entity's preparations for the funeral of the late President Mandela;

4.5.14 The following current and former officials of the Nelson Mandela Bay Metropolitan Municipality on 26 March 2015: -

4.5.14.1 The former Municipal Manager, Mr. Mpilo Mbambisa and the CFO, Mr. Trevor Harper accompanied by the former Acting CFO;

4.5.15 Meetings called upon by way of a subpoena in terms of sections 7(4) and (5) of the Public Protector Act, were held with the Executive Mayor, Speaker, and the following former and current officials of the KSD Municipality, on 25 March and 21 April 2015 respectively: -

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- 4.5.15.1 The Executive Mayor, Cllr. Nonkoliso Ngqongwa; the Speaker, Cllr. Dumani Zozo; the former Municipal Manager, Mr. Zama Mngqanqeni; the former CFO, Ms. Nomthandazo Ntshanga; the Acting Municipal Manager, Mr. Richard Mqokoyi; the Acting CFO, Mr. Mbuyiseli Mandla; the Director: Human Settlements and former Municipal Manager, Ms. Nobuzwe Soldati; the Director: Infrastructure Development, Mr. Zanemvula Heavens Ngovela and the Director: Community Services, Mr. Luvuyo Maka;
- 4.5.16 Meetings called upon by way of a subpoena in terms of sections 7(4) and (5) of the Public Protector Act, were held with the Executive Mayor, Speaker, and the following former and current officials of the ORTDM on 25 March and 22 April 2015, respectively: -
- 4.5.16.1 The Executive Mayor, Cllr. Nomakhosazana Meth; the Speaker, Cllr. Robert Nogumla; the Acting Municipal Manager, Ms. Pax Dunywa; the CFO, Mr. Moabi Moleko; the Director: Water and Sanitation, Mr. Songezo Wana; and the Director: Supply Chain Management, Mr. Sakhiwo Hopa;
- 4.5.16.2 Mr. Tshaka Hlazo, the former Municipal Manager did not honour the subpoena despite having been directed to appear before the Public Protector and having been made aware of the process and the directive for him to assist in the investigation in his former official capacity as the accounting officer of the Municipality;
- 4.5.17 The following members of the KSD Municipal Public Accounts Committee (MPAC) on 15 May 2015:
- 4.5.17.1 The Chairperson of the Committee, Cllr. Pasika P Nontshiza as well as the following Councillors: Cllrs. L L Mkhonto, Raymond Knock, V O Gwadiso, E S Tswina, K W Tsipa, J M Msakeni, Z Magazi, T Nomvete, M T Mtirara; and M Bunzana.

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**4.6 Correspondence exchanged between the Public Protector and:**

- 4.6.1 The Complainants dated 15, 16 and 20 January 2014; 18 February 2014 and 24 June 2014;
- 4.6.2 The former BCM Municipal Manager, Mr. A Fani dated 2, 15, 17, 22, 23, and 25 April 2014, and 6 and 8 May 2014;
- 4.6.3 The Premier of the Eastern Cape, Hon. Phumullo Masualle, the Director-General in his Office and the Acting DG, Mr. M Qwase; officials in the Office of the Premier, Mesdames W Sokutu, V Mali, T Mwangolela, and B Ngcungca dated 16 July 2014 and 2, 9, 12, 16 February 2015;
- 4.6.4 The former Acting Chairperson of the ECDC Board, Prof. M Mazibuko, the current Chairperson, Mr. N Dladla, the Company Secretary, Mr. D Mbelani, the former CEO, Mr. S Mase, the CFO, Ms. S Sentwa, Mesdames G Siyo and L Tsipa, and Messrs. G Cowley, R Siyengo, M Lwana, N Dlulane and M Mpikashe of the ECDC, Mr. S Mase dated 18 July 2014; 1, 3, 4,5, 8, 18 and 19 December 2014; 19, 20, 21, 22, 26, 28, 29 January 2015;
- 4.6.5 The former Head, Ms. M Mbina Mthembu; and Mesdames P Shipalana, A Badenhorst, T Buthelezi, D Cloete-Page, B Nqadolo, N Mbenga and Messrs. D Qhali, Q Khalimashe and J Gqibani of the EC Provincial Treasury dated 20, 21, 22, 23, 24, 26 January 2015; and 2, 4, 9, 10 February 2015;
- 4.6.6 The Hon. MEC, Ms. H Sauls-August and T Mxenge of the EC Department of Human Settlements dated 21, 22, 26, 27 January 2015; and 4, 5 February 2015;
- 4.6.7 McDonald's South Africa Restaurant Accountant, Mr. S Mafigu, as well as its Corporate Affairs Director, Mr. S Motsieloa dated 21, 22, 27 January 2015;

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- 4.6.8 The Managing Director of *Reagola Print & Mail*, Mr. S Mpengesi and his Group Head of Legal Services, Mr. B Dlodlo, dated 22 January 2015; and 6, 7, 10 February 2015;
- 4.6.9 The Senior Manger responsible for Financial Management in the EC Department of Safety & Liaison, Ms. N Libala dated 20, 26, 27 January 2015;
- 4.6.10 The former City Manager of the NMBMM, Mr. M Mbambisa; his then CFO, Mr. T Harper and Mesdames B De Scande, B Mazomba, S Marais N Xako, T Shabudien, and C Scheepers dated 26 January 2015; 10, 11, 13, 27 February 2015; and 18, 23 March 2015;
- 4.6.11 The former Deputy Minister of Finance, Mr. M H Jonas, MP; his Attorney, Mr. M Boqwana of *Boqwana Burns Attorneys* and officials in the Ministry, Mr. N Mboniswa and Ms. L Mathada dated 21 and 22 January 2015; and 3, 6, 9 February 2015;
- 4.6.12 The Chairperson of the ECPTA Board, Ms. V Zitumane and former and current officials, Messrs. L Rubushe, V Dayimani, E Marafane and Mesdames B Fokazi, N Phenduka, dated 9, 10, 16, 17, 23 February 2015 and 5, 24, 25 June 2015;
- 4.6.13 Mr. Mzwandile Vena the owner of the house hired by the ECPTA situated in Qunu dated 16 February 2015;
- 4.6.14 The Executive Mayor, Cllr. Ngqongwa; the Speaker, Cllr. Zozo; former and current officials of the KSD Municipality to wit, Messrs. Z Mnqanqeni, Z Mdikane, R Mqokoyi, M Mandla, L Maka, Z H Ngovela, and Mesdames N Soldathi and N Ntshanga, as well as the Members of *MPAC*, Cllrs. P Nontshiza, L L Mkhonto, R Knock, V O Gwadiso, E S Tswina, K W Tsipa, J M Msakeni, Z Magazi, T Nomvete, M T Mtirara; and M Bunzana dated 16, 17, 23 April 2015;

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4.6.15 The Executive Mayor, Cllr. N Meth, the Speaker, Cllr. R Nogumla and former and current officials of the ORTDM to wit, Ms P Dunywa and Messrs. H T Hlazo M Moleko, S Wana and L S Hopa.

#### 4.7 **Legislation and other prescripts**

4.7.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);

4.7.2 The Public Protector Act, 23 of 1994 (the PPA);

4.7.3 Local Government: Municipal Systems Act, 32 of 2000 (the Municipal Systems Act);

4.7.4 Local Government: Municipal Structures Act, 117 of 1998 (the Municipal Structures Act);

4.7.5 The Eastern Cape Development Corporation Act, 2 of 1997 (the ECDC Act);

4.7.6 The Eastern Cape Parks and Tourism Agency Act, 2 of 2010 (the ECPTAA);

4.7.7 The Public Finance Management Act, 1 of 1999 (the PFMA);

4.7.8 The Local Government: Municipal Finance Management Act, 56 of 2003 (the MFMA);

4.7.9 Promotion of Administrative Justice Act, 3 of 2000 (PAJA);

4.7.10 The Preferential Procurement Policy Framework Act, 5 of 2000 (the Preferential Procurement Framework);

4.7.11 The Prevention and Combating of Corrupt Activities Act, 12 of 2004 (the PCCAA);

4.7.12 The Eastern Cape Appropriation Act, 4 of 2013; and

4.7.13 The Eastern Cape Adjustments Appropriation Act, 6 of 2013.

#### 4.8 **Regulations**

4.8.1 National Treasury Regulations issued in terms of Public Finance Management Act; GN 225; GG 27388, 15 March 2005 (Treasury Regulations).

4.8.2 The Municipal Supply Chain Management Regulations, GG 27636, 30 May 2005.

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#### 4.9 Policies

4.9.1.1 The Supply Chain Management Policies of the Eastern Cape Office of the Premier; Provincial Treasury, ECPTA, BCM, NMBMM, ORTD and KSD Municipalities;

4.9.1.2 A Handbook for Members of the Executive and Presiding Officers, adopted by Cabinet on 07 February 2007 (Ministerial Handbook);

4.9.1.3 ECDC Procurement Policy, adopted on 31 October 2013.

#### 4.10 Case Law

4.10.1 *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* [2016] ZACC 11; 31 March 2016;

4.10.2 *Public Protector v Mail and Guardian* 2011(4) SA 420 (SCA);

4.10.3 *Affordable Medicines Trust & Others v Minister of Health & Others* 2005 (6) BCLR 529 (CC).

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

- 5.1 **Whether the ECPG improperly diverted public funds amounting to R300million placed in the custody of the ECDC, which were appropriated for purposes of accelerating social infrastructure delivery in the province, to use them for the memorial service and funeral of President Mandela and if so; whether such a conduct was improper and constitutes maladministration;**

Issues that are Common Cause

**It was not disputed that:**

- 5.1.1 On 30 October 2013, the ECPG appointed the ECDC as an additional infrastructure delivery arm of the Provincial Government for purposes of accelerating the rolling-out of social infrastructure projects in the province, in particular in the OR Tambo District.
- 5.1.2 Funds amounting to R300million were appropriated to the DEDEAT, the Provincial department responsible for the ECDC, for transfer to the entity for this purpose. It was earmarked for the refurbishing of schools, water and sanitation, as well as the improvement of road infrastructure.
- 5.1.3 Former President Mandela passed away on 5 December 2013.
- 5.1.4 In the evening of 5 December 2013, President Jacob Zuma announced that a state funeral would be held for President Mandela on 15 December 2013, at Qunu in the Eastern Cape Province.

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- 5.1.5 At the time, no provision was made in the budget of the ECPG for expenditure related to the arrangements and preparations of the funeral of President Mandela.
- 5.1.6 The Eastern Cape Provincial Executive Committee (EXCO) convened a special meeting on 6 December 2013, where a Resolution was taken to utilize some of the funds appropriated to the ECDC for the acceleration of infrastructure development, for the expenditure related to the arrangements and preparations for the funeral of President Mandela.
- 5.1.7 It was further resolved at this meeting to appoint the ECDC as *Project Host and Paymaster* in respect of the expenditure relating to goods and services for the preparations for the funeral of President Mandela.
- 5.1.8 National and Provincial elections were held on 7 May 2014, as a result of which a new Eastern Cape Provincial Legislature was elected, and the composition of the Eastern Cape Provincial EXCO changed.

**Issues that are in dispute**

- 5.1.9 The issues for determination by the Public Protector relate to the lawfulness and propriety of the decision of the former Eastern Cape Provincial EXCO (Eastern Cape Provincial EXCO) to approve the variation of funds appropriated to the ECDC for accelerating infrastructure service delivery in the province, and to utilize them for the expenditure incurred in relation to the funeral of President Mandela.

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5.1.10 It was established from the investigation that on 31 March 2011, the former Director-General in the Office of the Premier of the ECPG, Mr. Mbulelo Sogoni, informed all the MEC's in the province of a Resolution taken by the Eastern Cape Provincial EXCO on 16 March 2011, under the heading "*Establishment of a Dedicated Investment Fund at the Eastern Cape Development Corporation.*" In his letter, Mr. Sogoni stated that:

*"This serves to inform you that at the **40<sup>th</sup> Executive Council Meeting (4<sup>th</sup> term)** held on **16 March 2011**, and according to **Item 9.1.1** regarding the above-mentioned issue, the Executive Council resolved that:*

- *The establishment of a Dedicated Investment Fund at the Eastern Cape Development Corporation be supported.*
  
- *Access to the provincial catalytic project pipeline to initially capitalize the fund be approved."*

5.1.11 It was further noted that a Memorandum of the Eastern Cape Provincial EXCO was submitted to the EXCO Budget Committee on 30 October 2013, under the heading "*Development Finance Institution support to Infrastructure Implementation.*"

5.1.12 The purpose of the Memorandum was to request support from the EXCO Budget Committee for the extension of the mandate of the ECDC to include infrastructure delivery on behalf of the Province.

5.1.13 It is recorded in paragraph 2 of the Memorandum that the ECPG created efficiency savings by *top-slicing* departmental budgets and through improved governance of Public Entities.

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- 5.1.14 Paragraph 4 stated that in July 2013, the Provincial Treasury indicated to the Department of Roads and Public Works that funds would be recommended to their votes to address maintenance backlogs and to provide essential infrastructure that schools under the Department of Education would require, such as fencing, water and sanitation.
- 5.1.15 Further, that the additional expenditure regarding these schools would amount to approximately R201million, representing R24.9million in respect of water and sanitation; R98.2million for fencing and R43.5million for ECD centres.
- 5.1.16 The Memorandum stated that the rationale behind the appointment of ECDC to accelerate social infrastructure development was that the entity's mandate as derived from section 4(1)(d) and (h) of the ECDC Act, is to promote or carry out projects that are intended to benefit and develop the province as well as provide capital or other resources to furnish technical and other assistance, expert and specialised advice, as well as information and guidance.
- 5.1.17 In addition, it is recorded in paragraph 16 of the Memorandum that the ECDC is a 100% Provincial Government owned entity and as such no further approvals would be required by other spheres of government.
- 5.1.18 Paragraph 19 of the Memorandum stated that **the advantage of utilizing the ECDC, was the fact that the funds transferred to that entity would not be declared as unspent at the end of the financial year, as is the case with Provincial Departments.**
- 5.1.19 The Memorandum recommended that **the EXCO Budget Committee supports the appointment of ECDC as an additional infrastructure delivery arm of the ECPG, focusing on the maintenance and renewal of existing infrastructure in the Province.**

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- 5.1.20 It was further recommended that the EXCO Budget Committee supports that all governance and operations relating to the new arrangement be finalised between the Provincial Treasury, the DEDEAT and the ECDC.
- 5.1.21 The Memorandum was signed by Hon. Masualle in his official capacity at the time, as the MEC for Provincial Planning and Finance, as well Ms. Mbina-Mthembu, in her official capacity at the time as the Head of the Department of Provincial Planning and Treasury . As far as could be established during the investigation, the Memorandum was approved.
- 5.1.22 The Public Protector interviewed the current Speaker of the Eastern Cape Provincial Legislature and former Premier of the Eastern Cape, Hon. Noxolo Kiviet, as part of the investigation, on 30 November 2017. Hon. Kiviet confirmed that she was the Premier at the time of President Mandela's funeral.
- 5.1.23 According to Hon. Kiviet, planning for the funeral of President Mandela already started at a national government level before she was appointed as Premier. It was referred to as "**Project X.**" Due to President Mandela's wish to be laid to rest at his home in Qunu in the Eastern Cape, the ECPG had to take up the role of the second host for the funeral.
- 5.1.24 However, as it was uncertain when President Mandela would pass away, no budgetary provision was made for the ECPG's expenditure relating to the funeral.
- 5.1.25 On 6 December 2013, Hon. Kiviet was summoned to meet with the President and his team in Johannesburg, to discuss the funeral of President Mandela. Only principle decisions were taken, the modalities of which had to be worked out and implemented by the officials of the departments that would be involved.

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- 5.1.26 Before she went to the meeting, Hon. Kiviet had requested the ECPG officials to work out a plan on how the ECPG would fund the preparations and arrangements that had to be made for the funeral.
- 5.1.27 On her return later the same day, a Special Eastern Cape Provincial EXCO meeting was held. Hon. Kiviet requested that the Mayors of the Municipalities that would be involved in the funeral arrangements should also attend.
- 5.1.28 At the meeting, a Memorandum was submitted by the Provincial Treasury, recommending that funding for the expenditure relating to the funeral should be sourced from funds appropriated to the ECDC for social infrastructure development and that the ECDC should be the paymaster. The Provincial EXCO relied on the advice of the Provincial Treasury, in particular the Head of the Department of Provincial Planning and Treasury, Ms. Mbina-Mthembu when they approved the Memorandum.
- 5.1.29 Hon. Kiviet was also of the understanding that ECDC should be involved, because they had a less complicated procurement system than ordinary government departments.
- 5.1.30 During the investigation, the Public Protector obtained a copy of the Eastern Cape Provincial EXCO Memorandum that was submitted on 6 December 2013. It was signed and addressed to the Provincial EXCO of the ECPG by Hon. Masualle, in his capacity as the MEC, and was prepared by Ms. Mbina-Mthembu, the Head of the Department responsible for the Provincial Treasury.
- 5.1.31 The Memorandum is titled “*Variation of use of funds to support State Funeral Arrangements.*”
- 5.1.32 The purpose of the Memorandum was stated as to advise the Provincial EXCO of the ECPG on the proposed variation of use of funds to incur any expenditure to support the funeral arrangements of President Mandela.

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- 5.1.33 Paragraph 2 of the Memorandum recorded as background: **“The need to deliver infrastructure at a rapid pace and in a co-ordinated manner in Mthatha has been necessitated by the fact that many people will be visiting this area in the months ahead to mourn the loss of our former State President Nelson Mandela.”** (emphasis added)
- 5.1.34 In paragraph 3, it is stated that the roll-out of the **social infrastructure delivery project** will involve many spheres of government, namely, local, provincial and national government.
- 5.1.35 Further, that the ECDC had been identified as the vehicle to host the project as it is a Public Entity working across the three spheres of government and for control purposes **“any work to be paid for by the Provincial Government relating to this project must be endorsed first by the Provincial Treasury after Council approves this memo with the provincial co-ordinators to ensure no duplication of costs.”** (emphasis added)
- 5.1.36 In paragraph 7, it was recorded that *“Social Infrastructure funds of R300million have been **voted** to DEDEAT for transfer to ECDC during the 2013/14 Adjustment Estimate. **It will be necessary to utilize some of these funds for any costs related to the funeral preparations and related logistical arrangements.**”* (emphases added)
- 5.1.37 Paragraph 8 of the Memorandum stated that **the ECDC has been appointed by the province as the Project Host and that the entity will requisition these funds from the DEDEAT timeously.** It was noted in paragraph 9 that as a control measure **“[b]efore any funds are committed to the Mthatha project, endorsement must be received from the HOD of Provincial Treasury in terms of S 6.3.1(c) of Treasury Regulations as allocations earmarked by the relevant treasury for a specific purpose may not be used for other purposes except with its approval.”**

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- 5.1.38 In paragraph 11, it stated that: “The costs relating to this event are unknown at this stage therefore once the amount is established, the MEC for Planning and Finance will defray these costs from the PRF (Provincial Revenue Fund) if necessary (i.e. the funds voted to ECDC have been depleted, etc) – this will be done in line with section 25 of the PFMA”.
- 5.1.39 It was recommended in paragraph 12 of the Memorandum that the Provincial EXCO supports the proposal that the ECDC will be the Project Host and Paymaster and that some of the funds earmarked for social infrastructure development in the ECDC, be utilized to defer the cost of the funeral arrangements.
- 5.1.40 Further thereto, that the Provincial EXCO supports the proposal that all expenditure had to be endorsed by a Provincial Treasury official after consultation with Project Co-ordinators and that any expenditure incurred by both the Provincial and National Government must first be communicated to Provincial Treasury to limit duplication of costs.
- 5.1.41 During the investigation and on 16 July 2014, enquiries were forwarded to the Premier of the Eastern Cape, the Hon. Mr. Phumulo Masualle, regarding the process followed by the ECPG in preparing for the memorial services and funeral of President Mandela, considering that it was regarded as a Category 1 State Funeral, and as such, it was primarily the responsibility and within the competence of the South African National Defence Force.
- 5.1.42 In his response, dated 2 August 2014, Hon. Masualle noted that, at the time of the memorial services and funeral, he was the Eastern Cape MEC for Provincial Planning and Treasury. After the May 2014 national elections, he was appointed as the Premier of the Eastern Cape.

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- 5.1.43 According to Hon. Masualle, the Deputy Director-General in the Office of the Premier (OTP) convened a meeting of all the Heads of Departments on 6 December 2013. They were expected to prepare proposals regarding the tasks assigned to their departments relating to the memorial services and funeral of President Mandela, for submission to a Special Provincial EXCO meeting that was to be held later the same day.
- 5.1.44 He stated that at this Special Provincial EXCO meeting, a funding proposal in respect of the memorial services and funeral was presented by the Head of the Department of Provincial Planning and Treasury, Ms. Mbina-Mthembu.
- 5.1.45 Hon. Masualle explained that, the primary reason for the funding proposal was that, **“there existed no budget in the province for the funeral, but funds had to be found for it. By all standards, this presented a mammoth challenge to the province, which had to be innovative in finding funds for the expected world occurrence/event.”**
- 5.1.46 He denied the allegation of unconscionable use of public funds in connection with the expenditure incurred by the Province towards the memorial services and funeral of President Mandela. According to him, it was incorrect to suggest that the Provincial Government used the identified funds imprudently.
- 5.1.47 According to Hon. Masualle, the Provincial EXCO Resolution taken on 6 December 2013 authorised Ms. Mbina-Mthembu to approve expenditure related to the memorial services and funeral of President Mandela at her sole discretion, as long as same were related to the funeral and only after consultation with the relevant coordinators.

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- 5.1.48 Hon. Masualle held the view that the ECPG took all the necessary steps as required by law to regularise what would otherwise have been irregular or unauthorised expenditure. They acted prudently in implementing the Resolution taken at the Special Provincial EXCO meeting held on 6 December 2013, under the guidance and direction of the Provincial Treasury.
- 5.1.49 Hon. Masualle confirmed that the ECDC was appointed as Project Host and Paymaster in respect of remittance of payments related to the expenditure incurred towards the memorial services and funeral of President Mandela. However, he stated that the coordination of the funeral and other logistical arrangements were the responsibility of a national coordinating team, led by the South African National Defence Force.
- 5.1.50 A Provincial Co-ordinating team assisted because the funeral was to be held in Mthatha, in the Eastern Cape Province. He however disputed the appointment of Buffalo City, Nelson Mandela Metro, OR Tambo District and KSD Municipalities as implementing agents. He also stated that it was incorrect to suggest that there was a general disregard for the directives, guidelines and imprudent expenditure of public funds by the Eastern Cape Provincial Government.
- 5.1.51 Hon. Masualle was also interviewed during the investigation, on 2 August 2014.
- 5.1.52 When asked about the appropriation of R330million by the ECPG to the ECDC for rolling out of infrastructure, a the portion of which was subsequently identified for utilization in respect of expenses for the memorial services and funeral of President Mandela, Hon. Masualle stated that the ECPG has continuously had a challenge with infrastructure development and as such used multi state owned agencies to augment the capacities of Departments such as Education, Health, Roads and Public Works in the rolling out of infrastructure projects.

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- 5.1.53 He confirmed that the Eastern Cape Provincial EXCO took a Resolution to appoint the ECDC for purposes of rolling out of infrastructure in remote areas of the province as the law permits the entity provide the function of infrastructure delivery.
- 5.1.54 According to Hon. Masualle, an additional amount R30million was made available to the ECDC for purposes of setting up the implementing capacity so as to enable it to recruit personnel.
- 5.1.55 He explained that the amount of R330million was not initially appropriated for purposes of covering the expenses relating to President Mandela's funeral, but to deliver infrastructure to ensure that the province is ready for the unforeseen day of the send-off of President Mandela.
- 5.1.56 Considering the matter, the Provincial EXCO resolved that, as funds appropriated to the ECDC for infrastructure development had not yet been spent or committed to actual infrastructure projects, a portion of the R330million should be utilized to defray expenses related to the funeral preparations and thereafter, a reconciliation of the amount used be done with a view to reimbursing those funds for its intended purposes.
- 5.1.57 In connection with the relationship between the ECPG and the ECDC, Hon. Masualle explained that funds appropriated for the ECDC are made available through the DEDEAT that for all intents and purposes was the representative of the shareholder (the ECPG), of the ECDC.
- 5.1.58 According to Hon. Masualle, when the motivation for the budget of the ECDC is approved, the funds are transferred to the DEDEAT that will in turn transfer it to the ECDC. There is therefore no direct granting of funds from the Treasury to the ECDC, as such grants go via the DEDEAT. The funds are voted to the Department for transfer to the SOE.

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- 5.1.59 Regarding the preparations for the funeral, he confirmed that when President Zuma announced on the evening of 5 December 2013 that President Mandela was late, the Premier at the time, Hon. Noxolo Kiviet, summoned a Special Provincial EXCO meeting, which was preceded by meeting of all the Heads of the Departments. The Special Exco Meeting was held on 6 December 2013.
- 5.1.60 It was his understanding at the time that, subsequent to the meeting, Ms. Mbina-Mthembu had communicated the decision of the EXCO to the CEO of the ECDC and informed him of the tasks assigned to the entity.
- 5.1.61 During the investigation, it transpired (as referred to in more detail below) that the Provincial EXCO Resolution that was provided to the ECDC as their instruction to be the paymaster for the funeral, was in the form of an **unsigned** version of the Provincial EXCO Memorandum, dated 6 December 2013, which was initially forwarded by the Provincial Treasury to the ECDC.
- 5.1.62 Paragraph 7 of the **unsigned** memorandum stated that:
- “Social Infrastructure funds of R300million have been voted to DEDEAT for transfer to ECDC during the 2013/2014 Adjustment Estimate. **It will be necessary to utilize some of these funds for the cost of infrastructure to support these funeral arrangements.**”*
- 5.1.63 The Minutes of the Special Provincial EXCO meeting held on 6 December 2013 were obtained during the investigation.
- 5.1.64 It was apparently an extended meeting as invitations were sent to all Heads of Departments, the SAPS, Mayors and Municipal Managers as well as Accounting Officers responsible for public entities in the Eastern Cape.

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- 5.1.65 According to the Minutes, the meeting was also attended by the Executive Mayor of the ORTDM, Cllr. Nomakhosazana Meth and the Municipal Manager, Mr. H T Hlazo. The Executive Mayor of the BCM and the Municipal Manager also attended the meeting. The Executive Mayor of the KSD Municipality was represented by Mr. L S Nduku in an acting capacity. However the Municipal Manager at the time, Mr. Mnqanqeni, was present at the meeting. The Executive Mayor and Municipal Manager of the NMBMM did not attend the meeting.
- 5.1.66 The purpose of the meeting as recorded was to discuss the preparations for the funeral of President Mandela, following an announcement made by President Zuma on 5 December 2013 that President Mandela has passed on. The meeting was chaired by the former Premier, the Hon. Ms Noxolo Kiviet.
- 5.1.67 In noting the passing of President Mandela, Hon. Kiviet informed the meeting that his passing on necessitated that the ECPG linked with the National and Local Government structures to prepare for the funeral of President Mandela. She thus advised that the funeral required the ECPG to work together with a view to giving President Mandela a funeral befitting his stature as a Global Icon.
- 5.1.68 The DDG in the Premier's Office, Mr. Mahlubandile Qwase, briefed the meeting about the activities planned to be undertaken as well as those officials who would be responsible to execute such activities. The meeting took Resolutions noting the presentation on preparations for President Mandela's funeral, as well as that the MEC's responsible for Provincial Planning and Finance, Public Works, Roads and Transport, as well as Local Government and Traditional Affairs, were assigned the roles of providing leadership to the technical committee appointed to execute the project.

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- 5.1.69 The MEC responsible for Provincial Planning and Finance at the time, Hon. Masualle, made a presentation on urgent matters, in particular the coordination and variation of funds for an emergency, thus briefing the meeting on the proposal for the variation of use of funds to incur any expenditure to support the funeral arrangements of the late President Mandela. Hon. Masualle also informed the meeting about the control measures that were proposed to ensure that there are no duplication of payments, as well as giving an outline on the sources of funding and the identification of ECDC as a vehicle to host the project.
- 5.1.70 It was resolved to confirm the appointment of the ECDC in the capacity of a project host and paymaster, and that the funeral arrangement costs would be defrayed from some of the funds earmarked for social infrastructure within the ECDC.
- 5.1.71 The Resolution for the endorsement of the control measures proposed by Ms Mbina-Mthembu, were also confirmed; as well as the mandate to the MEC responsible for the Provincial Treasury to defray the funeral costs from the Provincial Revenue Fund in line with section 25 of the PFMA (should it become necessary).
- 5.1.72 The ECPTA was represented at the meeting by its CEO at the time, Mr. Luxolo Rubushe. However, there was no representative of the ECDC at the meeting, neither a Board Member nor its CEO, Mr. Sithembele Mase.
- 5.1.73 It was further established during the investigation that it was only on 26 February 2014, (i.e. more than two months after the funeral of President Mandela), that the General Manager responsible for Cabinet Support and Protocol Services of the ECPG, Mr. M Nkasawe, addressed a communication to the Premier and the MEC's, advising them of the Resolution taken by the Eastern Cape Provincial EXCO on 6 December 2013.

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5.1.74 In this communication under the heading *Coordination and Variation of Use of Funds for an Emergency*, it is recorded that;

*“This serves to inform you that at the Special Executive Council Meeting (4<sup>th</sup> term) held on 6 December 2013, and according to item 6.1 regarding the above-mentioned issue, the Executive Council resolved that:*

- 1) *The Eastern Cape Development Corporation be the project host/paymaster;*
- 2) *The funeral arrangement costs be defrayed from some of the funds earmarked for social infrastructure in ECDC*
- 3) *The control measures proposed by Provincial Planning and Treasury be endorsed;*
- 4) *The MEC for Provincial Planning and Finance is mandated to defray the funeral costs from the Provincial Revenue Fund in line with Section 25 of the Provincial Finance Management Act 1 of 1999.”*  
*(sic)*

5.1.75 During the investigation it further transpired that Ms. Mbina-Mthembu submitted a report to the Portfolio Committee for Finance on the preparations and expenditure of public funds incurred towards the December 2013 State Funeral of the late President Mandela on 9 July 2014.

5.1.76 Ms. Mbina-Mthembu reported that the preparations for the eventuality of the passing on of President Mandela and his funeral commenced in 2008, albeit subtle.

5.1.77 Both the KSD and OR Tambo Municipalities needed to be ready to host visitors for the funeral.

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- 5.1.78 It appeared that the state of readiness in terms of bulk infrastructure, water and sanitation and other logistics was inadequate. The ORTDM was responsible for bulk infrastructure in the KSD municipal area in terms of the Municipal Structures Act.
- 5.1.79 With regard to the provincial preparations, Ms. Mbina-Mthembu stated that, subsequent to the announcement of the passing on of President Mandela, she was summoned to a meeting of Heads of Departments by the Deputy Director-General in the Premier's office, Mr. M Qwase. The purpose of the meeting was to finalize the state funeral plans, including the financial contributions by the ECPG. These plans were to be presented to a Special EXCO that was held on 6 December 2013.
- 5.1.80 The Director-General, the Premier and the MEC for Provincial Planning and Finance, who had attended a meeting at the Presidency as part of the national PCC on 6 December 2013, were expected to advise the planning meeting on their return from Pretoria later that day. After deliberations, all HOD's and their representatives returned to their departments to prepare for the assigned tasks which they would later present to the planned Special Eastern Cape Provincial EXCO of 6 December 2013.
- 5.1.81 Ms. Mbina-Mthembu further reported that the Provincial Treasury considered two options for funding the preparations, the first being the declaration of an emergency in accordance with the provisions of section 25 of the PFMA, which would require a new allocation being made from the Provincial Revenue Fund.
- 5.1.82 The second option was to identify government funds that were already appropriated, but where there was slow spending and to utilize these in terms of Treasury Regulation 6.3.1(c). The Departments of Public Works, Education, the DEDEAT and the ECDC were showing very slow spending at the time.

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- 5.1.83 The Provincial Treasury thus opted for this route and selected ECDC for two reasons, one being the fact that it is a development finance institution and would be able to perform an additional function of supporting the municipalities.
- 5.1.84 According to Ms. Mbina-Mthembu's report, funds were available and in the event that the ECDC improved its spending, it would be reimbursed for all funds utilized for the funeral.
- 5.1.85 A Treasury memorandum was prepared in line with this option for presentation to the Special Eastern Cape Provincial EXCO that was held on 6 December 2013 and was approved without any amendments.
- 5.1.86 Ms. Mbina-Mthembu stated that she prepared two sets of correspondence; one addressed to the Auditor-General (AG) advising him of a possible variation in the use of funds as the province had an emergency. She also informed the AG about the appointment of the ECDC and tasks allocated to them in their capacity as the paymaster as well as responsibility for all related logistical arrangements.
- 5.1.87 She also explained the rationale for the application of the provisions of Treasury Regulation 6.3.1(c) instead of section 25 of the PFMA. She copied and delivered her letter to the former MEC responsible for DEDEAT, Hon. Mcebisi Jonas and scanned a copy thereof to the CEO of the ECDC, Mr. Sthembele Mase.
- 5.1.88 A second letter was forwarded to the CEO of the ECDC, Mr. Mase. According to Ms. Mbina-Mthembu, paragraph 6 of her correspondence to Mr. Mase read *"ECDC must also ensure that proper processes are followed in the utilization of these funds and that the necessary controls are in place."*

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- 5.1.89 With regard to her communication with Municipalities and other government institutions, Ms. Mbina-Mthembu reported that, having been aware of the financial position and financial management practices of the OR Tambo and KSD Municipalities, she requested the Treasury's Supply Chain Management (SCM) team to prepare a detailed SCM process on how to prepare deviation memoranda and what would be expected of them before Treasury could concur to requests for funding or payment for services rendered. In this regard, two sets of correspondences were forwarded to both Municipal Managers of these municipalities, copying their respective Chief Finance Officers.
- 5.1.90 Ms. Mbina-Mthembu stated that the purpose of Treasury approvals before goods were procured, was to ensure that only reasonable requests, such as items of goods and services that would be deemed necessary for the funeral were procured by these Municipalities, and this was clearly communicated and concurred to by all parties.
- 5.1.91 The approvals for the choice of suppliers and the deviation from normal procurement processes internally at municipal level, was the competence of the Municipal Managers and their teams in line with legislative prescripts and their own internal policies.
- 5.1.92 In her view, the communication to the ECDC regarding their role as both paymaster and logistical manager was clear, and by providing correspondence to both the responsible Executive Authority and the CEO, she did not see any reason why she should have also approached the Board of the ECDC.
- 5.1.93 Ms. Mbina-Mthembu lamented that she took decisions on the basis of limited support and information to carry out the tasks at hand. She concluded her report by providing a breakdown and a reconciliation of the expenditure incurred for the funeral and memorial service of the late President Mandela which were authorized for payment by the ECDC as follows: -

DESCRIPTION	PAYMENTS MADE	REMARKS
KSD Municipality	R10 874 645.11	Approved for payment
Meals for Marshalls and 3 PMV's	R1 271 519.00	Approved for payment
Expenditure incurred for PE Memorial Service	R9 239 407.00	OTP should have incurred expenditure as hosts
<b>TOTAL EXPENDITURE FOR THE ABOVE ITEMS</b>	<b>R22 214 271.11</b>	
Expenditure on Infrastructure projects at KSD Municipality	<b>R20 858 059.50</b>	There were other infrastructure requests which were authorized, but still required verification before payment
Expenditure on Infrastructure projects at O R Tambo District Municipality	<b>R5 098 800.00</b>	
<b>TOTAL EXPENDITURE FOR INFRASTRUCTURE RELATED PROJECT</b>	<b>R25 956 859.50</b>	
<b>THE TOTAL EXPENDITURE INCURRED FOR THE FUNERAL INCLUSIVE OF ALL ITEMS PROCURED</b>		<b>R48 171 131.00</b>
<b>Total value of declined requests from KSD &amp; OR Tambo District municipalities</b>	<b>R4 450 535.00</b>	<b>These items included accommodation, catering, LED screens and others</b>

5.1.94 On 4 February 2015, Ms. Mbina-Mthembu presented the Public Protector with a written submission in response to the allegations under investigation. She stated that in May 2012, she was invited by the Office of the Premier to a meeting to discuss preparations for President Mandela's funeral. The meeting was attended by various representatives of government institutions.

5.1.95 According to Ms. Mbina-Mthembu, her role as a representative of the Provincial Treasury was to identify the items that were required for the preparation of the funeral, and to identify what was not budgeted for.

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- 5.1.96 She had to source or reprioritize funds within base line. Subsequently, the Provincial Treasury costed the potential budget needed.
- 5.1.97 She confirmed that the Provincial Treasury presented the Provincial EXCO Budget Committee with a proposal in October 2013 to appoint the ECDC as an additional infrastructure delivery arm, which was approved by Provincial EXCO, and funds were allocated during the adjustment estimates process of 2013.
- 5.1.97 Further, Ms. Mbina-Mthembu in essence confirmed the contents of the report that she submitted to the Portfolio Committee on Finance of the Eastern Cape Provincial Legislature, on 9 July 2014.
- 5.1.98 On 31 July 2014, Members of the former Board of Directors of the ECDC, under the Acting Chairpersonship of Prof. Mkhalelwa, were interviewed during the investigation. The former Chairperson, Ms. Nomfanelo Magwentshu also attended the interviews.
- 5.1.99 According to Prof. Mkhalelwa, the Board was only made aware of the involvement of the ECDC in the expenditure for the Mandela funeral preparations through media reports, published around 9 January 2014. They were concerned about the CEO, Mr. Mase's failure to inform the Board of the involvement and participation of the ECDC in the preparations and expenditure for the funeral of President Mandela.
- 5.1.100 The Board decided to approach the shareholder representative for an explanation. MEC Jonas advised them that the actual amount spent by the ECDC was R22million. They then decided to convene a Board meeting to be held on 15 March 2014, so as to solicit an explanation from the CEO.

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5.1.101 Subsequently, the Board decided to conduct a forensic investigation and thus submitted to the Public Protector a copy of a forensic report compiled by Messrs. Fundudzi Forensic Services. Following the release of the report, the Board decided to terminate the services of the CEO.

5.1.102 In narrating the sequence of events, the former Chairperson of the Board, Ms. Nomfanelo Magwentshu stated that:

*“Where [when] we were advised of the Social Infrastructure Fund that will be transferred to the ECDC. And we had, by the time the funds were disbursed from this Fund, we have not concluded on the matter as a Board.*

*We were still waiting for the Executive to provide us with a Business Case on how we're going to spend these funds, on what criteria will be used to allocate funds to projects and also the Government structure on the disbursement of these funds and use of these funds. **And also noting that the funds were transferred to the ECDC very late in the financial year.***

*So we needed to be clear on how we're going to report, how we're going to spend the funds, and by the time the funds were used for the funeral, we had not completed on the matter.*

***Secondly, the use of funds, at no point did we, as the Board, get an indication from the Executive that there's an instruction to use these funds for the funeral.** And the only time we found all these documents and communication between the Executive and the Province, was when we were conducting the forensic investigation. **At no point were we informed by the Executive that there's money spent for the funeral, until the Board meeting of 15<sup>th</sup> March [2014].** So the meeting I had with the MEC on the 14<sup>th</sup> March was a shock. I mean when he said to me "are you aware that you guys have spent R22million already and there's another pending amount that you still have to pay, you're waiting for invoices."*

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*And he had been informed, in that previous day, on the 12<sup>th</sup> March when the HOD had a meeting with the Executives from the ECDC.*

*We cannot trust whatever information comes from the Executives, we really need to get an independent forensic investigator to enlighten us on this matter. And it's, the Forensic Report, the actual document that revealed exactly what happened and how the communication between Provincial Treasury and the ECDC Executives happened. **At no point were we called or even sent a note to say as the Board to the Board or at least myself as the Chairperson, that we've received this instruction, we're acting on this instruction, this is the funds that we're going to use and this is the amount that we're going to spend. Until the 14<sup>th</sup> March and this had happened in December.** And in between we had had discussions with the Executives. I just want to highlight that. It's very important.” (sic)*

5.1.103 According to the Board, it was their understanding that the funds utilized by the ECDC towards preparations for the funeral were from the entity's own coffers as the shareholder only transferred the R300million on 31 January 2014, despite the fact that the instruction to spend was in December 2013.

### **The Application of the relevant law**

#### **The Constitution of the Republic of South Africa**

5.1.91 The principle of legality in South African law is enshrined in the provisions of section 2 of the Constitution, which provides that:

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

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5.1.92 The Constitutional principle of legality requires that a decision-maker exercises the power conferred upon her/him lawfully, rationally and in good faith.

5.1.99 In *Affordable Medicines Trust & Others v Minister of Health & Others*<sup>2</sup> the Constitutional Court held that: -

*“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power. [...] The exercise of such power must be rationally related to the purpose for which the power was given.”*

5.1.100 In this case therefore, the Constitution required of the Executive of the ECPG to act within the confines of its provisions, and that of the statutes and other prescripts regulating the management of public finances and procurement, when it decided on how to fund the preparations for the funeral of President Mandela.

5.1.101 Section 239 further requires that all constitutional obligations must be performed diligently and without delay. The ECPG was accordingly obliged to be meticulous in the performance of its constitutional obligations relating to the management of public funds, as referred to below.

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<sup>2</sup> 2005 (6) BCLR 529 (CC) [paras 49, 75 and 77].

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5.1.102 The executive authority of provinces is provided for in Chapter 6. In terms of section 125, it is vested in the Premier that exercises the executive authority together with other members of the Executive Council by, *inter alia*, performing the functions assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

5.1.103 Section 226 regulates the establishment of Provincial Revenue Funds. It provides, *inter alia* that:

“(1) *There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.*

(2) *Money may be withdrawn from a Provincial Revenue Fund only-*  
(a) *in terms of an appropriation by a provincial Act; or*  
(b) *as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.”*

5.1.104 Chapter 7 provides for the establishment of local government in the form of Municipalities. Section 151 provides that the executive authority of a Municipality is vested in its Municipal Council. Municipalities have the right to govern the local affairs of its community, subject to national and provincial legislation.

5.1.105 Section 151(4) provides that:

*“The national or provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.”*

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### **The Public Finance Management Act, 1999**

5.1.106 Provincial Treasuries are established by section 17 of the PFMA. It provides that the MEC for finance in the province is the head of the provincial treasury.

5.1.107 The MEC for Finance may, in terms of section 20, in writing delegate any of the powers entrusted or delegated to the provincial treasury in terms of the PFMA, to the head of the Provincial Department of Finance, or instruct that head to perform any of the duties assigned to the provincial treasury in terms of the Act. Such delegation or instruction does not divest the MEC of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

5.1.108 During all material times relevant to the investigation referred to in this report, Hon. Masualle therefore was the Head of the Eastern Cape Provincial Treasury. As the Head of the Department of Provincial Planning and Treasury, Ms. Mbina-Mthembu performed duties assigned to the Eastern Cape Provincial Treasury, under delegation from the MEC.

5.1.109 Section 21 provides that the provincial treasury is in charge of the Province's Provincial Revenue Fund, and must enforce compliance with section 226 of the Constitution, referred to above.

5.1.110 **A provincial treasury must, in terms of section 18, *inter alia*:** -

- (a) Exercise control over the implementation of the provincial budget;
- (b) Promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities.

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5.1.111 In terms of section 24, only a Provincial Treasury may withdraw money from a Provincial Revenue Fund, and may do so only:

- (a) To provide funds that have been authorised:
  - (i) in terms of an appropriation by a Provincial Act; or
  - (ii) as a direct charge against the Provincial Revenue Fund provided for in the Constitution or a Provincial Act;
- (b) To refund money incorrectly paid into, or which is not due to the Provincial Revenue Fund; or
- (c) To deposit into or invest money in the National Revenue Fund.

5.1.112 The funds required to cover the expenditure incurred by the ECPG in respect of the funeral of President Mandela therefore, could only have been withdrawn from the Eastern Cape Provincial Revenue Fund under an item provided for in an Eastern Cape Appropriation Act, or if it was expenditure charged directly against the Provincial Revenue Fund.

5.1.113 The provisions of section 25 are of particular significance to matters referred to in this Report. It provides that: -

*“(1) The MEC for finance in a province may authorise funds from that province’s provincial Provincial Revenue Fund to defray expenditure of **an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest in the province, be postponed to a future appropriation by the provincial legislature.**”* (emphasis added)

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5.1.114 Further, that the amount authorised is a direct charge against the Provincial Revenue Fund if a provincial Act so provides. It must be reported to the Provincial Legislature and the Auditor-General within 14 days, and must be attributed to a vote.

5.1.115 From the evidence obtained during the investigation, it was established that the total reported expenditure for the funeral amounted to R48 171 131.00, which was within the R300 million that was available from funds appropriated to the ECDC. The provisions of section 25 was accordingly not invoked, even though the MEC for Provincial Planning and Finance was mandated to do so.

5.1.116 It should be noted at this juncture that “vote” is defined by section 1 as meaning:

*“one of the main segments into which an appropriation Act is divided and which-*

*(a) specifies the total amount which is usually appropriated per department in an appropriation Act; and*

*(b) is separately approved by Parliament or a provincial legislature, as may be appropriate, before it approves the relevant draft appropriation Act as such.”*

5.1.117 The virement of funds between main divisions within votes is regulated by section 43, in terms of which the accounting officer for a department may utilise a saving in the amount appropriated under a main division, within a vote towards the defrayment of excess expenditure under another main division within the same vote, unless the relevant treasury directs otherwise.

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5.1.118 Should the accounting officer decide to utilize a saving, he/she must, in terms of section 43(3), within seven days, submit a report containing the prescribed particulars to the executive authority responsible for the department and to the relevant treasury.

5.1.119 The financial management of public entities is regulated by Chapter 6 of the Act. In terms of section 50, the accounting authority must exercise the duty of utmost care to ensure reasonable protection of its assets. They must act with fidelity, honesty, integrity and in the best interests of the public entity in managing its financial affairs, and seek to prevent any prejudice to the financial interests of the state.

5.1.120 The accounting authority must further, in terms of section 51 ensure that it has and maintains an appropriate procurement system and must take effective and appropriate steps to collect all revenue due to the public entity and to prevent irregular, fruitless and wasteful expenditure, and expenditure not complying with the operational policies of the public entity.

5.1.121 Section 1 of the PFMA provides for the following definitions: -

(a) *“fruitless and wasteful expenditure means expenditure which was made in vain and would have been avoided had reasonable care been exercised.”*

(b) *“irregular expenditure means expenditure other than unauthorized in contravention or that is not in accordance with a requirement of any applicable legislation, including-*

*(a) this Act; or*

*(b) the State Tender Board Act, 1968, or any regulations made in terms of that act; or*

*(c) any provincial legislation providing for procurement procedures in that provincial government.”*

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(c) *“unauthorised expenditure means-*

*(a) Overspending of a vote or main division within a vote;*

*(b) 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.”*

5.1.122 The ECDC is a Provincial Public Entity listed in Part C of Schedule 3 to the PFMA.

**The Eastern Cape Development Corporation Act, 1997**

5.1.123 The ECDC derives its mandate from the Eastern Cape Development Corporation Act.

5.1.124 The ECDC is an organ of state as envisaged by section 239(b)(i) and (ii) of the Constitution.

5.1.125 The ECDC was, pursuant to the Act, incorporated as a profit company under the Companies Act, 61 of 1973. Subsequently, the ECDC adopted a Memorandum of Incorporation in order to bring the company in line with the Companies Act, 71 of 2008.

5.1.126 As at the date of the adoption of the Memorandum of Incorporation, the ECPG was the sole shareholder in the ECDC, duly represented in that capacity by the the MEC for Economic Development, Environmental Affairs and Tourism.

5.1.127 In terms of section 3 of the ECDC Act:

*“The objects of the corporation shall be to plan, finance, co-ordinate, market, promote and implement the development of the province and all its people in the fields of industry, commerce, agriculture, transport and finance.”*

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5.1.128 The ECDC is controlled by the Board of Directors who are appointed in terms of the Act and conduct their functions primarily in accordance with the ECDC Board Charter.

5.1.129 The Board is the accounting authority of the ECDC, by virtue of the provisions of section 49(2) of PFMA.

### **The Eastern Cape Appropriation Act, 2013**

5.1.130 This Act provided for the appropriation of money from the Provincial Revenue Fund for the requirements of the Eastern Cape Province in the 2013/14 financial year to votes and main divisions within a vote.

5.1.131 It came into operation on 1 April 2013.

5.1.132 The DEDEAT is listed under Vote 9 in the Act.

5.1.133 The total amount appropriated for Vote 9 was R 1 070 858 000. The main divisions were provided for as follows:

Administration:	R 202 292 000
Economic Development and Tourism:	R 574 297 000
Environmental Affairs:	R 291 269 000

5.1.134 Under the main division of Economic Development and Tourism, the Act provided for Transfers and Subsidies to *Departmental Agencies and Acccounts* in the amount of R467 479 000.

5.1.135 The purpose of the Vote was stated as: “[t]o lead economic development and environmental management in the Eastern Cape.”

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5.1.136 Under the main division Economic Development and Tourism, the purpose was stated as: “[t]o administer sustainable economic policies and develop appropriate strategies to promote business development and job creation.”

5.1.137 It was noted that, in the Eastern Cape Adjustments Appropriation Act, 2013, that came into operation in January 2014, the amount appropriated under Vote 9 for Economic Development and Tourism was R311 390 000 and the transfers and subsidies to *Departmental Agencies and Accounts* stated as R311 290 000.

### **The Treasury Regulations**

5.1.138 Treasury Regulation 6.3.1(c) provides that, for the purposes of section 43(1) of the PFMA (referred to above), allocations earmarked by the relevant treasury for a specific purpose may not be used for other purposes, except with its approval.

5.1.139 Accordingly, Treasury Regulation 6.3.1(c) could only have applied in this case, should the accounting officer of the DEDEAT have considered the virement of funds between the main divisions of the Eastern Cape Appropriation Act, 2013, in terms of section 43 of the PFMA. There are two requirements that had to be met in order to invoke the provisions of section 43.

5.1.139.1 Firstly, there had to be a saving in the amount appropriated under a main division within a vote; and

5.1.139.2 Secondly, the virement must have been intended to defray excess expenditure under another main division within the same vote.

5.1.140 In this case, the evidence indicates that the decision in respect of the variation of funds was initiated by the Provincial Treasury, in particular Ms. Mbina-Mthembu. The funds reallocated were, according to the evidence, appropriated to the ECDC under the main division of Vote 9.

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- 5.1.141 Neither the Board of the ECDC, as the accounting authority, nor the Head of the DEDEAT were involved in this decision.
- 5.1.142 The evidence does not show that there was any saving under a main division of an amount appropriated in terms of the Eastern Cape Appropriation Act, 2013.
- 5.1.143 Further, the expenditure that the virement was supposed to cover, had not been incurred when the decision was taken and there could therefore not have been any “*defrayment of excess expenditure*,” as contemplated by section 43(1) of the PFMA.
- 5.1.144 It therefore follows that the application of Treasury Regulation 6.1.3(c) did not arise as the virement that was proposed by the Provincial Treasury had not complied with the provisions of section 43 of the PFMA.
- 5.1.145 The accounting officer of an institution is, by virtue of Treasury Regulation 7.2, responsible for managing revenue efficiently and effectively.
- 5.1.147 In terms of Treasury Regulation 8.1, he/she must ensure that internal procedures and control measures are in place for payment approval and processing. These internal controls should provide reasonable assurance that all expenditure is necessary, appropriate, paid promptly and is adequately recorded and reported.
- 5.1.148 Treasury Regulation 8.1 provides that an official of an institution may not spend or commit public money except with the approval of the accounting officer or a properly delegated or authorised officer.
- 5.1.149 The evidence and information obtained during the investigation indicates that the Board of the ECDC was not even aware of the decision taken by the Provincial Treasury to reallocate funds that were appropriated to it for the purposes of the funeral of President Mandela.

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5.1.150 There is no indication in the Constitution, the PFMA, Treasury Regulations or the Eastern Cape Appropriation Act, that the Provincial Treasury could, of its own volition, decide to reallocate funds appropriated to the DEDEAT and accordingly, to the ECDC.

5.1.151 Supply Chain Management is regulated by Chapter 16A of the Treasury Regulations. The responsibility of the entire procurement process from demand management, acquisition to disposal, is that of the accounting officer or the accounting authority of an institution.

5.1.152 In this case, the Board of the ECDC was ultimately responsible for all procurement paid for from the funds appropriated. However, as stated above, Ms. Mbina-Mthembu apparently did not find it necessary to consult the Board on the matter.

5.1.153 Neither the Constitution, nor the PFMA or the Treasury Regulations provides for the appointment by the executive of a provincial public entity as a paymaster for the procurement of funds by another institution.

5.1.154 **Ms. Mbina-Mthembu's response to the Public Protector's Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994**

5.1.154.1 On 5 September 2017, the Public Protector issued Ms. Mbina-Mthembu with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to affording her with a further opportunity to respond to the allegations against her, in particular relating to the role she played in the expenditure of public funds for the funeral and provincial memorial service of the late President Mandela. Section 7(9)(a) of the Public Protector Act provides that: -

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*“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”*

5.1.154.2 Ms. Mbina-Mthembu responded to the notice on 15 September 2017. She was further interviewed on 15 November 2017, with a view to affording her an opportunity to explain the role, involvement and participation in the procurement of goods and services in preparation for the funeral of President Mandela.

5.1.154.3 She confirmed that she had been involved in meetings relating to the planning for the funeral of President Mandela since 2011. It was by then well-known that his last resting place would be at Qunu in the Eastern Cape Province.

5.1.154.4 With regard to funding for the funeral, Ms. Mbina-Mthembu stated that both the KSD and OR Tambo Municipalities were not ready to host the funeral of President Mandela and this necessitated the ECPG to invoke the provisions of section 154(1) of the Constitution, which provides that:

*“The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.”*

5.1.154.5 She was aware of the fact that the preparations for the funeral proceedings of the late President Mandela was a competence of the National sphere of government in accordance with the guidelines and regulations as provided for in the Ministerial Handbook.

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- 5.1.154.6 However, the infrastructure related preparations were a competence of both the Local and Provincial sphere of government.
- 5.1.154.7 With regard to the allegation of a variation of the use of funds intended for infrastructure delivery to pay for a funeral, Ms. Mbina-Mthembu stated that ECPG was ultimately responsible for the expenditure related thereto, and that the money could not have come from Vote 12, i.e. Provincial Planning and Treasury, *“as Treasury was not responsible for the burial.”*
- 5.1.154.8 According to her, President Mandela’s funeral was an emergency, as envisaged by section 25(1) of the PFMA.
- 5.1.154.9 She further stated that she only made a recommendation on the variation of the use of funds to the Eastern Cape Provincial EXCO, and that she was not responsible for the decision.
- 5.1.154.10 Ms. Mbina-Mthembu explained that the R300million appropriated to the ECDC was part of a provincial transfer of money to it, to assist with the implementation of social infrastructure. She described the R300million as money that was appropriated to the ECDC from a *“provincial saving.”*
- 5.1.154.11 According to Ms. Mbina-Mthembu, *“the amount of R300million belonged to the ECPG and the ECDC was slow in spending on social infrastructure and there was a commitment that they would be replaced if there was a need to do so, through the provisions of section 25 of the PFMA.”*
- 5.1.154.12 She further averred that the unsigned version of the memorandum that was submitted to the Eastern Cape Provincial EXCO on 6 December 2013, is of no consequence.

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5.1.154.13 According to her, the Resolution taken was as reflected in the letter of the former Director-General and Cabinet Secretary, Mr. M Sogoni, to all MEC's dated 26 February 2014 (i.e. more than two months after the funeral) stating *inter alia* that:

*“The funeral arrangement costs be defrayed from some of the funds earmarked for social infrastructure in ECDC.”*

5.1.154.14 As far as the involvement of the Board of the ECDC is concerned, Ms. Mbina-Mthembu stated that she had expected the MEC for Economic Development, Environmental Affairs and Tourism, as the representative of the shareholder of the ECDC, and the Head of the DEDEAT, to have communicated the Provincial EXCO's decision to the Board of the ECDC.

### **Conclusion**

5.1.155 Ms. Mbina-Mthembu, the Head of the Department of Provincial Planning and Finance, was aware of the need to plan and budget for the preparations and arrangements for the funeral of President Mandela from at least 2011.

5.1.156 Despite her involvement at meetings in this regard, no provision was made in the budgets of the ECPG for the expenditure that would have to be incurred by the ECPG in the event of President Mandela's demise.

5.1.157 It was only after it was announced that President Mandela had passed on on 5 December 2013 and when a Special Eastern Cape Provincial EXCO meeting was called that Ms. Mbina-Mthembu submitted a proposal for funding.

5.1.158 The gist of her proposal was to utilise funds appropriated to DEDEAT, to transfer to the ECDC for the acceleration of social infrastructure development.

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5.1.159 Her motivation, which was accepted by the Eastern Cape Provincial EXCO, was to rely on Treasury Regulation 6.1.3(c).

5.1.160 However, Treasury Regulation 6.1.3(c) did not apply, as it was reliant on the application of section 43 of the PFMA that required consideration and a decision by the Head of the DEDEAT in respect of the virement of funds between main divisions as stipulated in the Eastern Cape Appropriation Act, 2013.

5.1.161 **Two requirements had to be met in order to invoke the provisions of section 43.**

(a) Firstly, there had to be a saving in the amount appropriated under a main division within a vote; and

(b) Secondly, the virement must have been intended to defray excess expenditure under another main division within the same vote.

5.1.162 Neither the Board of the ECDC, as the accounting authority, nor the Head of the DEDEAT, were involved in Ms. Mbina-Mthembu's decision to propose the variation of funds appropriated to the ECDC for social infrastructure development for the purposes of expenditure to be incurred for President Mandela's funeral.

5.1.163 The evidence does not show that there was any saving under a main division of an amount appropriated in terms of the Eastern Cape Appropriation Act, 2013.

5.1.164 Further, the expenditure that the virement was supposed to cover, had not been incurred when the decision was taken, and there could therefore not have been any "*defrayment of excess expenditure*," as contemplated by section 43(1) of the PFMA.

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5.1.165 Ms. Mbina-Mthembu accordingly misdirected the Eastern Cape Provincial EXCO in this regard. Her proposal was irrational and unlawful.

5.1.166 This resulted in an irrational decision by the former Eastern Cape Provincial EXCO that culminated in expenditure by the ECDC that was unauthorised as contemplated by the PFMA.

5.1.167 The ECPG therefore improperly diverted public funds amounting to R300million, placed in the custody of the ECDC which were allocated for purposes of accelerating social infrastructure delivery in the province, to use them for the memorial service and funeral of President Mandela.

**5.2 Whether the procurement process followed by the ECPG in the appointment of service providers to assist in the preparations for the funeral of President Mandela was in accordance with a system that is fair, equitable, transparent, competitive and cost effective;**

Issues that are Common Cause

**It was not disputed that:**

5.2.1 Following the announcement of the passing on of President Mandela, the Eastern Cape Provincial EXCO convened a Special meeting on 6 December 2013 and took a Resolution, approving the variation of funds to support the funeral arrangements for the late President Mandela and appointing the ECDC as project host and paymaster.

5.2.2 A portion of an amount of R300million appropriated to the ECDC for the acceleration of social infrastructure development was utilized for expenditure related to the funeral arrangements of President Mandela.

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- 5.2.3 Organs of state in the Eastern Cape procured services from suppliers who were appointed to assist in the preparations for the funeral.

**Issues that are in dispute**

- 5.2.4 The issue for determination by the Public Protector was whether the procurement of the services by organs of state of the ECPG relating to the funeral arrangements of President Mandela complied with the relevant procurement legislation and prescripts.
- 5.2.5 According to the information and evidence obtained during the investigation, on 6 December 2013, and in giving effect to the Provincial EXCO Resolution regarding funding for preparations for the funeral of the late President Mandela, Ms. Mbina-Mthembu, in her official capacity as the Head of the Department of Provincial Planning and Treasury, addressed a communication to the Auditor-General in the Eastern Cape, Mr. Singa Ngqwala titled **“Coordination and Variation of Funds for an Emergency.”**
- 5.2.6 In her correspondence, Ms. Mbina-Mthembu informed the Auditor-General that:

*“ECDC has been identified as the provincial project host and paymaster for the Former State President’s funeral and related logistical arrangements. ECDC is a public entity, which works across the three spheres of government, which will be involved in the coordination, and preparation of the project.*

- 1. ECDC was allocated R300million during the 2013/14 Adjustment Estimates budget for social infrastructure in the province. Some of these funds will need to be utilized on the above event and its related logistical arrangements.*
- 2. Before any funds are committed to the above project, endorsement must be received from the HOD of Provincial Treasury in terms of s 6.3.1(c) of Treasury regulations as allocations earmarked by the relevant treasury for a*

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*specific purpose may not be used for other purposes, except with its approval.*

- 3. For control purposes, any work to be paid for by the Provincial, Local and National Government relating to this project must be endorsed first by Provincial Treasury after Council with the provincial coordinators to ensure no duplication of costs. (sic)*
- 4. Furthermore, any projects or amounts that will be spent on this initiative by Local or National Government must first be disclosed to Provincial Treasury for control purposes.*
- 5. The costs relating to this event are unknown at this stage therefore once the amount is established, the MEC for Planning and Finance will defray these costs from the PRF if necessary (i.e. the funds voted to ECDC have been depleted, etc) this will be done in line with section 25 of the PFMA”*

- 5.2.7 Ms. Mbina-Mthembu concluded her correspondence by stating that **“[t]he Provincial Treasury wishes the AG to note that there may be a variation of funds during this period.”**
- 5.2.8 The communication to the Auditor-General was copied to the MEC for Planning and Treasury, Hon. P Masualle, the CEO of ECDC, Mr. Sithembele Mase and the MEC for the Department for Economic Development, Environmental Affairs and Tourism, the Hon. Mr. Mcebisi Jonas.
- 5.2.9 A similar correspondence dated the same day was addressed by Ms. Mbina-Mthembu to the CEO of the ECDC, Mr. Mase. The only difference is that in paragraph 6 of the correspondence, Ms. Mbina-Mthembu stated that: -

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**“ECDC must also ensure that proper processes are followed in the utilization of these funds and that the necessary controls are in place.”**

(emphasis added)

5.2.10 On 9 December 2013, she also addressed a memorandum to the ECPG Heads of Departments, and Municipal Managers of the KSD and OR Tambo Municipalities, Messrs. Hlazo and Mngqanqeni respectively, under the heading *“Procurement Process to be followed in preparation for the funeral of Late Former President, Dr Nelson Rolihlahla Mandela.”*

5.2.11 The purpose of the Memorandum was to outline the process to be followed for the procurement of goods and/or services in preparation for the funeral of President Mandela. In providing background to the matter, Ms Mbina-Mthembu stated that since President Mandela would be buried and laid to rest at Qunu, the Provincial Executive Council deemed it appropriate that the Eastern Cape Province should provide appropriate assistance to the relevant authorities, to wit the OR Tambo District Municipality, to ensure the smooth running of the State Funeral.

5.2.12 In outlining the procurement process that was to be followed, Ms Mbina-Mthembu stated that it should be in accordance with Section 217(1) of the Constitution, Treasury Regulation 16A6.4 in respect of the provincial departments and public entities and section 112 of the Municipal Finance Management Act in respect to municipalities.

5.2.13 In giving a directive, Ms Mbina-Mthembu stated that the procurement process that **must** be followed was as follows: -

*“1. Due to urgency of the funeral preparations, approval for deviation from normal procurement processes must be secured from the Accounting Officer/Authority of the department/institution. The request for deviation must also indicate the goods and/or services to be procured.*

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- 1.1 *For the purposes of this event, the Accounting Officer/Authority must issue special delegations in writing to officials based on their competencies in order to expedite the procurement process.*
- 1.2 *Procurement must be handled by Supply Chain Management Practitioners and any other duly authorized officials, only.*
- 1.3 *Where possible three (3) written quotations must be solicited from suppliers or service providers registered on the supplier database of the department or institution.*
- 1.4 *The appointment of the successful service providers must be approved by the Accounting Officer/Authority or delegated official of the institution.*
- 1.5 *The selection process must be clearly documented for audit purposes.*
- 1.6 *The appointed service provider must have a valid Tax Clearance Certificate issued by SARS.*
- 1.7 *All relevant documentation but not limited to as indicated in the attached checklist must be properly filed and safely stored. No payment will be effected without the minimum documents indicated in the checklist.”*
- 5.2.14 With regard to payment of invoices, the instruction from Ms. Mbina-Mthembu was that Accounting Officers and/or Authorities must ensure that all invoices are received by 23 December 2013. Further thereto, Ms. Mbina-Mthembu instructed that all invoices together with supporting documents must be submitted by 8 January 2014 to the Department of Provincial Planning and Treasury for approval, prior to payment thereof.
- 5.2.15 The checklist that Ms. Mbina-Mthembu instructed Accounting Officers to adhere to in their procurement of goods and services for the funeral contained was as follows: -

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- “1. *Approved Request for Deviation*
  2. *Quotations obtained*
  3. *Valid SARS Tax Clearance Certificate*
  4. *Memorandum approving the appointment of the service provider*
  1. *Proof of delivery*
  2. *Invoice”*

5.2.16 On 6 December 2013, Ms. Mbina-Mthembu approached and advised Mr. Mase of the Eastern Cape Provincial EXCO Resolution appointing the ECDC in the capacity of project host and paymaster for purposes of arrangements for the funeral of President Mandela, as well as the fact that all expenses relating to these arrangements would be borne by the ECDC.

5.2.17 She further informed him of the Provincial EXCO Resolution that the R300million that was appropriated to the ECDC for the acceleration of social infrastructure projects would be used for this purpose.

5.2.18 Subsequently, Mr. Mase notified his staff, in particular the Chief Financial Officer (CFO), Mr. Sandile Sentwa, and thus requested them to cooperate with the Provincial Treasury. He forwarded to Mr. Sentwa a copy of the 6 December 2013 EXCO memorandum that he obtained from Ms. Mbina-Mthembu’s office, which was **unsigned**. (emphasis added)

5.2.19 Of particular note in this **unsigned** Memorandum were the contents of paragraph 7, which stated that “*Social infrastructure funds of R300million have been voted to DEDEAT for transfer to ECDC during the 2013/14 Adjustment Estimate. It will be necessary to utilize some of these funds for the cost of infrastructure to support these funeral arrangements.*” (emphasis added)

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5.2.20 Therefore, in effecting payments, the ECDC utilized the unsigned version of the EXCO memorandum. The contents of paragraph 7 of the Memorandum that appear to have been signed only in February 2014, were inconsistent with the unsigned version and thus appears to have been changed in the signed memorandum to read **“it will be necessary to utilize some of these funds for any costs related to the funeral preparations and related logistical arrangements.”** (emphasis added)

### **The Procurement of Meals**

5.2.21 According to the information and evidence obtained during the investigation, the first payment instruction and approval forwarded to the ECDC payment was with regard to meals to be procured for 3000 Marshalls who were to maintain order and safety in the areas around the KSD Municipality during the mourning period, as well as on the day of the funeral.

5.2.22 On 8 December 2013, the HOD of the Eastern Cape Department of Safety and Liaison, Ms. Ngaka Mosehana, forwarded a memorandum to Ms. Mbina-Mthembu, requesting a deviation from normal procurement processes in relation to the preparations for the funeral of President Mandela that was to be held in Mthatha on 15 December 2013.

5.2.23 In her memorandum, Ms. Mosehana stated that the KSD Municipality was expected to host thousands of mourners in various areas in Mthatha who would be attending the funeral, and as such, in order to maintain order and safety in the areas around the KSD municipality during the mourning period and on the day of the funeral, 3000 safety Marshalls would be deployed in different areas around the municipal area to control the masses of people that would be attending various events.

5.2.24 According to Ms. Mosehana, the Department of Safety and Liaison thus took a decision to provide meals for the 3000 safety Marshalls to be deployed in different areas around KSD Municipality. She thus motivated her request for deviation from normal procurement processes by stating that, *“due to the short period of time that the department has to provide these meals to the safety Marshalls, this is considered as an emergency and it is therefore impractical or impossible to follow normal tendering procedures in order to procure these meals either by way of quotations or through a bidding process.”*

5.2.25 The total cost for these meals was stated as R775 950.00. According to Ms. Mosehana, the Provincial Treasury confirmed that the payment of invoices received by departments from suppliers would be processed by the ECDC.

5.2.26 The food outlets that were identified to provide meals for the Marshalls were Kentucky Fried Chicken (KFC) as well as McDonalds SA, on the following days and per the costs as set out below:

DATE	FOOD OUTLET	QUANTITY	UNIT COST	TOTAL COST
9/12/2013	McDonalds	3000	37.15	111 450.00
11/12/2013	McDonalds	3000	37.15	111 450.00
13/12/2013	McDonalds	3000	37.15	111 450.00
<b>TOTAL AMOUNT SPENT TO PROCURE MEALS AT MCDONALDS</b>				<b>R334 350.00</b>
10/12/2013	KFC	3000	36.80	110.400.00
12/12/2013	KFC	3000	36.80	110.400.00
14/12/2013	KFC	3000	36.80	110.400.00
15/12/2013	KFC	3000	36.80	110.400.00
<b>TOTAL AMOUNT SPENT TO PROCURE MEALS AT KFC:</b>				<b>R441 600.00</b>
<b>TOTAL AMOUNT SPENT FOR PROVISION OF MEALS:</b>				<b>R775 950.00</b>

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- 5.2.27 On 8 December 2013, Ms. Mbina-Mthembu addressed an e-mail to Mr. Mase stating: ***“Please receive bank details. Food ordered and payment expected before 10am. Tricky but please help.”*** (emphasis added)
- 5.2.28 Mr. Mase forwarded the e-mail to Mr. Sentwa on the same day and wrote: ***“CFO, please take note and action.”*** On 9 December 2013, Mr. Sentwa of the ECDC received an invoice from KFC for an amount of R441 600.00, being part of the amount of R775 950.00, which was forwarded to him by the Department of Safety and Liaison. He was apparently not comfortable with the fact that he received the invoice from the Department directly, as the arrangement was that departments must first obtain approval from the Provincial Treasury.
- 5.2.29 He corresponded with Ms. Laurel Shipalana, the Manager in the Ms. Mbina-Mthembu’s office, regarding the KFC invoice that he received, thus requesting an approval. Ms. Shipalana wrote to him confirming that the ***“Approval for payment is granted, please process the KFC invoice.”***
- 5.2.30 Subsequent to Ms. Mbina-Mthembu’s approval and authorisation on 9 December 2013, an amount of R334 350.00 was paid by the ECDC into the Nedbank account of McDonalds SA in respect of meals provided by that outlet, and on 10 December 2013, an amount of R441 600 was also paid into the Standard Bank account of UBM Company t/a KFC in respect of the meals provided by that food outlet.
- 5.2.31 In Ms. Mbina-Mthembu’s report presented to the Eastern Cape Provincial Legislature’s Portfolio Committee on Finance, dated 9 July 2014 under the title ***“Report on Nelson Mandela Funeral Expenditure,”*** she also confirmed the expenditure. She classified the expenditure incurred for meals at *McDonalds and KFC* outlets and as ***“unforeseen exceptions.”***

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- 5.2.32 In concurring with the proposal to procure meals from these outlets, Ms. Mbina-Mthembu stated that she had to consider the following critical decision factors: -
- 5.2.32.1 The number of Marshalls which stood at 3000;
- 5.2.32.2 The mitigation against the risk of food poisoning in the event that catering was procured from the normal catering companies like members from the community; and
- 5.2.32.3 The unavailability of bed space in Mthatha hospitals, as all hospital beds were set aside for the Military, and patients transferred to Ntlaza and Dr. Malizo Mpehle hospital in Tsolo.
- 5.2.33 Ms. Mbina-Mthembu stated that she had authorised the ECDC to make upfront payments to the fast food outlets for the meals. Apparently, the management of *McDonalds* had informed the ECDC that their policy was upfront payment.
- 5.2.34 Based on the evidence, it appears that no competitive procurement process was undertaken with regard to the procurement of meals. Further thereto, note has been taken that the Department of Safety and Liaison submitted the KFC invoice directly to the ECDC for payment without obtaining prior approval of the Provincial Treasury.
- 5.2.35 The enquiry as to whether the process followed in the procurement of meals was irregular or not will be determined following an examination below of the applicable legal framework to the facts related to the particular issue under investigation.

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**The Procurement for the Provincial Memorial Service held in Port Elizabeth of transportation, a platform and sound equipment as well as printing and branding of merchandise**

5.2.36 On 11 December 2013, the CEO and CFO of the ECDC, Messrs. Mase and Sentwa received an e-mail from Ms. Mbina-Mthembu with an instruction and approval to effect payment in respect of a provincial memorial service of the late President Mandela that was to be held in Port Elizabeth on 13 December 2013. In her e-mail under the subject, ***“Urgent payments for memorial service,”*** Ms. Mbina-Mthembu stated that:

*“Please effect payments for the following today not later than 11 am*

- 1. For the provincial event- transportation and mobilization truck is approximately R10million. Details will come from the MEC August and I have forwarded your email addresses.*
- 2. Apparel for the day approximately R2.5 to R3.0M- balance payable by Saturday.*
- 3. Stage and sound approximately R1.7 million.*

*All paperwork will be officially signed on Tuesday and Wednesday as it is impossible now to be in PE and Mthatha all operational venues. I will be signing off infrastructure memo and other things for KSD today.*

*It is imperative that after the event we get a team to check the actual infrastructure work and verify the prices linked to these things.*

Even if we cannot reverse some of these payments where govt is taken for a ride we do need to raise but backed by facts and evidence. I get the sense that some people are taking chances but we are in trouble as a province. It does not look like we were prepared.

...

*Let us stand together now, this will pass too.”*

5.2.37 There was no supporting documentation justifying or motivating such payments. However, based on the approval by Ms. Mbina-Mthembu, as stated above, and equipped only with quotations, the ECDC effected payments in respect of the memorial service held in Port Elizabeth to the following entities: -

PAYMENT DATE	ENTITY	DESCRIPTION	AMOUNT
11/12/2013	Victory Ticket 750cc	Transporting BCM branches from EL City Hall via KWT to PE (Nelson Mandela Stadium) to attend the Provincial Memorial Service. 10 x 65 seaters	R250 000.00
11/12/2013	Solid Rock52	Sound, On stage Band Equipment, Display Systems, Lighting, Rigging Scaffolding Structure, Staging, Power, Miscellaneous, Cabling, Personnel, Transport, Various usable items + VAT	R1 876 706.99
11/12/2013	FNQ Bus Service.cc	Chartering 29 x 60 seater buses from Motherwell, Wells Estate and Uitenhage to NMB Stadium and return	R85 800.00
11/12/2013	Algoa Bus Company	Hiring of 371 + 50 buses for the Nelson Mandela Memorial Service to be held on 13 December 2013	R959 770.00
12/12/2013	Inyani Civil Works and Plant Hire	Hiring of one sound truck and provision of fuel for the Generator	R250 200.00

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- 5.2.38 As the request for the payment for the above items was averred to have been received from MEC Helen Sauls-August, she was interviewed during the investigation on 27 February 2015, with a view to verifying and seeking clarity on the allegations.
- 5.2.39 During the interview, MEC Sauls-August confirmed that she called Ms. Mbina-Mthembu, seeking assistance for payment for the above items. She stated that she was one of the MEC's that were deployed to arrange the provincial memorial service of the late President Mandela. She was aware that there were funds that were apportioned for use in respect of the memorial service and funeral of President Mandela, having attended the 6 December 2013 Special EXCO meeting where a Resolution in that regard was taken.
- 5.2.40 According to Hon. Sauls-August, she received numerous enquiries regarding the logistical arrangements and transportation of mourners to the memorial service. The risk that they had to mitigate was having an empty 40 000 seater stadium, hence the identification of a need to provide transportation.
- 5.2.41 She also stated that there were suppliers for a platform and sound equipment who had to be paid, as well as *Algoa Bus Service* and some taxis that would transport people. The challenge was that they did not have adequate administrative support, which was supposed to have been provided by the Premier's Office, as the event was a provincial memorial service and not a local event.
- 5.2.42 She stated that she was advised by Mr. Matutu to approach Mr. Sthembele Mase, the CEO of ECDC, who informed her that he would have to seek authorization from Ms. Mbina-Mthembu.

- 5.2.43 Hon. Sauls-August then also called Ms. Mbina Mthembu who advised her to collate all the relevant documentation and send it to her and Mr. Mase. As she did not have administrative support, Hon. Sauls-August sought the assistance of the Nelson Mandela Bay Municipality, in particular the Chief Whip, to assist in that regard and the documents were indeed sent. When she did a follow-up, she was advised that the items had been paid, and that ended her role.
- 5.2.44 Hon. Sauls-August stated that she was never involved in any procurement, as that was the competence of the administrative functionaries. She further stated that the provincial government had no clear plan for the memorial service. Fortunately, the Municipality was well organized and had plans, but they could not just rely on the Municipality paying suppliers for a provincial event.
- 5.2.45 During the investigation, the CFO of the ECDC, Mr. Sentwa stated that, on 10 December 2013, he received invoices from a company called *Reagola Print and Media*, even before he received Ms. Mbina-Mthembu's instruction of 11 December 2013. A *pro forma* invoice submitted on 10 December 2013 by Mr. Cliff Stanbury of *Reagola Print and Mail* described the services and costs for the goods that they were going to deliver as follows: -

GOODS TO BE DELIVERED	QUANTITY	UNIT PRICE	TOTAL EXCL. VAT
Golf Shirts	3500	R120.00	R420 000.00
T Shirts	50 000	R68.00	R3 400.000.00
Sarongs	3000	R100.00	R300 000.00
Umbrellas	500	R100.00	R50 000.00
Rain Suits	750	R250.00	R187 500.00
		<b>SUB-TOTAL</b>	<b>R4 357 500.00</b>
		VAT@14%	R610 050.00
		<b>TOTAL</b>	<b>R4 967 550.00</b>

- 5.2.46 In the *pro forma* invoice, Messrs. *Reagola Print and Mail* stated as a condition for commencing with the work that: “[i]n order for this job to be completed in time, a deposit of R3 000 000.00 is required on 11-12-2013”.
- 5.2.47 In conforming to Ms. Mbina-Mthembu’s instruction and approval as contained in paragraph 2 of the 11 December 2013 e-mail correspondence, the ECDC paid the R3million to the service provider.
- 5.2.48 On 17 December 2013, Mr. Stanbury of *Reagola Print and Mail* submitted another invoice to Mr. Sentwa of the ECDC for payment of the balance. The invoice is addressed to the ECDC and it contained the following: -

DESCRIPTION	QUANTITY	UNIT PRICE	TOTAL EXCL. VAT
Golf Shirts	3500	R120.00	R420 000.00
T Shirts	50 000	R68.00	R3 400.000.00
Sarongs	3000	R100.00	R300 000.00
Umbrellas	500	R100.00	R50 000.00
Rain Suits	750	R250.00	R187 500.00
		<b>SUB-TOTAL</b>	<b>R4 357 500.00</b>
		VAT@14%	R610 050.00
		<b>TOTAL</b>	<b>R4 967 550.00</b>
		<b>LESS PAYMENT RECEIVED</b>	<b>R3 000.000.00</b>
		<b>BALANCE DUE</b>	<b>R1 967 550.00</b>

- 5.2.49 Mr. Sentwa forwarded the invoice on 18 December 2013 to Ms. Laurel Shipalana of Ms. Mbina-Mthembu’s office, with a request that she approves it. It appears from the e-mails exchanged between the two officials that this invoice had been submitted earlier and that Ms. Shipalana had declined to approve same as there was no delivery note, which would have served as proof of delivery.

5.2.50 Ms. Shipalana approved the payment of R1 967 550.00 on 18 December 2013. She corresponded with Mr. Sentwa and stated that: -

*“Please note that I withdraw my previous rejection of the attached invoice. I have since located the supporting documents. Kindly go ahead and pay the balance of R1967 550 as stated in page 2 of the invoice. Pls send me a copy of the proof of payments (for the balance above and the initial payment of R3 mill).”*

5.2.51 Attached to the invoice from *Reagola Print and Mail* that was approved by Ms. Shipalana for payment of the balance, was a delivery note dated 14 December 2013, under the heading *“CUSTOMER: EASTERN CAPE DEVELOPMENT CORPORATION,”* and a sub-heading which reads *“DELIVERY: KSD MUNICIPALITY UMTATA.”* It lists and describes the goods that were supposedly delivered to the KSD Municipality in Mthatha as follows: -

QUANTITY	DESCRIPTION
3500	GOLF SHIRTS
50 000	T – SHIRTS
3000	SARONGS
500	UMBRELLAS
750	RAIN SUITS

5.2.52 Below the description of the goods, it is stated on the delivery note that *“[g]oods delivered to KSD municipality on Friday, Saturday and Sunday including the public viewing area at the funeral.”* It is signed on 13 December 2013 with a print, *“Checked and accepted as correct.”* The person who signed the delivery note is Mr. K P Mhlabeni, who noted below his signature that: -

*“Items above were received and delivered to KSD Municipality, public viewing areas and to the communities in KSD Municipality area.”* Mr. Mhlabeni appended his signature again.

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- 5.2.53 During the investigation, enquiries were made with the KSD Municipality to establish the identity of Mr. Mhlabeni at the Municipality, with a view to forwarding an invitation for him to attend interviews in relation to the matter, as he was required to verify that the goods were indeed delivered to KSD Municipality. It then transpired that the Municipality did not have an official by that name in their employ.
- 5.2.54 It was later established during the investigation that Mr Mhlabeni, in fact is in the employ of the service provider, *Reagola Print and Mail*. Mr. Siviwe Mpengesi, the Managing Director of *Reagola Print and Mail* was interviewed on 10 February 2014.
- 5.2.55 In the interview, Mr. Mpengesi was in the company of his Communications Manager, Mr. Norman Tshisa and Chippa Holdings Group Legal Head, Mr. Bongani Dlodlo.
- 5.2.56 He was asked to explain how his company got involved in the preparations for the memorial service of the late President Mandela that was held in Port Elizabeth on 13 December 2013; how and who approached his company and what services were they required to render; how payments for services rendered were made and how and where they delivered the goods. He preferred to make a presentation.
- 5.2.57 In submitting *Reagola Print and Mail's* presentation, Mr. Tshisa started by raising concerns about the damage this matter has caused to the integrity of his business as it was well reported in the media that he was a controversial businessman.
- 5.2.58 Explaining their involvement in the project, Mr. Tshisa stated that on 9 December 2013, their East London office received a telephone call from the Provincial Treasury to submit a quote for 50 000 branded T-shirts, 350 golf shirts, 3000 branded sarongs and 750 rain suits.

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- 5.2.59 The delivery date was stipulated as 14 December 2013, which was on the eve of the funeral of President Mandela.
- 5.2.60 The Provincial Treasury, so stated Mr. Tshisa, then advised them to submit the quotes to the ECDC. *Reagola Print and Mail's* Regional Manager, who is based in East London is Mr. Mhlabeni. He was contacted by Provincial Treasury and advised to forward his quotation to Mr. Mase, the CEO of the ECDC and the CFO, Mr. Sandile Sentwa. He stated that he contacted Mr. Mase who confirmed that they could submit the quotation to him.
- 5.2.61 It was at this point that Mr. Mpengesi preferred to take over the interview from Mr. Tshisa and respond himself. He stated that Mr. Mhlabeni is his Regional Manager, based in East London. He could not identify of the official from Provincial Treasury who called them, but indicated that it was the Provincial Treasury that advised them to approach Mr. Mase.
- 5.2.62 According to Mr. Mpengesi, Mr. Mase enquired from them whether they would have the capacity to deliver the items required in two or three day's time. They confirmed that it would be possible.
- 5.2.63 Mr. Mpengesi further indicated that, on checking their stock of T-shirts, it was established that they had about 20 000 white T-shirts. They approached their suppliers in East London and Durban to enquire whether they would be in a position to assist them and the answer to that was in the affirmative. It was for that reason that *Reagola Print and Mail* asked for a deposit of R3million to pay other suppliers that would assist them in the project.
- 5.2.64 During his presentation, Mr. Mpengesi stated that due to time constraints, they realized that they could not produce the other items quoted, such as sarongs, umbrellas and rain suits. They did produce some golf shirts, but not the number that was quoted, and they delivered those somewhere in East London.

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- 5.2.65 When he was asked to provide details where it was delivered, as well as a copy of a delivery note, Mr. Mpengesi could not produce same. T-shirts were, according to Mr. Mpengesi printed, however when it was time for delivery, they did not know where to go and on enquiry with Mr. Mase, they were told that the items were required in Port Elizabeth for the memorial service. When asked whether they delivered in Port Elizabeth, he said no.
- 5.2.66 On realising that *Reagola Print and Mail* was not going to be in a position to produce the other items, Mr. Mpengesi, without authorisation from either the Provincial Treasury or the ECDC, decided to increase the number of T-shirts from the quoted 50 000 to 80 000, an increase of 30 000 T-shirts, which was not according to specification nor the invoice which he submitted to ECDC and PPT. The printed T-shirts from their East London and Durban suppliers could only arrive late on the 14<sup>th</sup> December 2013, which was the evening before the funeral, and they battled to get confirmation from the Provincial Treasury and ECDC where they were supposed to deliver.
- 5.2.67 They called the CFO of ECDC who could not give them direction. The CFO indicated that his role was only that of paymaster.
- 5.2.68 *Reagola Print and Mail* therefore found themselves in a precarious situation, as they had the T-shirts, but did not know where to deliver.
- 5.2.69 It was then decided to deliver some of the t-shirts to Port Elizabeth, and to Chiefs in the Butterworth, East London, and KSD Municipality areas.
- 5.2.70 Some T-Shirts were just delivered at taxi ranks.
- 5.2.71 Mr. Mpengesi stated that T-shirts destined for Port Elizabeth, were actually delivered at Baviaans Municipality. When asked whether anyone signed for the delivery and to provide the delivery note, he could not provide a response or the document.

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5.2.72 He further confirmed that *Reagola Print and Mail* could not deliver all the items on the day of the funeral. Their delivery continued until 17 December 2013. However, he could not provide any proof of delivery.

5.2.73 When Mr. Mpengesi was asked to state what *Reagola Print and Mail* produced; what they delivered and what they invoiced the ECPG for, the interview went as follows: -

ADV. CH FOURIE

(PPSA):

*I just want to understand clearly, Sir, you said this invoice that went to the ECDC or they found five hundred golf shirts, you say that you did do some golf shirts but not as many as they indicated.*

MR. S MPENGESI:

*Ja. The golf shirts was done by that supplier in East London.*

ADV. FOURIE:

*Do you know how many?*

ADV. FOURIE:

*No sarongs?*

MR. MPENGESI:

*No.*

ADV. FOURIE:

*No umbrellas?*

MR. MPENGESI:

*No.*

ADV. FOURIE:

*No rain suits?*

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MR. MPENGESI: No.

ADV. FOURIE: *And then you said that you decided then, because you couldn't make contact with the authorities, to up the number of fifty thousand to eighty thousand t-shirts?*

MR. MPENGESI: *Yes, to cover the cost of the sarongs, but also to because their suppliers, the price that we got from other suppliers in terms of paying the other t-shirts was reasonable. We were because when we were negotiating, I never negotiated with them, they were asking a high price, a very high price.*

*Even before I submitted the quotation to, in fact the quote before I submitted the quote to ECDC, because I was working with how much is it gonna cost me, so now when they were no longer able to do the sarongs and others so then I asked for the further discount on the t-shirts. **So, and then I added an addition thirty thousand. Because if you look at original quote we were supposed to supply fifty thousand t-shirts but then we could no longer supply the other items, your sarongs and others then we decided to up the t-shirts.** (emphasis added)*

ADV. FOURIE: *Who was your client?*

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MR. MPENGESI: *What do you mean, client. The ECDC.*

ADV. FOURIE: *Not the treasury?*

MR. MPENGESI: *We never spoke to treasury even though the ECDC would have told us that they are paymaster on behalf of treasury. But as you can see our invoices, our delivery notes they were for the ECDC.*

ADV. FOURIE: ***Would you agree that this invoice of the seventeenth December is not a true reflection of what you delivered. (emphasis added)***

MR. MPENGESI: ***Yes, in terms of the items that are stated there. But the t-shirts, the golf shirts was delivered. We did do what they put there. (emphasis added)***

ADV. FOURIE: *You can tell us who this was or you can tell us later. Its fine by me if you say there was somebody.*

MR. MPENGESI: *Yes, there was somebody but there were no receipts.*

ADV. FOURIE: *Alright.*

MR. MPENGESI: *And there were no umbrellas.”*

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- 5.2.74 It was suggested to Mr. Mpengesi during the interview that his decision to unilaterally change the quoted items to 80 000 t-shirts, *Reagola Print and Mail* invoicing the ECPG for items that they did not produce and deliver, and one of their employees signing for delivery as if it was an official of the KSD Municipality, could be regarded as fraud.
- 5.2.75 Mr. Mpengesi responded that it was chaos at the time, and that there was no one from either Provincial Treasury or ECDC who could assist him by changing the specifications, and as such, he unilaterally decided to increase the number of T-shirts without first obtaining an amendment of the specifications.
- 5.2.76 In Ms. Mbina-Mthembu's report presented to the Eastern Cape Provincial Legislature's Portfolio Committee on Finance, dated 9 July 2014 under the title "*Report on Nelson Mandela Funeral Expenditure*," she confirmed the expenditure incurred for the memorial service for the late President Mandela that was held in Port Elizabeth on 13 December 2013, as referred to above.
- 5.2.77 She stated that, on 10 December 2013, she received a "*frantic call*" from MEC Helen Sauls-August, who was coordinating the memorial service. She urgently needed to finalise arrangements, but had no funding or administrative support.
- 5.2.78 According to Ms. Mbina-Mthembu, Hon. Sauls-August informed her that there was a need for various items to be procured, including the platform where the speakers would address the mourners attending the memorial service. She consented to assist by requesting the assistance of the CEO and CFO of the ECDC.
- 5.2.79 Ms. Mbina-Mthembu further stated that she advised these officials that she would work on trust as there was no time and personnel to prepare a Memorandum for approval.

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- 5.2.80 In this regard, Ms. Mbina-Mthembu explained that she was under the impression that the ECDC would have to pay the invoices on receipt, on the basis that she would have given them a verbal concurrence and authorisation with what was required and procured in Port Elizabeth.
- 5.2.81 She emphasized that her expectation from the ECDC was that they would either send administrators to Port Elizabeth, or that the Premier's Office would do so, as the province was the official host of the memorial service. However, Ms. Mbina-Mthembu indicated that she experienced challenges with the expenditure incurred for the memorial service held in Port Elizabeth, as there were no supporting and/or substantiating documents, due to a lack of administrative support.
- 5.2.82 With regard to the expenditure incurred in respect of the provision of apparel and banners, Ms. Mbina-Mthembu stated that the accreditation for the funeral was strictly limited, and foreign dignitaries as well as other visitors were given preference by the Presidency and other entities responsible for the accreditation process. It was for that reason that she supported the idea that Municipalities involved had to be afforded an opportunity to provide apparel, and in this case, t-shirts, caps and various other items including banners bearing the official bust photograph of the late President Mandela.
- 5.2.83 She reported that, after the funeral, a proper reconciliation of the expenditure of public funds that she consented to and authorised for procurement, and the costs incurred was prepared and in total, the overall expenditure incurred was as follows: -

DESCRIPTION	PAYMENTS MADE	REMARKS
KSD Municipality	R10 874 645.11	Approved for payment
Meals for Marshalls and 3 PMV's	R1 271 519.00	Approved for payment
Expenditure incurred for PE Memorial Service	R9 239 407.00	OTP should have incurred this expenditure as hosts
<b>TOTAL AMOUNT SPENT FOR ITEMS WHICH WERE NOT INFRASTRUCTURE RELATED</b>	<b>R22 214 271.11</b>	
Expenditure on Infrastructure projects at KSD Municipality	R20 858 059.50	There were other Infrastructure requests which were authorized but still required verification before payment
Expenditure on Infrastructure projects at OR Tambo District Municipality	R5 098 800.00	
<b>TOTAL AMOUNT SPENT FOR INFRASTRUCTURE RELATED PROJECTS</b>	<b>R25 956 859.50</b>	
<b>THE TOTAL EXPENDITURE INCURRED FOR THE FUNERAL INCLUSIVE OF ALL ITEMS PROCURED</b>		<b>R48 171 131.00</b>
Total value of declined requests from KSD & OR Tambo District Municipalities	R4 450 535.00	These items included accommodation, catering, LED screens and others

### The Application of the relevant law

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

5.2.84 Section 217 of the Constitution is the basis of all procurement practices within the public sector. It provides that when an organ of state contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

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5.2.85 It is important to note, in this regard, that in terms of section 2, conduct that is inconsistent with the Constitution is invalid.

### **The Public Finance Management Act, 1999**

5.2.86 The key instrument regulating procurement in the public service is the PFMA. Its objectives are to regulate financial management in the national and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.

5.2.87 The Eastern Cape Provincial EXCO Memorandum of 6 December 2013 conferred on Ms. Mbina-Mthembu the overall responsibility of endorsing all expenditure prior to funds being committed for the preparations for the funeral of President Mandela. In addition, paragraph 4 of the Memorandum provided that, for control purposes, any work to be paid for by the Provincial Government relating to the preparations for the funeral of President Mandela, had to be endorsed first, by the Provincial Treasury, after counsel with the provincial coordinators, to ensure that there was no duplication of costs.

5.2.88 Section 38 of the PFMA provides that the accounting officer of the department is *inter alia*, responsible for the effective, efficient, economical and transparent use of resources of the department.

5.2.89 Section 38(1)(a) (iii) provides that the accounting officer for a department must ensure that the department maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

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- 5.2.90 In terms of section 38(2), the accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.
- 5.2.91 The accounting officer is required to take effective and appropriate steps against any official in the service of the department who contravenes or fails to comply with the provisions of this Act, or who makes or permits unauthorised, irregular or fruitless and wasteful expenditure.
- 5.2.92 It follows that in this case, Ms. Mbina-Mthumbu, in her capacity as the accounting officer of the Department of Provincial Planning and Treasury was responsible for the effective, efficient, economical and transparent use of resources of the department. She had to ensure that all procurement by the Department complied with section 217 of the Constitution, and was obliged not to have committed the department to any liability for which money was not appropriated.
- 5.2.93 No money was appropriated to the Department of Provincial Planning and Treasury for procurement of goods and services relating to the funeral of President Mandela.
- 5.2.94 The ECDC is listed as a Provincial Public Entity in Part C of Schedule 3 to the PFMA.
- 5.2.95 The Board of the ECDC is by virtue of the provisions of section 49, its accounting authority.
- 5.2.96 Section 50 provides that the accounting authority of a public entity must, *inter alia*, exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity.

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- 5.2.97 In terms of section 51, the accounting authority must also ensure that the public entity has, and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent and cost effective.
- 5.2.98 An accounting authority may, in terms of section 56, in writing delegate any of the powers entrusted to it to an official of the public entity. It may also instruct an official to perform any of the duties assigned to the accounting authority in terms of the PFMA.
- 5.2.99 Such delegation or instruction to an official does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.
- 5.2.100 Accordingly, the Board of the ECDC was responsible and accountable for all the expenditure incurred by the ECDC in respect of the funeral of President Mandela.
- 5.2.101 Officials of ECDC must, in terms of section 57, have ensured that its systems of financial management and internal control were complied with, within their area of responsibility.
- 5.2.102 They were further responsible for the effective, efficient, economical and transparent use of financial resources of the ECDC during this time.
- 5.2.103 In addition, section 57 required of the ECDC officials (in particular the CEO and the CFO), to have taken effective and appropriate steps to prevent, within their area of responsibility, any irregular, or fruitless and wasteful expenditure of the funds of the ECDC in responding to requests for the payment for procurement of goods and services of other institutions relating to the funeral of President Mandela.

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5.2.104 Fruitless and wasteful expenditure is defined by section 1 as: *“expenditure which was made in vain and would have been avoided had reasonable care been exercised,”* and irregular expenditure as expenditure, other than unauthorised expenditure incurred in contravention of, or that is not in accordance with, a requirement of any applicable legislation.

5.2.105 During the investigation, Ms. Mbina-Mthembu stated that she received telephonic requests from Hon. Sauls-August to assist in paying for some items that were going to be used at the provincial memorial service that was held in Port Elizabeth on 13 December 2013.

5.2.106 This instruction resulted in expenditure of approximately R9.2million, paid for by the ECDC.

5.2.107 Section 64 regulates directives having financial implications and provides that: -

*“(1) Any directive by an executive authority of a department to the accounting officer of the department having financial implications for the department must be in writing.*

*(2) If implementation of the directive is likely to result in unauthorised expenditure, the accounting officer will be responsible for any resulting unauthorised expenditure unless the accounting officer has informed the executive authority in writing of the likelihood of that unauthorised expenditure.*

*(3) Any decision of the executive authority to proceed with the implementation of the directive, and the reasons for the decision, must be in writing, and the accounting officer must promptly file a copy of this document with the National Treasury and the Auditor-General, and if a provincial department is involved, also with the relevant provincial treasury.”*

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5.2.108 Section 64 relates to directives from the executive authority of a department to the accounting officer of the same department. In this case the executive directive from Hon. Sauls-August was given to Ms. Mbina-Mthembu, who was the Head of a different department. The drafters of the PFMA clearly did not envisage a situation where an MEC would give a directive with financial implications to the accounting officer of a department that falls outside of the MEC's authority - it would be inappropriate.

5.2.109 Subsequent to Hon. Helen Sauls-August's request, Ms. Mbina-Mthembu instructed the CEO and CFO of the ECDC to effect payments for the provincial memorial service, despite the fact that there was neither a written request from the MEC, nor supporting procurement documentation.

5.2.110 The ECDC, paid the suppliers of the goods as instructed, and Ms. Mbina-Mthembu stated during the investigation that she could not account for R9million.

### **The Treasury Regulations**

5.2.111 The Supply Chain Management (SCM) Framework of departments, constitutional institutions and public entities, is set out in Regulation 16A of the Treasury Regulations.

5.2.112 Regulation 16A3.2 provides that: -

*“16A 3.2 A supply chain management system referred to in paragraph 16A.3.1 must –*

- (a) be fair, equitable, transparent, competitive and cost effective;*
- (b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
- (c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*

- 
- (d) *provide for at least the following: –*
- (i) *demand management;*
  - (ii) *acquisition management;*
  - (iii) *logistics management;*
  - (iv) *disposal management;*
  - (v) *risk management; and*
  - (vi) *regular assessment of supply chain performance.”*

5.2.113 Treasury Regulation 16A4.1 regulates the establishment of supply chain management units and provides that “[t]he accounting officer or accounting authority must establish a separate supply chain management unit within the office of that institution’s chief financial officer, to implement the institution’s supply chain management system.” (emphasis added)

5.2.114 In terms of Regulation 16A6.1, the procurement of goods and services either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

5.2.115 It was noted during the investigation that Ms. Mbina-Mthembu advised the Heads of Provincial Departments and Municipalities that, in procuring goods and services relating to the funeral of President Mandela, Treasury Regulation 16A6.4 in respect of the Provincial Departments and Public Entities, and section 112 of the MFMA in respect of Municipalities had to be applied.

5.2.116 Regulation 16A6.4 provides that: -

*“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”*

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- 5.2.117 Ms. Mbina-Mthembu was therefore obliged to have approved the reasons for the deviation from the prescribed competitive procurement process for the procurement by the Department of Provincial Planning and Treasury of goods and services for the arrangements and preparation of the funeral of President Mandela.
- 5.2.118 Paragraph 6.6.2 of Chapter 6 of the *National Treasury Guide for Accounting Officers/ Authorities* states that all goods received should be verified for quality and quantity against the ordering documentation and it is also recommended that a receipt voucher be generated for payment purposes.
- 5.2.119 It was accordingly expected of Provincial Departments to verify that the procured goods and services relating to the funeral of President Mandela were delivered, as ordered, before payment was made.
- 5.2.120 In terms of Treasury Regulation 8.1, accounting officers of the Provincial Departments involved and the accounting authority of the ECDC were obliged to have ensured that internal procedures and control measures were in place to provide reasonable assurance that all the expenditure that was incurred for the arrangements and preparations for the funeral of President Mandela was necessary, appropriate and adequately recorded and reported.

**Ms. Mbina-Mthembu's response to the Public Protector's Notice in terms of section 7(9)(a) of the Public Protector Act**

- 5.2.121 On 5 September 2017, the Public Protector issued Ms. Mbina-Mthembu with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to affording her with a further opportunity to respond to the allegations against her, as well as the information and evidence obtained by the Public Protector during the investigation that may have an adverse implication against her.

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- 5.2.122 Ms. Mbina-Mthembu responded to the notice on 15 September 2017. She was further interviewed on 15 November 2017 with a view of affording her an opportunity to explain the role, involvement and participation in the procurement of goods and services in preparation for the funeral of President Mandela.
- 5.2.123 In connection with whether the process followed to procure goods and services in respect of the funeral of President Mandela, was in accordance with a system that is fair, equitable, transparent, competitive and cost effective, Ms. Mbina-Mthembu stated that, in her view, prudence and conservatism are fundamental principles of accounting, hence segregation of duties is required especially in procurement matters.
- 5.2.124 She stated that, as a Treasury team, they separated the duties by advising that the municipalities procure by deviation due to time constraints, and that normal procurement requires government institutions to advertise for 21 days and they had only 12 days. Treasury approved what would be procured, as it was deemed necessary for readiness for the funeral, and the ECDC was, under the circumstances, just going to be the paymaster.
- 5.2.125 With regard to the memorial service held in Port Elizabeth, Ms. Mbina-Mthembu stated that it was a Provincial event that was supposed to have been facilitated by the Premier's office. She was even aware that it was not funded, hence her surprise when she received the frantic phone call from MEC Helen Sauls-August.
- 5.2.126 Her dilemma was that Ms. Sauls-August was given a task by the Premier without any support. She was therefore not in a position to refuse to assist with the funding.
- 5.2.127 In conclusion, Ms. Mbina-Mthembu stated that she could not take accountability for the procurement regarding the expenditure incurred for the Provincial memorial service held in Port Elizabeth as she was not physically there, and can only account for OR Tambo and KSD Municipalities where the MEC for Provincial Planning and Treasury was deployed.

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**Mr. S Sentwa's response to the Public Protector's Notice in terms of section  
7(9)(a) of the Public Protector Act**

5.2.128 As indicated above, Mr. Sentwa was the Acting CEO and the CFO of the ECDC at all material times during the procurement of goods and services by organs of state for the funeral of President Mandela, at the expense of the ECDC.

5.2.129 On 11 September 2017, the Public Protector issued Mr. Sentwa with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view of affording him a further opportunity to respond to the allegations against him, as well as the information and evidence obtained by the Public Protector during the investigation that may have an adverse implication against him.

5.2.130 Mr. Sentwa responded on 2 October 2017.

5.2.131 He indicated that he was no longer employed by the ECDC.

5.2.132 Mr. Sentwa further confirmed that the CEO of the ECDC was on leave when the ECDC paid for goods and services that were procured for the arrangements and preparations for President Mandela's funeral.

5.2.133 As far as the appropriation of R330million to the ECDC in 2013 is concerned, Mr. Sentwa stated that:

*"On the 30 October 2013, the Eastern Cape Provincial Government Executive Committee appointed the ECDC as a delivery arm for the social infrastructure. On 21 November 2013, MEC for Provincial Treasury allocated during his mid term budget review R330 million to ECDC for 2013/2014 and R688 million over the MTEF period. Funds were going to be used, at the main, for the following projects:*

*EXCO Outreach Projects;*

*Access Roads to Social Facilities;*

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*Completion of Project X within the Municipal Sphere;  
Social Infrastructure Projects including trading services.*

5.2.134 He was informed by the CEO on 6 December 2013 that the ECDC had been appointed as the paymaster of the ECPG for the funeral.

5.2.135 He stated further that he received an email message from the CEO on 6 December 2013 approving *“variation and deviations regarding urgent and emergency implementation of social infrastructure projects as will assist in improving access.”*

5.2.136 Mr. Sentwa explained that he approached the DEDEAT on the same day, requesting the transfer of the R330million that was appropriated to the ECDC. However, he was advised by the CEO that expenditure incurred by the ECDC relating to the funeral of President Mandela would only be refunded if approved by Ms. Mbina-Mthembu.

5.2.137 He received an unsigned *“cabinet resolution from the CEO appointing the ECDC as the paymaster.”* He regarded the fact that the Resolution was unsigned as an administrative matter which could be addressed later, and was of the view that it should not be regarded as a reason not to execute the instructions. Mr. Sentwa confirmed that it was this unsigned Memorandum that was used as the source of approval for the procurement of goods and services and payment by the ECDC of the expenditure incurred as a result thereof, for the arrangements and preparations for the funeral of President Mandela.

5.2.138 He regarded paragraph 7 of the Resolution as critical *“in that it specifically mentioned that these funds will be used for the cost of infrastructure relating to the funeral.”*

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5.2.139 Mr. Sentwa further stated that: -

*“It was therefore my understanding that, the costs incurred relating to the infrastructure was going to be funded using R300m upon confirmation of delivery by the ECDC Social Infrastructure team (This was what the funds we voted and allocated to ECDC for in the mid-term budget review in 2013 Nov). It was our collecting understanding that other costs relating to the funeral logistic were going to be refunded to the ECDC by Treasury. Due to this understanding, payments made on approval by the Provincial Treasury were accounted for as a debtor and not as an expense in the ECDC books when incurred as refund was expected.”*  
(sic)

5.2.140 He rejected the notion that the ECDC was supposed to have followed its procurement process, as it was only instructed to make payments.

5.2.141 When the AG audited the procurement by the ECDC, the associated expenditure was found to have been irregular.

5.2.142 Mr. Sentwa concluded that he acted on the well-founded and *bona fide* belief that the payments were not only a loan/advance, but that it *“enjoyed the blessings, knowledge and active involvement”* of the Eastern Cape Provincial EXCO, the AG, Ms. Mbina-Mthembu and the CEO of the ECDC.

**Mr. Chipa Mpengesi’s response to the Public Protector’s Notice in terms of section 7(9)(a) of the Public Protector Act**

5.2.143 On 13 September 2017, the Public Protector issued Mr. Mpengesi with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to affording him a further opportunity to respond to the allegations against him, as well as the information and evidence obtained by the Public Protector during the investigation that may have an adverse implication against him.

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5.2.144 Mr. Mpengesi was assisted in his response dated 29 September 2017 by his attorneys.

5.2.145 On his behalf, it was contended that there is no evidence of fraud and corruption against Mr. Mpengesi.

5.2.146 Further, that *“there exists no evidence to the contrary that:*

*the t shirts and golf shirts were not delivered;*

*the ECDC failed to provide specifications regarding delivery;*

*the ECDC were dissatisfied with the delivery (as evidenced by the fact that payment was made).” (sic)*

5.2.147 Mr. Mpengesi’s attorneys further stated that he was in the process of attempting to obtain further documentation from his suppliers in order to substantiate the evidence regarding the delivery of the items. No such further evidence was presented.

### **Conclusion**

5.2.148 From the evidence and information obtained during the investigation it was established that the Provincial Treasury, in particular Ms. Mbina-Mthembu, was involved in discussions with other organs of state in connection with the planning of the funeral of President Mandela, from at least 2011.

5.2.149 Yet, when President Zuma announced on 5 December 2013 that a state funeral would be held for President Mandela in the Eastern Cape, there was no provision for the associated expenditure in the Provincial budget.

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- 5.2.150 There was also no plan in place for the procurement of goods and services by the ECPG that would be required for the arrangements and preparations for President Mandela's funeral.
- 5.2.151 This resulted, as concluded above, in a decision taken by the Eastern Cape Provincial EXCO on 6 December 2013, on the recommendation of Ms. Mbina-Mthembu, to appoint the ECDC as paymaster for all the procurement of goods and services that had to be done in relation to the funeral.
- 5.2.152 It also resulted in Ms. Mbina-Mthembu addressing an instruction to the Heads of Provincial Departments and the Municipal Managers of the KSD and OR Tambo Municipalities on the procurement process that had to be followed.
- 5.2.153 Due to the fact that there was a costed plan in place and no associated provision made in the Provincial budget; and as the funeral was to take place in a matter of days, Ms. Mbina-Mthembu decided that all procurement will have to be made in terms of a deviation based on urgency, to be approved by the respective accounting officers, and that all invoices had to be submitted to the Provincial Treasury for approval, upon which it would be presented to the ECDC for payment.
- 5.2.154 The very first request for payment, received by the ECDC, did not comply with Ms. Mbina-Mthembu's instructions.
- 5.2.155 When the Department of Safety and Liaison decided to provide meals for 3000 safety Marshalls, it requested Ms. Mbina-Mthembu to approve a deviation from the competitive procurement process in terms of Treasury Regulation 16A6.4, instead of the accounting officer of that department applying his mind and approving it, as required by the Regulation.

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- 5.2.156 Despite this non-compliance with the Treasury Regulations, and her own instruction, Ms. Mbina-Mthembu requested that the CEO of the ECDC, who forwarded the invoice to the CFO, pay an amount of R775 950 to KFC and McDonalds from the funds appropriated to the ECDC.
- 5.2.157 The procurement of the meals for the safety Marshalls was therefore clearly in violation of the PFMA and Treasury Regulations.
- 5.2.158 Ms. Mbina-Mthembu authorised the procurement of transportation, a platform and sound equipment for the memorial service that was held in Port Elizabeth, merely at the telephonic request of MEC Sauls-August. Again, there was apparently a deviation from the prescribed competitive process, approved by Ms. Mbina-Mthembu, yet, this time without any signed Memorandum.
- 5.2.159 It would appear that this procurement was done by the Department of Provincial Planning and Treasury. It resulted in the payment by the ECDC of more than R9million, only on the basis of quotations from the respective service providers, and merely at the request of Ms. Mbina-Mthembu.
- 5.2.160 Ms. Mbina-Mthembu conceded during the investigation that she could not account for this procurement.
- 5.2.161 It seems that at this stage of the events, Ms. Mbina-Mthembu had already disregarded her own instructions to other accounting officers and that the procurement of goods and services were chaotic, and completely in violation of the relevant provisions of the PFMA and Treasury Instructions.
- 5.2.162 Things got even worse when *Reagola Print and Mail* submitted an invoice directly to the ECDC for payment in advance in respect of the supply of umbrella golf shirts, t-shirts, sarongs, umbrellas and rain suits, and requested a deposit of R3million, which was paid.

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- 5.2.163 Mr. Sentwa, the CFO of the ECDC, authorised the payment of the R3million, merely on the basis of a *pro forma* invoice, and what he regarded as an instruction by Ms. Mbina-Mthembu that the ECDC should act as paymaster. There is no indication that he requested to be provided with the approval of the accounting officer responsible for the procurement (apparently of the Department of Provincial Planning and Treasury), of the above items and of a deviation from the prescribed procurement process in terms of Treasury Regulation 16A.6.4
- 5.2.164 Furthermore, the evidence shows that no verification of delivery of the ordered items was done at any stage by any organ of state involved in the procurement and the associated payment.
- 5.2.165 In fact, it transpired during the investigation that *Reagola Print and Mail* unilaterally changed the order and only supplied t-shirts, the number of which could not be established with certainty. It even went so far as to sign for delivery and to submit another invoice for the outstanding payment of more than R1,9million after the funeral, without disclosing that it had changed the order and delivered t-shirts after the funeral at taxi ranks and other places.
- 5.2.166 Yet, the Provincial Treasury approved the request for payment of the balance, and submitted it to the ECDC which paid, under the authority of Mr. Sentwa.
- 5.2.167 The evidence indicates that the conduct of Mr. Mpengesi of *Reagola Print and Mail* may constitute a criminal offence that should be referred to the National Prosecuting Authority.
- 5.2.168 The evidence further shows that the conduct of Ms. Mbina-Mthembu in approving and authorising procurement of goods and services relating to the funeral was in violation of the provisions of section 217 of the Constitution, section 38 of the PFMA, Treasury Regulations 8.1, 16A3.2, and 16A6.4.

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- 5.2.169 There is no provision in any of the mentioned legislation, or other prescripts, that provides for a situation where procurement of goods and services becomes the responsibility of the Provincial Treasury (except its own), and that it would be paid for by a Public Entity from funds that were appropriated for a different purpose.
- 5.2.170 It was also noted that the Board of the ECDC, as its accounting authority, played no role in the process that was followed to procure goods and services, and the payment for it by the ECDC. There is no indication that it was ever raised with the Board by Mr. Sentwa, who was at the time the Acting CEO and CFO.
- 5.2.171 Mr. Sentwa's explanation that he authorised payment for the procurement by other organs of state of goods and services relating to President Mandela's funeral on the basis of what he believed was a Resolution of the Eastern Cape Provincial EXCO, and that he acted *bona fide*, cannot be accepted.
- 5.2.172 As the acting accounting officer and the CFO of a Public Entity, Mr. Sentwa must have been aware of the standard of effective, efficient, economical and transparent use of financial resources required of him by the provisions of section 57 of the PFMA.
- 5.2.173 More so, he was aware that the ultimate responsibility for the expenditure was that of the Board. Despite the fact that nothing was presented to him indicating the Board had approved the implementation of the so called EXCO Resolution, he authorised the payment of millions of Rands of public money.
- 5.2.174 His justification that he regarded the payments as a loan or advance is also irrational and should be rejected. There are no provisions in either the Constitution or the PFMA that envisages and provides for a Provincial Public Entity to advance or loan money to the Provincial Treasury, who is in charge of the Provincial Revenue Fund, from which all expenditure by the ECPG is drawn.

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5.2.175 In the premise, Mr. Sentwa's conduct was in violation of provisions of section 217 of the Constitution, section 57 of the PFMA and Treasury Regulations 8.1 and 16A6.4.

**5.3 Whether the Provincial Treasury irregularly transferred an amount of R250 000 of public funds into a personal bank account of MEC Phumullo Masualle and if so; whether such conduct was improper and constitutes maladministration: -**

Issues that are Common Cause

**It is not in dispute that:**

- 5.3.1 The former MEC for Planning and Provincial Treasury in the Eastern Cape, the Hon. Mr Phumullo Masualle had access to public funds amounting to R500 000 for at least 24 hours during the period that preparations and arrangements were made for the funeral of President Mandela in December 2013.
- 5.3.2 The Provincial Treasury transferred an amount of R250 000 into the personal bank account of Hon. Masualle on 7 December 2013, another R250 000 was deposited into a special cheque account on 10 December 2013, and a "paycard" was provided to him to cater for "unforeseen expenses" during the period when he was leading the preparations for the funeral of the late President Mandela.
- 5.3.3 Ms. Marion Mbina-Mthembu approved the payments.
- 5.3.4 When Hon. Masualle discovered the payment into his personal bank account, he instructed the Department of Provincial Planning and Treasury to reverse it. The Department complied and instead opened a Departmental Special Account with a paycard for use by the MEC during that period;
- 5.3.5 Hon. Masualle did not benefit from this transaction, instead an amount of R5 243.58 was spent towards the repairs to an official state vehicle, meals and a portion thereof in respect of bank charges; and

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- 5.3.6 It was inappropriate for the Department to deposit public funds into the personal bank account of Hon Masualle and the transaction was irregular.
- 5.3.7 During the investigation into the allegations relating to this matter, it transpired that on 17 May 2014, the *Daily Dispatch* newspaper published an article titled “**Please account, Mr.**” In the article, it was reported that the former MEC for Provincial Planning and Treasury, Hon. Phumulo Masualle had access to R500 000 of taxpayers’ money for at least 24 hours during the period that preparation and arrangements were made for the funeral of President Mandela.
- 5.3.8 It was reported that R250 000 of this amount was paid into his private bank account on 7 December 2013 and before it was returned, another R250 000 was deposited into a special cheque account on 10 December 2013 and that a “*paycard*” was issued to him to cater for unforeseen expenses.
- 5.3.9 Ms. Mbina-Mthembu is reported in the article as having stated that she had full authority in terms of the Ministerial Handbook to have approved and effected the payments. In this regard, she was quoted as having stated as follows: -
- “I gave the blessing because we have never issued [the MEC] a departmental credit card... [I said] please organise it and put it there and I left. Unfortunately for me and fortunately for you because you are libellous ... my team then decided ... I don’t know whether they did not know we never had a credit card [but] they decided to move it to his personal account, [...] When we discovered that he didn’t want the money in his personal account it was recalled. What more do you then want?”*
- 5.3.10 During the investigation, it was established that on 6 December 2013, the Chief of Staff in the MEC’s office, Ms. F Nkomonye, addressed a memorandum to Ms. Mbina-Mthembu under the heading: “*ADVANCE PAYMENT OF R250 000 TO MEC.*”

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- 5.3.11 The purpose of the memorandum was to obtain approval for the advancement of a sum of R250 000 to MEC Masualle to enable him to settle any costs related to the receiving of guests, side meetings that may require special rooms and any other incidental costs, whilst in Mthatha preparing for the funeral of President Mandela.
- 5.3.12 MEC Masualle was stated as one of the key hosts for the dignitaries that would be receiving guests arriving in the province. He was also responsible for hosting the national Ministers and the President. According to the Memorandum, resources had to be made easily accessible to him to be able to carry out his responsibilities effectively and timeously.
- 5.3.13 Ms. Nkomonye stated that the expenditure would be reconciled and cleared after the event by the MEC, where there were invoices. She also noted that due to the haste of time, it would be possible that some invoices may not be kept and therefore in this instance the MEC's word would prevail. Ms. Nkomonye thus recommended in her Memorandum that the advance payment to MEC Masualle be approved by Ms. Mbina-Mthembu in her official capacity as the accounting officer and that an amount of R250 000 be transferred electronically with immediate effect.
- 5.3.14 Approval of the Memorandum was recommended by the General Manager responsible for Financial Management in the Department, Mr. Julius Gqibani (Mr. Gqibani) and approved by Ms. Mbina-Mthembu.
- 5.3.15 On the same day (6 December 2013), Mr. Gqibani, in a memorandum under the heading: *"MANUAL CREDIT TRANSFER-MEC'S ENTERTAINMENT,"* issued an instruction to the Chief Director responsible for Cash Management, Mr. Dominic Qhali (Mr. Qhali) as follows:

*"This is to request a manual credit transfer to the MEC in respect of financing the cost relating to meetings and entertainment for dignitaries coming to attend the funeral of the former State President Nelson Mandela.*

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*The amount of R250 000 should be debited from the Provincial Planning ECPG account number to the MEC's bank account* (emphasis added). The details of the banking accounts were provided.

- 5.3.16 The Memorandum was signed by Mr. Gqibani in his official capacity as an Acting CFO at the time. Further to the above and on the same date, Mr. Gqibani issued an instruction to the Manager of Standard Bank in Bhisho. His correspondence is addressed under the heading: *“TRANSFER OF R250 000 FROM OUR ECPG ACCOUNT NO ... TO THE BENEFICIARY”*. He instructed the bank as follows: -

*“Kindly transfer an amount of R250 000 (Two hundred and fifty thousand and no cents) only from our ECPG account number... in respect of financing the costs relating to meetings and entertainment for dignitaries coming to attend the funeral of the former State President Nelson Mandela”*

- 5.3.17 On Ms. Mbina-Mthembu's instruction and approval, an amount of R250 000 was therefore effectively transferred into MEC Masualle's personal bank account on 6 December 2013.
- 5.3.18 During the investigation, Hon. Masualle admitted that an amount of R250 000 was paid into his personal bank account and that the said payment was inappropriate. He however stated that the payment was not in any way made in an act of dishonesty or corruption.
- 5.3.19 He deemed it inappropriate because the account used by the Provincial Treasury to deposit the funds was a personal bank account. Initially, he was not aware that the said payment was going to be made into his personal bank account. Had he been made aware, he would not have agreed, and as a result, when he became aware through the bank's *in-contact* notification, he clearly indicated that alternative means that are more in line with corporate governance, be used for the transaction.

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- 5.3.20 During an interview held with the former Public Protector on 2 August 2014, Hon. Masualle confirmed that when the amount was deposited into his account, he was in Mthatha leading the preparations for the funeral of President Mandela.
- 5.3.21 He further confirmed that out of his own volition, he instructed the Department to withdraw the money from his personal account. He further confirmed that he was then issued with a departmental paycard to use during that period.
- 5.3.22 Following Mr. Masualle's displeasure regarding the transfer of an amount of R250 000 of public funds into his personal bank account, Mr. Dominic Qhali, addressed a Memorandum to Ms. Mbina-Mthembu to request approval for the recall of an amount of R250 000 deposited on 6 December 2013 into Mr. Masualle's bank account. He further requested approval to open a business cheque account under the ECPG-MEC PPT Special account.
- 5.3.23 This account was going to be used to assist Hon. Masualle to make financial transactions on any emergency related needs of the ECPG during the week of 6 to 16 December 2013, as he would be hosting various dignitaries during the execution of his duties in the preparation for the funeral of the late President Mandela.
- 5.3.24 In his Memorandum, Mr. Qhali stated that, whilst the recall of the R250 000 deposited into the personal bank account of the MEC was still pending, Ms. Mbina-Mthembu should authorise the transfer of another amount of R250 000 to the newly opened business account, so as to enable Hon. Masualle to have access to the funds.
- 5.3.25 The Memorandum was signed by the Director responsible for Cash and Liability Management in the Department, Ms. T Buthelezi on 9 December 2013, recommended by Mr. Qhali on the same day, and approved by Ms. Mbina-Mthembu.

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5.3.26 Having obtained Ms. Mbina-Mthembu's approval on 9 December 2013, Mr. Qhali and Ms. Buthelezi corresponded with Standard Bank requesting the bank to open a special account for Mr. Masualle for Provincial emergency issues. They thus requested the bank to issue a cheque card on this account for Hon. Masualle, and that this was a temporary arrangement for him as he needed to handle provincial emergency issues.

5.3.27 In paragraph 28 of Ms. Mbina-Mthembu's presentation to the Eastern Cape Legislature's Portfolio Committee on Finance dated 9 July 2014, dealing with the expenditure incurred in preparation for the funeral of President Mandela, she confirmed her instructions and approval and stated as follows: -

*"I instructed the Financial and Cash Management team and Finance to make funds available to MEC Finance of R250 000. This would cater for all needs of his guests in Mthatha. This is in line with the provisions of the Ministerial Handbook and only the HOD can instruct this to be done. The responsibility for reconciliation of the account also lies with the HOD.*

*The team erroneously deposited this into his personal account as the Department had no credit card. On discovering this, the MEC rejected the funds and asked them to be taken out of his personal account. This was duly done. Not a cent remained in the MEC's account."*

5.3.28 During the investigation, Ms. Mbina-Mthembu also confirmed having approved the transactions and stated in her submission to the Public Protector, dated 5 February 2015, that she verbally authorised the transfer of R250 000 into a Treasury credit card account as a way of mitigating any unforeseen risks that would require funding.

5.3.29 In this regard she confirmed having instructed Mr. Gqibani as Acting CFO to arrange the transfer of the funds. She also stated that she undertook, as provided for in the Ministerial Handbook, to reconcile the amount that would be utilized after the funeral.

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- 5.3.30 However, she was surprised when Hon. Masualle enquired from her why public funds were transferred into his personal banking account, and requested that she ensured that the Finance team in the Provincial Treasury reversed the transaction.
- 5.3.31 On 6 February 2015, Ms. Mbina-Mthembu was interviewed regarding the role she played in the issue of public funds that were deposited into the personal bank account of the MEC. She confirmed having approved that the department deposit an amount of R250 000 into a departmental credit card account as assistance to the MEC, whilst in Mthatha executing his duties of preparing for the funeral of the late President Mandela. In this regard, she stated that before taking such a decision, she consulted the Ministerial Handbook.
- 5.3.32 When asked why the department opened a special account with a debit card and not a corporate account with a credit card, Ms. Mbina-Mthembu stated that she was not aware that it was a debit card as she was under the impression that it was a corporate account with a credit card as guided by the Ministerial Handbook.
- 5.3.33 It was her contention that, the card that was issued should never have been a debit card. She further confirmed that the amount that was deposited into the personal bank account of Mr. Masualle was recalled when he objected thereto, and another amount was deposited into a departmental account. All the expenditure has since been reconciled and accounted for, and the funds returned to the departmental coffers.

### **The Application of the relevant law**

#### **The Public Finance Management Act, 1999**

- 5.3.33 In terms of section 38, the accounting officer of the department is *inter alia*, responsible for the effective, efficient, economical and transparent use of resources of the department.

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5.3.34 He/she must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure.

5.3.35 The accounting officer must further take effective and appropriate steps against any official in the service of the department who contravenes or fails to comply with the provisions of this Act, or who makes or permits unauthorised, irregular or fruitless and wasteful expenditure.

5.3.36 Section 1 defines irregular expenditure as: -

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

#### **The Treasury Regulations**

5.3.37 Treasury Regulation 8.1 provides that the accounting officer of an institution must ensure that internal procedures and internal control measures are in place for payment and approval and processing. These internal controls should provide reasonable assurance that all expenditure is necessary, appropriate, paid promptly and is adequately recorded and reported.

5.3.38 In terms of Treasury Regulation 8.2.1: -

*“An official of an institution may not spend or commit public money except with the approval (either in writing or by duly authorized electronic means) of the accounting officer or a properly delegated or authorized officer.”*

#### **The Handbook for Members of the Executive and Presiding Officers (Ministerial Handbook)**

5.3.39 The Ministerial Handbook that was applicable at all material times referred to in this Report, was approved by Cabinet on 7 February 2007.

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- 5.3.40 It provides a guideline for benefits and privileges, to which Members of the Executive, Presiding Officers and members of their families are entitled, in the execution of their duties.
- 5.3.41 The Preface of the Ministerial Handbook states that: *“Anything not mentioned in these guidelines does not form part of the benefits, allowance and support services envisaged for Political Office Bearers.”* (emphasis added)
- 5.3.42 In terms of paragraph 9 of Chapter 12, which regulates entertainment/reception on departmental sponsored credit cards, it is provided that where necessary, a corporate credit card may be obtained in the name of the Member, only with express authorisation of the Director-General or relevant accounting officer. This should be done concurrently with clear instructions regarding limits, serving cost cards, restriction in respect of items for which the State will not be liable for, and internal processes and control mechanisms to ensure the appropriate and prudent usage of the card.
- 5.3.43 Annexure G of the Ministerial Handbook outlines the issuing and the use of Departmental sponsored credit cards that accounting officers must follow in compliance with directives of the National Treasury, it states that on 4 November 1998, Cabinet decided that: -
- (a) *“All Government credit cards issued to political office bearers, Directors-General and any other affected officials at National, Provincial and Local levels of government be withdrawn”,* and
- (b) *“Where necessary, a corporate credit card may be obtained in the name of the individual only with the express authorisation of the Director-General or relevant Accounting Officer. This should be done concurrently with clear instructions regarding limits, servicing costs of cards, restrictions in respect of items for which the state will not be liable, and*

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*internal processes and control mechanisms to ensure the appropriate and prudent usage of the cards”.*

- 5.3.44 It also provides guidelines that must be followed as set out, which were put in place by the then Department of State Expenditure.
- 5.3.45 There is no provision in the Ministerial Handbook that allows public funds to be deposited to a personal bank account of a Member of the Executive. Further thereto, there is no provision in the Ministerial Handbook for an MEC to be issued with a paycard, but a corporate credit card.
- 5.3.46 Ms. Mbina-Mthembu, as the accounting officer of the Department of Provincial Planning and Treasury approved an irregular payment of public funds into the personal bank account of the MEC, and subsequently, the opening of a special departmental account with a debit paycard issued to the MEC, which gave him access to public funds. Neither of the two transactions are allowed by the provisions of the PFMA, the Treasury Regulations and the Ministerial Handbook.

### **Conclusion**

- 5.3.47 Ms. Mbina-Mthembu’s conduct constitutes a failure to adhere to the provisions of paragraph 9 of Chapter 12 of the Ministerial Handbook. Her conduct was further in violation of the provisions of section 38 of the PFMA and Treasury Regulation 8, constituted financial misconduct on her part and resulted in irregular expenditure.

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**5.4 Whether the ECDC acting in its official capacity as a Project Host and Paymaster caused the ECPG to incur irregular, fruitless and wasteful expenditure of public funds for the memorial service and funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**

Issues that are Common Cause

**It was not disputed that:**

- 5.4.1 At a Special Provincial EXCO meeting held on 6 December 2013, the Eastern Cape Provincial Government took a resolution that the ECDC would be the project host/paymaster for the expenditure to be incurred in respect of the arrangements and preparations for the funeral of President Mandela.
- 5.4.2 The ECDC was instructed by the Eastern Cape Provincial EXCO to utilize some of the R300million appropriated to it for the acceleration of social infrastructure development to pay for goods and services procured in respect of the funeral of President Mandela.
- 5.4.3 R22 214 271.11 was paid to service providers in respect items that were not infrastructure related.

Issues that are in dispute

- 5.4.4 The issue for determination by the Public Protector is whether the ECDC acting as a project host and paymaster caused the ECPG to incur irregular, fruitless and wasteful expenditure of public funds in respect of the arrangements and preparations preparations for the funeral of President Mandela.

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- 5.4.5 On 6 February 2015, the former MEC for Economic Development, Environmental Affairs and Tourism, Mr Mcebisi Jonas made a submission to the Public Protector in connection with the investigation, in particular the role played by his Department and the ECDC, an entity reporting to him in relation to the expenditure incurred in respect of the funeral of the late President Mandela.
- 5.4.6 In his submission, Mr Jonas confirmed that he was the MEC until May 2014 when he was appointed as the Deputy Minister of Finance in the national sphere of government following the national elections held in May 2014.
- 5.4.7 Mr Jonas further confirmed that the DEDEAT is the shareholder department in the ECDC on behalf of the ECPG. The entity is set up in terms of the ECDC Act 2 of 1997 and its mandate is to plan, finance, market, promote and implement the development of the Province and its people in the field of industry, commerce, agriculture and transport.
- 5.4.8 He referred to the decision of the Eastern Cape Provincial EXCO taken October 2013 in connection with the implementation of social infrastructure projects, in particular the appointment of ECDC as an extended infrastructure delivery arm of the province and the subsequent variation of the R300 million appropriated to the ECDC for this purpose in December 2013 to cater for the funeral related expenses for President Mandela.
- 5.4.9 One of the conditions for the initial transferring of the funds was that the ECDC had to develop a business plan and that a service level agreement had to be signed. This was discussed with the ECDC Board on 31 October 2013.
- 5.4.10 Mr Jonas stated that he had subsequently raised his concerns regarding the ECDC's technical capability of deliver on its mandate to accelerate social infrastructure development with the Provincial Treasury. This resulted in a further allocation of R30 million to the ECDC for capacity building.

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- 5.4.11 Mr Jonas stated in his submission that during the period between 30 October 2013 when t 6 December 2013 when a Provincial EXCO decision was taken to divert the funds to include the funeral preparations of President Mandela, no business plan was submitted to him or the Head of the Department by the ECDC for consideration and no service level agreement was concluded and signed.
- 5.4.12 It was further his understanding that the Provincial EXCO Resolution of 6 December 2013 included control measures that were going to be put in place to ensure that the three spheres of government work in a co-ordinated way in the delivery of the funeral project.
- 5.4.13 Further thereto, so stated Mr Jonas, the Provincial Treasury issued a directive appointing the ECDC as the paymaster for the expenditure to support the funeral arrangements. The directive required the Provincial Treasury to endorse all expenditure.
- 5.4.14 Mr Jonas stated that he subsequently read in the *Daily Dispatch* newspaper that the ECDC had been making payments ostensibly on direct instruction from the Provincial Treasury in relation to the funeral. **He immediately contacted the Chairperson of the ECDC Board, and she was equally unaware that Mr Mase was releasing payments without approval from the ECDC Board, and on instruction from Treasury.** According to him, the payments were made without the approval of the Board of the ECDC.
- 5.4.15 According to Mr Jonas, when these payments were made, the funds appropriated to the ECDC was still in the custody of the DEDEAT, pending the transfer thereof to subject to the submission and approval of the business plan and a service level agreements.
- 5.4.16 He was thus of the view that any variation referred to in the Provincial Treasury Memorandum of 6 December 2013 required certain processes and approvals to be in place prior to the release of funds and in this regard.

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- 5.4.17 He was later advised that the Board of the ECDC unaware of the involvement of the ECDC. He reiterated that he did not have any communication whatsoever with ECDC regarding the expenditure relating to the funeral arrangements, nor were there any measures put into place. Officials of the ECDC apparently communicated directly with the Provincial Treasury in this regard.
- 5.4.18 Mr Jonas stated that he did not convene a meeting with the Board prior to the funeral and that neither the Board nor DEDEAT were made aware of the methodology, nor were there measures put in place in dealing with the expenditure for the funeral.
- 5.4.19 Meetings were held with the Board of the ECDC after the expenditure had been incurred. It transpired that the Board was completely in the dark regarding payment by the ECDC of the expenditure incurred relating to President Mandela's funeral.
- 5.4.20 He stated that although the expenditure was incurred through the ECDC, an entity whose Shareholder Department is DEDEAT, such expenditure was incurred with specific exclusion and/or disregard of the DEDEAT and the ECDC Board and as such, his department would not have been in a position to monitor it prior to or during the period when it was incurred. However, he hoped that the provincial administration would ensure that in future, there is administrative integrity in transactions of this nature by ECPG and its entities.
- 5.4.21 On 20 January 2015 an invitation was extended to Mr Sithembele Mase to furnish the Public Protector with his responses to the allegations of maladministration, corruption and unconscionable use of public funds by the ECDC during his tenure as the CEO of the entity in connection with the procurement of service providers to render services in preparation for the funeral of the late President Mandela.
- 5.4.22 Mr Mase responded on 5 February 2015. He had by then left the employ of the ECDC.

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- 5.4.23 It was established during the investigation that he was on leave during the period that expenditure was incurred for payment by the ECDC relating to the funeral of President Mandela.
- 5.4.24 Mr Mase denied that he was involved in the procurement of goods and services for the funeral.
- 5.4.25 According to Mr Mase, section 5(2) of the Act allows the ECDC to *“undertake tasks on behalf of Government (its shareholder) which are in the public interest and have little or no eco merit for the Corporation if instructed to do so by the responsible member, subject to it being adequately remunerated by the Government of the Province for fulfilling such tasks”*.
- 5.4.26 Mr Mase argued in his submission that the funeral of President Mandela was undertaken in the public interest and had been declared a state funeral by the National Government.
- 5.4.27 He confirmed that the Eastern Cape Provincial EXCO instructed and/or directed the ECDC on 6 December 2013 to be the paymaster/project host in respect of the funeral.
- 5.4.28 It was his understanding that the ECDC was refunded in January 2014 for the amount expended to bury the the late President Mandela on 15 December 2013.
- 5.4.29 The ECDC was not involved in any procurement of goods and services. He further explained that the deviation from normal procurement procedures was approved by the Executive Authority through an EXCO resolution and that the ECDC procurement processes were of no application.

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- 5.4.30 According to Mr Mase, the amounts expended were not ECDC funds it belonged to the shareholder (ECPG) and as such no authority from the ECDC was required. Further thereto, the total amount of R22.2 million utilized for the Mandela funeral expenditure was approved by the Executive Authority (EXCO) as it was beyond the delegations of the ECDC Board, save for each individual approval which was within his own delegation of authority.
- 5.4.31 Mr Mase stated that due to the instruction of the Eastern Cape Provincial EXCO, expenditure amounting to approximately R22 000 000 was incurred for the state funeral. He contended that such expenditure was not irregular but was incurred in terms of the lawful directive by the Provincial Government and shareholder of the ECDC. He was also of the view that the payment by the ECDC did not require the approval of the Board, as it was an instruction from Government via the Provincial Treasury.
- 5.4.32 According to Mr Mase, the Board of the ECDC was aware of the instructions as well as the expenditure incurred.
- 5.4.33 He stated that subsequent to the expenditure, he communicated with the Provincial Treasury confirming the authorization in the reconciled amount totaling an expenditure of R22 200 000.00 in line with Treasury Regulation 6.3.1(c).
- 5.4.34 The said correspondence confirmed, as per the approved Provincial EXCO directive/resolution that the total expenditure should be defrayed from the R330 000.000.00 *social infrastructure fund* appropriated by the ECPG, which had been transferred to the ECDC on 31 January 2014. He concluded his submission by stating that the amounts paid by the ECDC were not irregular and were all in line with the Provincial EXCO directives and Treasury instructions.
- 5.4.35 On 5 February 2015, an interview was held with the former CEO of the ECDC, Mr Sithembele Mase, who was assisted by his attorney.

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- 5.4.36 With regard to the ECDC invoicing the Provincial Treasury on 24 February 2014 for the expenditure of R22million in respect of the funeral arrangements, Mr Mase stated that, his understanding of the Memorandum and resolution regarding the use of the R300million was that that ECDC will tap into those funds and that the expenditure would be deferred from the social infrastructure fund. When they requested Treasury to reimburse ECDC, they wanted them to confirm that even if they did not pay it directly, ECDC could deduct the amount from the social infrastructure fund to their own operational account.
- 5.4.37 Mr Mase stated that his understanding was that the funds utilized for the preparations of President Mandela's funeral were appropriated to the ECDC for the acceleration of social service delivery, but was utilised for the funeral as the Provincial Treasury urgently had to source funding for the expenditure.
- 5.4.38 According to Mr Mase, the Board of the ECDC only got to know about the involvement of the ECDC on 24 February 2014. However, he informed the Board Chairperson *via* his Attorneys on 9 December 2013 that he was going back to the Eastern Cape for funeral preparations.
- 5.4.39 He stated that the appointment of ECDC as paymaster was a surprise and the ECDC could not plan and properly organize for their role in thios regard.
- 5.4.40 During the investigation, enquiries were also made with the CFO of ECDC, Mr Sandile Sentwa regarding the role played by by the ECDC following the entity's appointment as Project Host and Paymaster by the Provincial Cabinet on 6 December 2013 in respect of arrangements and preparations for the funeral of the late President Mandela.
- 5.4.41 On 28 January 2015, Mr Sentwa furnished the Public Protector with a submission which he made to the ECDC Board on 19 December 2014, already referred to above.

- 5.4.42 With regard to the goods and services procured by the municipalities that were involved in the funeral of President Mandela, Mr Sentwa stated that his understanding was that upon approval of the Provincial Treasury, the ECDC would make payments to the municipalities, who would pay the service providers.
- 5.4.43 With regard to the transportation and logistics for the provincial memorial service of the President Mandela held in Port Elizabeth, Mr Sentwa stated that he received an e-mail instruction from Ms Mbina-Mthembu to make an amount of R10million available for the memorial service.
- 5.4.44 He stated that in the December 2013 Annual Financial Statements that were presented to the entity's Audit and Risk Committee, the expenditure for the funeral of the late President Mandela was reported as part of an advance or loan. Following a reconciliation, the payments made by ECDC in its capacity as the paymaster with regard to the preparations and arrangements for the funeral of the late President Mandela were as follows;

PAYMENT DATE	DESCRIPTION	SERVICE PROVIDER	AMOUNT
09/12/2013	Meals for funeral Marshalls: 9, 11 & 13 December.2013	McDonalds SA	R441 600.00
10/12/2013	Meals for funeral Marshalls: 10, 12, 14 & 15 December 2013	UBM Company t/a KFC	R334 350.00
10/12/2013	5130 x Safety Reflective Bibs	Falcon Trading Company	R263 169.00
11/12/2013	Golf Shirts, T-Shirts, Sarongs, Umbrellas & Rain Suites (deposit)	Reagola Print & Media	R3 000.000.00
11/12/2013	Sound System	Solid Rock	R1 876 706.99
11/12/2013	Transport Costs to the PE Memerial Service	Various service provid with taxis and buses	R2 324 650.00

11/12/2013	KSD Municipality	KSD Municipality	R11 673 845.12
13/12/2013	Catering utensils	Viwe Thando Trading	R48 500.00
13/12/2013	Groceries (shortfall based On revised quote)	Viwe Thando Trading	R36 780.00
13/12/2013	Groceries (shortfall based On revised quote)	Viwe Thando Trading	R147 120.00
19/12/2013	Golf Shirts, T-Shirts, Sarongs, Umbrellas & Rain Suites (balance)	Reagola Print & Media	R1 967 550.00
20/12/2013	Gospel Choir @ the Memorial service in Mthatha	Bao Musi Busin Learnership	R100.000.00
		<b>TOTAL</b>	<b>R22 214 271.11</b>

5.4.45 According to Mr Sentwa, subsequent to engagements and reconciliation having been done between the ECDC and Provincial Treasury team, Ms Mbina-Mthembu corresponded with the CEO of the ECDC on 13 February 2014 under the title, “*State Funeral Expenses*” acknowledging and confirming that all transactions that were paid for by the ECDC in the capacity as paymaster were approved by her and thus requesting a concurrence from the ECDC. In this regard, Ms Mbina Mthembu wrote as follows:

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1. *The Eastern Cape Provincial Planning & Treasury (PPT) would like to thank the ECDC for assusming the role of the provincial paymaster for the purposes of the state funeral that took place during December 2013.*
2. *It was agreed that PPT would approve all invoices before they are processed for payment by the ECDC (to various service providers and municipalities) between December 2013 and February 2014.*

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3. *As at 11 February 2014, PPT had approved a total of R22 214 271.11 for payment by ECDC for goods and services related to the state funeral held during December 2013.*
4. *PPT would appreciate if ECDC can confirm in writing that this is a correct amount approved for payment by Treasury for audit purposes.”*
- 5.4.46 On 24 February 2014, Mr Sentwa in his capacity as the CFO of ECDC confirmed the amount as well as the fact that the amount was as approved by the Provincial Treasury for payment for goods and services relating to the state funeral and thus requested the them to reimburse this amount and transfer into the ECDC banking account and attached an invoice in this regard.
- 5.4.47 The reason for requesting reimbursement was because in Mr Sentwa’s understanding, the R330million allocated to the ECDC was in respect of infrastructure related costs and not for funeral logistics.
- 5.4.48 Ms Mbina- Mthembu responded to the request for reimbursement of the ECDC and informed them that the Provincial Treasury would not do such a refund. In this regard she wrote on 5 March 2014 and stated that;
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1. *The HOD of Provincial Planning & Treasury in terms of s 6.3.1(c) of the Treasury Regulations authorized the variation on the use of funds appropriated to ECDC for the implementation of social infrastructure during the 2013/14 adjustment estimates.*
  2. *It was further approved by EXCO that when the costs of the provincial state funeral are established, the MEC for Planning and Finance will defray these costs from the Provincial Revenue Fund if necessary (i.e the funds voted to ECDC have been depleted) This was going to be done in line with section 25 of the PFMA*

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3. *However, the R330million allocated to ECDC for the implementation of social infrastructure has not been depleted and since a further allocation of R688million over the 2014 MTEF is being made, the project list will take into account the reduced funding.*
  4. *Furthermore, the project lists are still in draft stage and therefore the funds are not yet fully committed by the ECDC.*
  5. *The Eastern Cape Provincial Planning & Treasury (PPT) would like to confirm that the state funeral expenses **will not be refunded to the ECDC and that the social infrastructure project list to be implemented by ECDC will take into account the reduced funding (less by R22, 214, 271.11)***
- 5.4.49 Subsequently, Mr Sentwa advised the PPT that **the ECDC's request for reimbursement of the amount of R22 214 271.11 was not in respect of expenditure related to delivery of infrastructure projects but for costs related to the memorial service and funeral arrangements and logistics for the late President Mandela.** He was then referred by Treasury to the 26 February 2014 Provincial EXCO resolution which recorded the appointment of ECDC as project host.
- 5.4.50 **Of concern to Mr Sentwa regarding the 28 February 2014 Provincial EXCO resolution as well as the correspondence of 5 March 2014 from Ms MbinaMthembu was the fact that the ECDC was instructed on 6 December 2013 to use its voted funds and that using these funds would mean that all expenses incurred by the entity must be reflected as an expense in the income statement.**
- 5.4.51 **Having an expense in the ECDC books of accounts without following the ECDC procurement policy, processes and procedures and without proof of delivery would be unlawful and as a consequence thereof the entity received a qualification from the Auditor- General as it could not provide all supporting documentation and delivery notes on time.**

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- 5.4.52 Mr Sentwa was interviewed on 29 January 2015 in the company of the Head of the entity's legal department, Mr M Mpikashe. He confirmed his position as the CFO however stated that at the time of the preparations for the funeral, he was acting in the capacity of a CEO as Mr Mase was on leave. He confirmed that the document that he had which he presented to the Board on 19 December 2014 serves as his account of what happened during the preparations for the funeral of President Mandela.
- 5.4.53 According to Mr Sentwa, it was the Board of the ECDC that decided to disclose the expenditure to the AG as being irregular. In addition, he stated that if he was called to advise the Board, he would not have asked them to do that as the ECDC was not involved in the procurement of goods and services as that was done by the municipal managers and Treasury. The ECDC's role was just to pay on authorization by Treasury. According to him, the expenditure incurred was not an expense on the part of the ECDC financial records.
- 5.4.54 Mr Sentwa lamented that, at all material times, the ECDC acted on instructions, authorization and approval from Treasury in paying what they were asked to pay. He stated that he was charged by the Board and subjected to a protracted disciplinary enquiry for doing what he was instructed to do, and was found guilty.
- 5.4.55 Mr Sentwa subsequently resigned from the ECDC.
- 5.4.56 During the investigation, an interview was held with Ms Shipalana on 4 February 2015. She confirmed that, at the time of the preparations for the funeral of President Mandela, she was based in the office of the Head of Department of Provincial Planning and Treasury, where she performed executive support functions.
- 5.4.57 She described the payments made to *Reagola Print and Mail*, as **one of those unexplained expenditures incurred for the memorial service held in Port Elizabeth.**

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- 5.4.58 She further confirmed that the ECDC received an instruction from Ms Mbina-Mthembu to effect payment relating to the memorial service in Port Elizabeth.
- 5.4.59 Ms Shipalana explained that an initial amount of R3million was paid to *Reagola Print and Mail*, by the ECDC and later she received an invoice for the balance of R1 967 550.00. She was not comfortable paying the balance **without a delivery note** and instructed ECDC not to pay. On receipt of the delivery note at a later stage, she approved that ECDC could go ahead and pay.
- 5.4.60 Ms Shipalana was surprised to learn at the interview that the delivery note appeared to be fraudulent as it is dated 14 December 2013, whereas the signature date is a date prior, which is 13 December 2013. She was also taken aback when she was informed that it was signed by Mr Mhlabeni who in fact is an employee of *Reagola Print and Mail* and not KSD Municipality.
- 5.4.61 Ms Shipalana was further perplexed to learn that *Reagola Print and Mail* never delivered apparel at the memorial service in Port Elizabeth, instead they delivered to the Baviaans Municipality and to Chiefs in Butterworth, East London and Mthatha. She responded by stating that, she would not have known as she was based at the office in Bisho and did not do physical verifications of the goods and services procured.
- 5.4.62 On 31 July 2014, Members of the former Board of Directors of the ECDC under the Acting Chairpersonship of Prof Mkhalelwa, were interviewed. The former Chairperson, Ms Nomfanelo Magwentshu also attended the interviews.
- 5.4.63 According to Prof Mkhalelwa, the Board was only made aware of the involvement of the ECDC in the expenditure for the Mandela funeral preparations through the media reports published around 9 January 2014. They were concerned about the CEO, Mr Mase's apparent failure to inform the Board of the involvement and participation of the ECDC in the preparations and expenditure for the funeral of President Mandela.

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- 5.4.64 The Board decided to approach the shareholder representative for an explanation. MEC Mcebisi Jonas advised them that the actual amount spent by the ECDC was R22million. They then decided to convene a Board meeting to be held on 15 March 2014 so as to solicit an explanation from the CEO.
- 5.4.65 Subsequently, the Board decided to conduct a forensic investigation and thus submitted to the Public Protector a copy of a forensic report compiled by Messrs Fundudzi Forensic Services. Following the release of the report, the Board decided to terminate the services of the CEO.
- 5.4.66 In narrating the sequence of events, the former Chairperson of the Board, Ms Nomfanelo Magwentshu stated that:

*“Where [when] we were advised of the Social Infrastructure Fund that will be transferred to the ECDC.(sic) And we had, by the time the funds were disbursed from this Fund, we have not concluded on the matter as a Board.*

*We were still waiting for the Executive to provide us with a Business Case on how we're going to spend these funds, on what criteria will be used to allocate funds to projects and also the Government structure on the disbursement of these funds and use of these funds. **And also noting that the funds were transferred to the ECDC very late in the financial year.***

*So we needed to be clear on how we're going to report, how we're going to spend the funds, and by the time the funds were used for the funeral, we had not completed on the matter.*

***Secondly, the use of funds, at no point did we, as the Board, get an indication from the Executive that there's an instruction to use these funds for the funeral. And the only time we found all these documents and communication between the Executive and the Province, was when we were conducting the forensic investigation. At no point were we informed by the Executive that there's money spent for the funeral, until the Board meeting of 15<sup>th</sup> March [2014].***

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*So the meeting I had with the MEC on the 14<sup>th</sup> March was a shock. I mean when he said to me "are you aware that you guys have spent R22million already and there's another pending amount that you still have to pay, you're waiting for invoices". And he had been informed, in that previous day, on the 12<sup>th</sup> March when the HOD had a meeting with the Executives from the ECDC.*

*We cannot trust whatever information comes from the Executives, we really need to get an independent forensic investigator to enlighten us on this matter. And it's, the Forensic Report, the actual document that revealed exactly what happened and how the communication between Provincial Treasury and the ECDC Executives happened. **At no point were we called or even sent a note to say as the Board to the Board or at least myself as the Chairperson, that we've received this instruction, we're acting on this instruction, this is the funds that we're going to use and this is the amount that we're going to spend. Until the 14<sup>th</sup> March and this had happened in December.** And in between we had had discussions with the Executives. I just want to highlight that. It's very important."*

- 5.4.67 According to the Board, it is their understanding that the funds utilized by the ECDC towards preparations for the funeral were from the entity's own coffers as the shareholder only transferred the R300million on 31 January 2014 despite the fact that the instruction to spend was in December 2013.
- 5.4.68 According to the Board, when the CEO was questioned about reasons why he did not seek approval from the Board before disbursing the funds, the CEO responded that it was not ECDC funds but that of the Provincial Treasury and that he received instructions from Treasury in particular, Ms Mbina-Mthembu. This is despite the fact that the CEO reported to the Board in terms of his employment contract as well as the ECDC Act.
- 5.4.69 On a question whether the Board was advised about the paymaster role that would be played by the ECDC, the Board stated that they never received any communication as the Treasury only communicated with ECDC officials.

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- 5.4.70 In concluding the interview, the Board reiterated that they only knew about the expenditure after the fact and were thus not involved and the shareholder did not inform them.
- 5.4.71 Subsequently, on 19 December 2014, the new Board under the Chairpersonship of Mr Nhlanganiso Dladla was interviewed. The new Board also confirmed what was said by the previous Board.
- 5.4.72 On 29 January 2015, officials from the ECDC's Finance Division were interviewed in particular the Finance Manager, Ms Gcobisa Siyo as well as Mr Mr M Lwana. During the interviews both officials confirmed having received communication on 6 December 2013 signed by Ms Mbina-Mthembu of the Provincial Treasury. According to Ms Siyo the communication was advising them that the ECDC is appointed as a paymaster for the Mandela funeral project.
- 5.4.73 They understood their role as solely that of a conduit for payments from the *social infrastructure fund* that was placed within the ECDC, to service providers that would have been appointed by the Provincial Treasury.
- 5.4.74 They further understood that the ECDC would not be involved in the procurement of suppliers as that would be done by Treasury and municipalities. The role of the ECDC was just to pay on approval by the Provincial Treasury.
- 5.4.75 According to her, each and every payment made by the ECDC was approved by an official at the Provincial Treasury in particular, Ms Mbina-Mthembu. Ms Siyo also indicated that Ms Mbina-Mthembu was assisted during this period by the Manager in her office called Ms Laurel Shipalana who the ECDC was in constant communication with and who they received approvals for payment from.
- 5.4.76 With regard to the process that the ECDC used to ensure that they would be able to account for the expenditure, Ms Siyo stated that,

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*“Ja. So, we created them as a debtor in our system, meaning that there will be a trade off on how much they owe us, hence we invoiced them at the end. So, ja, we spent money on the understanding that it will be paid back. We are in the business of granting loans, you know. So for us, the ECDC, a loan is not (inaudible 12:47) you know, and one (inaudible 12:51) why would we simply take an instruction from Treasury. We were of the opinion that because Treasury is in charge of the Provincial Revenue Fund, they can redirect funds as they wish, through the (inaudible 13:04) Department of (inaudible 13:06). But, you know, that understanding is not based on any Act or Law.*

*I'm not a law person or, you know, I'm not going to quote to you what Treasury (inaudible) or what Act made us to have that understanding. But that was our understanding that Treasury has the right, in terms of their own regulations, to redirect the (inaudible) the funds that they allocate throughout the Province. We understood that we are the custodian of the Fund. And therefore hence we said, then if you take that responsibility to say that we'll recover the funds from the Social Infrastructure Fund, and also on the understanding that we are not going to do any procurement, then we want to pay on your approval, you know, which we got for each and every payment that we made. So we didn't simply just pay, we made sure that they approved every cent that we paid out.“*

- 5.4.77 She further stated during the interview that the ECDC was not in full control of the funds as they were just a paymaster and an implementing agent. Mr Lwana also echoed the same sentiments as Ms Siyo.
- 5.4.78 Mr Lwana also confirmed that the expenditure was disclosed to the AG as irregular due to the fact that none of the expenditure for the funeral was incurred in accordance with the provisions of the ECDC's procurement policy.

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## **The Application of the relevant law**

### **The Constitution**

- 5.4.79 Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

### **The Public Finance Management Act, 1999 (PFMA)**

- 5.4.80 The PFMA is the main legal instrument that regulates financial management and procurement in the public service. Its objectives are to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments.
- 5.4.81 *Fruitless and wasteful expenditure* is defined by section 1 as: “*expenditure which was made in vain and would have been avoided had reasonable care been exercised.*”; and irregular expenditure “*as expenditure, other than unauthorised expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.*” (emphasis added)
- 5.4.82 The ECDC is listed as a Provincial Public Entity in Part C of Schedule 3 to the PFMA.
- 5.4.83 Section 49 of the PFMA regulates the authority and accountability of Accounting Authorities and provides that if a public entity has a Board of Directors, the Board is the Accounting Authority of that entity.
- 5.4.84 Accordingly, the Board of the ECDC is its accounting authority.

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5.4.85 Section 50 of the PFMA regulates the fiduciary duties of accounting authorities and provides that;

“

(1) *The accounting authority for a public entity must—*

- (a) *exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*
- (b) *act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
- (c) *on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*
- (d) *seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.*

(2) *A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—*

- (a). *act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or*
- (b). *use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.*

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5.4.86 Section 51 of the PFMA provides for the general responsibilities of accounting authorities and provides *inter alia* that:

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(1) *An accounting authority for a public entity:*

(a). *must ensure that that public entity has and maintains—*

(i) *effective, efficient and transparent systems of financial and risk management and internal control;*

(ii) *a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and*

(iii) *an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;...*

(b). *must take effective and appropriate steps to—*

(i) *...*

(ii) *prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and...*

(c). *must take effective and appropriate disciplinary steps against any employee of the public entity 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 public entity; or*

(iii) *makes or permits an irregular expenditure or a fruitless and wasteful expenditure...*”

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- 5.4.87 In this case, the Board of the ECDC was responsible for compliance with the provisions of the PFMA above, when they were instructed to be the paymaster for the expenditure approved by the Provincial Treasury relating to the funeral of President Mandela. As indicated earlier, the evidence shows that the Board was neither consulted, nor informed of the resolution taken by the Eastern Cape Provincial EXCO on 6 December 2013.
- 5.4.88 It is of importance to note that section 51(2) provides that, if an accounting authority is unable to comply with any of the responsibilities determined for an accounting authority, it must promptly report the inability, together with reasons, to the relevant executive authority and Treasury.
- 5.4.89 As the Board of the ECDC was unaware of the Resolution taken by the Eastern Cape Provincial EXCO on 6 December 2013 and the instruction by Ms Mbina-Mthembu that the ECDC should pay from its funds for goods and services procured by other organs of state, on approval of the Provincial Treasury, they were therefore not in a position to have reported in terms of section 51(2), which would have been the prudent action to take under the circumstances.
- 5.4.90 Section 56 of the PFMA provides the accounting authorities with powers and duties to delegate to officials of the entity, powers entrusted to the accounting authorities subject to any limitations and conditions that they may impose. However, this does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.
- 5.4.91 It was established during the investigation that the CFO of the ECDC, Mr Sentwa, was the responsible official who had to approve the payments made by the ECDC paymaster for the procurement of goods and services relating to the funeral of President Mandela. However the Board of the ECDC, as the accounting authority, was not absolved from the responsibility for the expenditure.

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5.4.92 Section 57 of the Act entrusts other officials of the entity with responsibilities and provides that an official of a public entity:

- (a). *“must ensure that the system of financial management and internal control established for that public entity 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 irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*
- (d). *must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and*
- (e). *is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official’s area of responsibility.”*

5.4.93 As the Acting CEO and the CFO of the ECDC, Mr Sentwa was therefore obliged to have complied with section 57 and to have accordingly exercised a duty of care in respect of the sepnding of public funds.

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### The Treasury Regulations

- 5.4.94 The Treasury Regulations were made in terms of section 76 of the PFMA. Section 1 provides that the PFMA includes the Regulations.
- 5.4.95 Expenditure management of *inter alia*, public entities is regulated by Part 4 of the Treasury Regulations.
- 5.4.96 Regulation 8.1 provides that the accounting officer (authority) of an institution must ensure that internal procedures and internal control measures are in place for payment approval and processing. These internal controls should provide reasonable assurance that all expenditure is necessary, appropriate, paid promptly and is adequately recorded and reported.
- 5.4.97 In terms of Regulation 8.2, an official of an institution may not spend or commit public money except with the approval of the accounting officer or as properly delegated or authorised officer.
- 5.4.98 It is not in dispute that at all material times during the procurement by organs of state in the province, Mr Sentwa, in his capacity as the Acting CEO and the CFO of the ECDC had delegated authority to approve to spend or commit the funds of the entity.
- 5.4.99 He was therefore in terms of Regulation 8.1 responsible for ensuring proper internal controls for every payment that was made and to have ensured that the expenditure was necessary and appropriate.
- 5.4.100 The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all organs of state.
- 5.4.101 **Regulation 16A.3.2 provides that:**

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*“16A 3.2 A supply chain management system referred to in paragraph 16A.3.1*

*must –*

- (e) be fair, equitable, transparent, competitive and cost effective;*
- (f) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
- (g) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*
- (h) provide for at least the following: –*
  - (vii) demand management;*
  - (viii) acquisition management;*
  - (ix) logistics management;*
  - (x) disposal management;*
  - (xi) risk management; and*
  - (xii) regular assessment of supply chain performance.”*

5.4.102 Treasury regulation 16A4.1 regulates the establishment of supply chain management units and provides that; *“The accounting officer or accounting authority must establish a separate supply chain management unit within the office of that institutions chief financial officer, to implement the institution’s supply chain management system.”*

5.4.103 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A6 which provides that:

*“16A6.1 Procurement of goods and services either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.*

*16A6.4 If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for*

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*deviating from inviting competitive bids must be recorded and approved  
by the accounting officer or accounting authority.”*

5.4.104 The accounting authority or delegated official of public entity is accordingly responsible for the entire procurement process for goods and services, from the demand management phase to verification of delivery. There is no provision in the PFMA or the Treasury Regulations that provide for the payment by the authority or official of the expenditure incurred for goods and services by another organ of state, even if approved by the Provincial Treasury.

#### **The Eastern Cape Development Corporation Act, 1997**

5.4.105 The ECDC derives its mandate from the Eastern Cape Development Corporation Act 2 of 1997. It is a State owned enterprise created by virtue of Section 2(1) of the Act which The ECDC qualifies as an organ of State as envisaged by Section 239(b)(i) and (ii) of the Constitution.

5.4.106 The ECDC was, pursuant to the Act, incorporated as a profit company under the Companies Act 61 of 1973. Subsequently the ECDC adopted a memorandum of incorporation in order to bring the company in line with the Companies Act 71 of 2008.

5.4.107 As at the date of the adoption of the memorandum of incorporation, the ECPG was the sole shareholder in the ECDC, duly represented in that capacity by the Shareholder Department whose rights are exercised by the MEC for the Department of Economic Development and Environmental Affairs and Tourism. In terms of Section 3 of the ECDC Act:

*“The objects of the corporation shall be to plan finance co-ordinate, market, promote and implement the development of the province and all its people in the fields of industry, commerce, agriculture, transport and finance”.*

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5.4.108 The powers of the ECDC are set out in Section 4 of the Act and enable the ECDC to perform in terms of its objects. Section 5(1) of the Act provides that it is the duty of the ECDC to exercise its powers so that:

*“(c) generally, the activities of the corporation are directed towards guiding and assisting others in financing the establishment or development of industries or undertakings and that, so far as may be practicable, the corporation shall not be required to provide an unduly large proportion of the capital which is necessary for such establishment or development;*

*“(d) all income, property and profits of the corporation shall be used for the promotion and attainment of its objects: provided that dividends may be paid to the shareholders of the corporation.”*

5.4.109 The ECDC is controlled by the Board of Directors who are appointed in terms of the Act and conduct their functions primarily in accordance with the ECDC Board Charter.

5.4.110 Section 7(1) of the Act provides for the operations of the entity to be managed and controlled by the board which may exercise all powers of the company which are not required by the Act or the memorandum of incorporation or regulations framed in terms of the Act to be exercised by the MEC as shareholder. Section 7(1) of the Act read with paragraph 13.17 of the memorandum of incorporation provides for the powers of the Board.

5.4.111 Section 14(1) of the Act regulates the appointment of a CEO of the ECDC and provides that the Board, after consultation with the MEC, shall appoint a Chief Executive Officer who shall report to the Board.

5.4.112 The CEO’s functions, duties and responsibilities are set out in paragraph 9 of his contract of employment and include the following:

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- (a) To lead the implementation of the employer's business strategy as approved by the Board of Directors;
  - (b) To establish and oversee the implementation of appropriate governance and internal controls for all the activities of the employer;
  - (c) To plan and direct all interventions pertaining to responsibilities allocated to him by the Board of Directors, or required of the CEO in terms of the authorities delegated to the position in terms of the delegation matrix applicable within the employer;
  - (d) To establish and maintain an effective system of communication throughout the organisation;
  - (e) To give effect to the requirements imposed upon the office of the CEO in terms of the Public Finance Management Act, and associated Regulations; and
  - (f) To diligently serve the best interests of the employer at all times.

5.4.113 Paragraph 9.8 of the contract of employment provides that, *"The Employee shall carry out such functions and duties as are from time to time assigned to him and are consistent with his status and use his utmost endeavours to protect and promote the business and interests of the Employer and to preserve its reputation and goodwill."*

#### **The ECDC's Procurement Policy adopted on 31 October 2013**

5.4.114 The ECDC adopted a procurement policy on 31 October 2013 for the purpose of providing for an appropriate provisioning of a procurement system that is fair, equitable, transparent, competitive and cost effective.

5.4.115 Paragraph 2.7 of section 7 of the policy provides that where the competitive bidding process has been departed with, the recommendations to depart from the process

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must be recorded and reported to the CEO for approval and/or ratification thereof where the latter has delegated authority. The process is also applicable to the thresholds applicable to the Board.

5.4.116 There is no provision in the Policy that would allow the ECDC to pay for the procurement by other organs of state for goods and services.

Ms Mbina-Mthembu' s response to the Public Protector' s Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act 1994

5.4.117 On 5 September 2017, the Public Protector issued Ms Mbina-Mthembu with a notice in terms of section 7(9)(a) of the Public Protector Act, 1994 with a view to affording her with a further opportunity to respond to the allegations against her as well as the information and evidence obtained by the Public Protector during the investigation that may have an adverse implication against her.

5.4.118 Ms Mbina-Mthembu responded to the notice on 15 September 2017. She was further interviewed on 15 November 2017 with a view to affording her an opportunity to explain the role, involvement and participation in the procurement of goods and services in preparation for the funeral of President Mandela.

5.4.119 In connection with whether the process followed to procure goods and services in respect of the funeral of President Mandela, was in accordance with a system that is fair, equitable, transparent, competitive and cost effective, Ms Mbina Mthembu stated that in her view in her view, prudence and conservatism are fundamental principles of accounting, hence segregation of duties is required especially in procurement matters.

5.4.120 She stated that as a Treasury team, they separated the duties by advising that the municipalities procure by deviation due to time constraints and that normal procurement requires government institutions to advertise for 21 days and they had only 12 days.

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5.4.121 The Treasury approved what would be procured as deemed necessary for readiness for the funeral and ECDC was under the circumstances just going to be the paymaster.

**The CFO, Mr Sandile Sentwa's response to the Public Protector's notice in terms of the provisions of section 7(9)(a) of the Public Protector Act 1994**

5.4.122 As indicated above, Mr Sentwa was the acting CEO and the CFO of the ECDC at all material times during the procurement of goods and services by organs of state for the funeral of President Mandela, at the expense of the ECDC.

5.4.123 On 11 September 2017, the Public Protector issued Mr Sentwa with a notice in terms of section 7(9)(a) of the Public Protector Act, 1994 with a view to affording him a further opportunity to respond to the allegations against him as well as the information and evidence obtained by the Public Protector during the investigation that may have an adverse implication against him.

5.4.124 Mr Sentwa responded on 2 October 2017.

5.4.125 He indicated that he is no longer employed by the ECDC.

5.4.126 Mr Sentwa further confirmed that the CEO of the ECDC was on leave when the ECDC paid for goods and services that were procured for the arrangements and preparations for President Mandela's funeral.

5.4.127 He was informed by the CEO ON 6 December 2013 that the ECDC had been appointed as the paymaster of the ECPG for the funeral.

5.4.128 He stated further that he received an email message from the CEO on 6 December 2013 approving *"variation and deviations regarding urgent and emergency implementation of social infrastructure projects as will assist in improving access.*

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5.4.129 Mr Sentwa explained that he approached the DEDEAT on the same day, requesting the transfer of the R330 million that was appropriated to the ECDC. However, he was advised by the CEO that expenditure incurred by the ECDC relating to the funeral of President Mandela would only be refunded if approved by Ms Mbina-Mthembu.

5.4.130 He received an unsigned "*cabinet resolution from the CEO appointing the ECDC as the paymaster.*" He regarded the fact that the *resolution* was unsigned as an administrative matter which could be addressed later and was of the view that it should not be viewed as a reason not to execute the instructions. Mr Sentwa confirmed that it was this unsigned Memorandum that was used as source of approval for the procurement of goods and services and payment by the ECDC of the expenditure incurred as a result thereof, for the arrangements and preparations for the funeral of President Mandela.

5.4.131 He regarded paragraph 7 of the *resolution* as critical "*in that it specifically mentioned that these funds will be used for the cost of infrastructure relating to the funeral.*"

5.4.132 Mr Sentwa further stated that:

*"It was therefore my understanding that, the costs incurred relating to the infrastructure was going to be funded using R300m upon confirmation of delivery by the ECDC Social Infrastructure team (This was what the funds we voted and allocated to ECDC for (sic) in the mid-term budget review in 2013 Nov). It was our collecting (sic) understanding that other costs relating to the funeral logistic were going to be refunded to the ECDC BY Treasury. Due to this understanding, payments made on approval by the Provincial Treasury were accounted for as a debtor and not as an expense in the ECDC books when incurred as refund was expected."*

5.4.133 He rejected the notion that the ECDC was supposed to have followed its procurement process, as it was only instructed to make payments.

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5.4.134 When the AG audited the *procurement* by the ECDC, the associated expenditure was found to have been irregular.

5.4.135 Mr Sentwa concluded that he acted on the well-founded and *bona fide* belief that the payments were not only a loan/advance, but that it “*enjoyed the blessings, knowledge and active involvement*” of the Eastern Cape Provincial EXCO, the AG, Ms Mbina-Mthembu and the CEO of the ECDC.

### **Conclusions**

5.4.136 The PFMA that regulates management of the revenue expenditure, assets and liabilities of the, *inter alia* government departments and public entities, includes the Treasury Regulations and is an Act of Parliament.

5.4.137 Both the PFMA and the Treasury Regulations require of the accounting officer of a department and the accounting authority to establish and maintain a proper competitive procurement system.

5.4.138 Both further compels the accounting officer and authority to ensure that sufficient internal control measures are in place to provide reasonable assurance that all expenditure is necessary and appropriate.

5.4.139 There is no provisions in the Constitution, the PFMA or the Treasury Regulations that provide for a public entity to be the paymaster for the procurement of goods and services by other organs of state.

5.4.140 In fact, the relevant provisions put the responsibility of procurement from the demand management to the verification phase on the accounting officer/authority, who has to account for the expenditure. There is no room for shared responsibility.

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- 5.4.141 However, from the evidence and information obtained during the investigation, it emerged that Ms Mbina-Mthembu and Mr Sentwa, who was the Acting CEO and the CFO of the ECDC at the relevant times, held the view that the strict provisions of the Constitution, the PFMA and the Treasury Regulations pertaining to procurement and expenditure management could be overruled by a resolution of a Provincial Executive Committee.
- 5.4.142 This misconception resulted in the acceptance of a process where the ECDC paid for procurement of goods and services that it had no control over, had not verified delivery and had not approved. It relied on the approval of the Provincial Treasury that in some instances were not even involved in the procurement.
- 5.4.143 It was already concluded above that the expenditure incurred by the ECDC was unauthorised. Moreover, even if the expenditure was authorized, the payments by the ECDC would have constituted irregular expenditure as it was not in accordance with the PFMA and the Treasury Regulations.
- 5.4.144 The evidence confirmed that the Board of the ECDC as the accounting authority responsible for the expenditure, was not informed of the payments made under the authority of Mr Sentwa and at the request of Ms Mbina-Mthembu. Mr Sentwa seems to have just thought that they were aware. He never made sure, despite committing the Board to huge expenditure under circumstances that were clearly extra-ordinary.
- 5.4.145 As the CFO, he should have been aware that the payments were made in violation of the PFMA and the Treasury Regulations. Yet there is no indication that he raised alarm or his concern with the Board, to whom he was accountable.
- 5.4.146 Furthermore, both Ms Mbina-Mthembu were aware that the funds from which the payments were supposed to have been made had not been transferred to the ECDC. At the time when the payments were made, the ECDC was therefore spending money that was allocated to them for different purposes.

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- 5.4.147 When a reconciliation was eventually done, the ECDC lost more than R22 million that was originally allocated to them to accelerate social infrastructure development in the Eastern Cape. Money intended to alleviate the plight of the poorest of the poor was accordingly spent on a state funeral.
- 5.4.148 No verification was done on the delivery of the items procured from *Reagola Print and Mail* at a cost of R5 million paid for by the ECDC. It was established during the investigation that the majority of the items ordered from this company were not delivered as the quotation was unilaterally changed by them.
- 5.4.149 There is no indication in the evidence that the ECPG received value for the R5 million that the ECDC paid to *Reagola Print and Mail*. This payment was therefore made in vain and would have been avoided if Ms Mbina-Mthembu and Mr Sentwa exercised reasonable care. It accordingly constitutes fruitless and wasteful expenditure, as contemplated by section 1 of the PFMA.
- 5.4.150 Ms Mbina-Mthembu's and Mr Sentwa's response that they acted in accordance with the relevant laws and prescripts, were bona fide and under the belief that their actions were justified do not accord with the evidence and the application thereto of the applicable legislation.
- 5.4.151 Ms Mbina-Mthembu and Mr Sentwa acted in violation of the provisions of section 38 and 57 of the PFMA and Treasury Regulations 8.1 and 16A.

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**5.5 Whether the Eastern Cape Parks and Tourism Agency (ECPTA) incurred irregular and fruitless and wasteful expenditure in the procurement of goods and services relating to the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**

The issues that are Common Cause

- 5.5.1 There were no issues in dispute relating to the expenditure incurred by the Eastern Cape Parks and Tourism Agency (ECPTA) for the preparation and arrangements for the funeral of President Mandela.
- 5.5.2 The ECPTA incurred expenditure, amounting to approximately R2 804 413 towards the funeral of President Mandela.
- 5.5.3 Some of the funds were used in preparation for the hosting of a night vigil in Qunu, Mthatha on the evening prior to the day of the funeral of President Mandela.
- 5.5.4 Despite objections from the Joint Operations Committee not to proceed with the preparations, the ECPTA nevertheless continued.
- 5.5.5 Various service providers and musicians were appointed to assist, but the night vigil did not go ahead despite payments having been made.
- 5.5.6 From the documents submitted by the ECPTA during the investigation, it was established that the entity had plans for the eventuality of the passing of President Mandela as far back as June 2013 formulated as *Project M*.
- 5.5.7 In this regard, a memorandum was prepared by the Executive Director responsible for Destination Tourism at the ECPTA, Mr Eddie Marafane, on 26 June 2013. The purpose of the submission was to request the entity's EXCO to approve:

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- 5.5.7.1 The deviation from normal procurement processes due to the sensitivity and urgency of the matter, as well as the respect and honour to be accorded to President Mandela's family;
- 5.5.7.2 The single sourcing of preferred service providers to facilitate progress in implementing the project;
- 5.5.7.3 The upfront payment requests to ensure that an event of such magnitude does not fail; and
- 5.5.7.4 That the details of any preparatory work would be covered in Service Level Agreements.
- 5.5.8 Mr Marafane stated in his submission that the mandate of the ECPTA was to handle all tourism matters in the Eastern Cape Province where President Mandela was born and raised.
- 5.5.9 According to the memorandum, in the event of President Mandela passing on, it was expected that thousands of mourners and media representatives would gather in the Eastern Cape and as such, the ECPTA, as a tourism authority, has a mandate to ensure that visitors to the province were supported in order to make their stay as comfortable as possible.
- 5.5.10 In explaining plans for the *Project M* activities, Mr Marafane proposed that there should be information and call centres. The ECPTA would partner with the Nelson Mandela Museum in Qunu in establishing information centres where staff would be handling enquiries in relation to the availability of accommodation, tourist facilities and services.
- 5.5.11 According to Mr Marafane's submission, the costs related to the information centres were expected to be minimal as the operating of the centres was going to be the responsibility of the entity and the museum staff.

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- 5.5.12 These information centres were to be established at the Mthatha, East London and Port Elizabeth Airports at an estimated cost of R3000.00.
- 5.5.13 Mr Marafane stated further that the ECPTA planned to:
- 5.5.13.1 Utilize the school grounds at Milton Mbekela High School in Qunu where a marquee was to be erected for purposes of hosting the media. The ECPTA and the Nelson Mandela Museum were also expected to make use of this facility and align it with the plans of the GCIS and the Office of the Premier.
  - 5.5.13.2 Provide shuttle services for members of the media who would be disembarking at various airports in the province, as well as King Shaka International Airport in Durban at an estimated cost of R202 000.00.
  - 5.5.13.3 Provide for an Operations Room and a VIP Room to be utilized by the ECPTA, the Office of the Premier, important guests, Board Members and Executives as well as the provincial leadership, at an expected cost of R345 000.00.
  - 5.5.13.4 Erect a main marquee with four plasma screens, wooden floors, refreshments, podium catering points as well as 100 round tables, a day before the funeral that would accommodate one thousand (1000) guests. Note was taken of the fact that there was no provision for chairs in Mr Marafane's plans. It was estimated that the plan would cost the ECPTA an amount of approximately R999 110.00.
  - 5.5.13.5 Provide accommodation for the media and guests, which included 100 mattresses, blankets, gas stoves, general workers as well as morning and afternoon tea and refreshments.
  - 5.5.13.6 Partner with communities in Mvezo and Qunu Administrative Areas in identifying and facilitating home accommodation for visitors and the media.

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- 5.5.13.7 Facilitate training for the participants on service excellence and various South African host programmes. Service providers in the ECPTA database were to be used to conduct the training programme. The estimated cost for this exercise was an amount of R210 000.00
- 5.5.13.8 Utilize the material procured by ECPTA in respect of the *Home of Legends* programme of the ECPG for branding in the form of *billboards, banners* and *lamp post posters* to be displayed at East London and Port Elizabeth airports, Butterworth, Dutywa, Mthatha and Aliwal North and 1000 lamp post posters to be displayed across those towns to carry appropriate messages and visuals, The cost was estimated in the region of R5 338 825.00
- 5.5.13.9 Identify, constitute and allocate roles and functions to a team code-named, *M-Team* under the stewardship of the MEC for Economic Development, Environmental Affairs and Tourism, Hon. Mcebisi Jonas, whose primary duties were to provide leadership on governance and to give guidance on the *Project M* activities together with the Chairperson of the ECPTA Board.
- 5.5.13.10 Allocate a role of overseeing co-ordination between government, the Board and the MEC to the CEO of the ECPTA.
- 5.5.14 Mr Marafane motivated his plan by stating that in most cases, funeral arrangements are made after a person has passed on, but in the case of President Mandela, it was different as he was regarded as a *world icon* and the unforeseen eventuality of his death would attract masses of people as well as visitors to the Eastern Cape.
- 5.5.15 He was of the opinion that under the circumstances, the normal procurement process would be impractical hence his recommendation for a limited bidding process.

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- 5.5.16 With regard to the procurement of *MM Communications* to render an events management service for the ECPTA, Mr Marafane stated in his submission that this company had already been approached by the ECPTA to provide a quotation.
- 5.5.17 He stated that the reason for selecting this company was the fact that they previously handled the Eastern Cape Tourism Day celebrations held in the Mbhashe region and the ECPTA was satisfied with the quality of the service they rendered.
- 5.5.18 In addition to the procurement of *MM Communications*, Mr Marafane proposed the procurement and appointment of a company that was going to be responsible for branding and exhibition on behalf of ECPTA. According to him, the ECPTA and the Office of the Premier had been working on the *Home of Legends* project and appointed *Oryx Media Company* to assist. He stated that this company had material for President Mandela's imagery and the concept of the *Home of Legends*.
- 5.5.19 The financial implication to the ECPTA for *Project-M* was stated as in total an amount of R7 097 935.00. The available funds would be utilized as bridging finance for the project where after a submission would be made to source additional funding from the DEDEAT in respect of unforeseen expenditure.
- 5.5.20 Mr Marafane concluded his submission by recommending approval and signed on 26 June 2013 with a recommendation by the CFO Ms Thoneka Jama on the same date and the CEO supported the initiative on the same date. It was noted that there was no signature of the Chairperson of the ECPTA Board, Ms Vuyo Zitumane.
- 5.5.21 Two quotations were attached to Mr Marafane's submission from *MM Communications* dated 12 June 2013 for an amount of R999 110.00 and *Oryx Media* dated 24 June 2013 for an amount of R5 338.825.
- 5.5.22 It was established during the investigation that subsequent to the submission of Mr Marafane's proposal to the ECPTA Board and EXCO, a Board meeting by way of teleconferencing was held on 26 June 2013.

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- 5.5.23 In participation thereof were the Chairperson of the Board, Ms Zitumane and two Board members, Mr F Makiwane and M Sotshana. The EXCO was represented by the CEO, Mr L Rubushe, CFO, Ms T Jama, Board Secretary, Mr X Mapoma and Mr Marafane.
- 5.5.24 The only item on the agenda for this meeting was Mr Marafane's submission. During the deliberations, Ms Zitumane highlighted the sensitivity and the confidential nature of the project as it related to the Eastern Cape Province preparing itself for an unforeseen eventuality of the passing on of President Mandela.
- 5.5.25 Mr Rubushe further stated that the Board had mandated the executive to engage with the Office of the Premier with a view to entering into a service level agreement to ensure that the agency's role and responsibilities of each party with regard to the project were clearly defined.
- 5.5.26 Despite repeated requests by the ECPTA to meet with the OTP, the parties had by the time of the Board meeting not entered into the agreement.
- 5.5.27 Amongst the concerns that were raised in the meeting was the issue of funding in particular whether, the ECPTA was providing bridging finance for the project until the funds from DEDEAT were transferred. In response, the CFO stated that the entity would be using "available resources" from its own coffers.
- 5.5.28 The Board Chairperson expressed concern that the Board would be found wanting in respect of the basis upon which they were being requested to approve deviation from the normal procurement processes as provided for in the entity's procurement policy.
- 5.5.29 She advised that the submission should be formulated as a recommendation STATING explicit reasons such as the urgency, sensitivity and confidentiality of *Project-M* as well as reasons why it was not possible to consider an open tender process.

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- 5.5.30 The Chairperson's proposal was agreed upon and a decision taken that the submission should also include the prescripts which allowed the Board, under specific and compelling circumstances to deviate from the SCM Policy as well as the fact that the DEDEAT was to provide the budget for the project. In addition, even if a single sourcing process was going to be utilized, the costs should be market related and the Executive was to ensure that the Agency received value for money.
- 5.5.31 It was also agreed that the manner in which the submission was drafted could raise audit queries and for this reason, a Service Level Agreement between ECPTA and the Office of the Premier or written confirmation that ECPTA was going to implement the project and that the Provincial Government would provide the funding was required. The Board Chairperson further emphasized the importance of *due diligence* being undertaken within the *sole sourcing* process.
- 5.5.32 A Resolution was taken where EXCO agreed in principle, subject to the redrafting the submission of Project-M that the:
- “ECPTA proceed with single sourcing of the event organizer and the branding and exhibition companies viz, MM Communications and Oryx Media amounting to R6 264 110.00 provided that the Executive was satisfied that the service provider's quotations provided value for money for the services to be delivered. The plan as presented was also approved in principle subject to ongoing discussions with relevant role-players.”*
- 5.5.33 The 26 June 2013 Board resolution was thus confirmed by the Board Secretary, Ms X F Mapoma wherein she stated that “EXCO accepted the submission and approved deviation from the SCM policy to procure services of *MM Communications* in the amount of R999 110.00.
- 5.5.34 On 1 August 2013, Mr Marafane made another submission to the Board of the ECPTA requesting approval of the additional costs for marquees in respect of *Project-M*.

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- 5.5.35 The financial implication thereof was an amount of R281 750.00, in addition to the previous amount of R987 990.00 that was approved on 26 June 2013, referred to above. Apparently, the service provider, *MM Communications*, omitted in their initial quotation to include the costs relating to the main marquee which was bigger in size.
- 5.5.36 The Board approved the additional amount of R281 750 subject to a separate quotation being received and the required procurement process in this regard being followed.
- 5.5.37 The other request from the Board on the agenda was the approval for an extension of the *Home of Legends* billboard campaign for a further three months. In presenting this request to the Board, Mr Marafane explained that the total budget for the campaign was R10million and that an amount of R6 650 .000 had already been used in marketing for a month.
- 5.5.38 According to Mr Marafane, a balance of R3 350.000.00 remained and it was thus proposed that this amount be used by extending the campaign for a further three months at a total cost of R3 298 626.90. During the deliberations, questions were raised as to whether a Service Level Agreement had been signed with the Office of the Premier in relation to the implementation of the campaign so that a model, including a budget, for the campaign could be agreed upon, prior to implementation thereof.
- 5.5.39 It was agreed that this would avoid any possible negative implications going forward in view of the politicized nature of the campaign and therefore needed to be agreed with the Office of the Premier.
- 5.5.40 On the communication side, the intention of the billboards was to link the campaign to *Project M*, but it was pointed out that this could be expensive to maintain going forward. However, booklets were another option which could be further explored.

- 5.5.41 Mr Rubushe further added that there appeared to be reluctance on the part of the Office of the Premier to formally hand the project over to ECPTA and this was borne out by the fact that they had produced a plan and had approached the same service providers that ECPTA had used to launch the project and therefore ECPTA needed to continue with the momentum created and work with the Office of the Premier.
- 5.5.42 The Board approved the extension of the *Home of Legends* Billboard Campaign for a further three months in an amount of R3 298 626.90.
- 5.5.43 During the investigation, it also transpired that, whilst preparations for the funeral of President Mandela were underway, Mr Marafane requested that *MM Communications* should secure artists that would be performing at the main marquee on the night before the funeral.
- 5.5.44 In this regard, Ms Mandlakazi Mphahlwa of *MM Communications* furnished the ECPTA with a quotation for an amount of R359 160.00 which was broken down as follows:

	DESCRIPTION	UNIT PRICE	TOTAL
1	<b>PERFORMANCE FEE:</b>		
	1. Zahara and the Band	R115 000.00	R170 000.00
	2. Lusanda and the Band	R55 000.00	
2	<b>TRAVELLING</b>		
	1. Tickets from JHB-ELS: Zahara & her band people)	R3 500.00	R35 000.00
		R2 500.00	R25 000.00
	2. Tickets from DUR-JHB: Zahara & her band people)	R18 000.00	R18 000.00
	3. Hire Combi incl.fuels costs & kms from ELS-DUR	R3 700.00	R3 700.00
	4. Fuel costs for Lusanda		

3	<b>ACCOMODATION</b>		
	10 Rooms for Zahara & her band crew (4/5 Star facilities)	R4 000.00	R40 000.00
4	<b>SOUND &amp; STAGE</b>		
	Retainer fee charged by supplier for cancellation	R8 500.00	R8 000.00
	<b>Sub-Total:</b>		<b>R299 700.00</b>
5	Management Fee @ 20%		R58 340.00
	<b>DUE:</b>	<b>TOTAL</b>	<b>359 160.00</b>

5.5.45 Ms Mpahlwa of *MM Communications* confirmed on enquiry that an instruction came from Mr Marafane for her to secure artists who would be performing at the main marquee on the night before the funeral. The reason for securing the artists according to Ms Mpahlwa was the fear that there would be non-attendance and as such the ECPTA wanted to attract people to attend the event by advertising that *Zahara, Mzwakhe Mbuli* and *Lusanda Spiritual Group* would be performing at the function.

5.5.46 For this purpose, *MM Communications* sub-contracted *Mr Lufefe Mayekiso* of *Chargrile Events* to secure the artists, which they did.

5.5.47 However, according to Ms Mpahlwa, the artists could not perform as there were no people in attendance at the marquee and there was no platform as it was alleged to have been taken over by the *BBC News* on arrival at the venue at a higher price.

5.5.48 Mr Mayekiso was approached during the investigation and he confirmed what Ms Mpahlwa stated. He explained that he was telephonically approached on 13 December 2013 by Mr Marafane who instructed him to bring *Zahara, Mzwakhe Mbuli*, their band as well as *Lusanda Spiritual Group* to perform at the ECPTA marquee on the eve of the funeral of former President Mandela.

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- 5.5.49 With regard to the mode of transport used to secure the attendance of the artists, Mr Mayekiso stated that:
- 5.5.49.1 *Lusanda Spiritual Group* travelled by road transport from Willowvale to Qunu;
- Zahara* and her band including *Mr Mzwakhe Mbuli* travelled by air from Johannesburg to East London, en-route by road transport from East London to Qunu and they stayed over in Mthatha; and
- 5.5.49.2 From Mthatha, *Zahara*, her band and *Mr Mzwakhe Mbuli* travelled to Durban by road transport from where they flew back to Johannesburg.
- 5.5.50 All these travel arrangements were made and paid for by Mr Mayekiso's company through a travel agent.
- 5.5.51 During the investigation, Mr Mayekiso complained that his company was not fully paid for services rendered to *MM Communications* and the ECPTA. In this regard, he stated that he only received R200 000 of the amount invoiced which was R290, 662.38 and the reason advanced was that the artists did not perform due to the fact that there was no audiovisual infrastructure, nor an audience in the ECPTA marquee.
- 5.5.52 According to Mr Mayekiso, his company was also requested to provide sound equipment and a platform where the artists would be performing. However, he lamented that this was also done at the last minute and he delivered, but the event was cancelled. The equipment was not used and he had to pay a cancellation fee to their service provider.
- 5.5.53 It was however noted during the investigation that in addition, an amount of R150 000 in respect of carpet and flooring for the main marquee at R70 000.00 each, as well as *Isabhunga* for the sports field costing R80 000.00 was also paid by the ECPTA.

5.5.54 On 31 August 2013, Ms Mandlakazi Mpahlwa of MM Communications submitted an invoice for an amount of R370 745.00 in respect of a pre-payment to be made by ECPTA to enable her to secure material, goods and services that she would need for the preparations for the funeral of President Mandela.

5.5.55 Subsequent to the funeral, Ms Mpahlwa submitted a final invoice for payment on 17 December 2013, which was processed and paid by the ECPTA on 9 January 2014. The invoice stated the event as “*Project-M*” listed the items as follows:

Quantity	Description	Total Price	Due
1 Day	Freestanding Marquee to Accommodat 1000 Pax; 4 VIP Toilets 4 Fire Extinguishers	422,500.00	211,250.00
2	Engineering Certificates	35,000.00	35,000.00
1	Carpeting	80,000.00	80,000.00
100	Round Tables	7,500.00	3,700.00
100	Round Tables Cloths	14,5000.00	7,250.00
1000	Plastic Chairs	7,500.00	3,750.00
1000	Plastic Chair Covers	15,500.00	7,500.00
1000	Plates	3,000.00	3,000.00
1000	Under plates (Gold)	16,500.00	8,250.00
2000	Highball Tumblers and Juice Glasses (Normal)	7,000.00	3,500.00
24	Trestle Tables for Serving Points	6,000.0	3,000.00
24	Trestle Table Cloths with skirting	2,760.00	1,380.00
12	Trestle Tables for VIP/Ops/ Media Area	3,000.00	1,500.00
12	Trestle Table Cloths with skirting	1,380.00	690.00
3000	Spoons, Forks and Knives	6,600.00	3,300.00

24	Chaffing dishes	5,500.00	5,500.00
48	Burners	576.00	576.00
100	Glass Centre Pieces- with Jelly babies	32,000.00	16,000.00
6	Plasma screens	15,000.00	8,750.00
1	PA System, 6 x speakers	85,000.00	85,000.00
2	4x3 metres screens	70,000.00	70,000.00
1 Days	Freestanding Marquee to Accommo 150 Pax- to be divided in 3, Ops R VIP And Media Room	47,000.00	23,500.00
3	Divisions: VIP/Ops Marque/ Media area	22,500.00	11,250.00
6	Couches x 6 days	45,000.00	41,250.00
3	Coffee Tables x 6days	13,500.00	12,375.00
1	Carpeting (15x30) x 6 days	7,500.00	3,750.00
12	Round Tables cloths x 6 days	1,740.00	1,740.00
12	Round Tables x 6 days	9,000.00	9,000.00
10	Cocktail Tables x 6 days	6,000.00	
15	Round Table cloths (Orange) x 6 days	1,840.00	1,840.00
1	Draping	8,500.00	8,500.00
2	Plasma Screens (Including 1 in VIP ro 1 in OPS room ) x 6 days	12,500.00	6,250.00
30	Bar stools x 6 days	2,500.00	2,500.00
1	PA System, 4 x sound speakers and 2 Sound Technicians (Including: Connectivity to SABC Broadcast)	65,000.00	65,000.00
50	Breakfast- Muffins, Sandwiches, Juice,	15,750.00	15,750.00

(7 days)	Tea & Coffee:		
50 (7 days)	Lunch-3 Starches, 2 Veggies, 2 Salads, 3 Meats, Dessert and 3 cool drinks or juices	52,000.00	52,000.00
50 (7 days)	Afternoon Tea- Biscuits, Tea, Coffee	8,750.00	8,750.00
1000 (2days)	Lunch- 3 starches, 2 veggies, 2 salads, 3 meats, dessert and cool drinks and juic	170,000.00	170,000.00
	<b>Sub Total of amount due</b>		<b>971,406.00</b>
1	Management Fee (15 %)		97,140.60
1	Entertainment : Zahara; Mzwake Mbuli	350,000.00	350,000.00
	Transport Costs		125,000.00
		<b>Total Due:</b>	<b>R1 543,546</b>

- 5.5.56 Amongst the documents submitted by the ECPTA during the investigation was an invoice rendered by Mr Mzwandile Vena for the use of his house situated in Qunu, as a State House. His invoice is dated 12 December 2013 and is addressed to the official travel agent of the ECPTA, *Messrs. XL Aloe Travel*. Mr Vena describes in his invoice the services that he rendered as, *“Provision of Mini-State House in Qunu for the ECPTA”* and thus invoiced the entity for an amount of R175 000.00.
- 5.5.57 On 25 March 2014, Mr Marafane submitted a memorandum to the ECPTA Board of Directors requesting approval of the *Project-M* closure report. In his submission, Mr Marafane reported on how the entity worked with the *Nelson Mandela Museum* in rolling-out the project in as far as the provision of call and information centres which were operated, as planned in June 2013.
- 5.5.58 With regard to the use of the *Mini-State House*, he reported that the ECPTA managed to secure a house in Qunu, where visiting provincial and national dignitaries were hosted for meetings.

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- 5.5.59 According to him, the provision of such a base assisted in managing the province's reputation to show the world that the ECPTA was willing to go the extra mile to provide facilities to enable government to operate efficiently.
- 5.5.60 He stated that the house was selected because of its ideal location as it was just a few kilometres from the Museum where some activities were taking place and also close to the burial site of President Mandela.
- 5.5.61 In his report, Mr Marafane stated that some of the key people that were hosted in the house included the Eastern Cape Premier, Ms Noxolo Kiviet, Transport Minister, Ms Dipuo Peters, Communications Minister, Mr Yunus Carrim and the Minister of Public Works, Mr Thulas Nxesi. He brought it to the attention of the Board that the provision of the State House was not part of the initial approved plan and as such came at an additional cost to the ECPTA.
- 5.5.62 He further reported that the purpose of the main marquee procured was to provide for the *night vigil* and it was also planned to use it as a base for welcoming mourners that would arrive the day before the funeral.
- 5.5.63 However, he reported that this never materialized as people attended the main night vigil that was organized by the Office of the Premier and held at Rotary Stadium in Ngangelizwe township of Mthatha.
- 5.5.64 Moreover, so stated Mr Marafane, the ECPTA did not adhere to the initial plan, which required that invitations be sent to various stakeholders. According to the plan and assignment of responsibilities, MEC Jonas, ECPTA Board Chairperson and the CEO were expected to have led the invitation process.
- 5.5.65 With regard to his own planned assignments and responsibilities, Mr Marafane reported that on Monday 9 December 2013, he reminded the ECPTA CEO that an invitation list had to be drawn up.

- 5.5.66 The CEO was opposed to the idea and claimed to have a way of drawing crowds through other means and thus alleged to have had some discussions with political leaders of the province.
- 5.5.67 According to Mr Marafane, on 11 December 2013, following the media conference that the ECPTA had in Qunu, the Board Chairperson asked the management about the invitations and the guest list and the CEO provided the same response that he gave to Mr Marafane. The Chairperson of the Board then **cautioned management on the risk of a marquee tent that could be empty thus resulting in fruitless and wasteful expenditure.**
- 5.5.68 It is reported in Mr Marafane's submission that on Thursday, 12 December 2013, he became aware that another *night vigil* was to be held at the *Rotary Stadium* in the Ngangelizwe township of Mthatha. He proposed to the CEO that the ECPTA should acquire music artists that would assist in drawing crowds to the main marquee procured by the ECPTA.
- 5.5.69 He thus requested *MM Communications*, to submit quotations for the provision of the artists and received a quotation of R350 000.00 for *Zahara, Mzwakhe Mbuli and Lusanda Spiritual Group* performance fees, return flights from Johannesburg to East London and transport from East London Airport and from Willowvale to Mthatha for *Lusanda Spiritual Group* as well as accommodation for *Zahara* and her band, Friday, 13 December 2013.
- 5.5.70 In his report, Mr Marafane brought it to the attention of the Board that **the procurement of these artists was outside of the original plan and was done with a view to mitigating the risk of an empty marquee and that it resulted in additional costs.**
- 5.5.71 According to Mr Marafane, another challenge that the ECPTA team experienced was the mud at the Milton Mbekela School grounds where both marquees were erected, which was due to rainy weather that persisted for the entire week of the funeral.

- 5.5.72 On realizing that the marquees would not be accessible, the service provider was requested to supply saw dust which was quoted at R80 000.00. However, the saw dust could not be obtained from the *Elangeni Forest* due to bad weather and an alternative to mitigate the challenge was to surface the grounds with *Isabhunge (red soil)*.
- 5.5.73 In addition, Mr Marafane stated in his report that the ECPTA realized that the initial specification did not provide for a carpet in the main marquee despite the muddy grounds. To mitigate the situation, they requested the service provider to provide carpeting to avoid exposing guests/mourners to muddy seating.
- 5.5.74 The quotation for these additional items was R70 000.00. The total deviation from normal procurement processes amounted to R500 000.00 due to unforeseen circumstances and bad weather.
- 5.5.75 On 20 December 2013 an *ex post facto* submission was made to the CEO with the guidance of the Acting CFO and the Supply Chain Manager, requesting approval for the deviation following an *in principle* agreement between Mr Marafane and the CEO, who subsequently went on vacation without approving it.
- 5.5.76 The Acting CFO was requested to approve the deviation and settle the amount as the service provider was receiving pressure from its suppliers and that these payments were made upfront.
- 5.5.77 Mr Marafane also brought to the attention of the Board that, although the artists and their crew arrived on Friday evening, they experienced another challenge of the unavailability of the sound equipment and the platform where they would be performing.

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- 5.5.78 This glitch was as a result of the supplier getting lost and landing up at the DPW Marquee tent which was at the museum and the platform was apparently taken over by the *BBC News*, who offered the supplier more money. As a result of all these incidents, the music artists whose services had been procured could not perform.
- 5.5.79 He further stated that besides these deviations, the service provider claimed to have provided other items and services that were not on the specifications to the value of R370 745.00. However, following discussions about these, Mr Marafane and *MM Communications* could not agree on these items and the costs related to same.
- 5.5.80 Post the funeral and all the challenges that Mr Marafane reported on as having been experienced in the delivery of the project, he stated that he learnt some lessons as government institutions appeared to have planned in silos for the funeral of President Mandela instead of working together.
- 5.5.81 Mr Marafane stated in his report that it would be prudent in the future for the ECPTA to ensure that it aligns its plans with that of other government institutions to avoid duplication of efforts and fruitless and wasteful expenditure
- 5.5.82 He reported that the idea of a *Mini State House* worked, as it was a central point for the Premier of the Eastern Cape and her guests and as such, its availability proved to be useful for networking.
- 5.5.83 However, he conceded that the idea of the two marquee tents that were erected to service different aspects of the project failed, mainly because of disintegration in the implementation of the initial plan.
- 5.5.84 According to Mr Marafane, in the end, the financial implications for the ECPTA, which were occasioned by the deviation from the initial plan were the following:
- 5.5.84.1 R190 000.00 in respect of the ***Mini State House***;

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- 5.5.84.2 R281 750.00 for the two marquee tents which could not be utilized. These costs excludes the initially approved amount of R999 110.00; and
- 5.5.84.3 Additional expenditure amounting to R500 000.00 that was incurred due to *unforeseen* emergencies that arose at a later stage in the project for the marquee tents as well as R370 745 for the musicians.
- 5.5.85 Mr Marafane submitted that the additional amount that require approval per deviation process was within the CEO's delegation and was thus approved as such.
- 5.5.86 In concluding his report, Mr Marafane requested the Board to approve the *Project-M report* and that the amount of **R970 000.00** in respect of failures in the execution of the project be reported and declared as **fruitless and wasteful expenditure**.
- 5.5.87 He further request approval for condonation by the Board in accordance with the provisions of the PFMA.
- 5.5.88 Regarding the *Home of Legends campaign*, Mr Marafane recommended to the Board that due to lack of financial commitment to pursue the project, it must be closed.
- 5.5.89 The Board refused to approve Mr Marafane's recommendations. Instead it was of the view that disciplinary action should be taken against Mr Marafane.
- 5.5.90 On 24 March 2014, the CFO of the ECPTA, Mr Rubushe made a submission to the Board, the purpose of which was to request approval to condone irregular expenditure incurred during the preparations for the funeral of President Mandela.
- 5.5.91 In his submission, Mr Rubushe stated that during the preparations for the funeral, services were procured on an urgent basis. He stated that a quotation for an amount of R987 990.00 was received and an order generated for *MM Communications* to assist in managing the events and preparations.

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- 5.5.92 According to Mr Rubushe, due to heavy rains during the week prior to the date of the funeral, the need arose to procure marquee tents as well as flooring as a result of mud in the area reserved for the event. A gala dinner was arranged where the marquee was installed and as such, a decision was taken that the event to be held at the main marquee should be converted to a night vigil as a consequence of which, irregular expenditure amounting to R500 000.00 was incurred and paid to MM Communications.
- 5.5.93 He stated that the expenditure was incurred due to the changing nature of the requirements relating to the media management function closer to the date of the funeral, including the effect of the weather, which required the nature of the services to be amended to cater for the requests inside of the venue and the effect of this increased scope, resulted in the quotation being revised.
- 5.5.94 However, so stated Mr Rubushe, the service level agreement was never amended to accommodate the increase. The increase in scope was also greater than the allowed 15% increase which is permitted as per the ECPTA's SCM policy and the effect of the increase is that it was irregular due to the absence of approval for the increase in scope.
- 5.5.95 In his recommendation, Mr Rubushe submitted that the National Treasury Practice Note 8 of 2007/2008 requires that when determining transaction values, a requirement for goods, works or services consisting of different parts or items must as far as possible be treated and dealt with as a single transaction.
- 5.5.96 Mr Rubushe also outlined in his recommendation that in light of the fact that there are additional unapproved amounts, it cannot be treated as a separate procurement process as it relates to the same service provider and event.
- 5.5.97 The Board of the ECPTA did not approve Mr Rubushe's recommendation.

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- 5.5.98 On 25 February 2015, the Board of the ECPTA led by its Chairperson, Ms Vuyo Zitumane was interviewed. Other members of the Board that were in attendance at the interview were, Messrs. F Makiwane, S Mgxaji, the CEO, Mr V Dayimani as well as the Company Secretary, Ms X Mapoma.
- 5.5.99 At the outset, the Chairperson indicated that the Board was not aware of the Special Eastern Cape Provincial EXCO meeting held on 6 December 2013 and could not comment on the resolutions taken.
- 5.5.100 The Board was accordingly not aware that the ECDC was appointed as the paymaster for the procurement of goods and services by other organs of state for the arrangements and the preparations of the funeral of President Mandela and that funds were made available.
- 5.5.101 In narrating the events and activities undertaken by the ECPTA in preparation for the funeral as well as the expenditure that the entity incurred in connection therewith, Ms Zitumane stated that;

*“Before the initiative I think it started sometime in June 2013, as there was a hype that the old man’s health is deteriorating and, as such, some of the State Institutions must put a plan in place, to deal with the eventuality. At the time there was, we called it Project M. It was presented to board as a highly confidential document for us to set up a process in motion, so that when the eventuality occurs at least we are not caught off guard, as an institution.*

*The plan was presented to the board for the first time, I’m sure the documents would have them sometime in June, with every activity that would take place and the costs that is associated with it. The submission to the board was for an unsolicited bid because the whole plan was treated as strictly confidential, so we approved it on the basis that it’s going to be an unsolicited bid and it is going to be single sourcing.*

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*Subsequent to that there was another subsequent submission based on the indirection that was between the administration and the service provider that there were omissions on the original plan. And as such they wanted the board to consider additional expenditure and we approved that sometime in August, and the overall expenditure, which was approved by the board was about R1.2million and that's what we approved.*

*Now, I don't think there has been any further indirection between then until the old man died and there was a team, which was dispersed to work on that, and the CEO, the then CEO and not Mr Dayimani was the head of that operation.*

*Now, on the day, just a day before the funeral, I think some of the board members were there. We observed that there is some potential fruitless expenditure because the tent was not full and everything that was envisaged. You could see that what we would have spent and what happened actually on the ground, because we were there a day before. There was no correlation.*

*We then wrote a letter to the CEO, it must have been in January. I think it was an email raising a number of issues but amongst those issues was to say, "With our own observation, we suspect there has been fruitless and wasteful expenditure." He must respond to that and there was to-ing and fro-ing.*

*He didn't respond for almost three months, until we asked the Administration to do a further investigation on that. Now the report that came to the board indicated that there could have been irregular spending and unauthorised. We didn't know what the classification is, over and above fruitless and wasteful expenditure. Then we resolved, as a board that let's get our internal auditors to do the further investigation, so that there is objectivity in the process.*

*The report came back to the board and we said let's, Mr [Nklasha?] by the way, he's the Chairperson of the HR Committee and he has a legal background so the board... I delegated that responsibility to him as a competent person, who has*

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*the relevant background that he must initiate a process of identifying somebody who's going to do further investigations. Further investigations that will culminate into potential charges for whoever was part of the value chain, and we made it very clear, as a board, that everybody irrespective of the level if he has been part of the value chain must be held accountable and must be disciplined.*

*Now what we did on classification of the expenditure it was for us to disclose to the Auditor General, as it is a statutory requirement but also to make sure that whatever the PFMA requires us to do, as an institution, we do likewise. Then subsequently when the charges were brought to the attention, the then CEO resigned and unfortunately, at that point in time, we did not have the internal audit report.*

*Probably he could have been charged as well, if he was part of the institution because at the end of the day the buck stops at him. So we had to discipline those people that are within the institution and that process is currently underway, so that is as far as I can go but I must state it very clear that at no stage, both the CEO and the Executive Director, indicated to the board that they wanted to incur additional expenses. Everything that they did, they did it without our knowledge and without our authority.*

5.5.102 Ms Zitumane stated that the Board was not aware of the plan to hire Mr Vena's house in Qunu for use as a *State House*, until they were informed by the CEO that it had been procured.

5.5.103 He advised the Board that they were securing the state house which the ECPTA would use as an operations centre where its staff would be working from.

5.5.104 However the House was never used by the Board of the ECPTA but the DEDEAT MEC, Hon Mcebisi Jonas and the Premier's office.

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- 5.5.105 With regard to the hiring of main marquee and artists who could not perform, Ms Zitumane stated that she warned the CEO and Mr Marafane that in terms of the plan, she did not see any activity and that they would have an empty marquee resulting in fruitless and wasteful expenditure.
- 5.5.106 Equally, she was not aware of the hiring of artists such as *Zahara* and *Mzwakhe Mbuli* as that was not communicated to the Board.
- 5.5.107 The ECPTA thus incurred additional fruitless and wasteful expenditure despite her warnings. Subsequently, the Board asked for explanations which resulted in disciplinary action and the resignation of the CEO and Mr Marafane.
- 5.5.108 Mr Eddie Marafane, Executive Director responsible for Destination Tourism at the ECPTA was interviewed on 26 February 2015 to afford him an opportunity to respond to the evidence and information that was obtained mainly from his reports to the Board of the ECPTA.
- 5.5.109 At the time of the interview, Mr Marafane was no longer in the employ of the ECPTA as the parties had parted ways following disciplinary action that was taken against him that was resolved by means of a settlement agreement entered into, terminating his services..
- 5.5.110 He was informed that the purpose of the interview was also to elucidate from him the role he played in relation to the expenditure incurred by the ECPTA of an amount of approximately R2.8million. During the interview, Mr Marafane confirmed the contents of the reports that he submitted for approval by the Board.

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- 5.5.111 With regard to the costing of the *Project-M* plan, Mr Marafane stated that it was estimated at R7million and regarding whether the ECPTA budgeted for this, Mr Marafane stated that they had an amount of R10million that was voted to DEDEAT from the Department of Health for transfer to the ECPTA for this purpose and that there was a Provincial EXCO Resolution to this effect. When President Mandela passed on, the ECPTA implemented the plan.
- 5.5.112 However some aspects of the plan, such as holding a gala dinner failed as they neglected to invite people to attend. They learnt that at a very late that the Office of the Premier also had its plan of holding night vigils at Rotary Stadium and Walter Sisulu University.
- 5.5.113 The *Joint Organizing Committee* (JOC) led by national government was also opposed to the idea of hosting a gala dinner or night vigil at Qunu on the evening preceding the funeral of President Mandela. He conceded that the ECPTA Board Chairperson warned him and the CEO about a possible the fruitless and wasteful expenditure that may result from having an empty marquee due to non-attendance. He confirmed that the ECPTA incurred fruitless and wasteful expenditure of approximately R1.5million.
- 5.5.114 With regard to the hiring of artists to perform at the main marquee, Mr Marafane confirmed that it was his idea, the purpose of which was to mitigate fruitless and wasteful expenditure. He explained having suggested the hiring of *Zahara* and *Mzwakhe Mbuli* as well as a gospel group from the surrounding areas by the name, *Lusanda Spiritual Group*.
- 5.5.115 According to Mr Marafane, his idea did not materialize as the platform and sound system that was secured was taken over by *BBC News* at a higher fee than what they paid the service provider and apparently, the service provider got lost.
- 5.5.116 When he was asked about the *State House*, Mr Marafane stated that it was used to host the Premier, Members of the Cabinet, MEC's and the HOD of DEDEAT.

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5.5.117 Mr Marafane indicated that at the time of the funeral, he was not aware of the resolution taken by the Eastern Cape Provincial EXCO on 6 December 2013 appointing the ECDC as the paymaster for the procurement of goods and services.

5.5.118 According to Mr Marafane, an amount of approximately R500 000 was disclosed by the ECPTA to the AG as irregular expenditure. He also admitted that the expenditure incurred in connection with the large marquee tent that could not be utilized, constituted fruitless and wasteful expenditure.

5.5.119 The former CEO and the then Acting CFO, Messrs. Rubushe and Fokazi were also interviewed and afforded the opportunity to respond. They essentially confirmed Mr Marafane's evidence.

### **The Application of the relevant law**

#### **The Constitution**

5.5.120 Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

#### **The Public Finance Management Act, 1999 (PFMA)**

5.5.121 The PFMA is the main legal instrument that regulates financial management and procurement in the public service. Its objectives are to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments.

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5.5.122 *Fruitless and wasteful expenditure* is defined by section 1 as: “*expenditure which was made in vain and would have been avoided had reasonable care been exercised.*” and irregular expenditure “*as expenditure, other than unauthorised expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.*” (emphasis added)

5.5.123 The ECPTA is listed as a Provincial Public Entity in Part C of Schedule 3 to the PFMA.

5.5.124 Section 49 of the PFMA regulates the authority and accountability of Accounting Authorities and provides that if a public entity has a Board of Directors, the Board is the Accounting Authority of that entity.

5.5.125 Accordingly, the Board of the ECPTA is its accounting authority.

5.5.126 Section 50 of the PFMA regulates the fiduciary duties of accounting authorities and provides that;

“

(3) *The accounting authority for a public entity must—*

- (e) *exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*
- (f) *act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
- (g) *on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*

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*(h) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.*

*(4) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—*

*(c). act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or*

*(d). use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.*

5.5.127 Section 51 of the PFMA provides for the general responsibilities of accounting authorities and provides *inter alia* that:

“

*(1) An accounting authority for a public entity:*

*(d). must ensure that that public entity has and maintains—*

*(iv) effective, efficient and transparent systems of financial and risk management and internal control;*

*(v) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and*

*(vi) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective...*

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*(e). must take effective and appropriate steps to—*

*(iii) ...*

*(iv) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and...*

*(f). must take effective and appropriate disciplinary steps against any employee of the public entity who—*

*(iv) contravenes or fails to comply with a provision of this Act;*

*(v) commits an act which undermines the financial management and internal control system of the public entity; or*

*(vi) makes or permits an irregular expenditure or a fruitless and wasteful expenditure...”*

5.5.128 In this case, the Board of the ECPTA was responsible for compliance with the provisions of the PFMA above, when the ECPTA procured goods and services relating to the funeral of President Mandela.

5.5.129 Section 56 of the PFMA provides the accounting authorities with powers and duties to delegate to officials of the entity, powers entrusted to the accounting authorities subject to any limitations and conditions that they may impose. However, this does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

5.5.130 It was established during the investigation Mr Eddie Marafane, the then Executive Director responsible for Destination Tourism at the ECPTA was mainly responsible for the planning and procurement of goods and services for the funeral arrangements.

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5.5.131 However the Board of the ECDC, as the accounting authority, was not absolved from the responsibility for the expenditure.

5.5.132 Section 57 of the Act entrusts other officials of the entity with responsibilities and provides that an official of a public entity:

“

*(f). must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;*

*(g). is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;*

*(h). must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*

*(i). must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and*

*(j). is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.”*

5.5.133 Mr Marafane was accordingly obliged to have complied with the provisions of section 57 when he initiated and executed the procurement on behalf of the ECPTA for its activities pertaining to the funeral.

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### The Treasury Regulations

5.5.134 The Treasury Regulations were made in terms of section 76 of the PFMA. Section 1 provides that the PFMA includes the Regulations.

5.5.74.1 The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all organs of state.

5.5.135 Regulation 16A.3.2 provides that:

*“16A 3.2 A supply chain management system referred to in paragraph 16A.3.1 must –*

- (i) be fair, equitable, transparent, competitive and cost effective;*
- (j) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
- (k) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*
- (l) provide for at least the following: –*
  - (xiii) demand management;*
  - (xiv) acquisition management;*
  - (xv) logistics management;*
  - (xvi) disposal management;*
  - (xvii) risk management; and*
  - (xviii) regular assessment of supply chain performance.”*

5.5.136 Treasury regulation 16A4.1 regulates the establishment of supply chain management units and provides that; *“The accounting officer or accounting authority must establish a separate supply chain management unit within the office of that institutions chief financial officer, to implement the institution’s supply chain management system.”*

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5.5.137 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A6 which provides that:

*“16A6.1 Procurement of goods and services either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.*

*16A6.4 If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”*

5.5.138 The accounting authority or delegated official of public entity is accordingly responsible for the entire procurement process for goods and services, from the demand management phase to verification of delivery.

5.5.139 It is not disputed that the ECPTA incurred fruitless and wasteful and irregular expenditure in the procurement of goods and services for the funeral of President Mandela, due to non-compliance with the provisions of the PFMA and the Treasury Regulations referred to above.

**The ECPTA’s Supply Chain Management Policy adopted on 31 October 2013**

5.5.140 The purpose of the Policy is to regulate all SCM practices within the ECPTA and to provide for an appropriate provisioning of a procurement system that is fair, equitable, transparent, competitive and cost effective.

5.5.141 Paragraph 1.5.3 provides that Executive Directors of the ECPTA will be responsible and accountable for the implementation of the Policy on procedural and other prescripts thereof within their area of responsibility.

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5.5.142 The ECPTA may in terms of paragraph 3.5 dispense with the prescribed competitive procurement process in urgent or emergency cases. Reasons for such dispensing must be clearly recorded and approved by the CEO or the Accounting Authority.

### **Conclusions**

5.5.143 It was not disputed that the ECPTA incurred fruitless and wasteful expenditure in the amount of R970 000 and irregular expenditure of R 500 000 in procuring goods and services relating to the funeral of President Mandela.

5.5.144 The Board of the ECPTA took disciplinary action against Mr Marafane, the Executive Director: Destination Tourism and Mr Rubushe, the CEO as a result of which both of them resigned.

**5.6 Whether the BCM improperly procured and paid *Victory Ticket 750cc* an amount of R5 985 000.00 of public funds to transport mourners to four venues where the memorial services of President Mandela were to be held and if so, whether such conduct was improper and constitutes maladministration: -**

#### **Issues that are Common Cause**

#### **It is not disputed that: -**

5.6.1 The Buffalo City Municipality (BCM) paid an amount of R5 985 000 to a company called *Victory Ticket 750CC*, for purposes of transporting mourners who were attending memorial services for the late President Mandela that were held in East London, King Williams Town and Mdantsane during the period 10 to 12 December 2013.

5.6.2 The entity paid by the BCM belongs to Mr. Richard Mzwandile Sokwali and Ms. Busisiwe Boti.

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5.6.3 Attendance at the memorial services was very poor, in particular in Mdantsane.

**Issues that are in dispute**

- 5.6.4 The issue for determination by the Public Protector was the unlawfulness and impropriety of the procurement and payment for services rendered by *Victory Ticket 750CC* for the regional memorial services of the late President Mandela.
- 5.6.5 During the investigation, it was established that on 11 December 2013, the Executive Mayor of the BCM, Ms. Z V Ncitha tabled before the Municipal Council (Council) a report titled, *“BUDGET PROVISION FOR BUFFALO CITY METROPOLITAN MUNICIPALITY TO FUND PROPOSED ACTIVITIES IN COMMEMORATION OF NELSON MANDELA,”* under an *“EXIGENCY ITEM.”*
- 5.6.6 The purpose of the report was to request the Council to consider and approve funding for transport and venue costs from identified savings for the activities to commemorate President Mandela.
- 5.6.7 In her report, Ms. Ncitha stated that **“emanating from her meeting with the ECPG, it was resolved that the BCM should identify funding for the citizens to be transported to the identified venues.”** According to her, she had a consultation with the administration, and it was requested that the CFO should identify funding from potential savings to fund transport and venue costs.(emphasis added)
- 5.6.8 Ms. Ncitha also reported to the Council that the National Treasury had indicated what cost bearing implications were permissible in accommodating memorial services for the late former President Mandela, and that the Minister of Finance had determined that the following activities at a reasonable cost were allowed: -
- 5.6.8.1 Transportation services; and
- 5.6.8.2 Venue costs (community halls, multi-purpose centres and stadia).

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5.6.9 Ms. Ncitha further reported that the National Treasury had indicated that the following costs were not permissible: -

5.6.9.1 Catering;

5.6.9.2 Tents / Marquees; and

5.6.9.3 Commemorative advertising in the commercial media.

5.6.10 Ms. Ncitha reported to the Council that, due to the emergency nature of the request, the Municipality would deviate from normal procurement processes in accordance with the provisions of Regulation 36(1)(a)(i) of the Municipal Supply Chain Management Regulations, which provides that, *“Goods and Services may be procured through a convenient process which may include direct negotiations in terms of an emergency.”*

5.6.11 In this regard, Ms. Ncitha reported to the Council that the Municipality would adopt a three (3) quote procurement process, and thus provided an itinerary of the activities that were to be undertaken in respect of the memorial services to be held in East London and Port Elizabeth from 10 to 15 December 2013.

5.6.12 She further reported that the funding of the project would be accommodated for and tabled in the Mid-Year Adjustment Budget to Council, in accordance with section 29 of the MFMA, which regulates the handling of unforeseen and unavoidable expenditure as follows: -

*“(1) The Mayor of a municipality may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget.”*

5.6.13 According to Ms. Ncitha, due to the emergency nature of the request, the BCM resorted to deviating from the normal procurement processes.

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- 5.6.14 She thus reported that the financial implications to the BCM for the project was an amount of R10million, which was identified by the Finance Directorate of the Municipality, from the savings within the institution and recommended that: -
- 5.6.14.1 The Council should consider and approve funding for transportation and venue costs from identified savings for the activities to commemorate the late Nelson Mandela;
- 5.6.14.2 The identified savings amounting to R10million be adjusted in the Adjustment Budget that would be tabled before the Council in February 2014; and
- 5.6.14.3 Council ratifies any expenditure incurred in respect of transport and venue costs associated with the commemoration of the late former President Mandela.
- 5.6.15 The Council deliberated on the Executive Mayor's report and Cllr. Mdyolo of the Pan Africanist Congress objected to the amount of R10million and stated that, in as much as the setting aside of the amount was for a good cause, he was concerned that there was no breakdown on how it was going to be spent.
- 5.6.16 It was Cllr. Mdyolo's contention that no amount of money had been indicated in the list of activities to be undertaken and as such, he was reluctant to agree on a figure without a financial breakdown, as that would be tantamount to signing the service provider a blank cheque. He thus requested that, in the absence of a financial breakdown, it be recorded that the PAC dissents from the decision of the Council.
- 5.6.17 The Council took a Resolution approving the Executive Mayor's report and recommendations. It was also resolved that the Acting Director: Executive Support Service should table a further report to the Council at its meeting that was scheduled for January 2014, detailing the financial breakdown in respect of the expenditure related to the project.

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- 5.6.18 On 5 March 2015, the Executive Mayor of the BCM, Cllr. Z Ncitha was interviewed during the investigation, in particular regarding her involvement in the proposal for an amount of R10million to be set aside for purposes of providing transport for mourners who were to attending the memorial services in commemoration of the late President Mandela.
- 5.6.19 Cllr. Ncitha confirmed that she, in her capacity as the Executive Mayor, initiated the process presenting the item for the provision of R10million by the Council for purposes as stated above.
- 5.6.20 In narrating the process that she followed, Cllr. Ncitha stated that she started by calling the City Manager and the CFO to discuss the proposal that it would be proper for the Municipality to have a fund set aside for purposes of hiring transport and/or venues.
- 5.6.21 At the time, she was aware of a Circular from the Minister of Finance that prohibited Municipalities from providing catering for the mourners attending these events. According to Cllr. Ncitha, she instructed that the City Manager and the CFO find funds from the municipal budget. When she was asked whether she attended the Special Provincial EXCO meeting held in East London on the evening of 6 December 2013, Cllr. Ncitha at first denied knowledge of that meeting, but later admitted that she attended the 4<sup>th</sup> Term Special EXCO meeting.
- 5.6.22 She stated that she was not aware that the Municipality could source funding from the ECDC, despite the fact that this was resolved at the Provincial EXCO meeting. She stated that she was under the impression that these funds were meant for social infrastructure projects only.
- 5.6.23 She stated that she initially proposed an amount of R15million to the City Manager and the CFO. However they returned to her indicating that only R10million would be available.

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- 5.6.24 When she was informed during the investigation of evidence indicating that the proposal of R15million came from the *Regional Secretary of the ANC* (African National Congress), *Mr. Pumlani Mkolo*, Cllr. Ncitha denied any knowledge thereof and insisted that the proposal was her idea.
- 5.6.25 With regard to allegations that she sent the City Manager and the CFO to the regional offices of the ANC to find out how much money the Municipality had to reserve for the project, Cllr. Ncitha admitted that, indeed, she asked them to touch base with the ANC as the Municipality and the ANC's constituencies are the same. In this regard, the interview with Cllr. Ncitha went as follows: -

ADV C H FOURIE:  
(PPSA)

*Public Protector, I think in all fairness we should just put to the Mayor the short version of the evidence that we have with regards to the R15m. The evidence that we have is that the meeting took place between the Mayor and the City Manager and the CFO, where this was discussed. Shortly thereafter, on the very same day, I'm not sure when, the Mayor ... the City Manager and CFO walked to the office of the Regional ANC office where they met with ANC people and also with the Regional Secretary.*

*At that meeting the amount of R15m was discussed, it was then agreed that the amount would be R10m and the representatives of the ANC in that ANC meeting then provided the CFO and the City Manager with a list of the activities that the R10m should be used for, which list then became the basis of the CFO's document that he prepared for the Council.*

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ADV MADONSELA:

**(Public Protector)**

*Right. Before the Mayor answers Advocate Fourie, you said the CFO and the... walked to the ANC office?*

ADV FOURIE:

*Yes.*

ADV MADONSELA:

*Who directed them to do that?*

ADV FOURIE:

*It's our information that it was at the suggestion, or insistence, of the Executive Mayor that they should go there.*

ADV MADONSELA:

*Okay, so that's the thing then, Mayor, is that the suggestion is or the allegation is that you directed those two to go to the ANC to find information about how much exactly is required and what is this money going to do? Because we were trying to get your version of how did you arrive at this figure? You said you knew the things, but how did you quantify them and say this one will cost R8 000 and this one will cost R1m. You heard their version, their version says it was the ANC that made the decision.*

CLLR NCITHA:

*It's true that it's me who gave them the figure. And secondly on the issue of the ANC, there is partly fact in what they're saying. I said when they put together a plan, they must also take into consideration that their constituency that will be ferrying, is the same with the ANC constituency. So that you don't have parallel processes, they must be touching base in terms of developing a programme. I did say that to them.*

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ADV MADONSELA: *Is that an admission then that they went to the, across to the ANC regional office at your suggestion that they should touch base with the ANC because the constituency is the same?*

CLLR NCITHA: *I did suggest that.*

ADV MADONSELA: *Right. But is the constituency the same? Is everyone who was going to be catered for, going to Madiba's funeral, ANC?*

CLLR NCITHA: *The majority of people that you would get in the Buffalo City area is ANC people. But we're not discriminating, anyone that is coming from any other political party, that was the reason behind that, so that there is no duplication. We hired buses they end up getting empty.*

ADV MADONSELA: *But what about the churches, they might also be hiring buses?*

CLLR NCITHA: *We even invited them.*

ADV MADONSELA: *No, but I'm saying in terms of consultations, because you were saying to consult what's needed, you thought it was the ANC that would be ideal. But what about the PAC? What about the churches, what about the non-aligned Women's Organisations? Were they also not supposed to be saved from duplicating costs?*

CLLR NCITHA: *The reason behind, I'm still repeating it, is because the majority of those would get it from the ANC side. Not that the PAC, the churches, they were also invited to be*

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*part of those that get ferried. The office of the Speaker was instrumental to make sure that all political parties are getting to be ferried to the funeral and memorial services.*

ADV MADONSELA: *Just so they're clear, but I don't want to labour the point, Executive Mayor. If there's a consultation around what will be needed, you say it's because the ANC shouldn't, didn't these also need to be consulted if you needed to go outside (inaudible) didn't you need to consult as well, to see what are their own plans?*

CLLR NCITHA: *But I didn't think about that, because of the fact that I already said.*

- 5.6.26 Subsequently, so stated Cllr. Ncitha, she instructed the City Manager and the CFO to prepare a submission to the Council to enable her to table an item before the Council. However, when the document was ready, she was out of town and thus requested the Deputy Mayor to sign it on her behalf, as it could not wait for her to come back. She however presented it at the Council on 11 December 2013.
- 5.6.27 With regard to the allegation that she misled the Council by stating in the Council submission “emanating from her meeting with the ECPG, it was resolved that the BCM should identify funding for the citizens to be transported to the identified venues.” Cllr. Ncitha stated that she never mentioned anything about the ECPG in her presentation and was surprised to hear that she misled the Council.
- 5.6.28 According to Cllr. Ncitha, she did not read the submission before she presented it to the Council, as she assumed that it would contain what she had agreed on in her meeting with the Deputy Mayor, the Chief Whip and the Speaker of the Council.

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- 5.6.29 Cllr. Ncitha admitted that no competitive procurement process was followed. She confirmed that the PAC Councillor, Mr. Jerome Mdyolo, was uncomfortable about the amount involved, as well as the fact that there was no proper business plan. In this regard, she assured Cllr. Mdyolo that the Municipality would account for each and every cent spent.
- 5.6.30 According to Cllr. Ncitha, she requested reports from the Municipality's administration in January 2014, on how the funds were spent to enable her to report back to Council. She was surprised to learn that the officials could not provide her with reports as they were awaiting same from the service provider. She then reported the matter to the Hawks (SAPS) on 24 January 2014.
- 5.6.31 When Cllr. Ncitha was asked about an amount of R1.3million of municipal funds that were used to purchase T-shirts for the ANC, she admitted that it indeed happened and was reported on by the *Daily Dispatch* newspaper.
- 5.6.32 However, Cllr. Ncitha could not understand how these funds ended up being used for the ANC T-shirts, as the Council Resolution was clear and never referred to the provision of T-shirts. According to Cllr. Ncitha, she knew of two service providers who paid back some of the funds.
- 5.6.33 Cllr. Ncitha was also not aware that the R10million that was made available by the CFO was actually obtained from the budget that was earmarked for the Indigent Services Programme, intended for communities that are unable to pay for services such as electricity and water. She thought the funds would come from savings relating to funded vacant posts.
- 5.6.34 On 12 September 2017, the Public Protector furnished Cllr. Ncitha with a notice in terms of section 7(9)(a) of the Public Protector Act, thus affording her a further opportunity to respond to the information and evidence in the possession of the Public Protector, which implicates her. Cllr. Ncitha is currently a Member of Parliament for the African National Congress in the National Assembly.

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- 5.6.35 However Cllr. Ncitha failed to respond to the notice, as a consequence of which no further inputs from her could be included in this Report.
- 5.6.36 On 5 March 2015, the BCM City Manager, Mr. Andile Fani appeared before the Public Protector and made a presentation based on an affidavit that he signed with the Hawks on 20 March 2014, in connection with a criminal matter that is under investigation.
- 5.6.37 According to Mr. Fani, on 9 December 2013, he, together with the CFO, Mr. V Pillay, were called to an urgent meeting by the Executive Mayor, Cllr. Ncitha. At the meeting, Cllr. Ncitha requested that he avails an amount of R15million to be utilized for the late President Mandela's commemorative activities. He then indicated to her that the Municipality could not afford to spend R15million that was not backed up by any plan. After deliberations, so stated Mr. Fani, he agreed to avail an amount of R10million of the Municipality's funds.
- 5.6.38 According to Mr. Fani, as an advisor to the Executive Mayor, he presented her with a Circular from National Treasury, which provided guidelines on how Municipalities would participate in any programme or activities linked to former President Mandela's commemorative activities. He stated that the Circular clearly indicated which items municipal funds could be spent on. Cllr. Ncitha indicated her awareness of the Circular and he further advised that she did not have discretionary authority to allocate the available budget, and as such she had to take an item to Council for approval. The matter was then tabled before the Council for approval on 11 December 2013.
- 5.6.39 With regard to the involvement of the ANC in the matter, Mr. Fani stated that the Executive Mayor further indicated that the commemorative programme would be a joint programme with the ruling party (African National Congress). He was tasked to set up mechanisms that would integrate the joint programmes.

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- 5.6.40 Mr. Fani stated that he and the CFO, Mr. Ivan Pillay went to the nearby ANC Regional offices to advise them of the governance framework established by National Treasury for Municipalities to participate in the commemorative activities.
- 5.6.41 Procurement processes in accordance with the prescribed deviation procedures were prepared. However, the official responsible for Executive Support Services, Ms. Ondela Mahlangu, apparently refused to sign the documents, though she later relented and signed. It was only after the matter was reported in the print media that Mr Fani became aware that there were irregularities, and thus requested that the matter be reported to the Executive Mayor.
- 5.6.42 Amongst the documents that Mr. Fani presented at the interview, was a letter addressed to the former Head of the Provincial Department Cooperative Governance and Traditional Affairs, Mr. S Khanyile, dated 5 February 2014 and titled, “*ALLEGED IRREGULAR EXPENDITURE IN RESPECT OF EVENTS LEADING UP TO THE FUNERAL OF THE LATE FORMER PRESIDENT MR NELSON MANDELA.*”
- 5.6.43 In this letter, Mr. Fani stated that the Municipal Council of the BCM considered a report tabled by the Executive Mayor, Ms. Z V Ncitha on 11 December 2013 and took a Resolution, which read: -
- “1. *That the Council, having considered the tabled report of the Executive Mayor under the above heading, to the Council meeting held on 11 December 2013, **APPROVES** the funding for transportation and venue costs from savings to be identified by the Chief Financial Officer for the activities to commemorate the late Nelson Mandela.*
  
  2. *That the savings to be identified, amounting to R10million for the purpose stated in paragraph (1) hereof, be included in the Adjustment budget to be considered at the Council meeting to be held in February 2014*

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3. *That the Council ratifies any expenditure incurred in respect of transport and venue costs associated with the commemoration activities for the late Nelson Mandela and to this end, a further report be submitted by the Acting Director : Executive Support Services to the Council meeting scheduled for January 2014 detailing the financial breakdown in respect of expenditure related thereto.”*

- 5.6.44 With regard to the involvement of the City Manager’s office, Mr. Fani stated in his correspondence that the Executive Mayor requested him and the CFO to attend a consultative meeting to discuss the funding needs of the Directorate of Executive Support Services, with a view to facilitating the planned commemorative programme.
- 5.6.45 He further stated that, after the Council had considered the report of the Executive Mayor on 11 December 2013, he received a deviation report for the procurement of services for the events signed by the Acting Director: Executive Support Services, which was supported by the SCM Directorate and the CFO. According to him, the deviation report followed the appropriate administrative process as prescribed in the Regulation 36 of the Municipal Supply Chain Management Regulations and the BCM SCM Policy.
- 5.6.46 According to Mr. Fani, whilst he was authorised by Regulation 36 to consider and approve deviations, it was the responsibility of the relevant directorate of the Municipality to implement the deviation. However, as a control measure, the accounting officer always advised the implementing directorate of their legal responsibilities to prepare a report of the deviation to be tabled at the next Council meeting.
- 5.6.47 At the interview Mr. Fani confirmed what is stated in the documents that he submitted, in particular that the Executive Mayor told him that the commemoration programme would be done jointly with the ANC, and informed him that the Regional Secretary of the ANC, Mr. Pumlanzi Mkhomo would be calling him.

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- 5.6.48 He however proposed that the CFO accompanies him to the offices of the ANC as they are in close proximity to the municipal offices. They walked to the ANC offices and met with the Regional Secretary. At the meeting, Mr. Fani outlined what the Municipality would be allowed to contribute in terms of guidelines from National Treasury.
- 5.6.49 According to Mr. Fani, other than the R5 985 000.00 that had already been paid to *Victory Ticket750CC*, there was a further attempt to obtain an additional payment of R3million from the BCM. When this was brought to his attention by the CFO, he instructed him not to pay any further amounts to the entity.
- 5.6.50 When asked about the quotation submitted by *Victory Ticket750CC* dated 9 December 2013, which was even before the Council meeting of 11 December 2013, to consider the request for deviation, Mr. Fani stated that he noticed the anomaly and conceded that it appears as if it was known already that the Council would meet to approve the funding. He also stated that the fact that the *Victory Ticket750CC* quotation was for approximately R9.5million points to a possibility that someone must have known the amount that was reserved for funding the commemorative activities.
- 5.6.51 Regarding the purchasing of ANC T-shirts using municipal funds, Mr. Fani stated that he was not aware of that until the criminal investigation by the SAPS, which showed him the evidence that some of the municipal funds were used to purchase ANC T-shirts.
- 5.6.52 He was further not aware that, despite *Victory Ticket750CC* submitting a quotation dated 9 December 2013, they were only registered on the BCM Supplier database on 11 December 2013, the date on which the Council took the Resolution approving the deviation from normal procurement processes.

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- 5.6.53 With regard to the reason why no appropriate action was taken against Messrs. *Thembelani Sali* and *Nqaba Ludidi*, whom the director of *Victory Ticket750CC* admitted to have inappropriately benefitted from the transaction, Mr. Fani stated that it was because he was not given an opportunity as the accounting officer to investigate the matter and to take appropriate action against the two officials. He stated that he was stopped from conducting the investigation by the Executive Mayor.
- 5.6.54 On 5 March 2015, the CFO of the BCM, Mr. Vincent Pillay, appeared before the Public Protector. Amongst the information and documents that he presented was an affidavit that he signed on 24 January 2014, in connection with allegations of irregular expenditure in respect of events leading up to the funeral of President Mandela.
- 5.6.55 In his affidavit, Mr. Pillay stated that on Friday, 6 December 2013, an e-mail Circular was received by the Buffalo City Municipality from the National Treasury following the passing on of President Mandela, indicating the expenditure that was permissible in accommodating memorial services.
- 5.6.56 He further stated that, on 9 December 2013, he and the City Manager, Mr. Andile Fani, were summoned by the Executive Mayor, Cllr. Zukiswa Ncitha. At the meeting, the Executive Mayor indicated that she met with the provincial structures of the ruling party and that an amount of R15million was required for the expenses relating to the commemoration services of the late President Mandela.
- 5.6.57 According to Mr. Pillay, the City Manager reminded the Executive Mayor of the instruction contained in a Circular received from the National Treasury that was authored by the Treasury's Chief Director responsible for Local Government Budget Analysis, Mr. Jan Hattingh.

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5.6.58 The Circular that Mr. Pillay was referring to is addressed to Mayors, Municipal Managers, CFOs and other municipal officials under the subject, “**Cost implications regarding hosting memorial services for the late former President NR Mandela,**” which reads as follows: -

*“National Treasury has received a number of requests from municipalities seeking guidance with regard to costs associated with funeral arrangements associated with regard to the Memorial Services for the late President. You will no doubt agree that this is a sensitive matter and needs to be treated with utmost care and respect.*

*The Minister of Finance has determined that the following activities at a reasonable cost are permissible: -*

*Transportation services; and  
Venue costs (community halls, multipurpose centres and stadia)*

*However, the following costs are **NOT** permissible: -*

*Catering;*

*Tents / Marques; and*

*Commemorative advertising in the commercial media*

*Municipalities should ensure that the costs associated with the above arrangements are kept to a bare minimum.” (sic)*

5.6.59 According to Mr. Pillay, the Executive Mayor was aware of the contents of the Circular. He and the City Manager and Mr. Pillay informed Cllr. Ncitha that savings had to be identified to expend funds on the funeral, and a report would have to be tabled before the Council for approval.

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- 5.6.60 Mr. Fani enquired from the Mayor about the logistical arrangements around the memorial services that were to be held so as to arrive at the approximate cost to be incurred.
- 5.6.61 Mr Pillay stated in his affidavit that it was at this point that **the Executive Mayor instructed him and the City Manager to meet with the Regional ANC officials at the ANC offices. They immediately proceeded to meet with the Regional Secretary of the ANC and his Deputy.**
- 5.6.62 He further stated that the Regional Secretary of the ANC indicated an amount of R15million was requested, and that R10million would be sufficient.
- 5.6.63 According to Mr. Pillay, after a brief discussion, the Regional Secretary of the ANC provided them with a programme for the memorial services which contained a date, venue and times. The programme was incorporated into the Exigency Council Report that was tabled on 11 December 2013.
- 5.6.64 It was noted during the investigation that both the BCM's Executive Mayor, Cllr. Ncitha Faku and the City Manager, Mr. Fani attended the ECPG Special 4<sup>th</sup> term EXCO meeting held at the Regent Hotel in East London on 6 December 2013.
- 5.6.65 Mr. Pillay stated in his affidavit that he as the CFO of the BCM subsequently identified savings within the **City's Equitable Share budget** amounting to R10million which he immediately ring-fenced and transferred to the cost centre of the Acting Director responsible for Executive Support Services, for the activities relating to President Mandela's funeral.
- 5.6.66 According to Mr. Pillay, this business unit is responsible and accountable for the expenditure incurred relating to the budget of the directorate in terms of section 78 of the MFMA, where all financial management becomes the responsibility of the Director.

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- 5.6.67 This adjustment, according to Mr. Pillay, was going to be included in the report to Council in February 2014, when the Mid-Year Adjustment Budget would be tabled in accordance with the provisions of sections 28 and 29 of the MFMA.
- 5.6.68 Mr. Pillay confirmed that the Executive Mayor tabled a report before the Council for its consideration and approval of the R10million funding for the transport costs from identified savings for the activities to commemorate the late President Mandela, on 11 December 2013. The report was approved.
- 5.6.69 According to Mr. Pillay, his office communicated with the Acting Director: Executive Support Services, that a deviation report in terms of an emergency in accordance with the provisions of Regulation 36(1)(a) of the Municipal Supply Chain Management Regulations must be approved by the accounting officer, and that this report had to be supported by the General Manager: Supply Chain Management and the CFO.
- 5.6.70 In rendering assistance to the Executive Support, Mr. Pillay's office prepared the deviation report in compliance with the requirements of the MFMA, thus detailing reasons for deviating from the normal procurement processes and procedures and utilizing the three (3) quote system which was then signed by the Acting Director: Executive Support and other relevant parties.
- 5.6.71 The City Manager subsequently approved the deviation on condition that *“all transparent procurement processes were followed and that a deviation report was submitted to the next Council meeting as well as the Bid Adjudication Committee (BAC) for noting.”* The BAC subsequently noted the report which was tabled before the Council meeting of 31 January 2014.
- 5.6.72 Mr. Pillay explained that, in emergency cases, once a deviation report is approved by the City Manager, the original copy is maintained by the service department and copies from the Office of the City Manager are then circulated to SCM and the CFO's office. The buyers at the SCM would source the three quotes based on the deviation.

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The service provider whose quote has lowest price would be selected, subject to the following provisions of the Municipal Supply Chain Management Regulations: -

- “(a) That the service provider is on the BCM database (full name and company registration details);*
- (b) That the tax matters of the service provider is in order (tax clearance certificate);*
- (c) That there is a Deviation report by the Accounting Officer to Council.”*

5.6.73 According to Mr. Pillay, on 12 December 2013, three (3) quotations were received from the following service providers: -

5.6.73.1 *MZT Services* for an amount of R12 255 000.00;

5.6.73.2 *MNI Transport* for an amount of R10 580 000.00; and

5.6.73.3 *Victory Ticket* for an amount of R9 946 000.00.

5.6.74 The quotations were processed by the SCM business unit of the Municipality, who confirmed that the lowest quote was from *Victory Ticket 750cc*, and it was confirmed that this entity's tax records with SARS were in order.

5.6.75 According to Mr. Pillay, the procurement of *Victory Ticket750CC* to render the services was done on the basis of an emergency in terms of Regulation 36(1)(a) of the Municipal Supply Chain Management Regulations. He further stated that he was not aware of the specifications that were given to the suppliers regarding the requirements as this would have been provided by the service department.

5.6.76 Subsequently, Mr. Pillay's office received an invoice from *Victory Ticket750cc* for an amount of R5 985 000.00. He, together with the Asset and Risk Department questioned the information on the invoice and instructed his office to contact the service provider to amend it.

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- 5.6.77 According to Mr. Pillay, he then received numerous requests from the service provider and the ANC Regional Secretary, Mr. Pumlani Mkolo for payment of the invoice. On receipt of the amended invoice stating all the required information, his office prepared the cheque requisition on behalf of the Directorate of Support Services, attaching all the necessary supporting documentation. On 12 December 2013, he communicated with the Directorate: Support Service to authorise the payment and subsequently, a cheque requisition amounting to R5 985 000.00 was authorised on 13 December 2013 for payment that he countersigned, as the amount was in excess of R5million.
- 5.6.78 According to Mr. Pillay, he subsequently received another cheque requisition dated 10 January 2014 for an amount of R3 013 000.00. However, this payment was not processed as the City Manager instructed that it should not be paid.
- 5.6.79 On 5 March 2015, Mr. Pillay was also interviewed with regard to the role he played in the matter. During the interview, Mr. Pillay confirmed the contents of his affidavit.
- 5.6.80 With regard to the consultation with the ANC on what ought to be municipal business, Mr. Pillay confirmed that he and Mr. Fani consulted with the Regional Secretary of the ANC, Mr. Mkolo at the ANC offices where they found Mr. Mkolo and his deputy in a boardroom.
- 5.6.81 On arrival, so stated Mr. Pillay, the City Manager informed the ANC officials that they were sent by the Executive Mayor in connection with logistical arrangements for the commemorative activities and after a discussion, a figure of R10million was agreed upon and they returned to the municipal offices.
- 5.6.82 He confirmed that he was tasked to draft a submission to the Municipal Council to request approval of deviation from normal procurement processes. He then ring-fenced the amount of R10 million and put it under a vote for special projects, which resorts in the Mayor's Office under the Directorate: Executive Support.

- 5.6.83 Mr. Pillay confirmed the discomfort that Ms. Mahlangu had as a consequence of which she initially refused to sign the request for deviation, and that she later signed the document. He stated that two days later, his office received an envelope with three quotations which he referred to the SCM Department. He was later advised that a supplier had been selected.
- 5.6.84 According to Mr. Pillay, a Report to Council for approval was prepared and they went ahead with the necessary processes until payment was made. Later on, there was another invoice for about R4million which the City Manager refused to pay, essentially because of the media reports about the irregularities with regard to the first payment.
- 5.6.85 When he was asked who brought the quotations and invoices, Mr. Pillay did not know and when asked where the source of funds was, he said they identified funding from the ***Indigency Subsidy Programme***. With regard to the proposal of R15million, Mr. Pillay stated that it came from the Executive Mayor and was changed by the Regional Secretary of the ANC to be R10million.
- 5.6.86 **Verbatim, the interview went as follows: -**

ADV. FOURIE:

*The... let me just understand the sequence correctly, you... were you at a meeting when the Executive Mayor indicated that an amount of fifteen million Rands must be found for this project?*

MR PILLAY:

*Correct.*

ADV. FOURIE:

*Was it the Council?*

MR PILLAY:

*No, it was in a... in a chambers.*

ADV. FOURIE:

*Oh, she called you to the chambers?*

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- MR PILLAY: Yes.
- ADV. FOURIE: Okay. She then left on her instructions from there and went to the ANC Regional Office?
- MR PILLAY: Yeah, well, she spoke to the City Manager... that one... when he asked for the logistical arrangements then she spoke in the Xhosa language which I don't understand...
- ADV. FOURIE: Yes.
- MR PILLAY: And then he got up and then I followed him and as we got outside I asked him where are we going, **he said we're going to the Regional ANC Divisional Office to get the, the logistical arrangement how we're going to quantify that.**
- ADV. FOURIE: Alright so that was your obvious assumption?
- MR PILLAY: Yes.
- ADV. FOURIE: Now when she spoke about the fifteen million, where did she get the amount from, how was it determined to be fifteen million?
- MR PILLAY: That is what the City Manager questioned her, he asked her how did...
- ADV. FOURIE: Did she explain?
- MR PILLAY: No, she just said go to the office.
- ADV. FOURIE: So that was just an amount?

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MR PILLAY: Yes.

ADV. FOURIE: So you then went to the ANC office and in their discussion which you couldn't follow because you do not understand the language, the amount came down by five million, am I right?

MR PILLAY: I, I heard the secretary mention, not fifteen he  
said ten.

ADV. FOURIE: Yes.

MR PILLAY: Because the City Manager spoke to him and said... I think he told him

ADV. FOURIE: What amount did Council eventually approve?

MR PILLAY: Ten.

ADV. FOURIE: **Yes. Now this regional secretary is he official of government?**

MR PILLAY: **No.**

ADV. FOURIE: **The ANC office does it have anything to do with government?**

MR PILLAY: **No.**

ADV. FOURIE: **Does it have any control over government funds?**

MR PILLAY: **No.**

ADV. FOURIE: So how did this happen, did you not... did that... was this not strange to you... we're talking about public money here?

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MR PILLAY:

*Yes, remember we need to establish, establish an amount in terms of the ceremonies, now my assumption is that there was a meeting between the Mayor and the relevant parties for the Mayor to come up with a figure. So we need to take a report to Council so to establish the logistics the Mayor directed us to that office to establish...*

ADV. FOURIE:

*No, you've already told us about it... I'm asking do we... as the CEO you are in that meeting...*

MR PILLAY:

*Yes.*

ADV. FOURIE:

***You are sitting in an ANC office where they talk about public money...***

MR PILLAY:

*Yes.*

ADV. FOURIE:

***They are not supposed to have any control over public money, isn't it?***

MR PILLAY:

***That's correct, yes.***

ADV. FOURIE:

*And it, **that didn't bother you?***

MR PILLAY:

*Well, we would... well to extent that we need to determine what, what type of figure we take to Council... yes, you're correct, it did bother me but **remember I'm working upon instructions from both the leaderships.***

ADV. FOURIE:

*Why did think it bothered you?*

MR PILLAY:

***In, in terms of that we're sitting in an ANC office, you quite right in terms of that we are***

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*sitting where, where public rights, its public funds... I just sat there and, and not commented because I was under, under the... my, my superior was there, we come from the leadership office... but for me it was to determine the type of report that I was going to take to Council for approval and I needed to know the logistics...*

ADV. FOURIE:

Yes.

ADV. FOURIE:

*You are the CEO of a public institution... To take it one step further you are then provided with a list by the ANC on how this ten million should be spent, what it should be used for, am I right?*

MR PILLAY:

Yes.

ADV. FOURIE:

*So a political party gives the Municipality now instructions on how to spend money and they have just decided it will be ten million Rand... you're sitting there together with the accounting officers or... and you are the CFO and you accept that and you even take it to Council.*

MR PILLAY:

*The circumstances were different from a normal procurement, because it was the late Nelson Mandela's funeral and the ANC were then coordinating the funeral arrangements.*

ADV. FOURIE:

*The ANC?*

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MR PILLAY: ***The ANC were coordinating the funeral arrangements...***

ADV. FOURIE: ***Who was planning for that?***

MR PILLAY: ***The Council, obviously...***

ADV. FOURIE: *The tax payer?*

MR PILLAY: *Yes, but remember that we had a circular from [inaudible] and National... National said that we can pay for revenue... for venue and for, for transport.*

ADV. FOURIE: ***National Treasury is not part of the ANC is it?***

MR PILLAY: ***No, they're not...*** (emphasis added)

- 5.6.87 Mr. Pillay also confirmed that R1.3million was used to purchase t-shirts but the service provider has since refunded the Municipality that which was paid.
- 5.6.88 He further confirmed having been requested by the City Manager to compile a close-out report, detailing the expenditure of the funds which he and Ms. Mahlangu compiled and was presented to the Municipal Council that decided to refer the matter to the MEC for Cooperative Governance and Traditional Affairs, Hon. Mlibo Qoboshiyane.
- 5.6.89 On 12 September 2017, the Public Protector issued Mr. Pillay with a Notice in terms of section 7(9)(a) of the Public Protector Act, informing him about the information and evidence implicating him that is in the possession of the Public Protector, and thus affording him a further opportunity to respond thereto.

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- 5.6.90 It was expected that Mr. Pillay would respond to the Notice before close of business on 22 September 2017. He did not respond and instead, on 10 November 2017, Mr. Pillay requested an extension of time to submit his response. The Public Protector acceded to the request and granted him an extension until 1 December 2017. He duly responded.
- 5.6.91 In his response, Mr. Pillay still does not appear to differentiate between private political party interests and those of the state. He stated that he was **“merely attempting to fulfil his duties as a CFO.”** He again confirmed that the Executive Mayor initially could not provide him and the City Manager with an estimate of the expenditure that the Municipality was to incur in respect of the funeral of President Mandela. Instead she referred them to the ANC. This he did not regard as unusual.
- 5.6.92 He attached a copy of the African National Congress Programme, printed on its letterhead, consisting of an itinerary for the memorial services that were to be held for President Mandela.
- 5.6.93 **In paragraph 22 of his response, Mr. Pillay stated that: -**
- “At the meeting with the regional leadership of the ANC on 9 December 2013, the Regional Secretary, Mr Pumlanzi Mkhomo, indicated that R 10 million would be sufficient for the joint initiative and handed Mr Fani and Mr Pillay a programme that had been prepared by his office”.*
- 5.6.94 Judging by this response, Mr. Pillay does not consider this meeting inappropriate.
- 5.6.95 On 11 February 2015, a subpoena was issued in terms of the provisions of sections 7(4) and (5) of the Public Protector Act, calling upon Ms. Mahlangu of the BCM to appear before the Public Protector in connection with the investigation, in particular the role that she played in the matter regarding a payment of R5 985.000.00 of public funds made to *Victory Ticket 750cc*. She appeared before the Public Protector on 5 March 2015 and also made a written submission.

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- 5.6.96 In her submission, Ms. Mahlangu stated that the allocation of the amount of R10million was at the specific advice of the City Manager following a meeting that he attended with the Executive Mayor and CFO.
- 5.6.97 The allocation of the said amount was approved by the Council as well as the deviation from normal procurement processes as envisaged by Regulation 36 of the Municipal SCM Regulations.
- 5.6.98 She also stated that she never took part in the decision to appoint *Victory Ticket 750cc* to manage the transport arrangements on behalf of the Municipality.
- 5.6.99 According to Ms. Mahlangu, she was not in attendance at the meeting held on 9 December 2013. However, on 12 December 2013, she received a call from the CFO, Mr. Pillay, who informed her about the name of a preferred service provider.
- 5.6.100 According to Ms. Mahlangu, throughout the entire process, she was subjected to unrelenting pressure from the Executive Mayor, the ANC Regional Secretary, Mr. Pumlani Mkolo, and Mr. Pillay to cooperate and surrender to directives. She felt that she was used as a pawn to swindle the Municipality of its funds by high profile people who were the real drivers of the project.
- 5.6.101 Despite that fact that she was under extreme pressure, she acted within the mandate of the Council Resolution and a deviation initiated by the CFO, and approved by the Council.
- 5.6.102 Ms. Mahlangu attached to her submission a report dated 29 January 2014, addressed to the City Manager, in which she gives an account as to what actually happened. In this report she stated that her involvement in the matter was at the instance of the CFO, Mr. Pillay, who called her on 12 December 2013.

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- 5.6.103 Mr. Pillay advised her that he had prepared a deviation report for procurement of transport services to ferry BCM mourners to memorial services for the late President Mandela. He thus requested her to urgently get back to the office so as to sign the Memorandum.
- 5.6.104 When Ms. Mahlangu asked Mr. Pillay why the deviation report had to be signed by her, the latter stated that it was because the matter was related to Public Participation, which was her directorate. He informed her that an amount of R10million had been approved by the Council and was reallocated to the budget of her directorate.
- 5.6.105 Ms. Mahlangu stated that she obliged and signed the Memorandum, which had already been approved by Mr. Pillay.
- 5.6.106 Later that same day, Mr. Pillay advised her that *Victory Ticket 750cc*, an entity owned by *Mr. Mzwandile Sokwali*, had been appointed to provide transportation to the memorial services and that she and her public participation team should work with him in respect of logistical arrangements.
- 5.6.107 **According to Ms. Mahlangu, her team's project plan had been rejected, and as such they had to use the service provider's plan.** On the same day, she was called again by Mr. Pillay to sign a requisition form for the appointed service provider, which she refused, as she was not sure whether procurement processes were followed. She stated that **on 13 December 2013, she was called by the Regional Secretary of the ANC, Mr. Pumlanzi Mkhomo, who confronted and intimidated her for not wanting to sign the requisition form.**
- 5.6.108 However, she met with the City Manager and Mr. Pillay, and was advised that all the requisite procurement processes were followed, and that she must sign the document which she did.

- 5.6.109 Ms. Mahlangu confirmed that, in addition to the invoice for R5 985 000.00, received from *Victory Ticket 750cc*, she received another invoice from the same entity for approximately R3million on 17 January 2014, delivered to her by a messenger **from Mr. Pillay's office**. Apparently, on instructions from the City Manager, this invoice was not paid.
- 5.6.110 During her interview she confirmed the contents of her submission of the same date, as well as the report of 29 January 2014, addressed to the City Manager explaining her role in the appointment of and the payments made to *Victory Ticket 750cc*.
- 5.6.111 Ms. Mahlangu stated that she signed what she was requested to sign because of pressure exerted on her, not only by her seniors in the Municipality such as Mr. Pillay, but by outsiders as well, such as the ANC's Mr. Phumlani Mkolo, who phoned her several times.
- 5.6.112 She was also worried that if she refused, she may be disciplined for insubordination. However, she was concerned about the fact that Mr. Pillay told her that there is R10million allocated to her directorate's budget, and that a service provider has already been appointed. She was supposed to have initiated the process. Instead, it was done elsewhere, and all that was expected of her was just to sign, committing the Municipality to something that she was not aware of.
- 5.6.113 On 8 December 2014, following a criminal investigation of the matter by the Hawks, a plea bargain agreement was entered into between the State and Mr Sokwali of *Victory Ticket750CC*. On 20 November 2014 Mr Sokwali made a statement detailing the sequence of events leading to the payment of R5 985 000.00 by the BCM to *Victory Ticket750CC*.
- 5.6.114 Mr Sokwali stated that he received a call from "Zuziwe", a person working at the ANC Regional Offices in East London, enquiring whether he had received a call from Mr Phumlani Mkolo, the Regional Secretary of the ANC, regarding his company submitting a quotation to render services.

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- 5.6.115 He informed her that he had not and was thus summoned to the ANC offices. According to Mr Sokwali, Mr Mkolo called him whilst on his way to the offices and told him that he had an urgent transport request.
- 5.6.116 Mr Sokwali attended at the ANC offices where he was given a document by *Zuziwe* regarding a programme for memorial services to be held for the late President Mandela. He was requested to furnish a quotation to transport mourners to various venues. He advised that he needed more information, which was later provided to him by Mkolo. He prepared a quotation for an amount of R6 272 750.00. **On submission of the quotation, Mkolo told him that the budget for the project is R10million and he must adjust his quotation accordingly.**
- 5.6.117 At Mkolo's instance and request, Mr Sokwali changed his quotation to R9 946 000.00 based on the higher numbers and Mkolo was satisfied with same. He was told by Mr Mkolo that **the ANC required the balance of the funds to finance some of its own activities.**
- 5.6.118 On 9 December 2014, Mr Mkolo requested him to submit his quotation at the ANC office. Thereafter, they went to the East London City Hall to attend a meeting. Present at the meeting were Ms Viwe Vazi who is not a municipal official, Ms Gomba, who is a Councillor and the Speaker of the Municipality, Ms Luleka Simon-Ndzele. They had to wait for Ms Ondela Mahlangu who was on her way from the Airport. On her arrival, the meeting commenced.
- 5.6.119 Mr Sokwali was introduced at the meeting by Mr Mkolo and was to be responsible for transport while Ms Vazi was going to provide catering and Mr Dean Fanoë who was not at the meeting, was going to supply T-shirts. According to Mr Sokwali, Mr Mkolo explained at the meeting that, *Victory Ticket750CC* was going to submit an invoice to the BCM that would include the amounts payable to **Ms Vazi** and **Mr Fanoë** and in turn the two would invoice *Victory Ticket750CC* for services rendered.

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5.6.120 The understanding was that Victory Ticket750CC would pay Ms Vazi and Mr Fanoë. With regard to the transportation of Cllr Sindiswa Gomba and her team to attend the provincial memorial service of President Mandela that was to be held in Port Elizabeth on 13 December 2013, Mr Sokwali stated that;

*“During the same meeting I was requested by the Speaker to hire a vehicle (a Mercedes Vito minibus or a C Class Mercedes Benz sedan) to convey Gomba and her team to Port Elizabeth to attend arrangements/preparations for an event which was scheduled to take place on Friday, 13 December 2014 in the Nelson Mandela Stadium.*

*I was also asked to arrange accommodation for them in a Port Elizabeth Hotel. I offered to make my Chrysler Voyager motor vehicle (7 seater) available to them and to pay for their accommodation at Bishops Inn in Port Elizabeth.” (emphasis added)*

5.6.121 However, Cllr Gomba and her delegation did not use the accommodation that had been arranged for them, instead they lodged at the Kings Garden Court in Port Elizabeth and returned to East London on Friday, 13 December 2013. Mr Sokwali confirmed that he transferred funds to pay for their accommodation at Kings Garden Court to his driver Mr Nyiba who duly paid for the accommodation.

5.6.122 With regard to the registration of Victory Ticket750CC on the BCM supplier database, Mr Sokwali stated in his statement that he received a telephone call from Mr Mkolo enquiring about his company registration and on realizing that the company was not registered, Mr Mkolo suggested that they visit the BCM offices situated at Chislehurst in East London where the municipality’s SCM Department resides.

5.6.123 At the offices they met with Mr Thembelani Sali who confirmed that the company was not registered. He called Mr Nqaba Ludidi with a request that the company be registered, which was done on 11 December 2013.

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5.6.124 Subsequently, Mr Sokwali collected the service provider registration certificate at the Oxford Street offices of the BCM. Thereafter, so stated Mr Sokwali, he commenced with the project and passengers from 23 municipal wards were transported to Gompo Hall in buses and minibus taxis which he arranged. According to him, two events took place on Wednesday, 11 December 2013 at the War Memorial Hall in King William's Town and the other at the Mdantsane Indoor Sport Centre.

5.6.125 He stated that the King Williams Town event was poorly attended, but the one in Mdantsane was well supported. Mr Sokwali stated in his sworn statement that he also coordinated the transportation requirements for an event which took place at the East London City Hall on Thursday, 12 December 2013, which was well attended by residents of all 50 Buffalo City Municipal wards. With regard to the arrangements for the transportation of **ANC employees** to the provincial memorial service of President Mandela that was held in Port Elizabeth, Mr Sokwali stated that;

*“On Friday, 13 December 2013, **Zuziwe of the ANC Office** requested me to arrange transport for employees at the ANC Regional Office and members of the East London and King Williams Town branches of SASCO to attend the Port Elizabeth Nelson Mandela Memorial Service.*

*I arranged and paid for three 15 seater minibus taxis and a 22 seater bus. Mourners were also transported from East London to the event in more buses and minibus taxis which I have arranged.”*

5.6.126 Mr Sokwali further stated that subsequently, the Regional Secretary of the ANC, Mr Mkolo requested him to submit an interim invoice for the work performed up to that stage. Whilst in the process of doing so, he called Mr Mkolo and advised him that he did not intend charging for the event that was held at the Mdantsane Indoor Sports Centre on 11 December 2013 as it was poorly attended.

5.6.127 In response thereto, so stated Mr Sokwali:

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*“He explained that the ANC required funds for other projects and instructed me to charge. I accordingly prepared an interim invoice based on the itinerary. I addressed it to the ANC. I submitted this invoice to the Regional Secretary at the ANC Office. He advised me that Buffalo City will pay the invoice. The Regional Secretary accompanied me to the office of the Chief Financial Officer of the municipality, Mr Pillay.*

*The Regional Secretary and I furnished the interim invoice to Pillay, who, after he has studied it summoned an unknown lady and handed it to her without comment.”*

- 5.6.128 According to Mr Sokwali, he was called the very same day by a lady from Mr Pillay’s office with a request to meet at her office. At the meeting, she explained to him that the invoice had to be corrected and she escorted him to Mr Pillay’s office where he was advised in the presence of Mr Hugo and another gentleman that the invoice was not sufficiently detailed in that it did not specify the number of buses and minibus taxis that were used and how many passengers were conveyed on the various routes.
- 5.6.129 He was also advised by the lady to invoice the BCM as opposed to the ANC as the Municipality was going to be responsible for payment. He was shown a copy of a pro forma invoice as an example of an invoice that would be acceptable to the municipality. Enquiries were also made to his status as a VAT vendor and he replied that as he renders transportation services, he was not. He was then directed to submit proof to that effect, which was done.
- 5.6.130 He then prepared an invoice for an amount of R7 760 000.00 and submitted same. With regard to his company invoicing the municipality and **the kind assistance he received from Mr Pillay**, Mr Sokwali said;

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***“I submitted the amended invoice on Friday, 13 December 2013 to Pillay. As the invoice contained an item relating to the conveyance of passengers to the Port Elizabeth event which was at that stage still in process, Pillay instructed me to omit that item from the invoice.***

*I complied with his instruction and submitted yet a further amended invoice in the amount of R5 985 000 to Pillay later that same day”.*

5.6.131 In his statement, Mr Sokwali stated that he accordingly amended the interim invoices submitted to the municipality on four occasions before the final invoice was accepted on Friday, 13 December 2013: In this regard he explained that;

5.6.131.1 The first invoice in the amount of R5 985 000, was incorrectly addressed to the ANC;

5.6.131.2 The second in the amount of R5 985 000, erroneously reflected *Victory Ticket’s* tax number as a VAT registration number;

5.6.131.3 The third in the amount of R5 985 000.00, reflected the number of taxi’s and buses that were used and also the number of passengers that were transported;

5.6.131.4 The fourth in the amount of R5 985 000.00, reflected the municipality’s VAT number;

5.6.131.5 The fifth in the amount of R7 760 000.00 which contained an item relating to the conveyance of passengers to Port Elizabeth event which was at that stage still in process.

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5.6.132 According to Mr Sokwali, Mr Pillay instructed him to omit the Port Elizabeth item from the invoice. Mr Sokwali stated in his sworn statement that he only became aware of the payment of his invoice by the BCM when he was contacted by the ANC Regional Secretary, Mr Mkolo on 14 December 2013, whilst he was still in Port Elizabeth. In this regard, he stated that:

*“I received a telephone call from the Regional Secretary. He informed me that the municipality had deposited an amount of R5 985 000 into the bank account of Victory Ticket.*

*(This payment was also confirmed by SMS cell phone message which was sent to me by Victory Ticket’s bank). **He asked me to effect payment for the T shirts and catering service providers in the amount of R1 380 000 and R899 000 respectively.**”*

5.6.133 On 14 December 2013, Mr Sokwali enquired from Mr Mkolo about the night vigil which was scheduled to be held at Sisa Dukashe Stadium in Mdantsane that evening. In response, Mr Mkolo advised him that the event had been cancelled. **However, he told him that as the ANC required funds for future election purposes, Victory Ticket should invoice for the night vigil.**

5.6.134 The funeral of the late President Mandela was held on Sunday, 15 December 2013. It was arranged that the mourners could view the funeral on large television screens at the Sisa Dukashe Stadium in Mdantsane from 08:00 onwards. Mr Sokwali arranged sufficient vehicles to convey the number of passengers he had listed down on the itinerary. The turnout was however disappointing. He nevertheless had to pay for all the vehicles that he arranged.

5.6.135 According to Mr Sokwali, on 14 January 2014, the *Daily Dispatch* newspaper published an article headlined, “*BCM pays six million for Madiba service taxis*” and there were subsequent media articles that were published on the topic.

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- 5.6.136 Subsequently, so stated Mr Sokwali, on 16 January 2014, Mr Mkolo called him informing him that the Municipality requires a comprehensive report setting out details concerning the number and types of vehicles used, the number of passengers conveyed and the routes followed.
- 5.6.137 He also requested that it be reflected in the report that the full amount which was paid by the Municipality to *Victory Ticket* was in respect of the conveyance of passengers to the various venues set out in the itinerary.
- 5.6.138 On Tuesday, 21 January 2014, a meeting was eventually held with Ms Mahlangu of the BCM. Mr Nqaba Ludidi and Ms Zacharia, who he thought were municipal employees also attended the meeting.
- 5.6.139 At the meeting, Ms Mahlangu explained that the Municipality required a detailed reconciliation setting out how the full amount paid to *Victory Ticket* was spent. She showed him a draft report and explained that the report that was required had to be similar.
- 5.6.140 On enquiry about the payments made for the T-shirts and catering, Ms Mahlangu responded that the funds which were availed by the Municipality were in respect of transport and that he should omit any reference to the other payments he had made.
- 5.6.141 He submitted the draft report to Ms Mahlangu who later requested that same should be typed on *Victory Ticket's* official letterhead, with a stamp and his signature. Mr Sokwali refused to oblige and consulted with his attorneys. Subsequently and under pressure from Mr Mkolo, he submitted a report to the municipality in respect of the R5 985 000.00 payment made by BCM to *Victory Ticket* which he stated was spent as follows:

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5.6.141.1	Mantella	R1 380 000
5.6.141.2	Forty Wing	R899 000
5.6.141.3	Mpindo's	R100 000
5.6.141.4	<u>Lilly Rose</u>	<u>R350 000</u>
	<b>TOTAL</b>	<b>R2 729 000</b>

5.6.142 He stated that Mr Mkolo instructed him inflate the quotation to cover ANC activities that would take place after the period of mourning. Further that, Mr Mkolo approached him for payment in respect of the following:

5.6.142.1 **R180 000.00** to cover an ANC event. This payment was made to Mr Mkolo at *Vincent Park Standard Bank* in East London;

5.6.142.2 On 14 December 2013, he was instructed by Mr Mkolo to give him **R10 000.00** which he did at *Hemmingways Mall* in East London and also gave him his *Chrysler Voyager* for purposes of travelling by the ANC to attend President Mandela's Funeral in Qunu, Mthatha;

5.6.142.3 The payments that Mr Sokwali, according to his statement made to municipal officials of the BCM on instructions from Mr Mkolo included an amount of R80 000 paid to Mr Thembelani Sali of the BCM Supply Chain Management Unit. This was made on the week of the 16<sup>th</sup> December 2014.

5.6.143 It was noted during the investigation that Mr Sokwali's statement in respect of the plea bargain agreement entered to on 20 November 2014, did not include a reference to an amount of R250 00.00 from that he was paid by the ECDC in respect of transport services. There is no evidence that these services were rendered.

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5.6.144 During the investigation, it was established that on 9 December 2013, Mr Sokwali in his capacity as the Director of *Victory Ticket750CC* submitted a quotation to the ECDC in respect of the, **“transporting BCM branches from EL City Hall via KWT to PE (Nelson Mandela stadium) to attend the Provincial memorial service”**.

5.6.145 He quoted that he would offer ten(10) sixty-five (65) seater buses at R25000.00 a bus which totaled an amount of R250 000. On 11 December 2013, the ECDC paid the R250 000 into the standard bank account of *Victory Ticket750CC*. The quotation and proof of payment is as pictured below:

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE MISAPPROPRIATION OF PUBLIC FUNDS, IMPROPER CONDUCT AND MALADMINISTRATION IN CONNECTION WITH EXPENDITURE INCURRED IN PREPARATION FOR THE FUNERAL OF FORMER PRESIDENT NELSON ROLIHLEHLA MANDELA



10/12/2013 11:16

*AP 1 MANDELA*

(FAX)

P. 001/001

*17747*



VICTORY TICKET 250 CC  
REG NO: 2007/021134/25  
VAT NO: S125538169

**QUOTATION**

Date: 09/12/2013

DATE	DESCRIPTION	AMOUNT
11/12/2013	Transporting BCM branches from EL City Hall via K&T to PE (Nelson Mandela stadium) to attend the Provincial memorial service. 10 x 65 seater	R25 000.00 X 1.0
<b>TOTAL AMOUNT</b>		<b>R 250 000.00</b>

STD  
ACC NO: 042048172  
BRANCH CODE: 063721

Yours Truly

R.M. SOKWALI-NTOGHE

*R.M. Sokwali-Ntogh*

VICTORY TICKET  
70 EDGE ROAD  
DEACON BAY  
CELL: 065 285 2852  
CELL: 078 551 2745  
TEL/FAX: 045 748 3302

*Sfub* 11/12/2013



**NOTIFICATION OF PAYMENT**

To Whom It May Concern:

First National Bank hereby confirms that the following payment has been made :

Date actioned : 11/12/2013  
Time actioned : 16:13:20  
Trace ID : VO0SV8FDQBJB  
Payer Details  
Payment From : Main Account  
Amount : 250000.00  
Payee Details  
Recipient/Account No : .. 040172  
Name : VICTORY TICKET  
Bank : Standard Bank  
Branch Code : 063721  
Reference : ECDC  
Channel : INTERNET

END OF NOTIFICATION

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5.6.146 On 12 September 2017, the Public Protector issued Cllr Gomba with a notice in terms of section 7(9)(a) of the Public Protector Act, thus informing her about the information and evidence in the possession of the Public Protector that implicates her which may result in an adverse finding taken against her and affording her an opportunity to respond thereto.

5.6.147 **Cllr. Gomba failed to respond to the notice.**

5.6.148 On the same date (12 September 2017), the Public Protector issued the Speaker of the BCM Council, Cllr Luleka Simon-Ndzele with a notice in terms of section 7(9)(a) of the Public Protector Act thus informing her about the information and evidence in the possession of the Public Protector that implicates her which may result in an adverse finding taken against her and affording her an opportunity to respond thereto.

5.6.149 On 22 September 2017, Cllr Simon-Ndzele responded to the notice.

5.6.150 In her response, Cllr Ndzele explained that on 9 December 2013, she was invited to a meeting held at the ANC office. Present at the meeting were Messrs. Pumlani Mkolo, Themba Tinta, the Council Chief Whip, Mr Matwele as well as the Executive Mayor, Cllr Ncitha.

5.6.151 Whilst the meeting was underway, the City Manager and the CFO of the BCM arrived and joined the meeting. At the meeting, the discussions were about the ANC programme for the memorial services of the late President Mandela that were to be held in the region, as well as funding by the BCM for the activities.

5.6.152 Cllr. Simon-Ndzele attached to her response the meeting agenda and ANC programme depicted in the picture below:

*Annexure A*  
**AFRICAN NATIONAL CONGRESS**  
**BUFFALO CITY METROPOLITAN REGION**  
 REGIONAL SECRETARY'S OFFICE



127 Oxford Street, First Floor, East London 5200, RSA  
 Tel. +27 43 722 1775 Fax. +27 43 722 4982 Cell. 082 705 2636 Email: punlanimikolo@gmail.com

09 December 2013

ANC BCMM EXTENDED REC MEETING

**AGENDA**

1. Opening and welcome
2. Credentials and apologies
3. Matters for discussion
  - 1) Planning and preparations for Tata Nelson Rolihlahla Mandela's programme
4. AOB
5. Announcements
6. Closure

*Annexure B*  
**AFRICAN NATIONAL CONGRESS**  
**BUFFALO CITY METROPOLITAN REGION**  
 REGIONAL SECRETARY'S OFFICE



127 Oxford Street, First Floor, East London 5200, RSA  
 Tel. +27 43 722 1775 Fax. +27 43 722 4982 Cell. 082 705 2636 Email: punlanimikolo@gmail.com

**REGIONAL PROGRAMME FOR THE LATE CDE NELSON ROLIHLAHLA MANDELA**

DATE	Time	VENUE	ACTIVITY
09 December 2013	10H00	Anc Regional Office	Special extended REC for planning and preparation for Cde Mandela program
<del>11 December 2013</del>	<del>12H00</del>	<del>Ignatius stadium</del>	<del>Regional prayer day</del>
10 December 2013	<del>12H00</del> 15H00	Gompo Hall EL	Prayer and wreath laying
11 December 2013	12H00	War memorial KWT MDANTSANI	Prayer and wreath laying
12 December 2013	12H00	City Hall / BCM stadium	Regional memorial service - <i>Bonastal</i>
13 December 2013	12H00	Nelson Mandela Stadium	Prayer for all faith organs - Provincial
14 December 2013	<del>12H00</del> 15H00 18H00	Sisa Dubehe Stadium / Indoor Sport Centre	Night vigil
15 December 2013	<del>12H00</del> 08H00	Sisa Dubehe Stadium	Funeral viewing

5.6.153 In the end, it was resolved that the City Manager and the CFO be allowed to source funding.

5.6.154 Cllr Simon-Ndzele also explained that on 12 December 2013, which was after the Municipal Council approved the funding, she called a meeting of all officials in her office to inform them about the planning. Whilst the meeting was underway, the CFO, Mr Vincent Pillay arrived to introduce the service provider, Mr Sokwali of the *Victory Ticket750CC*. Subsequently, Ms Viwe Vazi, Cllr Gomba and Zuziwe of the ANC office arrived at the meeting.

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5.6.155 She also confirmed that she provided Zuziwe with space in her Council office to store ANC t-shirts as her office was secure and facing the City Hall.

5.6.156 She also explained that Cllr Gomba that had to go to Port Elizabeth for the memorial service had not requested assistance from Mr Sokwali. According to her, he offered.

5.6.157 On 12 September 2017, the Public Protector issued Mr Mkolo with a Notice in terms of section 7(9)(a) of the Public Protector Act thus informing him about the information and evidence in the possession of the Public Protector that implicates him, affording him an opportunity to respond thereto.

5.6.158 Mr Mkolo's response features nothing more than bare denials as well as reporting about R250 000 that Mr Sokwali apparently received from the ECDC which was not related to the funding by the BCM.

5.6.159 On 12 September 2017, the Public Protector issued Mr Sokwali with a Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act notifying him of the information and evidence in the possession of the Public Protector that implicates him and thus affording him an opportunity to respond thereto before she could release her final report on the matter.

5.6.160 On 28 November 2017, through Messrs. *Drake Flemmer & Orsmond Attorneys*, Mr Sokwali responded and stated that:

*"We advise that our client entered into a plea bargain agreement in terms of section 105(A) of the Criminal Procedure Act and was convicted and sentenced in accordance with the plea agreement by the Regional Court at East London. Any enquiry and/or intended remedial action by the Public Protector must in terms of section 182(1)(c) of the Constitution has been rendered res judicata when the criminal case against our client was finalized in the Regional Court, East London".*

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5.6.161 It was noted during the investigation that the procurement by the BCM of transportation services *Victory Ticket750CC* is currently the subject of criminal proceedings against, *inter alia*, Mr Pillay, Mr Sali and former Executive Mayor Zukiswa Ncitha.

### **The Application of the relevant laws and prescripts**

#### **The Code of Conduct for Councillors**

5.6.162 Schedule 1 to the Local Government Municipal Systems Act, 1998 provides for a Code of Conduct for Councillors.

5.6.163 Item 2 of the Code provides that councillor must perform the functions of office in good faith, honestly and a transparent manner; and at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.

5.6.164 In terms of item 6 a councillor may not use the position or privileges of a councillor, or confidential information obtained as a councillor, for private gain or to improperly benefit another person.

5.6.165 Item 14 provides that:

*“(1) A municipal council may-*

*(a) investigate and make a finding on any alleged breach of a provision of this Code; or*

*(b) establish a special committee-*

*(i) to investigate and make a finding on any alleged breach of this Code; and (ii) to make appropriate recommendations to the council.*

*(2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may-*

*(a) issue a formal warning to the councillor;*

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- (b) reprimand the councillor;*
  - (c) request the MEC for local government in the province to suspend the councillor for a period;*
  - (d) fine the councillor; and*
  - (e) request the MEC to remove the councillor from office”.*

5.6.166 It appeared from the evidence that the Executive Mayor, Cllr Ncitha, Cllr Goma and Cllr. Simon-Ndzele attended a meeting of the ANC where the procurement of goods and services by the BCM from *Victory Ticket 750CC* was discussed, according to a programme of events that was prepared by the ANC. The amount of public funds made available by the BCM for this programme, clearly arranged by the ANC, was also the subject of deliberations.

5.6.167 The evidence further shows that the Executive Mayor, Cllr Ncitha, at the request of the ANC, decided that an amount of R15 million of the BCM's funds should be sourced and made available for the activities, as organized by the ANC.

5.6.168 She even went so far as to instruct the City Manager and the CFO to meet with the Provincial Secretary to discuss the amount that would be required, which they did.

5.6.169 The Provincial Secretary of the ANC then decided that R10 million would be sufficient, clearly on the basis that it was all that could be made available.

5.6.170 There is no indication in the evidence of any process that was followed by the BCM to plan for the activities relating to the funeral that they wanted to be involved in and the associated goods and services that would be required. The plans were made by the ANC.

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5.6.171 The Executive Mayor and the other councilors involved appeared to have completely lost sight of the distinction between state and political party interests. They behaved in this matter as if the funds of the BCM belonged to the ANC.

5.6.172 Consequently, they acted dishonestly, without good faith, in a manner that was not in the best interest of the BCM and that compromised its credibility and integrity. Their conduct was clearly in violation of the Code of Conduct for Councillors.

### **The Municipal Finance Management Act**

5.6.173 Section 77 of the MFMA provides that the top management of a municipality's administration consists of the accounting officer, the chief financial officer; all senior managers who are responsible for managing the respective votes of the municipality and to whom powers and duties for this purpose have been delegated, any other senior officials designated by the accounting officer. The top management must assist the accounting officer in managing and coordinating the financial administration of the municipality.

5.6.174 Senior managers and other officials of municipalities exercising financial management responsibilities must, in terms of section 78, take all reasonable steps within their respective areas of responsibility to ensure *inter alia* that:

5.6.174.1 The system of financial management and internal control established for the municipality is carried out diligently;

5.6.174.2 The financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently;

5.6.174.3 Any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented.

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5.6.175 In terms of section 171(2) of the MFMA, the chief financial officer of a municipality commits an act of financial misconduct if that officer deliberately or negligently fails to carry out a duty delegated to that officer in terms of the Act.

5.6.176 Section 171(4) of the MFMA provides that:

*“A municipality **must**:*

*(a) investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality unless those allegations are frivolous, vexatious, speculative or obviously unfounded; and*

*(b) If the investigation warrants such a step, institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other official in accordance with systems and procedures referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of that Act.” (emphasis added)*

### **The Municipal Supply Chain Management Regulations**

5.6.177 In terms of regulation 10, a municipality’s supply chain management policy must provide for an effective system of demand management in order to ensure that the resources required to support the strategic and operational commitments of the municipality are delivered at the correct time, at the right price and at the right location, and that the quantity and quality satisfy the needs of the municipality.

5.6.178 Regulation 46 provides that a municipality’s supply chain management policy must establish a code of ethical standards for officials and other role players in the supply chain management system in order to promote mutual trust and respect; and an environment where business can be conducted with integrity and in a fair and reasonable manner.

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**The BCM Supply Chain Management Policy adopted on 30 October 2013**

- 5.6.179 Paragraph 1.3.1 of the Policy provides that all representatives of the Municipality involved in supply chain management activities shall act with integrity and in accordance with the ethical standards set out in the policy in order to create an environment where business can be conducted within integrity and in a fair and reasonable manner.
- 5.6.180 Paragraph 10 provides that. The accounting officer must establish and implement an appropriate demand management system in order to ensure that the resources required by the municipality support its operational commitments and its strategic goals outlined in the Integrated Development Plan.
- 5.6.181 The demand management system must:
- 5.6.181.1 Include timely planning and management processes to ensure that all goods and services required by the are quantified, budgeted for and timely and effectively delivered at the right locations and at the critical delivery dates, and are of the appropriate quality and quantity at a fair cost;
  - 5.6.181.2 Take into account any benefits of economies of scale that may be derived in the case of acquisitions of a repetitive nature; and
  - 5.6.181.3 Provide for the compilation of the required specifications to ensure that its needs are met.
- 5.6.182 In terms of paragraph 7.2, the supply chain management unit of the Municipality operates under the direct supervision of the chief financial officer or an official to whom this duty has been delegated.
- 5.6.183 In this case, it was therefore required of the CFO, Mr Pillay to have obtained proper specifications for the goods and services that would be required by the BCM for the memorial services. This he failed to do.

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5.6.184 Instead, he was more interested to source funds for a programme for the memorial services that was prepared by the ANC and not the BCM.

5.6.185 Is disconcerting that Mr Pillay sourced the funding from the Municipality's Indigency Programme that is supposed to assist the poorest of the poor in the BCM area to afford municipal services.

5.6.186 Paragraph 46(2) provides *inter alia* that an official or other role player involved in the implementation of this Policy:

5.6.186.1 Must treat all providers and potential providers equitably;

5.6.186.2 May not use his or her position for private gain or to improperly benefit another person;

5.6.186.3 Must declare to the accounting officer details of any private or business interest which that person, or any close family member, partner or associate, may have in any proposed procurement or Buffalo City Metropolitan Municipality;

5.6.186.4 Must immediately withdraw from participating in any manner whatsoever in a procurement or disposal process or in the award of a contract in which that person, or any close family member, partner or associate, has any private or business interest; and

5.6.186.5 Must assist the accounting officer in combating fraud, corruption, favouritism and unfair and irregular practices in the supply chain management system.

5.6.187 The CFO, Mr Pillay stated in his evidence that he is serving two masters, the ANC and the BCM.

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- 5.6.188 This is evident from the fact that he attended a meeting with the Regional Secretary of the ANC to discuss the amount that would be made available for the memorial services.
- 5.6.189 He did not deem it inappropriate to deliberate with a political party on the financial business of the BCM.
- 5.6.190 Moreover, when it was decided by the Regional Secretary that an amount of R10 million would be sufficient, he accepted it without having performed any of the demand management processes required by the Regulations and the Policy.
- 5.6.191 From what is stated in the evidence, it was no surprise that the amount quoted by *Victory Ticket 750 CC* was the closest to the R10 million.
- 5.6.192 When Mr Pillay realized that *Victory Ticket 750CC* was not listed on the BCM supplier database, as required by the Regulations and the Policy, he made arrangements that it was done immediately, without following the prescribed process.
- 5.6.193 Moreover, when it appeared to him that *Victory Ticket 750 CC* spent some of the funds paid to them on items not quoted for and that had not been delivered to the BCM, he insisted on an amended invoice to enable him to pay.
- 5.6.194 Mr Pillay's conduct was inconsistent with what is expected by law and by the public of a person in the position of a CFO.
- 5.6.195 He allowed his personal interests in the ANC to cloud his judgment, as a result of which there was non compliance with the procurement prescripts applicable to the BCM. This resulted in irregular expenditure incurred by the BCM in respect of the memorial services for President Mandela that it was involved in. His conduct constituted financial misconduct as contemplated by the MFMA, was improper and constitutes maladministration.

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5.6.196 In terms of paragraph 46(5), a breach of the code of ethics by an employee must be dealt with as follows in terms of the disciplinary procedures of the municipality envisaged in section 67(1)(h) of the Municipal Systems Act. In all cases, financial misconduct must be dealt with in terms of chapter 15 of the Act.

### **Conclusion**

5.6.197 The BCM improperly procured the services of and paid *Victory Ticket 750 CC* an amount of R5 985 000 of public funds to transport mourners to four venues where the memorial services of President Mandela were to be held.

5.6.198 This conduct was improper and constitutes maladministration.

**5.7 Whether the King Sabata Dalindyebo Local (KSD) Municipality incurred irregular and fruitless and wasteful expenditure of public funds by procuring the services of various service providers to assist in the preparations for the funeral of the late President Mandela despite being in dire financial constraints and if so; whether such conduct was improper and constitutes maladministration: -**

#### **Issues that are Common Cause**

5.7.1 The King Sabata Dalindyebo Local Municipality (KSD Municipality), in Mthatha procured the services of 255 catering companies to provide breakfast and lunch at the public mourning venues where the proceedings of the funeral President Mandela was telecast, at a cost to the Municipality of R2 677 55.00: -

5.7.1.1 An amount in excess of R858 000 was spent for transportation of mourners to the public mourning areas and the funeral in Qunu village;

- 
- 5.7.1.2 R4 470.820.05 was spent for road rehabilitation and pothole patching in the Mthatha central business district and surrounding areas;
- 5.7.1.3 R23 940 was paid for the transportation of Qunu family members for a period of six days;
- 5.7.1.4 R48 493.81 was paid in respect of cleaning material;
- 5.7.1.5 R2 865 425 was spent on the appointment of casual employees, and the provision of protective clothing for them;
- 5.7.1.6 R10 260 was paid in respect of casual employees who were responsible for road maintenance;
- 5.7.1.7 R119 700 was spent towards purchasing 300 two piece rain suites for casual employees;
- 5.7.1.8 R739 500 was spent towards the provision of VVIP and flushing toilets;
- 5.7.1.9 R1 160.770 was spent on procuring wheelie refuse bins;
- 5.7.1.10 R1.5million was spent towards cleaning the Mthatha central business district and the surrounding industrial and residential areas;
- 5.7.1.11 R525 941 was spent towards grass cutting in Mthatha and surrounding areas, including areas as far as Mqanduli and Kokstad routes from the N2 bridge to Zipunzana Administrative Area;
- 5.7.1.12 R3 519.586 was spent on branding, promotion and marketing of the jurisdictional area of the KSD Municipality;
- 5.7.1.13 R1 514.067 was spent towards hiring of equipment such as tipper trucks, generators, TLB's, 2 pole tents and gas heaters; and

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5.7.1.14 R251 935 was spent towards the accommodation of officials including officials from other Municipalities and government departments.

**Issues that are in dispute**

5.7.2 The issue for determination by the Public Protector was whether: -

5.7.2.1 The expenditure of public funds incurred by the KSD municipality was necessary;

5.7.2.2 The KSD Municipality was authorized by the Municipal Council to incur such expenditure; and;

5.7.2.3 The KSD Municipality complied with the procurement processes and procedures as enshrined in section 217 of the Constitution, the MFMA, 2003, the Municipal Supply Chain Management Regulations, as well as other prescripts applicable to the procurement of goods and services in the local sphere of government.

5.7.3 During the investigation, it was established that on 9 December 2013, the Head of the Eastern Cape Provincial Department of Planning and Treasury, Ms. Mbina-Mthembu, addressed correspondence to the Municipal Manager of the KSD Municipality, Mr. Zama Mnqanqeni, under the heading, *“PROCUREMENT PROCESS TO BE FOLLOWED IN PREPARATION FOR THE FUNERAL OF THE LATE FORMER PRESIDENT, DR NELSON ROLIHLAHLA MANDELA.”*

5.7.4 The purpose of Ms. Mbina-Mthembu’s correspondence was to advise, give guidelines, communicate and outline to Mr. Mnqanqeni, the process that was to be followed in the procurement of goods and services in respect of preparations for the funeral of President Mandela.

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5.7.5 In her communication, Ms. Mbina-Mthembu informed the Municipal Manager that since President Mandela would be laid to rest in Qunu, the Eastern Cape Provincial EXCO had deemed it appropriate that the Eastern Cape Province should provide appropriate assistance to the KSD Municipality to ensure the smooth running of the State Funeral.

5.7.6 With regard to the procurement process that was to be followed, Ms. Mbina-Mthembu informed Mr. Mnqanqeni that it had to comply with the provisions of section 217(1) of the Constitution, 1996, Treasury Regulation 16A6.4 in respect of the Provincial Government Departments and Public Entities and section 112 of the MFMA in respect of Municipalities.

5.7.7 **She outlined the procurement process as follows: -**

*“1.1 Due to urgency of the funeral preparations, approval for deviation from normal procurement processes must be secured from the Accounting Officer/Authority of the department/institution. The request for deviation must also indicate the goods and/or services to be procured.*

*1.2 For the purposes of this event, the Accounting Officer/Authority must issue special delegations in writing to officials based on their competencies in order to expedite the procurement process.*

*1.3 Procurement must be handled by Supply Chain Management Practitioners and any other duly authorized officials, only.*

*1.4 Where possible three (3) written quotations must be solicited from suppliers or service providers registered on the supplier database of the department or institution.*

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*1.5 The appointment of the successful service providers must be approved by the Accounting Officer/Authority or delegated official of the institution.*

*1.6 The selection process must be clearly documented for audit purposes.*

*1.7 The appointed service provider must have a valid Tax Clearance Certificate issued by SARS.*

*1.8 All relevant documentation but not limited to as indicated in the attached checklist must be properly filed and safely stored. No payment will be effected without the minimum documents indicated in the checklist.”*

5.7.8 With regard to the payment of invoices, Ms. Mbina-Mthembu's instruction was that, accounting officers and/or authorities must ensure that all invoices are received by the 23<sup>rd</sup> of December 2013.

5.7.9 Further thereto, she instructed that all invoices, together with supporting documents, must be submitted by 8 January 2014 to the Department of Provincial Planning and Treasury, for approval, prior payment thereof by the ECDC.

5.7.10 The checklist that Ms. Mbina-Mthembu instructed accounting officers to adhere to in their procurement of goods and services for the funeral was as follows: -

*“1. Approved Request for Deviation*

*1. Quotations obtained*

*2. Valid SARS Tax Clearance Certificate*

*3. Memorandum approving the appointment of the service provider*

*4. Proof of delivery*

*5. Invoice.”*

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- 5.7.11 On 11 December 2013, Mr. Mnqanqeni submitted a memorandum to Ms. Mbina-Mthembu. The purpose of the memorandum was to request Ms. Mbina-Mthembu to approve the KSD Municipality's deviation from the normal procurement process in relation to the preparation for the state funeral of President Mandela.
- 5.7.12 According to Mr. Mnqanqeni's submission, as the funeral was going to be held in Mthatha, the seat of the KSD Municipality, they expected to host multitudes of mourners in various areas on the day of the funeral in Qunu.
- 5.7.13 He further stated that a series of events would be held prior to the funeral around the locality of the KSD Municipality, and that those events would be aligned to the national and provincial plans to commemorate President Mandela's life. According to Mr. Mnqanqeni, in order to maintain publicity and to communicate the events to their local and international guests, the KSD Municipality had to procure extra services.
- 5.7.14 He further stated that, due to the short period within which preparations and arrangements had to be made, it was impractical or impossible to follow normal procurement procedures in order to procure goods and services, either by way of requests for quotations or through a competitive bidding process.
- 5.7.15 The KSD Municipality had therefore selected service providers from its supplier database, as well as other suppliers with the capacity to deliver the services within the prevailing short space of time. In his Memorandum, Mr. Mnqanqeni listed some of the expected expenditure to be incurred for the procurement of goods and services, as follows: -

DATE	SUPPLIER	SERVICE	COST CENTRE	AMOUNT
09/12/13	Bravo Africa	Promotional Material	Comms & Branding	R1 695 200.00
09/12/13	Khanyo-Piwe Trading	B&B-A Ngoqolo from Rural Development.	Comms & Branding	R27 000.00
09/12/13	Mvundla Group	Small Flags	Comms & Branding	R300 000.00
09/12/13	Iyana Trading.cc	Banners-Telescoping	Comms & Branding	R45 346.92
09/12/13	Ntutu & Mhlali	Promotional Material	Comms & Branding	R78 200.00
09/12/13	The Business Zone 852cc	Banners (Variety)	Comms & Branding	R603 187.68
11/12/13	Rose Signs	Billboards	Comms & Branding	R1 680 816

- 5.7.16 The financial implications relating to the provision of the above goods and services was stated as R6 365 470.00, and Mr. Mnqanqeni confirmed the instruction of the Provincial Treasury that the payment of the invoices received from suppliers would be processed by the ECDC.
- 5.7.17 Mr. Mnqanqeni thus recommended in his Memorandum that Ms. Mbina Mthembu approves the amount for payment in respect of communication and branding, and approves the deviation from the normal procurement processes and procedures.
- 5.7.18 Ms. Mbina-Mthembu approved the request on 11 December 2013, but declined the request for the provision of the LED Screens.
- 5.7.19 The total payment that was approved was therefore R4 429 750.60, according to an e-mail forwarded to the ECDC on 12 December 2013.
- 5.7.20 On 11 December 2013, a further Memorandum was submitted to Ms. Mbina-Mthembu by Mr. Mnqanqeni, requesting her approval of the deviation from normal procurement processes in respect of the provision of infrastructure related services in preparation for the funeral. He detailed the goods and services that he requested approval for, as follows:

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DATE	SUPPLIER	SERVICE	COST CENTRE	AMOUNT
11-Dec-13	Anix Trading	Road Maintenance	Roads	281 580.00
10-Dec-13	Bhango Transport	Transport-Solid Waste Teams	Roads	23 940.00
10-Dec-13	Manzezulu Cons. Services		Solid Waste	598 500.00
		<b>Refuse bags</b>		<b>87 292.80</b>
10-Dec-13	Sitha Setu	Trolley Bins and Skips	Solid Waste	866 115.00
11-Dec-13	Msira and Nkayi Multi Traders	Heavy Duty rain suite	Solid Waste	145 000.00
11-Dec-13	Msira and Nkayi Multi Traders	Gum Boots	Solid Waste	92 500.00
11-Dec-13	Imvaba KSD	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Zamulwazi Clothing Man	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Ababhokici Multi-Purpose Prima	Cleaning programme	Solid Waste	55 000.00
11-Dec-13	Fikisa Cleaning Co ops	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Meyisi Supply Cleaning	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Lithabodwa Agriculture Co op	Cleaning programme	Solid Waste	64 000.00
11-Dec-13	Ilanga Lethu Construction	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Iluzuko Lwethu Cleaning	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Lamaqhawe Cleaning Co op	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Inkonjane Construction & Multi	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Sinezinto Agricultural Primarry	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Lingelethu Cleaning	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Sinokhanyo Cleaning Primary	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Genetic Cleaning Co op	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Hlahlana Cleaning Co-op	Cleaning programme	Solid Waste	42 970.00
11-Dec-13	Blue Ocean Cleaning	Cleaning programme	Solid Waste	42 970.00
11-Dec-13	Masenze Co-operative	Cleaning programme	Solid Waste	60 000.00
11-Dec-13	Sakha Isidima Sasengangelizwe	Cleaning programme	Solid Waste	54 000.00
11-Dec-13	Nature Indalo Garden Service	Cleaning programme	Solid Waste	43 500.00
11-Dec-13	Nosipho Distributors	Cleaning programme	Solid Waste	251 940.00
11-Dec-13	Vuka Belele Trading CC	Cleaning programme	Solid Waste	79 500.00
11-Dec-13	Shadow Bricks	Protective Clothing for casuals	Solid Waste	119 700.00
11-Dec-13	LandMan Construction & Mining	Grass Cutters	Solid Waste	79 500.00
11-Dec-13	Hlasela Cleaning & Multi-Purpose	Cleaning programme	Solid Waste	60 000.00

11-Dec-13	Lawulwa Civils Cc	Hiring of additional Trucks	Solid Waste	32 832.00
11-Dec-13	Zezamaqoma Farming & Multi	Cleaning programme	Solid Waste	65 025.00
11-Dec-13	Sonke Consulting	Additional Bakkies for waste collection Solid Waste	Solid Waste	58 995.00
11-Dec-13	Bubele Trading Enterprise	Clearing Posters	Solid Waste	2 100.00
11-Dec-13	Best Enough Trading	VIP Toilets	Solid Waste	29 500.00
11-Dec-13	411 Moonlight	2 pole tents0Airport and Ultra City	Security Voc	60 000.00
11-Dec-13	Njilo-Njilo Consultancy	Electrical Maintenance	Electricity	73 302.00
11-Dec-13	Mbambisa Didi Ngwala Electrical	Electrical Maintenance	Electricity	61 440.00
11-Dec-13	Ngxathu Electrical Cc	Electrical Maintenance	Electricity	60 800.00
11-Dec-13	Khanyo-Piwe Trading	Electrical-Accommodation	Electricity	12 500.00
11-Dec-13	Nzauaki B & B	Electrical-Accommodation	Electricity	168 000.00
11-Dec-13	VNQ Project	Electrical Maintenance	Electricity	20 570.00
11-Dec-13	Manzezulu	Additional Transport for BCM Team	Electricity	119 700.00

5.7.21 The total cost for the provision of the goods and services was R4 532 771.80, which was broken down as follows: -

5.7.22.1 Electricity expenses amounting to R516 312.00;

5.7.22.2 Roads expenses amounting to R305 520.00; and

5.7.27.3 Expenses relating to solid waste costing R3 710 939.80

5.7.22 Mr. Mngqanqeni recommended in his Memorandum that Ms. Mbina-Mthembu approves the amount of R4 532 771.80 for payment in respect of the provision of infrastructure related services, as well as the deviation from the normal procurement processes and procedures.

5.7.23 She approved the submission on 12 December 2013, subject to verification by the Provincial infrastructure team.

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5.7.24 The ECDC accordingly paid approximately R10.8million to the KSD Municipality on approval by Ms. Mbina-Mthembu.

### **The Payments made to Bravo Afrika Holdings**

5.7.25 On 12 December 2013, *Bravo Afrika Marketing, Branding and Promotions (Bravo Afrika)* submitted a quotation to the Provincial Treasury for the supply of t-shirts, outside street flags, hand-held flags, SA flags and KSD flags, in an amount of R1 695 200.00.

5.7.26 *Bravo Afrika* requested an advance payment of R600 000.00.

5.7.27 On 12 December 2013, Ms. Shipalana of the Provincial Treasury authorised that the ECDC should remit the payment of the amount. She advised that the remainder of the amount had to be paid by the KSD Municipality as the ECDC would have transferred funds to the Municipality to enable them to make payments to their suppliers.

5.7.28 Despite having quoted for the supply of t-shirts and flags, in the amount of R1 695 200.00, *Bravo Afrika* submitted an invoice on 17 December 2013 for payment for the supply of protective clothing. It was noted that the amount was the same, namely R1 695 200.00.

5.7.29 Ms. Nobuzwe Soldati of the KSD Municipality certified on 18 December 2013 that she had received the protective clothing. In this regard, Ms. Soldati signed a municipal stamp that reads:

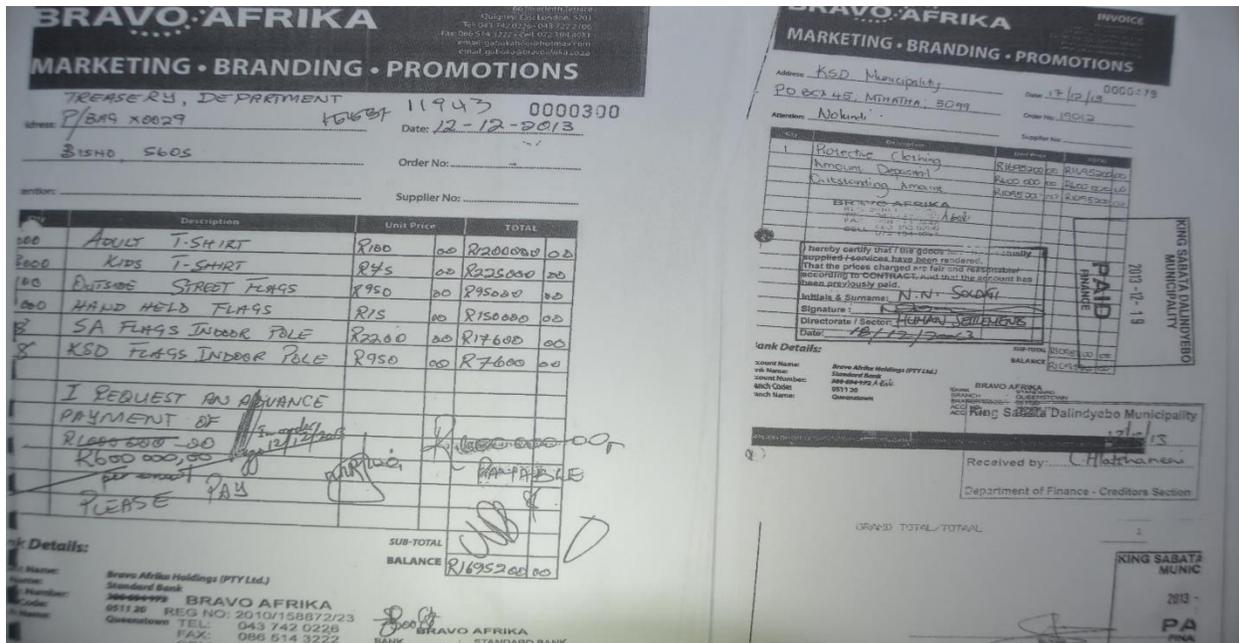
*“I hereby certify that/the goods have been actually supplied / services have been rendered. That the prices charged are fair and reasonable/ according to contract and that the account has not been previously paid.”*

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5.7.30 An amount of R1 695 200 was thus paid to *Bravo Africa* on 19 December 2013.

5.7.31 The pictures below depicts the goods that the entity quoted, as well as the goods that they invoiced to have delivered: -



5.7.32 In June 2014, the Auditor-General conducted an audit of the ECDC, and the KSD Municipality was requested to furnish the CFO of the ECDC with proof that the goods were actually delivered. On 27 June 2014, Ms. Soldati responded to the ECDC in a correspondence under the heading, “CONFIRMATION OF RECEIPTS OF GOODS AND SERVICES-BRAVO AFRIKA HOLDINGS.” Ms. Soldati stated that “[t]his is to confirm that I Nobuzwe Soldati Director Human Settlement received the following goods from the above mentioned company;

- 12000 x Adult T shirts
- 3000 x Kids T shirts
- 100 x Outside Street Banners
- 10 000 x Handheld Flags
- 8x SA Flags Indoor Pole

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*8 x KSD Flags Indoor Pole*

*These were delivered same day of the funeral at Mthatha Stadium and acknowledged the receipt of goods. Note that I was part of the organizing committee.”*

5.7.33 Ms. N Soldati, who is currently the Director: Human Settlements at the KSD Municipality, was afforded an opportunity during the investigation to respond to the evidence relating to the procurement of goods from *Bravo Africa*. She responded on 18 September 2017.

5.7.34 Ms. Soldati stated that *Bravo Africa Marketing and Branding and Promotions* is a trading name for *Bravo Africa Holdings* that was registered at the time as a listed supplier in the database of the KSD Municipality.

5.7.35 She stated that she personally witnessed the delivery of the goods procured from them and that it was used for the intended purposes.

**The Payments made to Mvundla Group Holdings**

5.7.36 Another entity that apparently rendered services in preparation for the funeral of President Mandela and was duly paid by the KSD Municipality, is *Mvundla Group*. On 9 December 2013, they furnished the KSD Municipality with a quotation for the supply of the following: -

DESCRIPTION	QUANTITY	UNIT PRICE	AMOUNT
Hiring of VVIP Toilets for a period of 5 days	20	R4000 x 20 x 5	R400 000.00
Hiring of 2 Flushing Toilets for a period of 5 days	2	R1000.00 x 2 x 20	R40 000.00
Small national flags on plastic rod 45 x 30cm	10 00	R30.00	R300 000.00
		<b>TOTAL</b>	<b>R740 000.00</b>

5.7.37 *Mvundla Group* send an invoice to the KSD Municipality on 17 December 2013, for black refuse bags for the same amount of R740 000.

5.7.38 On 18 December 2013, the amount of R740 000.00 was paid into the *Mvundla Group's* bank account. The picture below depicts both the statement of account presented to the Municipality as well as the invoice rendered:



5.7.39 *Mvundla Group Holdings* was afforded an opportunity during the investigation to respond to the evidence obtained in this regard.

5.7.40 Mr. P Toto, the Director of *Mvundla Group Holdings* responded on 22 September 2017. He explained that his company was appointed by the KSD Municipality on 11 December 2012 to supply and deliver refuse bags over a period of two years. On 12 November 2013 they received an order for 1 million refuse bags at a cost of R 504 340. The order was delivered and payment only made in August 2014.

- 5.7.41 He further stated that *Mvundla Group Holdings* was contracted by the KSD Municipality to supply and deliver VVIP toilets for the funeral of President Mandela. They accordingly delivered 20 toilets, 2 mobile chemical toilets and 10 000 small national flags to Ms. Soldati of the KSD Municipality. This was confirmed by Ms. Soldati during the investigation.
- 5.7.42 Due to an administrative error on their side, the invoice for these items stated that it was for the supply and delivery of refuse bags. Mr. Toto emphasised that his company was paid R504 340 and R740 000 respectively, as stated above. He provided supporting documents for his response.

#### **The Payments made Shadow Bricks**

- 5.7.43 **Shadow Bricks** is an entity that is in the business of plant hire as well as manufacturing of bricks, sand, stone and paving. It is registered on the KSD Municipality supplier database.
- 5.7.44 On 9 December 2013, *Shadow Bricks* furnished the KSD Municipality with a quotation for the supply of the following goods: -

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL AMOUNT
2000	PVC Gloves	R75 000	R105 000.00
2000	Dust Mask	R145.00	R290 000.00
400	BOVA Safety Boots	R450.00	R180 000.00
300	Conti Suits	R320.00	R96 000.00
50	Duster Coat	R205.00	R10 250 .00
		<b>SUB-TOTAL</b>	<b>R726 250.00</b>
		<b>VAT @14%</b>	<b>R101 675.00</b>
		<b>TOTAL</b>	<b>R827 925.00</b>

- 5.7.45 It was noted that the listed items amount to a subtotal of R681 250.00, and not R726 250.00 as indicated, probably as the amount invoiced for PVC Gloves was supposed to have been R150 000.



- 5.7.52 She further confirmed that *Shadow Bricks* also provided a quotation to the KSD Municipality for 300 two piece rain suits that were supplied and delivered. They were paid the R119 700 on submission of their invoice.
- 5.7.53 Mr. L Maka, the Director: Community Services of the KSD Municipality, confirmed during the investigation that he signed the delivery note for the rain suits.
- 5.7.54 **The Business Zone 852 CC** is another entity which submitted a quotation to the KSD Municipality on 9 December 2013 for the supply and delivery of the following goods: -

QTY	DESCRIPTION	UNIT PRICE	AMOUNT
1	GANTRY BANNERS	R22 000.00	R22 000.00
15	OUTDOOR BANNERS (4800mm x1800mm)	R5 358.00	R80 370.00
150	A1 POSTERS	R200.00	R30 000.00
150	A0 POSTER	R235.00	R32 250.00
2	BACKDROP BANNERS	R42 750.00	R85 500.00
5000	KEYHOLDERS	R45.00	R225 000.00
4	BRIDGE RUNNER BANNERS (8000mmx1300mm)	R6498.00	R25 992.00
	DELIVERY	R25 000.00	R25 000.00
		<b>SUB-TOTAL</b>	<b>R529 112.00</b>
		<b>VAT @ 14%</b>	<b>R74 075.68</b>
		<b>TOTAL AMOUN</b>	<b>R603 187.68</b>

- 5.7.55 They subsequently submitted an invoice which was paid by the KSD Municipality on 13 December 2013. Two delivery notes were signed by Ms. N Ntshanga and T Kimineri of the KSD Municipality confirming that they received the goods.

- 5.7.56 Ms. N Jayiya, the sole member of *Business Zone 825 CC*, stated during the investigation that the entity was registered on the KSD Municipality supplier database from 14 December 2012 to 14 December 2013. She confirmed the supply and delivery of the items referred to above.
- 5.7.57 *Masiqhame Trading 651CC* is registered on the Municipality's supplier database. Its business is stated as cleaning services. On 9 December 2013, this entity submitted a quotation for the supply and delivery of 150 wheelie refuse bins with the KSD Printing Logo for an amount of R449 958.00.
- 5.7.58 The KSD Municipality paid the amount on 13 December 2013.
- 5.7.59 During an inspection *in loco* conducted in December 2014 at the premises of the KSD Municipality, the storage yard where wheelie refuse bins were being kept, was visited. It was noted the bins appear to have been discarded. The following images depicts the bins kept at the KSD Municipality's depot at Callaway Street in Mthatha:





- 5.7.60 It also transpired that a number of other wheelie refuse bins were stored at the Mthatha Stadium and were not being used.
- 5.7.61 On further investigation, it was established from Mr. Luvuyo Maka of the KSD Municipality that the refuse bins were not being utilized and sold to residents so as to keep the city clean, as the KSD Municipality does not have a waste removal truck that can empty the bins. They only hired one during the funeral and the contract ended and could not be renewed.
- 5.7.62 During the investigation, Mr. Maka explained that the black refuse bins found at the storage site, as depicted above, were in fact not procured for the funeral, but was sponsored by the Department of Environmental Affairs as part of a *Cleaning and Greening Programme*.” These refuse bins were issued during the funeral at the public mourning venues and at the Qunu Homestead.
- 5.7.63 The yellow bins, so stated Mr. Maka, were also not procured for the funeral. They were delivered as part of the *“Youth Jobs in Waste Programme,”* meant for recycling projects, and were dispatched to households in Ward 5.

5.7.64 The pictures below depicts the bins that were inspected at Mthatha Stadium, gathering dust: -



5.7.65 Mr. Maka confirmed that the refuse bins found at the Mthatha Stadium were procured from *Masiqhame trading 651 CC* for the funeral.

5.7.66 He further stated that the KSD Municipality procured a refuse compactor truck in the 2016/17 financial year, which was delivered in July 2017. At the time of his response to the Public Protector, Mr. Maka stated that the KSD Municipality was in the process of entering into contracts for the utilization of the bins.

5.7.67 It transpired during the investigation that other than the wheelie refuse bins, the KSD Municipality purchased trolley bins, mobitainers and refutainers for an amount of R710 812.80 from an entity named *Trolley & Bin (Pty) Ltd.*

5.7.68 The trolley bins were delivered to Mthatha on 24 and 28 January 2014 respectively, which was long after the funeral of President Mandela. An invoice by the entity was rendered on 28 February 2014, and paid by the KSD Municipality on 31 March 2014.

5.7.69 During the inspection *in loco*, it was also established that the bins were discarded at the Municipality's storage site.

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5.7.70 Mr. Maka stated during the investigation that: -

*“We anticipated to receive the delivery on time, unfortunately, due to closure of the manufacturer for December holidays they failed to deliver on time. The purchase order was not cancelled as we were in need of the bins even beyond the funeral for commercial businesses. Currently all the skip bins and trolley bins are dispatched in commercial businesses for refuse collection and were bar coded and are on the KSD Asset Register.”*

**The Payments made to Manzezulu Consulting and Opola Trading Enterprise for transportation services**

- 5.7.71 It was further established that the KSD Municipality procured transportation services from *Manzezulu Consulting* for transportation during the funeral of President Mandela.
- 5.7.72 On 9 December 2013, *Manzezulu Consulting* submitted a quotation to the KSD Municipality for the hire of five 16-seater minibuses with drivers and fuel for seven days from 10 to 16 December 2013 at a unit cost of R15 000 per minibus, thus totaling a sum of R598 500.00, including VAT.
- 5.7.73 An invoice was submitted on 17 December 2013 without any proof that the services were actually delivered. However, Ms. Nobuzwe Soldati of the KSD Municipality certified that she had *received the goods*. The KSD Municipality paid the amount of R598 500.00 on 18 December 2013.
- 5.7.74 During the investigation, the KSD Municipality could not provide verification, such as the names of passengers that were transported or signed documents confirming that the services were actually rendered.
- 5.7.75 On 12 December 2013, *Manzezulu Consulting* submitted another quotation to the KSD Municipality for the provision of the following services: -

ITEM	QTY	DESCRIPTION	COST/UNIT	TOTAL
1	3	Hire of Transport, branded 16-seater mini-buses with drivers and fuel for 2 days from 12-13 December 2013	R15000.00	R90 000.00
2	1	Hire of Transport branded sedan with driver and fuel from 12-16 December 2013	R3000.00	R15000.00
			<b>Sub-total</b>	<b>R105 000.00</b>
			<b>VAT @14%</b>	<b>R14 700.00</b>
			<b>TOTAL</b>	<b>R119 700.00</b>

- 5.7.76 From the documents obtained during the investigation, no indication could be found that the rendering of the service was verified by the KSD Municipality. However, Ms. Soldati certified on 17 December that the goods were actually supplied and the payment for an amount of R119 700.00 was made by the Municipality on 18 December 2013.
- 5.7.77 It was noted that *Opola Trading Enterprise* also submitted a quotation to the KSD Municipality for transportation services and was paid an amount of R858 000.00 without any verification.
- 5.7.78 Ms. Soldati conceded during the investigation that the KSD Municipality did not keep proper verification records in regard to the transportation services that were procured by the KSD Municipality.
- 5.7.79 On 1 July 2014, the Executive Mayor, Ms. Nonkoliso Ngqongwa tabled a report to the Municipal Council titled, “*REPORT ON KSD ACTIVITIES IN PREPARATIONS FOR DR NELSON RHOLIHLAHLA MANDELA.*”
- 5.7.80 The purpose of the report was to update the Municipal Council about the activities that were undertaken by the KSD Municipality in preparation for the state funeral of President Mandela, as well as to request that the Council notes the report.

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- 5.7.81 Cllr. Ngqongwa commenced her report by giving background about the involvement of the KSD Municipality in the development of the *Home of Legends* campaign.
- 5.7.82 She also stated that, due to the passing on of President Mandela, the Municipality had to fast forward its festive season plan, which would otherwise have commenced around the 15<sup>th</sup> of December, so as to ensure its readiness in respect of cleanliness of the streets and open spaces, the stability of electricity, the general condition of the road network as well as public safety.
- 5.7.83 In this regard, so stated Cllr. Ngqongwa, the Municipality engaged in several cleaning campaigns and infrastructure refurbishment activities to prepare for visitors that were expected to gather in Mthatha to attend the funeral of President Mandela.
- 5.7.84 According to Cllr. Ngqongwa, the areas that needed urgent attention were the Mthatha central business district and its suburbs, and the Municipality thus urgently attended to the following: -
- 5.7.85.1 Infrastructure, which included electricity, roads, storm water and by-pass roads;
- 5.7.85.2 Cleaning, which included grass cutting, street cleaning, cleaning of illegal dumps, tree planting and beautification, land filling and bush cleaning;
- 5.7.85.3 Communication, publicity and legal promotion which included bill boards, promotional material and T-shirts;
- 5.7.85.4 Catering and transportation; as well as;
- 5.7.85.5 Public safety.
- 5.7.85 According to Cllr. Ngqongwa, the Municipality also ensured that there were public mourning venues that were well-resourced and that there was provision of meals for the mourners that would be utilizing these areas.

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- 5.7.86 The purpose of these venues was to cater for mourners who were not accredited to attend the funeral in Qunu. Transport arrangements were made to ferry the mourners from identified spots to the venues and the KSD Municipality had to incur the costs of transportation, as the Provincial Treasury declined payment of such expenditure.
- 5.7.87 In a section of the report, which is classified as “**Non-Permissible Expenses**” that were incurred by the Municipality, Cllr. Ngqongwa reported that expenditure amounting to R2 677 500.00 was incurred by KSD Municipality for catering.
- 5.7.88 The justification for catering according to the report, was based on the culture in respect of funerals in the areas around Mthatha, and the fact that transport was provided to ferry the community members early in the morning to the respective venues and back to their areas of abode in the afternoon, after the funeral proceedings. The quantities of meals were based on the capacity of the respective venues.
- 5.7.89 Regarding the criteria for the selection of caterers, it is stated in the report that environmental practitioners from both the KSD and OR Tambo Municipalities who operated at the venues, identified caterers that provided meals on the day of the funeral.
- 5.7.90 According to Cllr. Ngqongwa’s report, the KSD Municipality did not budget for the funeral or **Project X**, as it was code-named. She stated that normal operations and maintenance budget was utilized to fund all activities. The total expenditure incurred was R858 000 for transporting 17 984 members of the community as well as R2 677 500.00 in respect of catering for 25 500 people.

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- 5.7.91 It was also reported to the Council that KSD Municipality engaged 255 catering companies to provide breakfast at R35.00 and lunch at R70.00 per person, and caterers were appointed to cater for 100 people each. It is further stated in the report that the mechanism that was put in place as a control measure to manage catering at the public mourning venues by requiring documentation as proof of the number people to whom food and drinks were provided, failed.
- 5.7.92 Regarding the expenditure submitted to the Provincial Treasury for approval and for payment to the ECDC, Cllr. Ngqongwa reported that the KSD Municipality was instructed to procure goods and services in terms of the Municipality's SCM Policy. According to Cllr. Ngqongwa, all the procurement done was in accordance with the emergency procurement process, which had to be condoned by the Municipal Council and was pre-approved by Ms. Mbina-Mthembu of the Provincial Treasury. She then tabulated the goods and services that were procured and paid for by the ECDC.
- 5.7.93 During the investigation, both Cllrs. Ngqongwa and Zozo of the KSD Municipality were interviewed on 21 April 2015. Cllr. Ngqongwa confirmed the contents of her report of 1 July 2014 that she submitted to the Municipal Council. She also confirmed the expenditure from the Municipality's coffers. She further indicated that this expenditure had not been approved by the Municipal Council.
- 5.7.94 On 21 April 2014, interviews were conducted with both the current and former management of the KSD Municipality, led by the former Municipal Manager and CFO, Messrs. Zama Mqanqeni and Nomthandazo Ntshanga, respectively. The other officials who attended interviews were Ms. Nobuzwe Soldati and Messrs. L. Maka, M. Mandla, R. Mqokoyi, as well as the Municipality's legal adviser, Mr. Mandela Mayekiso.
- 5.7.95 At the time of the demise of President Mandela, Messrs. Zama and Ntshanga were at the helm, but they both resigned from the Municipality in 2014.

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- 5.7.96 According to Messrs. Zama and Ntshanga, they were fully aware of the provision of R300million to assist in the funeral through the Provincial Treasury and the ECDC, as Paymaster. They further confirmed that, at the time, the Municipality had dire financial constraints, following a court case against Landmark.
- 5.7.97 With regard to the expenditure of R2.6million on meals and R858 000.00 on transportation, Mr. Ntshanga stated that they identified a need to provide these items and confirmed that there was no prior Council Resolution authorising the expenditure.
- 5.7.98 In respect of the sourcing of service providers, Mr. Ntshanga stated that the Municipality used its supplier database to source suppliers. He also confirmed that he was aware of the National Treasury Instruction not to use public funds for catering.
- 5.7.99 On 31 March 2015, the KSD-Municipal Public Accounts Committee (MPAC) issued an oversight report on the KSD Municipality's Annual Report for the financial year 2013/2014. Amongst other issues dealt with in the report was the Executive Mayor's report referred to above, in connection with the expenditure incurred by the KSD Municipality for the preparations for the funeral of President Mandela.
- 5.7.100 According to the report, the AG, in its audit report referred to the procurement processes that were used by the Municipality for the event that did not adhere to the KSD Municipality's SCM Policy; which consequently resulted in those items being submitted in the adjustment budget subsequent to the funeral of President Mandela.
- 5.7.101 The KSD-MPAC noted in its report that the Executive Mayor, Cllr. Ngqongwa was on leave from 5 to 12 December 2013 and in her stead, Cllr. Ngcobo acted as Mayor. It is further stated that, at a Council meeting held on 11 December 2013, a Circular from the National Treasury relating to the items that Municipalities were not allowed to procure for the funeral, was circulated.

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5.7.102 According to the KSD-MPAC report, that was the last time that the Municipal Council was consulted and involved in matters relating to the preparations for, and the state funeral of, President Mandela.

**5.7.103 In its report, the KSD-MPAC observed that: -**

5.7.103.1 The expenditure by the KSD Municipality for the state funeral was not authorised by the **executive authority or a Council resolution;**

5.7.103.2 With regard to the procurement of 255 caterers which cost the Municipality an amount of R2 677 500.00, the KSD-MPAC distanced itself from same as the Council was never involved.

5.7.103 On 15 May 2015, the KSD-MPAC was interviewed, led by its Chairperson, Cllr. Pasika Nontshiza. Other members of the committee who attended were Cllrs. L L Mkhonto, Raymond Knock, V O Gwadiso, E S Tswina, K W Tsipa, J M Msakeni, Z Magazi, T Nomvete, M T Mtirara; and Cllr. M Bunzana.

5.7.104 According to the MPAC, subsequent to the passing on of President Mandela, the Council convened a meeting on 11 December 2013, where enquiries were made with the former Municipal Manager regarding arrangements for the funeral, as well as the extent of participation and expenditure that was to be incurred by the Municipality with regard thereto.

5.7.105 The MPAC stated that the response received from the Municipal Manager was that there will be no expenditure incurred by the Municipality for the funeral as that would be catered for by the national government, as it would be an official State Funeral. This dispelled the Council fears as there was no budget for the funeral.

5.7.106 The MPAC stated the expenditure incurred by the KSD Municipality was not approved by the Council.

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5.7.107 Cllr. Nontshiza stated that the Council was surprised when, on 28 February 2014, during the Adjustment Budget meeting, they were asked to condone expenditure of approximately R858 000.00 for transportation and R2.6million in respect of catering for the Mandela funeral. The Council refused to condone the expenditure and thus resolved to refer the matter to the National Treasury for further investigation, due to the fact that the Council was never consulted about this expenditure.

5.7.108 According to Cllr. Gwadiso, when the extent of the expenditure was brought to the Council, a Resolution was taken for the MPAC to investigate the irregular, fruitless and wasteful expenditure and they reported on same in their oversight report of 2013/2014.

5.7.109 Cllr. Tsipa stated that he had observed that there were no controls or verifications for the transportation of people.

### **The Application of the relevant laws and prescripts**

#### **The Constitution**

5.7.110 Section 215 of the Constitution provides that the national, provincial and municipal budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector. This is regulated by national legislation, i.e. the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

5.7.111 The constitutional imperative for procurement of goods and services by organs of state in all spheres of government is to be found in section 217 of the Constitution. In terms of this provision, organs of state that contract for goods or services must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

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**The Municipal Finance Management Act**

5.7.112 In terms of section 1 of the MFMA “*fruitless and wasteful means expenditure that was made in vain and would have been avoided had reasonable care been exercised.*”

5.7.113 Irregular expenditure in relation to a Municipality means, *inter alia*-

5.7.114.1 Expenditure incurred by a Municipality in contravention or that is not in accordance with a requirement of the Act, and which has not been condoned by the National Treasury;

5.7.114.2 Expenditure incurred by a Municipality in contravention of, or that is not in accordance with a requirement of the Supply Chain Management Policy.

5.7.114.3 It excludes expenditure by a Municipality that falls within the definition of unauthorised expenditure.

5.7.114 Unauthorised expenditure means any expenditure incurred by a Municipality otherwise than in accordance with section 15 or 11(3).

5.7.115 In terms of section 15 of the MFMA, a Municipality may (except where otherwise provided in the Act) incur expenditure only in terms of an approved budget, and within the limits of the amounts appropriated for the different votes in an approved budget.

5.7.116 Section 29(1) provides that the Mayor of a Municipality may, in an emergency or other exceptional circumstances, authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure: -

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- (a) must be in accordance with any framework that may be prescribed;
  - (b) may not exceed a prescribed percentage of the approved annual budget;
  - (c) must be reported by the Mayor to the Municipal Council at its next meeting; and
  - (d) must be appropriated in an adjustments budget.

5.7.117 Section 29(3) provides that, if such adjustments budget is not passed within 60 days after the expenditure is authorised, the expenditure is unauthorised.

5.7.118 According to the evidence and information obtained during the investigation, the KSD Municipality had not budgeted for the expenditure that it had to incur for the funeral of President Mandela.

5.7.119 There is no indication in the evidence that the Executive Mayor approved the expenditure incurred by the KSD Municipality for the funeral, in terms of section 29(1) of the MFMA.

5.7.120 The Executive Mayor only reported to the Municipal Council on the expenditure incurred by the KSD Municipality for the funeral of President Mandela on 1 July 2014, more than seven months after the funeral. The Council did not approve the expenditure.

5.7.121 There is no evidence that an adjustments budget in respect of the expenditure incurred by the KSD Municipality for the funeral was passed, as required by section 29(3) of the MFMA. The expenditure was therefore unauthorised.

5.7.122 Supervision over local government finance management is regulated in Chapter 2.

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5.7.123 Section 5(2) provides that the National Treasury may promote good budget and fiscal management by Municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing. It may further take any other appropriate steps necessary to perform its functions effectively.

5.7.124 It should be noted in this regard that, in terms of section 5(1) of the PFMA, the Minister of Finance is the head of the National Treasury.

5.7.125 The evidence obtained during the investigation show that the National Treasury issued the following Directive on 11 December 2013, clearly in terms of section 5(2) of the MFMA:

***“Subject: Cost implications regarding hosting memorial services for the late former President N R Mandela***

***To the Mayor, Municipal Manager, CFO and other municipal officials***

*National Treasury has received a number of requests from municipalities seeking guidance with regard to costs associated with funeral arrangements associated with regard to the Memorial Services for the late President. You will no doubt agree that this is a sensitive matter and needs to be treated with outmost care and respect. The Minister of Finance has determined that the following activities at a reasonable cost are permissible: (sic)*

*Transportation services; and*

*Venue costs (community halls, multi-purpose centre and stadia).*

*However, the following costs are not permissible:*

*Catering;*

*Tents/Marquees; and*

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*Commemorative advertising in the commercial media.*

*Municipalities should ensure that the costs associated with the above arrangements are kept to a bare minimum.”*

5.7.126 The Directive was signed by the Chief Director: Local Government Budget Analysis of the National Treasury.

5.7.127 According to the evidence, this Directive was brought to the attention of the KSD Municipality on the same day, i.e. 11 December 2013.

5.7.128 However, despite this Directive and the fact that the KSD Municipality had not budgeted for the funeral, it incurred expenditure in the amount of R2 677 500. This was not approved by the Municipal Council when the Executive Mayor reported thereon on 1 July 2014.

5.7.129 As indicated above, this expenditure was unauthorised. However, even if it was not, it would have constituted irregular expenditure as it was in direct violation of a Directive by the National Treasury, and not in accordance with the MFMA.

5.7.130 The procurement of goods and services by Municipalities is specifically provided for in Chapter 11 of the MFMA.

5.7.131 Every Municipality is obliged, by virtue of the provisions of section 111 and 112, to have and implement a Supply Chain Management Policy that complies with the requirements of section 217 of the Constitution, referred to above. The Policy must cover a range of relevant issues and activities, including: -

5.7.132.1 The different supply chain management processes that Municipalities may use, including tenders and quotations: -

(a) The procedures and mechanisms for each type of process;

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- (b) Bid documentation, advertising and invitations for contracts;
  - (c) Procedures and mechanisms for the evaluation of bids to ensure best value for money;
  - (d) The approval of bids;
  - (e) The barring of persons whose tax matters are not cleared by the South African Revenue Services or who willfully neglected, reneged on or failed to comply with a government contract during the past 5 years; and
  - (f) The delegation of Municipal supply chain management powers and duties, including those that relate to officials.

5.7.133 The accounting officer (the Municipal Manager in the case of the KSD Municipality) must, in terms of section 115, implement the supply chain management Policy of the Municipality and take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favoritism and unfair and irregular practices.

#### **The Municipal Supply Chain Management Regulations**

5.7.134 The Municipal Supply Chain Management Regulations were promulgated in terms of section 168 of the MFMA.

5.7.135 In terms of Regulation 14, a Municipality's Supply Chain Management Policy must instruct the accounting officer to keep a list of accredited prospective providers of goods and services that must be used for the procurement requirements of the Municipality.

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5.7.136 Regulation 36 provides that the accounting officer may dispense with the official procurement processes referred to above in, *inter alia*, an emergency or other exceptional cases, where it is impractical or impossible to follow the official procurement processes. The accounting officer must record the reasons for any deviations and report them to the next meeting of the Council.

### **The Supply Chain Management Policy of the KSD Municipality**

5.7.137 This Policy was adopted in May 2013.

5.7.138 The five pillars of procurement are contained in paragraph 16. One of them is “*value for money*,” which is defined as: -

*“The term value for money includes monetary value as well as the quality and the utilization of the procurement system to achieve government’s policy objectives. Due consideration should, however, be given to the quality of the goods required, the time to initiate the process and the cost effectiveness of the ensuing contracts. This is an essential test against which a municipality must justify a procurement outcome.”*

5.7.139 Paragraph 24 provides that the accounting officer must keep a list of accredited prospective providers of goods and services that must be used for the procurement requirements of the KSD Municipality through written or verbal price quotations.

5.7.140 According to paragraph 63(1) the procedures governing procurement may be dispensed with, and any required goods or services may be procured through any convenient process, which may include direct negotiations, but only in an emergency and/or in cases where such goods or services are produced or available from a single provider only.

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- 5.7.141 The KSD Municipality dispensed with the prescribed competitive procurement process when it procured goods and services for the funeral of President Mandela. Goods and services were procured directly from service providers. However, it could not be established during the investigation with certainty that all the suppliers were at the time registered on the database of the KSD Municipality and that any attempt was made to obtain quotations from more than one supplier. Further investigations need to be conducted in this regard to establish whether the expenditure was irregular, and if so, how it should be addressed.
- 5.7.142 Wheelie refuse bins were procured, despite the fact that the KSD Municipality did not have a mechanism to lift and empty them. The expenditure at the time therefore did not constitute value for money. Further, these items were discarded and it was only recently that the KSD Municipality procured a refuse truck. They are apparently in the process of procuring services to provide a refuse collection service, which has not commenced. To date, this procurement, at a cost of R760 000 was accordingly fruitless and wasteful, as it was made in vain and would have been avoided had reasonable care been taken.
- 5.7.143 The procurement of steel trollies bins that were intended for the funeral at a cost of R710 812 similarly resulted in fruitless and wasteful expenditure as it arrived after the funeral and was only recently dispatched to businesses. This expenditure would have been avoided had reasonable care been taken to ensure that the supplier could deliver in time.
- 5.7.144 The KSD Municipality procured transportation services for the funeral at a cost of more than R1.5million. No verification was conducted to ensure that the services were indeed rendered and that it constituted value for money.

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**Ms Mbina-Mthembu's response to the Public Protector's Notice in terms  
of section 7(9)(a) of the Public Protector Act**

5.7.145 On 5 September 2017, the Public Protector issued Ms. Mbina-Mthembu with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to affording her with a further opportunity to respond to the allegations against her, as well as the information and evidence obtained by the Public Protector during the investigation that may have an adverse implication against her.

5.7.146 Ms. Mbina-Mthembu responded to the notice on 15 September 2017. She was further interviewed on 15 November 2017 with a view to affording her an opportunity to explain her role, involvement and participation in the procurement of goods and services in preparation for the funeral of President Mandela.

5.7.147 She stated that the KSD and OR Tambo Municipalities was supposed to have completed a number of infrastructure related projects in preparation for the funeral months before the demise of President Mandela. However, the Municipality had failed to do so, due to financial difficulties and project management challenges.

5.7.148 Ms. Mbina-Mthembu referred in her response to the provisions of section 154(1) of the Constitution, which provides that: -

*“The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.”*

5.7.149 In this regard she stated that: -

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*“At the time of the demise of our former President, it became abundantly blatant that there was a state of unreadiness, and that financial assistance was required. The provincial government recognized that Eastern Cape could not fail the country by not ensuring that Mthatha as a town met minimum standards for at least the duration of the funeral.”*

**The KSD Municipal Manager, Mr. M Zenzile’s response to the Public Protector’s Notice in terms of section 7(9)(a) of the Public Protector Act**

5.7.150 On 8 September 2017, the Public Protector issued the current Municipal Manager of the KSD Municipality, Mr. M Zenzile with a Notice in terms of section 7(9)(a) of the Public Protector Act, with a view to affording him with an opportunity to respond to the allegations and evidence obtained by the Public Protector that implicates or may be to the detriment of the KSD Municipality.

5.7.151 Mr. Zenzile responded on 19 September 2017.

5.7.152 He indicated that the KSD Municipality received a R200million “*bailout*” from the ECPG in 2013 due to it experiencing severe cash flow problems.

5.7.153 He further confirmed that *Bravo Africa Holdings* was a listed service provider on the database of the KSD Municipality. He was informed that the Eastern Cape Provincial Treasury had directed that the KSD Municipality “*must avoid purchases of T-shirts and request was made to consolidate the order under the name ‘Protective Cloting.’*”

5.7.154 According to Mr. Zenzile, *Mvundla Group* was also a listed service provider appointed by the KSD Municipality to supply refuse bags long before the funeral.

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5.7.155 They were therefore given an order to supply refuse bags at a cost of R504 340 on 12 December 2013 for the funeral and the forthcoming festive season.

5.7.156 The steel and skip bins procured from *Trolley and Bin* were meant for storing and removing of refuse during the funeral, but were only delivered thereafter, due to the closure of the manufacturer for the December holidays.

5.7.157 Mr. Zenzile conceded that 150 wheelie refuse bins were placed at the public mourning venues, that the KSD Municipality at the time did not have the means to lift and clean the bins, and that some of them were vandalised.

5.7.158 He further confirmed that the Municipal Council did not approve the expenditure of R2.6million incurred by the KSD Municipality for the funeral of President Mandela.

### **Conclusions**

5.7.159 The KSD Municipality incurred unauthorised expenditure for the funeral of President Mandela in excess of R4.2million.

5.7.160 This expenditure would also have constituted irregular expenditure, if it was authorised.

5.7.161 The expenditure of R1 160 770 incurred in respect of refuse bins was fruitless and wasteful and accordingly unnecessary. There is no indication in the evidence that the KSD Municipality even considered alternatives for the procurement of wheelie refuse bins at a cost, some of which were discarded and vandalised after the funeral.

5.7.162 At the time when the KSD Municipality incurred the expenditure for the funeral of President Mandela, it was experiencing extreme financial constraints and was operating with a loan obtained from the ECPG.

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- 5.7.163 There are indications in the evidence that the payment of goods and services to certain suppliers was based on procurement documentation, the contents of which was incorrect or that did not refer to the items that were ordered.
- 5.7.164 The verification by the KSD Municipality of the delivery of the goods and services procured for the funeral was either not done, or was insufficient to have justified payment by the KSD Municipality.
- 5.7.165 Further investigation should be conducted by the Municipal Manager of the KSD Municipality under the guidance and supervision of the Chief Procurement Officer of the National Treasury, to determine whether the payments that were made to suppliers by the KSD Municipality for the funeral of President Mandela were justified the payments that were made, and if not, appropriate steps should be taken to recover such expenditure.
- 5.8 Regarding whether the OR Tambo District Municipality (ORTDM) incurred irregular in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration: -**

Issues that are Common Cause

**5.8.1 It is not disputed that the OR Tambo District Municipality (ORTDM): -**

- 5.8.1.1 Incurred expenditure amounting to approximately R500 000 towards catering for mourners who attended the regional memorial service and watched the telecast of the funeral of President Mandela in and around the jurisdictional area of the District Municipality.
- 5.8.1.2 Incurred expenditure of approximately R9 741 480 towards the provision of infrastructure services in preparation for the funeral of President Mandela that was paid for on approval by the Provincial Treasury by the ECDC.

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**Issues that are in dispute**

- 5.8.2 The issue for determination by the Public Protector is whether the ORTDM incurred irregular or unauthorised expenditure in respect of the provision of infrastructure and catering during the funeral of President Mandela.
- 5.8.3 During the investigation, it was established that on 9 December 2013, Ms. Mbina-Mthembu addressed correspondence to the Municipal Manager of the ORTDM, Mr. H T Hlazo. The purpose of her correspondence was to advise, give guidelines, communicate and outline the process that was to be followed in the procurement of goods and services in preparations for the funeral of President Mandela.
- 5.8.4 In her communication, Ms. Mbina-Mthembu informed the Municipal Manager that since President Mandela would be laid to rest in Qunu, the Provincial EXCO had deemed it appropriate that the Eastern Cape Province should provide appropriate assistance to the ORTDM to ensure the smooth running of the State Funeral.
- 5.8.5 With regard to the procurement process that was to be followed, Ms. Mbina-Mthembu informed Mr. Hlazo that it had to comply with the provisions of section 217(1) of the Constitution, and section 112 of the MFMA.
- 5.8.6 With regard to the payment of invoices, Ms. Mbina-Mthembu's instruction was that, accounting officers and/or authorities must ensure that all invoices are received by 23 December 2013. Further thereto, she instructed that all invoices together with supporting documents must be submitted by 8 January 2014 to Provincial Planning and Treasury for approval prior to payment thereof by the ECDC.

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- 5.8.7 On 9 July 2014, the Public Protector addressed correspondence to the Executive Mayor and the Municipal Manager of the ORTDM, Cllr. N Meth and Mr. H T Hlazo respectively, in connection with the investigation.
- 5.8.8 Mr. Hlazo responded on 6 August 2014.
- 5.8.9 With regard to the infrastructure related expenditure, he stated that the business plan from the Provincial Treasury was used as a basis for deviation from the normal procurement process.
- 5.8.10 He attached to his response a Memorandum requesting approval for the deviation from the normal procurement processes in relation to the preparations for the state funeral of President Mandela, dated and signed on 9 December 2013.
- 5.8.11 The Memorandum appeared to have been submitted by the Acting CFO at the time, Mr. M A Mandla, to the Municipal Manager, Mr. H T Hlazo.
- 5.8.12 The financial implications stated in the Memorandum were an amount of R9 691 490.00, which related to expenditure for infrastructure projects to support the funeral arrangements. The items that the ORTDM intended to procure in respect of infrastructure services were the following: -

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE MISAPPROPRIATION OF PUBLIC FUNDS,  
IMPROPER CONDUCT AND MALADMINISTRATION IN CONNECTION WITH EXPENDITURE INCURRED IN  
PREPARATION FOR THE FUNERAL OF FORMER PRESIDENT NELSON ROLIHLEHLA MANDELA



ITEMS	COST ESTIMATE	BUDGET AVAILABLE (FUNDED BY ORTDM)	BUDGET SHORTFALL TO BE FUNDED BY ECDC	BUDGET REQUIRED
Mthatha Dam Standby Generators	R 1, 000,000.00	R 1, 000,000.00	-	-
Mthatha Dam Security room & Fencing	R 500,000.00	R 500,000.00	-	-
Purchasing of 2x Steel Tanks	R 1, 400,000.00	R 1, 400,000.00		
Refurbishment of 22x Sewer Pump stations	R 7, 500,000.00	R 5,000,000.00	R 2, 500,000.00	R 2, 500,000.00
Fuel for Thornhill Treatment Works Standby generators	R 688,000.00		R 688,000.00	R 688,000.00
Bedford Water supply Tanks and Water cart trucks for PMVA's	R 500,000.00 R 450,000.00	R 500,000.00	R 450,000.00	R 450,000.00
Fixing of Airport Terminal buildings	R 760,000.00		R 760,000.00	R 760,000.00
Provision of VIP toilets at Qunu	R 50,000.00	R 50,000.00		R 50,000.00
Mhlahlane treatment works repairs	R 100,000.00		R 100,000.00	R 100,000.00
Mthatha Dam Security Services and CCTV	R 600,000.00		R 600,000.00	R 600,000.00
Rescue and Emergency Services(Staff) – Accommodation and catering	R 700,000.00		R 700,000.00	R 700,000.00
<b>SUBTOTAL</b>	<b>R14,248,800.00</b>	<b>R9, 750,000.00</b>	<b>R5, 798,800.00</b>	<b>R 5, 748,800.00</b>

Items	QTY	Unit cost	Total Cost (Excl VAT)
<b>SOFTWARE</b>			R 5 97,500
Disaster Management, Fire & Water Mobile App	15	R 6,000	R 90,000
Disaster Management Information System lic for additional services and users	10	R 25,000	R 250,000
GPS tracking for radios	1	R130,000	R130,000
Mobile Apps for MDTs	15	R 8,500	R 127,500
<b>HARDWARE</b>			R 2,477,500
Mobile Data Terminals for Vehicles	15	R 10,500	R 157,500
Radio for Control Rooms	6	R 12,500	R 75,000
Radio for base stations at LMs	6	R 12,500	R 75,000
Vehicle radio	15	R 9,500	R 142,500
Mobile/Handheld Users	15	R 8,500	R 127,500
Equipment for Additional Users	10	R 15, 000	R 150,000
Radio Integration and Interoperability	1	R 1,750,000	R 1,750,000
<b>SYSTEM SUPPORT AND PROFESSIONAL SERVICES</b>			R 338,500

Annual System Maintenance and Support	1	R 150,000	R 150,000
Relocation of Equipment and radios	1	R 60,000	R 60,000
Training and skills transfer (12 months)	1	R 37,500	R 37,500
Installation, Testing and Commissioning	1	R 100,000	R 100,000
Project Management	48	R 750	R 36,0000
		<b>Subtotal</b>	<b>R 3,458,500</b>
		<b>VAT @ 14%</b>	<b>R 484, 190</b>
		<b>Total (Incl VAT)</b>	<b>R 3,942,690</b>

- 5.8.13 Mr. Hlazo approved the Memorandum on the same day (9 December 2013). It was also approved by Ms. Mbina-Mthembu in her capacity as the Head of the Provincial Department of Planning and Treasury, and the amount was subsequently paid by the ECDC.
- 5.8.14 Regarding the expenditure incurred for catering and transport of mourners to attend a regional memorial service and watch the funeral proceedings at the public mourning venues, Mr. Hlazo stated in his response that his office did not approve any deviation from the normal procurement processes, as the National Treasury had issued a Circular prohibiting catering by municipalities for the memorial services and the funeral.
- 5.8.15 He stated that the Executive Mayor called Mr. Hattingh of the National Treasury to persuade him to agree to catering arrangements and some of the correspondence in that regard were sent to National Treasury on 10 December 2013.
- 5.8.16 The Circular that Mr. Hlazo referred to, was an e-mail message from the National Treasury's Chief Director responsible for Local Government Budget Analysis, Mr. Jan Hattingh. It was addressed to Mayors, Municipal Managers, CFOs and other municipal officials under the subject ***“Cost implications regarding hosting memorial services for the late former President NR Mandela.”*** It reads as follows: -

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*“National Treasury has received a number of requests from municipalities seeking guidance with regard to costs associated with funeral arrangements associated with regard to the Memorial Services for the late President.*

*You will no doubt agree that this is a sensitive matter and needs to be treated with utmost care and respect.*

***The Minister of Finance has determined that the following activities at a reasonable costs are permissible***

*Transportation services; and  
Venue costs (community halls, multi purpose centres and stadia)*

***However, the following costs are not permissible;***

***Catering;  
Tents / Marques; and  
Commemorative advertising in the commercial media***

*Municipalities should ensure that the costs associated with the above arrangements are kept to a bare minimum.”*

- 5.8.17 On 10 December 2013, Mr. Hlazo corresponded with Mr. Hatting of National Treasury with regard to the e-mail referred to above, thus requesting the National Treasury to allow the ORTDM to provide catering and undertook to keep the expenditure to a bare minimum.
- 5.8.18 Mr. Hlazo also made reference to the telephone call between Mr. Hatting and the Executive Mayor. In his correspondence, Mr. Hlazo requested the National Treasury to exempt the ORTDM from not providing catering.

5.8.19 Mr. Hattingh responded to Mr. Hlazo by e-mail on 12 December 2013, and stated that:

*“The original e-mail was circulated on behalf of the Minister of Finance. Any deviations from the instructions given in the notification would have to be at the sole discretion and responsibility of the Council of the Municipality.”*  
(emphasis added)

5.8.20 The table below depicts additional payments made by the ORTDM, as compiled from the information provided by Mr. Hlazo: -

ITEM NUMBER	PAYEE	AMOUNT
1	BEEZEE BEE EVENTS	27 500.00
2	BUYILE-MAKOPI	11 800.00
3	TAKE NOTE TRADING	19 500.00
4	SUJ SPORTS	12 500.00
5	BAYAZENZELA TRADING	19 500.00
6	NTSIKELELO TRADING	19 500.00
7	NTUTU AND MIHLALI	6 250.00
8	ISAKWATSHA	30 000.00
9	BYM TRADING	12 500.00
10	DEBE CLEANING	19 500.00
11	CNN INVESTMENT	19 500.00
12	OWAM OMBONO TRADING	19 500.00
13	PLEROMA INVESTMENTS	19 500.00
14	AAH BANGISIZWE	19 500.00
15	ANOINTED CREW	19 500.00
16	GQIBS TRADING	27 500.00
17	KYOVAX	12 500.00
18	NDAH CATERING	6 250.00
19	SUKU TRADING	47 500.00
20	CITY SHAFFLE TRADING	13 500.00
21	CROSS BAR 315 cc	15 480.00
22	L.BEJA BUILDING CONSTRUCTION	91 200.00
23	JWHR TRADING	80 000.00
24	CROSS BAR	4 243.50
25	GILMAN'S CARTAGE	80 000.00

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE MISAPPROPRIATION OF PUBLIC FUNDS,  
IMPROPER CONDUCT AND MALADMINISTRATION IN CONNECTION WITH EXPENDITURE INCURRED IN  
PREPARATION FOR THE FUNERAL OF FORMER PRESIDENT NELSON ROLIHLEHLA MANDELA**



26	SIPHAKU TRADING & PROJECTS	80 000.00
27	KHAZIMLA CONSULTANCY	18 230.00
28	NGQAKUMBA TRADING	34 000.00
29	NOSKANY TRADING	32 500.00
30	THATHO DIVOTSHA FLORENCE TRADING	100 000.00
31	UBABALO TRAVEL	12 786.00
32	UKHANYE TRAVELS	49 639.00
33	PM SANGQU EVENTS & OTHER SERVICES	44 245.00
34	LAWULWA CIVILS	450 00.00
35	BAMBOO ROCK	3 330.00
36	ANOINTED CREW TRADING PROJECTS	197 500.00
37	PUTUMUNCU MO 6369	52 000.00
38	SWIFT TRAVEL	7 452.00
39	CROSSBAR 315 cc	23 279.39
40	LELETHU IQHAYIYA TRADING	462 321.90
41	ZANO SECURITY	41 692.00
42	SINDILE MAJIKIJA	13 500.00
43	YALUSA TRADING ENTERPRISE	19 500.00
44	CWENGA KITCHEN cc	9 750.00
45	RANQUE ENTERTAINMENT	29 800.00
46	SINOKUHLE TRADING	32 500.00
47	AUDREY'S KITCHEN	2 280.00
48	SIBAHLE EASY TRAVEL	4 669.00
49	DISTANT STAR TRADING 463 cc	28 500.00
50	TAKE NOTE TRADING	13 995.60
51	NGQAKUMBA TRADING	14 110.00
52	SWIFT TRAVEL	3 067.48
53	MBETHA MULTI TRADERS	9 750.00
54	NOLUKHANYO TRADING	29 800.00
55	BKM CIVILS & PLUMBING SUPPLIES	72 213.30
56	RUCC COMMUNITY DEVELOPMENT	31 200.00
57	LAKESHORE TRADING 144cc	3 900.00
58	BHUBHA SONS	149 110.00
59	SWIFT TRAVEL TOURS	33 137.59
60	AMG	35 700.00

61	UMTATA TAXI OWNERS ASS	3 600.00
62	GIVING THE BEST TRADING	2 640.00
63	SWIFT TRAVEL & TOURS	14 525.95
64	SWIFT TRAVEL & TOURS	23 981.00
65	SWIFT TRAVEL & TOURS	11 714.00
66	UKHANYE TRAVELS	19 846.13
67	ISAKATSHWA CATERING & SUPPLIES	4 950.00
68	LICAMZI TRADING & TRADING	15 750.00
69	SWIFT TRAVEL TOURS	10 337.20
70	SABC	70 363.11
71	LAVENDER MOON TRADING 125	15 600.00
<b>TOTAL</b>		<b>2 992 989.15</b>

5.8.21 Mr Hlazo concluded his submission to the Public Protector by stating that the Executive Mayor indicated that catering was unavoidable, considering the rural nature of the Municipality and other exigencies, and as a result, a concept document was prepared by the Acting Director in the Office of the Executive Mayor, recommending an amount of R239 500.00, but the actual expenditure increased to more than R500 000.00.

5.8.22 There is no indication in the evidence and information obtained during the investigation that the ORTDM budgeted for the funeral of President Mandela.

5.8.23 On 30 March 2015, a subpoena in accordance with the provision of sections 7(4) and (5) of the Public Protector Act, was issued, calling upon the Executive Mayor of the ORTDM Cllr. Meth, to appear before the Public Protector on 22 April 2015 to respond to the allegations and evidence of the expenditure incurred by the ORTDM in respect of the memorial service and funeral of President Mandela.

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- 5.8.24 Amongst the documents Cllr. Meth presented to the Public Protector at her appearance, was a submission in connection with the allegations. In addressing the question whether there was a Council Resolution authorising the expenditure, Cllr. Meth stated that the expenditure for the funeral was the responsibility of the Provincial Treasury and as such expenditure pertaining to the funeral was to be incurred by that department.
- 5.8.25 According to Cllr. Meth, it was not necessary for the ORTDM to have had a pre-approval from the Municipal Council regarding expenses to be incurred for the funeral of President Mandela.
- 5.8.26 Cllr. Meth further stated that ORTDM is a Water Services Authority that is legislatively mandated in terms of section 11 of the Water Services Act, 108 of 1997, with the sole responsibility of ensuring that all consumers in its area of jurisdiction have efficient, affordable and sustainable access to water and sanitation services.
- 5.8.27 In this regard, so stated Cllr. Meth, the Provincial Treasury tasked the ORTDM with the responsibility of ensuring that there was consistent and uninterrupted water supply in that area during the ten day period from preparations until the date of the funeral of President Mandela.
- 5.8.28 Further to this task, the Disaster Management Services were to be strengthened due to the expected high influx of mourners from around South Africa, Africa and the globe who would be attending the funeral. According to Cllr. Meth, the ORTDM identified strategic areas that were regarded as high priority areas for the influx and as such measures to upgrade and improve the level of service to cover the expected number of mourners who would be in the areas, had to be put in place for uninterrupted supply of water and sanitation, as well as intensified disaster management services.

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- 5.8.29 The priority areas that the Municipality identified were Qunu, Mthatha CBD, the Airport, Mthatha Dam, Disaster Management and the public mourning venues. Cllr. Meth stated in her submission that the Provincial Treasury confirmed that the payment of the invoices received from the suppliers who were to render these services would be processed for payment by the Treasury as the funding for the State Funeral had been allocated to it.
- 5.8.30 The arrangement was communicated to the suppliers.
- 5.8.31 Cllr. Meth stated that the costs of the said services amounted to R9 741 490.00, with a sum of R5 798 800 committed to the provision of water and sanitation, and R3 942 690.00 in respect of the Disaster Management Services, which were going to be paid directly to suppliers by the Provincial Treasury through the ECDC.
- 5.8.32 According to Cllr. Meth, the additional amount of R8 450 000.00 was part of the already approved 2013/14 budget of the ORTDM, specifically for the provision of water and sanitation at Mthatha.
- 5.8.33 Cllr. Meth stated that a further amount of R675 144.50 was utilized for repairs and building maintenance. In total, the committed amount for the whole programme during the funeral preparations was R1 366 087.50. She then listed the scope of work that was done in implementing the project and further attached a report that was presented to Council in terms of Regulation 36 of the Municipal Supply Chain Management Regulations.
- 5.8.34 She also submitted a business plan prepared by *Amatola Water*, dated 9 December 2013 and titled “*Water Service Support for State Funeral of former President Nelson Mandela.*”

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- 5.8.35 According to this business plan, *Amatola Water* was tasked by the ECPG through the ECDC to ensure that the ORTDM water services function is adequately supported for the period leading up to, including and immediately subsequent to the state funeral.
- 5.8.36 The entity was thus tasked to ensure that Mthatha, the Mthatha Airport and the greater Qunu area have efficient and effective water services. The estimated total cost for the project was an amount of R11 496 613.00. The provision of water services in Qunu, such as borehole water systems, water reservoirs, windmills, bulk reticulation and pumps were implemented at a cost of R5 359 950.98.



**Qunu borehole**



**Qunu new Borehole rising main**



**Qunu new Borehole rising main**



**Qunu new Borehole rising main**



**Qunu galvanized steel tanks**



**Qunu galvanized steel tanks**



**Jojo tanks for Qunu PMVA's**



**Jojo tanks for Qunu PMVA's**



**Eskom connections  
refurbishment**



**Mthatha sewer pump station**



**Mthatha sewer pump station refurbishment Mthatha sewer pump  
station refurbishment**



**Mthatha sewer pump station refurbishment**



**Mthatha Dam standby generator**



### Repairs to Mthatha Airport & Qunu Community Centre

- 5.8.37 The total project cost for the ORTDM water and sanitation services in preparation for the funeral of President Mandela was R12 649 737.08. Of this amount, the ECDC paid directly to *Amatola Water Board* an amount of R10 721 863.18. R1 406 892.00 of the remaining amount of R1 927 873.90 was paid by the ORTDM to service providers.
- 5.8.38 Cllr. Meth did not provide not provide an explanation in regard to the procurement of catering for President Mandela's funeral.
- 5.8.39 On 31 January 2014, the Municipal Manager reported to the Municipal Council that he dispensed with the official procurement processes and procedures and thus procured the required goods and services through convenient process to the value of R10 785 914.86. The expenditure was incurred without following an open and competitive bidding process.
- 5.8.40 On 24 April 2015, the ORTDM prepared a *Consolidated Expenditure Report on the State Funeral of Dr Nelson Mandela*.
- 5.8.41 According to this report, the Office of the Executive Mayor incurred expenditure in the amount of R443 500 for catering during the memorial service and funeral of President Mandela.

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5.8.42 No evidence was found during the investigation that this expenditure was approved by the Executive Mayor or the Municipal Council. It could also not be established with certainty who authorised the payment to service providers.

5.8.43 Mr. Hlazo has since left the employ of the ORTDM.

### **The Application of the relevant laws and prescripts**

#### **The Constitution**

5.8.44 Section 215 of the Constitution provides that the national, provincial and municipal budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector. This is regulated by national legislation, i.e. Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

5.8.45 The Constitutional imperative for procurement of goods and services by organs of state in all spheres of government is to be found in section 217 of the Constitution. In terms of this provision, organs of state that contract for goods or services must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

#### **The Municipal Finance Management Act**

5.8.46 In terms of section 1 of the MFMA: -

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

5.8.47 Irregular expenditure in relation to a Municipality means, *inter alia*-

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-Expenditure incurred by a Municipality in contravention or that is not in accordance with a requirement of the Act and which has not been condoned by the National Treasury;

-Expenditure incurred by a Municipality in contravention of, or that is not in accordance with a requirement of the Supply Chain Management Policy.

-It excludes expenditure by a Municipality that falls within the definition of unauthorised expenditure.

5.8.48 Unauthorised expenditure means any expenditure incurred by a Municipality otherwise than in accordance with section 15 or 11(3).

5.8.49 In terms of section 15 of the MFMA, a Municipality may (except where otherwise provided in the Act), incur expenditure only in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget.

5.8.50 Section 29(1) provides that the Mayor of a Municipality may in an emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure-

- (e) must be in accordance with any framework that may be prescribed;
- (f) may not exceed a prescribed percentage of the approved annual budget;
- (g) must be reported by the Mayor to the Municipal Council at its next meeting; and
- (h) must be appropriated in an adjustments budget.

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- 5.8.51 Section 29(3) provides that if such adjustments budget is not passed within 60 days after the expenditure is authorized, the expenditure is unauthorised, and section 32 applies.
- 5.8.52 According to the evidence and information obtained during the investigation, the ORTDM Municipality had not budgeted for the expenditure that it had to incur for the funeral of President Mandela.
- 5.8.53 There is no indication in the evidence that the Executive Mayor approved the expenditure incurred by the ORTDM Municipality for the funeral, in terms of section 29(1) of the MFMA.
- 5.8.54 There is no evidence that the expenditure was reported to the Municipal Council.
- 5.8.55 There is also no evidence that an adjustments budget in respect of the expenditure incurred by the ORTDM Municipality in respect of catering for the funeral was passed, as required by section 29(3) of the MFMA. The expenditure was therefore unauthorised.
- 5.8.56 Supervision over local government finance management is regulated in Chapter 2.
- 5.8.57 Section 5(2) provides that the National Treasury may promote good budget and fiscal management by municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing. It may further take any other appropriate steps necessary to perform its functions effectively.
- 5.8.58 It should be noted in this regard that, in terms of section 5(1) of the PFMA, the Minister of Finance is the head of the National Treasury.

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- 5.8.59 The evidence obtained during the investigation show that the National Treasury issued the following Directive, clearly in terms of section 5(2) of the MFMA, on 11 December 2013, indicating to municipalities that expenditure for catering during the funeral of President Mandela was not permissible.
- 5.8.60 The ORTDM requested National Treasury to exempt them from this permission, but was advised that to incur such expenditure in the light of the Directive, would be in the sole discretion of the Municipal Council.
- 5.8.61 However, despite this Directive and the fact that the ORTDM Municipality had not budgeted for the funeral, it incurred expenditure in the amount of R443 500.
- 5.8.62 As indicated above, this expenditure was unauthorised. However, even if it was not, it would have constituted irregular expenditure as it was in direct violation of a Directive by the National Treasury and not in accordanc with the MFMA.

### **Conclusion**

- 5.8.63 The ORTDM incurred unauthorised expenditure in the amount of R443 500, in respect of catering for the Funeral of President Mandela.
- 5.8.64 Even if the expenditure was authorised, it would have been irregular, as it was in violation of a Directive of the National Treasury, and not in accordance with the MFMA.

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**5.9 Regarding whether the Nelson Mandela Bay Metropolitan Municipality (NMBMM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such a conduct constitutes improper conduct and maladministration: -**

Issues that are Common Cause

5.9.1 It is not in dispute that in preparation for the memorial service and funeral of President Mandela, the Nelson Mandela Bay Metropolitan Municipality (NMBMM) incurred the following expenditure: -

5.9.1.1 R110 300.00 in respect of catering for the funeral;

5.9.1.2 R722 100 to purchase t-shirts;

5.9.1.3 R200 000 for the provision of loudhailers;

5.9.1.4 R750 000 for the repair of the City's CCTV cameras;

5.9.1.5 R300 000 in respect of signage and advertising;

5.9.1.6 R30 000 for decoration at mourning sites;

5.9.1.7 R160 000 for public address systems;

5.9.1.8 R42 500 for satellite dishes at 17 mourning sites;

5.9.1.9 R1.7million for the use of the Nelson Mandela Bay Stadium for the Provincial memorial service

5.9.1.10 R197 944 for the accommodation for City Traffic Officers attending the funeral in Mthatha;

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- 5.9.1.11 R576 000 in respect of downlinks to screens at the various memorial programmes at community halls;
- 5.9.1.12 R200 000 for buses and taxis to ferry mourners to the stadium and public mourning venues;
- 5.9.1.13 R8 000 in respect of public address system for the *ANC Womens League* programme; and
- 5.9.1.14 R2 875 for a PVC banner.

**Issues that are in dispute**

- 5.9.2 The issues for determination by the Public Protector are whether: -
- 5.9.2.1 The NMBMM irregularly incurred expenditure amounting to R5 788 520.00 of municipal funds to procure goods and services for the memorial service and funeral of the late President Mandela;
- 5.9.2.2 The expenditure was authorised by the Municipal Council of the NMBMM; and;
- 5.9.2.3 The expenditure was in accordance with the provisions of the MFMA, 2003, the Municipal Supply Chain Management Regulations and the Municipality's Supply Chain Management Policy.
- 5.9.3 According to the information and evidence provided during the the investigation by the NMBMM, it was identified as a key stakeholder by the ECPG to host a memorial service for President Mandela.
- 5.9.4 A local task team was established, represented by Cllr. Thembenkosi Mafana, the NMBMM Portfolio Chairperson of Safety & Security.

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- 5.9.5 Other officials and politicians of NMBMM also served in the local task team, which was tasked to: -
- 5.9.5.1 Draft an appropriate plan of action for the memorial service and funeral of President Mandela;
  - 5.9.5.2 Compile a concept document for a memorial service at the NMB Stadium;
  - 5.9.5.3 Identify possible sites for signing of Condolence Books;
  - 5.9.5.4 Identify possible sites for public mourning venues; and
  - 5.9.5.5 Prepare a provisional budget.
- 5.9.6 These state-of-readiness plans were prepared in consultation with the SAPS, as well as the ECPG and included a breakdown of various workstreams.
- 5.9.7 Upon the news of President Mandela's passing, relevant stakeholders and officials were directed to report to a Provincial Joint Special Session called by the ECPG at South End Disaster Management Centre in Port Elizabeth. At this meeting, chaired by a Provincial Representative, the Joint Operations Centre was activated by SAPS, on 6 December 2013 and the operational plans of each workstream were put into action.
- 5.9.8 The procurement of goods and services by the NMBMM was to be aligned with the operational plans prepared prior to the passing of President Mandela. Deliverables were ever-changing as the magnitude of the event could never have been forecasted. Informed by the services required, and the deadline to be met, each workstream contacted numerous service providers to ascertain their availability and capability to deliver the service on time.

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- 5.9.9 Quotations were obtained from service providers who were in a position to produce the required goods and services. Requisitions were prepared accordingly and orders were generated. Payments were effected once the delivery of goods/services were rendered and verified.
- 5.9.10 The delivery of goods and services were monitored and verified as indicated in a report to the Municipal Council dated 11 March 2014.
- 5.9.11 The ECPG was responsible for the arrangement and payment of the following services relevant to the official memorial service to be held at NMB Stadium: -
- 5.9.11.1 Transport- R550 000;
- 5.9.11.2 Stage, Sound and Big Screen- R630 000;
- 5.9.11.3 Big Screen for overflow on B Field- R185 000.
- 5.9.12 On 26 January 2015, the Public Protector made an enquiry to the Municipal Manager of the NMBMM, Mr. Mpilo Mbambisa in connection with the investigation.
- 5.9.13 He responded on 13 February 2015 and provided the Public Protector with a written submission.
- 5.9.14 Mr. Mbambisa stated that on 6 December 2013, the NMBMM Municipal Council considered an agenda item in connection with hosting of a memorial service and funeral of President Mandela. The agenda item included responsibilities and duties of various operational functions which were required for the successful and reverent hosting of the events.
- 5.9.15 Subsequent to discussions and deliberations on the matter, the Municipal Council approved funding of R6million for purposes of procuring service providers that would assist in the preparations for the memorial service and funeral of the late President Mandela.

5.9.16 According to Mr. Mbambisa, the ECPG did not make any funding allocations to the NMBMM in respect of hosting the memorial service and the funeral. The amount of R6million was broken down as follows: -

ITEM	COST	MOTIVATION
<b>Nelson Mandela Bay Stadium</b>	R500 000.00	
<b>Safety &amp; Security</b>	R1.5million	Requirement of staff working extra-ordinary hours. Provision of catering for staff, rectification of CCTV cameras that were not working as well as provision of security
<b>Corporate Services</b>	R250.000.00	Printing of Condolence Books and Overtime for Caretakers at Community Centres
<b>Executive Mayor's Office</b>	R1.5million	Provision of data projectors with big screens and sound systems at selected Community Centres, catering and other unexpected costs
<b>Infrastructure &amp; Engineering</b>	R750 000.00	Provision of water and sanitation services
<b>Electricity &amp; Energy</b>	R500 000.00	Securing of generators and uninterrupted power
<b>Joint Operations Committee (JOC)</b>	R75 000.00	Envisaged that the committee would be operating during the entire period of the memorial service and funeral
<b>Transport &amp; Mobilisation</b>	R1million	Provision of public transport to the stadium to ensure that it is filled to capacity.  Secure 500 buses
<b>ESTIMATED COST</b>	<b>R6million</b>	

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- 5.9.17 During the investigation, it was noted that neither Mr. Mbambisa nor his Executive Mayor at the time, Cllr. Ben Fihla attended the Special Eastern Cape Provincial EXCO meeting held on the evening of 6 December 2013 at the Regent Hotel in East London.
- 5.9.18 However, in his submission, Mr. Mbambisa stated that, following the Special Provincial EXCO Resolution taken on 6 December 2013, the necessary authority to incur expenditure towards the events was obtained from the NMBMM Municipal Council.
- 5.9.19 In responding to the allegations regarding the expenditure that was incurred by the Municipality, Mr. Mbambisa stated that: -
- 5.9.19.1 The allegation that an amount of R1 129 601.00 was paid to service providers in respect of catering is incorrect, as the provision for catering was limited to an amount of R110 300.00. An amount of R3 200 was incurred for catering for staff members who were working outside normal working hours.
- 5.9.19.2 An expenditure amounting to R76 500.00 was in respect of 300 dignitaries and leaders attending the memorial service. Mr. Mbambisa also stated that an expenditure amounting to R30 600.00 was incurred for 120 artists who performed at the memorial service; and;
- 5.9.19.3 In accordance with the Council Resolution of 6 December 2013, a multi-party organizing committee was established to coordinate all activities for the successful and applicable hosting of the memorial service, including making decisions in that regard.
- 5.9.20 The Organizing Committee comprising of all political parties decided that t-shirts be acquired.

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- 5.9.21 According to Mr. Mbambisa, a Resolution was taken that loudhailing was expected throughout the jurisdictional area of the NMBMM to ensure that communities were aware of exactly where the activities would be taking place. This service was contracted to 16 service providers.
- 5.9.22 The NMBMM purchased CCTV cameras for usage during the 2010 Soccer World Cup. The cameras are considered strategic in ensuring the safety of residents of the Municipality. According to Mr. Mbambisa, it was a safety precaution that the behaviour of the general public was monitored during the events relating to the funeral.
- 5.9.23 A SAPS National Security Directive and Prevention Strategy was compiled and required that the NMBMM ensures that existing infrastructure, necessary for the monitoring of crowd and influx of visitors, be in working order and fully operational.
- 5.9.24 He explained that not all the non-functioning CCTV cameras were summarily fixed, but only the equipment that was strategically placed and positioned. The NMBMM's Communication Plan was premised upon notifying the public of the date, time and logistical arrangements for the official state funeral and the memorial service.
- 5.9.25 Mr. Mbambisa stated that informational notifications were strategically placed on communication platforms that were readily and easily exposed and available to the public of Nelson Mandela Bay. These platforms included informational notifications in local newspapers, on existing billboards, at condolence book sites and directional signage in and around the Nelson Mandela Bay Stadium where the official memorial was to be held.
- 5.9.26 R30 000 was spent in setting up 17 mourning sites for the signing of the condolence books. It included draping on stands, table cloths, chairs, candles and portraits of President Mandela.

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- 5.9.27 The number of mourning sites were later increased to 22. These sites had to be maintained for the Official Mourning Period of 6 to 16 December 2013.
- 5.9.28 An amount of approximately R160 000.00 was spent on public address systems for the provision of sound during the period 6 to 16 December 2013. This was in respect of open- air prayer services held at Mandela Peace Park, Vuyizile Mini Square (City Hall), NU2 Motherwell and Uitenhage Market Square.
- 5.9.29 Expenditure of R42 500.00 was incurred for the temporary installation of satellite dishes at the mourning sites. This was expected in order to provide visuals of daily coverage related to the President Mandela. In accordance with the Council Resolutions as well as funds allocated for this purpose, the NMBMM paid for the venue hire, which included all logistical, multimedia and related needs.
- 5.9.30 Mr. Mbambisa stated that, on 8 December 2013, the Municipal Manager of the KSD Municipality in Mthatha requested the City Manager of the NMBMM to assist with resources, specifically pertaining to traffic staff, fire starters, vehicles and equipment, as they did not have sufficient resources to ensure proper support.
- 5.9.31 In accordance with the principle of co-operative governance and commensurate with a national occasion that required the collaboration and joint efforts of all governance structures, the NMBMM City Manager acceded to the request, and as a result expenditure of R165 000.00 was incurred. The necessary approvals were obtained from the Executive Mayor.
- 5.9.32 Expenditure to the approximate amount of R 576 000.00 had to be incurred for the set up and maintenance of live feeds to each of the 17 public mourning venues.

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- 5.9.33 This included the provision of appropriate data projectors suitable to the size of the hall, computer links to satellite dishes, the provision of a link to the network, as well as screens, sound systems, decoders, and temporary licenses at all mourning sites. As in all other cases, prices of all these goods and services were at market- value.
- 5.9.34 Due to the vastness of the area and the fact that some of the venues were not in within walking distance, transport was made available. An amount of R200 000.00 was paid for bus and taxi transport during the period 6 to 16 December 2013 to transport community members to mourning sites, prayer services, public viewing areas and the memorial service.
- 5.9.35 In justifying the expenditure of an amount of R8 000 in respect of public address system for the *ANC Womens League* programme, as well as a PVC banner at a cost to the Municipality of R2 875, Mr. Mbambisa stated that many organisations took the initiative to pay tribute to the President Mandela, and as such numerous cross-cutting programmes were running during his mourning period.
- 5.9.36 Therefore the *ANC Women's League* programme was not exclusive to its members only but a City-wide programme that encompassed all women structures. He further stated that the public address system enabled participants of the march to mobilise others and to encourage them to join the march.
- 5.9.37 This also assisted in controlling the crowd and proceedings during the procession. According to Mr. Mbambisa, a banner was carried with President Mandela's image whereafter all women were invited to write a condolence message on the banner with their names.

5.9.38 The costs incurred by the NMBMM in executing this operational plan amounted to R6 030 111.08 which is broken down as follows: -

NELSON MANDELA BAY MUNICIPALITY CONTRIBUTION TOWARDS THE MEMORIAL SERVICE AND FUNERAL OF THE LATE PRESIDENT MANDELA	
ACTIVITY// DIRECTORATE	EXPENDITURE
Nelson Mandela Bay Stadium	R1 773 571.19
Directorate: Safety & Security	R1 475 828.16
Directorate: Corporate Services	R63 136.36
Directorate: Office of the Executive Mayor	R1 497 351.42
Directorate: Infrastructure & Engineering	R654 379.95
Directorate: Electricity & Energy	R70 074.00
Directorate: Transport & Mobilization	R495 770.00
<b>TOTAL EXPENDITURE</b>	<b>R6 030 111.08</b>

5.9.39 It was expected that the ECPG was going to contribute an amount of R550 000 for the provision of transport to the stadium as well as R630 000.00 towards the provision of a stage, big screen and sound system and R185 000 for the provision of a back up screen.

5.9.40 It was noted during the investigation that no provision was made in the planning and the submission to the Municipal Council for catering to be provided during the events relating to the funeral. There is no evidence that this expenditure was budgeted for or was approved by the Municipal Manager and/or the Municipal Council.

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- 5.9.41 It could not be established with certainty during the investigation who authorised the expenditure relating to catering.

### **The Application of the relevant laws and prescripts**

#### **The Constitution**

- 5.9.42 Section 215 of the Constitution provides that the National, Provincial and Municipal budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector. This is regulated by national legislation, i.e. Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).
- 5.9.43 The Constitutional imperative for procurement of goods and services by organs of state in all spheres of government is to be found in section 217 of the Constitution. In terms of this provision, organs of state that contract for goods or services must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

#### **The Municipal Finance Management Act**

- 5.9.44 In terms of section 1 of the MFMA *“fruitless and wasteful means expenditure that was made in vain and would have been avoided had reasonable care been exercised.”*
- 5.9.45 Irregular expenditure in relation to a Municipality means, *inter alia*-
- Expenditure incurred by a Municipality in contravention or that is not in accordance with a requirement of the Act and which has not been condoned by the National Treasury;

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-Expenditure incurred by a Municipality in contravention of, or that is not in accordance with a requirement of the Supply Chain Management Policy.

-It excludes expenditure by a Municipality that falls within the definition of unauthorised expenditure.

5.9.46 Unauthorised expenditure means any expenditure incurred by a Municipality otherwise than in accordance with section 15 or 11(3).

5.9.47 In terms of section 15 of the MFMA, a Municipality may (except where otherwise provided in the Act), incur expenditure only in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget.

5.9.48 Section 29(1) provides that the Mayor of a Municipality may, in an emergency or other exceptional circumstances, authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure-

- (a) must be in accordance with any framework that may be prescribed;
- (b) may not exceed a prescribed percentage of the approved annual budget;
- (c) must be reported by the mayor to the municipal council at its next meeting; and
- (d) must be appropriated in an adjustments budget.

5.9.49 Section 29(3) provides that, if such adjustments budget is not passed within 60 days after the expenditure is authorised the expenditure is unauthorized, and section 32 applies.

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- 5.9.50 According to the evidence and information obtained during the investigation, the NMDMM had not budgeted for catering at events relating to the funeral of President Mandela.
- 5.9.51 The evidence show that, except for catering, the Municipal Council had approved the expenditure that the Municipality incurred in relation to the funeral.
- 5.9.52 There is no indication in the evidence that the Executive Mayor approved the expenditure incurred by the NMBMM for the funeral, in terms of section 29(1).
- 5.9.53 There is no evidence that an adjustments budget in respect of the expenditure incurred by the NMBMM for catering at events relating to the funeral was passed, as required by section 29(3) of the MFMA. The expenditure was therefore unauthorised.
- 5.9.54 Supervision over local government finance management is regulated in Chapter 2.
- 5.9.55 Section 5(2) provides that the National Treasury may promote good budget and fiscal management by Municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing. It may further take any other appropriate steps necessary to perform its functions effectively.
- 5.9.56 It should be noted in this regard that in terms of section 5(1) of the PFMA, the Minister of Finance is the head of the National Treasury.
- 5.9.57 The evidence obtained during the investigation show that the National Treasury issued the following Directive on 11 December 2013, clearly in terms of section 5(2) of the MFMA:

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***“Subject: Cost implications regarding hosting memorial services for the  
late former President N R Mandela***

***To the Mayor, Municipal Manager, CFO and other municipal officials***

*National Treasury has received a number of requests from municipalities seeking guidance with regard to costs associated with funeral arrangements associated with regard to the Memorial Services for the late President. You will no doubt agree that this is a sensitive matter and needs to be treated with outmost care and respect. The Minister of Finance has determined that the following activities at a reasonable cost are permissible: (sic)*

*Transportation services; and*

*Venue costs (community halls, multi-purpose centre and stadia).*

*However, the following costs are not permissible:*

*Catering;*

*Tents/Marquees; and*

*Commemorative advertising in the commercial media.*

*Municipalities should ensure that the costs associated with the above arrangements are kept to a bare minimum.”*

5.9.58 The Directive was signed by the Chief Director: Local Government Budget Analysis of the National Treasury.

5.9.59 However, despite this Directive and the fact that the KSD Municipality had not budgeted for catering at events relating to the funeral, it incurred expenditure in the amount of R110 300.00.

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- 5.9.60 As indicated above, this expenditure was unauthorised. However, even if it was not, it would have constituted irregular expenditure as it was in direct violation of a Directive by the National Treasury, and not in accordance with the MFMA.
- 5.9.61 The procurement of goods and services by Municipalities is specifically provided for in Chapter 11 of the MFMA.
- 5.9.62 Every Municipality is obliged, by virtue of the provisions of section 111 and 112, to have and implement a Supply Chain Management Policy that complies with the requirements of section 217 of the Constitution, referred to above. The Policy must cover a range of relevant issues and activities, including:
- 5.9.62.1 The different supply chain management processes that municipalities may use, including tenders and quotations;
- i. The procedures and mechanisms for each type of process;
  - ii. Bid documentation, advertising and invitations for contracts;
  - iii. Procedures and mechanisms for the evaluation of bids to ensure best value for money;
  - iv. The approval of bids;
  - v. The barring of persons whose tax matters are not cleared by the South African Revenue Services or who willfully neglected, reneged on or failed to comply with a government contract during the past 5 years; and
  - vi. The delegation of municipal supply chain management powers and duties, including those that relate to officials.

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5.9.63 The accounting officer (the Municipal Manager in the case of the NMB Municipality) must, in terms of section 115, implement the Supply Chain Management Policy of the Municipality and take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favoritism and unfair and irregular practices.

### **The Municipal Supply Chain Management Regulations**

5.9.64 The Municipal Supply Chain Management Regulations were promulgated in terms of section 168 of the MFMA.

5.9.65 In terms of Regulation 14, a Municipality's Supply Chain Management Policy must instruct the accounting officer to keep a list of accredited prospective providers of goods and services that must be used for the procurement requirements of the municipality.

5.9.66 Regulation 36 provides that the accounting officer may dispense with the official procurement processes referred to above in, *inter alia* an emergency or other exceptional cases, where it is impractical or impossible to follow the official procurement processes. The accounting officer must record the reasons for any deviations and report them to the next meeting of the Council.

5.9.67 It appears from the evidence that the Municipal Council approved a the expenditure to be incurred by the NMBMM, except for catering, at its meeting held on 6 December 2013 and also approved a deviation from the official procurement process in terms of Regulation 36.

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## **Conclusion**

- 5.9.68 The NMBMM incurred unauthorised expenditure of R110 300 in respect of catering for events relating to the funeral of President Mandela.
- 5.9.69 Even if the expenditure was authorised, it would have been irregular as it was in violation of a Directive of the National Treasury and not in accordance with the MFMA.

## **6. OBSERVATIONS**

During the investigation, the Public Protector observed that:

- 6.1 There was no properly coordinated plan for all the different role players in the funeral and related activities, from the level of National and Provincial Governments to Local Government and Public Entities.
- 6.2 Despite the fact that there were earlier discussions and a plan at national level for the funeral of President Mandela, it did not translate into advance and coordinated planning by the ECPG, the municipalities and public entities involved.
- 6.3 There was no operational centre where daily meetings were held and feedback was given on the status of the logistics.
- 6.4 Accordingly the related expenditure was not budgeted for resulting in the taking of what was regarded as emergency measures, both for funding and the procurement of goods and services. That was mainly the cause of unauthorised, irregular and fruitless and wasteful expenditure.

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- 6.5 This weakness was explored and capitalized upon by some service providers that took advantage of the situation and inflated prices. Some submitted invoices and were paid for goods and services, the delivery of which was not or could not be verified. For an example the costs for t-shirts were inflated and it could not be verified whether they were actually delivered and where. The number of people that were transported to public mourning venues and memorial services could also not be verified.
- 6.6 In some instances there appeared to have been improper collusion between officials and service providers at the expense of the organs of state involved.
- 6.7 Some of the service providers used were not on the list of registered suppliers (supplier database) and seemed to have appeared from nowhere.
- 6.8 Millions of Rands of public funds earmarked for service delivery and social infrastructure development were used for a state funeral because of a lack of coordinated planning and non-compliance with the legislation and other prescripts regulating procurement.
- 6.9 A similar occurrence of impropriety and maladministration can and should be avoided by all the organs of state that will be involved in state funerals in the future by ensuring that proper plans are made in advance, funds are accordingly appropriated and that the activities of everyone involved is properly coordinated and monitored.

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## 7. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

### 7.1 **Whether the ECPG improperly diverted public funds amounting to R300million placed in the custody of the ECDC, which were appropriated for purposes of accelerating social infrastructure delivery in the province, to use them for the memorial service and funeral of President Mandela and if so; whether such conduct was improper and constituted maladministration:**

7.1.1 The allegation that the ECPG improperly diverted funds amounting to R300million appropriated to the ECDC for the acceleration of social infrastructure development to be used for the funeral of President Mandela, is substantiated.

7.1.2 The Head of the Department of Provincial Planning and Treasury, Ms. Mbina-Mthembu recommended to Eastern Cape Provincial EXCO on 6 December 2013, that funds appropriated to the ECDC should be utilised for the funeral of President Mandela. Her advice to the Provincial EXCO was based on Treasury Regulation 6.1.3(c).

7.1.3 However, Treasury Regulation 6.1.3(c) did not apply as it was reliant of the application of section 43 of the PFMA that required consideration and a decision by the Head of the DEDEAT in respect of the virement of funds between main divisions, as stipulated in the Eastern Cape Appropriation Act, 2013.

7.1.4 Two requirements had to be met in order to invoke the provisions of section 43:

7.1.4.1 Firstly, there had to be a saving in the amount appropriated under a main division within a vote; and

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- 7.1.4.2 Secondly, the virement must have been intended to defray excess expenditure under another main division within the same vote.
- 7.1.5 Neither the Board of the ECDC, as the accounting authority, nor the Head of the DEDEAT was involved in Ms. Mbina-Mthembu's decision to propose the variation of funds appropriated to the ECDC for social infrastructure development, for the purposes of expenditure to be incurred for President Mandela's funeral.
- 7.1.6 The evidence does not show that there was any saving under a main division of an amount appropriated in terms of the Eastern Cape Appropriation Act, 2013.
- 7.1.7 Further, the expenditure that the virement was supposed to cover, had not been incurred when the decision was taken and there could therefore not have been any "*defrayment of excess expenditure*", as contemplated by section 43(1) of the PFMA.
- 7.1.8 Ms. Mbina-Mthembu accordingly misdirected the Eastern Cape Provincial EXCO in this regard. Her proposal was irrational and unlawful.
- 7.1.9 This resulted in an irrational decision by the former Eastern Cape Provincial EXCO that culminated in expenditure by the ECDC that was unauthorised as contemplated by the PFMA.
- 7.1.10 Ms. Mbina-Mthembu's conduct was improper and constituted maladministration.

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**7.2 Whether the procurement process followed by the ECPG in the appointment of service providers to assist in the preparations for the funeral of President Mandela was in accordance with a system that is fair, equitable, transparent, competitive and cost effective:**

- 7.2.1 The allegation that the procurement process that was followed by the ECPG in the appointment of service providers to assist in the preparations for the funeral of President Mandela was not in accordance with a system that is fair, equitable, transparent, competitive and cost effective, is substantiated.
- 7.2.2 The Head of the Department of Provincial Planning and Treasury, Ms. Mbina-Mthembu was involved in discussions with other organs of state in connection with the planning of the funeral of President Mandela, from at least 2011.
- 7.2.3 Yet, when President Zuma announced on 5 December 2013 that a state funeral would be held for President Mandela in the Eastern Cape, there was no provision for the associated expenditure in the Provincial budget.
- 7.2.4 There was also no costed plan in place for the procurement of goods and services by the ECPG that would be required for the arrangements and preparations for President Mandela's funeral.
- 7.2.5 This resulted, as concluded above, in a decision taken by the Eastern Cape Provincial EXCO on 6 December 2013, on the recommendation of Ms. Mbina-Mthembu, to appoint the ECDC as paymaster for all the procurement of goods and services that had to be done in relation to the funeral.
- 7.2.6 It also resulted in Ms. Mbina-Mthembu addressing an *instruction* to the Heads of Provincial Departments and the Municipal Managers of the KSD and OR Tambo and Nelson Mandela Bay Metropolitan Municipalities on the procurement process that had to be followed.

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- 7.2.7 Due to the fact that there was costed plan in place and no associated provision made in the provincial budget, and as the funeral was to take place in a matter of days, Ms. Mbina-Mthembu decided that all procurement will have to be made in terms of a deviation based on urgency to be approved by the respective accounting officers and that all invoices had to be submitted to the Provincial Treasury for approval, upon which it would be presented to the ECDC for payment.
- 7.2.8 Despite the fact that this was not adhered to, Ms. Mbina-Mthembu instructed the ECDC to make payments.
- 7.2.9 The conduct of Ms. Mbina-Mthembu in approving and authorising procurement of goods and services relating to the funeral was in violation of the provisions of section 217 of the Constitution, section 38 of the PFMA, Treasury Regulations 8.1, 16A3.2, and 16A6.4.
- 7.2.10 Her conduct was improper and constituted maladministration.
- 7.2.11 There is no provision in any of the said legislation and other prescripts that allows for a situation where procurement of goods and services becomes the responsibility of the Provincial Treasury (except its own) and that it would be paid for by a Public Entity from funds that were appropriated for a different purpose.
- 7.2.12 It was also noted that the Board of the ECDC, as its accounting authority, played no role in the process that was followed to procure goods and service and the payment for it by the ECDC. There is no indication that it was ever raised with the Board by Mr. Sentwa, who was at the time the Acting CEO, and CFO.

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7.2.13 The conduct of the CFO of the ECDC in approving and authorising payments by the ECDC for goods and services procured by other organs of state conduct was in violation of provisions of section 217 of the Constitution, section 57 of the PFMA and Treasury Regulations 8.1 and 16A6.4.

7.2.14 His conduct was improper and constituted maladministration.

**7.3 Whether the Provincial Treasury irregularly transferred an amount of R250 000 of public funds into a personal bank account of MEC Phumullo Masualle and if so; whether such conduct was improper and constitutes maladministration:**

7.3.1 The allegation that the Provincial Treasury irregularly transferred an amount of R250 000 into the bank the personal bank account of MEC Masualle, is substantiated.

7.3.2 Ms. Mbina-Mthembu, as the accounting officer of the Department of Provincial Planning and Treasury, approved an irregular payment of public funds into the personal bank account of the MEC and subsequently the opening of a special departmental account with a debit pay card issued to him, which gave him access to public funds.

7.3.3 Neither of the two transaction are allowed by the provisions of the PFMA, the Treasury Regulations and the Ministerial Handbook.

7.3.4 Ms. Mbina-Mthembu's conduct was therefore in violation of the provisions of section 38 of the PFMA and Treasury Regulation 8(1) and resulted in irregular expenditure.

7.3.5 Her conduct therefore was improper and constitutes maladministration.

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**7.4 Whether the ECDC acting in its official capacity as Project Host and Paymaster caused the ECPG to incur irregular, fruitless and wasteful expenditure of public funds for the memorial services and funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**

- 7.4.1 The allegation that the ECDC as the project Paymaster the caused the ECPG to incur irregular and fruitless and wasteful expenditure of public funds for the memorial services and funeral of President Mandela, is substantiated.
- 7.4.2 The PFMA that regulates management of revenue expenditure, assets and liabilities of, *inter alia* government departments and Public Entities, includes the Treasury Regulations and is an Act of Parliament.
- 7.4.3 Both the PFMA and the Treasury Regulations require of the accounting officer of a department and the accounting authority of a Public Entity to establish and maintain a proper competitive procurement system.
- 7.4.4 Ms. Mbina-Mthembu, the Head of the Department of Provincial Planning and Treasury and Mr. Sentwa, who was the Acting CEO and the CFO of the ECDC at the time, held the view that the strict provisions of the Constitution, the PFMA and the Treasury Regulations pertaining to competitive procurement and expenditure management could be overruled by a Resolution of a Provincial Executive Committee.
- 7.4.5 This misconception resulted in the acceptance of a process where the ECDC paid for procurement of goods and services that it had no control over, had not verified delivery of and had not approved. It relied on the approval of the Provincial Treasury that in some instances were not even involved in the procurement.

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- 7.4.6 It was found that expenditure incurred by the ECDC was unauthorised. Moreover, even if the expenditure was authorised, the payments by the ECDC would have constituted irregular expenditure as it was not in accordance with the PFMA and the Treasury Regulations.
- 7.4.7 The Board of the ECDC as the accounting authority responsible for the expenditure, was not informed of the payments made under the authority of Mr. Sentwa and at the request of Ms. Mbina-Mthembu.
- 7.4.8 As the CFO, he should have been aware that the payments were made in violation of the PFMA and the Treasury Regulations. Yet there is no indication that he raised alarm or his concern with the Board, to whom he was accountable.
- 7.4.9 The funds from which the payments were made had not been transferred to the ECDC. At the time when the payments were made, the ECDC was therefore spending money that was allocated to them for different purposes.
- 7.4.10 When a reconciliation was eventually done, the ECDC lost more than R22 million that was originally appropriated to them to accelerate social infrastructure development in the Eastern Cape. Money intended to alleviate the plight of the poorest of the poor was accordingly spent on a state funeral.
- 7.4.11 There is no indication in the evidence that the ECPG received value for the R5 million that the ECDC paid to *Reagola Print and Mail*. It accordingly constitutes fruitless and wasteful expenditure, as contemplated by section 1 of the PFMA.
- 7.4.12 Ms. Mbina-Mthembu and Mr. Sentwa acted in violation of the provisions of section 38 and 57 of the PFMA and Treasury Regulations 8.1 and 16A.
- 7.4.13 Their conduct was improper and constitutes maladministration.

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**7.5 Whether the Eastern Cape Parks and Tourism Agency (ECPTA) incurred irregular and fruitless and wasteful expenditure in the procurement of goods and services relating to the funeral of President Mandela and if so, whether such conduct was improper and constitutes maladministration:**

7.5.1 The ECPTA incurred irregular expenditure of R 500 000 and fruitless and wasteful expenditure in the amount of R970 000 in procuring goods and services relating to the funeral of President Mandela.

7.5.2 This conduct was improper and constitutes maladministration.

**7.6 Whether the BCM improperly procured and paid *Victory Ticket 750cc* an amount of R5 985 000.00 of public funds to transport mourners to four venues where the memorial services of President Mandela were to be held and if so, whether such conduct was improper and constitutes maladministration:**

7.6.1 The allegation that the BCM improperly procured the services of and paid *Victory Ticket 750cc* an amount of R5 985 000 of public funds to transport mourners to four venues where the memorial services of President Mandela were to be held, is substantiated.

7.6.2 This conduct was improper and constitutes maladministration.

7.6.3 The Executive Mayor and Councillors Goma and Simon-Ndzele of the BCM Municipal Council acted in violation of the Code of Conduct for Councillors by putting the interest of the ANC, instead of that of the BCM first. The acted dishonestly, without good faith and in a manner that compromised the integrity of the BCM.

7.6.4 The CFO of the BCM, Mr. V Pillay failed to distinguish between financial matters of the BCM and the interests of the ANC. He acted in violation of the provisions

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of the Municipal Supply Chain Management Regulations and the Supply Chain Management Policy of the BCM. His conduct constituted financial misconduct as contemplated by the MFMA and the Municipal Supply Chain Regulations. It resulted in irregular expenditure for the BCM.

7.6.5 Mr. Pillay's conduct was improper and constitutes maladministration.

**7.7 Whether the King Sabata Dalindyebo Local (KSD) Municipality incurred irregular and fruitless and wasteful expenditure of public funds in procuring the services of various service providers to assist in the preparations for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**

7.7.1 The KSD Municipality incurred unauthorised expenditure for the funeral of President Mandela in excess of R4.2million.

7.7.2 This expenditure would also have constituted irregular expenditure, if it was authorised.

7.7.3 The KSD Municipality also incurred fruitless and wasteful expenditure of R1 470 812.

7.7.4 At the time when the KSD Municipality incurred the expenditure for the funeral of President Mandela, it was experiencing extreme financial constraints and was operating with a loan obtained from the ECPG.

7.7.5 There is indication in the evidence that the payment of goods and services to certain suppliers was based on procurement documentation, the contents of which were incorrect or did not refer to the items that were ordered.

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- 7.7.6 The verification by the KSD Municipality of the delivery of the goods and services procured for the funeral was either not done, or was insufficient to have justified payment by the KSD Municipality.
- 7.7.7 The conduct of the KSD Municipality was improper and constitutes maladministration.
- 7.8 Whether the OR Tambo District Municipality (ORTDM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**
- 7.8.1 The ORTDM incurred unauthorised expenditure of R443 500 in respect of catering for the funeral of President Mandela.
- 7.8.2 **Even if the expenditure was authorised, it would have been irregular as it was in violation of a Directive of the National Treasury and not in accordance with the MFMA.**
- 7.8.3 The conduct of the ORTDM was improper and constitutes maladministration.
- 7.9 Whether the Nelson Mandela Bay Metropolitan Municipality (NMBMM) incurred irregular expenditure in procuring goods and services for the funeral of President Mandela and if so; whether such conduct was improper and constitutes maladministration:**
- 7.9.1 The NMBMM incurred unauthorised expenditure of R110 300 in respect of catering for events relating to the funeral of President Mandela.
- 7.9.2 Even if the expenditure was authorised, it would have been irregular as it was in violation of a Directive of the National Treasury and not in accordance with the MFMA.

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- 7.9.3 The conduct of the NMBMM was improper and constitutes maladministration.
- 7.10 The tragedy of the passing on of former Presidents or the current President passing, even unexpectedly, is a reality that requires government to be prepared for a state funerals and the associated expenditure at all times.
- 7.11 State Funerals are also not only held for Presidents, but also for other current and former political leaders.

## **8. RECOMMENDATIONS**

The Public Protector recommends in terms of section 6(4)(c)(ii) of the Public Protector Act that:

- 8.1 The Minister of Finance, as the head of the National Treasury, establishes a Task Team consisting of all the role players at all levels of government to develop a coordinated plan for the eventuality of state funerals provided for in the Ministerial Handbook;
- 8.2 Once the coordinated plan is approved, the Minister of Finance directs that it is issued as an instruction to all organs of state in terms of section 76 of the PFMA, to ensure the unauthorised, irregular and fruitless and wasteful expenditure in respect of state funerals is avoided in the future;
- 8.3 It be compulsory that the coordination of any activities in respect of preparations for state funerals be located strictly in the Office of the Premier in the case of Provinces and the Executive Mayor in the case of Local Government; and
- 8.4 It be compulsory that service providers appointed to assist in the preparations for state funerals are selected strictly from the supplier databases of the departments and municipalities involved.

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- 8.5 As the custodians of public funds, it be compulsory that the National Treasury provide funding for state funerals and give guidance on how the funds will be accessed and spent.

## 9. REMEDIAL ACTION

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

- 9.1 The Minister of Finance as the Head of the National Treasury, to request the President to issue a Proclamation in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act, 1996 to investigate the:
- 9.1.1 unlawful appropriation or expenditure of public money or property;
  - 9.1.2 unlawful, irregular or unapproved acquisitive acts, transactions, measures or practices; and
  - 9.1.3 intentional or negligent loss of public money

by organs of state and referred to in this report, with a view to institute civil action for the recovery of the loss of public money by organs of state in the procurement of goods and services for the funeral of President Mandela.

- 9.2 The Provincial Treasury of the Eastern Cape to conduct an investigation into the financial misconduct conduct of Ms. Mbina-Mthembu referred to in this report, in terms of Treasury Regulation 4.1.3, and to take the appropriate action;
- 9.3 The Municipal Managers of the BCM, KSD Municipality, ORTDM and the NMBMM, in consultation and with the assistance of the National Treasury to investigate the financial misconduct of officials of the respective Municipalities referred to in this report, in terms of section 171(4) of the MFMA, and to take the appropriate action;

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9.1.4 The Municipal Council of the BCM to appoint a special committee to investigate the conduct of Councillors Goma and Simon-Ndzele referred to in this report in terms of the item 14.1 of the Code of Conduct for Councillors, provided for in the Local Government: Municipal Systems Act; 2000, and to take further action accordingly.

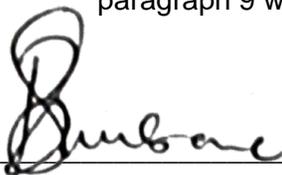
## 10. MONITORING

10.1 The Minister of Finance must report to the Public Protector on the progress made with the remedial action taken in paragraph 9 above within 60 days from the date of this report;

10.2 The Head of the Eastern Cape Provincial Treasury must report to the Public Protector on the progress made with the implementation of the remedial action taken in paragraph 9 within 60 days from the date of this report;

10.3 The Municipal Managers of the BCM, KSD Municipality, ORTDM and the NMBMM must report to the Public Protector on the progress made with the implementation of the remedial action taken in paragraph 9 within 60 days from the date of this report;

10.4 The Executive Mayor of the BCM must report to the Public Protector on the progress made with the implementation of the remedial action taken in paragraph 9 within 60 days from the date of this report



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

**Date:** 04 / 12 / 2017

*Assisted by the Good Governance and Integrity Team*