

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



**PUBLIC PROTECTOR  
SOUTH AFRICA**

***“Inappropriate Moves”***

*REPORT NO 13 OF 2013/2014*

*ISBN 978-1-920692-02-5*

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND  
CORRUPTION IN THE PROCUREMENT OF THE RIVERSIDE OFFICE PARK TO  
ACCOMMODATE THE HEAD OFFICES OF THE ELECTORAL COMMISSION**

## ACRONYMS AND ABBREVIATIONS

<b>260 Walker Street</b>	<b>Former offices of the ELECTORAL COMMISSION</b>
<b>Abland</b>	<b>Abland (Pty) Ltd</b>
<b>ABSA</b>	<b>Amalgamated Banks of South Africa</b>
<b>Adv.</b>	<b>Advocate</b>
<b>BEE</b>	<b>Black Economic Empowerment</b>
<b>CEO</b>	<b>Chief Electoral Officer</b>
<b>CFO</b>	<b>Chief Financial Officer</b>
<b>CIPC</b>	<b>Company Intellectual Property Commission</b>
<b>Commission</b>	<b>The Electoral Commission made up of the Chairperson, Vice Chairperson and the Commissioners</b>
<b>DG</b>	<b>Director-General</b>
<b>DPW</b>	<b>National Department of Public Works</b>
<b>Exc.</b>	<b>Excluding</b>
<b>EXCO</b>	<b>Executive Committee</b>
<b>Inc.</b>	<b>Incorporated</b>
<b>MTEF</b>	<b>Medium Term Expenditure Framework</b>
<b>PA</b>	<b>Personal Assistant</b>
<b>PFMA</b>	<b>Public Finance Management Act, 1999</b>
<b>PPPFA</b>	<b>Preferential Procurement Policy Framework Act</b>
<b>Rev.</b>	<b>Reverend</b>
<b>SCM Guide</b>	<b>Supply Chain Management: A Guide for Accounting Officers/Authorities</b>
<b>SCM</b>	<b>Supply Chain Management</b>
<b>TR</b>	<b>Treasury Regulations</b>
<b>UDM</b>	<b>United Democratic Movement</b>
<b>VAT</b>	<b>Value Added Tax</b>

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## EXECUTIVE SUMMARY

- i) ***“Inappropriate Moves”*** is a 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.
- ii) The report communicates the Public Protector’s findings and directives on appropriate remedial action to be taken following an investigation into a complaint lodged by the Honourable General Bantu Holomisa, a Member of Parliament and the President of the United Democratic Movement (Hon. Holomisa), on 15 October 2011, alleging suspected irregularities in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission (the Commission) the validity of the lease agreements entered into by the Commission in respect thereof and various payments to Abland.
- iii) Further allegations pertaining to a conflict of interest between the Commission’s former Chief Electoral office (CEO), Advocate Pansy Tlakula (Adv. Tlakula), and Parliament’s Finance Portfolio Committee Chairperson, Hon. Thaba Mufamadi’s (Hon. Mufamadi), Chairperson of Manaka Property Investments , which owns a 20% stake in Abland, by virtue of their co-directorship in Lehotsa Investments (Pty) Limited, appeared in a newspaper article of 28 April 2011 entitled: *“Electoral Commission’s office partly owned by the boss’s business partner”*.
- iv) Two other anonymous complaints were lodged by a group which referred to itself as the *“Concerned IEC Employees”* through memoranda dated 20 July 2012 and 24 August 2012 respectively, whose allegations included an alleged romantic relationship between the Chairperson of Manaka Property Investments and the CEO of the Electoral Commission. The group further alleged that it was the CEO who had irregularly caused the award of the tender to Abland.
- v) The following seven(7) issues were considered and investigated:
  - (a) The propriety of moving the Commission’s Head Office from 260 Walker Street, Sunnyside to the Riverside Park Offices in Centurion;
  - (b) Alleged maladministration and possible corruption in the procurement process followed for the Riverside Office Park consisting of alleged flaws in the demand management process, the budget process, the procurement procedure, bid evaluation process and award;

- (c) Alleged impropriety relating to inconsistent monthly rental amounts paid to the Riverside Office Park Trust from September 2010 to September 2011;
  - (d) Alleged irregularity of the Commission's payment for the old building whilst the building stood empty;
  - (e) Alleged irregular advance payment of a lump sum in the amount of R22 603 374.00 in March 2010;
  - (f) Alleged irregular payment of a lump amount of R26 979 155.00 in December 2010; and
  - (g) Alleged conflict of interest arising from a close business relationship between Adv. Tlakula, and Hon Thaba Mufamadi, MP, an Executive Chairman and co-director with Adv. Tlakula in Lehotsa Investment (Pty) Ltd who also happens to be a Chairperson of Manaka Property Investments, a BEE Partner and 20% shareholder in Abland, the company awarded the contract for the provision of the Riverside Office Park leased accommodation, for the Electoral Commission.
- (vi) The allegations regarding the existence of a romantic relationship between Adv. Tlakula and Hon. Mufamadi were not investigated as they were not backed by anything tangible. Furthermore, the employee who was alleged to have been the whistle-blower on these allegations, denied this when interviewed and also in a statement that she was made to sign by the Commission Chairperson, Adv. Tlakula.
- (vii) On request from Hon. Mufamadi, that the Public Protector removes from the report any reference to the allegations regarding a romantic relationship, the detailed allegations regarding such alleged relationship are omitted from this report. It must be noted however, that Hon. Mufamadi was invited to indicate whether he would like the Public Protector to investigate the allegations to enable her to consider his request that she makes a definite finding that such relationship did not exist, no feedback was received.
- (viii) The conduct of the current CEO, Mr Mosotho Moepya, his Deputy, Mr Norman du Plessis and the manager in the office of the CEO, Mr Stephen Langtry in relation to cooperation with regard to information requests and treatment of employees that cooperated in the investigation eventually became an issue of concern.

- (ix) Despite repeated requests, information such as the full sets of the EXCO and the Commission's minutes of meetings as well as the budget in connection with the procurement of the Riverside Office Park building was not provided during the investigation. Only extracts from the minutes were provided with some not having the actual dates when the meetings were held.
- (x) The investigation included interviews with Commissioners and former Commissioners of the Commission, including the former Chairperson, Dr Brigalia Bam and her former Deputy Chairperson, Ms Thoko Mpumlwana, the current Chairperson, Adv. Pansy Tlakula, Deputy Chairperson Mr Terry Tselane, Commissioners, Rev. Bongani Finca and Ms Raenette Taljaard. Other interviews were held with former and current officials including but not limited to, the current CEO, Mr Mosotho Moepya and his Deputy responsible for Corporate Services, Mr Norman Du Plessis as well as former and current members of staff in the employ of the Commission.
- (xi) During her interview, Adv. Tlakula was in the company of Senior Counsel, Adv. Ismael Semanya, who was allowed to assist her during the proceedings. Various documents relating to the procurement of the Riverside Office Park were obtained and analysed. Correspondence was exchanged with the Commission, including lawyers, Mkhabela Huntley Adekeye Incorporated firm of attorneys retained by Adv. Tlakula.
- (xii) Adv. Tlakula conducted virtually all her correspondence, including submissions on questions asked on what happened, through her lawyers. This included simple administrative tasks such as asking for an extension of time for comment on the provisional report with the last task performed by the lawyers being a letter dated 22 August 2013, asking for a copy of the report before its public release as planned on Monday 26 August 2013.
- (xiii) De Klerk Mandelstam Incorporated Attorneys also corresponded with the Public Protector, acting on behalf of Hon. Mufamadi. Mchunu Attorneys also interacted with the Public Protector during the investigation ostensibly on the instructions of the Commission.

- (xiv) The investigation also covered the consideration of applicable laws, including constitutional provisions, the Electoral Commission Act, 1996, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations, the Procurement Policy and Procedures approved by the Commission on 10 March 2005 and other institutional policies of the Commission as well as reports such as the King III report on corporate governance and the July 2006 report of the Public Service Commission on managing conflicts of interest in the public service.
- (xv) References were also made to principles developed in previous reports issued by the Public Protector dealing with investigations into similar procurement and conflict of interest matters. Such principles are referred to as *touchstones*.
- (xvi) The Public Protector makes the following findings:
- (a) On the propriety of moving the Electoral Commission Head Office from Walker Street, Sunnyside to the Riverside Park Offices in Centurion.**
1. There is satisfactory evidence supporting a genuine need for the Electoral Commission to move from the 260 Walker Street Sunnyside Offices to Riverside Park Offices in Centurion. Evidence includes the fact that the building posed a health and safety hazard, the Electoral Commission needed additional space for its staff and the rent had increased unacceptably. The decision to move, accordingly, does not constitute improper conduct or maladministration.
- (b) On alleged maladministration and possible corruption in the procurement process followed for the Riverside Office Park consisting of alleged flaws in the demand management process, the budget process, the procurement procedure, bid evaluation process and award of the tender**
1. While there was no impropriety with regard to the Commission handling its own procurement of immovable assets as a constitutional institution, the process followed by Adv. Tlakula and her EXCO in the procurement of the Riverside Office Park building was grossly irregular as it was characterized by a violation of procurement legislations and prescripts such as section 38 of the PFMA, Treasury Regulation 5.1, and 16A6, section 2(1)(e) of the PPPFA as well as chapter 4 of the Electoral Commission's Procurement Policy and Procedures of 10 March 2005.

2. By her own admission, Adv. Tlakula issued a directive on 11 February 2009 for the procurement process to be handled by EXCO to the exclusion of the procurement committee in violation of her own Commission's Procurement Policy and Procedures. In so doing, she countermanded the decision of the Commission, which had on 12 January 2009 made a decision to award the office space tender to a different company in respect of Menlyn Corporate Park premises.
3. There was no separation of roles and responsibilities between the various committees within the Commission that are tasked with administration of the procurement process i.e. the bid specification, bid evaluation and bid adjudication committees. Though these structures may have existed under different names, they were not used in the matter under investigation.
4. The initiation of the procurement process was handled by the user department in consultation with the Supply Chain Management within Commission and by the office of the Deputy CEO, Mr Norman du Plessis, resulting in Adv. Tlakula approving the needs analysis on 13 February 2009. The needs analysis prepared by Mr du Plessis and approved by Adv. Tlakula was not comprehensive enough to include fixtures and the other items subsequently procured as part of a turnkey solution, resulting in poor demand management, leaving a blank cheque to be filled during negotiations with Abland as a sole supplier.
5. The Commission confirmed that the initial procurement of the Menlyn Corporate Park premises was not concluded according to a competitive bidding process as the need for the said property was not advertised. This resulted in Adv. Tlakula directing in a memorandum of 11 February 2009, referred to above, that a new open procurement process involving a Request for Proposals be embarked upon by the Commission's EXCO. However, the contents of this memorandum raise serious concern as the approach appeared high-handed and Adv. Tlakula failed to obtain a resolution of the Commission rescinding the Menlyn Corporate Park award before she could commence with the new process.
6. Adv. Tlakula accordingly, gave a directive that the Menlyn Corporate Park award be discontinued. Thereafter what would have been expected was for her to obtain a resolution of the Commission prior to commencing with the process that culminated in the acquisition of the Riverside Office Park building. Instead, Adv.



Tlakula individually decided that the “EXCO should embark on an open process and thereafter, place all options before the Commission for a decision.”

7. The Commission only decided to rescind its decision in March 2009. This is according to the extracts of the Commission’s meeting which did not provide the actual date in March when the meeting was held. The conduct of Adv. Tlakula in this regard was highly irregular.
8. The current CEO of the Commission, Mr Moepya as well as his Deputy Mr du Plessis and the Manager in the office of the CEO, Mr Langtry were requested to furnish the Public Protector with the full sets of minutes of the Commission’s meetings. By the time of reporting, they had not provided same as would have been expected of them by virtue of their constitutional obligations to cooperate with the Public Protector
9. Adv. Tlakula went further in the same correspondence and directed that Mr du Plessis must “*draft a request for proposals and submit it to me for sign-off. We will have to approach the Commission again after the outcome of the public process.*” (emphasis added) With respect, this was also highly irregular. In essence, Adv. Tlakula obtained the Commission resolution to rescind the award to Menlyn Corporate Park *ex-post facto* as she had already commenced with the new procurement process with advertisements having been placed on 27 February 2009, inviting potential bidders to submit their proposals whilst she did not have official authorization from the Commission to do so. Adv. Tlakula’s conduct in this regard was improper and constituted maladministration.
10. With regard to the procurement of the Riverside Office Park, a Bid Specification Committee was not set up to analyse the needs of the Commission and draft specifications that would be suitable for the needs of the Commission. Even though the need to make the move as seamless as possible was identified at the needs analysis stage, this was not incorporated in the terms of reference of the request for proposal.
11. The EXCO approved a request for proposal in respect of the Commission’s accommodation in violation of the provisions of the Chapter 4 of the Commission’s Procurement Policy and Procedures, 2005 which provides for three methods of procurement depending on the thresholds. These procurement processes do not include a request for proposal that was suddenly utilized in the

- procurement of the Riverside Office Park. According to the institution's procurement policy, amounts above R100 000 should be subjected to a tender process.
12. Accordingly, there is a process that must be followed in respect of tenders and/or procurement which was not followed in respect of the procurement of the Riverside Office Park.
  13. The advertisement of a "request for proposal" for the office accommodation as opposed to a comprehensive competitive tender bidding process violated the provisions of Chapter 4 of the Commission's procurement policy and was accordingly irregular and constituted maladministration.
  14. The request for proposal did not comply with provisions of the Treasury Regulations, the PFMA, the PPPFA and the Commission's own procurement policy and procedures, where applicable in respect of:
    - 14.1 The thresholds for a tender process, which the Commission policy puts at R100 000 unless otherwise approved;
    - 14.2 The number of days that it needed to be advertised;
    - 14.3 The evaluation process i.e. the evaluation and procurement committee were not involved in the evaluation process; and
    - 14.4 The evaluation criterion was not clearly defined at the point of advertising.
  15. Treasury Regulations provide for deviation from procurement policy in the event of an emergency. There was no motivation from the Commission's EXCO to deviate from a tender process in line with Treasury Regulations. The procurement of the Commission's building was not motivated as an emergency. In any event the circumstances of the move do not qualify as an emergency as defined in paragraph 4.7.5.1 of the Treasury Guides which provides that *an emergency is a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery*. In this regard, the conduct of Adv. Tlakula and her EXCO was accordingly improper and constitutes maladministration.

16. The irregularity in respect of the procurement of the Riverside Office Park building was also confirmed by the Auditor General in the 2011 audit, recorded in the 2010/2011 Annual Report of the Commission which indicates that *“sufficient appropriate audit evidence could not be obtained that the assets with a transaction value of over R500 000 were procured by means of a competitive bidding process as per the requirements of the TR 16A6.1, TR 16A6.4 and National Treasury Practice Note 6 and 8 of 2007/08”*.
17. An advertisement calling for bids for a provision of office accommodation for the Commission was placed on 27 February 2009 and closed on 09 March 2009. In addition to prompting the decision of the Commission regarding whether or not to rescind its decision to acquire the Menlyn premises, the conduct violated the provisions of the Commission’s procurement policy which stipulate that an advertisement in terms of a tender be placed for a minimum of 14 ordinary days. Mr Norman du Plessis was the responsible official directed to execute this function in Adv. Tlakula’s memorandum of 11 February 2009. The conduct hereof was accordingly irregular, improper and constituted maladministration.
18. Treasury Regulation 16A6 stipulates that bids be advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine. The media schedule was signed on 25 February 2009 by Mr J H Pretorius and there is no evidence that approval was obtained to advertise for a shorter period.
19. The Commission approved the appointment of Abland to provide accommodation for Electoral Commission. The approval did not mention the appointment of Abland for the turnkey solution and the estimated cost of the related services. Abland’s proposal stated that this would be negotiated in the future and related costs subjected to an open market process. However, the costs related to the turnkey solution were neither subjected to an open market process nor approved by the Commission as Adv. Tlakula and her EXCO failed to obtain the Commission’s approval for the use of a turnkey solution. Their conduct in this regard was irregular and constituted maladministration.

20. The occupation by the Commission of the building in September 2010 as opposed to April 2010 as indicated in their advertisement is problematic in that bidders who proposed a later date were not considered during the evaluation process. This could have also prejudiced other bidders who did not submit their proposals based on the requirement for occupation being April 2010. In this regard, the conduct of Adv. Tlakula and the EXCO in handling the entire move was improper and constituted maladministration.

**(c) In connection with allegations of impropriety relating to inconsistent monthly rental amounts paid to the Riverside Office Park Trust from September 2010 to September 2011:**

1. The amounts did vary as evident in Table 14 covered in paragraph 6.3.28.6 of the main report and this was conceded by the Commission. For example, rental was R1 440 524.17 for the period September 2010 to March 2011 but increased to R1 730 412.43 from April 2011 to September 2011.
2. The Explanation that water and electricity charges are not consistent, is accepted.
3. However what is not accepted is the argument that the rest of the payments comprised of rentalisation in respect of fittings and furniture which formed part of a turnkey solution agreement reached with Abland subsequent to the main agreement and added as an addendum to the main lease agreement. As these expenses were not included in the lease agreement signed on 21 August 2009 between Abland and the Commission and were not approved by the Commission, the conduct of Adv. Tlakula in that regard was irregular, improper and constituted maladministration.
4. Also not acceptable is the fact that the turnkey features went beyond what was anticipated in the contract, which envisaged permanent features and included items such as furniture which the Commission already had, having purchased most of such furniture whilst it occupied the 260 Walker Street Building.
5. It was also not acceptable that Abland charged handling fees for procuring the turnkey features between 5 and 12%, in contravention of the 2% of the cost plus VAT agreed to in the contract signed between 12 and 19 April 2010 with Adv. Tlakula representing the Commission and Mr D S Savage of Abland.

6. It was further recorded that the monthly rental payable in terms of the lease will be adjusted to provide for the rentalisation of the actual cost incurred in respect of the immovable items. According to the addendum, the additional tenant specific item which classify as immovable will be rentalised over the period of the lease agreement, provided that the cost incurred with regard to such items will not exceed the amount of R20 000 000 excluding VAT. The parties agreed that the monthly rental would be adjusted by the amount of the cost incurred with regard to such immovable items multiplied by 0.135 and divided by 12.
7. According to the second addendum to the lease agreement, the amount of R20 000 000 in respect of fitting out of the lease premises was increased to R22 603 374.00.

**(d) On the allegations of irregularity in connection with payments made by the Electoral Commission in respect of the old building whilst standing empty**

1. It is correct that an amount of R6 753 880.42 was paid in respect of the 260 Walker Street lease commencing September 2008 and expiring in August 2012 while the building was standing empty between October 2010 and July 2011.
2. However, the said amount was refunded to the Commission on 21 February 2012, without interest. Evidence indicates that the financial loss to the Commission in terms of interest was due to factors including not having a termination clause in the lease agreement and what can be termed as haphazard handling of the move, and, possibly, reckless use of public funds.

**(e) On allegations of irregular advance payment of a lump sum in the amount of R22 603 374.00 in March 2010,**

1. It is true that advance payments were made to Abland in respect of the Riverside premises in March 2010 in the amount of R1 653 215.46.
2. Adv. Tlakula's explanation that the amounts were part of a 50% deposit for the fixtures and movables forming part of the turnkey solution is not contradicted by evidence. It is of grave concern though that this is part of the procurement that was done in contravention of the contract between Abland and the Commission, which contract had required that the procurement of these be subjected to an open market.

3. No evidence could be found indicating that an amount of R22 603 374.00 was paid in March 2010 by the Commission.
4. An amount of R R22 603 374.00 was approved as an amount for the fitting out budget in respect of the second addendum between Riverside Office Park Trust and the Commission which was signed on the 25 and 31 March 2011 respectively. This amount was to be rentalised over the period of the lease.

**(f) With regard to the allegations of irregular payment of a lump sum amount of R26 979 155.00 for the building in December 2010; and**

1. Indeed, there was payment of R26 716 023.92 to the Riverside Office Park Trust but part of the amount was eventually credit noted resulting in the final payment for the month of December being R11 014 325.12.
2. This amount was in respect of the December 2010 and January 2011 rentals as well as payment of movables forming part of the turnkey. There was no irregularity in this regard. However, as stated earlier, the fact is the procurement process in respect of the turnkey solution was not subjected to an open market, making it irregular.

**(g) In connection with allegations of a conflict of interest arising from a close business relationship between Adv. Tlakula, and Hon Mufamadi, an Executive Chairman and her co-director in Lehotsa Investment (Pty) Ltd, who also happens to be a Chairperson of Manaka Property Investments, the BEE Partner which holds a 20% stake in Abland, the company awarded the contract for the provision of the Riverside Office Park leased accommodation for the Commission**

1. There was indeed an undisclosed and unmanaged conflict of interest between the then Commission Chief Electoral Officer, Adv. Tlakula's responsibility to act in the best interests of the Electoral Commission as its Accounting Officer and her special business relationship with Hon Mufamadi, her Chairperson and co-director in Lehotsa Investment Holdings.
2. Adv. Tlakula confirmed that she was a director of Lehotsa Holdings. Hon Mufamadi is her Chairman and co-director in that company. Hon Mufamadi is also Chairman of Manaka Property Investments, the BEE partner and holder of a 20% stake in Abland which was awarded a contract to lease the Riverside Office Park

building to accommodate the Head Offices of the Electoral Commission. Adv. Tlakula was highly involved in initiation, evaluation and adjudication of the bids for the procurement of the building in her capacity as the CEO and Chairperson of the Commission's EXCO at the time.

3. Of grave concern, is that on 11 February 2009, a month after the Commission's meeting where it had formally resolved to accept the bid for premises in Menlyn, Adv. Tlakula issued a written directive to Mr du Plessis to start a new procurement process and that such procurement process be handled by EXCO. This was irregular. The irregularity was compounded by the fact that this new bid process was managed from her office. This included the submission of the proposals that were handled by Mr Langtry from her office. Hon. Mufamadi was indicated in the proposal from Abland as the Chairperson of the BEE partner, Manaka Property Investments, which owned a 20% stake in Abland.
4. During the evaluation of the bids by EXCO, there was no way in which Adv. Tlakula could not have been aware of this fact as the evaluation and the adjudication of the proposals was done by the EXCO which included and was chaired by her.
5. Adv. Tlakula only declared her interest in Lehotsa Investments in the Commission's annual and general declaration of interests' forms in compliance with the annual Financial Disclosure Framework which is a standard disclosure of interest form and which did not relate to a specific procurement transaction. This declaration said nothing about her business relationship with Hon Mufamadi.
6. The declaration only covered Lehotsa as a company in which she has shares and not the names of her co-directors or share-holders. All the members of EXCO, including Adv. Tlakula, failed to disclose their business interests prior to participating in evaluation committee meetings that considered the procurement in violation of Chapter 4 of the Electoral Commission's Procurement Policy and Procedures. The conduct of Adv. Tlakula and her EXCO colleagues in this regard was improper and constituted maladministration.
7. When the name and involvement of Hon Mufamadi became evident during the evaluation of the bids in which Adv. Tlakula was involved, it would have been prudent of her to declare, to her colleagues and fellow panellists, her relationship with him in Lehotsa Holdings as her Chairperson **and co-director** and recused herself from the procurement process. Her argument that they were mere



directors and shareholders in that company and the fact that neither she nor Lehotsa Investments had direct or indirect financial interest in Manaka Property Investments is not accepted.

8. Such argument is in fact, a source of concern it would have been reasonably expected that the Chairperson of a body such as the Electoral Commission should understand that things that can undermine objectivity transcend financial interests. The fact of the matter is that there was a conflict of interest arising out of her business relationship with Hon Mufamadi in Lehotsa which should have been declared in all the meetings that she participated in the evaluation of the bids. Her conduct in this regard was improper and constituted maladministration.
9. The ideal way that Adv. Tlakula could have mitigated and managed this conflict was through declaration of the relationship and recusal from the procurement process. By her participation in the procurement process involving her Chairperson and co-director where they have a common interest in Lehotsa Investments, her independence and the objectivity in the entire process may have been compromised.
10. Adv. Tlakula failed to declare her business relationship with Hon Mufamadi to the team that had to evaluate the bids in respect of this particular procurement. Her disclosure was only limited to the general disclosure of financial interests, which complied with the letter of the Commission's policy but not the spirit that underpins disclosure and management of conflict of interest as a good administration practice seeking to optimise objectivity and ultimately integrity in procurement and other business processes.
11. The situation was exacerbated by the fact that Adv. Tlakula not only managed the bid selection and evaluation process, but also prompted the retraction of the original award of the contract to Menlyn Corporate Park though the final decision was taken by the Commission following her presentation when she recommended the two bidders resulting in the Commission awarding the contract to Abland.
12. As the Accounting Officer of the Commission at the time, Adv. Tlakula was expected to ensure that the Commission's supply chain management processes give effect to the core principles of behaviour as envisaged by the five pillars of procurement which are fairness, equity, transparency, competitiveness and cost



effectiveness. Fairness includes compliance with ethical standards, recognizing and dealing with conflicts of interest or the potential thereof.

13. She had a duty to eliminate any threats to objectivity and independence in the procurement of the Riverside Office Park to accommodate the Head Offices of the Commission. The procurement policies and procedures of the Electoral Commission requires all parties to comply with the highest ethical standards in order to promote:

- 13.1 Mutual trust and respect; and

- 13.2 An environment where business can be conducted in a fair and reasonable manner and with integrity.

14. Furthermore it requires all officials / employees associated with procurement:

- 14.1 recognise and deal with conflicts of interest or the potential thereof;

- 14.2 deal with suppliers even-handedly;

- 14.3 provide all assistance in the elimination of fraud and corruption (as defined in the public service anti-corruption strategy); and

- 14.4 adhere to the instructions issued by the CEO.

15. The procurement provisions contained in Chapter 4 of the Commission's Procurement Policy and Procedures, 2005 are consistent with the requirements of the Electoral Commission's Act, 1996 as the provisions thereof clearly state that, *"where a possible conflict of interest arises or where an employee has or obtains a financial or other interest in a company or firm with which the Electoral Commission enters into a business transaction, or where an interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Electoral Commission as soon as it arises, and the employee must refrain from participating in any way in related business dealings."* (emphasis added)

16. Adv. Tlakula had a duty in law to procure goods and services according to a system which is fair, equitable, transparent, competitive and cost effective. All employees of the Commission, including the CEO have a duty where an interest is such that it may influence their objectivity in making any decision or benefit any

person or company or firm, the interest must be disclosed in writing to the Electoral Commission as soon as it arises, and the employee must refrain from participating in any way in related business dealings. Such interest in this instance relates to the existing business relationship through common directorship thus creating a threat to independence and objectivity.

17. Adv. Tlakula's improper conduct and maladministration in this regard, in particular the non-compliance with relevant procurement prescripts as well as her undisclosed and unmanaged conflict of interest had the impact of:

17.1 Risking of loss of public confidence in the Electoral Commission as an organ of state in open and transparent procurement of goods and services;

17.2 Risking impairment of the reputation of the Electoral Commission as an impartial constitutional body with optimal levels of integrity;

17.3 Fostering a perception from potential service providers that they cannot expect fair and equal treatment from Electoral Commission; and

17.4 Risking the possibility of an asset procurement process that is not cost effective, through failure to ensure that the procurement of assets is tested in the open market, a systemic problem that afflicts most organs of state.

- vi) **The appropriate remedial action to be taken as envisaged by section 182(1)(c) of the Constitution is the following:**

- (1) The Speaker of Parliament, in consultation with the Electoral Commission to the exclusion of the Chairperson, consider whether action should be taken against Adv. Tlakula for her role in the procurement of the Riverside Office Park building to accommodate the Head Offices of the Commission in light of the undisclosed and unmanaged conflict of interest and her contravention of the procurement laws and prescripts dealt with in this report and accordingly, advise the President of the appropriate action to take.

- 
- (a) The Electoral Commission to take urgent steps to:
- (1) Consider the expenses in respect of the turnkey solution as irregular, fruitless and wasteful expenditure and in consultation with the National Treasury, consider ratifying such expenditure;
  - (2) In consultation with the National Treasury, consider reviewing the entire lease agreement with Abland including its appendices with a view to ratifying same;
  - (3) In consultation with the Chief Procurement Officer, consider commissioning a forensic investigation into the entire lease agreement and the related expenditure in order to determine a fair market value of the contract and related expenditure and recover any extravagant expenditure incurred and further, to investigate the cession of the agreement from Abland to Riverside Office Park Trust.
  - (4) Consider taking appropriate action against all members of EXCO who may still be in the employ of the Commission, who participated in the procurement of the building for their contravention of the procurement laws and prescripts dealt with in this report.
  - (5) Consider taking disciplinary action against the CEO, Mr Moepya, his Deputy, Mr du Plessis and the Manager in the office of the CEO, Mr Langtry for their failure to provide the Public Protector with the budget as well as full sets of minutes of the EXCO and Commission's meetings in connection with the procurement of premises to accommodate the head offices of the Commission in violation of their Constitutional obligations of cooperation with the Public Protector in the investigation of this matter.
  - (6) In consultation with the National Treasury to urgently review its Supply Chain Management structures and processes to align with Treasury Regulations and good practice.
  - (7) To ensure that no retaliatory action in the form of subjecting to occupational detriment is taken against any of the officials and employees of the Commission that cooperated and assisted the Public Protector in the investigation referred to in this report.

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- (8) To review its Conflict of Interest policy and procedure for declaring conflict of interest within 60 days.

## REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND CORRUPTION IN THE PROCUREMENT OF THE RIVERSIDE OFFICE PARK TO ACCOMMODATE THE HEAD OFFICES OF THE ELECTORAL COMMISSION

### 1. INTRODUCTION

- 1.1 *“Inappropriate Moves”* is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 8(2)(b) of the Public Protector Act to:
  - 1.2.1 The Speaker of Parliament, Hon. Mr M V Sisulu, MP.
- 1.3 To take cognisance of the report; copies are presented in terms of section 8(3) to:
  - 1.3.1 The President of the Republic of South Africa, Mr J G Zuma
  - 1.3.2 The Judge President of the Electoral Court, Justice KK Mthiyane, JA
- 1.4 Copies of the report are presented in terms of section 8(3) to:
  - 1.4.1 The Chairperson of the National Council of Provinces;
  - 1.4.2 The Minister of Finance;
  - 1.4.3 The Electoral Commission;
  - 1.4.4 Adv. P Tlakula, the Chairperson of the Electoral Commission; and
  - 1.4.5 The Complainant, General B H Holomisa, MP.
- 1.5 The Electoral Commission is a permanent independent State Institution established under section 181(f) to support Constitutional Democracy managing free and fair elections at all levels of government.
- 1.6 Although publicly funded and accountable to Parliament, the Commission is independent of the government. According to section 181 of the Constitution, the institutions established under Chapter 9, including the Electoral Commission are independent, and subject only to the Constitution and the law, and they must be

impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

- 1.7 According to Section 191 of the Constitution, the Electoral Commission must be composed of at least three persons. The Commission currently comprises the Chairperson, four (4) Commissioners, the CEO and two (2) Deputy CEO's.
- 1.8 The Electoral Commission is a globally respected institution that is regularly requested to assist with facilitation of free and fair elections, particularly in post conflict democracies.
- 1.9 The complaint regarding alleged irregularities involving the procurement of the Electoral Commission's national Head Offices was initially lodged in October 2011. The Electoral Commission at the time comprised of the following Commissioners:
  - 1.9.1 Dr Brigalia Bam (Chairperson);
  - 1.9.2 Ms Thoko Mpumlwana( Deputy Chairperson)
  - 1.9.3 Mr Fanie van der Merwe;
  - 1.9.4 The late Judge Herbet Msimang; and
  - 1.9.5 Mr Terry Tselane.
- 1.10 At the time that the complaint was lodged, Adv. Tlakula was occupying the position of Chief Electoral Officer (CEO) of the Commission whilst Mr Norman du Plessis and Mr Mosotho Moepya (Mr Moepya) were Deputy CEO's responsible for Corporate Services and Electoral Operations respectively.
- 1.11 In October 2011, the tenure of office of the Commission chaired by Dr Brigalia Bam expired and on 7 November 2011, Adv. Tlakula was appointed by President Zuma as a Chairperson of the Electoral Commission. The Electoral Commission currently comprises of the following members:
  - 1.11.1 Adv. Pansy Tlakula (Chairperson);
  - 1.11.2 Mr Terry Tselane (Vice-Chairperson);
  - 1.11.3 Judge GM Thami Makhanya;
  - 1.11.4 Rev. Bongani Finca; and

1.11.5 Ms Raenette Taljaard.

1.12 Currently, the CEO of the Commission is Mr Mosotho Moepya with Messrs Norman du Plessis and Sy Mamabolo indicated as Deputy CEO's responsible for Corporate Services and Electoral Operations respectively.

1.13 The building in question is the Riverside Office Park situated at Portion 2 of ERF 65, Verwoerdburgstad, measuring 37,678m<sup>2</sup> in Centurion. The Electoral Commission moved into this building from 13 September 2010.

## 2 THE COMPLAINT

2.1 On 15 October 2011, a Member of Parliament, and the President of the United Democratic Movement, the Hon. General Bantu Holomisa, MP (the Complainant), lodged a complaint with the Public Protector in connection with allegations of suspected irregularities in the procurement by the Electoral Commission of the Riverside Office Park to accommodate its head offices.

2.2 In his complaint, General Holomisa alleged *inter alia* that;

2.2.1 There were possible irregularities regarding the lease agreement concluded by the Electoral Commission for new Offices in Centurion which had come to his attention.

2.2.2 The agreement, as reached between the Electoral Commission and the Riverside Office Park Trust (the Trust), which commenced in March 2010 and ends in March 2021 was a product of an irregular tender process.

2.2.3 The Electoral Commission paid a lump sum of R22 603 374 million to the aforementioned Trust in March 2010, long before the building was occupied and that the occupation of the building took place only in September 2010.

2.2.4 Since the first payment the Electoral Commission had spent R100 279 253 million to date with regard to the lease and provided the following breakdown of the said expenditure:

<i>Lump Sum (March 2010)</i>	<i>R22 603 374.00</i>
<i>August 2010</i>	<i>R 9 954 421.00</i>
<i>September 2010</i>	<i>R 1 667 975.00</i>
<i>October 2010</i>	<i>R 8 137 972.00</i>
<i>November 2010</i>	<i>R 4 291 085.00</i>
<i>December 2010</i>	<i>R 26 979 155.00</i>
<i>January 2011</i>	<i>R 1 209 777.00</i>
<i>February 2011</i>	<i>R 2054 419.00</i>
<i>March 2011</i>	<i>R 11 228 550.00</i>
<i>April 2011</i>	<i>-</i>
<i>May 2011</i>	<i>R 2 405 242.00</i>
<i>June 2011</i>	<i>R 2 405 242.00</i>
<i>July 2011</i>	<i>R 2 597 952.00</i>
<i>August 2011</i>	<i>R 2 352 981.00</i>
<i>September 2011</i>	<i>R 2 391 108.00</i>
<i>Total</i>	<i>R 100 279 253.00</i>

2.2.5 The Complainant alleged that there was no consistency in the monthly amount paid to the Trust, unlike the previous building the Electoral Commission occupied in Pretoria, which cost R750 758.40 per month and alleged that the Electoral Commission was still paying for the old building even though it is not being utilised since the Electoral Commission moved.

2.2.6 The Complainant specifically requested that: *“When the matter is being investigated, there should be emphasis on why a lump sum payment was made in advance, in March 2010, whilst the building was still being constructed. Could it be possible that this lump sum payment was used to cover construction costs? If so, why did they not*



*construct their own building instead? In addition, after the Electoral Commission paid for their building, two additional buildings were erected on the same premises for leasing to other interested parties. A forensic audit might assist to verify what happened with the R22 million lump sum payment.”*

2.2.7 General Holomisa further alleged that in December 2010 an amount of R26 979 155 million was paid to the same company and thus that the Electoral Commission did not adhere to PFMA regulations and that there could be possible corruption involved.

2.3 Similar allegations were made in a City Press article, published on 28 April 2012, entitled *“Electoral Commission’s offices partly owned by the boss’s business partner”*. In the article, it was reported that;

*“The Independent Electoral Commission’s R320 million office lease, in which Manaka Property Investment has a backdoor stake, faces renewed scrutiny. City Press confirmed this week that one of the Manaka directors was a business partner of Electoral Commission chair Pansy Tlakula. Tlakula played a role in the Electoral Commission’s new lease acquisition. Parliament’s finance portfolio committee chairperson Thaba Mufamadi’s company, Manaka Property Investments, owns a 20% stake in the trust that owns the Riverside Office Park. Riverside is the Centurion office park in which the Electoral Commission has been renting more than 9 700 square metres of office and storage space since September 2010.*

*Mufamadi and Tlakula are listed as fellow directors in three separate companies involving a mining logistics company called Lehotsa. Three of the four are still recorded in online company records as being active. Tlakula and the Electoral Commission denied that this relationship constituted a conflict of interest. However, Electoral Commission spokesperson Lydia Young told City Press that Tlakula had been part of the committee that evaluated the bid for Riverside to be considered as the new premises while she was still Chief Electoral Officer. At the time, another entity – Abland – had competed for the tender and had been one of two recommended by the Electoral Commission committee on which Tlakula sat to be considered for the contract.*

*Abland won the bid but ultimately represented the Riverside Office Park Trust in which Manaka – and Mufamadi – had a stake. The lease has already been the subject of a complaint to Public Protector Thuli Madonsela by United Democratic*

*Movement leader Bantu Holomisa. The Riverside Office Park lease deal was signed in August 2009, with an initial monthly rental of some R1.5 million in 2010. The rental increases by 9% annually, which means that currently the Electoral Commission pays nearly R1.9 million a month. City Press has established that Tlakula, who was elevated to Electoral Commission chair, last year, has been Mufamadi's business partner in Lehotsa Investment since 2006. Tlakula said the decision to award the contract was taken by the Electoral Commission, not the organisation's executive committee, on which she served at the time.*

*She said Manaka was not involved in the bidding and she had no knowledge of their involvement in any way. Tlakula said the committee submitted the proposals for Riverside and another rival bid to the Commission without any indication of a preference and the Commission approved the move to Riverside Office Park. "I had no knowledge of Manaka's involvement and I think they got involved through a consortium at a later stage. But I didn't have anything to do with the awarding of the contract," said Tlakula.*

*She said Lehotsa Investment has been dormant since 2007 and that she had declared her business interests. Mufamadi denied that Tlakula was a business associate because, he said, Lehotsa was dormant. He said he had never discussed the lease with Tlakula, and said that as Manaka's chairperson he was not involved in Manaka's operational affairs or any negotiations for contracts. Jannie Moolman, a director in the office park trust's majority shareholder, East and West Investments, as well as a director of Manaka, said he was not aware of Tlakula and Mufamadi's business relationship."*

- 2.4 Two other complaints were lodged anonymously by "Concerned Electoral Commission Employees" through memoranda dated 20 July 2012 and 24 August 2012 respectively.
- 2.5 The memorandum dated 20 July 2012 and received by the Public Protector on 27 July 2012 was addressed to the Vice Chairperson of the Electoral Commission T I Tselane copying Members of the Electoral Commission of South Africa: R Taljaard, Judge GM Makhanya and Rev B Finca. The memorandum titled "Corruption and Maladministration in the Electoral Commission", included the following allegations:

*"It is exactly eight weeks since we wrote to you and your fellow Commissioners informing you of the steps we have taken in the light of serious allegations of corruption and maladministration levelled against the Commission; and the reasons why we have taken such steps. In the MEMO we have also asked you to call the management and ask the questions we prepared.*

*We want to point out that the intention of that exercise was to afford you an opportunity to get first hand facts about the allegations that are flying around in the media so that you as The Members of the Commission have the same knowledge and understanding. We are your employees. We are now writing under the assumption that the meeting between you and management did take place. And now that you know the truth we want to formally welcome you as our partner in the fight against Corruption and Maladministration in the Electoral Commission. In welcoming you, we want to draw your attention to the following facts:*

*...The process followed in awarding the Building Rental Deal was, according to some members of Procurement Committee grossly flawed as the whole process was handled by the CEO's office. When these members raised some questions about the Deal and process followed they were told to just affix their signatures as the CEO's office is handling all this. ...We are not exaggerating when we say, "you need not be a rocket scientist to see that there is a strong conflict of interest on the part of the Electoral Commission CEO now Chairperson." It must be remembered that the Building Rental Deal was initially given to a company which Norma(sic) Du Plessis introduced to the Commission. The company was unceremoniously kicked out by Pansy Tlakula ...*

*That the award-winning African Election Management Body's reputation, credibility and image are now at stake as result of what clearly seems as an aggravated form of corruption and tendepreneuring at its highest leadership echelons.*

*That the trust and respect that South Africans, Political Parties and the rest of the world have put on us the Electoral Commission is now at stake. One of the questions that may be asked is, if a high profile member of a political party especially ruling party pulls strings of the Chairperson and the face of an organization like the Electoral Commission what is it that that party will not get from that organization? The much talked about 'treating all parties equally,*

*impartiality and independence issues' of what the Electoral Commission has been known for all the years of its existence are undoubtedly compromised.*

*That the authenticity and integrity of the work that we do, is likely to start raising questions such as why political party 'A' is winning or losing or that Electoral Commission has rigged the elections and so on.*

*We have never before been associated with such questions, but the new developments will undoubtedly make us counted among other Election Management Bodies that no longer care about such questions and doubts.*

*Another fear or concern is that our leaders: Councillor, MPLs, and MPs walk with pride wherever they go as the whole world have never doubted their election which is the phenomenon we see in other countries, particularly in Africa.*

*The very office that appointed the person in question here is likely to be compromised when acts of corruption and maladministration are levelled against the person it appointed.*

*We hereby request you on our behalf to do the following:*

*That you request the Chairperson of the Commission and Mr Norman du Plessis to resign with immediate effect to save the organization from further embarrassment.*

*That, other people who know that they either had a role to play or benefited be also requested to resign just like the Head of Legal Services and other staff members from the IT Consulting Companies did before they are named and shamed.*

*We would also like to know on what bases were the services of a Senior Counsel solicited and who paid for those services? Were procurement processes followed?*

*Is the CEO not the person who is supposed to be handling this matter rather than Norma (sic) du Plessis? We are asking this question knowing well that on 6<sup>th</sup> July 2012 the CEO was left in the Electoral Commission offices, but Norman was the one who accompanied the Chairperson for questioning at the Public Protector's office.*

*We would like to see the action before the end of July 2012."*

- 2.6 The correspondence dated 24 August 2012 served as follow up on the progress of the investigation. It was stamped as received by the office of the Public Protector on 29 August 2012. The subject of the letter was *“Report on alleged corruption and maladministration in the Electoral Commission”*.

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

#### **3.1 Mandate of the Public Protector**

- 3.1.1 The Public Protector is an independent institution, established under section 181(2) of the Constitution to support and strengthen constitutional democracy by:

- 3.1.1.1 Investigating 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;

- 3.1.1.2 Reporting on that conduct; and

- 3.1.1.3 Taking appropriate remedial action.

- 3.1.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation. Such legislation includes the Public Protector Act and the Executive Members’ Ethics Act.

- 3.1.3 The Public Protector Act 23 of 1994 elaborates on the investigation powers of the Public Protector and section 6(4) of the Public Protector Act specifically provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged:

- 3.1.3.1 Maladministration in connection with the affairs of government at any level; or

- 3.1.3.2 Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function.

- 3.1.4 Section 6(4)(c)(i) of the Public Protector Act provides that the Public Protector may, during or after an investigation, if he or she is of the opinion that the facts disclose a commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions.

3.1.5 Section 8(1) of the Public Protector Act, states that the Public Protector may make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

3.1.6 The Electoral Commission is an organ of state and its conduct amounts to conduct in state affairs, and, accordingly, the matter falls within the remit of the Public Protector. The jurisdiction of the Public Protector was not disputed by any of the parties.

## 3.2 **Approach to the investigation**

3.2.1 The Public Protector's mandate on improper conduct requires an enquiry that transcends scrutinising the lawfulness of the conduct in question and also poses questions of justice and correctness of such conduct. Such enquiry has three components:

3.2.1.1 What happened?

3.2.1.2 What should have happened? and

3.2.1.3 Is there a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, abuse of power, improper enrichment or conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act .

3.2.2 In determining whether conduct was improper or constituted maladministration or any of the violations envisaged in the Public Protector Act, the Public Protector compares the conduct of government entities and officials complained of as against the relevant legislation and other prescripts and good practice, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, transparency, ethical standards and local and international best practises.

3.2.3 The mandate of the Public Protector is not limited to the investigation of complaints, but he/she can also investigate suspicion or allegations of improper conduct on own initiative.

### 3.3 The obligation of the Public Protector to follow due process

3.3.1 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 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, in terms of section 7(9) (a) of the Public Protector Act, afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

3.3.2 Due process was complied with during the course of the investigation referred to in this Report. Among other things, interested and affected parties were also afforded an opportunity to present their side of the story and as well, respond to the contents of the Provisional Report of the Public Protector pertaining to the matters investigated to ensure fairness and transparency.

## 4 THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR

4.1 The allegations from the complainants were combined and analysed to distil the essential issues needing to be investigated. The investigation focussed on the following issues:

4.1.1 The propriety of moving the Electoral Commission Head Offices from Walker Street, Sunnyside to the Riverside Park Offices in Centurion;

4.1.2 Alleged maladministration and possible corruption in the procurement process followed for the Riverside Office Park consisting of alleged flaws in the demand management process, the budget process, the procurement procedure, bid evaluation process and award;

4.1.3 Alleged impropriety relating to inconsistent monthly rental amounts paid to the Riverside Office Park Trust from September 2010 to September 2011;

4.1.4 Alleged irregularity of Electoral Commission payment for the old building whilst the building stood empty;

4.1.5 Alleged irregular advance payment of a lump sum in the amount of R22 603 374.00 in March 2010;



- 4.1.6 Alleged irregular payment of a lump amount of R26 979 155.00 in December 2010; and
- 4.1.7 Alleged conflict of interest arising from a close business relationship between Adv. Tlakula, and Hon Thaba Mufamadi, MP, an Executive Chairman and co-director with Adv. Tlakula in Lehotsa Investment (Pty) Ltd who also happens to be a Chairperson of Manaka Property Investments that holds a 20% shareholding in Abland, the company awarded the contract for the provision of the Riverside Office Park leased accommodation, for the Electoral Commission.
- 4.2 The Public Protector did not investigate the allegations of an existence of a romantic relationship between Adv. Tlakula and Hon. Thaba Mufamadi which were filed on an anonymous basis by the *Concerned IEC Employees* as they were not substantiated by evidence. The employee whom they alleged to have knowledge about the allegations was interviewed and denied knowledge of an existence of the said relationship.
- 4.3 In the absence of tangible information to enable the Public Protector to investigate the alleged romantic relationship and further to a denial by the person alleged to be the whistle-blower on that matter, the investigation did not pursue this issue.
- 4.4 On request from Hon. Mufamadi, that the Public Protector remove from the report any reference to the allegations of an existence of a romantic relationship, the detailed allegations regarding such alleged relationship are omitted from this report. However, it must be noted that Hon. Mufamadi was invited to indicate whether he would like the Public Protector to investigate the allegations to enable her to consider his request with a view to making a definite finding that such relationship did not exist, no feedback was received from Hon Mufamadi in that regard.

## **5 THE INVESTIGATION**

### **5.1 Scope of the Investigation**

- 5.1.1 The scope of the investigation was restricted to January 2009 when the procurement of office accommodation for the Electoral Commission was initiated to August 2013 when the report was issued; and



5.1.2 Allegations of irregularities at the Electoral Commission unrelated to the procurement of The Riverside Office Park building did not form part of the investigation.

5.2 The following methods of gathering and analysing information were employed:

### 5.3 **Interviews and Meetings**

5.3.1 Interviews were conducted with:

5.3.1.1 The former Chairperson and Deputy Chairperson of the Electoral Commission, Dr Brigalia Bam and Ms Thoko Mpumlwana respectively;

5.3.1.2 The former CEO of the Electoral Commission and current Chairperson, Adv. Tlakula;

5.3.1.3 The current Commissioners of the Electoral Commission, Commissioners Tselane, Finca and Taljaard respectively;

5.3.1.4 The current Chief Electoral Officer, Mr Mosotho Moepya;

5.3.1.5 The Deputy CEO Corporate Services, Mr Norman du Plessis;

5.3.1.6 The Manager in the former CEO's office, Mr Stephen Langtry; and

5.3.1.7 Current and former employees of the Electoral Commission.

### 5.4 **Analysis of documents and/or information**

5.4.1 Documents obtained from the Electoral Commission, were analysed, including:

5.4.1.1 Correspondence between the DPW, Electoral Commission and (Fountain Head Property Trust Scheme);

5.4.1.2 Lease agreements between DPW and the Fountain head Property Trust Scheme and Electoral Commission;

5.4.1.3 Cancellation of lease agreement between Electoral Commission and Fountain head Property Trust Scheme;

5.4.1.4 Reconciliation of the calculation of the refund to Electoral Commission;

5.4.1.5 Memoranda to the Electoral Commission lease agreement;

5.4.1.6 Needs analyses compiled by the Electoral Commission;

5.4.1.7 Supply Chain Management policy of the Electoral Commission;

5.4.1.8 Asset register of the Electoral Commission in relation to the Riverside Office Park building;

5.4.1.9 Extracts of minutes of meetings of the EXCO and the Commission in respect of the office accommodation;

- 5.4.1.10 Advertisement in respect of the Electoral Commission building;
- 5.4.1.11 Register of the closing of bids;
- 5.4.1.12 Evaluation sheet of ten(10) bids received;
- 5.4.1.13 Submissions of the four(4) shortlisted entities; and
- 5.4.1.14 Lease agreement and addenda to the lease agreement between Electoral Commission and the Riverside Office Park.

## **5.5 Correspondence**

- 5.5.1 Correspondence between the Public Protector and:
  - 5.5.1.1 The former Chairperson of the Electoral Commission;
  - 5.5.1.2 The current Chairperson of the Electoral Commission;
  - 5.5.1.3 The CEO of the Electoral Commission;
  - 5.5.1.4 The Chief Financial Officer of the Electoral Commission;
  - 5.5.1.5 The Deputy CEO Corporate Services of the Electoral Commission;
  - 5.5.1.6 Current and former Commissioners;
  - 5.5.1.7 The Complainant;
  - 5.5.1.8 Mkhabela Huntley Adekeye Incorporated Attorneys retained by the current Electoral Commission Chairperson, Adv. Tlakula; and
  - 5.5.1.9 De Klerk Mandelstam Incorporated Attorneys on behalf of Hon. Mufamadi

## **5.6 Legislation and other prescripts**

- 5.6.1 The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:
  - 5.6.1.1 The Constitution of the Republic of South Africa, 1996;
  - 5.6.1.2 The Public Protector Act 23 of 1994;
  - 5.6.1.3 The Public Finance Management Act, 1 of 1999;
  - 5.6.1.4 The Treasury Regulations and instructions for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management, 1999;
  - 5.6.1.5 The Electoral Commission Act, 1996;
  - 5.6.1.6 The Electoral Commission Procurement Policy and Procedures approved on 10 March 2005;
  - 5.6.1.7 The Preferential Procurement Policy Framework Act, 2000 and Regulations issued in terms of the section 5 thereof;
  - 5.6.1.8 The Companies Act, Act 78 of 2008;
  - 5.6.1.9 King III report on Corporate Governance;

5.6.1.10 The Public Service Commission's report on Managing Conflicts of Interest in the Public Service issued in July 2006; and

5.6.1.11 Touchstones, the previous Reports of the Public Protector relevant to the matter.

## **6 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

### **6.1 The Complainants Case**

#### **6.1.1 Meeting with the complainant: Hon B. Holomisa**

6.1.1.1 In addition to the written submission by the complainant, the Public Protector met with Hon. Holomisa at her offices in Pretoria on 9 July 2012. During the meeting the complainant indicated that he did not profess any first-hand information on any aspect of the complaint.

6.1.1.2 He indicated that his main source was the anonymous employees of the Electoral Commission whom he had met in person. He also provided documents supporting his case and pointed the investigation in the direction of people that could help.

6.1.1.3 The complainant's documents included a list of further allegations on systemic contract maladministration at the Electoral Commission transcending the leasing of the Riverside Office Park building. However, it was agreed that the current investigation would retain its focus. He advised that he had asked the president to consider a commission of inquiry for the alleged systemic governance and administrative deficiencies.

#### **6.2 The evidence and information obtained from the “Concerned IEC Employees”**

6.2.1 Amongst the documents submitted by the *Concerned IEC Employees* was a memorandum with annexures dated 7 May 2012 addressed to the Chairperson of the Standing Committee on Public Accounts, Mr Themba Godi entitled “*Confirmation of allegations made by UDM President General Holomisa and certain newspapers about the Electoral Commission building*”.

6.2.2 In the document, the anonymous complainants stated that:

*"It is true that in September 2010, the Electoral Commission left its offices located at 260 Walker Street, Sunnyside, Pretoria which it had occupied for almost 13 years before its rental agreement with Fountainhead Property Trust Scheme expired. According to the rental agreement entered into in September 2008, the contract was to terminate on 13<sup>th</sup> August 2012.*

*It is true that the Electoral Commission left very cheap offices for more expensive ones in centurion. For an example, according to our records, at the time of moving from Sunnyside offices the Electoral Commission was paying about R670, 320.00 per month. But now with the new offices in centurion, it is paying about R2,4 million per month which is more that 300% expensive compared to the Sunnyside building.*

*It is true that in September 2010, the Electoral Commission hurriedly occupied the centurion offices while still under construction. According to Electoral Commission payment records, the agreement is between the Electoral Commission and River Side Office Park Trust and the agreement started 19 March 2010 to end 31<sup>st</sup> March 2021.*

*It is true that the Electoral Commission has been paying rent for two buildings, one in Sunnyside building which it left in 2010 as mentioned above at the rate of about R670, 320.00 per month and the other in centurion at the rate of R2,4 million.*

*It is true that in March 2010, the Electoral Commission paid an advance lump sum of R22, 603, 374.00 to the Riverside Office Park Trust six months before it took occupation of the building. This amount was followed by R12, 1 million in May 2010 to the same company. More and more very suspicious payments were made to the same company*

*We knew from the time that these allegations were made by General Holomisa that instituting an unbiased investigation on this matter was going to be very difficult for the following reasons:*

*... This explains three things:*

*Firstly, why the Electoral Commission was forced out of the Sunnyside Building before its contract expired and hurriedly occupied the Centurion offices even before they were ready.*

*...*

*Secondly, this is why there is no progress in investigating this matter because it involves a powerful and high profile person from the ruling African National Congress. That it might also be involving other heavyweights from the ANC as newspapers alleges.*

*Thirdly, there is a very high and strong possibility that the IEC Chairperson is getting some shares out of this deal since the two are confirmed business partners. Also that even the ANC is a likely beneficiary given that its heavyweight is involved and there seems to be no action from the Public Protector.*

*That the now Chairperson of the IEC who was the CEO when lease deals were concluded is not only a personal friend to Adv. Thuli Madonsela, but they are also leaders of Chapter Nine Institutions. It is clear that Thuli is very reluctant to probe and embarrass her own personal friend and a colleague as Chapter Nine Institutions. She seems prepared to rather compromise her own institution, work and image it has built over the years to protect a friend.*

*Our strongest fears and concerns:*

*That the award-winning African Election Management Body's reputation, credibility, and image are now at stake as a result of what clearly seems as an aggravated form of corruption and tenderepreneurial scandal at its highest leadership echelons.*

*That the trust and respect that South Africans, political parties and the rest of the world have put on us as the Electoral Commission is now at stake.... The much talked about "treating all parties equally, impartiality and independence issues" of what the IEC has been known for all the years of its existence are undoubtedly compromised.*

*That the authenticity and integrity of the work that we do, is likely to start raising questions such as why political party 'A' is winning or losing or that IEC has rigged the elections and so on. We have never before been associated with such questions, but the new developments will undoubtedly make us counted among other Election Management Bodies that no longer care about such questions and doubts.*

*Another fear or concern is that our leaders: Councillor, MPLs, and MPs walk with pride wherever they go as the whole world have never doubted their election which is the phenomenon we see in other countries, particularly in Africa.*

*The very office that appointed the person in question here is likely to be compromised when acts of corruption and maladministration are levelled against the person it appointed.*

*We therefore request you and your organization/institution to among others do the following:*

*Please do everything in your power to have these allegations thoroughly investigated in the same way as we have seen the likes of the suspended Commissioner of Police and others. And those involved and found guilty must face the might of the law as appropriate.*

*We also request that a forensic investigation into the finances of the IEC be instituted as there are a lot of suspected payments of transactions that we process every day for things we don't have documentation for.*

*That other crime fighting or investigation units be involved as it does not look like the Public Protector will be in a position to do this or will be as impartial and objective as possible on this matter because of the reasons stated above. To us it looks like she is very interested in exposing cases involving certain political party leaders.*

*The old IEC Commissioners who were supposed to look after the image of the organization left without having uttered a word on this matter in order to take the nation into confidence. Now the new Commissioners who took over from November 2011 have themselves not said a word although the matter has been appearing and re-appearing from this newspaper to the other.*

*We must emphasise that these are not the only acts of corruption and maladministration taking place within the IEC, but for now we want to limit ourselves to what has been reported to the whole nation.*

*We request your institution / organization to help save the IEC of South Africa from this unprecedented embarrassment."*

## 6.3 The Electoral Commission's Case

### 6.3.1 The Response of the Electoral Commission to enquiries made by the Public Protector

- 6.3.1.1 On 5 October 2011, The Public Protector addressed correspondence to the Electoral Commission requesting a response and information in connection with allegations made by General Holomisa. The Commission in a correspondence entitled "*Allegations of Irregularities: Electoral Commission lease agreements*" responded to the Public Protector's enquiries as follows:

*"We acknowledge receipt of your communication of 5 October 2011. For easy reference we enclose a copy thereof together with a copy of the press release by Mr Holomisa – marked annexure A.*

*We deny the allegations that have been made against us and we have provided you hereunder with full explanation of the lease agreement entered into and the payments relating thereto.*

#### **The Need for New Accommodation**

*We required new and more spacious accommodation since the building in Sunnyside was over occupied to such an extent that ablution facilities could not cope, posing a health hazard. In addition we have constantly had to rent outside accommodation for meetings as even corridors were used as "office space"*

#### **Request for Proposal**

*In seeking new accommodation a request for proposal was widely advertised in the press. The requirements to be used in deciding the matter were part of the public advertisements. **We, however, omitted to indicate upfront in the public advertisements that the 90:10 principal (90% price and 10% BEE preference) as prescribed in the Preferential Procurement Policy Framework Policy Act (PPPFA), would be applied. This omission is indicated in our financial statements for the 2010/2011 financial year which have been audited by the Auditor-General.***

*It must be emphasised that the prescripts were, however, correctly applied and we have accepted the highest scoring bid (which also happened to be the cheapest suitable option) that met the advertised requirements. We regard this as a technical*



*rather than material matter and must mention that we received a clean audited report from the Auditor-General for the 2011/12 financial year.*

*The attached file marked Annexure b contains a full story of the procurement process followed to acquire new accommodation. This includes –*

- a memorandum dealing with space requirements and acceptance of the principle of the turnkey solution*
- newspaper advertisements*
- a list of the submissions received in response to the advertisements*
- an evaluation summary of the submission received*
- excerpts of EXCO decisions and Commission approvals*
- advertisement regarding the awarding of the contract*
- details of the audit issue referred to in paragraph 3.1 which the Auditor-General considered, with our response thereto, as far as the procurement of the accommodation is concerned.*

### **The Contract**

*A copy of a proposal submitted by our current landlord is attached as marked annexure C. the contract/lease agreement was entered in to for our new accommodation is attached and is marked Annexure C1. Annexure B to the contract to the contract contains details of rental costs and fixed operation costs. Other variable costs such as for electricity are not included in the fixed operating costs and would come to different amounts from month to month. We accepted the proposal for a turnkey solution and this is provided for in annexure D1 of the contract. It is essentially deals with Electoral Commission specific requirements that fall in two categories:*

***Immovable infrastructure requirements that are not part of a rented building and additional cost were rentalised.***

*This includes physical security elements, special fire roof constructions to the house a generator and UPS as well as computer server room, infrastructure in the computer server room for appropriate air conditioning, raised flooring in the computer and training centres, and the like. It would have been much more expensive to have this work done post the completion of the building and it was practically and financially more attractive for it to be part of the constructions process.*

***Movable items which were installed and which the Electoral Commission produced as assets by means of the turnkey contract. This includes items such***



as the air conditioning units in the computer server room, the generator, computer switches, network cabling and audio visual cabling and infrastructure and the like. The infrastructure referred to in paragraph 4.2.1 was rentalised as cost whilst a 2% handling fee (to cover additional installation and labour costs) was charged in respect of assets referred to in this paragraph. The handling fee of 2% above actual cost is below market trends and was a practical and financially attractive proposition. **We also utilised the turnkey proposal for space planning, interior design – including and industrial kitchen for the canteen – and for the manufacture of purpose designed furniture. The companies used had standing arrangements with the developers (Abland) and was contracted by them but quotations and samples had to be submitted in all instances for Electoral Commission consideration and prior approval.**

The furniture we used in our previous accommodation was mostly procured in either 1994 or during the period 1997/1998 and had long since had book value of R1 per item. Due to their old age much of the furniture was either no longer serviceable or hardly serviceable and it was neither economical nor practical proposition to move with it.

The furniture that was still useable was transferred to a government department in terms of the applicable Treasury prescripts. The furniture acquired was most purpose manufactured for the Electoral Commission to ensure appropriate quality and durability and contact was directly with factories, for example most desks have steel frames rather than the modern trend of glued wooden panels which has a limited lifespan. Total handling charges (on top of factory costs) by the interior design companies varied between 5% and 12.5% to which should be added 2% by the developers. Assured quality apart, this was much cheaper alternative to paying ordinary retail prices where wholesale and retail margin add substantially to final cost.

We have provided you with full details of the facilities and assets referred to in the previous paragraphs above since it explains the different and variable payments made from month to month. **Deposits required on placement of orders and those deposits are the payments reflected in payments prior to our occupation of the building.**

**Payments made to Riverside Office Park Trust during the 2009/10, 2010/11 and 2011/12 Financial Years**

*The bundle marked Annexure D contains full details of all payments made, to Riverside Office Park Trusts and the purpose thereof together with copies of bank statements for verification of those payments. Details of rental amounts are also indicated.*

*It will be noted the rental paid from September 2010 to March 2011 was R1 440 524.17 per month whilst the adjusted Annexure B to the contract indicates that it should be R1 730 412.41. The contract has been adjusted to conclude the rentalisation adjustment referred to in paragraph 4.2.1 above but we have not yet been invoiced for the difference.*

*Rental payment since April 2011 at R1 730 412.43 (rounded) per month is correct as per the contract but an adjustment from September 2011 onwards must also be made. Please note that the amounts indicated do not include fixed or variables operating costs.*

*It must also be pointed out that we only occupied the building on 13 September 2010 and the lower amount paid in October 2010 was due to a pro-rata adjustment of the full payment made in September 2010.*

*As indicated in paragraph 4.2.4 above we were required to pay deposits in most instances when orders were placed for the acquisition of assets. The total amount of deposits paid came to R34 965 298.26. On delivery of the assets we were then invoiced for the full cost and provided with credit note to the value of the deposit. This is standard accounting procedure and the schedules and bank statements confirm that only the outstanding balance was then paid. The matter of debits and credits, let's say, were evidently not understood by the complainant or his source of information.*

**Rental Old Building (260 Walker Street, Sunnyside)**

*A copy of the contract relating to our former accommodation is attached and marked Annexure E.*

*A copy of lease agreement entered into by the Department of Public Works in respect of 260 Walker Street with effect from 1 January 2011 is attached as annexure F.*

*A copy, and subsequently correspondence, on the formal termination of our lease agreement for 260 Walker Street is attached and marked as Annexure G. It confirms a rent free period from October to December 2010.*

*The essence of the matter is that the Electoral Commission paid rental for two buildings for a period of 18 days in September 2010 and that this was essential to clean and restore the building we vacated in Sunnyside. The Commission formally sanctioned the agreement – refer to the annexure marked H.*

*The history of the termination of our lease in Sunnyside is a matter that requires some amplification. The Electoral Commission was approached by the Department of Human Settlements in 2007 with a view to them taking over the lease for 260 Walker Street. They occupy the adjoining building at 240 Walker Street and were informed by our common landlord that we had by then not indicated our intention to extend our lease of 260 Walker Street. With the pending election in 2009 we, however, from a practical perspective had no option but to extend our lease.*

*We, at the same time, immediately entered into discussions with the Department of Human Settlements and Department of Public Works with a sub-lease for the remainder of our contract after the 2009 elections in mind. We had meetings with successive Directors-General and Acting Directors-General of the Department of Public Works (DPW). The lack of continuity in that Department was problematic and various agreements were reached during this time, ranging from sub-lease by DPW to the State procuring the building under Urban Renewal Scheme. At the beginning of 2009 and before we advertised for new accommodation the final agreement was reached that DPW would combine the rental for 240 and 260 Walker Streets into a single lease agreement and we proceeded to seek new accommodation on that understanding.*

*Since these agreements reached with DPW were verbal we, as the time for our move approached, were concerned about the lack of progress in the matter being contractually finalised. We were, however, continuously reassured by the Head of the Department that the matter is in hand and that the contract would be in place by January 2011. To cover the delay in the finalisation of the contract his Department had before we vacated 260 Walker Street also negotiated a rent free period from October 2010 to December 2010 for the Electoral Commission with the landlord Fountainhead Property Trust.*

*On 8 December 2010 we received a copy of an acceptance of a new lease agreement by DPW addressed to Fountainhead Property Trust for the rental of 240 and 260 Walker Streets and pending the signing of a formal contract that resolved the issue (Refer to the annexure marked I). a formal lease was ultimately, however, only concluded on 13 September 2011.*

*This was after the Electoral Commission had approached the Minister of Public Work and Directors of the Fountainhead Property Trust to intervene in the resolution of the contractual impasse. In the end the contract was, however, concluded retrospectively to 1 January 2011 and all the verbal undertakings by DPW to the Electoral Commission have therefore now been honoured.*

*Until DPW and Fountainhead Property Trust concluded their agreement the Electoral Commission remained legally liable for the payment of rental for 260 Walker Street and we did so until end of August 2011. Fountainhead Property Trust – as is evident from the “Termination of lease agreement” – will however refund the Electoral Commission for rental payments from October 2010 onwards. We still need to resolve the issue of them only doing so after receiving payment from DPW/Human Settlements.*

*We have provided you with a comprehensive picture of all the circumstance around our move to Centurion. The details contained in this communication and the annexures supporting the following replies to your specific questions:*

*Monthly rentals are consistent but operating costs are variable depending on electricity consumed, etc. Payments made over the last 14 months are variable since deposits and/or final payments for assets and should not be confused with the rental portion. The schedule in annexure B makes those distinctions very clear.*

*The Electoral Commission is not liable for its old building from October 2010 to December 2010 and is no longer the lessee since January 2011. It is contractually assured of a refund for payments made since October 2010.*

*No lump sum (of R22 603 374) was paid in March 2010. An amount of R1 275 706.60 was paid in that month as a deposit for furniture and an amount of R33 509.86 for professional services (Space planning / design fees). No lump sum was paid and no payment was ever made to cover the construction costs of the building. IEC requirements that required “construction” were all classified as “immovable” as per annexure D1 of our contract and rentalised; but only after we moved into the building. We only paid for assets that were all appropriately recorded*

*in our assets register and that has been audited by the Auditor-General with no issues arising.*

*We only paid R11.6 million in December 2010 and not the amount of R22 979 155 as alleged. The payment in December 2010 was for rental for December 2010 and January 2011 (as the office closes over the festive period). The balance of payment was for the final payment of assets acquired.*

*If there is a necessity for further information to deal with the specific allegations of the complainant or should you wish to verify source documents (invoices etc.), please advise me.” (Emphasis added)*

- 6.3.1.2 A response from Adv. Tlakula subsequent to the meeting between her and the Public Protector was also provided. On 13 July 2012 the office of the Public Protector received further representations from Adv. Tlakula in connection with her understanding of the conflict of interest. under the heading “*Conflict Of Interest*”, thus explaining more on her standpoint with regard thereto as follows;

*“In the meeting of 06 July 2012, it became evident that the Public Protector was concerned whether the conflict of interest was limited to financial interest that Adv. Tlakula had in relation to the lease concluded between the Commission and the Trust, or whether the conflict should be adjudged beyond financial interest. In this regard, we make the following submission:*

*The employee Policy Manual of the Electoral Commission relevant to conflict of interest prohibits an employee from making any “personal gain at the expense of or as a result of their employment by the Electoral Commission.” The expression “personal gain” is not defined. The interrogation is whether “personal gain” is limited to financial gain. We submit that this must necessarily be the case even when looking at related incidents involving questions of conflict of interest. We point to these herein below:*

*It is common cause that Adv. Tlakula as a shareholder and director of Lehotsa Investment (Pty) Limited will not derive any direct or indirect financial interest in the lease concluded by the Commission and the Trust.*

*It is also common cause that Adv. Tlakula is not a director or shareholder of Manaka which company is a shareholder in the Trust. It is further common cause*

*that Lehotsa Investment Holding (Pty) Ltd (“Lehotsa”) is not in any way connected with Manaka by way of subsidiarity.*

*None of the companies have a juristic relationship with the other. The Directors of Manaka do not have any fiduciary duty to Lehotsa. Mr Mufamadi’s fiduciary duty to Lehotsa is distinctly different to the fiduciary duty he holds towards Manaka. Most significant is that adv. Tlakula does not have any fiduciary duty to the directors of Manaka. If she was so minded, she would legally and completely be able to enter into transactions that are in direct competition with the interests of Manaka, be they direct or indirect.*

*We submit that there is no personal gain which Adv. Tlakula derives from the lease concluded by the Commission with the Trust. We submit that the decision to conclude the lease agreement with the Trust was made by the Commission (the delegation of authority matrix of the Commission stipulates that the Chief Electoral Officer can make a decision beyond R2 000 000.00 after consulting the Commission.) This, consultation happened and the Commission agreed that the contract should be concluded with the Trust but that Adv. Tlakula should explore whether the lease agreement could be concluded easier.*

*The Constitution of the Republic of South Africa Act, 1996 ( “the Constitution”) provides under section 96 in relation in relation to the conduct of Cabinet Ministers and deputy Ministers and in relation to Provincial Members of the Executive Councils that they must act in accordance with a code of ethics prescribed by the national legislation. The Members of the Cabinet, deputy Ministers and Members of the provincial executive Councils may not:*

*Act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interest; or use their position or any information entrusted to them to enrich themselves or benefit any other person.*

*We submit that there is no evidence that the award of the lease agreement to the Trust by the Commission could in any way be construed to enrich Adv. Tlakula, even if, (which is not conceded) that Manaka would derive any benefit from that lease agreement. This is so since Adv. Tlakula is not a shareholder of Manaka nor is Lehotsa Investment (Pty) Ltd a subsidiary or shareholder in Manaka.*



*The Companies Act 71 of 2008 address in section 75 directors personal financial interest and reads, in the relevant part as follows:*

*‘Section 75(6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board , or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstance relating to the director or related person’s acquisition of that interest.’*

*We submit that even under the Companies act, the duty on any director to disclose is singularly aimed at the disclosure of financial interest. In this case, there is no assertion that Adv. Tlakula, despite not being a director in Manaka or the Trust, is not deriving any financial interest arising out of the conclusion of the lease between the Commission and the Trust.*

*The position of conflict of interest under the common law is that a director may not place himself or herself in a position in which he or she has a personal interest or duty conflicting, or which possibly may conflict, with his or her duties to the company. It is significant to note that the phrase “possibly may conflict” entail a situation where a reasonable person looking at the relevant facts would think that there was possibility of conflict; and not that the same situation can be imagined as arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by a reasonable person, result in a conflict.*

*The five components to the duties under the general rule are:*

*The rule against self-dealing and the rule (the fair dealing rule) that requires disclosure of interest in company contracts;*

*The duty to account for secret or incidental information;*

*The duty not take corporate opportunities;*

*The duty not to misuse confidential information; and*

*The duty not to compete with the company.*

*The legal position is that the rule is only breached when, and only when a director acts for his or her company in a manner which he or she has an interest or duty which conflicts, or many possibly conflict with his or her duty to the company. In other words, a director may not act for his or her company when, in doing so, he or she might be tempted to breach his or her duty to act in the best interest of the company.*

*The first components that is the self –dealing rule of conflict of interest rule provides that a director may not act on behalf of his or her company in a matter in which he or she has interest (or in regard to which he or she owes a duty to another) that conflict or may possibly conflict with his or her duties to his or her company.*

*On the one hand the fair dealing rule provides that if a director wishes to contract with his or her company, or has an interest in a contract which his or her company purposes to enter with a third party, he or she is not permitted also to act on the companies behalf. The primary duty that this rule imposes on a director is that in that event, he or she must disclose his or her interest to the company.*

*The self-dealing rule does not have any applicant in this case as the Commission did not contract with a company belonging to Adv. Tlakula. Neither in her personal capacity nor with a company in which she holds an interest. This applies with equal force for the fair dealing rule since Lehotsa did not contract with the Commission. Adv. Tlakula does not have an interest, direct or otherwise in the Trust or in Manaka.*

*Lastly, the question to ask is whether Adv. Tlakula is a related person within the meaning of the Companies Act. A related person is defined in the Companies Act to mean when used in respect of two persons to refer to persons who are connected to one another in one of the following ways:*

*They are married to one another; or live together in a relationship to a marriage;  
or*

*Are separated by no more than two degrees of natural or adopted consanguinity or affinity; or*



*When an individual is related to a juristic person, if the individual directly or indirectly controls the juristic person.*

*On the facts, Adv. Tlakula is not married to Mr Mufamadi the co-director in Lehotsa; does not live with him in a relationship similar to a marriage and is not otherwise related to him by consanguinity or affinity. Adv. Tlakula is not having a direct or indirect control of Manaka or the Trust. She also does not hold any controlling interest within the meaning of Section 2 of the Companies Act.*

*The conclusion must be that there is nothing affecting Adv. Tlakula to suggest any conflict of interest under the common law, the statutory law, or the policies of the Commission.”*

6.3.1.3 Adv. Tlakula further explained the Commission’s perspective regarding the non-involvement on the DPW in the procurement process of the Riverside Office Park. Reference was made to chapter 5 of the Treasury Instructions which deals with assets and liability management and specifically with lease transactions which provides that the Commission has the power, without any limitations, to enter into lease transactions.

6.3.1.4 Adv. Tlakula further added that *“the accounting officer of an institution may, for the purpose of conducting the institutions business enter into lease transactions without any limitations provided that such transactions are limited to operating lease transactions.”*

### **6.3.2 The Public Protector’s interview and evidence and information obtained from the current Chairperson of the Electoral Commission, Adv. P Tlakula**

6.3.2.1 The Public Protector met with the former CEO and current Chairperson of the Electoral Commission, Adv. P Tlakula together with a Senior Counsel, Adv. Ismael Semanya, who assisted her during the interview. She was also accompanied by Mr Norman du Plessis, the Deputy Chief Executive Officer responsible for Corporate Services in the Commission.

6.3.2.2 Adv. Tlakula had responded to the Public Protector’s questions in writing and basically confirmed the answers and explanations previously given, expatiating on some of the matters in the process. On the justification of the movement of offices, Adv. Tlakula submitted that the building was leased with the Commission’s consent and after having been viewed by a number of the Commissioners. She justified the

move on space shortages, health and safety concerns over the Sunnyside Building and rent increase concerns.

- 6.3.2.3 She further indicated that Human Settlements had expressed an interest in the building hence the decision to move before the Electoral Commission lease had expired.
- 6.3.2.4 On why a long term lease had been entered into and cancelled within a year, she submitted that at the time the lease was acquired the Electoral Commission already had plans to move but was assured by DPW that the contract would be ceded to another organ of state.
- 6.3.2.5 Adv. Tlakula confirmed that the Commission had concluded the process of choosing a building and made a resolution to lease a building in Menlyn Corporate Park when she as CEO, approached Mr Norman du Plessis and her EXCO to advise that the Commission revokes its decision on account of her having had second thoughts about the wisdom of leasing office space in Menlyn, which she argued was too busy for the Electoral Commission's purposes.
- 6.3.2.6 She also said she had pointed out a flaw in the procurement process leading to the acquisition of the Menlyn lease, which could incur an audit query. She advised that the Commission accepted her submission and revoked its earlier decision.
- 6.3.2.7 On the question of advances paid and the inconsistencies on amounts paid in each month, her explanation was that the money was for office fixtures for the Electoral Commission, arguing that was standard procedure. On the involvement of the Department of Public Works (DPW), she submitted and confirmed that the Electoral Commission did its own work in the new bid although its Sunnyside Head Offices had been procured through DPW. She said DPW was, however, involved in finding and assuring the Electoral Commission of a new occupant of the old building when the Electoral Commission moved.
- 6.3.2.8 However, at the last minute, they discovered that that deal which involved the Department of Human Settlements fell through. It was their understanding though that the DPW was paying the rent for the empty office as principal lease holder. She assured that the Electoral Commission had never paid for the empty office space.

- 6.3.2.9 On the allegations of a conflict of interest arising from a close business relationship between her and Hon Mufamadi, MP, an Executive Chairman and co-director with Adv. Tlakula in Lehotsa Investment (Pty) Ltd who also happens to be a Chairperson of Manaka Property Investments that holds a 20% shareholding in Abland, the company awarded the contract for the provision of the Riverside Office Park leased accommodation for the Electoral Commission, Adv. Tlakula confirmed that they had a business relationship that did not involve the bidding company and therefore there was no conflict of interest to be disclosed or managed.
- 6.3.2.10 With the assistance of her senior counsel, Adv. Tlakula also explained that the Electoral Commission's conflict of interest policy confined disclosure to a financial interest in the bidding company and she had no financial interest in the bidding company. She maintained that there was no need to tell her staff who were fellow panellists that she was a co-director with a director of Abland in a different entity as this was, in her view, irrelevant to the bid in question.
- 6.3.2.11 She however never mentioned that the Commission's procurement policy and procedures requires members of the evaluation committee to submit a declaration of interest form prior to commencing with all committee meetings. A long discussion ensued between Adv. Tlakula and the Public Protector with the latter pointing out that conflict of interest relates to any relationship that may seriously undermine or appear to undermine objectivity.
- 6.3.2.12 The Public Protector explained that a direct financial interest need not exist, pointing to the provisions of section 96 of the Constitution as a bench mark. However, Adv. Tlakula persistently maintained her position.
- 6.3.3 Public Protector's interview and information obtained from the former Electoral Commission Chairperson and Deputy Chairperson, Dr Brigalia Bam and Ms Thoko Mpumlwana, respectively.**
- 6.3.3.1 The Public Protector met with the former Chairperson and Deputy Chairperson of the Electoral Commission, Dr Brigalia Bam and Mrs Thoko. Mpumlwana, respectively.
- 6.3.3.2 They confirmed that the building was leased with the Commission's consent and after having been viewed by a number of Commissioners. They confirmed that the accommodation was genuinely needed.

- 6.3.3.3 They further confirmed that the Commission had concluded the process of choosing a building and took a resolution to lease a building a Menlyn Corporate Park building when they were approached by Adv. Tlakula with a request that the Commission revoke its earlier decision on account of her having been reportedly warned by someone that the procedure followed in leasing the Menlyn Corporate Park Building was flawed and would invite an audit query. The former Commissioners confirmed Adv. Tlakula's submission that the Commission accepted her submission and revoked its earlier decision. The two further indicated that at the time they saw nothing sinister in the move.
- 6.3.3.4 On the question of advance payments made and the inconsistencies on amounts paid in each month, they professed no knowledge of the administrative intricacies that were handled by the CEO and CFO at the time. On the involvement of the DPW, they confirmed that the Electoral Commission did its own search for accommodation although its Sunnyside Head Offices had been procured through DPW.
- 6.3.3.5 They stated that the DPW was, however, involved in finding and assuring the Electoral Commission of a new occupant of the old building when the Electoral Commission moved. However, at the last minute, they discovered that that deal, which involved the Department of Human Settlements, fell through. It was their understanding though that DPW was paying the rent for the empty office as principal lease holder.
- 6.3.3.6 On the allegations of a conflict of interest arising from a close business relationship between her and Hon Mufamadi, MP, an Executive Chairman and co-director with Adv. Tlakula in Lehotsa Investment (Pty) Ltd who also happens to be a Chairperson of Manaka Property Investments that holds a 20% shareholding in Abland, the company awarded the contract for the provision of the Riverside Office Park leased accommodation for the Electoral Commission, former Commissioners Bam and Mpumlwana confirmed having seen Mr Mufamadi in the building visiting Adv. Tlakula and did not see anything untoward about that at the time.
- 6.3.3.7 They further confirmed that in one instance Adv. Tlakula introduced Hon. Mufamadi to them as a business partner and did not see anything sinister in that. They however expressed a view that the CEO should have disclosed the business relationship to her fellow panellists and should have ideally kept an arm's length.

### **6.3.4 The interviews held with Commissioners Terry Tselane and Rev Bongani Finca of the Electoral Commission**

- 6.3.4.1 On 5 November 2012, the Public Protector interviewed Commissioners Tselane and Finca respectively. In the interview, the Commissioners echoed the view that the Commission had to move from their Walker Street, Sunnyside Building due to the fact that the office space in the building was small and therefore a process of having to find new premises started.
- 6.3.4.2 They further stated that when the issue of the office space started, the Administration was tasked with a duty of looking for a suitable accommodation for the Commission. At the time, only Commissioner Tselane was part of the Commission as Rev Finca was the head of the Commission in the Eastern Cape Province and was also appointed a Commissioner in November 2011. As the Commissioners, they were not involved in the identification of the building. Two buildings were identified and the Commissioners were transported to view the buildings. Mr Norman du Plessis was in charge of that process and submitted to the Commission information indicating the kind of premises that could be considered for a new office space.
- 6.3.4.3 Commissioner Tselane confirmed that he was part of the collective that viewed premises in Menlyn. He also submitted a statement dated 5 November 2012. In that statement, Commissioner Tselane confirmed that on 12 January 2009, the Commission approved the office space located in Menlyn which was later revoked at the instance of the former CEO due to irregularities observed in the procurement thereof and a new process under the leadership of the Electoral Commission EXCO was initiated resulting in the procurement of the Riverside Office Park.
- 6.3.4.4 Commissioner Tselane indicated during the interview that he was at some stage also a Provincial Electoral Officer responsible for Gauteng Province just like Commissioner Finca was in respect of the Eastern Cape.
- 6.3.4.5 He stated as a background that having been the Provincial Electoral Officer for Gauteng he knew that when the Commission identified office space, they did not necessarily have to go through the procurement processes as such.

- 6.3.4.6 He indicated that he was one of the officials responsible for identifying the offices where the Provincial Office in Gauteng is situated. According to him, the specifications in respect of that building were developed at national level, and the province would then visit different places to identify a place that we believed could actually be suitable accommodation the Commission. The Province would identify office space and then forward a recommendation to the Head Office to say, *“This is the places that we have identified and then you can proceed and do the procurement”*.
- 6.3.4.7 In his opinion, when the Commission went through the process of identifying office space, he thought they were still going through the same process that they went through when they were acquiring offices at that time when he was the Provincial Electoral Officer. So when Commissioner Van der Merwe called him and said the Commission had to rescind the decision to procure the Menlyn Building because the procurement process was not followed, he did not read much into it and just agreed on the understanding that it was going to be correcting the process.
- 6.3.4.8 In as far as the Commission’s identification of the Riverside Office Park is concerned, Commissioner Tselane stated that he was not part of the team of Commissioners that went to view the building and only saw the building when the Commission was basically launching the new offices.
- 6.3.4.9 With regard to the involvement of the DPW, Commissioner Tselane responded that the Commission never questioned that and stated that the manner in which the matter was presented to them as the Commission was that it was the most convenient way of dealing with the issue and that the Electoral Commission has always been dealing with its own processes and therefore that there was no need for us to be involving the Public Works in securing new offices.
- 6.3.4.10 In his response, Rev Finca stated that his understanding of the policy though he needed to have a look at the policy to refresh was that the Commission had a Procurement Committee where the process originates and the tenders are looked at and it is at that Committee level that all the administrative part of the procurement happens.

6.3.4.11 He further indicated that the next stage is where then the Procurement Committee makes a submission to the Executive Committee, which is chaired by the Chief Electoral Officer and sitting there are the Deputy Chief Electoral Officers, the CFO and the CIO. There might be one or two other people who sit there and this Committee then makes a submission and the matter is dealt with administratively at that level.

6.3.4.12 He concluded by stating that depending on the amount involved in that procurement, the matter then gets escalated to the Commission subject to a certain threshold and then the Commission goes into the submission made to them by the Executive Committee and take a final decision on whether to approve or not approve.

### **6.3.5 The interview held with Commissioner Raenette Taljaard**

6.3.5.1 The Public Protector also met and interviewed with Commissioner Taljaard in Cape Town on 31 October 2012. Commissioner Taljaard commenced the interview by informing the Public that she obviously was not a Commissioner at the time of the procurement of the Riverside Office.

6.3.5.2 She however informed the Public Protector that the current Commission is faced with an unenviable task as a result of this procurement in that they took over an Auditor General's finding of irregular expenditure for the period 2010/2011 as a result of the alleged irregularities committed by the Commission's EXCO in the procurement of the building.

6.3.5.3 Following the interview, Commissioner Taljaard further provided the Public Protector with a statement detailing the timeline of events surrounding the procurement under investigation that was presented to the Commission effective from February 2009 to July 2011. To a great extent, Commissioner Taljaard's submission was very helpful and the issues she raised have been covered extensively in the report.

### **6.3.6 The interview held with Mr Stephen Langtry, the Manager in the CEO's office**

6.3.6.1 During the investigation, an interview was held with the Commission's Manager in the CEO's office Mr Stephen Langtry which was held on 7 November 2012. During the interview, Mr Langtry stated that by virtue of holding that office, he is also the secretary of the EXCO and sat in the meetings in respect of this procurement.



- 6.3.6.2 He stated that the process of the procurement of the Riverside Office Park commenced with him receiving all the submissions at close of the bids on 09 March 2009. These were recorded in an excel spread sheet and submitted to EXCO for evaluation. EXCO would then take a decision on the bidders that would be interviewed or called to make representations and the EXCO decided that Mookoli Properties, Menlyn Corporate Park, New Leaf Property Agency and Abland (Pty) Ltd and had to be invited to do presentations. Two companies, Abland and Menlyn Corporate Park were then recommended by EXCO to the Commission for a decision to be taken on which property would be awarded the tender. Such a decision had and was made by the Commission and not EXCO.
- 6.3.6.3 When asked about the role played by the Procurement Committee, Mr Langtry responded that they only received the bids and forwarded them to the CEO's office and nothing else as this particular procurement was strictly handled by EXCO and stated that this was a decision of the CEO as items procured which are in excess of R2 million had to be approved by the Commission. He stated that this particular procurement process was the first of its kind as they did not do it like that in the previous procurements for buildings. According to him, it was a special case and they did it and prioritized it and EXCO therefore had to deal with it.
- 6.3.6.4 According to Mr Langtry, the procurement committee was not involved in the process. The bids were evaluated in the office of the CEO by the EXCO and no Evaluation Committee was involved and they were referred to the procurement committee afterwards for noting. In connection with the procurement process that is normally followed, Mr Langtry indicated that under normal circumstances, there would have been an evaluation committee, procurement committee and EXCO and then the Commission depending on the value of the tender
- 6.3.6.5 Mr Langtry confirmed during interview that as secretary of the EXCO, the issue of the turnkey solution was discussed during the evaluations though he could not recall who raised the issue other than that there was a view which he could recall in the discussion that it would not have been viable or cost effective to move all the furniture from the old building to the new building, so there was a view that it wasn't viable to move the furniture from the old to the new building.



6.3.6.6 In connection with the abandoned Menlyn Park Building, Mr Langtry stated that the former CEO advised them that the process had to be done away with as there was no public process followed despite it having been approved by the Commission who later had to rescind their decision on the matter.

**6.3.7 The interview held with Mr Mosotho Moepya, the Electoral Commission's current Chief Executive Officer**

6.3.7.1 The current CEO of the Electoral Commission, Mr Mosotho Moepya was interviewed on 24 October 2012. During the interview, Mr Moepya indicated that the procurement process used by the Commission for the procurement of the Riverside Office Park was the Request for Proposals wherein invitations for proposals from prospective bidders were issued.

6.3.7.2 According to him this was an appropriate process as it was not procurement for a specific item. In their invitation, they provided the requirements and the bidders were expected to prove that they would be able to provide and deliver on the said requirements.

6.3.7.3 He confirmed that the initial process had to be put to a halt and a new process was embarked upon with a view to ensuring that it was an open process and prospective bidders would be able to participate. He however indicated that as the former Deputy CEO at the time, he was not involved in the process of drafting and compiling specifications.

6.3.7.4 He stated that a process was agreed to evaluate the submissions that were made and confirmed that they sat as EXCO and looked at the bids from a procurement point of view and made arrangements to have those companies that were meeting the requirements or who potentially were able to meet the requirements of the Commission should be invited to make representations.

6.3.7.5 Furthermore, EXCO then made a submission to the Commission in respect of the two shortlisted entities. According to Mr Moepya, the Commission then looked at the proposals and considered the submission that was made. A process of site visit occurred on both of the shortlisted companies and the Commission took a decision to award the bid to Abland (Pty) Ltd

- 6.3.7.6 He further confirmed that in this particular procurement, EXCO played a role that would under normal circumstances have been played by the Procurement Committee.
- 6.3.7.7 He further confirmed the composition of EXCO as the Accounting Officer, the Deputy Chief Electoral Officers, the Chief Financial Officer and the Chief Information Officer. According to Mr Moepya though there was a time when the CEO would not have chaired these meetings, she was involved in the process. He further confirmed that EXCO did the evaluation and selection of the bids and thereafter submitted their recommendation of the two companies shortlisted to the Commission for a decision.
- 6.3.7.8 With regard to the non-involvement of the DPW in this particular procurement, Mr Moepya confirmed that it is the Department that advised the Electoral Commission to continue on their own and in fact, they do not involve them in all the buildings throughout the country that they have leased. He also confirmed that the Commission was in dire need of a bigger space as they experience shortages of office space and ablution facilities in the Walker Street building could not cope with the number of staff and the demand related thereto.
- 6.3.8 The interviews held with former and current members of staff at the Electoral Commission**
- 6.3.8.1 Several former and current members of staff were interviewed during the investigation and most of them merely confirmed that they heard about the allegations from the media and that staff were addressed by the Chairperson and Deputy Chairperson of the Commission via the CEO's office through e-mails and it was indicated that the Public Protector is handling the matter.
- 6.3.8.2 They confirmed having seen and/or read the documents submitted to the Public Protector anonymously by the *Concerned IEC Employees*. Not even a single one of them claimed to be associated with the said documents nor did they know who the authors of the said anonymous complaints were. They averred that they had no knowledge about the processes followed in the procurement of the Riverside Office Park.
- 6.3.8.3 According to them, there was a veil of secrecy surrounding the said procurement and only two people were knowledgeable about it and that is Adv. Tlakula and to a large extent, Mr Norman du Plessis.

6.3.8.4 They further confirmed that the space in the Walker Street building was too small to accommodate staff and the Commission had to rent offices across the road at the Barclay Square complex due to a dire need for adequate accommodation.

### **6.3.9 Expiry of the lease of the 260 Walker Street Building**

6.3.9.1 The second lease of the 260 Walker Street building was between ABSA Bank Limited as Trustees of Allan Gray Property Trust Scheme and the Electoral Commission. The lease commenced on 01 September 2004 and was terminated on 31 August 2008.

6.3.9.2 Email correspondence between Mr Jake Pretorius and Mr William Latimer of Broll Property Group in July 2008 was in respect of the renewal of the rental on the same basic terms and conditions. The email from Mr Latimer indicated that the rental with effect 01 September 2008 as R521 543 excluding VAT and escalating at 12% per annum compound.

6.3.9.3 Mr Pretorius indicated that the increase in rental from 01 September 2009 constituted a 26.1% increase compared to current lease of R413 599.10 and requested to the increase to be revisited.

6.3.9.4 Email correspondence from Mr Latimer to Mr du Plessis on 03 December 2008 states that their client is not prepared to sign renewal for such a short period as 18 months. The email requested that Electoral Commission reconsider signing and returning the lease for 4 years which was sent in November 2008.

6.3.9.5 On 19 March 2009 a new lease agreement for a four (4) year period from 01 September 2008 to 31 August 2012 was entered into between ABSA Bank Limited as Trustees of Fountainhead Property Trust Scheme and the Electoral Commission.

6.3.9.6 Mr Pretorius sent email correspondence with the subject "*Sub Leasing of Election House to DPW*". The email indicates that this matter was going to be discussed in their meeting during the week and as such they would have an answer by the end of the week.

- 6.3.9.7 Verbal confirmation was made to DPW according to the email from Mr Pretorius to Mr du Plessis dated 14 July 2010 that Human Settlement can move in on 01 October 2010. Mr du Plessis's email correspondence confirmed that they will be moving early September 2010.
- 6.3.9.8 An email dated 31 August 2010 from Mr du Plessis to Mr Latimer indicates that Electoral Commission has decided to relocate and will be vacating its offices at 260 Walker Street, Sunnyside from 11 September 2010 onwards.
- 6.3.9.9 The email added that they are currently in discussions with the DPW with a view to subletting the building for the remainder of the lease period in order for the Department of Human Settlements to also occupy this building in addition to the adjoining building at 240 Walker Street.
- 6.3.9.10 According to the email, if such an agreement is reached with Public Works the arrangement will obviously be subject to the concurrence of the landlord.
- 6.3.9.11 The email requested a written agreement for the Electoral Commission to proceed with such an agreement and added that the resulting contract will be drawn up in conjunction with the Landlord.
- 6.3.9.12 Mr du Plessis added in the email that: *"The Electoral Commission will obviously remain responsible for all its contractual obligations for the remainder of the lease period until 2012 unless and until otherwise agreed. In the same vein, the contractual obligations of the lessor must also continue until termination of the principal lease agreement."*
- 6.3.9.13 A letter of acceptance of new lease, additional accommodation and renewal of lease agreement: Human Settlement: 260 Walker Street and 240 Walker Street was signed on 08 December 2010 by the Acting Regional Manager, Ms Mosegomi. One of the conditions of acceptance were that the Landlord grants the agreed 3 months free rental period from 01 October 2010 to January 2011 at rental amount of R2, 406, 987.88.

### **6.3.10 Alternative accommodation for the Electoral Commission**

6.3.10.1 The need for alternative accommodation is supported by all narratives from interviews and supporting documents. Arguments presented include acute office space shortage, safety concerns and concern over an exorbitant rental increase. For example, extracts from the Commission minutes of meetings dated 06 October 2008 indicate that Mr du Plessis reported that the rental for the current accommodation at 260 Walker Street has been increased by to 42% and a further 12% increase in the subsequent years. It was decided to negotiate a lease contract for one (1) year and to look for alternative accommodation thereafter.

6.3.10.2 EXCO minutes of 31 October 2008 further indicate a decision that the Electoral Commission could not remain at the current premises due to the high rental, lack of scope and concerns about safety and proposed that new premises be found in Pretoria, close to access to public transport and the highway by November 2008.

6.3.10.3 The acceptance of a long-term contract despite a clear intention to move is also validly explained by, among, others, CEO's report in the Commission minutes of 03 November 2008, which stated that the landlord at 260 Walker Street building insisted on a 4 year contract with the Electoral Commission.

6.3.10.4 Evidence also backs the assertion that the move was on the strength of an undertaking by the Department of Human Settlements to acquire the building for another government entity when the Commission vacated the premises before the four year lease expired.

6.3.10.5 The Commission's argument that the acquisition of the Menlyn Corporate Park premises was flawed is also backed by facts. Evidence shows that no tender process was followed and that the decision to acquire the premises followed a presentation by Menlyn Corporate Park and the distribution of a list of alternative accommodation premises by Mr du Plessis distributed. Minutes and witness accounts further show that The Commission agreed to the proposal for the national office to relocate to the site in which the Menlyn Corporate Park was going to be built subject to Mr du Plessis making arrangements for Commissioners to visit these sites as soon as possible.

6.3.10.6 As indicated earlier, Adv. Tlakula's role in the reversal of the Commission's decision and implementation of a new procurement process is not disputed. The letter dated 11 February 2009 from Ms Tlakula to Mr du Plessis expresses discomfort on the award of the lease to Menlyn Corporate Park without following a public process and directing that a request for proposal be drafted and submitted to her for sign-off for a new process be started, was submitted to the Public Protector by Adv. Tlakula's own lawyers. In the letter, Adv. Tlakula states that:

*I have some discomfort in the fact that we have awarded the lease for our new offices to the Menlyn Corporate Park without a public process. Although this has been sanctioned by the Commission, there are too many views that have been expressed on the site and proposed building. These views include accessibility of the site to public transport and that the proposed building might be too opulent. These discomforts cannot be ignored.*

*Since the matter of the office relocation was dealt with by EXCO, I have decided that EXCO should embark on an open process and thereafter places all option before the Commission for a decision.*

*I don't want personal preferences on the location of our new offices to influence the process.*

*Please, draft a request for proposal and submit it to me for sign-off. We will have to approach the Commission again after the outcome of the public process.*

*Can we please have a discussion on this matter?"*

6.3.10.7 It is also not in dispute that Adv. Tlakula's directive to Mr du Plessis and EXCO was implemented immediately, before the Commission had an opportunity to sit and reverse its earlier decision thus effectively countermanding the Commission's decision of 12 January 2009. An example in this regard is found in the EXCO minutes of the meeting held on 13 February 2009, where EXCO noted that *an advertisement would be placed in local newspapers inviting "proposals". The advert would be published in the following week. Meanwhile, a 4-year contract would be signed for the current premises. The CEO would take this matter to Commission with a request that it reverses its earlier resolution.*

6.3.10.8 Minutes of March 2009 further confirm that it was only about a month after the CEO's directive to Mr du Plessis and EXCO and about three months since its earlier decision that the Commission was requested by the CEO to rescind its decision to relocate to new premises in Menlyn due to the fact that procurement processes were not adequately followed. No lease agreement had been entered into with Menlyn Corporate Park following the approval of that bid by the Commission as the CEO had acted swiftly to stop that process and initiate a new process that culminated in the bid winner being Abland.

### **6.3.11 The Needs Analysis**

6.3.11.1 A Memorandum from Deputy Chief Electoral Officer, Mr Norman du Plessis addressed to the Chief Electoral Officer, Adv. Tlakula dated 13 February 2009 is with regards to the new accommodation. The memorandum records the space requirements as something in the region of 9500m<sup>2</sup> to 10 000m<sup>2</sup> ranges.

6.3.11.2 Mr du Plessis made an assessment and indicated a minimum of 9000m<sup>2</sup>. He further attached the summary sheet from DPW which indicated current practices and attached a calculation of min 9012m<sup>2</sup> and max 13145m<sup>2</sup>.

6.3.11.3 According to the memorandum, Mr du Plessis suggested that they indicated 9 000m<sup>2</sup> and stay away from not less than or not more than in the advertisement.

6.3.11.4 With regards to the awarding of contract, Mr du Plessis indicated that suitability was a big issue. He indicated that cost is fundamental but it should not negate suitability.

6.3.11.5 Mr du Plessis further indicated that it may be important that they incorporate as much of the relocation and settlement activities in as few contracts as possible, if not in a single contract, provided it is sensible and economical.

6.3.11.6 According to the needs analysis, there is simply no time before they have to go into election mode. The move had to be as seamless for most activities but especially in IT.

6.3.11.7 The needs analysis suggested that they contract an internal project manager in good time. It was signed off by Mr du Plessis on 13 February 2009 and Adv. Tlakula approved it on the same date.



6.3.11.8 In her response to the provisional report that was issued on 13 July 2013, Adv. Tlakula attached a copy of a memorandum from Dr Jake Pretorius of the Commission's Support Service dated 3 February 2009 and addressed to Mr du Plessis under the heading, "*National Office: Space Determination*". It was recorded in the document that the total estimated office space was 9012.08 square meters. However, this space determination needs analysis did not record what the cost estimates or budget was.

6.3.11.9 This information was not initially made available to the Public Protector during the investigation.

### **6.3.12 The Budget**

6.3.12.1 During the investigation, no record of the budget in respect of this move/relocation amongst the documentation provided. The Public Protector requested the budget from Electoral Commission and the current Chief Executive Officer, Mr Moepya advised her as follows:

*"On the matter of budget. The issue of alternative accommodation arose as early as 2007 and actively from 2008/09 onwards. We made provision in our MTEF submissions for alternative accommodation (keeping also in mind that we rent more than 200 office buildings country wide). All MTEF and ENE submissions are formally and in detail considered and approved by the Commission as standard practice before submission to the National Treasury".*

6.3.12.2 The actual MTEF and ENE submission that included the relocation to Riverside Offices in Centurion were however not provided despite repeated requests for same.

### **6.3.13 Invitation for proposals-Office Accommodation Needs**

6.3.13.1 The media schedule for the Tender: Relocation Needs (Pretoria/Centurion) with reference number Electoral Commission/SS-003/2009 was dated 25 February 2009. The media schedule indicated five publications in which they were going to be made.

6.3.13.2 The publications were indicated as:



- a) Sowetan;
- b) Pretoria News;
- c) The Star;
- d) Beeld; and
- e) The Citizen.

6.3.13.3 The media schedule was signed off by J H Pretorius who was also indicated as the contact person.

6.3.13.4 The advertisements were placed in the Sowetan, Pretoria News, the Star and the Citizen on 27 February 2009 and it was placed in the Beeld on 02 March 2009.

6.3.13.5 The contents of the advertisements were as follows:

*“The Electoral Commission hereby invites suitably qualified suppliers to supply the Commission with: Office Accommodation required in the Pretoria/ centurion area of Tshwane.*

*The Electoral Commission is desirous to relocate its national office (presently located in Sunnyside) to premises in the Pretoria/ Centurion area of Tshwane. To this end it invites written proposals from preferably black owned property companies/ black property developers. The Proposal must be submitted to Mr S Langtry: Manager Office of the CEO Election House 260 Walker Street Sunnyside by 17:00 on 09 March 2009. Late submission will not be considered.*

*The accommodation requirements of the Electoral Commission include the following:*

- *A separate securable street front grade a building with approximately 9 000 square meter of office space- lager buildings will not be suitable and share occupation will not be considered.*
- *Preference will be given to a new building that is under construction or will soon be constructed and that will be able to accommodate Electoral Commission requirements for internal office design, electrical requirements (including standby power), air conditioning suitable for its ICT infrastructure, etc. without substantial additional rental cost implications. Existing building where such requirements can be met will however be considered.*

- *No less than 300 under cover parking spaces.*
- *Easy access to a motorway will be an important consideration.*
- *Location within walking distance of shopping and eating facilities is imperative.*
- *Proximity to schools, banks and general medical facilities will be a recommendation.*
- *Access to public transport.*
- *Occupation on 01 April 2010. Given the pending municipal election in 2011 a later date will be problematic.*
- *The all-inclusive costing/rental and annual escalations on a current day basis must be indicated. A 5 year contract will be preferred, but the period is negotiable.*

*The Electoral Commission reserves the right to accept or not accept any proposal and to do so on any basis it may regard as appropriate.'*

#### **6.3.14 The Finding by the Auditor General**

6.3.14.1 According to Electoral Commission management letter the Auditor General made the following finding:

*"In terms of Treasury Regulation 16A6.3(b) bid documentation must include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000).*

*In terms of Preferential Procurement Policy regulation 7, an organ of state must in the tender document, stipulate the preference point system which will be applied in adjudicating the tenders.*

*In terms of section 2(1)(e) of the PPPF Act, any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender".*

6.3.14.2 The Auditor General indicated therefore that the evaluation criterion to be used in awarding preference points for the Electoral Commission tender was not specified. According to the Auditor General, the non-compliance with this requirement results in all expenditure incurred in this regard to be deemed irregular expenditure in terms of the Practice Note number 4 of 2008.

6.3.14.3 The Electoral Commission annual report for 2011 captured the irregular expenditure which relates to non-compliance with Treasury Regulations and the PPPF Act. The Auditor General noted that no action was taken as this was no financial misconduct but just a matter of non-compliance.

6.3.14.4 In her response to the provisional report, Adv. Tlakula attached a copy of a letter dated 9 February 2012 entitled, “*CONDONEMENT OF IRREGULAR EXPENDITURE 2011*” and signed by the current CEO, Mr Mosotho Moepya. This information was not provided to the Public Protector during the investigation. In the document it is stated that:

*“With reference to the audited irregular expenditure included in the 2010/11 financial statements in respect of:*

*Deviation from competitive bidding in respect of furniture, fittings and other once off set up costs including generators, UPS, data cabling, audio visuals infrastructure and similar costs R58,578,366*

*I have received clarification from Treasury that it is within my authority to condone this irregular expenditure. In addition I have satisfied myself that the irregular expenditure relates to non-compliance with Treasury Regulations and that there was no financial misconduct, it was only a matter of non-compliance. I am of the opinion that action against any officials to recover these amounts is not warranted and thus this expenditure is condoned”*

6.3.14.5 Adv. Tlakula also attached to his response to the Provisional Report extracts from the Electoral Commission’s Annual Report for the period 2011/2012 particularly the section dealing with *Notes to Annual Financial Statements* for the year ended 31 March 2012. In the annual report under the said section it is recorded that the following irregular expenditure incurred was condoned or not condoned:

Description	March 2012 R	March 2011 R	condoned	Not condoned
Failure to obtain Tax clearance certificates	3, 076, 082	-		Awaiting Condonation
Incorrect vendor	6,426			Awaiting

selected				Condonation
Failure to comply with requirement of PPPFA for 2010/2011		1,267,904		Awaiting Condonation
Failure to indicate evaluation criteria for quotation above R30 000	9,404,945	153,145,295		153,145,295 Awaiting Condonation
Riverside Office Park rentals	23,902,201	13,241,203		Awaiting Condonation
Riverside Office Park Turnkey Cost	-	58,578,366	Condoned	
Post Event Purchase Orders	6,218,018	7,035,641	Condoned	
Condoned	-6,218,018	-7,035,641		

### 6.3.15 Receipt of tender documents

6.3.15.1 A schedule of tender received at the Electoral Commission national office was obtained and reviewed. The schedule was in respect of tender number Electoral Commission/SS-003/2009. The closing date and time for submission of proposals was indicated in the schedule as 09 March 2009 and at 17h00.

6.3.15.2 The schedule indicated a total of ten (10) tenders as received as follows:

**Table 1**

No.	Name of tenderers
1	Khwela City
2	Blackstone Property Fund
3	Slipknot Investments 74 (Pty) Ltd
4	Mookoli Properties
5	RCP Brokers

No.	Name of tenderers
6	One Visions Investment 179 (Pty) Ltd
7	Menlyn Corporate Park- Mvelaphanda Consortium
8	JIL JHI Properties
9	New – Leaf Property Agency (Pty) Ltd
10	Abland (Pty) Ltd (Property Development)

6.3.15.3 The schedule of receipt of tender documents was signed off by RM Malele and Johannes Thipane.

#### **6.3.16 Members of the Procurement Committee**

6.3.16.1 According to the email dated 12 October 2012 from Mr Moepya to the office of the Public Protector, the Procurement Committee at the time comprised of the following officials:

- a) Simon Boyle ( Chairperson);
- b) Nilan Rampershad;
- c) Stephen Langtry;
- d) Adele Pansegrouw;
- e) Kate Bapela;
- f) Marius Steyn;
- g) Noloyiso Ntandane;
- h) Zolisa Mafuya;
- i) James Aphane; and
- j) Lindiwe Dlamini(Scribe)

#### **6.3.17 Evaluation of National Office Accommodation Proposals**

6.3.17.1 An evaluation sheet was provided in response to a request for copies of Bid Evaluation Committee documentation i.e. evaluation reports, recommendation, minutes of meetings, internal memoranda and correspondence recording evaluation of tender.

Table 2

		Location: Pretoria / Centurion	Approx. 9000 square meters	New building	No less than 300 under cover parking spaces	Easy access to motorway	Proximity to shopping and eating facilities	Proximity to schools, banks and general medical facilities	Access to public transport	Occupation on 1 April 2010	Price
1	Khwela City	Centurion	27 000 square meters made of various different buildings	Yes	450	Centurion between N14 and N1	Close to Centurion Mall	Several	Across West Street and on taxi route	1 June 2010	R116.28 per square meter
2	Blackstone Property Fund	Centurion	9 600 square meters	Yes	360	Centurion	Not clear from proposal	Not clear from proposal	Not clear from proposal	1 April 2010	R160 per square meter
3	Slipknot Investment 74 (Pty) Ltd	Centurion	5 136 sqm			Centurion (c/o Jean Ave and Leoni Sts)					
		Midrand	10 135 sqm			Midrand (92 President Park, c/o Dale and Pretorius Sts)	2 km to Boulders Shopping Centre		Walking distance to Midrand Station		R90 per sqm
4	Mookoli Properties	Centurion	9 000 sqm	Yes	300 (102 basement and 198 shaded	Accessible to N1 and R101 (Old	New Shopping Centre under development	Not clear from proposal	Not clear from proposal	1 April 2010	R104.92 per sqm

		Location: Pretoria / Centurion	Approx. 9000 square meters	New building	No less than 300 under cover parking spaces	Easy access to motorway	Proximity to shopping and eating facilities	Proximity to schools, banks and general medical facilities	Access to public transport	Occupation on 1 April 2010	Price
					net)	Johannesburg Rd)	within walking distance				
5	Tony Moore Architects	Pretoria CBD	6 000 sqm	Old building in Paul Kruger Street	500	Pretoria		Not clear from proposal			R100 per sqm
5	RCP Brokers	Centurion – Earls Court	10 000 sqm	Yes	Not clear from proposal	Centurion (close to N1)	New shopping Centre under development within walking distance	Not clear from proposal	Not clear from proposal	Not clear from proposal	R135 per sqm
		Centurion – Eco Glades	33 801 sqm split over 6 buildings	Yes	612	Centurion (close to N1)	Not clear from proposal	Not clear from proposal	Not clear from proposal	Not clear from proposal	R125 per sqm
		Centurion – Eco Point	10 000 sqm split over two buildings	Yes	Not clear from proposal	Not clear from proposal	Not clear from proposal	Not clear from proposal	Not clear from proposal	Not clear from proposal	R110 per sqm
		Centurion – Eco Court	9 605 sqm	Yes	185	Centurion (close to N1)	Not clear from proposal	Not clear from proposal	Not clear from proposal	Not clear from proposal	R140 per sqm
6	One Vision	Centurion	5 982 sqm	Yes	134						

		Location: Pretoria / Centurion	Approx. 9000 square meters	New building	No less than 300 under cover parking spaces	Easy access to motorway	Proximity to shopping and eating facilities	Proximity to schools, banks and general medical facilities	Access to public transport	Occupation on 1 April 2010	Price
	Investments 179 (Pty) Ltd										
7	Menlyn Corporate Park / Mvelaphanda Consortium JV		9 059 sqm	Yes	300 or more	Easy access and close proximity to the N1	Close to Menlyn Shopping Centre and adjacent to Menlyn Retail Park  Hotel on site.	Several schools, banks and medical facilities close by	On taxi and bus routes	1 April 2010	R110.30 per sqm
8	JHI Properties		10 934 sqm	Yes	466	Easy access to N1	Close to Menlyn Shopping Centre	Not clear from proposal	Close to transport routes	End 2009 – beginning 2010	R140 per sqm
9	New Leaf Property Agency		9 000 sqm	Yes	300	Accessible to N14 via Potgieter and Skinner Streets	Adjoining Home Hyper City	8 schools and colleges in surrounding area	Close to main bus terminus at Church Squire and taxi rank	31 March 2010	R170 per sqm
10	Abland (Pty) Ltd	Centurion	9 000 sqm	Yes	300	910 m from N1  3.4 km from N14	Centurion Mall within 440m	7 high schools and several other schools within 3 km	1.3 km from Gautrain Station	1 April 2010	R102 per sqm



		Location: Pretoria / Centurion	Approx. 9000 square meters	New building	No less than 300 under cover parking spaces	Easy access to motorway	Proximity to shopping and eating facilities	Proximity to schools, banks and general medical facilities	Access to public transport	Occupation on 1 April 2010	Price
								Unitas Hospital is located within 4.5 km			

6.3.17.2 The evaluation sheet included the following as evaluation criterion,

- a) Location,
- b) Square metres,
- c) Status of the building(old/new),
- d) cover parking space,
- e) easy access to the motor way,
- f) proximity to shopping and eating facilities,
- g) proximity to schools, banks and general medical facilities;
- h) occupation on 01 April 2010; and
- i) Price

6.3.17.3 The evaluation sheet populated the information of each on the ten bids received alongside the above criterion.

6.3.17.4 A scoring sheet as captured below was found amongst the documentation sent by Electoral Commission. The scoring is based on the 90/10 scoring principle. The ratings were captured below under the heading ,Relocation Tender: Electoral Commission/SS-003/2009

**Table 3**

REF#	Tenderer	Price	PDI points	Price Points	PDI points	Total Points
10	Abland (Pty) Ltd	R38 714 400.00	25.000	90.000	2.500	92.500
7	Menlyn Corporate Park Mvelaphanda Consortium Joint Venture	R41 861 077.20	33.333	33.333	3.333	86.018

### 6.3.18 Extracts from the minutes of EXCO regarding the National Office Accommodation

6.3.18.1 Extracts from the minutes of the EXCO meeting held on 15 May 2009 at 09:30 at Election House read as follows;

*“The evaluation summary report was noted. The CEO had asked for the arrangements to be made for presentations from the three short-listed submissions.*

*It was agreed that the short-list would be expanded. The following submissions would therefore be considered in the next stage through presentations:*

- *Mookoli Properties (Centurion)*
- *Menlyn Corporate Park / Mvelaphanda Consortium JV (Menlyn)*
- *New Leaf Property Agency (Pretoria)*
- *Abland (Centurion)*

*The presentation would be organised on the return of the CEO.”*

6.3.18.2 Extracts from the minutes of the EXCO meeting held on 19 June 2009 at 09:30 at Election House were captured as follows:

*“Further to its decision of 15 May, EXCO considered the following shortlisted proposals for new accommodation for the national office:*

- *Mookoli Properties (Centurion)*
- *Menlyn Corporate Park / Mvelaphanda Consortium JV (Menlyn)*
- *New Leaf Property Agency (Pretoria)*
- *Abland (Centurion)*

*With respect to Mookoli Properties, it was noted that the rental on occupation would be R120 per square meter. Occupation would be in October 2010.*

*With respect to Menlyn Corporate Park, it was noted that the current rental would be R110 per square meter and that escalation would be 10% per annum. Occupation would be effect from 1 April 2010 since construction had already started. They would provide additional information on their BEE partner.*

*With respect to New Leaf Property Agency, it was noted that the current rental would be R170 per square meter and that escalation would be 10% per annum. Occupation would be effect from June 2010.*

*With respect to Abland, it was noted that the rental would be R102 per square meter and that escalation would be 9% per annum. Occupation would be with effect from 1 August 2010.*

*After considering the proposals, EXCO agreed to eliminate the submission of Mookoli Properties and New Leaf Property Agency. With respect to the remaining submissions, EXCO agreed that:*

- site visits had to be organised;*
- the submission had to be subjected to scoring in terms of the PPPFA; and*
- the Commission should be asked to consider the proposal at their next meeting.”*

**6.3.18.3 Extract from the minutes of the EXCO meeting held on 17 July 2009 at Election House indicated that:**

*“EXCO noted that the Commission had on 06 July 2009 approved the appointment of Abland (Pty) Ltd to provide the Electoral Commission with accommodation for the national office.”*

6.3.18.4 The office of the Public Protector requested full set of minutes in respect of the decision pertaining to the Commission’s office accommodation. At the time of reporting, the full sets of minutes had not been provided despite repeated requests on interviews with Mr Norman du Plessis and the CEO, Mr Mosotho Moepya as well as follow up e-mails.

**6.3.19 A Report of the CEO at the time, Adv. Tlakula that was tabled at the Commission meeting held on 06 July 2009 and an excerpt from the draft minutes of the Commission meeting held on Monday, 06 July 2009.**

6.3.19.1 Amongst the documents and information provided to the Public Protector by Adv. Tlakula and Mr du Plessis was a report of the Chief Electoral Officer for the Commission meeting of 06 July 2009. The following was captured in respect of the National Office Accommodation:

*“In March, an advertisement was placed in various newspapers, inviting proposals to respond the Commission’s national office accommodation needs. Ten proposals were received. These proposals were evaluated against the Commission’s requirements as stipulated in the advertisement.*

*On 15 May 2009, EXCO considered the proposals and shortlisted four proposals which met the minimum requirements, for further consideration. The four respective*

developers were invited to make presentations to EXCO on 19 June 2009. The developers in question are:

- Mookoli Properties (Centurion)
- Menlyn Corporate Park / Mvelaphanda Consortium JV (Menlyn)
- New Leaf Property Agency (Pretoria)
- Abland (Centurion)

After the presentations, two proposals were eliminated. Documentation on the two remaining proposals have been made available to the Commission. In addition, site visits were organised for those two on 30 June. A summary of two proposals follow below:

Requirements	Menlyn Corporate Park / Mvelaphanda Consortium JV	Abland (Pty) Ltd
Location: Pretoria / Centurion	Menlyn Pretoria	Centurion
Size: Grade A building, approx. 9 000 square meters	9 059 sqm	9 000 sqm
New Building: Preference	Yes	Yes
Parking: No less than 300 under cover parking spaces	300 basement parking; 20 open parking	149 basement parking; 151 covered parking; 150 open parking
Access: easy access to a motorway and public transport	Easy access and close proximity to the N1; on taxi and bus routes	910 m from N1; 3.4 km from N14; 1.3 km from Gautrain Station
Proximity to shopping and eating facilities	Close to Menlyn Shopping Centre and adjacent to Menlyn Retail Park	Centurion Mall within 440m
Proximity to schools, banks and general medical facilities	Several schools, banks, and medical facilities close by	7 high schools and several other schools within 3 km; Unitas Hospital is located within 4.5 km
Occupation: 1 April 2010	1 April 2010	1 August 2010 (based on information provided presentation to EXCO)
Price:	R110.30 per sqm for office	R102 per sqm for office areas;

	areas; R522 for basement parking; R350 for open parking <b>(Total = R1 162 807.70 per month)</b>	R450 for basement parking; R250 for open parking; R350 for covered parking <b>(Total = R1 075 400.00 per month)</b>
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6.3.19.2 Based on the 90/10 point scoring, the two proposals rank as follows:

1. *Abland (Pty) Ltd – 92.500*
2. *Menlyn Corporate Park – 86.018*

***For decision***

*The Commission is requested to make a decision on the relocation of the national office.*

6.3.19.3 It was noted in the minutes of meetings of 06 July 2009 that:

*“The CEO reported that the process of renting of new office accommodation was redone as previous one did not adequately follow required procedures. Two buildings were identified as suitable, one in Menlyn Park and the other in Centurion. Commissioner had an on-site visit to the two places. Noted*

*After a discussion, agreed that the building in Centurion is preferred.*

*The CEO was requested to investigate the possibility of moving into this building earlier than August 2010, as this is too close to the elections in 2011.”*

## 6.3.20 The Proposals submitted by Abland

### National office relocation Abland submission

6.3.20.1 The submission is dated 09 March 2009. The submission is proposing 9 000m<sup>2</sup> gross rentable Area and is with reference to tender no Electoral Commission/SS-003/2009.

6.3.20.2 The current day net monthly rentals (based on 01 April 2009) was indicated at R1 545 144.60 and the note indicated that storage was on request. The commencement date was indicated as 01 April 2010 provided the programme date

as set out were adhered to by the Electoral Commission. The current day net monthly rentals (based on 01 April 2009) was captured as follows:

**Table 4**

Description	Gross rentable area	Cost per m <sup>2</sup> /Bay (R)	Total Cost On 01 April 2009 (R)
Office Areas	9 000	102	918 000
Storage	125		On request
basement Parking	149	450	67 050
Covered Parking	151	350	52 850
Open Parking	150	250	37500
SUB TOTAL ( Excluding VAT)			1 075 400
Operational costs		13	117 000
Rates and Taxes(Actual charge)		12	108 000
SUB TOTAL ( Excluding VAT)			225 000
Air-conditioning maintenance		1	9 000
SUB TOTAL ( Excluding VAT)			9 000
Water consumption estimate		1.11	9 900
Electrical consumption estimate		4	36 000
SUB TOTAL ( Excluding VAT)			45 990.00
TOTAL GROSS MONTHLY RENTAL (EXCLUDING VAT)			1 355 390
VAT @ 14%			189 740.60
TOTAL MONTHLY RENTAL			1 545 144.60

6.3.20.3 The lease period was indicated for an initial period of 5 years from the commencement date put it was indicated as negotiable.



6.3.20.4 Paragraph 7.4 in respect of lease escalation was captured as follows: *“The net monthly rental at the commencement dated will escalate annually on the anniversary of the commencement date, at a rate of 9% (nine percent) compounded annually. Operating costs will escalate at 10 % (ten percent) compounded annually and rates and taxes will be based on actual charges by Council.”*

6.3.20.5 Paragraph 8 under the heading operating costs indicates that the Electoral Commission will be liable for all actual property expenses directly attributable to their occupation of the leased premises. Par 8.1.1 listed what these (operating costs) would be further 8.1.2 indicated what would be excluded.

6.3.20.6 According to paragraph 9 which is indicated as “Programme”. It was anticipated that the following programme dates would be applicable.

<i>Electoral Commission to sign the heads of agreement</i>	<i>31 March 2009</i>
<i>Electoral Commission to sign the lease agreement</i>	<i>17 April 2009</i>
<i>Commence Site works</i>	<i>01 May 2009</i>
<i>Building Occupation</i>	<i>01 April 2010</i>

6.3.20.7 Paragraph 10 covered the Tenant Specific Items as captured below:

*“Items normally handled directly by the occupant of the building such as telephone system and IT installation, etc. are referred to as tenant specific items.*

*Abland, as part of the turnkey development process, would undertake the procurement and installation of these items on behalf of Electoral Commission*

*Based on the information obtained from Electoral Commission, Abland would prepare a schedule of such items with indicative budget figures for consideration*

*The items selected from this schedule would be tendered to the open market to ensure optimum cost is obtained for Electoral Commission’s benefit”.*

6.3.20.8 Paragraph 14 is in respect of the Background to the Abcon Group and states the following:

*“The Abcon group consists of a number of private owned independent companies each embracing a different discipline of the construction/ real estate industry. The main focus however is on construction and property development. (Curriculum Vitae enclosed)*

*Private ownership of the group reinforces the entrepreneurial and independent spirit of the working shareholders, each of whom brings a specific discipline to each company.*

*Abland, the commercial property development company within the Abcon group, provides a fully integrated property development and management services based on the cornerstones of quality, commitment and the group’s trademark of enthusiasm.*

*In terms of this proposal Abland will provide a total turnkey package for the development for Electoral Commission”.*

6.3.20.9 Paragraph 16 indicated that these heads of agreement were suspense upon the following conditions: *“Upon shareholders’ approval within 7 days from approval of this proposal of the Electoral Commission”.*

6.3.20.10 The proposal was signed by Willem V D Westhuizen.

6.3.20.11 The following were indicated as annexures to the proposal:

- Annexure A Architects Brochure
- Annexure B Architects Layout 2
- Annexure C Black Ownership
- Annexure D Schedule of finishes and allowances
- Annexure E Electrical letter from DJJ Conradies Consulting Electrical Engineers
- Annexure F Copy of tender details

6.3.20.12 The content of Annexure C to the proposal was entitled: *“Black Ownership”* and dated 09 March 2009. It contained the following information regarding it’ s BEE credentials and status:

*“Thaba Mufamadi* **Chairman Manaka property Investments (Pty) Ltd**

**Executive Chairman Lehotsa Holdings**

*Chairman Vibrant Veterans Mineral Resources*

*Former Minister of Finance and Economic Development,  
Limpopo Province*

*Member of the NEC African National Congress*

*Owner of Eldan Auto Body Shop*

*Joe Mathebula* *CEO Manaka Property Investments (Pty) Ltd;*

*Former CEO, Trade and investment Limpopo;*

*Director, Nexus Limpopo;*

*Director, Limpopo Gambling Board; and*

*Director of Companies*

*Thaba Mufamadi and Joe Mathebula are currently shareholders of Manaka Property Investments, a black owned company having about 50 000m<sup>2</sup> under management with more being negotiated.”*

6.3.20.13 The contact details of Manaka Property investments were provided. The timeline of events can be summarized in the table below:

No	Description	Individuals involved	Dates involved	Companies/Entities involved	Relationship between Individuals	Relationship between Companies	Comments
1	Proposal submitted	signed by Willem V D Westhuizen	09 March 2009	Abland( Pty) Ltd	Representative of Abland	Abland (Pty) Ltd, the commercial property development company within the Abcon group	<p>"Upon shareholders' approval within 7 days from approval of this proposal of the IEC".</p> <p>"The Abcon group consists of a number of private owned independent companies each embracing a different discipline of the construction/ real estate industry. The main focus however is on construction and property development. (Curriculum Vitae enclosed)</p> <p>Private ownership of the group reinforces</p>

No	Description	Individuals involved	Dates involved	Companies/Entities involved	Relationship between Individuals	Relationship between Companies	Comments
							<p>the entrepreneurial and independent spirit of the working shareholders, each of whom brings a specific discipline to each company.</p> <p>Abland, the commercial property development company within the Abcon group, provides a fully integrated property development and management services based on the cornerstones of quality, commitment and the group's trademark of enthusiasm.</p>
2	Lease agreement	<ul style="list-style-type: none"> <li>TZ Moolman as Director,</li> <li>Marthinus</li> </ul>	24 August	<ul style="list-style-type: none"> <li>East and West Investments</li> <li>Abland (Pty) Ltd</li> <li>Copper Circle Investments</li> </ul>	<ul style="list-style-type: none"> <li>East and West Investments by TZ Moolman as</li> </ul>	Shareholders/Owners of	<ul style="list-style-type: none"> <li>Lease Agreement between East and West Investments(</li> </ul>

No	Description	Individuals involved	Dates involved	Companies/Entities involved	Relationship between Individuals	Relationship between Companies	Comments
		<ul style="list-style-type: none"> <li>Delpont,</li> <li>EC Lourens,</li> </ul>	2009	<ul style="list-style-type: none"> <li>55 CC</li> <li>South Central Investment 147 CC</li> </ul>	<ul style="list-style-type: none"> <li>Director</li> <li>Marthinus Delpont as Director representing Abland (Pty) Ltd</li> <li>EC Lourens on behalf of members of Copper Circle Investments 55 CC,</li> <li>EC Lourens on behalf of members of South Central Investment 147 CC</li> </ul>	Riverside Office Park	<ul style="list-style-type: none"> <li>Pty) Ltd and Abland (Pty) Ltd and copper Circle Investment 55 CC and South central Investments 147 CC</li> <li>According to paragraph 2.2 of the recitals: East and West Abland Copper Circle and South Central sold the Property to the Riverside Office Park Trust subject to the lease and the Riverside Office Trust became the new landlord under and in terms of the lease on 29 March 2010.</li> </ul>
3	First addendum to the lease agreement	<ul style="list-style-type: none"> <li>David Stanley Savage as MD/ Trustee</li> </ul>	19 April 2010	<ul style="list-style-type: none"> <li>Riverside Office Park Trust</li> </ul>	Representative of the Trustees	<ul style="list-style-type: none"> <li>it is recorded that the site has been transferred to the Riverside Office Park Trust, it no it3670/2009, in which Trust East and West investments( Proprietary) Limited Abland (Propriety) Limited, Copper Circle Investments 55 CC and South Central Investments 147 CC hold a beneficial interest of 80% and Manaka investments (Property) Limited holds a beneficial interest of 20%</li> </ul>	<ul style="list-style-type: none"> <li>"The Landlord further records its intention to transfer the site and/or the Property to the Pivotal Fund Limited when the Pivotal Fund Limited's requirements to include the site and/or property portfolio have been met."</li> </ul>

No	Description	Individuals involved	Dates involved	Companies/Entities involved	Relationship between Individuals	Relationship between Companies	Comments
4	Third addendum to the lease agreement	<ul style="list-style-type: none"> <li>Marthinus Delpont as authorised signatory</li> </ul>	<ul style="list-style-type: none"> <li>29 March 2012</li> </ul>	<ul style="list-style-type: none"> <li>Riverside Office Park Trust</li> </ul>	Representative of the Trustees	<ul style="list-style-type: none"> <li>it is recorded that the site has been transferred to the riverside office park trust, it no it3670/2009, in which Trust East and West investments(Proprietary) Limited Abland (Propriety) Limited, Copper Circle Investments 55 CC and South Central Investments 147 CC hold a beneficial interest of 80% and Manaka investments (Property) Limited holds a beneficial interest of 20%</li> </ul>	



### 6.3.21 Letter of appointment of the successful service provider

6.3.21.1 Amongst the documents received by the Public Protector from Adv. Tlakula and Mr du Plessis respectively was an email from Mr Stephen Langtry dated 06 July 2009 addressed to Willem van der Westhuizen and copying Thinus Delport with the subject *Tender No. Electoral Commission/SS-003/2009*. The contents thereof read as follows:

*"I would like to inform you that the Commission today (06 July 2009) approved your proposal for the accommodation of the national office of the Electoral Commission. We will be in touch with you shortly to discuss the implementation of the proposal."*

6.3.21.2 This served as the letter of appointment in respect of Abland. No other formal letter was provided to the Public Protector during the investigation which would otherwise serve as a formal notification letter of appointment to the successful bidder.

### 6.3.22 The announcement in the government tender bulletin

6.3.22.1 The notice of the award was indicated in the Government tender bulletin on 15 April 2011 as follows:

**Table 5**

Reference No	Description	Successful Bidder	Amount including VAT
Electoral Commission/SS-03/2009	Electoral Commission Building(monthly lease-Riverside Office Park)	Riverside Office Park Trust	R1 517 905.64

6.3.22.2 The notice of bid award was also made in the Pretoria News on Friday 15 April 2011. The notice was as follows:

*“The Electoral Commission has finalised the adjudication process and contractual obligations in respect of the invitation for proposal (ref Electoral Commission/SS-03/2009) for turnkey office accommodation. A monthly office lease of approx. R1.5million has been entered into with the Riverside Office Park Trust.”*

**6.3.23 The Lease Agreement between East and West Investments( Pty) Ltd and Abland (Pty) Ltd and Copper Circle Investment 55 CC and South central Investments 147 CC and the Electoral Commission of South Africa in respect of the Riverside Office Park Building.**

6.3.23.1 The summary schedule indicated the site as Portion 2 of ERF 65 Verwoerdburgstad Township on which Riverside. The building is situated on the property comprising the leased Premises (situated at the South Western corner of the site).

6.3.23.2 The leased premises were tabulated as follows:

**Table 6**

No	Description	Measuring
1	Office Space	9435.5m <sup>2</sup>
2	Storage facility	103.2m <sup>2</sup>
3	Basement parking bays	170
4	Open parking bays	60
5	Covered parking bays	149

6.3.23.3 The lease period was indicated as ten (10) years and the commencement date was indicated as 01 September 2010. The deposit /guarantee was noted to be an amount equal to 3(three) months rental.

6.3.23.4 Paragraph 1.9 indicated the monthly rental excluding VAT as:

**Table 7**

No.	Description	Area	Net rental per m <sup>2</sup> or parking bay	Net monthly rental
1	Office Space	9435.5m <sup>2</sup>	xR115.35	=R1 088 384.93
2	Storage Space	103.2m <sup>2</sup>	xR50.89	=R5 251.85
3	Basement parking	170 bays	xR508.89	=R86 511.30
4	Open parking	60 bays	xR282.72	=R16 963.20
5	Covered parking	149bays	xR395.81	=R58 975.69
<b>TOTAL</b>				<b>R1 256 086.97</b>

6.3.23.5 Rental escalation rate is 9% per annum compounded.

6.3.23.6 Operating costs according to paragraph 1.11 shall mean “*all the costs incurred by the landlord in maintaining and running the building/and or the property and/or the site...*”

6.3.23.7 Fixed operating cost of 14.90 per m<sup>2</sup> of office space escalating annually on the anniversary of the commencement date at the fixed operating cost escalation rate.

6.3.23.8 The fixed operating cost escalation rate was stated as a compound annual rate of 10%.

6.3.23.9 Annexures to the lease agreement were indicated as:

*Annexure A Plans*

*Annexure B Schedule of Net Rentals and Fixed Operating costs.*

*Annexure C Zoning Certificate*

*Annexure D Fitting out of Leased Premises*

*Annexure E Construction of the leased Premises*

6.3.23.10 The lease agreement was signed at Pretoria on 24 August 2009 on behalf of East and West Investments by TZ Moolman as Director, Marthinus Delport as Director representing Abland (Pty) Ltd on 24 August 2009, EC Lourens on 24 August 2009 on behalf of members of Copper Circle Investments 55 CC, EC Lourens on 24 August 2009 on behalf of members of South Central Investment 147 CC and on 21

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August 2009 on behalf of Electoral Commission by Faith Dikeledi Pansy Tlakula as CEO.

6.3.23.11 Annexure B in respect of the original lease agreement is the schedule of Net rentals and fixed operating costs for the lease period and the same is indicated as follows:

Table 8

			Parking						Fixed operating costs					
No	Offices exc. VAT 9435,5m2 @R115/m2	Storage exc VAT 103,2m2 @R50,89/m2	Basement exc vat 170 bays @ R508.89/bay	Covered excl. vat 149 bays @ R395.81/bay	Open exc. VAT 60 bays @ 282.72/bay	Total excl VAT	VAT @ 14%	TOTAL Inc. VAT	Amount exc. VAT 9435.5m2 @14,90/m2	VAT @14 %	TOTAL	TOTAL inc. of rental and fixed operating costs	FROM	TO
1	1 088 384.93	5 251.85	86 511.30	58 975.69	16963.20	1 256 087.97	175852.17	1 431 939.15	140 588.95	19 682.45	160 271.40	1 592 210.55	01/09/2010	31/08/2011
2	1 186 339.57	5 724.51	94 297.32	64 283.50	18 489.89	1 369 136.79	191 678.87	1 560 813.66	154 647.85	21 650.70	176 298.54	1 737 112.21	01/09/2011	31/08/2012
3	1 293 110.13	6 239.72	100 784.08	70069.02	20 153.98	1 490 359.93	208 929.97	1 699 006.90	170 112.63	23 815.77	193 928.40	1 892 935.30	01/09/2012	31/08/2013
4	1 409 490.04	6 801.30	112 034.64	76 375.23	21 967.84	1 626 673.05	227 733.67	1 854 402.72	187 123.89	26 197.34	213 321.24	2 067 723.95	01/09/2013	31/08/2014
5	1 536 344.14	7 413.41	122 117.76	83 249.00	23 944.94	1 773 074.25	248 229.70	2 021 298.95	205 836.28	28 817.08	234 653.36	2 255 952.30	01/09/2014	31/08/2015
6	1 674 615.12	8 080.62	133 108.36	90 741.41	26 099.99	1 932 651.5	270 570.37	2 203 215.87	226 419.91	31 698.79	258 118.70	2 461 334.57	01/09/2015	31/08/2016
7	1 825 330.48	8 807.87	145 088.11	98 908.14	28 448.98	2 106 590.58	294 921.70	2 401 505.28	249 061.90	34 868.67	283 930.57	2 685 435.85	01/09/2016	31/08/2017

			Parking						Fixed operating costs					
No	Offices exc. VAT 9435,5m2 @R115/m2	Storage exc VAT 103,2m2 @R50,89/m2	Basement exc vat 170 bays @ R508.89/bay	Covered excl. vat 149 bays @ R395.81/bay	Open exc. VAT 60 bays @ 282.72/bay	Total excl VAT	VAT @ 14%	TOTAL Inc. VAT	Amount exc. VAT 9435.5m2 @14,90/m2	VAT @14 %	TOTAL	TOTAL inc. of rental and fixed operating costs	FROM	TO
8	1 989 610.22	9 600.58	158 146.04	107 809.87	31 009.39	2 296 184.1	321 464.66	2 617 640.75	273 968.09	38 355.53	312 323.62	2 929 964.38	01/09/2017	31/08/2018
9	2 168 675.14	10 464.64	172 379.18	117 512.76	33 800.24	2 502 840.96	350 396.47	2 853 228.43	301 364.90	42 191.09	343 555.99	3 196 784.42	01/09/2018	31/08/2019
10	2 363 855.90	11 406.45	187 893.31	128 088.90	36 842.26	2 728 096.82	381 932.16	3 110 018.97	331 501.39	46 410.19	377 911.58	3 487 930.56	01/09/2019	31/08/2020
	<b>16 535 755.67</b>	<b>79 790.95</b>	<b>1 312 360.1</b>	<b>896 013.52</b>	<b>257 720.71</b>	<b>19 081 695.95</b>	<b>2 671 709.74</b>	<b>21 753 070.68</b>	<b>2 240 625.79</b>	<b>313 687.61</b>	<b>2 554 313.4</b>	<b>24 307 384.08</b>		

6.3.23.12 Annexure D as captured in the original lease agreement is as per the table below:

**Table 9**

NO	Description	TI – Rate/m <sup>2</sup> (usable area)
1	Carpets	100
2	Ceiling	150
3	Partitions(excluding finish)	130
4	Paint to walls(including column and partitions)	70
5	Vertical blinds to windows	20
6	Kitchen	25
7	Air condition	450
8	Electrical	300
<b>Total</b>		<b>1 245m<sup>2</sup></b>

6.3.23.13 The original lease agreement indicated in paragraph 2.1.8 of Annexure E that:

*“If the Practical Completion date is later than 01 September 2010, save to the extent that the delays was caused by an act of God or by reason of vis majeure or by the Tenant, the landlords will be liable to pay to the Tenant monthly in advance from 01 September 2010 to the Practical Completion date a penalty of R10 000 per day, which penalty amount will increase to R25 000 per day from 01 October 2010 to the practical completion date.”*

### **6.3.24 Addendum 1 to the Lease Agreement between the Riverside Office Park and the Electoral Commission of South Africa**

- 6.3.24.1 The first addendum to the lease agreement was concluded between Riverside Office Park Trust (*registration IT 3670/2009*) as the Landlord and The Electoral Commission of South Africa established in terms of section 181(f) of the Constitution of the republic of South Africa 1996 and the Electoral Commission Act 51 of 1996 as the tenant in respect of the Riverside Office Park Building.
- 6.3.24.2 Recitals were captured as follows: “East and West Abland, Copper Circle and South Central being the previous registered owners of the Property and the Tenant into the lease on 24 August 2009 in respect of the building to be constructed on the Property.
- 6.3.24.3 According to paragraph 2.2 of the recitals: East and West Abland Copper Circle and South Central sold the Property to the Riverside Office park Trust subject to the lease and the Riverside Office Trust became the new landlord under and in terms of the lease on 29 March 2010.
- 6.3.24.4 The Parties wish to amend the lease and it is necessary to record the amendment in writing according to paragraph 2.3 of the recitals.
- 6.3.24.5 The following amendment to the lease was noted:

*“The landlord and the tenant agree to delete Annexure D attached to the lease and to substitute it with Annexure D1*

*The landlord and the tenant agree that the tenant will have the option to renew the lease as will more fully appear from Annexure F.*

*The landlord and the tenant agree to delete clause 22.2 of the lease and to substitute it with the following new clause 22.2:*

*it is recorded that the site has been transferred to the riverside office park trust, it no it3670/2009, in which trust east and west investments( Proprietary) Limited Abland (Propriety) Limited, Copper Circle Investments 55 CC and South Central Investments 147 CC hold a beneficial interest of 80% and Manaka investments (Property) Limited holds a beneficial interest of 20%*



*The Landlord and the Tenant agree to delete clause 22.3 and to substitute it with the following new clause 22.3:*

*The Landlord further records its intention to transfer the site and/or the Property to the Pivotal Fund Limited when the Pivotal Fund Limited's requirements to include the site and/or property portfolio have been met."*

- 6.3.24.6 The lease agreement was attached as Annexure 1. The fitting of the leased premises as Annexure D1 and Annexure F as Option to renew the lease agreement.
- 6.3.24.7 Annexure D 1 in respect of the Fitting of the Leased premises was captured as follows:
- 6.3.24.8 The leased premises will be fitted out by the Landlord in accordance with the specifications contained in Annexure A, the landlord fit out budget and the tenant's fit out budget are hereinafter provided for. The landlord will appoint all contractors' consultants and suppliers to be used in such fit out such further consultants as may be necessary or appropriate and agree upon by the tenant to advise on and finalise the additional tenant specific items, including but not limited to the interior design of the leased premises. All cost of further consultants appointed to advise on the Tenants Fit out Budget will be done by the tenant.
- 6.3.24.9 Paragraph 2 under the heading Landlords fit out budget covers the fact that the landlords specification contained in Annexure A includes an allowance which the landlord will make available for the fitting out of the tenants usable area as defined by SAPOA.
- 6.3.24.10 According to the annexure, the tenant may utilise the landlord fit out budget as it deems fit save for the limitation of the landlord and the landlord shall remain liable for no more than R1 325 (excluding VAT) per usable square metre as set out below:

Table 10

NO	Description	TI – Rate/m <sup>2</sup> (usable area)
1	Carpets	100
2	Ceiling	150
3	Partitions(excluding finish)	130
4	Paint to walls(including column and partitions)	70
5	Vertical blinds to windows	20
6	Kitchen	25
7	Air condition	530
8	Electrical	300
Total		1 325m <sup>2</sup>

6.3.24.11 Paragraph 3.5 in respect of immovable items provides that, the additional tenant specific item which classify as immovable will be rentalised over the period of the lease agreement, provided that the cost incurred with regard to such items will not exceed the amount of R20 000 000 (excluding Vat) the parties agree that the monthly rental will be adjusted by the amount of the cost incurred with regard to such immovable item multiplied by 0.135 and divided by 12.

6.3.24.12 The parties agree that a final adjustment account will be done prior to the commencement date of the lease and the tenant will pay monthly rental only in respect of the actual amount rentalised in respect of immovable items.

6.3.24.13 It is recorded that the Monthly rental payable in terms of the lease will be adjusted to provide for the rentalisation of the actual cost incurred in respect of the immovable items.

6.3.24.14 Paragraph 3.6.1 provides 'the additional tenant specific items which classify as movable items will be paid for by the tenant in cash. Prior to the placement of an order for movable items, the tenant will approve such order in writing and will pay a cash deposit of 50% of the cost of such movable items within 7 days of receipt of a tax invoice form the landlord. The balance will be paid after delivery and installation

*of such items to reasonable satisfaction of the tenant and within 30 days of receipt of the tax invoice...*

6.3.24.15 Paragraph 3.6.2 states *“it is specifically recorded that ownership of all movable items and such other additional tenant specific items as agree upon in writing between the Landlord and the tenants, will vest in the Tenant.”*

6.3.24.16 According to paragraph 3.6.4 *“the landlord will be entitled to charge a co-ordination fee of 2 %( two percent) of the cost of the movable items plus value added tax.”*

6.3.24.17 Paragraph 3.6.5, *“...the landlord will cede all rights against the contractor, consultants and the suppliers in respect of defects in the movable items and all applicable guarantees and warranty undertakings in respect of defect to the Tenant.”*

6.3.24.18 The Addendum was signed off in Pretoria on 12 April 2010 on behalf of the Electoral Commission by FDP Tlakula as CEO and on 19 April 2010 on behalf of the Trustees for the time being of the Riverside Office Park Trust by David Stanley Savage as MD/ Trustee.

6.3.24.19 Annexure B to Addendum 1 is the schedule of Net rentals and fixed operating costs for the lease period in terms of the addendum and is indicated as follows:

**Table 11**

			Parking					Fixed operating costs					
No	Offices exc. VAT 9489,5m2 @R139/m2	Storage exc. VAT 271 m2 @R78.44/m2	Basement exc. vat 151 bays @ R558.33/bay	Covered exc. vat 148 bays @ R446.25/bay	Open exc. VAT 70 bays @ 389.37/bay			Amount exc. VAT 9489.5m2 @14,90/m2	VAT @14 %		TOTAL Inc. of rental and fixed operating costs	FROM	TO
1	1 319 040.50	21 256.51	84 307.71	66 045.00	27 255.90	212 506.79	1 730 412.41	141 393.55	19 795.10	161 188.65	1 891 601.06	01/09/2010	31/08/2011
2	1 437 754.15	23 169.60	91 895.40	71 989.05	29 708.93	231 632.40	1 886 149.52	155 532.91	21 774.61	177 307.51	2 063 457.05	01/09/2011	31/08/2012
3	1 567 152.02	25 254.86	100 165.99	78 468.06	32 382.73	252 479.31	2 055 902.98	171 086.20	23 952.07	195 038.26	2 250 941.24	01/09/2012	31/08/2013
4	1 708 195.70	27 527.80	109 180.93	85 530.19	35 297.18	275 202.45	2 240 934.25	188 194.82	26 347.27	214 542.09	2 455 476.34	01/09/2013	31/08/2014
5	1 861 933.31	30 005.30	119 007.21	93 227.91	38 473.93	299 970.67	2 442 618.33	207 014.30	28 982.00	235 996.30	2 678 614.63	01/09/2014	31/08/2015
6	2 029 507.31	32 705.78	129 717.86	101 618.42	41 936.58	326 968.03	2 662 453.98	227 715.73	31 880.20	259 595.93	2 922 049.91	01/09/2015	31/08/2016

			Parking					Fixed operating costs					
No	Offices exc. VAT 9489,5m2 @R139/m2	Storage exc. VAT 271 m2 @R78.44/m2	Basement exc. vat 151 bays @ R558.33/bay	Covered exc. vat 148 bays @ R446.25/bay	Open exc. VAT 70 bays @ 389.37/bay	VAT @ 14%	TOTAL Inc. VAT	Amount exc. VAT 9489.5m2 @14,90/m2	VAT @14 %	TOTAL	TOTAL Inc. of rental and fixed operating costs	FROM	TO
7	2 212 162.97	35 649.30	141 392.47	110 764.08	45 710.87	356 395.16	2 902 074.84	250 487.30	35 068.22	285 555.52	3 187 630.37	01/09/2016	31/08/2017
8	2 411 257.64	38 857.73	154 117.79	120 732.84	49 824.85	388 470.72	3 163 261.57	275 536.03	38 575.04	314 111.07	3 477 372.64	01/09/2017	31/08/2018
9	2 628 270.82	42 354.93	167 988.39	131 598.80	54 309.09	423 433.08	3 447 955.12	303 089.63	42 432.55	345 522.18	3 793 477.29	01/09/2018	31/08/2019
10	2 864 815.20	46 166.87	183 107.35	143 442.69	59 196.91	461 542.06	3 758 271.08	333 398.59	46 675.80	380 074.40	4 138 345.47	01/09/2019	31/08/2020
	<b>20 040 089.62</b>	<b>322 948.68</b>	<b>1 280 881.1</b>	<b>1 003 417.04</b>	<b>414 096.97</b>	<b>3 228 600.67</b>	<b>26 290 034.08</b>	<b>2 253 449.06</b>	<b>315 482.86</b>	<b>2 568 931.91</b>	28 858 966.00		

### 6.3.25 Addendum 2 to the lease agreement between the Trustees for the time being of the Riverside Office park Trust and the Electoral Commission of South Africa in respect of the Electoral Commission Building/Riverside Office Park

- 6.3.25.1 The addendum to the lease agreement is between the Trustees for the time being of the Riverside Office Park Trust (registration IT 3670/2009) as the Landlord and The Electoral Commission of South Africa established in terms of section 181(f) of the Constitution of the republic of South Africa 1996 and the Electoral Commission Act 51 of 1996 as the tenant in respect of the Electoral Commission Building/Riverside office park.
- 6.3.25.2 The recitals captured that, the lease provides that the Monthly Net Rentals will be based on the final measurements of the leased Premises determined by the Landlord's Architect in accordance with SAPOA method.
- 6.3.25.3 The final measurements of the leased premises have been determined by the Landlord's Architect and as such it was necessary to records the final measurements and the revised Monthly Net Rentals in writing.
- 6.3.25.4 According to paragraph 3.1 of the addendum, the summary schedule to the lease as captured in **Table 7** above was deleted and substituted with the following:

**Table 12**

No	Description	Measuring
1	Office Space	9 489.50m <sup>2</sup>
2	Storage space	271m <sup>2</sup>
3	Basement parking bays	151
4	Open parking bays	70
5	Covered parking bays	148

6.3.25.5 Further, clause 1.8 of the agreement was deleted and substituted as follow:

***“Deposit/guarantee,***

*The Tenant shall furnish the Landlord a, as soon as possible after it has signed this Addendum, with an initial irrevocable bank guarantee to the value of R4 788 911.40 being an amount equal to 3(three) months gross rental of the first year of the lease period which amount is inclusive of vat but exclusive of any rentalised amounts related to additional Tenant specific items which classify as immovables. The initial bank guarantee shall be valid for the entire lease period and shall expire no earlier than 3 (three) months after the lease expiry date. The Tenant shall arrange that the aforesaid amount is increased on the anniversary of each following year of the lease period to an amount equal to 3 (three) months gross rental of that particular year which amount shall be inclusive of VAT and amounts are detailed on the attachment hereto marked Annexure G.”*

6.3.25.6 Clause 1.9 was deleted and replaced with monthly rental excluding VAT calculated as:

**Table 13**

No	Description	Area	Net rental per m <sup>2</sup> or parking bay	Net monthly rental
1	Office space	9 489.50m <sup>2</sup>	139	1 319 040.50
2	Storage space	271m <sup>2</sup>	78	21 256.51
3	Basement parking	151 bays	558.33	84 307.71
4	Open parking	70 bays	389.37	27 255.72
5	Covered parking	148 bays	446.25	66 045.20
<b>Total</b>				<b>1 517 905.64</b>

6.3.25.7 This amount was set to escalate annually on the anniversary of the Commencement date at the rental escalation rate as set out in Annexure B.

- 6.3.25.8 Fixed operating cost of R14, 40 m<sup>2</sup> of office space escalating annually on the anniversary of the commencement date at the fixed operating cost escalation rates. This replaces clause 1.12 according to paragraph 3.4 of the Addendum.
- 6.3.25.9 Clause 3.5 Annexure D1 to the lease agreement “...referring to fitting out the leased premises is hereby amended by deleting only the specified amount of R20 000 000.00 pertaining to additional tenant specific items which classify as immovable to rentalised over the period of the lease agreement substituting the aforesaid amount with the amount of R22 603 374.00.”
- 6.3.25.10 The parties agreed to insert the following new clause 29 in the General Conditions of Lease:

**“29 Building Management Services**

*The Parties agree that certain internal maintenance is to be conducted within the leased Premises for which the Tenant is responsible in terms of the Lease Agreement.*

*The Landlord , or its managing agent on its behalf, shall, unless otherwise agreed to in writing enter into on behalf of the Tenant, annual maintenance agreements and/or conduct ad hoc repairs and maintenance services at market related costs and recover such costs from it, together with the monthly rental and other charges.*

*It is agreed that the following services are to be arranged by the Landlord or its agent through reputable contractors:*

- 29.1      *Service of Fire Equipment Annually*
- 29.2      *Service of Smoke Detection Annually;*
- 29.3      *Service of Gas Suppression Equipment Annually*
- 29.4      *Maintenance of Air-conditioning Monthly*
- 29.5      *Maintenance of Generator Monthly*
- 29.6      *Maintenance of Lifts as per the supplier recommendation*
- 29.7      *Removal of wet waste directly in relation to the Leased Premises on request of the Tenant*



29.8 *Ad hoc repairs and maintenance services as requested from time to time by the Tenant*

29.9 *Rental for the installation and maintenance of hygiene equipment in the bathrooms for an initial period of 36 months. The aforesaid agreement shall include bio-flow (urinals) and paper hand towels only. All other consumables shall be arranged for by the Tenant.*

29.10 *Service of water purification system 3-monthly.*

*It is specifically recorded herewith that the Landlord shall arrange the aforementioned services and advise the Tenant timeously of such service however the Tenant shall be responsible for proper supervision and direct management of such service contractors.”*

6.3.25.11 The addendum was signed on 31 March 2011 at Bryanston on behalf of the Trustees for the time being of the Riverside Office Park Trust by D S Savage as Managing Director. The addendum was also signed on 25 March 2011 at Centurion by FDP Tlakula as CEO on behalf of the Electoral Commission.

**6.3.26 Addendum 3 to the lease agreement between the Trustees for the time being of the Riverside Office park Trust and the Electoral Commission of South Africa in respect of the Electoral Commission Building/Riverside Office Park**

6.3.26.1 The addendum to the lease agreement is between the Trustees for the time being of the Riverside Office Park Trust (registration IT 3670/2009) as the Landlord and The Electoral Commission of South Africa established in terms of section 181(f) of the Constitution of the republic of South Africa 1996 and the Electoral Commission Act 51 of 1996 as the tenant in respect of the ELECTORAL COMMISSION Building/Riverside office park.

6.3.26.2 The recitals captured that, the lease provides that a deposit shall be furnished by way of an irrevocable bank guarantee; the Tenant has now requested to provide the deposit by way of a cash deposit.

6.3.26.3 Clause 1.8 of the summary Schedule to the lease is hereby deleted and substituted with the following clause:

*“The Tenant shall furnish the Landlord as soon as possible after it has signed this addendum, with an initial such deposit to the value of R4,788,911.40. The aforesaid deposit shall be deposited into an interest-bearing account and the interest accrued shall be capitalised.*

*The Tenant shall arrange that the amount held as deposit is increased on each anniversary of the commencement date of the lease according to the following formula:*

*An amount equal to three months’ net rent and operating costs (as per Annexure B of the lease agreement) as at the anniversary of the commencement date of the lease agreement in that specific year; Minus*

*The actual total deposit held as at the anniversary of the commencement date of the lease agreement; Minus*

*All interest accrued thereon for the preceding period.”*

6.3.26.4 Save as aforementioned, all the terms and conditions of the original lease agreement shall remain valid and of full force and effect.

6.3.26.5 The addendum was signed on 29 March 2012 at Centurion on behalf of the Trustees for the time being of the Riverside Office Park Trust by Marthinus Delport as authorised signatory. The addendum was also signed on 16 March 2012 at Centurion by M. S. Moepya as CEO on behalf of the Electoral Commission.

### **6.3.27 The cancellation of the lease of agreement between Fountainhead Property Trust Scheme and the Electoral Commission**

6.3.27.1 The standard agreement between DPW and ABSA Bank Limited as Trustees for Fountain Head Property Trust Scheme for office accommodation and Parking was signed on 13 September 2011.

6.3.27.2 The period of lease was indicated as 01 January 2011 and it was to terminate on 31 December 2018.

6.3.27.3 The leased premises were indicated as 240 and 260 Walker Street Pretoria, Stand number 01396, Sunnyside.

- 6.3.27.4 An email dated 21 September 2011 from Mr Latimer to Mr du Plessis and Mr Pretorius enclosed an agreement of cancellation of lease in respect of 260 Walker Street effective 31 December 2010. The agreement needed to be signed on behalf of Electoral Commission and subsequently by the landlord.
- 6.3.27.5 The lessor and lessee have agreed to cancel the lease and they are desirous of recording in writing the terms under which it has been agreed to cancel the lease.
- 6.3.27.6 The contents of the cancellation agreement were subject to the lessor entering into a substitute lease over the leased premises with the Government of the Republic of SA: Department of Public Works commencing 01<sup>st</sup> January 2011 and expiring on 31 December 2018 on terms and conditions acceptable to the lessor in its sole discretion the lease is cancelled upon signature hereof on the following terms:
- “(i) The lessee shall vacate the leased premises on or before midnight on 31<sup>st</sup> December 2010;*
- (ii) Notwithstanding such cancellation, the lessee shall be responsible for all its obligations in terms of the lease up to 31<sup>st</sup> December 2010, except the payment of rental for the 3 (three) months October, November and December 2010;*
- (iii) The lessee acknowledges that it is aware that the electricity consumed in the leased premises is debited by the lessor two months in arrears and that the charges for the last two months of the lessee's tenancy in the premises will be debited to it after cancellation of the lease;*
- (iv) The lessee shall be responsible for the cost of the electricity consumed in the leased premises;*
- (v) The lessee shall furnish the lessor with an Electrical certificate of Compliance in respect of the leased premises, evidence of servicing of the air-conditioning units installed in the leased premises and reinstatement of the leased premises to the lessor's satisfaction*
- (vi) The lessor shall repay the lessee any amounts paid by the lessee to the lessor in respect of rental and appropriate operating cost for the premises for the period after 31 December 2010.”*

6.3.27.7 According to paragraph 2 of the cancellation agreement, notwithstanding the cancellation of the lease, it is specifically recorded that *all the terms and conditions of the lease shall remain of full force and effect up to and including 31<sup>st</sup> December 2010.*

6.3.27.8 The cancellation was signed by Margaret Rose Dell as a witness and by William Francis Latimer as authorised signatory on 26 October 2011.

6.3.27.9 The cancellation agreement was signed by the Electoral Commission on 25 October 2011 under the signature of Adv. Tlakula and witnessed by Norman du Plessis and Moeketsi Motsapi.

**6.3.28 The payment of monthly rental amount to the Trust at the beginning of September 2010 until September 2011**

6.3.28.1 Adv. Tlakula and in the submissions made to the Public Protector stated that the records of the Electoral Commission demonstrates a consistent payment for rental of R1 440 524.17 for the period September 2010 to March 2011 and the rentals increased to R1 730 412.43 from April 2011 to September 2011. The increase in rental according to the submission was as a result of rentalisation of infrastructure fit out requirements of the Electoral Commission per Annexure D1 of the lease agreement.

6.3.28.2 For the month of October 2010 the rental is indicated as R864 314.51 representing and adjustment for September, the Electoral Commission took occupation on 13 September 2010. The other amounts relate to variables such as consumption of water, refuse and sewage services, electricity usage, rates, building maintenance and operating costs.

6.3.28.3 Annexure H to the response of Adv. Tlakula is an excerpt from the minutes of the Finance and Audit Committee held on 26 July 2010. The contents are captured as follows:

*“11.2.1 Double payment of rental for September 2010.*

*The Meeting approved the payment of rent for the new and current premises for the months of September 2010 to facilitate the relocation to the new building in Centurion.”*

- 
- 6.3.28.4 An amount of R1 546 478 was paid in respect of Walker street and the Riverside Office Park. The total amount was made up of R797 762.12 paid to Walker street whilst and amount of R748 715.87 was paid to Riverside Office Park from 13 to 30 September 2010.
- 6.3.28.5 According to Adv. Tlakula's submission, both these amounts include electricity, water, storage, parking, rate and operating costs, as applicable. This amount differs from the amounts indicated in the table below which exclude refuse and operating costs.

6.3.28.6 The building rental invoice breakdown has been captured as follows:

**Table 14**

No .	Descripti on	Sep-10	Oct-10	Nov-10	Dec-10	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Total for the period
1	Rental	1 440 524. 17	864 314. 51	1 440 524. 17	1 440 524. 17	1 440 524. 17	1 440 524. 17	1 440 524. 17	1 730 412. 43	1 730 412. 43	1 730 412. 43	1 730 412. 43	1 730 412. 43	1 730 412. 43	19 889 934. 11
2	Water	0.00	0.00	0.00	8 971.73	6 885.35	7 955.17	4 805.11	6 193.84	7 458.03	3 783.92	7 460.19	12 084.14	10 140.89	75 738.37
3	Refuse & Sewage	0.00	3 914.19	22 951.71	15 520.87	8 718.45	9 423.61	8 072.56	8 819.73	9 025.76	7 885.00	9 026.41	10 735.38	9 336.23	123 429.9
4	Electricity	0.00	0.00	0.00	258 724.40	244 072.80	234 120.39	215 883.17	230 718.27	295 607.45	236 549.52	212 565.06	234 468.57	267 827.35	2 430 536.9 8
5	Rates	0.00	0.00	421 903.17	162 270.45	162 270.45	162 270.45	162 270.45	162 270.45	162 270.45	162 270.45	162 270.45	162 270.45	162 270.45	2 044 607.6 7
6	Operating Costs	161 188.65	88 058.7 6	155 779.63	155 779.63	155 779.63	155 779.63	155 779.63	155 779.63	155 779.63	155 779.63	155 779.63	155 779.63	171 357.60	1 978 401.3 1
7	Building Main	0.00	0.00	84 035.29	35 180.78	57 821.18	39 763.58	39 763.58	109 053.35	44 688.38	44 574.38	39 763.58	47 230.92	39 763.58	581 638.6
<b>Total</b>		<b>1 601 712. 82</b>	<b>956 287. 46</b>	<b>2 125 193. 97</b>	<b>2 076 972. 03</b>	<b>2 076 072. 03</b>	<b>2 049 837</b>	<b>2 027 098. 67</b>	<b>2 403 247. 7</b>	<b>2 405 242. 13</b>	<b>2 341 255. 33</b>	<b>2 317 277. 75</b>	<b>2 352 981. 52</b>	<b>2 391 108. 53</b>	<b>27 124 286. 94</b>

The total amount paid for September 2010 to September 2011 in respect of the table by the Electoral Commission is R27 124 286.94. The amount in respect of rental for this period is R19 889 934.11.

**6.3.29 The Electoral Commission's payments for the 260 Walker Street, Sunnyside building whilst the building stood empty and not occupied by the Commission.**

6.3.29.1 According to the submissions made to the Public Protector by Adv. Tlakula of 06 July 2012, there was no period in which the Electoral Commission paid for an empty building. This was based on the fact that the amounts paid by the Electoral Commission for the period from October 2010 to December 2010 were refunded.

6.3.29.2 Adv. Tlakula also advised the Public Protector in her submission that the Commission occupied 260 Walker Street under a lease agreement commencing September 2008 and expiring in August 2012.

6.3.29.3 She explained that when it became evident that the office requirements of Electoral Commission were not met by the Walker Street Building, the Commission explored options to acquire alternative suitable accommodation. In this regard, discussions were held with the DPW to explore mitigating possible costs associated with the remaining period of the lease agreement.

6.3.29.4 Ultimately a lease agreement was concluded by the Department of Public Works with the landlord of 260 Walker Street to cover the unexpired portion of the Electoral Commission lease. As part of this agreement a cancellation agreement was signed and the lease agreement in respect of 260 Walker Street was to terminate on 31 December 2010 with the period from 01 October 2010 to 31 December 2010 being rent free.

6.3.29.5 She further explained that the Commission continued to pay rent until a new lease agreement between the DPW and the landlord to take over from the Commission was concluded. Furthermore, a memorandum to the Commission from the CEO with the Subject "*Recovery of Rental paid for 260 Walker Street*" read as follows:

*"It is confirmed that all rentals paid in respect of 260 Walker Street post September 2010 has been fully refunded to the Commission. As discussed in the Commission meeting of 30 March 2012 it is also confirmed that all documentation relating to the*

*cancellation of the lease agreement for 260 Walker Street are available for inspection. Documents relating to the tender for Riverside Office Park, the tenant installations for the building and the procurement of furniture have been audited by the Auditor General in 2010/11 and are also available for inspection. This included bank statements for all payments to the project.”*

- 6.3.29.6 According to the Commission's records, a journal entry dated 27 January 2012 and signed off indicates an amount of R6 753 880.42 received as a refund for rental-building, rates and utilities against account 1001849. The account short text for this account is indicated as Broll Property Group.
- 6.3.29.7 A reconciliation capturing the amounts paid between October 2010 and July 2011 by Electoral Commission for Rental and other service was prepared. This reconciliation was titled “Broll Recon”. The Refundable amount was indicated as R8 557 102.29 less the amount of R1 803 221.87 which was not paid by the Commission, the balance of R6 753 880.42 was refundable.
- 6.3.29.8 An urgent memo dated 09 January 2012 from Mr Pretorius to the CFO regarding Account Reconciliation: Broll (260 Walker Street) was reviewed. The memo serves to indicate to the CFO that they should verify the amount on the reconciliation prepared by Broll Property Group so that the amount can be paid into the Electoral Commission account.
- 6.3.29.9 The computer generated copy of the Standard Bank statement account in the name of the Electoral Commission showing transactions for 21 February 2012 reflect a CATS Third Party Payment BRO11 Fountainhead credited to the account in the amount of R6 753 880.42.

### **6.3.30 A lump sum advance payment made in March 2010**

- 6.3.30.1 In her submission to the Public Protector of 6 July 2012, Adv. Tlakula clarified that the records of the Commission indicate that an advance payments of R1 653 215.46 (being R1 275 705.60 and R377 509.86) were made in March 2010 to the Riverside Office Park Trust prior to taking occupation.
- 6.3.30.2 She explained that the two payments were in respect of interior designer fees, to the tune of R377 509.86 and a deposit for the interior design fit out, being the amount of R1 275 705.60. The payment of R1 653 215.46 made to the Riverside



Office Trust in the month of March 2010 was not for construction costs, but was for interior design fees and a deposit for the interior design fit out of the office. No further evidence was provided indicating that a lump sum amount of R22 603, 74 was made by the Commission to the Riverside Office Park Trust.

### 6.3.31 Lump sum paid in December 2010

6.3.31.1 According to Adv. Tlakula's submission to the Public Protector of 6 July 2012 the financial records of the Commission show that it was invoiced in December 2010 for a total amount of R26 716 023.92 made up as follows:

- *R2,076,972.03 on 02 December 2010, being the December building rental, utilities and operating costs;*
- *R3, 038,806.41 on 10 December 2010 being sundry fees and assets including catering equipment walk off mats and audio visual equipment, etc.;*
- *R778 794.30 on 10 December 2010 being additional TV displays and BMS installation;*
- *R18, 745,379.15 on 17 December 2010 being the final invoice for assets;*
- *R2 076 072.03 on 22 December 2010 being the January building rental, utilities and operating costs;*
- *The electoral Commission was credited with an amount of R15 701 698.80 (R2 702 261.10 and R12 999 482.70) on 17 December 2010.*

6.3.31.2 Thus the actual total payments for the month of December 2010 was in fact R11 014 325.12 being final payments for assets acquired as well as for the rentals for the months of December and January (this is practice since the office closes over the December month end for the holiday period)

## 6.4 Assets of the Electoral Commission at the Riverside Office Park

6.4.1 According to the Electoral Commission payments made to the Riverside Office Park Trust were as follows:

**Table 15**

PAYMENTS TO RIVERSIDE OFFICE PARK TRUST								
ASSETS 2010/2011								
Binder	Date	Amount				Description		
RE417	2010/03/23	1 275 705.60		This Payment				
			Doc No	Date	Amount			
			57	2010/03/01	1 275 705.60	Down payment Furniture as per Order		
RE419		377 509.86		This Payment				
			Doc No	Date	Amount			
			56	2010/03/01	377 509.86	Fees Furniture as per Order		
RE436	2010/05/11	3 209 229.37		This Payment				
			Doc No	Date	Amount			
			60	2010/04/01	1 022 996.10	Furniture as per Order 002		
			61	2010/04/01	1 947 975.00	Furniture as per Order 003		
			64	2010/04/01	148 334.44	Fees as per order 002		
			66	2010/04/01	89 923.83	Fees as per order 003		

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
RE439	2010/05/21	8 670 908.98		This Payment				
			Doc No	Date	Amount			
			73	2010/05/21	112 860.00	Gas suppression to computer room as per order		
			74	2010/05/21	263 340.00	Gas suppression to archives room as per order		
			75	2010/05/21	451 440.00	Standby Generator as per order		
			76	2010/05/21	3 075 811.83	Commercial Office Furniture 01		
			77	2010/05/21	215 306.83	Fees as per order office furniture 01		
			78	2010/05/21	849 216.96	Commercial Office Chairs 01		
			79	2010/05/21	59 445.19	Fees as per order office chairs 01		
			80	2010/05/21	1 812 754.62	Bulk Filers 01		
			81	2010/05/21	126 892.82	Fees as per order bulk filers 01		
			82	2010/05/21	1 488 070.50	Executive Furniture as per order 004		
			83	2010/05/21	215 770.23	Fees as per order 004		
RE449	2010/07/06	5 231 815.64		This Payment				
			Doc No	Date	Amount			
			86	01-Jul-10	599 580.04	Computer Room A/C 01		
			87	01-Jul-10	1 275 148.71	Data Cabling 01		
			88	01-Jul-10	995 587.99	UPS 01		
			92	01-Jul-10	200 195.00	Audio Canteen 01		

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
			93	01-Jul-10	2 115 000.00	Server Switches 01		
			94	01-Jul-10	4 003.90	Fees-Audio Canteen 01		
			95	01-Jul-10	42 300.00	Fees-Server Switches 01		
RE454	2010/07/16	4 007 447.41	This Payment					
			Doc No	Date	Amount			
			96	16-Jul-10	14 701.83	Fees-Visitors Chairs 01		
			97	16-Jul-10	210 026.06	Office Visitors Chairs 01		
			98	16-Jul-10	30 780.00	Walk Off Mats 01		
			99	16-Jul-10	21 601.87	Fees-Office Furniture 02		
			100	16-Jul-10	308 598.11	Office Furniture 02		
			3002	16-Jul-10	1 561 908.30	Order 006-Executive Furniture Procurement		
			3003	16-Jul-10	226 476.71	Fees-Order 006		
			3004	16-Jul-10	1 426 510.50	Order 005-Executive Furniture Procurement		
			3005	16-Jul-10	206 844.03	Fees-Order 005		
RE463	2010/08/05	6 978 532.80	This Payment					
			Doc No	Date	Amount			
			3013	2010/08/01	6 978 532.80	Interim Payment (40%) Interior Design Fitout 01		
RE475	2010/09/06	216 831.21	This Payment					

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
			Doc No	Date	Amount			
			3019	2010/09/01	212 579.62	Coffee Machines		
			3020	2010/09/01	4 251.59	Fees-Coffee Machines		
RE479	2010/09/09	2 817 925.22	This Payment					
			Doc No	Date	Amount			
			3014	2010/09/09	597 377.67	Catering Equipment 01		
			3015	2010/09/09	63 247.55	Fees-Catering Equipment 01		
			3017	2010/09/09	2 115 000.00	Server Switches 01		
			3018	2010/09/09	42 300.00	Fees-Server Switches 01		
MG110	2010/09/23	2 305 215.56	This Payment					
			Doc No	Date	Amount			
			3021	2010/09/23	66 262.53	Office Cleaning Equipment		
			3022	2010/09/23	1 325.25	Fees-Office Cleaning Equipment		
			3025	2010/09/23	2 237 627.78	Audio Visual 01		
RE494	2010/10/12	3 451 680.58	This Payment					
			Doc No	Date	Amount			
			3026	2010/10/12	451 440.00	Standby generator - Final		
			3027	2010/10/12	44 752.56	Fees - Audio visuals		
			3029	2010/10/12	1 544.00	Fees - Audio Equipment to Gym		

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
			3031	2010/10/12	334 700.63	Computer room hot aisle containment		
			3032	2010/10/12	599 580.04	Computer room AC installation - Final		
			3033	2010/10/12	995 587.99	UPS Installation - Final		
			3034	2010/10/12	263 340.00	Gas suppression to archives - Final		
			3035	2010/10/12	255 816.00	Gas protection to computer room - Final		
			3036	2010/10/12	278 825.00	TV Displays		
			3037	2010/10/12	5 576.50	Fees - TV Displays		
			3038	2010/10/12	216 193.98	Audio equipment - canteen		
			3039	2010/10/12	4 323.88	Fees - Canteen		
MG123	2010/10/15	559 937.65	This Payment					
			Doc No	Date	Amount			
			3024	2010/10/15	6 940.87	Fees - Office smalls equipment		
			3028	2010/10/15	77 200.00	Audio equipment to GYM		
			3040	2010/10/15	64 094.63	Fees - Office chairs		
			3042	2010/10/15	14 682.62	Fees - Office visitor's chairs		
			3044	2010/10/15	126 892.82	Fees - Bulk filers - Final		
			3046	2010/10/15	17 352.17	Fees - Office small equipment		
			3047	2010/10/15	3 313.13	Fees - Office cleaning equipment		
			3049	2010/10/15	249 461.41	Fees - Office furniture - Final		
RE498	2010/10/15	2 369 549.66	This Payment					

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
			Doc No	Date	Amount			
			3023	2010/09/01	347 043.36	Office smalls equipment		
			3043	2010/10/01	209 751.69	Office visitors chairs - Final		
			3045	2010/10/01	1 812 754.61	Bulk filers - Final		
RE501	2010/10/22	915 637.56	This Payment					
			Doc No	Date	Amount			
			3041	2010/10/01	915 637.56	Office chairs - Final		
RE502	2010/10/25	3 563 734.45	This Payment					
			Doc No	Date	Amount			
			3050	2010/10/01	3 563 734.45	Office furniture final PO 4500057406 = R6,948,144.39 (less Inv 76 & 100)		
RE509	2010/11/17	88 920.00	This Payment					
			Doc No	Date	Amount			
			3048	2010/10/01	88 920.00	Water filters		
RE511	2010/11/19	548 383.47	This Payment					
			Doc No	Date	Amount			
			3052	2010/11/01	512 507.92	Office Small Equipment 02		

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
			3053	2010/11/01	35 875.55	Fees-Office Small Equipment 02		
RE518	2010/12/10	3 038 806.41	This Payment					
			Doc No	Date	Amount			
			3055	2010/11/01	26 334.00	Kitchen air curtains		
			3072	2010/11/01	18 545.52	Ice machine and pump flasks		
			3073	2010/11/01	370.91	Fees - Ice machine and pump flasks		
			3077	2010/11/01	957.60	Sick bed fees		
			3079	2010/11/01	7 999.82	Fees- Additional TV displays		
			3081	2010/11/01	1 237.00	Fees - Audio recording DCEO		
			3082	2010/11/01	2 237 627.78	Audio visual - Final		
			3083	2010/11/01	44 752.56	Audio visual installation fees - Final		
			3085	2010/11/01	597 377.67	Catering equipment - Final		
			3086	2010/11/01	63 247.55	Fees - Catering equipment		
			3087	2010/11/01	40 356.00	Walk off mats - Final		
RE520	2010/12/10	778 794.30	This Payment					
			Doc No	Date	Amount			
			3078	2010/11/01	399 991.00	Additional TV displays		
			3088	2010/11/01	378 803.30	BMS installation		
RE527	2010/12/17	3 043 680.46	This Payment					
			Doc No	Date	Amount			



## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
			3056	2010/11/01	(6 978 532.80)	Credit note i.r.o. inv 3013		
			3057	2010/11/01	(1 561 908.30)	Credit note i.r.o. inv 3002		
			3058	2010/11/01	(1 426 510.00)	Credit note i.r.o. inv 3004		
			3059	2010/11/01	(1 488 070.50)	Credit note i.r.o. inv 0082		
			3060	2010/11/01	(1 947 975.00)	Credit note i.r.o. inv 0061		
			3061	2010/11/01	(1 022 996.10)	Credit note i.r.o. inv 0060		
			3062	2010/11/01	(1 275 705.60)	Credit note i.r.o. inv 0057		
			3063	2010/11/01	2 551 830.72	Final figures Order No 1		
			3064	2010/11/01	1 975 984.80	Final figures Order No 2		
			3065	2010/11/01	3 349 092.00	Final figures Order No 3		
			3066	2010/11/01	929 023.79	Final figures Order No 7		
			3067	2010/11/01	2 668 052.58	Final figures Order No 6		
			3068	2010/11/01	3 010 204.20	Final figures Order No 4		
			3069	2010/11/01	2 561 819.00	Final figures Order No 5		
			3076	2010/11/01	47 880.00	Sick Bed		
			3084	2010/11/01	1 651 491.67	Data & TV cabling installation Final		
RE552	2011/03/14	61 850.29	This Payment					
			Doc No	Date	Amount			
			3080	2010/11/01	61 850.29	Audio recording DCEO		
RE569	2011/03/29	5 446 113.58	This Payment					
			Doc No	Date	Amount			
			0101	2011/03/01	(512 507.92)	Refer inv 3052		

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
			0102	2011/03/01	(35 875.56)	Refer inv 3053		
			0103	2011/03/01	1 063 363.84	Office small equipment 02 revision 1		
			0104	2011/03/01	74 435.48	Office small equipment 02 revision 1 Fees		
			0105	2011/03/01	2 689 375.14	Interior design extras 1-5		
			0106	2011/03/01	1 596 771.38	Interior design extras 1-5 fees		
			0107	2011/03/01	63 748.80	Audio visual changes training room		
			0108	2011/03/01	1 274.98	Audio visual changes training room Fees		
			0109	2011/03/01	34 050.00	Additional TV displays Final		
			0110	2011/03/01	681.00	Additional TV displays Final Fees		
			3074	2010/11/01	23 902.38	Dishwasher detergent & pump		
			9079	2011/03/01	376 200.00	Public Address System		
			3099	2011/03/01	1 237.00	Audio recording DCEO Final fees		
			3100	2011/03/01	69 457.05	BMS Installation Final		
RE578	2011/04/11	478.05	This Payment					
			Doc No	Date	Amount			
			3075	2010/11/01	478.05	Dishwasher detergent & pump Fees		
RE579	2011/04/07	61 850.29	This Payment					
			Doc No	Date	Amount			
			3098	2011/03/01	61 850.29	Audio recording DCEO Final		

## PAYMENTS TO RIVERSIDE OFFICE PARK TRUST

## ASSETS 2010/2011

Binder	Date	Amount				Description		
RE579	2011/03/31	17 500.00		This Payment				
				Doc No	Date	Amount		
					2011/03/31	17 500.00	Framing of 50 pictures	
		59 038 038.40				59 038 038.40		
Costs expended		(416 124.28)				(416 124.28)		
Fees Expensed		(43 548.04)				(43 548.04)		
		58 578 366.08				58 578 366.08		

**6.4.2** The **total** amount of money paid in respect of movable assets of the Electoral Commission for 2010/2011 was R59 038 038.40 as captured above. Of this amount, an amount of R416 124.28 was apparently expensed during the period and amount of R43 548.04 were expensed, a total amount of R58 578 366.08 has been reflected in Electoral Commission records.

**6.4.3** The total amount of R58 578 366.08 of acquisitions were categorised as follows:

**Table 16**

No	CoCd	Class	Description	Acquisition(R)
1	1000	3200	Computer Equipment	9 073 869.98
2	1000	3300	Computer Software	631 829.73
3	1000	3500	Office Mach and Equi	11 171 786.68
4	1000	3600	Furniture and fitting	33 843 804.15
5	1000	3700	Appliances	2 992 584.84
6	1000	3900	Objects of art	864 490.70
<b>*1000</b>				<b>58 578 366.08</b>

**6.4.4** Provided together with this schedule from the Commission's assets, are **files** containing the tax invoices from Riverside Office Park Trust in respect of these above expenses, orders supporting each invoice as well as budget for each section.

**6.5 The allegations of conflict of interest arising from a close business relationship between the former CEO of the Electoral Commission, Adv. Pansy Tlakula and the Chairperson of the Parliamentary Portfolio Committee on Finance, the Hon. Mr Thaba Mufamadi, MP**

**6.5.1** As indicated earlier in the report, Advocate Tlakula did not dispute the existence of a business relationship with Hon Mufamadi, the Chairman of Manaka, a BEE partner and 20% shareholder in Abland. What she disputed was the fact that the non-disclosure of such relationship constituted a conflict of interest which should have been declared when Abland's bid was adjudicated.

**6.5.2** Adv. Tlakula's argument was that the provisions of the Commission's conflict of interest policy only require an employee to declare when he/she has a financial interest and she had and continues to have no financial interest in Abland. She said there was no relationship in her and Hon Mafumadi's shared financial interests in

Lehotsa and his interest in Abland. In her written submission through her lawyers filed with the Public Protector on 22 July 2013, the following was argued:

*“The Employees Policy Manual of the Electoral Commission Provides, in the relevant part relating to conflicts of interest as follows:*

*All employees have duty to promote the reputation and business of the Electoral Commission and not make any personal gain at the expense of or as a result of either employment by the Electoral Commission. Decisions and functions carried out in the course and scope of employment must be directed at what is in the best interest of the Electoral Commission.*

*Personal interests must not conflict with those of the Electoral Commission. Where a possible conflict of interest arises or where an employee has or obtains a financial or **other interest in a company** or firm with which the Electoral Commission enters into a business transaction, or where the interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Commission as soon as it arises and the employee must refrain from participation in any way in related business dealings.*

*Written disclosure is effected by the employee making and appropriate entry in the register kept for this purpose in the office of the CEO. The facts regarding the relationship between the Chairperson of the Electoral Commission and Mr Thaba Mufamadi are as follows:*

*Mr. Thaba Mufamadi and Adv. Tlakula are directors and shareholders of Lehotsa Investment Company (Pty) Ltd; Mr Thaba Mufamadi has a financial interest in Manaka. The chairperson of the Electoral Commission has no direct or indirect financial interest in Manaka. Lehotsa Investment Company (Pty) Ltd, to which the Chairperson of the Electoral Commission is a director and shareholder, ha no direct or indirect financial interest in Manaka. The executive Committee of the Electoral Commission did not place any particular bidder as preferred service provider, but instead placed the two suitable options before the Commission for a decision.*

*The decision to award the contract to Riverside Office Park Trust was made by the Commission. (At the time of the decision the Chairperson was not a Commissioner, but was the chief Electoral Officer.) For each year, the Chairperson, as required by her then contract of employment, disclosed her financial interest indicating Lehotsa*

*Investment Company (Pty) Ltd, as one of the entities in which she holds a financial interest.*

*We submit that the final award of the contract to Riverside Office Park Trust by the Electoral Commission does not constitute a conflict of interest on the part of the Chairperson. This is so since the chairperson derives no personal gain in the transaction.*

*She is not a director nor is she a shareholder in Manaka; whatever financial interest might accrue to Manaka as a result of its shareholding in Riverside Office Park Trust does not flow to Lehotsa Investment company (Pty) Ltd; the decision to award the contract to Riverside Office Park Trust was that of the Commission to which she was not a party.*

*We submit that it would have been improper and a possible ground for judicial review, to disqualify Riverside Office Park Trust as a bidder, purely on the grounds that the Chairperson (then CEO) and the director of an entity that is a shareholder in Riverside Office Park Trust have a common interest in an unrelated business entity.'*

- 6.5.3** She furnished the Public Protector with copies of the Commission's disclosure of interest forms which she signed on 08 April 2009 and on 12 April 2010. Ms Tlakula according to the forms declared the following:

*"I Faith Dikeledi Pansy Tlakula hereby declare that I, in my personal capacity have shareholding and business interests in and/or provide consulting and/or business services to the following company/companies:"*

- 6.5.4** Amongst others, she listed the following company for 2009 and 2010 respectively:

**Table 17**

o	Name of company	Nature of interest	Remuneration/ 2009	Remuneration/ 2010
1	Lehotsa	Board Member	None	None

- 6.5.5** The form states at the bottom as a footnote that:

*"In terms of the policy on conflicts of interest, employees must make a written disclosure where possible conflict of interest arises. Employees are encouraged to*

*use this form to do so. The form must be submitted to the office of the CEO with supporting documents. Submissions are encouraged on an annual basis.”*

**6.5.6** During her interview, Adv. Tlakula confirmed that the declaration ended there and that during the evaluation process in which she and her EXCO members were involved in respect of the procurement of the Riverside Office Park, there were no declaration of any interests they might have had in any of the bidding companies as required by the Commission’s Procurement Policy and Procedures of 10 March 2005.

**6.5.7** Also worth noting is the fact that the Commission’s policy reference to conflict of interest transcends financial interest. This is apparent in the highlighted part of Adv. Tlakula, submission reproduced in paragraph 6.5.2 above.

## **6.6 The Provisional Report of the Public Protector issued on 13 July 2013**

**6.6.1** On 13 July 2013, the Public Protector issued a provisional report on the investigation to the complainants and other relevant parties involved (including Adv. Tlakula).

**6.6.2** The Provisional Report was distributed on the basis of confidentiality to provide the recipients with an opportunity to respond to its contents.

**6.6.3** Adv. Tlakula’s attention was specifically directed at the provisions of section 7(9)(a) of the Public Protector Act which provides that:

*“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.**”* (Emphasis added)

**6.6.4** Having issued the provisional report and on 18 July 2013, the Public Protector received correspondence from Adv. Tlakula’s attorneys, Messrs Mkhabela Huntley Adekeye Incorporated with a request for permission to be granted for that firm of attorneys to disclose aspects of the Provisional Report to Hon. Thaba Mufamadi, MP with a view to him perusing and responding to same as they argued that, “there are

adverse comments made against the Chairperson of the Electoral Commission and Mr Mufamadi, a Member of Parliament”

- 6.6.5** The Public Protector considered the request for disclosure of the contents of the provisional report to Hon. Mufamadi and acceded to it even though she was of the view that the focus of her investigation was not Hon Mufamadi but the Electoral Commission hence she did not even invite him for an interview during the investigation.
- 6.6.6** The recipients of the provisional report were requested to submit their responses thereto by 22 July 2013 to enable the Public Protector to finalize the matter and issue her final report. They were further informed that no extensions for submissions of comments will be granted owing to the length of time taken by the investigation.
- 6.6.7** On 23 July 2013, the Public Protector received correspondence from De Klerk Mandelstam Incorporated Attorneys who advised that they were corresponding with her on behalf of Hon Mufamadi, MP requesting the Public Protector not to issue her final report on 31 July 2013 as envisaged so as to allow Hon. Mufamadi an opportunity to respond to the allegations contained in the provisional report.
- 6.6.8** The Public Protector responded to De Klerk Mandelstam Incorporated Attorneys on 24 July 2013 and stated that since Hon. Mufamadi was not a party to the matter investigated, she will accordingly proceed with the release of the report as planned. Hon Mufamadi was also invited to advise the Public Protector whether he wanted the issues to be investigated and no further response was received from him following such an invitation.
- 6.6.9** On 30 July 2013, De Klerk Mandelstam Incorporated Attorneys made submissions to the Public Protector on behalf of Hon Mufamadi raising concerns about allegations in connection with an existence of a romantic relationship between Adv. Tlakula and Hon Mufamadi. The said allegations were quoted in the provisional report from a complaint lodged on an anonymous basis by the Concerned IEC Employees.
- 6.6.10** De Klerk Mandelstam Incorporated Attorneys considered the allegations to be unnecessary and unfounded as they were not investigated and neither a finding nor remedial action was taken in respect thereof. They thus requested the Public Protector to either omit any reference to the allegations or express a finding on same.



The Public Protector considered the request from Hon. Mufamadi and removed from the report any reference to the allegations of an existence of a romantic relationship.

## **6.7 Responses to the Provisional Report of the Public Protector issued on 13 July 2013**

### **6.7.1 The response of the former CEO and current Chairperson of the Electoral Commission, Adv. Tlakula.**

6.7.1.1 Adv. Tlakula responded to the Provisional Report on 22 July 2013 through the signature of her attorneys, Messrs Mkhabela Huntley Adekeye Incorporated. In general, the response was in agreement with the findings of the Public Protector that she together with her EXCO did not follow the PFMA, Treasury Regulations, the PPPFA and notably, their own SCM policies in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission.

6.7.1.2 In her response, Adv. Tlakula also sought to introduce allegations of a sexual relationship which the Public Protector took a conscious decision not to investigate. The only issues that were disputed by Adv. Tlakula related to the findings of conflict of interest, thus relying on the Commission's Employee Policy Manual in raising her arguments; the separation of roles relating to the EXCO's evaluation and adjudication of the bids; the difference between a tender and request for proposal procurement processes; the inclusion of the turnkey solution without prior approval by the Commission as well as the remedial action calling upon the President to consider whether an appropriate action should be taken against her for her role in the procurement in light of the undisclosed and unmanaged conflict of interest reported on in this report.

6.7.1.3 Adv. Tlakula's response to the provisional report was put together to include the following issues:

- 6.7.1.3.1 Point to the legal framework informing the role and functions of the Public Protector;
  - 6.7.1.3.2 Gross procedural irregularities in the conduct of the investigation;
  - 6.7.1.3.3 Errors of fact and law in the provisional report;
  - 6.7.1.3.4 Abuse of power by the Public Protector in the investigation leading up to the compilation of the report;
  - 6.7.1.3.5 Submissions on legal principles regarding “conflict of interest”;
  - 6.7.1.3.6 Clarifications on various procurement matters that forms the subject matter of the report;
  - 6.7.1.3.7 Identification of inconsistent findings in the report; and
  - 6.7.1.3.8 Submissions regarding the remedial action which the Public Protector should determine.
- 6.7.1.4 The response commented about the legal framework guiding the Public Protector in the performance of her functions in particular the provisions of the constitution and the Public Protector Act as well as the promotion of Administrative Justice Act, 2000 stating that she has a constitutional right to an administrative action that is lawful, reasonable and procedurally fair.
- 6.7.1.5 In connection with procedural irregularities, Adv. Tlakula argued that the investigation into the matter was beset with procedural and substantive irregularities citing a complaint lodged by the *Concerned IEC Employees* which were not put to her for a response. She also queried the fact that the Public Protector did not provide her with a format and procedure to be used in conducting an investigation.
- 6.7.1.6 She also made references to the provisions of the Public Protector Act relating to assistance by an attorney or advocate when appearing before the Public Protector and argued that her Senior Counsel was not allowed to speak at the interview session she had with the Public Protector and instead he could only “whisper” to Adv. Tlakula thus depriving her the right to legal representation. She further alleged that the Public Protector refused and/or failed to clarify Adv. Tlakula’s status in attending the interview session.(emphasis added)
- 6.7.1.7 In her response, Adv. Tlakula also made reference to issues which the Public Protector, exercising her discretion as conferred on her by the Public Protector Act, took a conscious decision not to investigate due to the nature of the allegations as

well as the fact that they were neither considered as relevant nor even substantiated. It was therefore unfortunate that Adv. Tlakula chose to bring the allegations which were neither investigated nor any finding or remedial action taken in respect thereof.

- 6.7.1.8 In connection with allegations of a conflict of interest arising out of a business relationship between Adv. Tlakula and Hon Thaba Mufamadi, MP, she contended that the Public Protector appeared to confuse the legal concepts of “bias”, “recusal” and “conflict of interest”. She was of the view that conflict of interest does not arise out of perceptions but a matter of fact. She stated that it is an interest which stands in conflict with a duty to be performed arguing that joint directorship in a dormant company which Adv. Tlakula and Hon Mufamadi has, does not constitute an interest in conflict with the former’s obligations to the Electoral Commission, specifically, the evaluation of the subject of the investigation. She contended that there is no such thing as a perception of a conflict of interest.
- 6.7.1.9 She further dealt with the provisions of the Electoral Commission’s Employee Policy Manual which are dealt with extensively in the report arguing about the relationship between Lehotsa Investment (Pty) Limited and Manaka Holdings that they are not related to each other and that she did not as a shareholder to Lehotsa derive any direct or indirect financial interest as a result of the lease concluded by the Commission with Riverside Office Park Trust. She argued further that Hon Mufamadi’s fiduciary duty towards Lehotsa Investments is distinctly different to that Manaka Holdings.
- 6.7.1.10 With regard to allegations of abuse of power by the Public Protector, Adv. Tlakula referred to issues which were contained in the anonymous complaint that were not investigated by the Public Protector.
- 6.7.1.11 She however accepted the numerous findings of the Public Protector in connection with the procurement process that formed the subject of the investigation. She however denied that there was no separation of roles in the procurement process.
- 6.7.1.12 She further conceded that the Menlyn Corporate Park process was not done through a competitive bidding process. Adv. Tlakula also disputed that the Commission’s EXCO acted as both the bid evaluation and adjudication committees and stated that EXCO undertook the evaluation of the bids resulting in the shortlisting of four bidders. She stated that the adjudication process was undertaken

by the Commission following EXCO's submission of two bidders. She further admitted that there was non-compliance with some of the Treasury Regulations and the PPPFA. She for the first time informed the Public Protector that the needs analysis was drawn up by Facilities Management Department in consultation with Mr du Plessis and she approved the submission made by Mr du Plessis on 13 February 2009.

- 6.7.1.13 She justified the relocation from 260 Walker Street stating that the landlord was not prepared to enter into a contract for a period shorter than four years and the Commission had either to vacate the premises or extend the lease in 2008.
- 6.7.1.14 In connection with the inclusion of the turnkey solution into the contract, Adv. Tlakula admitted that no formal deviation from competitive bidding was made, an omission which resulted in an indication of an irregular expenditure in the Commission's financial statements of 2010/2011. She however informed the Public Protector that the matter was dealt with in consultation with the National Treasury on 1 June 2011 with a view to the condonation of the expenditure which was done and reflected in the 2011/2012 financial statements of the Commission.
- 6.7.1.15 Adv. Tlakula concluded her response to the Provisional Report by suggesting remedial action to be taken in the matter and informed the Public Protector that the Commission approved an SCM Policy that is compliant with the Treasury Regulations and that the Commission is also in the process of reviewing the conflict of interest policy which by and large addresses the subject matter of the report.
- 6.7.1.16 With regard to the allegations of a conflict of interest, she was steadfast that she was not in breach of any policy in that regard suggesting that she knew of no policy that she breached advocating that "where non-compliance is visited with a sanction, such provisions require clarity so that those to whom it applies must know what is expected of them"

## **6.7.2 The response of the Electoral Commission**

- 6.7.2.1 The Commission essentially did not oppose the intended findings in the provisional report issued on 13 July 2013. The Commission's response was received on 22 July 2013, with a covering letter signed on behalf of the Commission by the Deputy Chairperson, Commissioner I T Tselane and in which he confirmed the concurrence of fellow Commissioners.
- 6.7.2.2 The Commissioners noted the intended findings and remedial action of the Public Protector and confirmed that their comments were mainly to request clarification or reconsideration of a few issues arising out of the report.
- 6.7.2.3 The Commission raised an issue about the interchangeable use in the report of the terms, "the Electoral Commission", "the Independent Electoral Commission", "the Commission" and the (IEC) respectively. They decried that the interchangeable use of the said terms appeared to obscure matters as there are instances where individuals who appeared before the Public Protector were referred to in the Provisional Report as if they were representing the Commission.
- 6.7.2.4 According to the Commissioners, the only correspondence that was addressed by the Commission as a collective to the Public Protector was a letter which was sent under the hand of Judge Makhanya. The rest of the submissions were made on an individual basis.
- 6.7.2.5 The Commissioners further distanced themselves from the submissions made by the Chairperson, Adv. Tlakula to the Public Protector stating that they as a collective did not make any further submissions other than the one which was submitted to the Public Protector under the signature of Judge Makhanya. Submissions made by the Chairperson to the Public Protector were therefore made in her personal capacity and not on behalf of the Commission.

- 6.7.2.6 The Commissioners also pointed out that the composition of the Commission as outlined in the provisional report is not as contemplated by section 6(1) of the Electoral Commission Act in that the Commission according to the Act is comprised of 5 Commissioners which excludes administrative officials such as the CEO's and DCEO's. They thus requested the Public Protector to look into these concerns with a view to correcting them to avoid sending incorrect message to the members of the public.
- 6.7.2.7 In connection with the remedial action that the Public Protector intended taking in her provisional report, the Commissioners pointed out that the irregular and fruitless and wasteful expenditure constitutes a matter that cannot be ratified by the Commission on its own.
- 6.7.2.8 They suggested that the Public Protector should reconsider the period stipulated in the report when action would be taken by the Commission in that regard with a view to allowing the Commission sufficient time to apply its mind to each case where there is a recommendation for condonation. They were of the view that the Commission did not have the authority on their own to ratify the procurement procedures or prescripts without the concurrence of the National Treasury.
- 6.7.2.9 They further raised concern that should they go ahead with the ratification as proposed, such action may expose the Commission to legal challenges and civil claims by the bidders who may have been prejudiced and/or disadvantaged as a consequence of the awarding of the contract for the lease of the Riverside Office Park.
- 6.7.2.10 The Commissioners thus suggested that the proposed remedial action in that regard be reviewed so as to accommodate a requirement for a consultation with the National Treasury on ratification of these procedures.
- 6.7.2.11 They concluded their comments by emphasizing that since the appointment of the new Commission, various procurement measures and processes were put in place specifically for the purposes of strengthening organisational systems.

### **6.7.3 The response of the former Chairperson and Deputy Chairperson of the Electoral Commission, Dr Brigalia Bam and Ms Thoko Mpumlwana respectively**

- 6.7.3.1 The former Chairperson and Deputy Chairperson of the Electoral Commission, Dr Brigalia Bam and Ms Thoko Mpumlwana also commented on the Provisional Report on 22 July 2013 in a letter signed by Dr Bam.
- 6.7.3.2 They commenced their response by thanking the Public Protector for the opportunity and sharing her provisional report with them the contents of the provisional report thus welcoming the findings of the investigation despite same raising a number of concerns on their side.
- 6.7.3.3 In their response they raised a concern that the contents of the report have a potential of tarnishing the image of the Electoral Commission of South Africa stating that the national and global reputation of this most trusted institution is now in serious jeopardy and it will be very difficult for the Commission to regain the trust and confidence of the public on election management.
- 6.7.3.4 They disputed submissions by the *Concerned IEC Employees* that *“The old Electoral Commission Commissioners who were supposed to look after the image of the organisation left without having uttered a word on this matter in order to take the nation into confidence.”* stating that when the matter came to the attention of the Commissioners, the former CEO, Adv. Tlakula acted on same forthwith and responded to the Commissioners requests by sending masses of information.
- 6.7.3.5 They further stated that Adv. Tlakula organized a hasty press conference to address the matter and as the Commission, they assumed that the CEO, Adv. Tlakula and the office Public Protector had resolved the matter when their term of office expired in October 2011 since this was an administrative matter. They stated that according to the PFMA, the CEO as accounting officer has extensive powers and authority over both the financial and administrative aspects of the Commission and as a result, the commission chose to act in a manner which trusted the CEO’s authority on such issues.

- 6.7.3.6 With regard to the Commission sending e-mails to staff on this matter, the former Commissioners refuted the contents of the provisional report in this regard stating only that all communication with staff was through the office of the CEO as it was standard practice.
- 6.7.3.7 Regarding the contents of the Auditor-General's report, where it has been stated in the provisional report that *"The Auditor General noted that no action was taken as this was no (financial misconduct) but just a matter of non-compliance."* the former Commissioners suggested that the Public Protector verify whether the word *"financial misconduct"* was used by the Auditor General. They also questioned reasons why the Public Protector did not interview former Commissioner, Van Der Merwe as he was the Commission's Chairman of the Finance and Audit Committee and legal advisor for the Commissioner on all legal and tender procedures.
- 6.7.3.8 In connection with the allegations of conflict of interest reported in the provisional report, the former Commissioners stated that they fully support the recommendations of reviewing the policy on conflict of interest as that would ensure that such occurrences are not repeated. They further proposed that the Public Protector should recommend that "in all the meetings of the Commission, the Commissioners and EXCO members should declare conflict of interest in writing."
- 6.7.3.9 They further raised their disappointment that under their watch as the Commissioners and the watch of the Supply Chain Management structures and the various committees, the former CEO did not adhere to the policy provisions. They proposed to the Public Protector that the policy which provides for the threshold of R2 million in respect of authorization by the CEO should be reviewed and that the said threshold should be reduced to R1 million to circumvent recurrence of this problem.
- 6.7.3.10 In connection with the involvement of the Department of Public Works in the contract transfer process of the tenants for the Sunnyside building to Housing Department, the former Commissioners explained to the Public Protector that as the Commission, they were concerned about the delays and lack of implementation on the decision of the transfer. They confirmed having monitored the progress as it unfolded on a monthly basis and were embarrassed to learn of the expenditure for an empty building to an extent that they contacted the Minister of Public Works to complain about the matter.



6.7.3.11 The former Commissioners concluded their commentary to the contents of the provisional report of the Public Protector by stating that, "Oversight is only possible where administration subscribes to ethical governance. This organization has handled over R2 Billion in the 14 years of our leadership and has operated on trust with only one qualified audit in this time period."

#### **6.7.4 The response of the complainant, General H B Holomisa, MP**

6.7.4.1 General Holomisa responded, on 22 July 2013, to the provisional report provided to him as the main complainant on 13 July 2013 with comments principally decrying the length of time that it took to investigate the matter and questioning a few intended findings.

6.7.4.2 Regarding the narrative General Holomisa took issue with an apparent discrepancy between the contents of the provisional report and the public statements allegedly made by Adv. Tlakula in justifying the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission thus suggesting that the Commission needs to clarify some of those statements which General Holomisa felt were misleading.

6.7.4.3 Hon General Holomisa argued that Adv. Tlakula personally influenced the course of the search for the Commission's office accommodation. He commented that the Commission had concluded the process of approving a building, and had taken a resolution to lease offices in Menlyn, when Adv. Tlakula approached the EXCO to advise that the Commission should revoke its decision on account of her having had second thoughts about the wisdom of leasing office space in Menlyn Corporate Park.

6.7.4.4 He commented about the submissions made to the Public Protector by Commissioner Tselane who stated that the manner in which the matter was presented to them as the Commission was that it was the most convenient way of dealing with the issue contending that Adv. Tlakula and her EXCO may not have given the Commissioners a complete picture of the entire procurement process.

- 6.7.4.5 He also commented about the use of the phrase “most convenient” thus questioning whether the Commission’s scrutiny of the procurement proposals was entirely adequate or that the Commissioners may have been relied too much on their EXCO to an extent of not actually applying their minds in their awarding of the contract.
- 6.7.4.6 General Holomisa also raised concerns in connection with the issue of budgeting by the Commission for the relocation to a new office building questioning whether there were any reasons advanced with the Public Protector regarding failure to budget for same. He considered the issue as pertinent considering the amount of money that was subsequently involved in the leasing of the Riverside Office Park.
- 6.7.4.7 General Holomisa also questioned the reasons advanced by Adv. Tlakula in terminating the awarding of the contract to Menlyn Corporate Park as well as embarking on a new process which culminated in the contract being awarded to Abland. He also questioned whether the decision to approve Abland’s proposal was taken by the Commission on 9 July 2009 and wanted clarity on when did the Commission.
- 6.7.4.8 In concluding his response to the provisional report, General Holomisa noted the Public Protector’s intended findings in connection with the demand management process leading to the procurement of the Riverside Office Park, the propriety of the accommodation procurement process, the Commission’s deviation from the prescribed Supply Chain Management processes, the involvement of the Adv. Tlakula and the Commission’s EXCO in the evaluation process, the conflict of interest arising out of the business relationship between Adv. Tlakula and Hon. Mufamadi, the incorrect capturing of the information in respect of Mookoli Properties, the deviation in respect of date of occupation of the building thus disadvantaging other bidders, the delegation of authority in respect of the signing of the addenda which had financial implications beyond the R2 million delegation.
- 6.7.4.9 Further thereto, General Holomisa noted the Public Protector’s intended findings in respect of Adv. Tlakula failure to recuse herself from the procurement process stating that Adv. Tlakula acted inappropriately in not obtaining the Commission’s approval regarding the use of the turnkey solution to purchase assets; the failure to ensure that assets purchased through turnkey solution were procured using a competitive bidding process to ensure optimum costs for the Commission’s benefit; the additional costs in terms of handling charges over and above factory costs that varied between 5% and 12.5% which were added to the 2% by the developers

resulted in the handling fees in the region of 15% of the cost were not provided for in the lease agreement or the subsequent addenda;

- 6.7.4.10 In connection with the appropriate remedial action intended to be taken by the Public Protector, Gen. Holomisa commented that the remedial action as expressed in the provisional report was not commensurate with the gravity of the findings intended to be made by the Public Protector thus making comparison with remedial action taken previous reports of the Public Protector such as *“Against the Rules”* and *“Against the Rules Too”* issued on 22 February and 14 July 2011 respectively wherein the remedial action taken specified that *“urgent steps should be taken against the relevant officials that acted in contravention of the law, policy and other prescripts.”*
- 6.7.4.11 In this regard, General Holomisa was of the view that the remedial action taken should extend to all officials of the Commission that participated in the procurement of the Riverside Office Park building including all members of the EXCO that were involved. In connection with a remedial action to be taken in respect of the expenses incurred by the use of the turnkey solution, General Holomisa was of the view that the suggested ratification of the expenditure by the Commission ex post facto would not change the fact that the said expenditure was irregular, fruitless and wasteful as there was a likelihood that other bidders who were disadvantaged by the process may consider taking legal action against the Commission.
- 6.7.4.12 He suggested that rather than just ratifying the expenditure, the Commission should also review the entire procurement of the building with a view to ensuring that it is in fact acceptable, appropriate and cost-effective.
- 6.7.4.13 He further suggested that the Commission should also consider cancelling the agreement immediately after the 2014 general elections so as to avoid a possibility of facing legal action by the disadvantaged bidders. He agreed with the Public Protector that the Commission in respect of all other remedial actions which the Public Protector considered appropriate under the circumstances proposing that the consequences of this maladministration and wasteful expenditure as reported, should be commensurate with the gravity of the transgressions of the law as reported and that disciplinary steps should be taken against the officials of the Commission who were involved.

- 6.7.4.14 In view of the findings and remedial action taken by the Public Protector, General Holomisa proposed in his response that the National Treasury and the Auditor-General should audit the Commission's finances as soon as possible and that all role-players should be placed on precautionary suspension pending finalization of the said audit.

## **7 EVALUATION OF EVIDENCE OBTAINED DURING THE INVESTIGATION**

### **7.1 Issues not in dispute**

- 7.1.1 The current Chairperson of the Electoral Commission, Adv. Tlakula was the CEO at the time of the acquisition of the contested lease. She was appointed as Chairperson of the Commission with effect from 08 November 2011.
- 7.1.2 The maladministration allegations regarding the acquisition of the new building principally centre on the allegation that the Commission's act of revoking its decision taken on 12 January 2009 to acquire accommodation at Menlyn Corporate Park was improperly instigated and influenced by its then CEO, Adv. Tlakula.
- 7.1.3 It is also not in dispute that Adv. Tlakula is a business partner with Hon Mufamadi in Lehotsa investments who also happens to be a Chairman of Manaka Property Investments, a BEE Partner holding a 20% stake in Abland, the company that has an interest in Riverside Office Park where the Commission's head offices are now situated.
- 7.1.4 The Commission also did not dispute the allegations in so far as they relate to shortcomings in the acquisition of the building. Adv. Tlakula's admissions for example, include the fact that she was the one who triggered the reversal of the decision taken on 12 January 2009 by the Electoral Commission and that the new process was under her close direction and supervision.
- 7.1.5 Another key admission from her is that she does have a close business relationship with Hon Mufamadi as co-directors and shareholders in Lehotsa. She only disputed that the relationship poses a conflict of interest and that she should have disclosed it as required by the Commission's 2005 Procurement Policies and Procedures when the Abland bid was considered.

- 7.1.6 The needs analysis for the office accommodation that was prepared by the user department in consultation with Mr Norman du Plessis on 13 February 2009 was approved by Adv. Tlakula in her capacity as the CEO at the time on the same date. This is confirmed by her signature on the Needs Analysis memorandum.
- 7.1.7 The first advertisement for Electoral Commission national offices was placed in the various newspapers from 27 February 2009 and the closing date for the submission of bids was 9 March 2009. The relocation to the Riverside Office Park was done on 13 September 2010.
- 7.1.8 The process of procurement for the new Electoral Commission offices in Riverside Office Park started and was concluded during the term of office of Dr Brigalia Bam as Electoral Commission Chairperson and Adv. Tlakula as CEO of the Electoral Commission at the time.
- 7.1.9 In connection with the alternative accommodation for the Commission, the need thereof is supported by all narratives from interviews and supporting documents. Arguments presented include acute office space shortage, safety concerns and concern over an exorbitant rental increase. For example, extracts from the Commission minutes of meetings dated 06 October 2008 indicate that Mr du Plessis reported that the rental for the current accommodation at 260 Walker Street has been increased by 42% and a further 12% increase in the subsequent years. It was decided to negotiate a lease contract for one (1) year and to look for alternative accommodation thereafter.
- 7.1.10 Evidence shows that the Commission extended their existing office accommodation at 260 Walker Street in Sunnyside in March 2009. Not long thereafter, the Commission decided to move and started to look for premises, with the blessing of DPW and on the understanding that the existing premises would be taken over by another government entity. It is unclear why a four year lease ending in 2012 was signed; however the cancellation of the lease due to the fact that the accommodation was no longer suitable is reasonable and acceptable.
- 7.1.11 With regard to the needs analysis, there is no dispute that same was prepared by the user department in consultation with Mr du Plessis and approved by the then CEO of the Commission, Adv. Tlakula.

- 7.1.12 A Memorandum from Deputy Chief Electoral Officer, Mr Norman du Plessis addressed to the Chief Electoral Officer, Adv. Tlakula dated 13 February 2009 is with regards to the new accommodation. The memorandum records the space requirements as something in the region of 9500m<sup>2</sup> to 10 000m<sup>2</sup> ranges.
- 7.1.13 In so far as the invitation to the potential bidders to submit proposals, it is undisputed that the advertisements were placed in the Sowetan, Pretoria News, the Star and the Citizen on 27 February 2009 and it was placed in the Beeld on 02 March 2009 with a closing date of 9 March 2009.
- 7.1.14 The Auditor General indicated in the 2010/2011 annual report that the evaluation criterion to be used in awarding preference points for the Electoral Commission tender was not specified in the advertisements. According to the Auditor General, the non-compliance with this requirement resulted in all the expenditure incurred in this regard to be deemed irregular expenditure in terms of the Practice Note number 4 of 2008.
- 7.1.15 The Electoral Commission annual report for 2011 captured the irregular expenditure which relates to non-compliance with Treasury Regulations and the PPPF Act. The Auditor General noted that no action was taken as this was no financial misconduct but just a matter of non-compliance.
- 7.1.16 The closing date and time for submission of proposals was indicated in the schedule as 09 March 2009 and at 17h00 and 10 tenders were received. The schedule of receipt of tender documents was signed by RM Malele and Johannes Thipane.
- 7.1.17 It is not in dispute that although there was a procurement committee a decision was taken unilaterally by Adv. Tlakula that EXCO should handle the procurement of this particular transaction to the exclusion of the Committee.
- 7.1.18 It is further not in dispute that the following entities were shortlisted and recommended for the next stage of the tender process being presentations to the EXCO:
- Mookoli Properties (Centurion)
  - Menlyn Corporate Park / Mvelaphanda Consortium JV (Menlyn)
  - New Leaf Property Agency (Pretoria)

- Abland (Centurion)

7.1.19 It is also not in dispute that after presentations the two entities chosen for site visits and subsequently recommended to the Commission were:

- Menlyn Corporate Park / Mvelaphanda Consortium JV (Menlyn)
- Abland (Centurion)

7.1.20 It is not in dispute that payments were made in respect of 260 Walker Street, Sunnyside building whilst the building was unoccupied and that the amount was refunded in February 2012.

7.1.21 With regard to the lump sum advance payment of R22 603 374.00; there is no dispute that some money was paid. The Commission's version though differs from the Complainant's with regard to the amount involved. Evidence supports the Commission's version in that the records indicate that an amount of R1 653 215.46 was made in March 2010 to the Riverside Office Park Trust prior to taking occupation.

7.1.22 The agreed amount of R22 603 374.00 was in respect of the immovable items. However, it was not paid upfront but rentalised over the period of the lease as provided for in the addendum to the lease agreement.

7.1.23 With regard to the allegation of a lump sum payment made in December 2010, the evidence indicates that an initial amount of R26 716 023. 92 was paid in respect of December 2010 and January 2011 rentals as well as payment for fees and assets procured.

## **7.2 Issues in dispute**

### **7.2.1 The Budget**

7.2.1.1 During the investigation, no record of the budget in respect of this move/relocation amongst the documentation provided. the public protector requested the budget from electoral commission and the current chief executive officer, Mr Moepya advised her as follows:



*“On the matter of budget, the issue of alternative accommodation arose as early as 2007 and actively from 2008/09 onwards. We made provision in our MTEF submissions for alternative accommodation (keeping also in mind that we rent more than 200 office buildings country wide). All MTEF and ENE submissions are formally and in detail considered and approved by the Commission as standard practice before submission to the National Treasury”.*

7.2.1.2 The actual MTEF and ENE submission that included the relocation to Riverside Offices in Centurion were however not provided despite repeated requests for same.

**7.2.2 The allegations of conflict of interest arising from a close business relationship between the former CEO of the Electoral Commission, Adv. Pansy Tlakula and the Chairperson of the Parliamentary Portfolio Committee on Finance, the Hon. Mr Thaba Mufamadi, MP**

7.2.2.1 It is not disputed that Adv. Tlakula and Hon. Mufamadi are business associates by virtue of their co-directorship in Lehotsa Investments (Pty) Ltd. It is further not disputed that Hon. Mufamadi’s company Manaka property Investments holds a 20% stake in Abland, the company that was awarded a contract to provide lease premises to accommodate the Head Offices of the Electoral Commission.

7.2.2.2 What is in dispute is whether Adv. Tlakula should have declared her business relationship with Hon. Mufamadi during the evaluation of the bids in connection with the procurement of the Riverside Office Park building.

7.2.2.3 It was noted during the investigation that Adv. Tlakula declared this business relationship in terms of the Annual Financial Disclosures Framework. Further thereto she did not dispute having introduced Hon Mufamadi to the former Commission Chairperson and Deputy as her business partner.

7.2.2.4 What is now in dispute is whether Adv. Tlakula should have disclosed this relationship before participating EXCO meetings which considered the procurement of the Riverside Office Park building and whether failure to disclose this business relationship constituted a conflict of interest.



## 8 LEGAL AND REGULATORY FRAMEWORK

### 8.1 The Commission's authority to procure accommodation and process to have been followed

8.1.1 The process of procuring accommodation for the Commission should have been guided by the Constitution, the Preferential procurement Policy Framework Act, the Public Finance Management Act, Treasury Regulations and related prescripts and internal Supply Chain Policies of the commission. Collectively, these require a competitive, cost-effective and fair bidding process. Deviations are allowed under strict conditions, which include urgency and a sole supplier situation. The key legal and policy benchmarks applied to assess the propriety of the Commission's acquisition of new offices are outlined in the following

### 8.2 General Procurement Legislation

8.2.1 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.

8.2.2 The key instrument regulating procurement is the PFMA the purpose of which is set out in the preamble to the Act, which reads as follows:

*"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; and to provide for matters connected therewith."*

8.2.3 In terms of section 76(4)(c) of the PFMA, the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning, inter alia, the determination of a framework for an appropriate procurement and provisioning system which is in keeping with the dictates of Section 217(1) of the Constitution (supply chain management {SCM} framework).

- 8.2.4 The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all Constitutional institutions (see Regulation 16A2.1 (b)).
- 8.2.5 The Treasury Regulations apply to all constitutional institutions, but only to the extent as indicated in regulations 1 to 22.
- 8.2.6 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A.3.2 which reads as follows:
- “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.”*
- 8.2.7 Provision 16A4.1 under the heading *“Establish of supply chain management units”* 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.
- 8.2.8 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A6 which reads as follows:
- “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.*
- 16A6.2 A supply chain management system must, in the case of procurement though a bidding process, provide for-*
- (a) The adjudication of bids through a bid adjudication committee;*

- (b) *The establishment, composition and functioning of bid specification, evaluation and adjudication committees;*
- (c) *The selection of bid adjudication committee members;*
- (d) *Bidding procedures; and*
- (e) *The approval of bid evaluation and/or adjudication committee recommendations.*

16A6.3 *The accounting officer or accounting authority must ensure that-*

- (a) *Bid documentation and the general conditions of a contract are in accordance with-*
  - (i) *The instruction of the national Treasury; or*
  - (ii) *The prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry;*
- (b) *Bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000(Act No.5 of 2000) and the Broad Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003);*
- (c) *Bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine;*
- (d) *Award are published in the Government Tender Bulletin and other media by means of which the bids were advertised;*

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."*

8.2.9 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A8 which reads as follows:

***"16A8 Compliance with ethical standards***

16A8.1 *All officials and other role players in a supply chain management system must comply with the highest ethical standards in order to promote –*

- (a) *mutual trust and respect; and*

- (b) *an environment where business can be conducted with integrity and in a fair and reasonable manner.*

*16A8.2 The National Treasury's Code of Conduct for Supply Chain Management Practitioners must be adhered to by all officials and other role players involved in supply chain management.*

*16A8.3 A supply chain management official or other role player –*

- (a) *must recognise and disclose any conflict of interest that may arise;*
- (b) *must treat all suppliers and potential suppliers equitably;*
- (c) *may not use their position for private gain or to improperly benefit another person;*
- (d) *must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act;*
- (e) *must be scrupulous in their use of public property; and*
- (f) *must assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.*

*16A8.4 If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –*

- (a) *disclose that interest; and*
- (b) *withdraw from participating in any manner whatsoever in the process relating to that contract.*

*16A8.5 An official in the supply chain management unit who becomes aware of a breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting.”*

- 8.2.10 Regulation 11(a) of the Regulations issued in terms of the Preferential Procurement Policy Framework Act, 2000, provides that an organ of state must, prior to making an invitation for tenders properly plan for and as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made.

### 8.3 Supply Chain Management

- 8.3.1 In February 2004, the National Treasury, issued a document entitled “Supply Chain Management: A Guide for Accounting Officers/Authorities” (SCM Guide). The purpose of the SCM Guide was to give guidance to accounting officers in fulfilling their roles within the SCM framework.

- 8.3.2 Paragraph 3 of the SCM Guide sets out guidelines in regard to demand management and reads as follows:

*“Demand management*

#### **3.1 Introduction**

- 3.1.1 *Demand management is the first phase of SCM. The objective is to ensure that the resources required to **fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs**. As part of this element of SCM, a total needs assessment should be undertaken. This analysis should be included as part of the strategic planning process of the institution and hence will incorporate the future needs.*

- 3.1.2 *It is vital for managers to understand and utilise sound techniques to assist them in their planning, implementation and control activities. **As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be clearly analysed**. This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, etc.” (Emphasis added)*

8.3.3 This document is applicable to all accounting officers and contains the following principles:

- a) The identification of a need is the initiating trigger to a procurement process.
- b) The fulfilment of the need should form part of the strategic objectives of the department and a needs analysis should therefore be part of the strategic planning process.
- c) Sound techniques should be utilised in conducting the needs analysis.
- d) The need should be linked to the budget.

8.3.4 Paragraph 1.3.2.2 of the SCM Guide states that Demand Management is the beginning of the supply chain where:

- a needs assessment is done to ensure that goods or services are acquired in order to deliver the agreed service;
- specifications are precisely determined;
- requirements are linked to the budget; and
- the supplying industry has been analysed.

8.3.5 Planning therefore plays an integral part in supply chain management.

## 8.4 Budget

8.4.1 As stated earlier, the National Treasury guidelines expect a need to be linked to a budget and strategic objectives. Each constitutional institution is expected to have a strategic plan in place that identifies the aims of the constitutional institution and provides a budget towards achieving the said aims.

8.4.2 Regulation 5.1 of the Treasury Regulations makes it mandatory for the accounting officer of an institution to prepare a strategic plan for the forthcoming Medium Term Expenditure Framework (MTEF) cycle.

8.4.3 Regulation 5.2.2 requires that the strategic plan include the following:

*“5.2.2 The strategic plan must –*

- (a) cover a period of three years and be consistent with the institution’s published medium term expenditure estimates;*

- (b) *include specific Constitutional and other legislative, functional and policy mandates that indicate the output deliverables for which the institution is responsible;*
- (c) *include policy developments and legislative changes that influence programme spending plans over the three-year period;*
- (d) *include the measurable objectives, expected outcomes, programme outputs, indicators (measures) and targets of the institution's programmes;*
- (e) *include details of proposed acquisitions of fixed or movable capital assets, planned capital investments and rehabilitation and maintenance of physical assets;*
- (f) *include details of proposed acquisitions of financial assets or capital transfers and plans for the management of financial assets and liabilities;*
- (g) *include multi-year projections of income and projected receipts from the sale of assets;*
- (h) *include details of the Service Delivery Improvement Programme;*
- (i) *include details of proposed information technology acquisition or expansion in reference to an information technology plan; and*
- (j) *for departments, include the requirements of Chapter 1, Part III B of the Public Service Regulations, 2001.” (Emphasis added)*

8.4.4 The PFMA, together with the Treasury Regulations and guidelines, ensure that proper planning is in place when setting out a budget and as a consequence, needs are prioritised and budgeted for. The ideal scenario being that a need is identified, analysed, and included in the strategic planning and therefore budgeted for.

8.4.5 Section 38(2) of the PFMA reinforces this principle of proper planning. This section reads as follows:

*“(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.”*

8.4.6 The PFMA, however, recognises situations where a need is not linked to a budget. In these instances four options are available to a department to fund such needs.

8.4.7 The first option deals with a situation where no funding has been appropriated, but due to an emergency, funds are required for the purposes of procurement. Section 16 of the PFMA allows the Minister of Finance to authorise the use of funds from the National Revenue Fund to defray expenditure provided that:

- a) the expenditure is of an exceptional nature;
- b) expenditure is not currently provided for; and
- c) the expenditure cannot be postponed to a future appropriation cycle without serious prejudice to the public interest.

8.4.8 The second option is in the form of section 43 of the PFMA which allows an accounting officer to utilise a saving in an amount appropriated under a main division within a vote towards the defrayment of excess expenditure under another main division within the same vote. This virement of funds is, however, limited to 8% of the amount appropriated under that main division and a report concerning the utilisation of the savings must be presented to the Executive Authority (Minister) and the relevant treasury.

8.4.9 The third option open to departments is to request further funds from the National Treasury. This is, however, limited in its application and would only be applicable to situations where:

- a) a department inherited new functions; or
- b) where due to policy decisions new needs arise.

8.4.10 The fourth option is to re-prioritise expenditure within a main division of a vote to accommodate the need.

## **8.5 Acquisition process**

8.5.1 The DPW was not included in the acquisition process. This was after the correspondence from the DG of the of the DPW signed on 11 December 1997 where the DG indicated that their department will no longer liaise with the landlord at 260 Walker Street on behalf of the Electoral Commission.



- 8.5.2 According to the introduction the Electoral Commission procurement policy dated 10 March 2005. It is based on Section 217 of the Constitution and section 76(4) (c) of the PFMA which prescribes that the public sector procurement system must be fair, equitable, transparent, competitive and cost effective.
- 8.5.3 Further, procurement at the Electoral Commission is done in terms of the provisions of the PPPF Act.

*“Chapter 3 on the legal Framework is captured as follows:*

- 3.1 The procurement of goods and services within the Electoral Commission is governed by the Constitution, The Public Finance Management Act, Preferential Procurement Policy Framework Act and its regulations as well as all other applicable laws of the Republic. Where any stipulation in this document is in conflict with the directives or stipulations of any other applicable control act, the directives or stipulations of that particular act shall apply...*

Chapter 5: in respect of determination of requirements is captured as follows:

- 5.1 Where a need has been identified and the availability of funds for this purpose established and before any expenditure can be incurred, a requisition needs to be raised.*
- 5.2. Specifications shall be prepared by the User Department based on relevant characteristics and or performance requirements.*
- 5.3. Specifications shall be worded in such a way as to encourage the widest possible participation and competition.*
- 5.4. Procurement of goods and services must be properly planned and a requisition based on a reliable and market related estimate shall be obtained.*
- 5.5. The procurement procedures and the financial delegations determine the flow of the authorisation of the requisition and expenditure based on the estimated cost.*

5.6. *The delegation for the procurement of goods and services shall be applicable within the Electoral Commission as set out in the schedule (ANNEXURE F) annexed hereto.*

8.5.9 Chapter 7 of the Electoral Commission supply chain management policy deals with the Procurement of Goods and Services through tenders. For the purposes of this report the process has been divided into the following 5 steps:

- Obtaining tenders;
- Specifications;
- Tender documents;
- Administration of tenders; and
- Communication.

8.5.10 Obtaining Tenders *“Goods and Services with a Rand value above one hundred thousand (R 100 000, 00 excl. VAT) may be procured by means of tenders. The Procurement Committee may also recommend to the CEO whether tenders or eProcurement should be used to procure the goods or services.*

*7.1.1 Calling for Tenders*

- (a) Tenders are invited by the Procurement Department on the approval of the CEO.*
- (b) Unless otherwise indicated in the invitation, preparation of a tender is for the account of the supplier.*

*7.1.2 Time Scales*

*Unless otherwise determined by the CEO, the minimum period for the closing of tenders is 14 ordinary days.*

*7.2. Specifications*

*7.2.1 Initiating Department*

*The User Department will draft the specification, as outlined in Chapter 5. The User Department must bear the costs of drafting the specification.*

*Tender Documents*

*7.3.1. Drawing up Tender Documents*

*The User Department drafts and submits specifications and tender documents to the Procurement Committee which makes recommendations to the CEO. On approval by the CEO the Procurement Department calls for tenders.*

#### *7.3.2. Official Language*

*Tender documents must be in English.*

#### *7.3.3. Standard Forms*

*The Procurement Department's standard forms must serve as the basis for all tender invitations. (**Annexure D**). However, when the format of these forms is not suitable in a particular case, it may be amended by the CEO after considering the recommendation of the Procurement Committee."*

- 8.5.11 According to paragraph 7.3.6, tender documents and evaluation criteria must be available when the tender invitations are advertised in the relevant communication media.
- 8.5.12 Paragraph 7.5.1 states that, the evaluation of tenders is dealt with in terms of the Act. In addition, the evaluation of tenders shall be in accordance with the technical criteria set out in the tender specifications. This must be clearly stipulated in the tender invitation documents.
- 8.5.13 The Procurement Policy covers communication in respect of Tenders as follows:
- a) Unless the CEO decides otherwise beforehand, tender invitations are advertised through any appropriate communication channel/s.
  - b) Advertisements in the printed media including the local newspapers are left to the discretion of the Procurement Department. In comparable media they must appear simultaneously. Information contained in adverts for tenders placed in different media must correspond.
- 8.5.14 Paragraph 4.1 is in respect of the Procurement Committee and is stated as follows:

#### **“4.3.1 Composition**

- a) *The CEO establishes the Procurement Committee by appointing five members who will serve on the committee on a permanent basis.*
- b) *The CEO appoints a Chairperson.*
- c) *A quorum shall be made up of 50% of the members plus one.*
- d) *In the absence of the Chairperson at a meeting, the Procurement Committee shall elect an Acting Chairperson from among the members present at the meeting.*
- e) *The Chairperson of the Committee may co-opt a member of staff for a particular meeting.*

#### **4.3.1. Meeting Procedure**

- a) *The Procurement Committee shall hold meetings once a week, unless otherwise agreed.*
- b) *All procurement related meetings must be recorded and records should be kept for a period of at least five years.*
- c) *A declaration of interest from the members of the Committee and the Procurement Department should be obtained at each meeting.*
- d) *The Procurement Committee may call any official of the Electoral Commission as and when required.*
- e) *Decisions of the Procurement Committee shall be by consensus.*
- f) *In the absence of consensus the matter will be decided by a vote. In the event of a tie the Chairperson shall have a casting vote and the report of the Committee shall accurately reflect the views of the members.*

#### **4.3.2. Introduction**

- a) *The Procurement Committee makes recommendations to the CEO on the procurement of goods and services for or on behalf of the Electoral Commission.*
- b) *The Procurement Committee makes recommendations on the hiring of goods and services for, or on behalf of, the Electoral Commission.*
- c) *The Procurement Committee makes recommendations to the CEO on the disposal of movable Electoral Commission property.”*

- 8.5.15 The Evaluation Committee is covered under paragraph 4.4 of the policy and according to the policy an Evaluation Committee shall be constituted upon the closure of each and every tender or for any quote or bid exceeding R100 000-00 (One hundred thousand rand).
- 8.5.16 In respect of quotations and bids less than R100 000-00, (one hundred thousand rand) the Procurement Department evaluates a quote/bid and makes recommendations to the User Department to deal with within their delegated authority.

#### ***“4.4.1 Composition***

- a) *The Evaluation Committee shall consist of:*
  - (i) *A member of the Procurement Department;*
  - (ii) *A member of the Legal Services Department;*
  - (iii) *A maximum of two members of the User Department;*
  - (iv) *In the event of a tender exceeding Ten Million Rand (R10 000 000) or on recommendation of the Procurement Committee, an external expert.*
- b) *The member from the Procurement Department shall serve as Convenor of the Evaluation Committee.*
- c) *In the event of an external expert, the User Department together with the Procurement Department shall submit a recommendation to the Procurement Committee with regard to the appointment of such an expert.*
- d) *A quorum shall be made up of at least one member from the departments mentioned above.*
- e) *A member of the Procurement Committee may sit as a member of the Evaluation Committee.*
- f) *The composition of the Evaluation Committee shall be approved by the Chairperson of the Procurement Committee.*

#### ***4.4.2. Meeting Procedure***

- a) *The Convenor shall convene the Evaluation Committee upon the closure of a quote/tender/bid and submit a report to the Procurement Committee forthwith.*
- b) *The report shall contain the details of the meeting, members present, the evaluation procedure and the outcome including any such details as the Evaluation Committee may deem relevant.*

- c) ***A declaration of interest from the members of the Evaluation Committee shall be obtained at each meeting.***

#### ***4.4.3. Functions of the Evaluation Committee***

- (a) *Determination of Acceptable quotes/tenders/goods for Goods and Services*
  - (i) *At the stipulated closing time for the responses, the Procurement Department at Head Office, opens the tenders and compiles a register of quotes/tenders/bids received.*
  - (ii) *The Evaluation Committee evaluates the quotes/tenders/bids according to the specifications and submits a report to the Procurement Committee.*
  - (iii) *The Internal Audit department performs audit tests prior to final adjudication.*
  - (iv) *The Procurement Committee makes recommendations to the CEO in respect of the awarding of quotes/tenders/bids taking into account the Act and the Electoral Commission's Procurement Policy. (Refer to annexure B for the Provisions of the Act)."*

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***The role of the Procurement Department according to the policy is:***

- a) The Procurement department is responsible for the administration of all the Electoral Commission's procurement processes.
- b) The Procurement Department shall maintain and update a database of suppliers of the Electoral Commission.
- c) The Procurement department provides support functions to the Procurement Committee
- d) The Procurement Department must provide all the information which the Procurement Committee and/or CEO require in connection with the execution of their powers and functions.
- e) On receipt of the report from the Evaluation Committee, the Procurement Department shall apply the Act with regard to the allocation of points.
- f) Procurement Department shall perform the due diligence enquiries together with the Internal Audit Unit prior to the awarding of a contract.

**8.5.18 Tenant installations**

8.5.18.1 The SCM Policy of the Electoral Commission does not cover tenant installations.

**8.5.19 Urgency**

8.5.19.1 The PFMA and Treasury Regulations require that the default position in regard to procurement is that a competitive bid procedure be embarked upon.

8.5.19.2 The legislation, however, recognises that in certain cases it is impractical to invite competitive bids and as such it is permissible to procure goods or services by other means, provided that reasons for the deviation are recorded and approved by the accounting officer (Regulation 16A6.4).

8.5.19.3 The National Treasury issued Practice Note 8 of 2007/08 wherein, inter alia, urgent, emergency or sole supplier cases were further regulated. Paragraph 3.4.3 thereof provides as follows:

*“Should it be impractical to invite competitive bids for specific procurement ,e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price*

*quotations or negotiations in accordance with Treasury Regulation 16A6.4. **The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4.** The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.”(Emphasis added)*

8.5.19.4 The SCM Guide at paragraph 4.7.5.1 notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process but must act in a manner that is in the best interest of the State.

8.5.19.5 The SCM Guide defines an “emergency case” as –

**“a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery.”**(Emphasis added)

8.5.19.6 An “urgent case” is defined as “a case where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical.” This definition is, however, subject to the qualification that “A lack of proper planning should not be constituted as an urgent case.” (Emphasis added)

8.5.19.7 The following principles can be gleaned from this definition of urgency:

- a) The early delivery is the key requirement which would decide the success or failure of the project.
- b) The time period available for the acquisition makes it impractical or impossible to pursue a competitive bid process.
- c) The urgency was not foreseeable or the result of dilatory conduct.

8.5.19.8 For a situation to be classified as urgent all three the above requirements must be met.



## 8.6 The responsibilities of accounting officers in respect of SCM

- 8.6.1 Section 38(1)(a)(iii) of the PFMA prescribes that the accounting officer for a constitutional institution must ensure and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.
- 8.6.2 In terms of section 38(1) (c) (ii) of the PFMA, an accounting officer must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure. It is expected of the accounting officer to take effective and appropriate disciplinary steps against any official in the service of the department who makes or permits an unauthorised, irregular and fruitless and wasteful expenditure. Irregular, unauthorised or fruitless and wasteful expenditure is regarded as an act of financial misconduct in terms of section 38(1) (h) (iii) of the PFMA.
- 8.6.3 An accounting officer is, in terms of section 86(1) of the PFMA guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, if he or she wilfully or in a grossly negligent way fails to comply with a provision of, inter alia, section 38, referred to above.
- 8.6.4 Chapter 4 of the Electoral Commission procurement policy describes the duties of the Electoral Officer, The procurement Committee and the Procurement Department.
- 8.6.5 Paragraph 4.1 states that the goods and services with rand value below one hundred thousand (R1000 00exc VAT) are normally procured by means of electronic or manual quotations. In respect of goods and services with a Rand value above one hundred thousand (R100 00excl Vat) the procurement Committee recommends to the Chief Electoral Officer (CEO) whether tender, quotations or eProcurement should be used to procure the good or services.
- 8.6.6 According to paragraph 4.2 (a) the CEO procures goods and services for the Electoral Commission and arranges the hiring of goods and services or the acquisition or granting of any right for or on behalf of the Electoral Commission, and disposes of movable assets subject to compliance with the requirements of Section 12(2) (c) of the Electoral Commission Act, *Section 38(a) (iii) of the Public Finance management Act, the Treasury regulations and the Act. In respect of goods and services in excess of Two Million Rand (R2 000 000), the CEO does so after consultation with the Commission.*

## 8.7 Assignment of powers and duties by accounting officers

- 8.7.1 In terms of section 44 of the PFMA, the accounting officer for a department may in writing delegate any of the powers entrusted or delegated to him/her to an official in that department.
- 8.7.2 However, in terms of section 44(2)(d) of the PFMA, a delegation to an official does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.
- 8.7.3 Paragraph 4.2(b) and (c) of the Electoral Commission Procurement policy provides that the Power to enter into, amend or cancel contract rest with the CEO. The CEO may delegate certain functions.

## 8.8 The powers of the National Treasury

- 8.8.1 Section 6(2) of the PFMA provides that the National Treasury must intervene by taking appropriate steps to address the serious material breach of the Act by a constitutional institution and may do anything further that is necessary to fulfil its responsibilities effectively.
- 8.8.2 The illustration is provided below as a summary of the SCM process as it pertains to the procurement at Electoral Commission. This table further highlights the areas of responsibility.

No.	Procurement Step	Responsible Department
1	Need analysis/Specifications	User department
2	Financial Planning	CEO and Commission
3	Procurement process	User department
4	Evaluation of Bids	<ul style="list-style-type: none"> <li>- Evaluation Committee</li> <li>- Procurement Committee</li> <li>- EXCO</li> <li>- CEO</li> </ul>

		- Commission
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## 8.9 Irregular Payments made

8.9.1 Section 195(b) of the Constitution stated that public administration should be governed by democratic values and principles which include the promotion of “...efficient, economic and effective use of resources...”

8.9.2 Further thereto, the procurement policies and legislation as mentioned in paragraph 8.1 above further applies to the spending of resources in order to prevent incurring irregular, fruitless and wasteful expenditure.

## 8.10 Conflict of Interest

8.10.1 Section 96(1) of the Constitution provides that members of the Cabinet must act in accordance with a Code of Ethics prescribed by National Legislation.

8.10.2 In terms of section 96(2), Members of the Cabinet may not:

“(a) ...

(b) *act in **any way that is inconsistent with their office**, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or*

(c) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”*(Emphasis added)

8.10.3 Even though section 96(2) explicitly applies to Members of Cabinet it may be utilised, at the very least, as a benchmark for officials performing public duties in institutions mandated to uphold Constitutional Democracy such as the Chapter 9 Institutions.

8.10.4 Section 195 of the Constitution provides that: “*Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

(a) *A high standard of professional ethics must be promoted and maintained.*

(b) *Efficient, economic and effective use of resources must be promoted.*

- (c) *Public administration must be development-oriented.*
- (d) *Services must be provided impartially, fairly, equitably and without bias.*
- (e) *People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) *Public administration must be accountable.*
- (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information..."*

8.10.5 Therefore section 195(a) envisages a "*high standard of professional ethics*" in the performance of public duties.

## **8.11 Touchstones, the previous reports of the Public Protector applicable to the matter investigated**

### **8.11.1 "*Against the Rules*" Report Number 33 of 2010/2011**

8.11.1.1 This is a report of the Public Protector issued on 22 February 2011 in connection with an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the department of public works and the South African police service relating to the leasing of office accommodation in Pretoria.

8.11.1.2 The complaints related to the alleged non-compliance with the requirements of section 217 of the Constitution of the Republic of South Africa, 1996 by the SAPS and the DPW, and the alleged improper involvement of the National Commissioner of the SAPS in the procurement of two buildings in Pretoria and Durban for office accommodation for the SAPS. The need for a second building to accommodate the SAPS Head Office in Pretoria was also questioned. Questions were also raised regarding the SAPS's relationship with the preferred service provider and the cost effectiveness of the transaction.

#### **8.11.1.3 The Public Protector found *inter alia* that:**

*"The need for the office accommodation relevant to the investigation was not contained in the SAPS Immovable Asset Plan, as is required by directions issued by the National Treasury.*

*The procurement of the lease was not in accordance with a system that is cost effective, as is required by the Constitution.*

*The urgency claimed by the SAPS in respect of the procurement of the lease, which resulted in a deviation from an open tender process, only related to a small part of the accommodation need. The entire Sanlam Middestad building was therefore not urgently required.*

*The DPW failed to record the reasons for deviating from a competitive tender process, as is required by the SCM prescripts;*

*It appears from the very nature of the procurement process followed, namely, by entering into a negotiated contract instead of a competitive bidding process, that the constitutional requirements of fairness, equitability and transparency were not complied with.*

*The procurement of the lease was done in a manner that did not comply with the validity requirements of the Constitution, other applicable legislation and the Treasury Regulations and instructions for procurement by organs of state. The lease agreements entered into by the DPW and the RPF are therefore invalid.*

*The conduct of the accounting officers of the DPW and the SAPS, who were responsible for compliance with the relevant provisions of the Constitution and other procurement legislation and prescripts in respect of the procurement of the lease, was improper and unlawful.*

*The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.*

*The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.*

*The procurement by the DPW of the lease was not in accordance with a system that is cost effective and competitive, as is required by section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain*

*management rules and policies. This failure amounted to improper conduct and maladministration.*

*The conduct of the accounting officer of the DPW was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require from an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.*

*The process that led to the conclusion by the DPW of the lease agreements with RPF was fatally flawed in various respects, including non-compliance with prescribed procurement procedures such as ensuring a competitive bid process or justifying the deviations in the prescribed manner. This rendered the process unlawful and further constituted improper conduct and maladministration.*

*The lease agreement should not have been entered into as it did not comply with the validity requirements of the Constitution, applicable legislation and prescripts. The lease agreements entered into by the DPW and RPF are therefore invalid.”*

#### **8.11.2 “Against the Rules Too” Report Number 6 of 2011/2012**

8.11.2.1 This is the second report of the Public Protector issued on 14 July 2011 in connection with an investigation into complaints and allegations of improper procurement of the lease of office accommodation for the SAPS in the Middestad building (previously known as the Sanlam Middestad building) in Pretoria and the Transnet Building in Durban. These complaints related to allegations of maladministration, improper and unlawful conduct by the Department of Public Works and the South African Police Service relating to the leasing of office accommodation in Pretoria.

8.11.2.2 It was alleged in the complaints that there was non-compliance with the requirements of section 217 of the Constitution of the Republic of South Africa, 1996 by the SAPS and the DPW, and the alleged improper involvement of the National Commissioner of the SAPS in the procurement of two buildings in Pretoria and Durban for office accommodation for the SAPS. Questions were also raised regarding the SAPS’s relationship with the preferred service provider and the cost effectiveness of the transaction.

#### 8.11.2.3 The Public Protector found *inter alia* that:

*“The need was not dealt with in the SAPS Immovable Asset Management Plan and not budgeted for.*

*The fact that the procurement of the lease of the Transnet building was not budgeted for and included in the Immovable Asset Management Plan of the SAPS, constituted maladministration.*

*The involvement of the SAPS proceeded beyond the demand management phase of the SCM process.*

*The market rental rate for a building such as the Transnet building was determined by the DPW at R40.00 per m2. The lease agreement signed between RPF and the DPW in respect of the Transnet building reflect a rental rate of R125.30 per m2. The procurement of the lease was not in accordance with a system that is cost effective.*

*There was no legitimate justification for a deviation from the prescribed tender process.*

*In violation of Treasury Regulations, the DPW did not record and report the reasons for deviating from a competitive process as required by SCM prescripts.*

*The purpose of the reporting requirement is clearly to provide the National Treasury, as the custodian of public funds, with an opportunity to note, evaluate and, if necessary, intervene in the procurement process. The failure to report the deviation therefore accordingly deprived the National Treasury of the intended opportunity.*

*The procurement process did not comply with the requirement of fairness, equitability and transparency.*

*It appears from the very nature of the process followed, namely, by entering into a negotiated contract instead of a competitive bidding process, without justification, the constitutional requirements of fairness, equitability and transparency were also not complied with. The situation was exacerbated by the fact that the contractor had already been involved in the process right from the beginning, even before the total extent of the need was established.*



*The floor space leased from RPF exceeded the total guideline area determined by the DPW. The difference between the approved offer and the final DPW norm document equates to 4058.87m<sup>2</sup>. The financial impact of the additional floor space amounted to R77 683 352.29, excluding operational costs, over the entire lease period (9 years 11 months)*

*This additional expenditure, resultant from maladministration on the part of the DPW, could further have led to fruitless and wasteful expenditure as contemplated by section 1 of the PFMA*

*The lease agreement entered into by the DPW and the RPF was invalid as the procurement of the lease was done in a manner that did not comply with the requirements of the Constitution, the PFMA and the Treasury Regulations and instructions for procurement by organs of state.*

*The difference between the approved offer and the final DPW norm document equates to 4058.87m<sup>2</sup>. The financial impact of the additional floor space amounted to R77 683 352.29, excluding operational costs, over the entire lease period (9 years 11 months)*

*The conduct of SAPS and DPW officials involved in the procurement of the lease was improper and unlawful.*

*The failure of the National Commissioner to ensure that the procurement process complied with the said legal requirements and prescripts, as indicated in the findings above, resulted in the invalid conclusion of a lease agreement, to the detriment of the State, and therefore constituted maladministration.*

*Although the ultimate accountability in terms of the PFMA for the procurement of the lease remains that of the Director-General, as the accounting officer, the evidence shows that the process in respect of the procurement of the Transnet building had already progressed to an advanced stage at the time when he took office, on 1 July 2010.*

*The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to unlawful, improper conduct and maladministration.*



*The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations.*

*These provisions require an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.*

*The procurement by the DPW of the lease was not in accordance with a system that is cost effective and competitive, as is required by section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.*

*The reckless manner in which the DPW dealt with public funds in this case, particularly by not following the prescribed tender process without justification, not ensuring that the state received value for money, as well as ignoring containment process that was already in place, fell short of the requirements of good governance and administration.*

*The conduct of the DPW KZN Regional Office and that of the SNBAC was in breach of those duties and obligations incumbent upon them in terms of section 217 of the Constitution, the PFMA and the relevant Treasury Regulations. These provisions require that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.*

*The process that led to the conclusion by the DPW of a lease agreement with RPF was fatally flawed in various respects, including non-compliance with prescribed procurement procedures and conditions imposed by the SNBAC and the accounting officer. This rendered the process unlawful and further constituted improper conduct and maladministration.*

*The lease agreement should not have been entered into as it did not comply with the validity requirements of the Constitution, applicable legislation, prescripts and the instructions of the accounting officer. The lease agreement entered into by the DPW and RPF was therefore invalid.*

*The conduct of the Minister of Public Works in relation to the procurement by the DPW for the SAPS referred to in this report and in respect of the investigation by the Public Protector failed to meet the requisite stewardship expected from her, including the use of public resources as envisaged by sections 195 and 217 of the Constitution and the Batho Pele Principles, and her obligation to cooperate with the investigation in terms of the Public Protector Act, and accordingly constituted improper conduct as envisaged by sections 181(3) and 182(1) of the Constitution.*

***The non-compliance by the SAPS and DPW with the prescribed SCM process in the procurement of the Transnet building lease had the following impact:***

*Due to the fact that the procurement was not cost effective it resulted in a significant potential monetary loss to the state and prejudice to the South African tax payers;  
Loss of public confidence in the SAPS, DPW and organs of state in general in open and transparent procurement of goods and services;*

*The perception of potential service providers that they cannot expect fair and equal treatment from organs of state;*

*A delay in improving the accommodation and working conditions of SAPS officials, which has a direct bearing on their level of service delivery;*

*The perception created by the SAPS needs analyses that vulnerable members of the community, i.e. women and children will have limited access to units of the SAPS established specifically to deal with family violence, child protection and sexual offences related matters.*

*As was the case in the Middestad investigation referred to above, it was evident throughout this investigation that a number of the officials interviewed had the perception that the SAPS could irregularly influence the procurement process. These perceptions were reinforced by the fact that when these officials raised serious concerns with the process followed by the SAPS and the DPW to procure the lease in writing in, they were sidelined and/or deliberately removed from the procurement process.*

*By entering into long term lease agreements of substantial amounts (R1.1 billion in this instance), which includes operational costs aimed at upgrading buildings significantly, the DPW is essentially footing the bill for the improvement of properties*

*owned by private entities. The expenditure incurred for such a lease could be better utilised for the construction of client specific accommodation and/or the purchasing of suitable property to accommodate client departments. It was noted from the response of the Minister of Public Works to the Provisional*

*Report of the Public Protector that she intends formulating a policy in terms of which the DPW will in future consider favouring the construction of buildings over leased accommodation.*

*The total space requirement as reflected in the needs analysis in terms of which the PI of 17 March 2011 was issued by the DPW is exactly the same as was offered by and leased from RPF in terms of the lease agreement that lapsed.*

*It was therefore clearly tailored to suit the previous offer made by RPF. The validity of this needs analysis is therefore highly questionable and should not have been accepted by the DPW at face value.”*

#### **8.11.3 “On The Point Of Tenders” Report Number 10 of 2012/2013**

- 8.11.3.1 This is a report of the Public Protector issued on 10 October 2013 in connection with an investigation into allegations of impropriety and corrupt practices relating to the awarding of contracts for goods and services by the Limpopo Department of Roads and Transport.
- 8.11.3.2 The investigation followed complaints in which it was alleged that Mr Julius Malema who was the President of the ANC Youth League at the time, used his political position to influence the awarding of tenders by the Department of Roads and Transport and other Departments of the Limpopo Provincial Government, to certain companies where he is involved.
- 8.11.3.3 It was further alleged that Mr Malema improperly benefited from corrupt kickbacks paid to him by the companies involved, via the Ratanang Family Trust, set up by him. The allegations in respect of the Department specifically referred to the awarding of tenders to On- Point Engineers (Pty) Ltd, Arandi Trading Enterprises and Sizani Build It respectively.

#### 8.11.3.4 The Public Protector found *inter alia* that:

*“On 11 September 2009, 10 days after Mr Letebele took office as the Head of the Department (HOD), the Department advertised a tender for the procurement of a PMU for the construction and maintenance of roads. The advert ran for 20 days from 11 September 2009, the closing date being 01 October 2009. This timeline did not comply with the National Treasury requirement of a minimum of 21 days and the Provincial Treasury requirement of 30 days.*

*The Department’s argument for urgency, as envisaged under Regulation 16A6.3 of the Treasury Regulations, on account of thereof that a lot of work still had to be done before the end of the financial year, is not convincing.*

*Out of 16 bids that were received, only On-Point was eventually considered to qualify for consideration, with all of the others having been eliminated on account of various administrative infractions, including failure to indicate acceptance of bid terms in the covering letter, not separating the price and functionality envelops and failure to score a minimum of 30 points for functionality.*

*Evidence suggests that Mr Gwangwa and company began preparations for the PMU tender long before it was advertised in September 2009. Such evidence includes the fact that the shelf company, Achir Shelf, which according to Mr Gwangwa was acquired solely for the PMU tender, was purchased in August 2009.*

*Members of the BEC that evaluated the bid for the PMU included an external person from Denel who was not an appropriate expert and who participated fully, including in the scoring process. This was against the requirements of National Treasury prescripts and guidelines that only officials of the Department or experts specifically contracted for that purpose may be appointed to the BEC.*

*The failure by the Department, specifically the Bid Committees and the HOD, to notice obvious discrepancies in the bid, particularly the Tax Clearance Certificate and company registration documents, showing the company to be not older than 5 months while the bid document claimed 9 years of experience, leaves a lot of questions to be answered regarding the relationship between the HOD and some or all of the departmental players that took part in the bid process and On-Point. That On-Point was given preferential treatment is without doubt. The unanswered*

*questions are further compounded by the fact that evidence suggests that On-Point knew about and started preparing for the bid some time prior to September 2009.*

*The failure by the BEC, BAC and the HOD to properly interrogate the bid presented by On-Point and to perform a due diligence test on and verification of its functionality and compliance with the requirements of the bid, was improper and constituted maladministration.*

*The fact that On-Point had no employees and that it misrepresented its experience, involvement in youth business development and annual turnover is obvious and evident from the bid document itself. None of these obvious discrepancies were noted and considered during the procurement process. The awarding of the tender by the Department to On-Point was unlawful, improper and constitutes maladministration.*

*On-Point paid more than R2 million directly to the Ratanang Family Trust from November 2010 to May 2012 in the form of “dividends” and loans. The amount of R1 million withdrawn 5 days after one of the kickbacks was paid under the back-to-back agreements, is further accounted for in the bank statements as having been paid towards the Ratanang Farm. Further amounts of R160 000 and R100 000 are reflected as having been paid in respect of the “Sandton Property” and “Sandowns Property”, respectively. Payments were also made to Tshiamo Dichabe, the Makatele Family Trust, Guilder Investments and the Gwangwa Family Trust (former and current shareholders of Guilder Investments, which is the sole shareholder of On-Point).*

*The evidence of Mr Gwangwa in respect of how and by whom it was decided that On-Point should pay (monthly) dividends to the Ratanang Family Trust and make payments to the Gwangwa Family Trust (via Guilder Investments) furthermore supported the allegation that the Trusts were probably used as vehicles for the transfer of funds obtained through an unlawful process.*

*As the main source of income of On-Point during this period was the payments made to it by the Department in terms of the agreement and On-Point owed its existence as a profit making establishment that could declare regular dividends thereto, the Ratanang Family Trust as one of two shareholders of Guilder Investments (as the holding company), accordingly benefitted improperly from the*

*unlawful, fraudulent and corrupt conduct of On-Point and maladministration of the Department.*

*In terms of the provisions of section 38 of the PFMA, it was expected of the HOD to act in the best interests of the Department and to ensure that the procurement process complied with the provisions of section 217 of the Constitution, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations and directives, and other relevant legislation and policies.*

*The HOD conceded during the investigation that as the accounting officer of the Department, he was ultimately responsible for the procurement of the services of On-Point. He also agreed that it was expected of him to consider the minutes of the tender committee meetings and the disqualification and recommendations of bidders.*

*No indication could be found during the investigation that the HOD applied his mind to the disqualification of bidders. He made no effort to ensure that the awarding of the bid to On-Point was in accordance with the principles of a system that promotes competition and cost effectiveness in the interest of the Department and the public. The HOD also could not provide any satisfactory explanation for his failure to act in accordance with the resolution of the BAC that the price on certain items had to be negotiated with On-Point, which was recorded in the Minutes of the relevant BAC meeting.*

*The conduct of the Department, specifically that of Mr Letebele the HOD and the BEC and BAC failed to meet the standard stipulated under the PFMA, particularly section 38, thereof and relevant Treasury Regulations, inclusive of Regulation 16A6, read with National Treasury's Supply Chain Management Guide for Accounting Officers. The conduct was accordingly unlawful, improper and constitutes maladministration."*

#### **8.11.4 "To Be Or Not To Be In Conflict" Report Number 9 of 2011/2012**

- 8.11.4.1 This is a report of the Public Protector issued on 28 September 2011 in connection with a complaint lodged against the former Director-General of the Department of Labour, Mr Jimmy Manyi. In this complaint it was alleged that there was a conflict of interest between Mr Manyi's public duties as the Director General of the Department



of Labour and his private duties as the President of the Black Management Forum (BMF)

8.11.4.2 It was further alleged that as the Director-General of the Department of Labour, Mr Manyi was constitutionally obliged to execute loyally the lawful policies of government and is required to act in accordance with the values and principles that govern the public administration. In addition, he was required to serve the public impartially, fairly, equitably and without bias.

8.11.4.3 **The Public Protector considered the following issues:**

*“Did a conflict of interest exist between Mr Manyi’s public duties and responsibilities as the Director General of the Department of Labour and his private interests as the President of the Black Management Forum;*

*If the above is answered in the affirmative, the next issue for consideration is whether such a conflict was appropriately managed by the relevant authorities of the Department of Labour;*

*Did a conflict of interest exist between Mr Manyi’s public duties and responsibilities as the Chief Executive Officer of the Government Communications and Information Systems and Cabinet Spokesperson and his private duties and interests as President of the BMF; and*

*If the answer to the above is in the affirmative, the next issue for consideration is whether there is an appropriate remedial action to be taken by the relevant authorities of the Government Communications and Information Systems to address the conflict of interest.”*

8.11.4.4 **The Public Protector found *inter alia* that;**

***“With regard to Mr Manyi’s previous position as the Director General of the Department of Labour, the Public Protector’s finding was that:***

*There was a conflict of interest between Mr Manyi’s personal interest in the BMF and his duty towards the Department of Labour. As a senior public official, he failed to comply with the Public Service Code of Conduct and the Rules of the Public*

*Services Commission: Managing Conflicts of Interest Identified through the Financial Disclosure Framework for Senior Managers (the Rules) which required him to manage the conflict effectively by excusing himself from certain duties and responsibilities that resulted or would have resulted in him being influenced by this conflict;*

*The former Minister of Labour, Mr Mdladlana, failed to comply with the relevant provisions of the Code of Conduct and the Rules that required him to manage effectively the said conflict of interest as the relevant Executive Authority of the Department of Labour.*

***With regard to Mr Manyi's current position as the Chief Executive Officer of the Government Communications and Information Systems and Cabinet Spokesperson, the Public Protector's finding was that:***

*A perceived conflict of interest existed between these positions and his position at the BMF which could lead to an actual conflict of interest if not properly and effectively managed by the relevant Executive Authorities in accordance with the Rules, the Code of Conduct and the Financial Disclosure Framework (FDF)."*

**8.11.5 Report of the Public Protector on an investigation into allegations of improper conduct by the former Chairperson of the Board of Directors of Eskom Holdings Limited, Mr Valli Moosa, relating to the awarding of a contract: Report Number: 30 of 2008/2009.**

8.11.5.1 This is a report of the Public Protector issued on 18 February 2009 in connection with allegations of improper conduct by the former Chairperson of the Board of Directors of Eskom Holdings Limited, Mr Valli Moosa, relating to the awarding of a contract.

8.11.5.2 It was alleged that a contract for the construction of boiler works for new coal fired power station to be built in Lephalale area, known as Medupi Power Station, was awarded by Eskom to a company in which the African National Congress had an interest. At the time of the awarding of the contract, Mr Valli Moosa was the Chairperson of the Eskom Board of Directors, but also a member of the National Executive Committee of the ANC and therefore, so it was alleged, had a conflict of interest.



#### 8.11.5.3 The Public Protector found *inter alia* that:

*“There was a conflict between the personal interest of the former Chairperson of the Eskom Board of Directors, Mr V Moosa, in the African National Congress and his duty towards Eskom at the time when the Board resolved to award the Medupi Boiler Contract to the Hitachi Consortium, in which the ANC has an interest;*

*Mr Moosa failed to manage his said conflict of interests in compliance with the Conflict of Interest Policy of Eskom and therefore acted improperly;*

*The contract that was awarded to the Hitachi Consortium was not in any way affected by Mr Moosa’s improper conduct;*

*The awarding of the contract by Eskom to an entity in which the ruling political party has an interest was not unlawful; and*

*It is desirable that the conducting of business between government institutions or public entities and political parties should be regulated by legislation”*

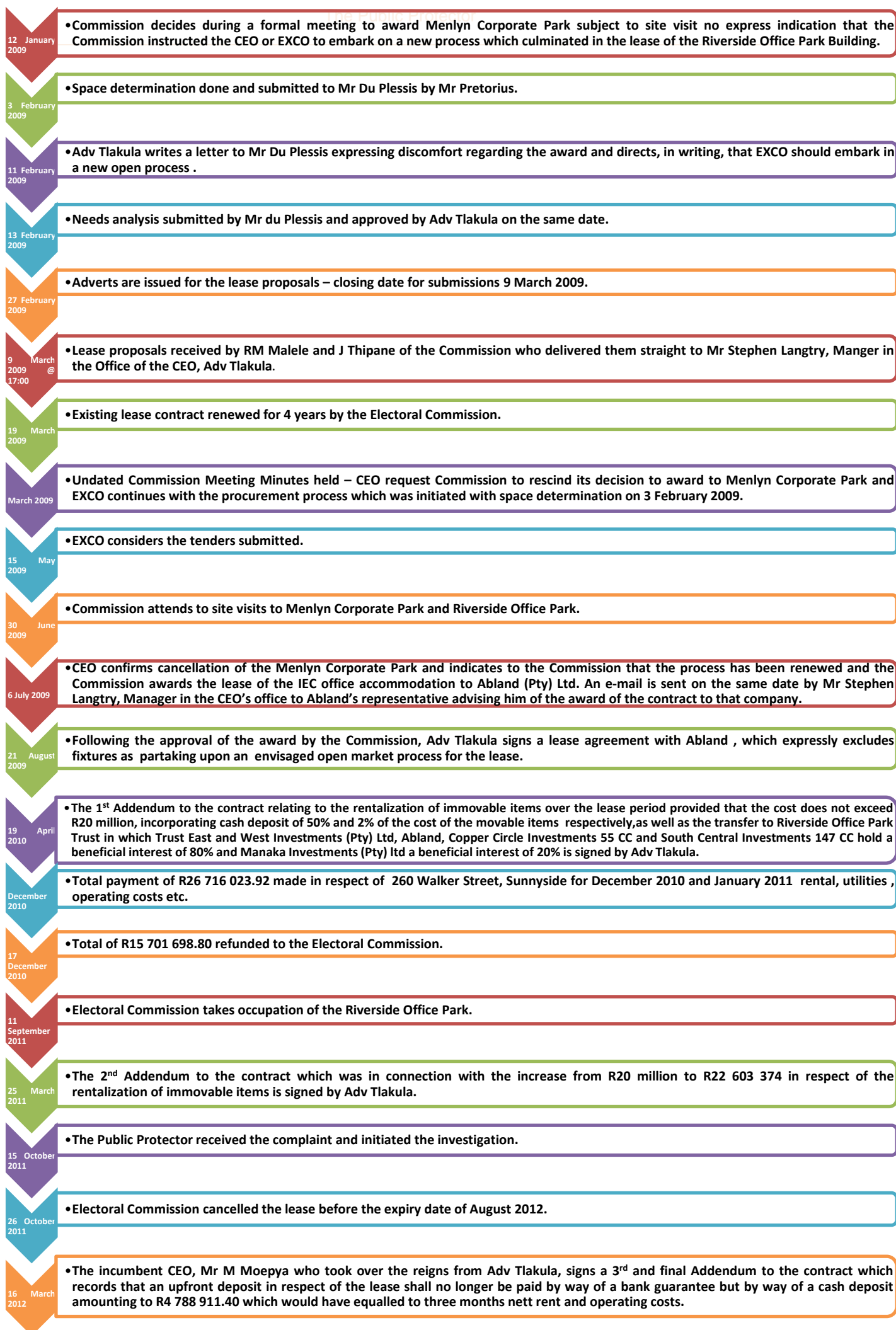
## 9. THE ANALYSIS AND CONCLUSION

### 9.1 The key legal issues requiring determination

9.1.1 The key legal issues requiring determination related to the procurement authority and process, turnkey solution, advance payments, conflict of interest and lines of accountability for Commissioners and the Commission’s Chief Electoral Officer. The law relating to these issues needed to be applied to the facts as found on the basis of the accepted evidence.

9.1.2 The process of procuring accommodation for the Commission should have been guided by the Constitution, the Preferential Procurement Policy Framework Act, the Public Finance Management Act, Treasury Regulations and related prescripts and internal Supply Chain Policies of the commission. Collectively, these require a competitive, cost-effective and fair bidding process. Deviations are allowed under strict conditions, which include urgency and a sole supplier situation.

9.1.3 The flow-chart below illustrates a summary of the sequence of events.



- 9.1.4 Though the needs analysis was compiled there were no specific reasons provided why this process was managed by the office of the then CEO and her Deputy, Mr Norman du Plessis.
- 9.1.5 The Request for Proposal procurement process used by the Electoral Commission for the Riverside Office Park was inappropriate as it was in violation of their SCM policy, PFMA and Treasury regulations which provides that in respect for amounts in excess of R100 000 to be subjected to a tender process of procurement.
- 9.1.6 The advertisement did not follow both the Supply Chain Management Policy of the Commission as well as the PFMA and Treasury Regulations in that it was advertised for less than the minimum of 14 days as required by the Electoral Commission procurement policy and less than the minimum of 21 days as required by the Treasury Regulations. Further thereto, the advertisement did not specify the evaluation criteria to be used in the evaluation of the bids in line with the requirements of the PPPFA.
- 9.1.7 There are further no specific reasons why the tender process as provided for in the Electoral Commission procurement policy, The Treasury Regulations and the PFMA was not followed in the procurement of the Riverside Office Park.
- 9.1.8 As far as compliance with the SCM legal framework, Treasury Regulations, PPPF and other prescripts are concerned the Auditor General already has made a finding against the Electoral Commission for non-compliance as set out in their 2011 Annual Report.
- 9.1.9 From the evidence gathered during the investigation it is evident that the turnkey proposal was not advertised rather a proposal was sought.
- 9.1.10 The Commission approved the appointment of Abland (Pty) Ltd to provide accommodation for the Electoral Commission.
- 9.1.11 The EXCO which is chaired by the CEO was involved in the processes of evaluation and the adjudication of the bids received and Adv. Pansy Tlakula was part of this process.

- 9.1.12 Though Adv. Tlakula is not a director in Manaka Properties the fact that a common interest exist between her and Mr Mufamadi suggests that her objectivity may have been compromised in respect of the evaluation process.
- 9.1.13 The addenda to the agreement between the Electoral Commission and Riverside Office Park signed by Adv. Tlakula and Mr Moepya were never brought before the Commission for approval.
- 9.1.14 The information provided and evidence submitted by the officials of the Electoral Commission is generally consistent with the relevant documentation that was reviewed and considered during the investigation.
- 9.2 The propriety of the accommodation procurement process: The level of the involvement of DPW in the process of securing property to lease for Electoral Commission accommodation.**
- 9.2.1 Ordinarily, DPW manages procurement for organs of state while the role of the organs of state needing the building is restricted to demand management and appropriate budgeting. The DPW is given mandate in respect of the needs of Provincial Government Departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law according to Schedule 4 of the Constitution of the Republic of South Africa.
- 9.2.2 With regard to the relocation of the Electoral Commission, the DPW was not involved in the process of the Electoral Commission obtaining alternative accommodation. This was based on the correspondence from the DG of the DPW in 1997 not to be involved in the Electoral Commission obtaining of accommodation.
- 9.2.3 In a letter signed by the Director General of the department of Public Works on 11 December 1997, the DPW stated that as from 01 January 1998, officials of the Electoral Commission would be dealing directly with Ampros regarding the occupation of 260 Walker Street, and their future requirements and that DPW would no longer liaise on behalf of the Electoral Commission. It can be reasonably concluded that the Electoral Commission used this confirmation directly solicit accommodation for the national Electoral Commission office in 2010.

- 9.2.4 The Electoral Commission as a Constitutional State Institution set in terms of section 181(f) of the Constitution and subject to the provisions of section 181 (2) of the Constitution, which states that these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. Section 16.7.4 of the Treasury Regulations of 2012 further states that 'The accounting officer or accounting authority of an institution may, for the purpose of conducting the institution's business, enter into an operating lease transaction without any limitations'.
- 9.2.5 Based on the law as espoused above, there is no legal requirement for the Independent Electoral Commission to include the DPW in its procurement of leased property. The involvement of the DPW in the case in point accordingly would have been a matter of choice rather than a legal compliance issue.
- 9.3 The Needs Analysis and the Budget for the procurement of the Riverside Office Park**
- 9.3.1 The SCM guide requires that as part of the strategic plan, the resources required for the fulfilment of its obligations should be clearly analysed. This includes a detailed needs analysis of the goods, works and services required.
- 9.3.2 The emphasis is thus on first determining the full nature and extent of the need required prior to initiating the procurement process. The specifications of goods required must be determined through a comprehensive needs analysis, taking into account aspects such as budget and the strategic objectives of the institution concerned.
- 9.3.3 According to the response from Mr Moepya, the Electoral Commission included the relocation to Centurion in its 2007/ 2008 submissions and approved by the Commission before they were sent to National Treasury.
- 9.3.4 With the absence of the MTEF report that indicates the amount that was budgeted for by Electoral Commission in respect of the move we are unable to confirm whether the relocation was budgeted for and if the amount was within the approved budget.
- 9.3.5 Regulation 11(a) of the Regulations issued in terms of the Preferential Procurement Policy Framework Act, 2000, provides that an organ of state must, prior to making an

invitation for tenders properly plan for and as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made.

9.3.6 In the absence of the 2010/2011 MTEF we are unable to confirm if indeed this was budgeted for.

**9.4. Deviation from prescribed SCM processes in respect of the utilization of a Request for Proposal in the procurement of the Riverside Office Park**

9.4.1 The Commission's EXCO did not follow a competitive bidding process in respect of advertising for the Electoral Commission office accommodation in line with the Electoral Commission procurement policy where amounts above R100 000 should be subjected to a tender process.

9.4.2 According to the Electoral Commission procurement policy, goods and services with a rand value below R100 000 excl. VAT are normally procured by means of electronic or manual quotation. In respect of goods and services with a rand value above R100 000 excl. VAT the Procurement Committee recommends to the CEO whether tenders, quotations or procurement should be used to procure the goods or services.

9.4.3 From the review of the Electoral Commission procurement policy, there is a process that must be followed in respect of tenders and/or procurement. Further thereto, the procurement according to the policy covers issues of bidding on auctions, which was not applicable in this case.

9.4.4 Furthermore, values above R100 000 should then follow a comprehensive competitive bidding tender process which was not followed in this case. It is therefore clear that Electoral Commission did not follow its own procurement policies when advertising for office accommodation. A request for proposals as opposed to a comprehensive competitive bidding tender process was followed.

9.4.5 The fact that the advertisement for the Electoral Commission building was issued as a request for proposals as opposed to a comprehensive competitive bidding tender process in line with Electoral Commission procurement policy is therefore irregular and constituted maladministration.

- 9.4.6 There was no motivation from Electoral Commission to deviate from a tender process in line with Treasury Regulations.

**9.5. Deviation from SCM process in respect of the number of days**

- 9.5.1 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.

- 9.5.2 The Treasury Regulations found 16A.3.2 requires 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...”*

- 9.5.3 According to the Treasury Regulations, bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine.

- 9.5.4 The Electoral Commission procurement policy provides for 14 days for closing of tenders as follows: “Unless otherwise determined by the CEO, the minimum period for the closing of tenders is 14 ordinary days”.

- 9.5.5 The Electoral Commission invitation for proposals for office accommodation needs was placed and/or published in Sowetan, Pretoria News, the Star, Beeld and the Citizen newspaper publications, the bid was not advertised in the government tender bulletin.

- 9.5.6 Further, the first day of placing the adverts in the newspapers above with the exception of the Beeld was on 27 February 2009. The one for the Beeld was placed on 02 March 2009.

- 9.5.7 The closing date on the newspaper articles was indicated as 09 March 2009. This resulted in 11 days and 7 ordinary days in respect of Sowetan, Pretoria News, the Star and the Citizen and 8 days and 6 ordinary days in respect of the Beeld. This is contrary to treasury regulations as well as the provisions of the Electoral Commission SCM policy.
- 9.5.8 The SCM Guide at paragraph 4.7.5.1 notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process but must act in a manner that is in the best interest of the State.
- 9.5.9 The SCM Guide defines an “emergency case” as –
- “A case where immediate action is necessary in order to avoid a dangerous or risky situation or misery.” (Emphasis added).”*
- 9.5.10 The fact that the advertisement for the Electoral Commission building was not advertised in the government gazette and for a minimum number of 14 days in line with Commission’s procurement policy is irregular and constituted maladministration.
- 9.5.11 There was no motivation from Electoral Commission to publish the advert in other mediums excluding the government gazette and for a period less than the required days.

## **9.6. Deviation from the SCM process in respect of the process of evaluation**

- 9.6.1 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A.3.2 which reads as follows:
- “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: –*
    - (i) demand management;*
    - (ii) acquisition management;*



- (iii) *logistics management;*
- (iv) *disposal management;*
- (v) *risk management; and*
- (vi) *regular assessment of supply chain performance.”*

9.6.2 The Evaluation Committee is covered under paragraph 4.4 of the policy and according to the policy an Evaluation Committee shall be constituted upon the closure of each and every tender or for any quote or bid exceeding R100 000-00 (One hundred thousand rand). We found no evidence during the investigation that an Evaluation Committee was constituted in line with this provision. This proposal was evaluated by the EXCO of the Electoral Commission.

9.6.3 The evaluation criterion was not set out in the advertisement in line with the PPPF Act as well as the Commission's Procurement requirements. The 90/10 evaluation criterion was only introduced and applied in respect of the final two proposals. This meant that the comparison between the bids received was arbitrary.

9.6.4 The requests for proposals were evaluated by the EXCO contrary to the Electoral Commission Procurement Policy and Procedures which provides for the Evaluation Committee as well as the Procurement Committee to be involved.

9.6.5 The involvement of EXCO chaired by Adv. Tlakula in the evaluation process meant that her objectivity and independence may have been compromised based on the apparent common directorship between her and Hon. Mufamadi in Lehotsa Investments.

## **9.7. The legitimacy and justification for a deviation from the prescribed tender process**

9.7.1 Organs of state should, where urgency dictates a deviation from procurement procedures, carefully consider the value and lengths of contracts concluded in order to address only the immediate urgency. In this way on-going needs and requirements must as far as possible and where appropriate, be met by way of public tender procedures.

- 9.7.2 Regulation 16A6.4 of the Treasury Regulations provides that if in a specific case it is impractical to invite competitive bids, the accounting officer 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.

#### **9.8. Incorrect capturing of the information in respect of Mookoli Properties**

- 9.8.1 With respect to Mookoli Properties, it was noted that the rental on occupation in respect of approximately 9000m<sup>2</sup> was captured as R120 per square meter. Furthermore, occupation was indicated that it would be in October 2010 in the minutes of EXCO of 19 June 2009.
- 9.8.2 This is contrary to their proposal as well as the evaluation sheet in Table 2 in paragraph 8.10 above that indicated the rate per square metre as R104.92m<sup>2</sup>.
- 9.8.3 Furthermore the evaluation sheet also indicated the occupation date as 01 April 2010 contrary to the October 2010 indicated on the minutes of meetings.
- 9.8.4 The indication of the incorrect information in the minutes of EXCO is misleading and had the effect of disadvantaging the Mookoli Properties especially in terms of the price proposed.

#### **9.9. Deviation in respect of date of occupation**

- 9.9.1 The Electoral Commission indicated in their advertisement that the date of occupation had to be April 2010 and given the pending election any later date would be problematic.
- 9.9.2 The date of occupation as indicated in the proposal was one of the criterion used as per the evaluation sheet in Table 2 in paragraph 7.10.1 above.
- 9.9.3 Abland indicated the date of occupation as 01 April 2010 in their proposal. This would have been used as a critical evaluation criterion given the election. This was further emphasised in the advertisement by Electoral Commission.
- 9.9.4 This date was however subsequently changed to 01 August 2010 during the presentations and documented in the EXCO minutes of 19 June 2009.

- 9.9.5 However according to Electoral Commission's confirmation they took occupation of the building on 13 September 2010 approximately five months after the anticipated date.
- 9.9.6 This is highly irregular and was not consistent with SCM process and disadvantaged other bidders such as Mookoli Properties and others who did not submit and/or who were rejected on the initial evaluation because occupation in their proposals was post April 2010.
- 9.10. Deviation from delegation of authority in respect of the signing of the addenda**
- 9.10.1 According to paragraph 4.2 (a) of the Electoral Commission procurement policy, the CEO procures goods and services for the Electoral Commission and arranges the hiring of goods and services or the acquisition or granting of any right for or on behalf of the Electoral Commission, and disposes of movable assets subject to compliance with the requirements of Section 12(2) (c) of the Electoral Commission Act, Section 38(a) (iii) of the Public Finance management Act, the Treasury regulations and the Act.
- 9.10.2 In respect of goods and services in excess of Two Million Rand (R2 000 000), the CEO does so after consultation with the Commission.
- 9.10.3 The CEO entered into the agreement with Riverside Office park or relevant representation on: 24 August 2009 after the approval by the Commission of the appointment of Abland.
- 9.10.4 Subsequent to the agreement, the current and former CEO signed addenda that changed the initial agreement and had financial implications beyond R2 million delegations.
- 9.10.5 This included the introduction of 2% handling fees and 50% cash deposit for the procurement of movable assets. A total amount of R58 578 366.08 has been spent in respect of Electoral Commission assets without the ratification by the Commission.

#### **9.11. The Assets of the Electoral Commission purchased through the turnkey solution**

9.11.1 Total amount of R58 578 366.08 was paid to Riverside Office Park Trust for the period 2010/2011 in respect of the purchase of Electoral Commission assets through the turnkey solution.

9.11.2 We found no evidence that Riverside Office Park subjected the procurement of these assets to any competitive process in line with their proposal which stated that:

a. *“The items selected from this schedule would be tendered to the open market to ensure optimum cost is obtained for Electoral Commission’s benefit.”*

9.11.3 When reviewing the assets and supporting documentation we found no evidence that they were tendered to in the open market to ensure optimum cost is obtained for the Electoral Commission benefit. With respect, it is Electoral Commission assets and not the service provider’s assets and as such, the Electoral Commission had a duty to ensure that a competitive bidding process was embarked upon in the procurement of those assets and they cannot shift the blame to the service provider.

9.11.4 We found no evidence that the purchase of assets of the Electoral Commission through the turnkey solution was approved by the Commission.

9.11.5 In response to the request for minutes of meeting in respect of the presentations. Mr Moepya stated that:

*“Minutes of the contents of the presentations were not kept nor were the proceedings recorded and only the decisions were minuted. This was the standard practice for EXCO and Commission meetings at the time. It is confirmed that in general the companies spoke to their tender submissions and the matter of a turnkey solution were indicated by both Menlyn Corporate Park and Abland. The turnkey solution was, however, not discussed and did not form part of the adjudication of the proposals. The two acceptable proposals (Menlyn and Abland) were favoured on the basis that they fully met the advertised requirements and were then evaluated in terms of the provisions of the PPPFA. The two options, without an indication of preference, were thereafter submitted to the Commission – after they had conducted site visits - for a decision. The decision of the Commission complied with the provisions of the PPPFA and the proposal of Abland as the cheapest and highest scoring option was approved.”*

- 9.11.6 The Commission on 06 July 2009 approved the appointment of Abland (Pty) Ltd to provide the Electoral Commission with accommodation for the national office.
- 9.11.7 Based on the 90:10 points scoring the two proposals were ranked as Abland (Pty) Ltd 92.5 and Menlyn Corporate Park as 86.018. The Commission was requested to make a decision on the relocation of the national office.
- 9.11.8 The introduction of the turnkey solution that was not approved by the Commission is therefore irregular.
- 9.11.9 Mr du Plessis indicated in the needs analysis that it may be important that they incorporate as much of the relocation and settlement activities in as few contracts as possible, if not in a single contract, provided it is sensible and economical.
- 9.11.10 Based on the review of fees charged in Table 15 above the fees charged by Riverside Office Park exceed the 2% provided for in the Addendum.
- 9.11.11 Electoral Commission indicated in their response that total handling charges over and above the factory cost varied between 5% and 12.5% which was to be added to 2% by the developers this resulted in the handling fees in the region of 15% of cost.
- 9.11.12 These additional costs were not provided for in the lease agreement or the subsequent Addenda.
- 9.11.13 Whilst these amounts may be a cheaper alternative to paying ordinary prices, as indicated in their response, the competitiveness of the prices was never tested in that they were not subjected to that process.
- 9.11.14 The cost involved to purchase furniture exceeded one million in other instances and should have been subjected to a competitive process.
- 9.11.15 It is important to note that even in those instances where a situation does not warrant the use of tender procedures, it does not mean that an organ of state may do away with a competitive procurement process altogether. Organs of state are still required in order to ensure compliance with the principles of competitiveness and cost effectiveness in section 217(1) of the Constitution, to procure goods or services on the best possible terms.

9.11.16 The procurement of assets through the turnkey solution did not comply with the requirement of fairness, equitability and transparency.

**9.12. The Electoral Commission did not record and report the reasons for deviating from a competitive bidding process as required by prescripts**

9.12.1 The National Treasury Practice Note No 8 of 2007/08, which came into effect on 1 December 2007 prescribes the following in paragraph 3.4 regarding any transaction which exceeds R500 000. (VAT included):

*“3.4.3 Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his / her delegate. Accounting officers /authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.” (Emphasis added)*

9.12.2 From the available evidence, including an interview conducted it is evident that the Electoral Commission did not see this as a deviation and as such it was not recorded in their records.

9.12.3 The purpose of the reporting requirement is clearly to provide the National Treasury, as the custodian of public funds, with an opportunity to note, evaluate and, if necessary, intervene in the procurement process. The failure to report the deviation therefore accordingly deprived the National Treasury from the intended opportunity.

**9.13. The payment of an amount of R6 753 880 whilst the building stand vacant**

- 9.13.1 There is no termination clause in place in the written agreements between Electoral Commission and the landlord at Sunnyside. The fact that Mr du Plessis agreed that the Electoral Commission would be responsible for the remainder of the lease period was problematic.
- 9.13.2 Mr du Plessis in an email indicated that: *“The Electoral Commission will obviously remain responsible for all its contractual obligations for the remainder of the lease period until 2012 unless and until otherwise agreed. In the same vein, the contractual obligations of the lessor must also continue until termination of the principal lease agreement.”*
- 9.13.3 Though the amount paid by the Electoral Commission to the landlord at 260 Walker Street was eventually paid back in February 2012 there is no justification to why the amount was paid in the first place in that the Electoral Commission could have negotiated a termination clause with the landlord.

**9.14. The publishing of the award of the proposal to Abland**

- 9.14.1 The Electoral Commission indicated in its notice of award that: *“The Electoral Commission has finalised the adjudication process and contractual obligations in respect of the invitation for proposal (ref Electoral Commission/SS-03/2009) for turnkey office accommodation. A monthly office lease of approx. R1.5million has been entered into with the Riverside Office Park Trust.”*
- 9.14.2 The contents of the Electoral Commission advertisements were as follows:
- “The Electoral Commission (Electoral Commission) hereby invites suitably qualified suppliers to supply the commission with: Office Accommodation required in the Pretoria/ centurion area of Tshwane.”*
- 9.14.3 Nowhere in the Electoral Commission initial advertisement did they propose a turnkey solution. Therefore, the publishing of an award in respect of office accommodation for the Electoral Commission using a turnkey office accommodation is grossly misleading as their did not advertise their need for accommodation under a turnkey solution.

**9.15. The allegation of conflict of interest and independence of Adv. Tlakula arising from a close business relationship between her and Hon Thaba Mufamadi, MP, an Executive Chairman and co-director with Adv. Tlakula in Lehotsa Investment (Pty) Ltd who also happens to be a Chairperson of Manaka Property Investments that holds a 20% shareholding in Abland, the company awarded the contract for the provision of the Riverside Office Park leased accommodation, for the Electoral Commission**

9.15.1 Section 217 of the Constitution of South Africa provides guidance on procurement for all organs of state and 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.*”

9.15.2 The 2005 Procurement Policy and Procedures of the Electoral Commission state that the Electoral Commission is an organ of state as defined in the Constitution and the Public Finance Management Act.

9.15.3 In terms of the Electoral Commission Act the Chief Electoral Officer:

- a) shall be the head of the administration of the commission;
- b) shall be the accounting officer of the commission for the purposes of the exchequer act, 1975 (act 66 of 1975), and shall cause the necessary accounting and other related records to be kept; and
- c) may exercise all such powers and shall perform all such duties and functions as may be entrusted or assigned to him or her by the commission or this act or any other law.

9.15.4 Section 20.3 of the Treasury Regulations state that the accounting officer must ensure that the supply chain management gives effect to the core principles of behaviour as envisaged by the five pillars of procurement which are fairness, equity, transparency, competitiveness and cost effectiveness. Fairness includes compliance with ethical standards, recognizing and dealing with conflicts of interest or the potential thereof.

9.15.5 Therefore the accounting officer has a duty to eliminate actual and perceived threads to objectivity and independence.



- (a) The procurement policies and procedures of the Electoral Commission requires all parties are required to comply with the highest ethical standards in order to promote: Mutual trust and respect; and
- (b) An environment where business can be conducted in a fair and reasonable manner and with integrity.

9.15.6 Furthermore it requires all officials / employees associated with procurement:

- (a) recognise and deal with conflicts of interest or the potential thereof;
- (b) deal with suppliers even-handedly;
- (c) provide all assistance in the elimination of fraud and corruption (as defined in the public service anti-corruption strategy); and
- (d) adhere to the instructions issued by the CEO.

9.15.7 The provisions of the policy are consistent with the requirements of the Electoral Commission's Act.

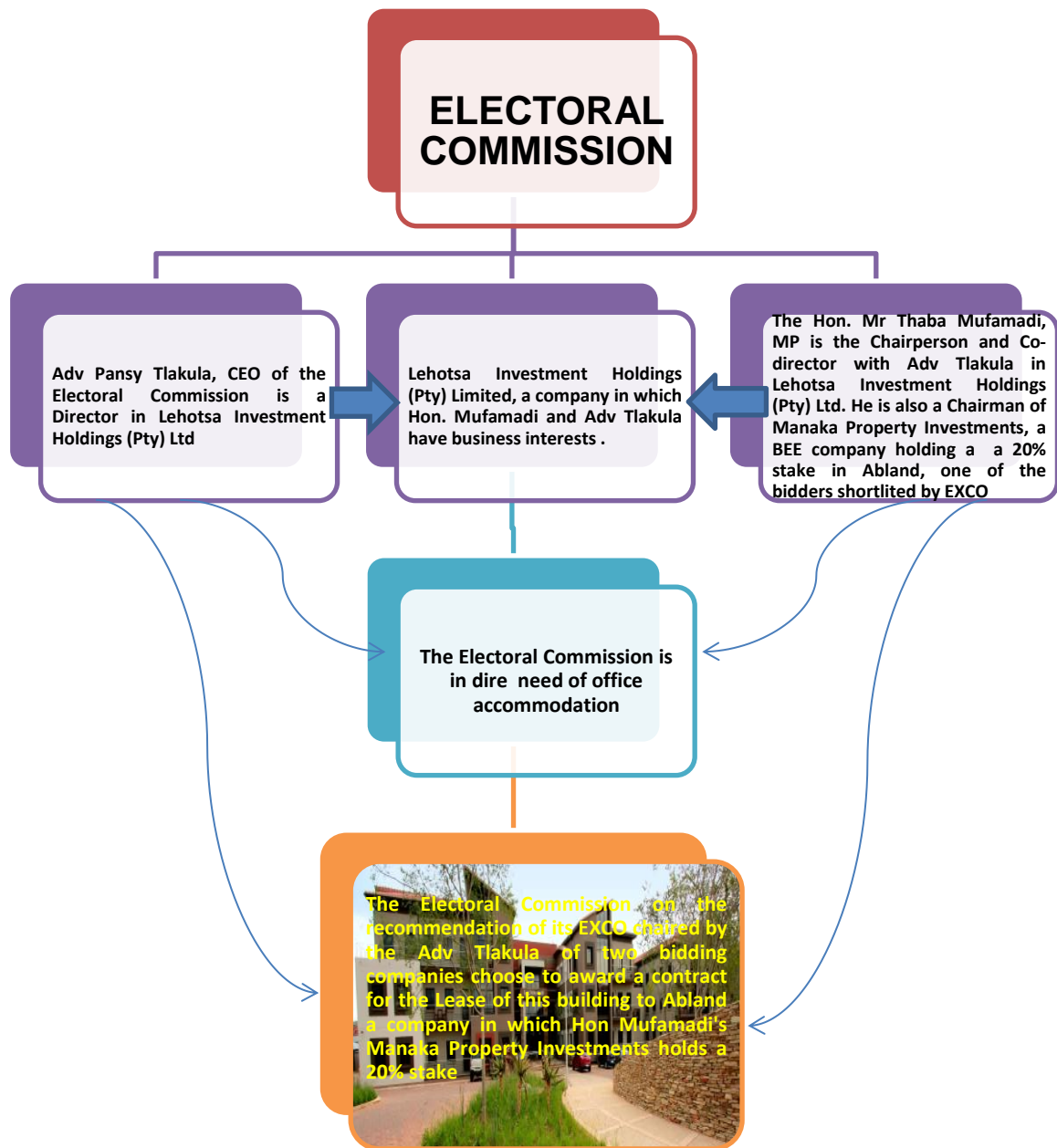
9.15.8 The policies and procedures state that where a possible conflict of interest arises or where an employee has or obtains a financial or other interest in a company or firm with which the Electoral Commission enters into a business transaction, or where an interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Electoral Commission as soon as it arises, and the employee must refrain from participating in any way in related business dealings.

9.15.9 Written disclosure is effected by the employee making an appropriate entry in a register kept for this purpose in the office of the CEO

9.15.10 In order to assess whether duty exists for the CEO to should have recused herself in the procurement process it is important to understand the relationships.

9.15.11 It is apparent from the information obtained during the investigation that the procurement process was managed from the office of the former CEO, Adv. Tlakula. This included the submission of the proposals that was handled by Mr Stephen Langtry from that office.

9.15.12 Below is a diagrammatic representation of the relationship.



9.15.13 The evaluation of the proposals was done by the EXCO which include and was chaired by the former CEO Adv. Tlakula.

9.15.14 Adv. Tlakula declared her interest in a company called Lehotsa Investment (Pty) Ltd where Mr Thaba Mufamadi is an Executive Chairman and co-director in the annual Electoral Commission declaration of interest forms as is standard practice and in conformity and compliance with the Public Service Regulations.

- 9.15.15 She however did not make this declaration at all the meetings which she attended when the EXCO was handling the evaluation of the bids as is required by the Commission's Procurement Policy and Procedures of 10 March 2005. No evidence could be found from the information obtained from Adv. Tlakula and the Electoral Commission's EXCO that there were financial and/or any other declaration of interest forms completed prior to the evaluation and adjudication by the EXCO in respect of the procurement of the Riverside Office Park.
- 9.15.16 Mr Mufamadi was indicated in the proposal from Abland as a Chairperson of a BEE partnering company, Manaka Property Investments (Pty) Limited with a 20% shareholding in Abland. This is a fact that officials from EXCO who evaluated and adjudicated the bids for the procurement of the Riverside Office Park should have picked up and at that moment, Adv. Tlakula should have done the right thing and fully declare her business relationship with Hon. Mufamadi in Lehotsa Investments, recuse herself from the meeting and allow the remaining members to discuss her declaration and decide whether she should participate in the proceedings going forward.
- 9.15.17 The Electoral Commission is an organ of state as stated in their procurement policies and procedures. Therefore, the accounting officer or accounting authority has a duty in law to procure goods and services according to a system which is fair, equitable, transparent, competitive and cost effective.
- 9.15.18 All employees of the Electoral Commission including the CEO have a duty where an interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Electoral Commission as soon as it arises, and the employee must refrain from participating in any way in related business dealings. Such interest in this instance may not be proven in fact but the existing business relationship through common directorship creates a perceived threat to independence and objectivity.
- 9.15.19 The only way that the CEO could mitigate and avoided this threat was through declaration of the relationship and recusal from the procurement process. By Adv. Tlakula's involvement in the procurement process involving a director where they have a common interest in Lehotsa Investment (Pty) Ltd, her independence may have been compromised.

## 9.16. Conflict of interests, The General Principles

- 9.16.1 The Public Protector and in her report issued on 18 February 2009 entitled, *“Report on an investigation into allegations of improper conduct by the former Chairperson of the Board of Directors of Eskom Holdings Limited, Mr Valli Moosa,”* relating to the awarding of a contract: *Report Number: 30 of 2008/2009* under the heading, *“Conflict of Interests: General Principles”* made the following observations about the conflict of interest;
- 9.16.2 The identification and management of a conflict between the personal interests of a decision maker in the private and public sector and that of the entity that he/she serves, has been the subject of much discussion and debate in academic, business and public administration circles for centuries.
- 9.16.3 Some writers on the issue claim that the identification and management of conflicts of interests is merely a part of sound and proper business ethics, which originated in the application of everyday moral or ethical norms to business and public service dealings, since times immemorial.
- 9.16.4 Currently, the global discussion on the prevalence and impact of conflicts of interests in the public service is more alive than ever. Wilson R Abney, in his paper entitled: *“A brief history of public service ethics in the United States: 1787-1997, 2007 Ethics Counts, LLC* for example, stated the following in this regard:

*“Every recent study of the American electorate has found that most citizens do not believe that government officials make decisions in the public interest. Instead, Americans are convinced that the campaign donations which politicians and political parties have solicited from, and which have been provided by special interest groups, are more important to the politicians and parties in deciding positions on issues of public policy than the achievement of the common good. Because people no longer trust the politicians, the politicians call the people ‘cynical’, but history and current events demonstrate that politicians have provided ample reason for the public’s lack of trust.”*

- 9.16.5 The sentiments referred to by Abney equally apply in many other parts of the world and some of it also finds expression in the views and perceptions of many South Africans.

- 9.16.6 M H Kanyane of the University of Limpopo and in his work, “Conflict of Interest in South Africa: Unravelling the revolving door” published in the October 2005 Journal of Public Administration, supports the notion that conflict of interest is becoming more and more prevalent in our present day society:

*“Its affects are disastrous to an institution or a department in as far as both finances and reputation risks are concerned. This obviously affects the country as a whole.*

...

*One of the achievements of the first term of the post-1994 era is the enactment, in the wake of ethical concerns, of legislation, codes of conduct, and the establishments of institutional mechanisms, as a basis for resolving ethical questions of governance. However, conflict of interests proved to be a resilient test to the government and contributed to corroding the moral and economic fabric of the country. In spite of these shortcomings, the institutional and legislative mechanisms put in place should be turned into potent weapons for combating conflict of interests.*

*The public is entitled to feel confident that their power or sovereignty is being exercised for their benefit. For as the famous counsel, Archibald Cox, has noted, the stability of government rests on the maintenance of public confidence. Both a free society and democratic government require a high degree of public confidence in the integrity of those chosen to govern.*

*However, the confidence is sometimes eroded by the appearance of a conflict of interest. For this reason, the ethical requirements for legislators, ministers and officials are apparent and imperative to build public confidence. In this way a politician or official who creates the appearance of a conflict of interest is simply inviting the closer inspection of his or her motive.” (Emphasis added)*

- 9.16.7 There are many different views on the definition of ‘a conflict of interest’. However the common theme present in all definitions relates to a clash between the official or business duties of the decision maker concerned and his/her personal interests.

- 9.16.8 According to Dr M J Mafunisa, Senior Lecturer at the School for Public Management and Administration at the University of Pretoria in his work, "Conflict of interest: Ethical Dilemma in politics and administration, South African Journal of Labour Relations": Winter 2003, stated that interest includes:

*"...all those influences, emotions and loyalties that could influence a public functionary and compromise the exercise of his or her competent judgment. Conflict of interest involves a clash between influences of this nature and the interests of the public that the functionaries serve."*

- 9.16.9 Judy Nadler and Miriam Schulman of the Markkula Center for Applied Ethics at the Santa Clara University in California,(see: [http://www.scu.edu/ethics/practising/focuseareas/government\\_ethics/introduction/conflicts](http://www.scu.edu/ethics/practising/focuseareas/government_ethics/introduction/conflicts)) give a very simple definition to the concept:

*"Conflict of interest occurs when an officeholder puts his or her personal or financial interest ahead of the public interest."*

- 9.16.10 They also hold the view that the law regulating conflict of interests is aimed at the perception as well as the reality, that a public official's personal interest may influence a decision. ***"Even the appearance of impropriety undermines the public's faith that the process is fair."*** (Emphasis added)

- 9.16.11 Dr Mafunisa (supra) supports this view, as follows:

*"The concept (of conflict of interests) is applicable not only to situations where a conflict of interest actually exists, but also to situations where it appears to exist. A charge of conflict of interest may arise not only when public duty clashes with private interest, but also when they appear to converge."*

- 9.16.12 Nadler and Schulman (supra) further stated in this regard that:

*"Another common misconception about conflicts of interest is that office holders are absolved of their responsibility merely by being transparent about their stake in the issue. **It is not sufficient for government officials to make conflicts public. They must take themselves out of the decision-making process altogether.**"* (Emphasis added)

9.16.13 The South African Public Service Commission (PSC) conducted a comprehensive study into the occurrence and management of conflicts of interest in the Public Service. In its report, issued in July 2006 and entitled, *'Report On Managing Conflicts Of Interest In The Public Service'*, Public Service Commission, July 2006, from page 15, the PSC referred to the generally accepted definition of a conflict of interest in the public service i.e. "a conflict between the public duties and private interests of a public official, in which the public official has private capacity interests which could improperly influence the performance of his/her official duties and responsibilities", and stated that:

*"The above mentioned is a rather narrow approach when looking at conflicts of interest. One needs to look at conflicts of interest more comprehensively. In this respect it needs to be mentioned that the interaction between the private and public sectors has made the issue of conflicts of interest much more complex. In recent years, especially in South Africa, a great velocity between the public and private sectors was evident. In South Africa, for example, the government promotes mechanisms such as Black Economic Empowerment. This interaction has given rise to the fact that whilst conflicts of interest in the past focused on traditional sources of influence such as nepotism, gifts and hospitality, conflicts of interest in recent years are more directed on:*

- *a public official having private business interests in the form of partnerships, shareholdings, board membership, investments and government contracts;*
- *a public official leaving to work in a private company or a Chief Executive Officer taking up a key position in a government department with a commercial relationship with his/her former company; and*
- *a public official having affiliations with other organizations."*

9.16.14 In dealing with the question as to whether it is wrong to have a conflict of interests, the Report of the PSC makes the following important observation:

*"There are many misconceptions about conflicts of interest. Some of them are that it is something to be ashamed of and should be hidden or ignored. In terms of media commentary on the matter it would appear that in the South African context we have fallen into these misconceptions. Conflicts of interest are not wrong in themselves. It is how they are managed that is important. In this regard it should be noted that*



*public officials are also private individuals, and there will be occasions when an official's own private interests may come into conflict with his/her public duty which is to put public interest first at all times. Where reasonably possible, a public official should avoid conflicts between his/her personal interest and the public interest. However, where conflicts of interest cannot reasonably be avoided, an official has a responsibility to identify and effectively manage any conflicts of interest he/she may have, in consultation with his/her supervisor."* (Emphasis added)

9.16.15 The King Report on Corporate Governance for South Africa-2002 from page 47 stated the following in regard to conflict of interests of directors of companies:

*"The personal interests of a director, or persons closely associated with the director, must not take precedence over those of the company and its shareowners. A director should avoid conflicts of interest, even when these could only be perceived as such. **Full and timely disclosure of any conflict, or potential conflict, must be made known to the board.** Where an actual or potential conflict does arise, on declaring their interest, a director can participate in the debate and/or vote on the matter, but must give careful consideration to their own integrity in such circumstances and the potential consequences it may have for the board, company and themselves personally."* (Emphasis added)

9.16.16 In his book "The Corporate Citizen" published by Penguin Books, South Africa, 2006 and from page 51, Mervyn King SC dealt extensively with the duties of good faith, care, skill and diligence of directors of companies<sup>11</sup> and the fact that courts in the twenty-first century are applying more objective tests to compliance with these duties. The modern test therefore, according to King, is what a reasonable director who acted honestly, diligently and with skill would have done in the circumstances of each case.

9.16.17 King emphasized that the average director cannot be expected to apply these legal tests in the heat of the boardroom. This is particularly true when one considers the different aspects of these duties gleaned from American, English and Commonwealth jurisprudence.

9.16.18 In order to address this dilemma, King developed 10 pertinent questions that every director should ask himself/herself in regard to the issues before the board. The very first question is:



***“Do I as a director of this board have any conflict in regard to the issue before the Board?”***

9.16.19 As remote as the conflict might be, King recommends that it (the conflict) is disclosed. *“This disclosure is not the end to the enquiry. The following question should then be asked: ‘Should I excuse myself from the remainder of the board meeting or should I make my contribution, having regard to the fact that I was asked to be a member of the board either for my practiced ability or because of my representatively?’”*

9.16.20 The tenth question that King suggests a director should ask is:

*“Will the board be embarrassed if its decision and the process employed in arriving at its decision were to appear on the front page of a national newspaper?”*

9.16.21 With regard to Adv. Tlakula, it is not in dispute that she has a business relationship with Hon. Mufamadi by virtue of their co-directorship in Lehotsa Investments. What is in dispute is whether she should have declared this relationship prior to participation in the evaluation of bids for the procurement of Riverside Office Park building in which Hon Mufamadi had a 20% stake in one of the bidders, Abland by virtue of his Chairmanship of Manaka Holdings (Pty) Limited.

9.16.22 The Public Protector is of a firm view that Adv. Tlakula should have declared this relationship to the evaluation panel which was the EXCO in this regard and to the Commission and should not have participated in the evaluation process for the procurement of the building to protect the integrity of the process and to protect her own integrity as well. What would have been expected of her was to excuse herself from any deliberations or committee meetings connected with the procurement of the office accommodation when the name of Hon Mufamadi appeared from Abland’s bid documents.

9.16.23 The fact that she declared in the annual declaration forms, her interest in Lehotsa Investments was not enough as such an interest was not addressed in respect of this particular procurement. She should have known better that by virtue of her seniority in the Commission and that of EXCO, perceptions of conflict may be more readily and that their conduct therefore would be subject to greater scrutiny.

- 9.16.24 She would have been expected to disclose her interest in writing before each meeting of EXCO that was undertaking an evaluation of the bids where a question of entering into a contract was taken into consideration and such a disclosure should have been read out to the meeting and members of EXCO confirm that the declaration and engage in deliberations whether she should be allowed to participate or not participate under the circumstances.
- 9.16.25 With respect, a conflict of interest arises when one's personal interests or other interests affect, or could be perceived to affect, or has a potential to affect, one's objectivity and discretion and/or the objectivity and discretion of another person in performing his or her duties. Therefore, a conflict of interest may be an actual or potential, direct or indirect interest of an employee or a director in any business, entity, undertaking, or investment, as a shareholder, director, associate, member, adviser/consultant or in any other capacity.
- 9.16.26 Conflict situations are therefore not necessarily confined to interests in contracts or direct financial interests. Conflict of interest can thus arise in various situations. In her situation, Adv. Tlakula should have disclosed her interest whether she was of the belief that it existed or not existed, was direct or indirect and should have then withdrew from the procurement to allow the evaluation panel to consider if there was an existence of a conflict or not; was it direct or indirect, trivial or irrelevant and take a decision on whether Adv. Tlakula should participate in the proceedings or excused.

## **9.17. Analysis of responses to the Provisional Report of the Public Protector**

### **9.17.1 The procedural issues raised by the response of Adv. Tlakula**

- 9.17.1.1 The procedural issues raised by Adv. Tlakula in her response to the provisional report points to a failure to understand the Public Protector Act, its provisions and the application thereof. Her response which purports to rely on the Act and even suggest that the process followed in the investigation violated its provisions actually distorts the Act and its provisions which clearly envisage an inquisitorial process of an investigation. Adv. Tlakula's arguments regarding the investigation process applied in the investigation are clearly based on a misconception of the mandate, powers and functions of the Public Protector.

- 9.17.1.2 Section 7(1) (b)(i) of the Public Protector Act provides that, “the format and procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case.” [Emphasis added]
- 9.17.1.3 The Public Protector knows of no provision in the Public Protector Act, rules of natural justice or any other law that justifies the expectations raised by Adv. Tlakula that she had to be informed of the investigation process to be followed and afforded an opportunity to put questions to witnesses that were interviewed during the investigation. The Public Protector had no obligation to present her investigation plan or the names of witnesses that were going to be interviewed prior to and/or during the investigation to Adv. Tlakula as that is for the Public Protector to determine and she had no obligation to disclose that information to Adv. Tlakula.
- 9.17.1.4 Adv. Tlakula’s expectations would have been accommodated in the event that the investigation was conducted by way of a subpoena directing witnesses to appear before the Public Protector as provided for in Section 7(5) of the Public Protector Act. The Public Protector investigation of this matter was conducted in terms of Section 7(4)(b) of the Act which provides that, “the Public Protector or any person duly authorized thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information on a matter being or to be investigated.” [Emphasis added]
- 9.17.1.5 As a consequence thereof, there was no need for the Public Protector to invoke her subpoena powers as the witnesses in the investigation including Adv. Tlakula cooperated with the Public Protector. Had the Public Protector been put in an untenable position of having to use her subpoena powers due to lack of cooperation from the witnesses, a formal hearing would have been held wherein oath or affirmation would have been administered and witnesses testified and examined by the Public Protector followed by Adv. Tlakula.
- 9.17.1.6 A list of relevant witnesses interviewed as determined by the Public Protector was provided to Adv. Tlakula in the Provisional Report. The Public Protector’s investigation process is regulated by sections 6 and 7 of the Act and none of the said sections refers to the requirements mentioned by Adv. Tlakula in her response to the provisional report.

9.17.1.7 Further thereto, Adv. Tlakula's contention that that the Public Protector did not apply the provisions of section 7(8) read with section 7(9)(b)(ii) of the Act in that she was deprived of her right to legal representation by ruling that her counsel could only "whisper" to her is misleading.

9.17.1.8 Indeed, section 7(8) of the Act provides that, any person appearing before the Public Protector by virtue of the provisions of subsection (4) may be assisted at such examination by an advocate or an attorney and shall be entitled to peruse such of the documents or records referred to in subsection (2) as are reasonably necessary to refresh his or her memory.

9.17.1.9 Nowhere in the Act did the Public Protector come across a provision that witnesses appearing before her should be represented by an attorney or advocate. There is therefore a distinction between legal assistance and legal representation for purposes of an investigation by the Public Protector. Section 182(1) of the Constitution confers the Public Protector with a power to investigate, to report on the findings of the investigation and to take appropriate remedial action. Therefore, the mandate, powers and functions of the Public Protector determined by section 182 of the Constitution and the Public Protector Act clearly prescribe a process that is inquisitorial (and not accusatorial) in nature.

9.17.1.10 Therefore, the Public Protector's investigation process was very comprehensive and in line with the inquisitorial character of her approach as an ombudsman institution. Adv. Tlakula was informed of the allegations and what the focus of the investigation was.

## **9.17.2 The issues relating to conflict of interest raised by the response of Adv. Tlakula.**

9.17.2.1 In her response Adv. Tlakula argued that there was no conflict of interest based on the fact that as a shareholder and director of Lehotsa Investment (Pty) Limited, she derived no direct or indirect financial interest in the lease concluded by the Commission and the Riverside Office Park Trust. She went further and stated that she is not a director or shareholder of Manaka, a company which has a stake in Abland, the company that was awarded the lease contract. She further stated that

Lehotsa is not in any way connected with Manaka by way of a subsidiary. The directors of Manaka do not have any fiduciary duty towards Lehotsa.

9.17.2.2 The Public Protector disagrees with Adv. Tlakula's interpretation and understanding of the conflict arising out of this business relationship. The evidence and information provided by Adv. Tlakula during the investigation clearly confirms without any doubt that Manaka Property Investments owns a 20% stake in the trust that owns the Riverside Office Park. According to the proposal submitted by Abland, the company that owns the building, Hon Thaba Mufamadi is listed as the Chairman of Manaka Property Investments and the Executive Chairman of Lehotsa Holdings.

9.17.2.3 On the other hand, Adv. Tlakula was at the time of the procurement the CEO of the Electoral Commission who played a critical role in the committee which evaluated the bids resulting in the awarding of the contract to Abland. It also came to light that she held a joint directorship with Hon Mufamadi in Lehotsa Investments with the latter being her Executive Chairman in that company. Therefore, there is an existence of a business relationship between Adv. Tlakula and Hon Mufamadi arising out of this joint directorship.

9.17.2.4 This business relationship was never disclosed by Adv. Tlakula to the Commission prior to participating in the evaluation of the bids for the procurement of the building as required in paragraph 4.4.2(c) of the Electoral Commission's Procurement Policy and Procedures approved by the Commission on 10 March 2005. Abland was one of the companies that submitted their bids that were recommended by the EXCO chaired by Adv. Tlakula as one of two companies that the Commission should consider to award the lease contract and ultimately, they were indeed awarded the contract.

9.17.2.5 Adv. Tlakula did not in her response dispute the evidence of Commissioners Bam and Mpumlwana who testified during the investigation that Hon Mufamadi was introduced to them by Adv. Tlakula as her business partner. If she introduced him as such, therefore she should have known that it would have been prudent of her to disclose such a business relationship prior to her participation in the evaluation process in respect of the procurement of the Riverside Office Park building immediately when the name of Hon Mufamadi appeared.

- 9.17.2.6 Further thereto and as she correctly declared her interests in Lehotsa in the Commission's annual declaration of interest forms, she would have been expected to declare to the evaluation panel that her Chairperson and co-director in Lehotsa Investments is listed in the proposal from Abland as a BEE shareholder by virtue of his Chairmanship of Manaka Investment Holdings which had a 20% stake in Abland and leave the meeting to enable the remaining members of the evaluation panel to deliberate on her declaration with a view to determining whether she would be precluded from participating in the valuation proceedings by reason of such a conflict.
- 9.17.2.7 Her averment that she knew of no policy that she breached thus suggesting that where non-compliance is visited with a sanction, such provisions require clarity so that those to whom it applies must know what is expected of them, Adv. Tlakula was not entirely honest. She has been holding the Executive position of heading the administration of the Commission for a while and the policies referred to in this report where formulated and adopted whilst she was at the helm. By virtue of her seniority at the Commission, she should have considered her own integrity and the potential consequences in the event that a conflict of interest appears to exist.
- 9.17.2.8 In her response, Adv. Tlakula relies on the provisions of the Commission's Employee Policy Manual in so far as it relates to conflict of interest and ignores the fact that her own Procurement Policy requires that she declares her interest at each meeting of the evaluation committee. She admitted that EXCO which was under her chairmanship undertook the evaluation of the bids and out of the four bidders, selected two which were recommended for approval by the Commission and subsequently, Abland was chosen as the successful bidder. The EXCO including Adv. Tlakula did not comply with the provisions of their own procurement policy in that they evaluated the bids without declaring their interests in all the meetings in which they assembled as an evaluation committee.
- 9.17.2.9 Under the circumstances, when the name and involvement of Hon Mufamadi became evident during the evaluation and adjudication process in which Adv. Tlakula was involved, it would have been prudent of her to declare her relationship with Mr Mufamadi in Lehotsa Holdings as her Chairperson and recused herself from the procurement process.

- 9.17.2.10 Her argument that they are merely directors and shareholders in Lehotsa Investments and the fact that neither she nor Lehotsa Investments had direct or indirect financial interest in Manaka Property Investments is not accepted. The fact of the matter is that there was a conflict of interest arising out of her business relationship with Hon Mufamadi in Lehotsa which should have been declared in all the meetings that she participated in the evaluation of the bids.
- 9.17.2.11 The only way that Adv. Tlakula could mitigate and avoid this conflict was through declaration of the relationship and recusal from the procurement process. By her participation in the procurement process involving her chairperson and co-director where they have a common interest in Lehotsa Investment (Pty) Ltd, her independence may have been compromised.
- 9.17.2.12 The situation was exacerbated by the fact that Adv. Tlakula not only managed the bid selection and evaluation process, but also initiated the cancellation of the original award of the contract to another bidder, though the final decision was taken by the Commission following her presentation. Inasmuch as the reasons for the cancellation thereof are accepted, the subsequent violation of the procurement processes and procedures of the Commission by the EXCO at the instance of Adv. Tlakula justifies the complainants' allegations and suspicions that something may have been amiss.
- 9.17.2.13 By her own admission, Adv. Tlakula and in a letter dated 11 February 2009 addressed to Mr Norman du Plessis directed that, *"I have decided that EXCO should embark on an open process and thereafter place all options before the Commission for a decision"*

### **9.17.3 The procurement issues raised by the response of Adv. Tlakula**

- 9.17.3.1 In general, Adv. Tlakula did not dispute the Public Protector's intended findings and remedial action taken in the provisional report that the Commission's EXCO violated the provisions of the PFMA, Treasury Regulations and the SCM policies in the procurement of the Riverside Office Park building.
- 9.17.3.2 She conceded that she largely accepted the numerous findings made by the Public Protector in so far as the procurement of the building was concerned raising issue about the separation of roles where she stated that the EXCO only undertook the



evaluation process of the procurement. However the Public Protector does not share Adv. Tlakula's sentiments in this regard as the EXCO performed all the functions which were supposed to have been performed by the Evaluation and Adjudication committees respectively.

- 9.17.3.3 The only function performed by the Commission was just to award the contract when the two bidders were presented to them by EXCO.

#### **9.17.4 Analysis of the response of the Electoral Commission**

- 9.17.4.1 The Public Protector noted the comments made by the Commission to the contents of the provisional report and where applicable, included them in this report. Suffice to say, former Commissioners Bam and Mpumlwana confirmed that Adv. Tlakula and EXCO were acting under their authority and mandate in searching for the Commission's office accommodation and cannot now distance the Commission from the process. However, this does not mean the Commission authorized the EXCO to contravene the laws relating to procurement.

#### **9.17.5 Analysis of the comments made by former Commissioners Brigalia Bam and Thoko Mpumlwana to the provisional report**

- 9.17.5.1 The Public Protector noted the comments made by Commissioners Bam and Mpumlwana to the contents of the provisional report and where applicable, included them in this report.

#### **9.17.6 Analysis of the issues raised in the response of General Holomisa to the provisional report**

- 9.17.6.1 The Public Protector noted the comments made by General Holomisa to the contents of the provisional report and where applicable, included them in this report.
- 9.17.6.2 Suffice to say that the primary reasons for the delay in finalizing my investigation was the fact that the Public Protector does not have sufficient investigative and report writing capacity due to workloads and complexity of matters investigated such as the matter that is being reported on. All attempts are being made by the Public Protector to prioritize and finalize all her investigations expeditiously.



- 9.17.6.3 With regard to statements made by the Commission in the media, the Public Protector is unable to tell the Commission to retract them. This is a matter for them to handle.

## 10. FINDINGS

The Public Protector makes the following findings:

### 10.1 On the propriety of moving the Electoral Commission Head Office from Walker Street, Sunnyside to the Riverside Park Offices in Centurion.

- 10.1.1 There is satisfactory evidence supporting a genuine need for the Electoral Commission to move from the 260 Walker Street Sunnyside Offices to Riverside Park Offices in Centurion. Evidence includes the fact that the building posed a health and safety hazard, the Electoral Commission needed additional space for its staff and the rent had increased unacceptably. The decision to move, accordingly, does not constitute improper conduct or maladministration.

### 10.2 On alleged maladministration and possible corruption in the procurement process followed for the Riverside Office Park consisting of alleged flaws in the demand management process, the budget process, the procurement procedure, bid evaluation process and award of the tender

- 10.2.1 While there was no impropriety with regard to the Commission handling its own procurement of immovable assets as a constitutional institution, the process followed by Adv. Tlakula and her EXCO in the procurement of the Riverside Office Park building was grossly irregular as it was characterized by a violation of procurement legislations and prescripts such as section 38 of the PFMA, Treasury Regulation 5.1, and 16A6, section 2(1)(e) of the PPPFA as well as chapter 4 of the Electoral Commission's Procurement Policy and Procedures of 10 March 2005.
- 10.2.2 By her own admission, Adv. Tlakula issued a directive on 11 February 2009 for the procurement process to be handled by EXCO to the exclusion of the procurement committee in violation of her own Commission's Procurement Policy and Procedures. In so doing, she countermanded the decision of the Commission, which had on 12 January 2009 made a decision to award the office space tender to a different company in respect of Menlyn Corporate Park premises.

- 10.2.3 There was no separation of roles and responsibilities between the various committees within the Commission that are tasked with administration of the procurement process i.e. the bid specification, bid evaluation and bid adjudication committees. Though these structures may have existed under different names, they were not used in the matter under investigation.
- 10.2.4 The initiation of the procurement process was handled by the user department in consultation with the Supply Chain Management within Commission and by the office of the Deputy CEO, Mr Norman du Plessis, resulting in Adv. Tlakula approving the needs analysis on 13 February 2009. The needs analysis prepared by Mr du Plessis and approved by Adv. Tlakula was not comprehensive enough to include fixtures and the other items subsequently procured as part of a turnkey solution, resulting in poor demand management, leaving a blank cheque to be filled during negotiations with Abland as a sole supplier.
- 10.2.5 The Commission confirmed that the initial procurement of the Menlyn Corporate Park premises was not concluded according to a competitive bidding process as the need for the said property was not advertised. This resulted in Adv. Tlakula directing in a memorandum of 11 February 2009, referred to above, that a new open procurement process involving a Request for Proposals be embarked upon by the Commission's EXCO. However, the contents of this memorandum raise serious concern as the approach appeared high-handed and Adv. Tlakula failed to obtain a resolution of the Commission rescinding the Menlyn Corporate Park award before she could commence with the new process.
- 10.2.6 Adv. Tlakula accordingly, gave a directive that the Menlyn Corporate Park award be discontinued. Thereafter what would have been expected was for her to obtain a resolution of the Commission prior to commencing with the process that culminated in the acquisition of the Riverside Office Park building. Instead, Adv. Tlakula individually decided that the *"EXCO should embark on an open process and thereafter, place all options before the Commission for a decision."*
- 10.2.7 The Commission only decided to rescind its decision in March 2009. This is according to the extracts of the Commission's meeting which did not provide the actual date in March when the meeting was held. The conduct of Adv. Tlakula in this regard was highly irregular.

- 10.2.8 The current CEO of the Commission, Mr Moepya as well as his Deputy Mr du Plessis and the Manager in the office of the CEO, Mr Langtry were requested to furnish the Public Protector with the full sets of minutes of the Commission's meetings. By the time of reporting, they had not provided same as would have been expected of them by virtue of their constitutional obligations to cooperate with the Public Protector
- 10.2.9 Adv. Tlakula went further in the same correspondence and directed that Mr du Plessis must *"draft a request for proposals and submit it to me for sign-off. We will have to approach the Commission again after the outcome of the public process"*. (Emphasis added) With respect, this was also highly irregular. In essence, Adv. Tlakula obtained the Commission resolution to rescind the award to Menlyn Corporate Park ex-post facto as she had already commenced with the new procurement process with advertisements having been placed on 27 February 2009, inviting potential bidders to submit their proposals whilst she did not have official authorization from the Commission to do so. Adv. Tlakula's conduct in this regard was improper and constituted maladministration.
- 10.2.10 With regard to the procurement of the Riverside Office Park, a Bid Specification Committee was not set up to analyse the needs of the Commission and draft specifications that would be suitable for the needs of the Commission. Even though the need to make the move as seamless as possible was identified at the needs analysis stage, this was not incorporated in the terms of reference of the request for proposal.
- 10.2.11 The EXCO approved a request for proposal in respect of the Commission's accommodation in violation of the provisions of the Chapter 4 of the Commission's Procurement Policy and Procedures, 2005 which provides for three methods of procurement depending on the thresholds. These procurement processes do not include a request for proposal that was suddenly utilized in the procurement of the Riverside Office Park. According to the institution's procurement policy, amounts above R100 000 should be subjected to a tender process.
- 10.2.12 Accordingly, there is a process that must be followed in respect of tenders and/or procurement which was not followed in respect of the procurement of the Riverside Office Park.

- 10.2.13 The advertisement of a “request for proposal” for the office accommodation as opposed to a comprehensive competitive tender bidding process violated the provisions of Chapter 4 of the Commission’s procurement policy and was accordingly irregular and constituted maladministration.
- 10.2.14 The request for proposal did not comply with provisions of the Treasury Regulations, the PFMA, the PPPFA and the Commission’s own procurement policy and procedures, where applicable in respect of:
- 10.2.14.1 The thresholds for a tender process, which the Commission policy puts at R100 000 unless otherwise approved;
- 10.2.14.2 The number of days that it needed to be advertised;
- 10.2.14.3 The evaluation process i.e. the evaluation and procurement committee were not involved in the evaluation process; and
- 10.2.14.4 The evaluation criterion was not clearly defined at the point of advertising.
- 10.2.15 Treasury Regulations provide for deviation from procurement policy in the event of an emergency. There was no motivation from the Commission’s EXCO to deviate from a tender process in line with Treasury Regulations. The procurement of the Commission’s building was not motivated as an emergency. In any event the circumstances of the move do not qualify as an emergency as defined in paragraph 4.7.5.1 of the Treasury Guides which provides that an emergency is a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery. In this regard, the conduct of Adv. Tlakula and her EXCO was accordingly improper and constitutes maladministration.
- 10.2.16 The irregularity in respect of the procurement of the Riverside Office Park building was also confirmed by the Auditor General in the 2011 audit, recorded in the 2010/2011 Annual Report of the Commission which indicates that “sufficient appropriate audit evidence could not be obtained that the assets with a transaction value of over R500 000 were procured by means of a competitive bidding process as per the requirements of the TR 16A6.1, TR 16A6.4 and National Treasury Practice Note 6 and 8 of 2007/08”.

- 10.2.17 An advertisement calling for bids for a provision of office accommodation for the Commission was placed on 27 February 2009 and closed on 09 March 2009. In addition to prompting the decision of the Commission regarding whether or not to rescind its decision to acquire the Menlyn premises, the conduct violated the provisions of the Commission's procurement policy which stipulate that an advertisement in terms of a tender be placed for a minimum of 14 ordinary days. Mr Norman du Plessis was the responsible official directed to execute this function in Adv. Tlakula's memorandum of 11 February 2009. The conduct hereof was accordingly irregular, improper and constituted maladministration.
- 10.2.18 Treasury Regulation 16A6 stipulates that bids be advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine. The media schedule was signed on 25 February 2009 by Mr J H Pretorius and there is no evidence that approval was obtained to advertise for a shorter period.
- 10.2.19 The Commission approved the appointment of Abland to provide accommodation for Electoral Commission. The approval did not mention the appointment of Abland for the turnkey solution and the estimated cost of the related services. Abland's proposal stated that this would be negotiated in the future and related costs subjected to an open market process. However, the costs related to the turnkey solution were neither subjected to an open market process nor approved by the Commission as Adv. Tlakula and her EXCO failed to obtain the Commission's approval for the use of a turnkey solution. Their conduct in this regard was irregular and constituted maladministration.
- 10.2.20 The occupation by the Commission of the building in September 2010 as opposed to April 2010 as indicated in their advertisement is problematic in that bidders who proposed a later date were not considered during the evaluation process. This could have also prejudiced other bidders who did not submit their proposals based on the requirement for occupation being April 2010. In this regard, the conduct of Adv. Tlakula and the EXCO in handling the entire move was improper and constituted maladministration.

**10.3 In connection with allegations of impropriety relating to inconsistent monthly rental amounts paid to the Riverside Office Park Trust from September 2010 to September 2011:**

- 10.3.1 The amounts did vary as evident in Table 14 covered in paragraph 6.3.28.6 of the main report and this was conceded by the Commission. For example, rental was R1 440 524.17 for the period September 2010 to March 2011 but increased to R1 730 412.43 from April 2011 to September 2011.
- 10.3.2 The explanation that water and electricity charges are not consistent, is accepted.
- 10.3.3 However what is not accepted is the argument that the rest of the payments comprised of rentalisation in respect of fittings and furniture which formed part of a turnkey solution agreement reached with Abland subsequent to the main agreement and added as an addendum to the main lease agreement. As these expenses were not included in the lease agreement signed on 21 August 2009 between Abland and the Commission and were not approved by the Commission, the conduct of Adv. Tlakula in that regard was irregular, improper and constituted maladministration.
- 10.3.4 Also not acceptable is the fact that the turnkey features went beyond what was anticipated in the contract, which envisaged permanent features and included items such as furniture which the Commission already had, having purchased most of such furniture whilst it occupied the 260 Walker Street Building.
- 10.3.5 It was also not acceptable that Abland charged handling fees for procuring the turnkey features between 5 and 12%, in contravention of the 2% of the cost plus VAT agreed to in the contract signed between 12 and 19 April 2010 with Adv. Tlakula representing the Commission and Mr D S Savage of Abland.
- 10.3.6 It was further recorded that the monthly rental payable in terms of the lease will be adjusted to provide for the rentalisation of the actual cost incurred in respect of the immovable items. According to the addendum, the additional tenant specific item which classify as immovable will be rentalised over the period of the lease agreement, provided that the cost incurred with regard to such items will not exceed the amount of R20 000 000 excluding VAT. The parties agreed that the monthly rental would be adjusted by the amount of the cost incurred with regard to such immovable items multiplied by 0.135 and divided by 12.

10.3.7 According to the second addendum to the lease agreement, the amount of R20 000 000 in respect of fitting out of the lease premises was increased to R22 603 374.00.

**10.4 On the allegations of irregularity in connection with payments made by the Electoral Commission in respect of the old building whilst standing empty**

10.4.1 It is correct that an amount of R6 753 880.42 was paid in respect of the 260 Walker Street lease commencing September 2008 and expiring in August 2012 while the building was standing empty between October 2010 and July 2011.

10.4.2 However, the said amount was refunded to the Commission on 21 February 2012, without interest. Evidence indicates that the financial loss to the Commission in terms of interest was due to factors including not having a termination clause in the lease agreement and what can be termed as haphazard handling of the move, and, possibly, reckless use of public funds.

**10.5 On allegations of irregular advance payment of a lump sum in the amount of R22 603 374.00 in March 2010.**

10.5.1 It is true that advance payments were made to Abland in respect of the Riverside premises in March 2010 in the amount of R1 653 215.46.

10.5.2 Adv. Tlakula's explanation that the amounts were part of a 50% deposit for the fixtures and movables forming part of the turnkey solution is not contradicted by evidence. It is of grave concern though that this is part of the procurement that was done in contravention of the contract between Abland and the Commission, which contract had required that the procurement of these be subjected to an open market.

10.5.3 No evidence could be found indicating that an amount of R22 603 374.00 was paid in March 2010 by the Commission.

10.5.4 An amount of R R22 603 374.00 was approved as an amount for the fitting out budget in respect of the second addendum between Riverside Office Park Trust and the Commission which was signed on the 25 and 31 March 2011 respectively. This amount was to be rentalised over the period of the lease.



**10.6 With regard to the allegations of irregular payment of a lump sum amount of R26 979 155.00 for the building in December 2010**

10.6.1 Indeed, there was payment of R26 716 023.92 to the Riverside Office Park Trust but part of the amount was eventually credit noted resulting in the final payment for the month of December being R11 014 325.12.

10.6.2 This amount was in respect of the December 2010 and January 2011 rentals as well as payment of movables forming part of the turnkey. There was no irregularity in this regard. However, as stated earlier, the fact is the procurement process in respect of the turnkey solution was not subjected to an open market, making it irregular.

**10.7 In connection with allegations of a conflict of interest arising from a close business relationship between Adv. Tlakula, and Hon Mufamadi, an Executive Chairman and her co-director in Lehotsa Investment (Pty) Ltd, who also happens to be a Chairperson of Manaka Property Investments, the BEE Partner which holds a 20% stake in Abland, the company awarded the contract for the provision of the Riverside Office Park leased accommodation for the Commission.**

10.7.1 There was indeed an undisclosed and unmanaged conflict of interest between the then Commission Chief Electoral Officer, Adv. Tlakula's responsibility to act in the best interests of the Electoral Commission as its Accounting Officer and her special business relationship with Hon Mufamadi, her Chairperson and co-director in Lehotsa Investment Holdings.

10.7.2 Adv. Tlakula confirmed that she was a director of Lehotsa Holdings. Hon Mufamadi is her Chairman and co-director in that company. Hon Mufamadi is also Chairman of Manaka Property Investments, the BEE partner and holder of a 20% stake in Abland which was awarded a contract to lease the Riverside Office Park building to accommodate the Head Offices of the Electoral Commission. Adv. Tlakula was highly involved in initiation, evaluation and adjudication of the bids for the procurement of the building in her capacity as the CEO and Chairperson of the Commission's EXCO at the time.



- 10.7.3 Of grave concern, is that on 11 February 2009, a month after the Commission's meeting where it had formally resolved to accept the bid for premises in Menlyn, Adv. Tlakula issued a written directive to Mr du Plessis to start a new procurement process and that such procurement process be handled by EXCO. This was irregular. The irregularity was compounded by the fact that this new bid process was managed from her office. This included the submission of the proposals that were handled by Mr Langtry from her office. Hon. Mufamadi was indicated in the proposal from Abland as the Chairperson of the BEE partner, Manaka Property Investments, which owned a 20% stake in Abland.
- 10.7.4 During the evaluation of the bids by EXCO, there was no way in which Adv. Tlakula could not have been aware of this fact as the evaluation and the adjudication of the proposals was done by the EXCO which included and was chaired by her.
- 10.7.5 Adv. Tlakula only declared her interest in Lehotsa Investments in the Commission's annual and general declaration of interests' forms in compliance with the annual Financial Disclosure Framework which is a standard disclosure of interest form and which did not relate to a specific procurement transaction. This declaration said nothing about her business relationship with Hon Mufamadi.
- 10.7.6 The declaration only covered Lehotsa as a company in which she has shares and not the names of her co-directors or share-holders. All the members of EXCO, including Adv. Tlakula, failed to disclose their business interests prior to participating in evaluation committee meetings that considered the procurement in violation of Chapter 4 of the Electoral Commission's Procurement Policy and Procedures. The conduct of Adv. Tlakula and her EXCO colleagues in this regard was improper and constituted maladministration.
- 10.7.7 When the name and involvement of Hon Mufamadi became evident during the evaluation of the bids in which Adv. Tlakula was involved, it would have been prudent of her to declare, to her colleagues and fellow panellists, her relationship with him in Lehotsa Holdings as her Chairperson and co-director and recused herself from the procurement process. Her argument that they were mere directors and shareholders in that company and the fact that neither she nor Lehotsa Investments had direct or indirect financial interest in Manaka Property Investments is not accepted.

- 10.7.8 Such argument is in fact, a source of concern it would have been reasonably expected that the Chairperson of a body such as the Electoral Commission should understand that things that can undermine objectivity transcend financial interests. The fact of the matter is that there was a conflict of interest arising out of her business relationship with Hon Mufamadi in Lehotsa which should have been declared in all the meetings that she participated in the evaluation of the bids. Her conduct in this regard was improper and constituted maladministration.
- 10.7.9 The ideal way that Adv. Tlakula could have mitigated and managed this conflict was through declaration of the relationship and recusal from the procurement process. By her participation in the procurement process involving her Chairperson and co-director where they have a common interest in Lehotsa Investments, her independence and the objectivity in the entire process may have been compromised.
- 10.7.10 Adv. Tlakula failed to declare her business relationship with Hon Mufamadi to the team that had to evaluate the bids in respect of this particular procurement. Her disclosure was only limited to the general disclosure of financial interests, which complied with the letter of the Commission's policy but not the spirit that underpins disclosure and management of conflict of interest as a good administration practice seeking to optimise objectivity and ultimately integrity in procurement and other business processes.
- 10.7.11 The situation was exacerbated by the fact that Adv. Tlakula not only managed the bid selection and evaluation process, but also prompted the retraction of the original award of the contract to Menlyn Corporate Park though the final decision was taken by the Commission following her presentation when she recommended the two bidders resulting in the Commission awarding the contract to Abland.
- 10.7.12 As the Accounting Officer of the Commission at the time, Adv. Tlakula was expected to ensure that the Commission's supply chain management processes give effect to the core principles of behaviour as envisaged by the five pillars of procurement which are fairness, equity, transparency, competitiveness and cost effectiveness. Fairness includes compliance with ethical standards, recognizing and dealing with conflicts of interest or the potential thereof.

- 10.7.13 She had a duty to eliminate any threats to objectivity and independence in the procurement of the Riverside Office Park to accommodate the Head Offices of the Commission. The procurement policies and procedures of the Electoral Commission requires all parties to comply with the highest ethical standards in order to promote:
- 10.7.13.1 Mutual trust and respect; and
- 10.7.13.2 An environment where business can be conducted in a fair and reasonable manner and with integrity.
- 10.7.14 Furthermore it requires all officials / employees associated with procurement:
- 10.7.14.1 recognise and deal with conflicts of interest or the potential thereof;
- 10.7.14.2 deal with suppliers even-handedly;
- 10.7.14.3 provide all assistance in the elimination of fraud and corruption (as defined in the public service anti-corruption strategy); and
- 10.7.14.4 adhere to the instructions issued by the CEO.
- 10.7.15 The procurement provisions contained in Chapter 4 of the Commission's Procurement Policy and Procedures, 2005 are consistent with the requirements of the Electoral Commission's Act, 1996 as the provisions thereof clearly state that, "where a possible conflict of interest arises or where an employee has or obtains a financial or other interest in a company or firm with which the Electoral Commission enters into a business transaction, or where an interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Electoral Commission as soon as it arises, and the employee must refrain from participating in any way in related business dealings." (Emphasis added)
- 10.7.16 Adv. Tlakula had a duty in law to procure goods and services according to a system which is fair, equitable, transparent, competitive and cost effective. All employees of the Commission, including the CEO have a duty where an interest is such that it may influence their objectivity in making any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Electoral Commission as soon as it arises, and the employee must refrain from participating

in any way in related business dealings. Such interest in this instance relates to the existing business relationship through common directorship thus creating a threat to independence and objectivity.

10.7.17 Adv. Tlakula's improper conduct and maladministration in this regard, in particular the non-compliance with relevant procurement prescripts as well as her undisclosed and unmanaged conflict of interest had the impact of:

10.7.17.1 Risking of loss of public confidence in the Electoral Commission as an organ of state in open and transparent procurement of goods and services;

10.7.17.2 Risking impairment of the reputation of the Electoral Commission as an impartial constitutional body with optimal levels of integrity;

10.7.17.3 Fostering a perception from potential service providers that they cannot expect fair and equal treatment from Electoral Commission; and

10.7.17.4 Risking the possibility of an asset procurement process that is not cost effective, through failure to ensure that the procurement of assets is tested in the open market, a systemic problem that afflicts most organs of state.

## **11. REMEDIAL ACTION**

The remedial action to be taken as envisaged by section 182(1)(c) of the Constitution is the following:

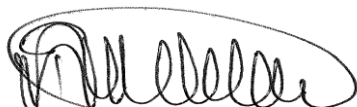
11.1 The Speaker of Parliament, in consultation with the Electoral Commission to the exclusion of the Chairperson, consider whether action should be taken against Adv. Tlakula for her role in the procurement of the Riverside Office Park building to accommodate the Head Offices of the Commission in light of the undisclosed and unmanaged conflict of interest and her contravention of the procurement laws and prescripts dealt with in this report and accordingly, advise the President of the appropriate action to take.

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- 11.2 The Electoral Commission to take urgent steps to:
- 11.2.1 Consider the expenses in respect of the turnkey solution as irregular, fruitless and wasteful expenditure and in consultation with the National Treasury, consider ratifying such expenditure;
  - 11.2.2 In consultation with the National Treasury, consider reviewing the entire lease agreement with Abland including its appendices with a view to ratifying same;
  - 11.2.3 In consultation with the National Treasury's Chief Procurement Officer, consider commissioning a forensic investigation into the entire lease agreement and the related expenditure in order to determine a fair market value of the contract and related expenditure and recover any extravagant expenditure incurred and further, to investigate the cession of the agreement from Abland to Riverside Office Park Trust.
  - 11.2.4 Consider taking appropriate action against all members of EXCO who may still be in the employ of the Commission, who participated in the procurement of the building for their contravention of the procurement laws and prescripts dealt with in this report.
  - 11.2.5 Consider taking disciplinary action against the CEO, Mr Moepya, his Deputy, Mr du Plessis and the Manager in the office of the CEO, Mr Langtry for their failure to provide the Public Protector with the budget as well as full sets of minutes of the EXCO and Commission's meetings in connection with the procurement of premises to accommodate the head offices of the Commission in violation of their Constitutional obligations of cooperation with the Public Protector in the investigation of this matter.
  - 11.2.6 In consultation with the National Treasury to urgently review its Supply Chain Management structures and processes to align with Treasury Regulations and good practice.
  - 11.2.7 To ensure that no retaliatory action in the form of subjecting to occupational detriment is taken against any of the officials and employees of the Commission that cooperated and assisted the Public Protector in the investigation referred to in this report.

- 11.2.8 To review its Conflict of Interest policy and procedure for declaring conflict of interest within 60 days.

## **12 MONITORING**

- 12.1 The Secretary of Parliament to advise the Public Protector of action taken by the Speaker within 60 days of receipt of this report.
- 12.2 The Electoral Commission to advise the Public Protector of the progress made in respect of:
- 12.2.1 The review and ratification of the expenditure in respect of the turnkey solution within 60 days;
- 12.2.2 The review and ratification of the lease agreement as well as the addenda to the lease agreement between the Commission and the landlord within 60 days.
- 12.2.3 The review of the Electoral Commission Supply Chain Management Policies within 60 days;
- 12.2.4 The review of the Electoral Commission's Conflict of Interest policy and procedure for declaring conflict of interest within 60 days.
- 12.3 The Electoral Commission to submit an action plan in respect of the implementation of the remedial action referred to in paragraph 11 above within 30 days of receipt of this report.



**ADV. T N MADONSELA**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE: 26 AUGUST 2013**