



**THE PERILS OF DEPRIVATION:
BETRAYED AND DROWNED BY TREACHEROUS EXCAVATIONS**



**INVESTIGATIONS INTO THE TRAGIC DEATHS OF SIYABONGA MABILA, AGED 7 AND
LAWRENCE TSHWENU, AGED 4, IN PIENAARSPORT EXTENSION 20 MAMELODI TSHWANE**

**TJB BOKABA SC
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**PRESENTED TO: MEC FOR GAUTENG DEPARTMENT
OF ROADS AND TRANSPORT:
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SECTION A

INTRODUCTION

- 1 On Saturday, 27 February 2021 two minor children, Siyabonga Mabila, aged 7 and Lawrence Tshwenu, aged 4, tragically drowned in an old illegal sand quarry (which was being converted into an attenuation pond) located in the construction site of the K54/Tsamaya Road in Mamelodi, Tshwane. Both children resided in Ward 100, Pienaarspoort, Extension 20, adjacent to the K54/Tsamaya Road which is under construction.
- 2 The incident sent shockwaves not only through the community, but throughout the country. The MEC for Roads and Transport in Gauteng, MEC Jacob Mamabolo, undertook to appoint an independent investigator to uncover the facts and determine who was responsible for this tragic incident.
- 3 In March 2021, MEC Mamabolo tasked me with conducting an investigation into the causes of the tragedy and to make recommendations to ensure that an incident of this nature does not happen again.
- 4 The K54/Tsamaya Road upgrading and rehabilitation project between the Old Bronkhorstspuit and Solomon Mahlangu Roads is a development in Mamelodi Township, Gauteng, that entails the construction of approximately 9 (nine) kilometres of road. The Gauteng Department of Public Transport and Roads Infrastructure (“**GDRT**”) appointed GMH Tswelelo Consulting Engineers (“**GMH Tswelelo**”) as the main consultant for the Project. The contractor

employed for the Project is King Civil Engineering (Pty) Limited (“**King Civil**”). The Project officially commenced in February 2018 and was originally scheduled to be completed in November 2020.

- 5 The K54/Tsamaya Road construction involved the construction of K54/Tsamaya Road between P154-1 (K22, Old Bronkhorstspuit Road) and K69 (Hans Strydom) (approximately 6,8 km) as well as section of Road 2561 from K54 to K54/Tsamaya Road in Mamelodi (approximately 2,2 km) (“**the Project**”). Included in the Project was the construction of a wetland and later the conversion of the illegal sand mining quarry into an attenuation pond to deal with the overflow of water from the wetland, to prevent stormwater from flooding nearby communities or the newly constructed road.
- 6 The quarry/pond is located within two communities. The first being a community that was relocated from Mamelodi East Extension 11 by the Tshwane Municipality and the second being a community of illegal dwellers. The quarry existed prior to both communities taking occupation.
- 7 At the time of the incident, the quarry was part of the K54/Tsamaya Road construction site. In fact, King Civil had excavated or conducted earth works in the area in order to shape it into an attenuation pond. There is a dispute about the extent of the excavation or earth works, King Civil claims that it excavated the sides of the quarry and had undertaken the process of reshaping it, while

some members of the community claim that King Civil also removed large volumes of soil from the area to use as part of the road construction.

- 8 What is not disputed, is that on 27 February 2021, the quarry was full of rainwater because of previous rains. It is also undisputed that on the day of the incident, the pond area was not properly barricaded and only two security guards were stationed on the western side of the pond.
- 9 The two young children's bodies were recovered by divers and the South African Police Service ("**SAPS**") and identified by their parents at the scene of this tragic accident.
- 10 My approach to this investigation is not only limited to finding what led to the incident of 27 February 2021. It includes the arduous task of trying to find answers as to why incidents such as this occur, and have occurred, during construction activities and how to prevent such incidents from happening again in the future.
- 11 Consideration is also given to whether there were prevailing unsafe conditions prior to construction activities around the quarry or whether the unsafe activities developed after the commencement of the construction. Further, what role, if any, did each one of the parties play in the incident.

12 Before I delve deeper into the issues, I pause to recognise the lives of Siyabonga Mabila and Lawrence Tshwenu and acknowledge the tragedy of their passing and the trauma and loss suffered by their loved ones. During consultations with the families the grief and anguish were palpable. Their parents explained that the boys were full of life, determined and full of potential. I hope that this report will shed some light around the events of their children's tragic passing and bring a measure of accountability and closure and ensure that an incident such as this does not happen again.

The Scope of the Investigation

13 The Terms of Reference were published on 7 March 2021 setting out the parameters of this investigation. The Terms of Reference are attached as annexure "**KTR 1**".

14 The investigation was also governed by the following principles:

14.1 Independence - Although the Investigation was conducted at the instance of the GDRT, the investigation was completely independent of the GDRT, and the findings and recommendations will be those of the Investigator alone.

- 14.2 Accessibility – the investigation was accessible to the families of the deceased and all persons who wanted to assist the investigation with the relevant information.
 - 14.3 Confidentiality – any information provided during the course of the investigation was kept confidential.
- 15 The aim and scope of the investigation was to establish:
- 15.1 the relevant facts and accountability for the deaths of Siyabonga and Lawrence;
 - 15.2 the immediate and surrounding circumstances in which the deaths occurred;
 - 15.3 the wider circumstances of the deaths;
 - 15.4 all the facts, including any failure on the part of anyone, including individuals, institutions or entities;
 - 15.5 whether any improvements to the GDRT’s policies, processes and procedures are recommended by the Investigator, and any additional policies, processes or procedures should be effected; and
 - 15.6 any other matter relevant to the Investigation.

- 16 The GDRT's role was circumscribed and limited in the terms set out in the Terms of Reference. The GDRT's role was limited to –
- 16.1 providing the Investigator with access to all materials and information within its power and control that the Investigator regards as relevant to the purposes of the Investigation;
 - 16.2 providing such assistance as may be necessary for the Investigator to obtain materials and information requested from third parties;
 - 16.3 providing the Investigator with such resources as the investigator may consider to be reasonably necessary to carry out the investigation efficiently and effectively, including any specialist services and taking statements from witnesses and those interviewed; and
 - 16.4 more generally, supporting the investigation.
- 17 The Terms of Reference limited the period within which the investigation needed to be completed to twelve weeks (12 weeks). However, due to Covid-19 waves and related restrictions that impeded my work, and the delay in the engagement of independent engineers for technical assistance, an extension was sought and granted to complete the investigation.

Approach/Methodology

18 The investigation employed the following methodology:

18.1 I conducted detailed interviews with all the relevant and affected parties. Key parties were identified and invited for consultations. These include:

18.1.1 Parents of Siyabonga Mabila and Lawrence Tshwenu accompanied by their legal representatives, Mkhabela Huntley Attorneys;

18.1.2 Relevant officials from the GDRT and the City of Tshwane (**“the City”**);

18.1.3 GMH Tswelelo Consulting Engineers CC (**“GMH Tswelelo”**) who were appointed as the consulting engineers by the GDRT;

18.1.4 King Civil Engineering Contractors (Pty) Ltd (**“King Civil”**) appointed to the Project as the contractors;

18.1.5 Maudi A Matlakala Security Services (Pty) Ltd (**“Maudi”**) appointed by King Civil to provide security across the construction site;

- 18.1.6 The Community Liaison Officers (“**CLOs**”) appointed by King Civil to facilitate communication between the contractors and the communities;
 - 18.1.7 Councillor Maleka, the Ward 100 municipal councillor.
- 18.2 Documents collated and analysed:
- 18.2.1 A number of documents from the GDRT and the GMH Tswelelo, including copies of contracts between the various parties setting out their obligations relating to the K54/Tsamaya Road construction.
 - 18.2.2 Further documents were received from parties and individuals who were interviewed during the course of the investigation.
 - 18.2.3 A complete index of documents received from various parties is attached as annexure “**KTR 2**”.
- 18.3 An inspection *in loco* was conducted on 11 March 2021 and 27 May 2021.
- 18.3.1 the initial inspection involved the pointing out of the quarry.

18.3.2 the second and detailed inspection involved a walk through the site and pointing out where the incident occurred and where various role players were on 27 February 2021.

18.4 Desktop research into all the applicable legislation and regulations.

Setting up the investigation

19 After my appointment, I visited the Mabila and Tshwenu families to introduce myself and explain the task that I had been called on to undertake.

20 I also sought the assistance of duly qualified junior advocates, Ms Thabang Poee and Mr Mfundo Salukazana to assist with the investigation. As a team, we met to discuss our approach and set up various interviews, document requests and research necessary for the investigation.

21 I further sought the assistance of BoTong Civils, a qualified and fully infrastructure-compliant, construction and engineering company, to assist with technical aspects of the investigation.

The Scheme of the report

22 In what follows, I:

22.1 start by setting out the background;

- 22.2 then provide a description of the governing legal and contractual framework;
- 22.3 also summarize the consultations conducted with various role players;
- 22.4 given an analysis of the issues that arise; and
- 22.5 lastly, provide some recommendations.

THE ROLE PLAYERS

- 23 The **Gauteng Department of Road and Transport** commissioned the Project and issued the tender for the construction of the road.
- 24 The **City of Tshwane** is the municipality in charge of the area where the tragic incident occurred. The City was also required to grant various approvals related to the Project.
- 25 **GMH Tswelelo Consulting Engineers CC** were appointed as the consulting engineers by the Gauteng Department of Road and Transport. GMH Tswelelo's appointment was in terms of the Standard Condition of Contract for Professional Services. GMH Tswelelo was engaged to perform amongst others the following functions;
 - 25.1 Preliminary design review;
 - 25.2 Detailed designs;

- 25.3 Environmental assessments;
- 25.4 Compilation of contract documents; and
- 25.5 Supervision and monitoring of construction works and to act as the agent of the GDRT.
- 26 **King Civil Engineering Contractors (Pty) Ltd** were appointed as the contractors. King Civil's appointment was in terms of the General Conditions of Contract for Construction Works (2013, 3rd edition).
- 27 **Maudi A Matlakala Security Services (Pty) Ltd** were appointed by King Civil to provide security across the construction site.
- 28 **Comprac Gauteng (Pty) Ltd** were appointed as health and safety compliance practitioners.

BACKGROUND

About the area

- 29 During or about 2013, the City of Tshwane ("the City") established a Re-aga-Tshwane Mayoral Task Team. The purpose of this Task Team was to embark on formalisation of informal settlements and townships and the development of affordable housing. The City states that this was done in order to restore human dignity, provide services and issue title to the respective beneficiaries. This was

done in order for the City to mitigate and better the living conditions of people residing in the informal settlements.

30 In June 2015, the City moved families from Wards 10, 16, 17, 40 and 97 to Ward 100 and created a Municipal Transitional Settlement in Pienaarspoort Extension 15, 22 & 23. A Municipal Transitional Settlement is described as “an area of land acquired to provide temporary/permanent housing for persons identified by the Municipality in need of housing and which area of land shall be proclaimed in terms of the relevant legislation by the Municipality. It was designed to consist mainly of housing and streets, but may also contain ancillary structures and services which, in the opinion of the Municipality, were necessary for the provision of a safe, orderly and healthy living environment.”¹

31 The area was divided into 10 sections and there were 2600 permanent stands created. The area with the quarry was named Skierlik, Mountain View. The relocations were completed on 3 October 2015. Unfortunately, the newly established township was devoid of basic infrastructure such as running water, sanitation facilities and electricity.

32 During the township application process, it was discovered that the township was located near a flood plain. Therefore, provision was made in the layout plans for the Pienaarspoort Spruit to be partly channelized for approximately 1,6km along the eastern boundary of the then proposed K54/Tsamaya Road up to a

¹ Report from COT (June 10, 2015).

point where K54/Tsamaya Road route crosses the spruit and moves to the western side of the spruit and outside the flood plain of the Pienaarspoort Spruit. It was also discovered that a portion of K54/Tsamaya Road route between R104 (Bronkhorstspruit Road) and the Pienaarspoort Station was also running within the Pienaarspoort Spruit and its flood plain.

- 33 The proposal to partly channelize the Pienaarspoort Spruit for approximately 1,6 km along the eastern boundary was accepted and approved by the Agricultural and Environmental Management Department, as well as the Roads and Transport Department of the City.
- 34 Ultimately, when the K54/Tsamaya Road was conceptualised and designed, included in it was channelling water away from the road reserve and the community to a wetland located near the Pienaarspoort township. When GMH Tswelelo was appointed by GDRT to proceed with the design of this section of Road K54, they also incorporated this proposal to channelize this section of the Pienaarspoort in their designs.
- 35 GMH Tswelelo ran the tender process which resulted in the appointment of King Civil as the contractor. Work on the project began in February 2018. At this point King Civil was contracted to construct the road, install the channelling infrastructure and rehabilitating the wetland where the water would be channelled to.

36 LEAP Environmental Consulting, who were contracted by GMH Tswelelo, requested a meeting with Mr. Gawie Jansen van Vuuren from the City's Integrated Stormwater Planning Sub-Section of the Transportation Planning Division for 25 October 2018 for "K54 Mamelodi - Wetland Rehabilitation Stormwater Outlet". At this meeting, attended by representatives from LEAP, GMH Tswelelo and Gawie Jansen van Vuuren, LEAP explained that they were appointed by GDRT for the design of the channelization, re-routing and rehabilitation of the wetland in Pienaarspoort.

37 There are two versions presented by the parties as to how the old illegal sand quarry was added to the project.

37.1 GMH Tswelelo informed me that the City had identified the area for the settlement and requested that the illegal quarry be incorporated into the project to deal with potential flooding during heavy rains. GMH Tswelelo stated that this was a condition imposed by the City in order for the City to approve the Project.

37.2 The City on the other hand, stated that GMH Tswelelo and LEAP indicated that there was a problem with the design of the channelisation and rehabilitation part of the project. They explained that on the last 300m of the proposed channelisation of the Pienaarspoort spruit, there were quite a lot of informal settlers/occupiers staying in the area where the channel would have had to go through and the City was unable to

relocate the people. They then presented a proposal to re-route the last 300m of the channel east and then north around the occupiers and into an existing old sand mining quarry. The old sand mining quarry would then be converted into an attenuation pond.

- 38 Whatever the correct version is, the result of this was the incorporation of the illegal quarry into the K54/Tsamaya Road construction project as an attenuation pond. The attenuation pond measures about 800 meters in diameter and is designed to hold about 175 000 cubic meters of water.

Challenges facing the Project

- 39 All the parties explained that the project encountered a number of challenges.
- 39.1 First, when the project commenced, members of the community and the business forum, dissatisfied with how the project would be carried out, protested during the commencement of the project. Both GMH Tswelelo and King Civil explained that there were daily protests and that workers would be attacked when seen on site. At some stage, the situation was so dangerous that police and armoured security had to be deployed to protect workers and equipment.
- 39.2 Second, while the community, during or about 2018, consisted of mainly people settled by the City, over time more illegal occupiers settled near

the wetland, the proposed attenuation pond and in parts of the road reserve. The illegal occupation had now become so bad, that the Contractor could only resume construction work once people were removed. King Civil explained that, however, when some people are moved, more people seem to arrive to occupy the area. This is happening faster than the City is able to relocate the illegal occupiers.

39.3 Third, the community was not provided, since the establishment of the informal settlement, with proper services such as water, electricity and sanitation. Instead, portable toilets were placed on each street and communal water tanks were provided. These temporary solutions were not made available to the illegal occupiers. This meant that the temporary solutions had to cater for more than the number of people envisioned. It became a norm that the unlawful occupiers made use of the pond to do their laundry.

39.4 Fourth, there were no amenities and recreational facilities in the area. As a result, children played in the old illegal sand mining quarry.

40 These challenges also extended to the work that King Civil was required to do on the attenuation pond.

40.1 King Civil commenced work on the attenuation pond on or about January 2020. The first part of the work was to excavate the area and reshape it

into the desired shape. This process involved the movement of soil; raising parts of the area around the pond and flattening other parts of the surface area around the pond. King Civil and the CLOs noted that, for every piece of land that was flattened, unlawful occupiers would build structures on the banks of the pond. Soon enough the entire perimeter of the pond was surrounded by illegal occupiers. This, according to King Civil, prohibited them from being able to carry out their work.

40.2 The lack of basic services also affected the work that could be done on the pond and safety. Because of the lack of water, the illegal occupiers used the water in the pond to do washing. During this time, children could regularly be seen playing in the area.

40.3 The security guards employed by Maudi, informed me that securing the water area created friction between the security guards and the community. This was to a point where a security guard was severely assaulted by members of the community in 2019 for attempting to prevent children from playing in the pond area. This will be discussed in detail later.

41 What is clear from all affected parties is that this project was characterised by a number of problems which had a direct bearing on safety and ultimately contributed to the tragic events of 27 February 2021.

The events of 27 February 2021

- 42 According to the Maudi security guards, who were the only eyewitnesses interviewed, on Saturday, 27 February 2021, after some heavy rain, three (3) young boys were seen entering the pond area. The security guards saw the two (2) of the boys undressing in preparation to enter the pond. The two security guards decided to split; one ran on foot towards the boys while the other drove the security motor vehicle around the pond towards the boys.
- 43 The security guards state that reaching the boys was complicated by the terrain, because it had just rained and there are illegal occupiers settled along the banks of the pond, any attempts to reach the boys meant driving or running around the structures. Before the boys could be reached, they entered the water. From a distance they could see the third boy signalling that the two (2) other boys were in distress by waving and screaming for help.
- 44 Members of the community on the banks of the pond tried to assist the boys but they tragically drowned. The security guards did not proceed to the scene because of past violent conflicts that had taken place between the community and the security company appointed by King Civil to keep watch over the area.
- 45 It is unknown who called the SAPS, however, they attended to the scene together with the police divers. The lifeless bodies of the two boys were retrieved from the pond.

46 Members of the community sounded the whistle, usually used to alert the community to emergencies. Mrs Mabila stated that she heard the commotion and was advised by her neighbour to attend to the scene as two boys had drowned. Ms Tshwenu was equally alerted by members of the community that her son may have drowned. Both parents stated that they ran to the scene and were asked to identify the clothes of their children. Both mothers identified their children's clothing. And later, their children.

SECTION B

THE GOVERNING FRAMEWORK FOR CONSTRUCTION WORK AROUND WATER AREAS

47 The Project is governed by contracts, the applicable legislation and related regulations. These are discussed below.

The Applicable Legislation

The Occupational Health and Safety Act

48 The primary legislation applicable and considered is the Occupational Health and Safety Act 85 of 1993 (“**OHSA**”). Section 8 of the OHSA reads as follows:

“8 General duties of employers to their employees

- (1) *Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.*
- (2) *Without derogating from the generality of an employer’s duties under subsection (1), the matters to which those duties refer include in particular-*
 - (a) *the provisions and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;*
 - (b) *taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;*

- (c) *making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;*
- (d) *establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;*
- (e) *providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;*
- (f) *as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs (b) and (d), or any other precautionary measures which may be prescribed, have been taken;*
- (g) *taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;*
- (h) *enforcing such measures as may be necessary in the interest of health and safety;*

- (i) *ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and*
- (j) *causing all employees to be informed regarding the scope of their authority as contemplated in section 37(1) (b)."*

49 Section 9 of the OHSA reads as follows:

"9. General duties of employers and self-employed persons to persons other than their employees

- (1) *Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.*
- (2) *Every self-employed person shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that he and other persons who may be directly affected by his activities are not thereby exposed to hazards to their health or safety."*

50 In terms of section 38 of the OHSA, any person who contravenes or fails to comply with the provisions of sections 8, 9, 14 is guilty of an offence and shall on conviction be liable to be sentenced to a fine not exceeding R50 000.00 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

51 Section 8 of the OHSA places a duty on the employer to maintain as far as is reasonably practicable a working environment that is safe and without health risks for its employees. Section 9 places a duty on the employer to conduct its business in such a manner as to ensure as far as reasonably practicable that persons who are not its employees who may be directly affected by its activities are not thereby exposed to health or safety hazards.

52 “Reasonably practicable” means practicable having regard to:

- (a) *the severity and scope of the hazard or risk concerned;*
- (b) *the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;*
- (c) *the availability and suitability of means to remove or mitigate that hazard or risk; and*
- (d) *the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.*

53 Sections 8 and 9 therefore place a duty on the employer to act proactively to avoid any harm or injury to its employees and others. There is no standard as to what is reasonably practicable. Each case will have to be determined on its own facts and circumstances. As can be seen from the definition of “reasonably practicable” it involves weighing different considerations from risk evaluation, means of removing or avoiding the risk, resource availability and a cost-benefit analysis. In *Edwards v National Coal Board*, Lord Justice Asquith stated:

“Reasonably practicable as traditionally interpreted, is a narrower term than ‘physically possible’ and implies that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble involved in the measure necessary to avert the risk is placed in the other; and that, if it is shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon who the duty is laid discharges the burden of proving that compliance was not reasonably practicable. This computation falls to be made at a point of time anterior to the happening of the incident complained of.”²

54 Section 43 of the OHSA empowers the Minister to make regulations on any number of issues including construction.³

Construction Regulations, 2014

55 The Construction Regulations⁴ are regulations promulgated in terms of section 43 of the OHSA. They are applicable to all persons involved in construction work.⁵

56 The duties of a client, i.e a person for whom construction work is being performed, are set out in Regulation 5. Specifically, a client must:

² [1949] 1 ALL ER 743 CA. Quoted with authority in *Pikitup (Soc) Limited v SAMWU and Others* (JA82/13) [2013] ZALAC 33; [2014] 3 BLLR 217 (LAC); (2014) 35 ILJ 983 (LAC) (5 December 2013).

³ Section 43(1)(b)(i) which provides that the Minister may make regulations -
“(b) which in the opinion of the Minister are necessary or expedient in the interest of the health and safety of persons at work or the health and safety of persons in connection with the use of plant or machinery, or the protection of persons other than persons at work against risks to health and safety arising from or connected with the activities of persons at work, including regulations as to -
(i) the planning, layout, construction, use, alteration, repair, maintenance or demolition of buildings.”

⁴ GNR.84 of 7 February 2014: Construction Regulations, 2014. Government Gazette No. 37305.

⁵ Regulation 2 of the Construction regulations.

- “(a) prepare a baseline risk assessment for an intended construction work project;*
- (b) prepare a suitable, sufficiently documented and coherent site-specific health and safety specification for the intended construction work based on the baseline risk assessment contemplated in paragraph (a);*
- (c) provide the designer with the health and safety specification contemplated in paragraph (b);*
- (d) ensure that the designer takes the prepared health and safety specification into consideration during the design stage;*
- (e) ensure that the designer carries out all responsibilities contemplated in regulation 6;*
- (f) include the health and safety specification in the tender documents;*
- (g) ensure that potential principal contractors submitting tenders have made adequate provision for the cost of health and safety measures;*
- (h) ensure that the principal contractor to be appointed has the necessary competencies and resources to carry out the construction work safely;*
- (i) take reasonable steps to ensure cooperation between all contractors appointed by the client to enable each of those contractors to comply with these Regulations;*
- (j) ensure before any work commences on a site that every principal contractor is registered and in good standing with the compensation fund or with a licensed compensation insurer as contemplated in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);*
- (k) appoint every principal contractor in writing for the project or part thereof on the construction site;*

- (l) *discuss and negotiate with the principal contractor the contents of the principal contractor's health and safety plan contemplated in regulation 7 (1), and must thereafter finally approve that plan for implementation;*
- (m) *ensure that a copy of the principal contractor's health and safety plan is available on request to an employee, inspector or contractor;*
- (n) *take reasonable steps to ensure that each contractor's health and safety plan contemplated in regulation 7(1)(a) is implemented and maintained;*
- (o) *ensure that periodic health and safety audits and document verification are conducted at intervals mutually agreed upon between the principal contractor and any contractor, but at least once every 30 days;*
- (p) *ensure that a copy of the health and safety audit report contemplated in paragraph (o) is provided to the principal contractor within seven days after the audit;*
- (q) *stop any contractor from executing a construction activity which poses a threat to the health and safety of persons which is not in accordance with the client's health and safety specifications and the principal contractor's health and safety plan for the site;*
- (r) *where changes are brought about to the design or construction work, make sufficient health and safety information and appropriate resources available to the principal contractor to execute the work safely; and*
- (s) *ensure that the health and safety file contemplated in regulation 7(1)(b) is kept and maintained by the principal contractor."*

57 Regulation 5(2) caters for a situation where a client requires additional work be performed as a result of a design change or an error. In that event, the client is

required to ensure that that sufficient safety information and appropriate additional resources are available to execute the required work safely.

58 Regulation 5(3) requires that where a fatality or permanent disabling injury occurs on a construction site, the client must ensure that the contractor provides the provincial director with a report contemplated in section 24 of the Act, in accordance with regulations 8 and 9 of the General Administrative Regulations, 2013. The report must include the measures that the contractor intends to implement to ensure a safe construction site as far as is reasonably practicable.

59 Regulation 5(5) provides that where a construction work permit is required as contemplated in regulation 3(1), the client must, without derogating from his or her health and safety responsibilities or liabilities, appoint a competent person in writing as an agent to act as his or her representative, and where such an appointment is made the duties that are imposed by these Regulations upon a client, apply as far as reasonably practicable to the agent so appointed. An agent appointed in terms of Regulation 5(5) must:

59.1 manage the health and safety on a construction project for the client; and

59.2 be registered with a statutory body approved by the Chief Inspector as qualified to perform the required functions.

60 The duties of a designer are set out in Regulation 6. The designer of a structure must

- “(a) ensure that the applicable safety standards incorporated into these Regulations under section 44 of the Act are complied with in the design;*
- (b) take into consideration the health and safety specification submitted by the client;*
- (c) before the contract is put out to tender, make available in a report to the client -*
 - i) all relevant health and safety information about the design of the relevant structure that may affect the pricing of the construction work;*
- ...*
- (d) inform the client in writing of any known or anticipated dangers or hazards relating to the construction work, and make available all relevant information required for the safe execution of the work upon being designed or when the design is subsequently altered;*
- ...*
- (f) take into account the hazards relating to any subsequent maintenance of the relevant structure and must make provision in the design for that work to be performed to minimize the risk;*
- (g) when mandated by the client to do so, carry out the necessary inspections at appropriate stages to verify that the construction of the relevant structure is carried out in accordance with his design: Provided that if the designer is not so mandated, the client's appointed agent in this regard is responsible to carry out such inspections;*

- (h) *when mandated as contemplated in paragraph (g), stop any contractor from executing any construction work which is not in accordance with the relevant design's health and safety aspects: Provided that if the designer is not so mandated, the client's appointed agent in that regard must stop that contractor from executing that construction work;*

...”

61 Regulation 7 sets of the duties of the principal contractor and contractor.

According to Regulation 7(1), a principal contractor must:

- “(a) *provide and demonstrate to the client a suitable, sufficiently documented and coherent site-specific health and safety plan, based on the client's documented health and safety specifications contemplated in regulation 5(1)(b), which plan must be applied from the date of commencement of and for the duration of the construction work and which must be reviewed and updated by the principal contractor as work progresses;*
- (b) *open and keep on site a health and safety file, which must include all documentation required in terms of the Act and these Regulations, which must be made available on request to an inspector, the client, the client's agent or a contractor; and*
- (c) *on appointing any other contractor, in order to ensure compliance with the provisions of the Act:*
- (i) *provide contractors who are tendering to perform construction work for the principal contractor, with the relevant sections of the health and safety specifications contemplated in regulation 5(1) (b) pertaining to the construction work which has to be performed;*
- (ii) *ensure that potential contractors submitting tenders have made sufficient provision for health and safety measures during the construction process;*

- (iii) *ensure that no contractor is appointed to perform construction work unless the principal contractor is reasonably satisfied that the contractor that he or she intends to appoint, has the necessary competencies and resources to perform the construction work safely;*
- (iv) *ensure prior to work commencing on the site that every contractor is registered and in good standing with the compensation fund or with a licensed compensation insurer as contemplated in the Compensation for Occupational Injuries and Diseases Act, 1993;*
- (v) *appoint each contractor in writing for the part of the project on the construction site;*
- (vi) *take reasonable steps to ensure that each contractor's health and safety plan contemplated in sub-regulation (2)(a) is implemented and maintained on the construction site;*
- (vii) *ensure that the periodic site audits and document verification are conducted at intervals mutually agreed upon between the principal contractor and any contractor, but at least once every 30 days;*
- (viii) *stop any contractor from executing construction work which is not in accordance with the client's health and safety specifications and the principal contractor's health and safety plan for the site or which poses a threat to the health and safety of persons;*
- (ix) *where changes are brought about to the design and construction, make available sufficient health and safety information and appropriate resources to the contractor to execute the work safely; and*
- (x) *discuss and negotiate with the contractor the contents of the health and safety plan contemplated in sub-regulation (2) (a), and must thereafter finally approve that plan for implementation;*

(d) ensure that a copy of his or her health and safety plan contemplated in paragraph (a), as well as the contractor's health and safety plan contemplated in sub-regulation (2) (a), is available on request to an employee, an inspector, a contractor, the client or the client's agent;

...”

62 Regulation 7(2) captures what a contractor must do prior to performing any construction work. This includes:

62.1 providing and demonstrating to the principal contractor a suitable and sufficiently documented health and safety plan, based on the relevant sections of the client's health and safety specification contemplated in regulation 5(1)(b) and provided by the principal contractor in terms of sub-regulation (1)(a). The plan must be applied from the date of commencement of and for the duration of the construction work and which must be reviewed and updated by the contractor as work progresses;

62.2 opening and keeping on site a health and safety file, which must include all documentation required in terms of the Act and these Regulations, and which must be made available on request to an inspector, the client, the client's agent or the principal contractor;

62.3 before appointing another contractor to perform construction work, be reasonably satisfied that the contractor that he or she intends to appoint

has the necessary competencies and resources to perform the construction work safely;

62.4 cooperate with the principal contractor as far as is necessary to enable each of them to comply with the provisions of the Act; and

62.5 as far as is reasonably practicable, promptly provide the principal contractor with any information which might affect the health and safety of any person at work carrying out construction work on the site, any person who might be affected by the work of such a person at work, or which might justify a review of the health and safety plan.

63 Regulation 7(4) places the responsibility on a principal contractor who must take reasonable steps to ensure cooperation between all contractors appointed by the principal contractor to enable each of those contractors to comply with these Regulations.

64 Regulation 7(5) expressly states that *“[n]o contractor may allow or permit any employee or person to enter any site, unless that employee or person has undergone health and safety induction training pertaining to the hazards prevalent on the site at the time of entry.”*

65 Management and supervision of construction work is provided for in Regulation 8. There are a number of key requirements set out in this regulation. These include;

65.1 A principal contractor must in writing appoint one fulltime competent person as the construction manager with the duty of managing all the construction work on a single site, including the duty of ensuring occupational health and safety compliance, and in the absence of the construction manager an alternate must be appointed by the principal contractor.

65.2 A contractor must, after consultation with the client and having considered the size of the project, the degree of danger likely to be encountered or the accumulation of hazards or risks on the site, appoint a fulltime or parttime construction health and safety officer in writing to assist in the control of all health and safety related aspects on the site.

65.3 A construction manager must in writing appoint construction supervisors responsible for construction activities and ensuring occupational health and safety compliance on the construction site.

65.4 A contractor must, upon having considered the size of the project, in writing, appoint one or more competent employees for different sections thereof to assist the construction supervisor contemplated in

sub-regulation (7), and every such employee has, to the extent clearly defined by the contractor in the letter of appointment, the same duties as the construction supervisor: Provided that the designation of any such employee does not relieve the construction supervisor of any personal accountability for failing in his or her supervisory duties in terms of this regulation.

66 Regulation 9 provides for risk assessment for construction work. A contractor must before the commencement of any construction work and during such construction work, have risk assessments performed by a competent person appointed in writing, which risk assessments form part of the health and safety plan to be applied on the site.

67 The risk assessments must include:

67.1 the identification of the risks and hazards to which persons may be exposed to;

67.2 an analysis and evaluation of the risks and hazards identified based on a documented method;

67.3 a documented plan and applicable safe work procedures to mitigate, reduce or control the risks and hazards that have been identified;

67.4 a monitoring plan; and

67.5 a review plan.

68 Regulation 9(2) expressly requires that a contractor must ensure that as far as is reasonably practicable, ergonomic related hazards are analysed, evaluated and addressed in a risk assessment. Related to this, Regulation 9(4) requires a principal contractor to ensure that all contractors are informed regarding any hazard that is stipulated in the risk assessment before any work commences, and thereafter at the times that may be determined in the risk assessment monitoring and review plan of the relevant site.

69 In terms of Regulation 9(7) a contractor must review the relevant risk assessment where changes are effected to the design and or construction that result in a change to the risk profile; or when an incident has occurred.

70 Where construction involves excavation, Regulation 13 applies. In terms of regulation 13(2), a contractor who performs excavation work –

“(i) must cause every excavation which is accessible to the public or which is adjacent to public roads or thoroughfares, or whereby the safety of persons may be endangered, to be:

(i) adequately protected by a barrier or fence of at least one metre in height and as close to the excavation as is practicable; and

(ii) provided with warning illuminants or any other clearly visible boundary indicators at night or when visibility is poor, or have resort to any other suitable and sufficient precautionary measure

where subparagraphs (i) and (ii) are not practicable.”

71 When dealing with water environments, Regulation 26 provides as follows:

“(1) A contractor must ensure that where construction work is done over or in close proximity to water, provision is made for:

(a) preventing persons from falling into water; and

(b) the rescuing of persons in danger of drowning.

(2) A contractor must ensure that where a person is exposed to the risk of drowning by falling into the water, the person is provided with and wears a lifejacket.”

72 All the parties claimed to understand the legal framework. How each party complied will be detailed below.

THE CONTRACTUAL ARRANGEMENTS

The Contract between Gauteng Department of Roads and Transport and the GMH Tswelelo

73 GMH Tswelelo was appointed by the GDRT to render consulting engineering services on the Project.

74 In July 2013, the GDRT, represented by the Head of Department, offered GMH/Tswelelo Consulting Engineers under Tender Number: RFP 99/12/2012,

a tender for “Consulting Engineering Services for the Preliminary Design Review, Full Survey, Full Environmental Impact Assessment, Detail Design, Contract Documentation and Site Supervision for K54/Tsamaya Road between P154-1 (K22, Old Bronkhorstspuit Road) and K69 (Hans Strydom) (approximately 6,8 km) as well as section of Road 2561 from K54 to K54/Tsamaya Road In Mamelodi (approximately 2,2 km)”.⁶ The offer was in the amount of R25 976 661.04.

75 On 21 July 2014, the offer was accepted by GMH Tswelelo.⁷

76 Subsequent to that GMH Tswelelo and the GDRT concluded a written contract.

77 In terms of the contract, GMH Tswelelo would be the Agent and the GDRT the Employer. GMH was also required to undertake construction monitoring and supervision. These terms are given life in the Definition section of the contract.⁸

77.1 “Agent” is described as the service provider appointed in terms of the OHS Act, including the relevant regulations.

77.2 “Employer” is defined as the contracting party named in the Contract who employs the Service Provider.

77.3 Construction monitoring/supervision services for which GMH were engaged are defined as the process of co-ordinating the Works Contract

⁶ Contract between the GDRT and GMH Tswelelo, C1.1.1.

⁷ Contract between the GDRT and GMH Tswelelo, clause C.1.1.2.

⁸ Contract between the GDRT and GMH Tswelelo, p C1-10.

and overseeing and/or inspecting the Works in accordance with the Employer's requirements.

78 In terms of clause 5.1.4, GMH Tswelelo is delegated as the Employer's Mandatory in terms of the OHSA and as the Employer's Agent as defined in the Construction Regulations.

79 The scope of work to be undertaken is set out in **PART C3: SCOPE OF WORK**. In essence, GMH Tswelelo was contracted to design and oversee the construction of K54/Tsamaya Road between P154-1 (K22, Old Bronkhorstspuit Road) and K69 (Hans Strydom) (approximately 6,8 km) as well as section of Road 2561 from K54 to K54/Tsamaya Road in Mamelodi (approximately 2,2 km). GMH Tswelelo would become the GDRT's agent in this regard.

80 The Scope of Work is set out in Part C.

81 In terms of Clause 4 of the Contract, the GDRT as the Employer had the following obligations:

81.1 Provide to GMH Tswelelo any information it requires for the performance of the services;

81.2 Give decisions on matters properly referred by GMH Tswelelo withing a reasonable time and in writing so as to not delay performance of services;

- 81.3 Co-operate with GMH Tswelelo and not interfere or obstruct proper performance of the service, including to:
- 81.3.1 authorise GMH Tswelelo as its agent in so far as it is necessary for the provision of the services,
 - 81.3.2 provide all relevant data, information, reports, correspondence which becomes available;
 - 81.3.3 ensure that GMH Tswelelo has access to the premises or sites necessary for performance of the services;
 - 81.3.4 assist in obtaining all relevant approvals, licences and permits necessary for the services;
 - 81.3.5 designate in writing a person to act with complete authority in giving instructions and receiving communication on behalf of the Gauteng Department of Roads and Transport.
- 81.4 The GDRT was also required to engage such others as may be necessary to the execution of work necessary for the completion of the Project, but not included in the Services. However, the GDRT was prohibited from entering into an agreement or contract with others which involves the duties and responsibilities of GMH Tswelelo in terms of the contract without a written agreement.

81.5 The GDRT was also obligated to pay GMH Tswelelo the contract price.

82 GMH Tswelelo as the Service Provider had the following obligations:⁹

82.1 To perform the services in accordance with the Scope of Work with all reasonable care, diligence and skill in accordance with generally accepted professional techniques and standards and shall be responsible for breach of professional duty by reason of any error omission or neglect in connection with delivering the services.

82.2 Unless specifically instructed differently, GMH Tswelelo is delegated as the Employer's "Mandatory" in terms of the OHSA and as the Employer's Agent as defined in Construction Regulations 4(2), (5) and (6) of the OHSA.

83 Clause 8 of the Contract provides for the commencement and completion of the Contract. It stipulates the commencement date as the date that it is signed by both parties or such and later date as may be stated in the contract data. GMH Tswelelo was required to commence the performance of the services within 30 days after the date that the contract became effective, or such a date as specified in the contract data.

⁹ Contract between the GDRT and GMH Tswelelo, p C1 – 15, clause 5.

84 In so far as the completion date of the contract is concerned, the contract provides that unless terminated in terms of the contract or otherwise specified in the contract date, the contract shall be concluded when GMH Tswelelo has completed all its deliverables in accordance with the Scope of Work.

85 Furthermore, the Contract provides for extension of the contract.

85.1 GMH Tswelelo may request an extension to the Period of Performance if it is or will be delayed in completing the Contract by any of the following causes:

85.1.1 variations to Services ordered by the GDRT;

85.1.2 failure by the GDRT to fulfil its obligations under the Contract;

85.1.3 any delay in the performance of the Services which is not due to GMH Tswelelo's default; and

85.1.4 Force Majeure.

85.2 GMH Tswelelo is required within 14 days of becoming aware that a delay may occur, to notify the GDRT of its intention to make a request for the extension and will thereafter have 30 days to deliver full particulars of the request for extension.

- 85.3 The GDRT is required, within 30 days of receipt of a detailed request, grant such extension for the Period of Performance as may be justified, either prospectively or retrospectively, or inform GMH Tswelelo that it is not entitled to an extension.
- 85.4 Should GMH Tswelelo find the decision of the GDRT be unacceptable it shall, nevertheless, abide by such decision in the performance of the services and the matter shall be dealt with as a dispute in terms of Clause 12.
- 86 The description of the project is as follows:
- 86.1 The services required of the service provider are divided into the following distinct phases:
- 86.1.1 First, detailed assessments and review of preliminary design;
- 86.1.2 Second, detailed design;
- 86.1.3 Third, tender documentation for the works;
- 86.1.4 Fourth, site inspection and tender evaluation;
- 86.1.5 Fifth, administration and monitoring of the works; and

86.1.6 Sixth, administration during the defects notification.

87 Each of these phases are explained in detail at clause C3.2- C3.9. Below we focus primarily on duties directly relevant to this investigation.

87.1 Under detailed assessments and review of preliminary design, GMH Tswelelo was required to complete a draft detailed assessment and design report which included environmental and OHS obligations and considerations.¹⁰

87.2 Clause 3.3.6 expressly provided that *“Notwithstanding that the scope of works prescribes various procedures in terms of health and safety requirements the service provider cannot rely on these as the sole source of his obligations in terms of the OHS Act and accompanying Construction Regulations. Nothing herein shall absolve the service provider from conforming to all the requirements of the said Act and Regulations and in the event of conflict between the provisions of the scope of works and the statutory provisions, the latter shall prevail.”*

87.3 Under administration and monitoring of the works, GMH Tswelelo is required to administer and monitor construction works in accordance

¹⁰ Contract between the GDRT and GMH Tswelelo, clause C3.3.3 sub-clause o.

with legislation, contract documents, GDRT manuals of procedures and guidelines and current industry good practices.¹¹

87.4 Clause 3.6.6 sets out the specific duties associated with the management and supervision of a Works contract. This includes:

87.4.1 Monitoring and reporting of the contractor's programme;

87.4.2 Implementation of the engineer's quality control plan;

87.4.3 Monitoring the contractor's quality control plan;

87.4.4 Site audits, inspections, quality control testing, and approval or rejection of work;

87.4.5 Measurement and certification of completed work inclusive of cash flow forecast;

87.4.6 Regular site meetings with contractor and employer;

87.4.7 Monitoring of the contractor's third-party claims;

87.4.8 Monitoring and reporting of contractor's CPG commitments;

¹¹

Contract between the GDRT and GMH Tswelelo, clause C3.6.2.

87.4.9 Statutory control functions;

87.4.10 Attend public liaison committee meetings;

87.4.11 Monitoring and reporting of project's EMP requirements;

87.4.12 Implementing the engineer's requirements in terms of compliance with the OHSA;

87.4.13 Monitoring the contractors compliance with their OHSA; and

87.4.14 Compile all reports and as-built data in accordance with the employer's standards requirements.

88 As far as permits and authorizations were concerned, clause 3.1.6 stipulates that any environmental management plans or programs over and above the employers standard EMP that may be required will be treated as a specialized additional service. Similarly, the compilation of any plans or reports necessary to comply with the relevant Minerals and Energy Act pertaining to quarries and borrow pits were to be treated as an additional specialized service.

89 The service provider, GMH Tswelelo, was thus responsible to ensure that all submissions for approvals to the relevant approving authorities are completed in terms of the parameters set out in clause C 3.1.7.

90 Safety is dealt with in clause 3.1.11 of the contract. The clause provides as follows:

“The service provider [GMH Tswelelo] shall on award of the contract become the Employer's [GDRT] agent in terms of the Construction Regulation 4(5). The duties and responsibilities as the Client's agent are prescribed in Construction Regulation 4 in its entirety.”

91 This clause also details the typical duties that GMH Tswelelo had to be aware of:

91.1 Design phase

“The service provider must identify elements of the design that are inherently dangerous or hazardous during the construction phase and design in such a manner as to mitigate or eliminate the risk where possible. This duty of identification continues into the construction phase of the project regardless that the designer may not be monitoring the construction phase. All identified dangers or hazards are to be listed and brought to their attention of potential contractors by way of notification on the tender and contract drawings or separately listed in the tender or contract documents.”

91.2 Construction phase

“During the construction phase the supervising service provider must ensure that the employer's duties are continuously fulfilled meaning that the service provider has to include amongst its permanent monitoring staff at least one appropriately trained member in addition the service provider must conduct monthly internal audits to ensure that the site personnel are adhering to the statutory requirements.”

92 GMH Tswelelo was also allowed to order external audits, the cost of which were separately recoverable as a disbursement to the specialized sub-service

providers selected to conduct the audit. Furthermore, GMH Tswelelo was obligated to comply with section 24 of the OHSA.

- 93 Insofar as indemnification is concerned, the contract provides that “the service provider shall, at his own expense, indemnify, protect and defend the Employer, its agents and its employees from and against all actions, claims, losses and damages arising from any willful or negligent act or omission by the service provider or his subcontractors in the performance of the services, including any violation of legal provisions or rights of others in respect of patents, trademarks and other forms of intellectual property such as copyrights.”¹²

The Contract between GDRT and King Civil

- 94 On 9 March 2017, the GDRT, represented by RB Swarts, and King Civil, represented by Francois van Iddekinge, entered into an agreement for the construction of K54/Tsamaya Road between P154-1 (K22, Old Bronkhorstspuit Road) and K69 (Hans Strydom) (approximately 6,8 km) as well as section of Road 2561 from K54 to K54/Tsamaya Road in Mamelodi (approximately 2,2 km). The contract amount was stipulated as R442 687 683.86.

¹² Contract between the GDRT and GMH Tswelelo, p1-13, clause 3.10.

95 As part of the contract, the parties also concluded an agreement in terms of the OHSA.¹³ In this agreement, King Civil declared that it was conversant with the following:

95.1 All the requirements, regulations and standards of the OHSA together with its amendments and with special reference to the following sections:

95.1.1 Section 8, the general duties of employers to their employees

95.1.2 section 9, the general duties of employers and self-employed persons to persons other than employees

95.1.3 section 37, act or omission by employees or mandatories and

95.1.4 subsection 37(2) relating to the purpose and meaning of this agreement, Construction Regulations 2014 and other safety regulations as applicable.

95.2 The procedures and safety rules of the GDRT as relating to King Civil and all its subcontractors.

¹³ Contract between the GDRT and King Civil, p 10 of 213, clause C1.2.

- 96 The agreement further states that King Civil is responsible for compliance with the Act by all its sub-contractors, whether or not selected and/or approved by the employer. King Civil also provided a warranty that all its subcontractors and/or their employees are covered in terms of the OHSA.
- 97 Clause 4.3.1 states that King Civil is required to comply with all applicable laws, with regard to health, safety, wages and conditions of work, regulations, statutory provisions and agreements. This clause also makes provision for GMH Tswelelo to request proof of compliance.
- 98 Clause C3.1.5.15 expressly states that it is a requirement of the contract that the Contractor shall provide a safe and healthy working environment and to direct all his activities in such a manner that the employees and any other persons, who may be directly affected by his activities, are not exposed to hazards to their health and safety. To this end the contractor shall assume full responsibility to conform to all the provisions of the OHSA and the Construction Regulations 2014.
- 99 The contract also included the appointment of CLOs. Clause C11 provides that King Civil will appoint CLOs in consultation with Social Facilitators. The CLOs duties are to:
- 99.1 be available onsite daily between the contractors normal working hours and at other times as the need arises;

- 99.2 determine, in consultation with the contractor, the needs of the relevant skills training and be responsible for the identification of suitable trainees and will attend one of each of the training sessions;
- 99.3 communicate daily with the contractor and the employer's agent to determine the labour requirements with regards to numbers and skills to facilitate in labour disputes and to assist in their resolution;
- 99.4 facilitate the recruitment of temporary labour;
- 99.5 attend all meetings in which the community and all labour are present or are required to be present;
- 99.6 inform labourers of their conditions of employment and to inform temporary labourers as early as possible when their period of employment will be terminated;
- 99.7 perform all such other duties as agreed upon between all parties concerned; and
- 99.8 submit monthly returns regarding community liaison in a format prescribed by the employers agent.

THE HEALTH AND SAFETY PROVISIONS IN THE CONTRACT

- 100 The contract, in the section dealing with project specifications, sets out the Health and Safety specifications. Clause E 17 deals with water environments. In particular it provides that the paragraphs of the Construction Regulations and all the measures assigned thereto by the definitions included in the said Construction Regulations shall be deemed to constitute the contents of the specification.
- 101 Clause 3.5 deals with management; this includes the Health and Safety Management specifications. The scope of the Health and Safety Management specifications is set out at Clause 3.5.1.1 and provides that the specification cover the health and safety requirements to be fulfilled by the contractor to ensure a continued safe and healthy environment for all workers employees, subcontractors under his control and all other persons entering the site of work. These specifications are also to be read with the OHSA and the corresponding Construction Regulations.
- 102 Clause C3.5.1.8 deals with risk assessments. Before the commencement of any construction work and during the construction, King Civil is required to have a risk assessment performed and recorded in writing by a competent person. The contract also explains that *“risk is a measure of likelihood that the harm from a potential hazard will be realized, taking into account the possible severity of the harm. Harm to people includes death, injury (temporary or permanent), physical*

or mental health or any combination thereof. Risk management in health and safety includes the identification of hazards, assessing risk, taking action to eliminate or reduce the risk, monitoring the effectiveness and performing regular reviews of the entire process.”

103 Additionally, King Civil was required to compile method statement to address or handle the following:

103.1 hazards particulars to contract;

103.2 identify what could go wrong and how;

103.3 identify the likelihood of this happening;

103.4 identify the persons at risk;

103.5 identify the extent of possible harm;

103.6 eliminate or reduce the risk;

103.7 a monitoring plan; and

103.8 a review plan.

- 104 King Civil also had to ensure that all subcontractors conducted risk assessments for their scope of work as well.
- 105 Additionally, the risk assessment shall identify and evaluate the risks and hazards that may be expected during the execution of the work under the contract, and it shall include a documented plan of safe work procedures to mitigate, reduce or control the risk and hazards identified. Lastly, the risk assessments were to be made available on site for inspection by inspectors, the employer's agent, subcontractors, employees, trade unions and health and safety committee members and must be monitored and reviewed periodically by King Civil.
- 106 Clause C3.5.1.11 reiterates the duties of King Civil that are set out in the Construction Regulations. It again states that where construction work is done over or in close proximity to water, the provisions of Regulation 26 apply.

SECTION C

INTERVIEWS

Interview with the parents of Siyabonga Mabila and Lawrence Tshwenu, the bereaved families

107 On 11 March 2021, I met with the two families to introduce myself and explain the purpose of the investigation. In attendance was Mrs Pretty Mabila and Mr Mandla Mabila, parents of Siyabonga Mabila, Ms Madelaine Tshwenu, Siyabonga Tshwenu's mother, and the Councillor for Ward 100 Ms Maleka.

108 On 25 March 2021, I interviewed the parents of Siyabonga Mabila and Lawrence Tshwenu. The interview took place Thulamela Chambers in Sandton.

109 The meeting was attended by the following:

109.1 Mrs Pretty Mabila and Mr Mandla Mabila, parents of Siyabonga Mabila.

109.2 Ms Madelaine Tshwenu and Mr Deon Moore, Siyabonga Tshwenu's mother and uncle.

109.3 The parents' legal representatives, Wendel Bloem, Boitumelo Dlamini and Reitumetse Senaoana from Mkhabela Huntley Attorneys Inc.

110 The purpose of the consultation was to obtain information about the families, facts around the tragic accident that resulted in the children's deaths on 27 February 2021 and the families' interactions with any of the parties involved

(City of Tshwane, GMH Tswelelo, King Civil, Maudi Security Services and the GDRT).

- 111 The consultation with the families was extremely emotional. Whenever a family talks about loss of a loved one, especially a child, it evokes pain and emotions and is traumatic. Pain is personal. The two families, the Mabila and Tshwenu family, have lost their children. During the consultation, the families had to relive an extremely difficult time in their lives. This resulted in a long and emotional meeting.

The Families' backgrounds

- 112 Mrs Pretty Mabila and Mr Mandla Leonard Mabila are Lawrence Mabila's parents. Mr and Mrs Mabila have one other child, Busisiwe Mabila, aged 4. Lawrence was born on 13 July 2016. The Mabila family resides in 2497 Skierlik Mountain View, Kopanong, Pienaarspoort.
- 113 Ms Madelaine Amelia Tshwenu is Siyabonga Tshwenu's mother. Ms Tshwenu has two other children, Chantel Tshwenu, aged 7, and Channel Tshwenu, aged 1. Siyabonga was born on 22 August 2013. Ms Madelaine Tshwenu resides in 2356 Skierlik Mountain View, Kopanong, Pienaarspoort.

The Families' relocation

- 114 The two families arrived in the area in 2015. According to the parents, the City of Tshwane moved the families from Mamelodi East Extension 11 to the current area. The Municipality allocated plots. No explanation was provided to the families for the move, but they were informed that it would be a permanent relocation.
- 115 The Skielik Mountain View area that the families reside in has no basic services (no water, ablution facilities and electricity). The community makes use of mobile toilets located on each street and Jojo tanks filled with water periodically are provided by the Municipality.
- 116 There are also no schools and clinics in the area. The nearest school is about 10 km away and learners travel by bus to get to and from the nearby schools. In addition, the children in the community have no areas to play and play mainly in the streets.

Development of the area surrounding the quarry.

- 117 When the families arrived in 2015, the families explain that the illegal quarry consisted of no more than a few small bodies of water. The water was shallow, and during dry months members of the community used the area as a walkway to go to various destinations. Water flowed through the quarry when it rained.

- 118 According to the families, King Civil began to excavate the quarry making it bigger and deeper and funnelled excess water from the wetland into the quarry. King Civil also mined part of the sand to use as part of the road construction process.
- 119 The families state that the community was initially informed and understood that the area would be developed and a school and a mobile clinic would be built in area adjacent to the quarry.
- 120 The families also stated that since King Civil took over area and started the excavations, there was no fence and visible security around the area. The fence and visible security were only installed and placed after the tragic accident occurred.

Events of 27 February 2021

The Mabila family

- 121 On the day in question, Mr Mabila had left his home to do odd jobs in the community and Mrs Mabila stayed home performing chores. At around 11:00 am, Lawrence, Siyabonga and Siyabonga's sister had breakfast at the Mabila family home. At approximately 12:00 pm, Lawrence, Siyabonga and a third child, who is their friend, were playing together in the yard. The children then

requested permission from Mrs Mabila to go play at Siyabonga's home. Mrs Mabila gave them permission to do so.

122 While the children were out playing Mrs Mabila remained home working on household chores.

123 At approximately 15:00 pm, Mrs Mabila recalls that she was busy cleaning the house and washing curtains when Mrs Mologadi, her neighbour, passed by and asked where Siyabonga was. Mrs Mabila informed her that he had gone to play with the other children at Lawrence's home. Mrs Mologadi told Mrs Mabila that she should go check by the construction site dam because there are some children who drowned there and check at the clothes left outside the water, matched those of Siyabonga.

124 Mrs Mabila explained that she ran to the dam (quarry) and checked Siyabonga's clothes, and they matched those of her son. He was wearing dark blue long trousers, light blue long sleeve t-shirt and blue and white sneakers. These clothes were on the side of the dam.

125 By this time, Mrs Mabila explains that there were many people standing around the area. She sat down in shock and disbelief. She then called Siyabonga's father Mr Mabila, who was at work, and informed him of the drowning. He was also in shock and informed her that he is coming to the quarry site.

126 When Mr Mabila arrived at the scene, he asked his wife what had happened. Mrs Mabila informed Mr Mabila that she was at home when the drowning happened and was also called by a neighbour to come identify the clothes next to the dam.

127 Mr Mabila attempted to jump into the water to rescue Siyabonga and Lawrence and was stopped by the police who were already there when he arrived.

128 Soon thereafter two other police vans arrived. In one of them were divers who went into the water and recovered the lifeless bodies of Siyabonga and Lawrence. First, they recovered Lawrence and then Siyabonga.

129 Mr and Mrs Mabila asked the police if they can see their son's body. The police allowed them to view both bodies and to confirm the identity of their son. After they confirmed that it was their son, they left the scene and headed home.

The Tshwenu Family

130 Ms Tshwenu explains that after 11:00 am on 27 February 2021, Lawrence and his friend, Amogelang, were playing in the yard with old car tyres and soon thereafter Lawrence gave his mother his toy pistols and requested to go play with the other children in the streets. Lawrence and Amogelang left the yard whilst pushing the tyres around and playing, as they normally would.

- 131 At approximately 15:00, she heard the community whistle being sounded. This meant that there was a community meeting or an emergency.
- 132 Ms Tshwenu left the house to check what the matter was. On her way, she encountered Mrs Mologadi, one of the neighbours, who was sounding the whistle.
- 133 Mrs Mologadi asked Ms Tshwenu what Lawrence was wearing on the day and she told her to go check at the construction site dam to see if Lawrence is not one of the children who drowned there.
- 134 Ms Tshwenu arrived and found three ladies whom she had never seen around the community before the day in question. She greeted them and asked to see the clothes. The clothes were pointed out and Ms Tshwenu identified them as Lawrence's clothes. The shoes were red and blue, brown tracksuit pants and a blue and white stripped short sleeve t-shirt (with stripes on the front only). At this point, the police had not arrived at the scene.
- 135 Ms Tshwenu tried to take Lawrence's clothes, but she was stopped by people who had now gathered at the scene. She was told that the police will need to use the clothes as evidence. Ms Tshwenu later gave the clothes to Gladys, one of her neighbours.

136 Ms Tshwenu then ran back home in disbelief to go check if Lawrence had not gone home instead. When she got home, she asked her younger sister, Judy, if she had seen Lawrence, she said no, Lawrence had left in the morning. Ms Tshwenu checked the rest of the house and even went to the local tuckshop to look for him.

137 Ms Tshwenu sat at the shop waiting until she was fetched and it was confirmed that it was indeed Lawrence who had drowned.

138 Ms Tshwenu was taken to the scene to identify Lawrence's body. When she arrived, the police opened the pathology bag for her to identify her son, Lawrence. She positively identified him, and she was taken home thereafter.

The families' engagements with the parties involved

139 King Civil Engineering took the families to their site office. According to the families, the following people attended the meeting:

139.1 a King Civil representative;

139.2 the owner of the security company (black man), Mr Monageng;

139.3 the Project CLO, Mr Sidu;

139.4 Sylvia, a representative of the community.

- 140 The engagements took place in English. Mr Monageng would translate for the families.
- 141 The families were asked whether they were employed. They replied that they were not. According to the families, King Civil undertook to find the parents employment and undertook to pay the families monthly compensation. The families did not respond or participate in the meeting. The meeting ended on the basis that another meeting would be held after the funeral to discuss a way forward.
- 142 King Civil assisted with the funeral arrangements – King Civil paid for the costs of the funeral. However, since the funeral the families have not been approached by any representative whether from King Civil or any other entity or organisation.
- 143 The families also met with a number of officials at local, provincial and national level. The families state that at each of the meetings they were promised trauma counselling, food parcels and assistance with the funerals. They were provided with food parcels for a period of three (3) months commencing April 2021 to June 2021 by a social worker from the City of Tshwane. The provision are abruptly stopped without any explanation.

The situation currently

- 144 The families were asked to state what the current situation in the community was. They explained that since Siyabonga and Lawrence's tragic death, a fence was erected around the quarry area and there are security guards stationed around the quarry. According to the families, one security guard patrols the area during the day and two in the evening.
- 145 The families also complained about the presence of illegal occupiers around the pond and the illegal electricity connections which pose danger to the community, particularly children. The families added that their area is currently being electrified.
- 146 The families indicated in a follow up interview, held on 10 November 2021, that they have not heard from any of the involved parties in recent months. In particular, they complained of poor services received from the social worker tasked with assisting them. They indicated that while they were promised groceries, they only received groceries for the first three months after the death of their children. Thereafter, the social worker only delivered once, in September, to the Mabila family and not to the Tshwenu family.
- 147 In addition, they have not received any counselling. They indicated that they are still in need of these services to assist them with coping with the loss they suffered.

What the families wish for

- 148 Ms Tshwenu and Ms Mabila want justice for their children. During a follow up consultation, the families indicated that they hoped that compensation for the pain and suffering and the wrongful death of their children will go some way in easing their pain
- 149 Mr Deon Moore, Lawrence's uncle, suggested that there should be reparations: children should be assisted in the area with playing areas and taught to swim. Mrs Mabila mentioned that a park should be built in their honour. This provided a heart-warming moment during the entire consultation with the bereaved families.

Interview with the GDRT

- 150 The initial interviews with the GDRT was conducted on Monday, 5 March 2021 and on 12 August 2021 at Thulamela Chambers Sandton. It was attended by:

150.1 Mr Mohlomphegi Thulare, Chief Director: Legal Services;

150.1 Mrs Keyanao Morena, the Chief Director: Roads Construction;

150.2 Ms Valerie Govinden: Director: Construction; and

150.3 Mr Tshivhase Ramasindi, the chief engineer.

Relevant GDRT employees

151 The construction project is basically overseen by two individuals:

151.1 Mr Tshivhase Ramasindi who is the Chief Engineer within the GDRT.

151.1.1 Mr Ramasindi obtained his BEng Civil Engineering from the University of Pretoria in 2010. He joined GDRT in October 2018. Prior to this, Mr Ramasindi was employed as a civil engineer at eMzansi Consulting Engineers. He was a civil engineer involved in the design of road construction projects. He was assigned to and joined the K54 project in November 2018. His expertise is in design and road projects.

151.1.2 Mr Ramasindi manages a number of projects from a technical point on behalf of the GDRT.

151.1.3 Mr Ramasindi joined the GDRT when the contract between the GDRT and GMH Tswelelo was already in place. His primary task is to manage the project from a technical point of view on the GDRT's side. Mr Ramasindi attends all project-related meetings on behalf of the GDRT and sees to it that the consultants, GMH Tswelelo, are properly managed.

151.1.4 When asked what this means, Mr Ramasindi indicated that if there are technical issues, he intervenes to assist the consultant from the GDRT's side so that issues that arise are dealt with. Mr Ramasindi is primarily based at the GDRT offices and only attends to the site when there are site meetings or when there are issues that need urgent attention.

151.1.5 Mr Ramasindi explained that Ms Nenongwe is the person on the ground on behalf of the GDRT.

151.2 Ms Audry Nenongwe (Project Manager)

151.2.1 Ms Nenongwe is the project manager. She is the first contact on managing the project on site.

151.3 Overseeing Mr Ramasindi and Ms Nenongwe is Mrs Keyanao Morena.

151.3.1 Mrs Morena is the Chief Director: Roads Construction. She holds a B-Tech Engineering in Construction Management obtained in 2006 from the Tshwane University of Technology. She joined the GDRT in March 2016. Prior to that, she was the Director of Infrastructure for the Mpumalanga Department of Education.

151.3.2 Mrs Morena provides strategic management and is responsible for the strategic plan that is incorporated in the overall GDRT plan. She is also responsible for the annual performance plan supported by the operational plan of the two directorates that report to her. She ensures that projects that have been identified receive the necessary budgets, she sits on Bid Evaluation Committees and recommends project submissions that go to Bid committees, this includes recommendations on extensions, variations, or condonation.

151.3.3 In relation to this project, Mrs Morena is not certain if she sat in the Bid evaluation process, however, currently she recommends solutions and authorises payments of up to R2.5 million. She also intervenes when there are issues in the project that require the accounting officer's intervention. She would then communicate with the MEC or HoD to escalate the matter.

The relationship between the GDRT//GMH Tswelelo contract

152 GMH Tswelelo was appointed as Consulting Engineers to assist with the Preliminary Design Review, Full Survey, Full Environmental Impact Assessment, Detail Design, Contract Documentation and Site Supervision for K54/Tsamaya Road between P154-1 (K22, Old Bronkhorstspuit Road) and K69 (Hans

Strydom) (approximately 6,8 km) as well as section of Road 2561 from K54 to K54/Tsamaya Road in Mamelodi (approximately 2,2 km)". The contract was signed on 21 July 2014.

- 153 The scope of work included the design of the project, the formulation of the construction contracts and related documentation and supervision of the project on behalf of the GDRT.
- 154 Part of their obligations was to procure specialised services such as occupational health and safety practitioners and environmental health specialists. They were also required to obtain all the approvals necessary for construction, including water use licenses, environmental impact assessments etc. They also needed approvals from the City of Tshwane for the design of the wetland and the attenuation pond. Additionally, GMH Tswelelo also liaised with other entities affected by the project such as Eskom, water services, fibre suppliers etc.
- 155 As far as the pond is concerned, the brief was for it to be converted into an attenuation pond, with an outlet pipe directing water to the river to ensure that the community and the road reserve do not get flooded. In order to do so, the area had to be excavated and use the material to create a pond. According to Mr Ramasindi, the holes in the ground were already there, caused by the community sourcing sand from that area.

Project supervision

156 Mr Ramasindi was asked who ensures that contractual obligations and the health and safety requirements are adhered to.

157 In response, Mr Ramasindi explained that there were platforms that were put in place for this.

157.1 First, is the Project Steering Committee (“PSC”). The PSC consists of councillors of the affected wards, CLOs, Project Managers, GMH Tswelelo, King Civil and social facilitators from the GDRT and deals with any issues arising from the community. Minutes of these meetings were requested.

157.2 Second, are the site meetings. Site meetings are attended by GDRT, GMH Tswelelo, King Civil, a CLO and in the initial stages, representatives from the City. These meetings are reserved for discussing construction progress and any issues that have arisen including issues from the PSC meetings. Mr Ramasindi attends these meetings on behalf of the GDRT. Of specific relevance to this case, health and safety issues are reported on and discussed during site meetings.

158 Mr Ramasindi was asked what he does when it is clear that an issue has arisen. He indicated that he responds by “constantly requesting progress reports”.

Specifically, Mr Ramasindi was asked about the health and safety reports and what steps he takes in ensuring that the health and safety audit recommendations are properly dealt with. He responded that it is the contractor, King Civil, that must adhere to those findings. He added that when he receives the minutes and notices issued, through the consultant, GMH Tswelelo, he follows up on the progress made in dealing with that issue.

159 Mr Ramasindi also explained that in every PSC meeting, attendees are required to report. The Contractor, King Civil, provides progress reports which include the environmental consultant's report and health and safety site audits from Comprac – Risks will be highlighted in the project report. According to Mr Ramasindi, the project has never scored 100%, however, if it scores less than 90%, the risks are highlighted and discussed.

160 Mr Ramasindi was asked what he does if there is no compliance with the health and safety audits. He responded that the health and safety auditors, i.e Comprac, have the power to stop the project. If it is stopped, that is when the GDRT will intervene. He will only intervene if he is requested by the consultants, GMH Tswelelo, to do so. Prior to that, GMH Tswelelo is required to ensure that King Civil is complying with the audits.

161 Mr Ramasindi added that the contract between the GDRT and GMH Tswelelo, provided for the appointment of an environmental consultant and a health and safety agent. These were indeed subcontracted by GMH Tswelelo to monitor

compliance. He also mentioned that the project would not be compliant if these were not in place. Mr Ramasindi was asked if he was aware that at the time of the tragic accident, these services were not in place, he responded that he was. He explained that these services were not in place because the GMH Tswelelo's contract had lapsed, in the view of the GDRT Supply Chain Management team.

Lapsing of the GDRT and GMH Tswelelo Contract

162 Mr Ramasindi and Mrs Morena were asked why there was a conclusion that the GDRT and GMH Tswelelo Contract had lapsed.

163 First, they were referred to clause 8 of the contract which expressly provides that the contract shall be concluded when GMH Tswelelo has completed all its deliverables in accordance with the Scope of Work. Although Mr Ramasindi and Mrs Mokoena accepted the clause of the contract, it seems that after the conclusion of the contract, a few events led to a variation of the contract period.

164 As I understand things:

164.1 In May 2017, an internal memorandum prepared by the Directorate: Construction, served before the Bid Adjudication Committee ("BAC"), to amend the period for construction monitoring to align it with the construction period of Project K54, namely 30 months plus an additional

1 month for project close out. The memorandum is attached as annexure **“KTR 3”**.

164.2 The request was approved by the BAC on 15 June 2017.

164.3 Based on this, the GDRT and GMH Tswelelo concluded an extension agreement on 28 August 2017. In addition to additional costs, the extension agreement stipulated that the appointment of the Consulting Engineers was extended from 1 July 2017 to 31 January 2020 (30 months plus 1 month for project close out). The extension agreement is attached as annexure **“KTR 4”**.

165 It seems both the GDRT and GMH Tswelelo read the original contract together with the extension agreement to mean that the contract was varied. Therefore, after 31 January 2020, the Supply Chain Management division noted that the contract had lapsed and refused to make further payments to GMH Tswelelo.

166 Despite this supposed termination of the contract on 31 January 2020, GMH Tswelelo remained on site. GMH Tswelelo continued operating out of pocket while officials of the GDRT proceeded to find a solution to this problem.

167 On 8 May 2020, the GMH Tswelelo requested the GDRT for an extension of time from 1 February 2020 until 3 December 2020. This request was tabled before

the BAC. However, the request was made after the contract was terminated. As a result, the BAC then instructed that a legal opinion be sought on the matter.

168 The GDRT sought an opinion on whether the appointment for supervision in this matter could be extended after it had expired. In addition, the opinion was to include the legality of the payment made by the GDRT to the GMH Tswelelo after the expiry of the appointment. In sum, the opinion stated that:

168.1 The extension agreement varied the terms of the original contract such that to the extent so varied, the terms of the original contract are of no legal force and effect.

168.2 The contract concluded between the GDRT and GMH Tswelelo terminated by the effluxion of time and cannot be legally revived. An ex post facto extension of time is not possible under the circumstances. This would have been possible had the contract not terminated.

168.3 From a procedural law point of view, payments made by GDRT to GMH Tswelelo for work performed in February 2020, after the termination of the contract, would constitute irregular expenditure. An application for condonation of irregular expenditure can be made to National Treasury.

168.4 The GDRT may conclude a new contract with the GMH Tswelelo for the completion of the work. However, the GDRT must take care not to make

payments to GMH Tswelelo over and above the contract price without following due process.

169 The legal opinion was sent to the BAC to consider the option of concluding a new contract with GMH Tswelelo for the site, supervision and completion of the project. The GDRT motivated for continuing with GMH for the following reasons:

169.1 Construction work will be suspended as construction work cannot proceed without supervision;

169.2 Security of the community living along the incomplete construction site will be compromised;

169.3 The GDRT will be incurring additional costs for design and the review of the existing design;

169.4 Loss of project time to complete the work as the project will be suspended;

169.5 Finished road layers being damaged by being exposed to environmental effect while the project is on hold;

169.6 Further invasion by informal dwellers and businesses on the road reserve;

- 169.7 Enormous financial loss due to standing time claim from the contractor;
and
- 169.8 The risk of drowning on the attenuation pond and the wetland canal will remain as the construction will remain unfinished.
- 170 The GDRT team further noted that the appointment of a new consultant will take a period of up to 2 years.
- 171 Having considered the explanation provided by the GDRT, the BAC in turn recommended that the GDRT request the Gauteng Provincial Treasury to approve the deviation from normal bidding process in order for GMH Tswelelo to be appointed. On 24 March 2021, the Gauteng Provincial Treasury denied the request on the basis that the deviation request emanates from poor contract management.
- 172 It is important to note that during all this, GMH Tswelelo operated out of pocket. By December 2020, GMH Tswelelo could no longer cover the costs of Comprac – the health and safety auditors. Therefore, at the time the tragic incident occurred, there was no independent health and safety auditors on site. It appears that Comprac resumed work in March 2021, after the incident. It is worth noting that even in the March report, the health and safety auditors alerted the parties to the failure to effectively barricade some of the water areas and that failure would result in fatalities.

173 It appears that the contractual issues between the GDRT and GMH Tswelelo have since been resolved.

Comprac Health and Safety Audits

174 Mr Ramasindi was referred to Comprac December 2020 report.¹⁴ In this report Comprac issued the following prohibition notice:

“No access management was identified implemented at the main entrance to site e.g., children were found playing in water environment. This causes the risk of members of the public sustaining serious injuries in the event of unauthorized access to construction site/children drowning resulting in public liability claims.”

175 He was asked if he did anything after reading the report. Mr Ramasindi indicated that he waited for it to be discussed at the January 2021 site meeting. However, there is no mention of this in the site meeting minutes.

176 Mr Ramasindi was referred to a Comprac report dated 8 November 2018.¹⁵ It was indicated to Mr Ramasindi that as early as 2018, children were found swimming and playing in the quarry. In fact, Comprac expressly stated that there was unauthorised entry and warned that children were at risk of drowning, and yet no steps were taken to secure the area, despite clear warnings in the report.

¹⁴ Report attached as annexure “**KTR 5**”.

¹⁵ Report attached as annexure “**KTR 6**”.

177 Mr Ramasindi indicated that it was GMH Tswelelo that had to ensure that the reports were actioned.

178 Generally, it seemed that the GDRT's attitude towards the health and safety reports was that it was for GMH to attend to those issues. If this was not done, Comprac had the power to close the site and then the GDRT would intervene.

Interview with GMH Tswelelo

179 The interview with GMH Tswelelo was conducted on Tuesday, 13 April 2021 at Thulamela Chambers Sandton. It was attended by:

179.1 Mr Mohammed Rida Jaffer (Director and Contract Engineer);

179.2 Mr Isaac Peter Ojunga-Omara (Resident Engineer); and

179.3 Mr Christian Birihanze (Contract Engineer).

About GMH Tswelelo

180 GMH Tswelelo is a specialised road and storm water design civil engineering consultancy. The company was first established in 1987 as GM Hattingh & Partners, and has a 30-year experience. GMH Tswelelo had directors, Mohammed Rida Jaffer, George Hattingh, Louis Marais and Johan Gilbert.

181 GMH Tswelelo serves both the public and private sectors within the fields of traffic engineering, all aspects of road and bridge design, structural design involving to roads and earthworks, geotechnical work, project management and the whole spectrum of municipal services design.

182 GMH Tswelelo has offices in Randburg, Nelsrui and Limpopo. They have done a number of municipal projects for the Johannesburg Road Agency and the GDRT.

Relevant GMH Tswelelo employees managing the contract

183 The contract was managed by three individuals.

183.1 Mohammed Rida Jaffer who was the Contract Engineer from the inception until 2020. In the year 2020, Christian Birihanze took over as the Contract Engineer.

183.1.1 Mr Jaffer holds National diploma in civil engineering obtained in 1994 and is registered with the Engineering Council of South Africa.

183.1.2 The duties of the contract engineer include:

- (a) Leading the implementation of the contract;
- (b) Attending to all the contractual matters;

- (c) Attending all site meetings;
- (d) From GMH Tswelelo's side, taking ownership of decisions and implementation of site meeting decisions;
- (e) Dealing with all claims submitted by the contractor, King Civil.

183.2 Isaac Peter Ojungu-Omara is the Resident Engineer and was tasked with monitoring construction supervision.

183.2.1 Mr Ojungu holds a BSC Civil Engineer in 1997 and a MSC in Urban Transport Planning in 2006 from the University of Cape Town. Mr Ojungu is registered with the Engineering Council of South Africa and started working at GMH Tswelelo in 2017.

183.2.2 Mr Ojungu's duties in this project were to:

- (a) Monitor and provide supervision of construction to make sure that the work is done according to specification, within budget and on time;
- (b) Remain full time on site; and

- (c) Be aware of all the daily activities and what happens on the project.

183.3 Christian Birihanze who took over from Mr Jaffer as a contract engineer.

183.3.1 Mr Birihanze holds a B-Tech in Civil Engineering under Urban Engineering from Vaal University of Technology in 2007 and is registered with the Engineering Council of South Africa. He joined GMH Tswelelo in 2003.

183.3.2 Mr Birihanza's duties included:

- (a) Site supervision;
- (b) Approval of payment certificates;
- (c) Chairing site meetings; and
- (d) Approval of construction drawings.

The Contract

184 The contract with the GDRT was concluded on 21 July 2014. According to GMH Tswelelo, the contract was initially meant to run until the scope of work was

complete. However, GMH Tswelelo was subsequently issued a letter that was then signed by both parties limiting the contract to 20 months.

185 So, in February 2020, the GDRT stopped making payments to GMH Tswelelo and considered that the contract had lapsed. Despite this, GMH Tswelelo continued working and providing the service with the hope that the contract would be extended/renewed. When probed, GMH Tswelelo admitted that they regarded the contract as still binding on them and that is the reason, they never stopped providing the services.

186 The contract has since been extended to run concurrently with that of the contractor, King Civil.

187 In terms of compliance with its obligations, GMH Tswelelo confirmed that they understood the obligations as set out in the contract. In compliance with these obligations, GMH Tswelelo did the following:

187.1 Securing specialised services, and obtained the services of –

187.1.1 Occupational Health and Safety Auditors (Comprac);

187.1.2 Laboratory and testing services; and

187.1.3 Environmental Health and Safety Auditors.

187.2 Procuring the necessary licences and approvals from –

187.2.1 the Department of Water and Environmental Affairs for Water Use Licences;

187.2.2 PRASA;

187.2.3 Transnet;

187.2.4 Eskom; and

187.2.5 City of Tshwane for the construction of the wetland and the attenuation pond.

188 The GMH Tswelelo team was referred to certain provisions of clause C3.6.3 and asked about the steps taken to meet these obligations.

188.1 In response to how they understood sub-clause 1, the GMH Tswelelo team stated that community meetings do not happen often. The reason provided was that the PSC meetings have not been happening. The Project Steering Committee meetings had been requested but according to GMH Tswelelo, the Ward Councillors had not been attending following the placing of the City of Tshwane under administration. This had been the case since April 2020. The GMH Tswelelo team further noted that according to the contract, neither GMH nor King Civil can engage the

community directly, this is done through the GDRT social facilitators (Portia Nyati), who they claim was not ensuring that these meetings took place.

- 188.2 In response to how they understood sub-clause 3, the GMH Tswelelo team confirmed that monthly technical and site meetings are conducted. I have been provided with minutes to that effect signed by the GDRT, King Civil and GMH Tswelelo.
- 188.3 In response to how they understood sub-clause 4, the GMH Tswelelo team stated that provision was made for drawings and document reproduction as may be required.
- 188.4 In response to how they understood sub-clause 5, the GMH Tswelelo team maintained that they had complied with this clause.
- 188.5 In response to how they understood sub-clause 11, the GMH Tswelelo team averred that they monitored compliance with all relevant Occupational Health and Safety legislation, including regular internal audits to be conducted by Comprac and arranged for visits by the designer at identified critical phases of construction and recording/reporting of Section 24 incidents.

188.6 In response to how they understood sub-clause 12, the GMH Tswelelo team confirmed that they monitored compliance and reported on conformance to all relevant Environmental and/or Minerals and Energy legislation.

188.7 In response to how they understood sub-clause 18, the GMH Tswelelo team confirmed that they identified risks to the Employer under the Works Contract and communicated mitigation measures to the Employer. The team was asked what some of the risks identified for the pond and wetland areas were, and what measures were proposed to mitigate those risks. In response, the GMH Tswelelo team explained that the following risks were identified in the drawings:

188.7.1 Environmental risks identified included preservation of fauna and flora, other plants to be replanted, planting plan to replace certain species of plant. Fencing around the wetland but must have gaps for animals to be able to move around.

188.7.2 Health and safety risks around areas requiring excavation identified and barrication and warning signs in order for the area to comply with health and safety requirements for construction works.

The quarry/attenuation pond

189 According to GMH Tswelelo, the wetland was originally designed to store storm water from the newly constructed road. The City was then concerned that excess water has the potential of flooding the area including the newly established informal settlement. Accordingly, GMH Tswelelo claims that the City told them to include the illegal sand mining quarry in this project and convert the area into an attenuation pond. GMH Tswelelo explained that during the construction process, the area already had pits created by illegal sand mining and some of the mining was still happening. GMH Tswelelo furnished me with the Attenuation Pond Report and approval from the City. These documents are attached as “**KTR 7**” and “**KTR 8**” respectively.

190 The process would involve excavations to reshape the area and the addition of an outlet pipe to release excess water. When asked what kind of excavations were necessary, the GMH Tswelelo team confirmed that the area had to be reshaped and deepened to carry a certain volume of water. The attenuation pond was to hold excess water from the wetland as well and release it slowly into a stream.

191 The GMH Tswelelo team also stated that the pond was approximately 3 m deep. It was put to the GMH Tswelelo team that the community alleged that the pond was made deeper by King Civil. The GMH Tswelelo team stated that King Civil

was not instructed to dig deeper but to reshape the walls to allow natural flow of water. In essence they were meant to create a gentle slope.

192 The GMH Tswelelo team was also asked when the attenuation pond reshaping commenced and in response, they stated that it started in November 2019 and by the end of 2020, they were 70% of the way to completion. However, the construction couldn't continue because of the illegal occupation around the attenuation pond. The pond should not have held water, the outlet pipe was meant to be inserted to drain the water. This did not happen because of the occupation around the area. Currently the reshaping work is 90% complete, according to GMH.

193 The GMH Tswelelo team was also asked about the Environmental consultant's recommendations in relation to the wetland and the attenuation pond. According to the GMH Tswelelo team, Environmental consultants recommended a fence – there is a type of fencing that allows for rodents to move freely. This was also meant to happen around the wetland and the attenuation pond.

Occupational Health and Safety Audits

194 The GMH Tswelelo team was asked about the OHS Act and the Construction Regulations and how they understood their obligations towards GDRT specifically. The GMH Team indicated that they understood that they had to

adhere to all legislation and took that responsibility from the GDRT. They had to ensure all and full compliance.

195 The GMH Tswelelo team was referred to the Comprac reports. Specifically, the October 2018 report and the December 2020 report.

195.1 In relation to the October 2018 report, GMH Tswelelo was asked what solid barricading was. This question was posed because Comprac recommended that solid barricading be used to secure the water areas. GMH Tswelelo indicated that the safety net often used did not constitute solid barricading. Either the concrete or yellow plastic barricading was what was considered solid barricading. GMH Tswelelo commented that these were no longer used because they were frequently stolen by some members of the community.

195.2 In relation to the December 2020 report, GMH Tswelelo was asked about the measures taken in response to the report. The report noted that children were seen in the water area and that proper access control management was required.

195.3 GMH Tswelelo stated that “active measures” were taken, and that is, the deployment of security guards. GMH Tswelelo stated that 5 security guards were deployed during the day and 10 during the night. This was however contradicted by the evidence of King Civil and Maudi, who

mentioned that only 2 security guards were requested at night and none during the day as there are people working on site during the day.

Interview with King Civil

196 The initial consultation with King Civil took place on 14 April 2021. King Civil brought a large delegation. For ease, an attendance register is attached with all delegates' details as annexure "**KTR 9**".

About the Project

197 King Civil was appointed as the contractor for the Project.

198 The Project involved the construction of about 9 km of 2 roads that are not connected, the first road being the K54 and the other being Tsamaya Road. Part of the construction was a mandate to build underpasses, bridges, upgrading of culverts, upgrading of stormwater channels, construction of pedestrian walkways around Tsamaya road and K54. Later, the construction of the wetland was included. This involved the channelisation of water to a newly rehabilitated wetland. Thereafter, the designs were changed again to connect the wetland to the old illegal sand mining quarry and convert it into an attenuation pond with an outlet pipe to a nearby stream.

The Construction Contract

199 King Civil confirmed that they entered into a contract with the GDRT for construction of the Project. King Civil also confirmed that they understood all their responsibilities in terms of the contract. They also confirmed familiarity and understanding of the OHSA, the Construction Regulations and the environmental management programme and conditions.

200 King Civil explained that the contract was initially for 30 months, however, the project encountered a few challenges. These challenges included a strike at the beginning that caused a 6-month delay and ongoing encroachment by illegal occupiers of the road reserve. The encroachment has effectively prevented King Civil from working on certain areas of the construction project.

201 This, King Civil explained, has caused more delays and they have now sought multiple extensions. The first extension up until 21 July 2020, the next was to 13 January 2021 and the latest is to 12 April 2022.

The quarry/pond area

202 In terms of the specifications of the pond, the circumference of the attenuation pond is approximately 800 metres and about 3 metres deep. It was designed to take a certain amount of water and slowly release the water into a nearby stream. According to the design, the pond is not designed to have high volumes of water. The outlet pipe is meant to ensure the area does not flood.

203 King Civil admitted that there was work done on the pond. In particular, that they had removed soil for the purpose of re-shaping the pond. King Civil denies that this was equivalent to excavations. Instead, King Civil characterised the work as earth moving. Some of the soil was used to lift the banks of the pond and the remaining soil was used on the road. King Civil clarified that the use of soil on the road was not because King Civil needed that soil for construction, but rather that the soil needed to be removed and it was convenient to then use it as part of construction.

204 King Civil noted that there is ongoing illegal mining approximately 300 metres from the construction area. Despite having raised this as an ongoing safety risk with authorities, nothing has been done. King Civil noted that the digging stopped for a week after the incident but thereafter continued uninterrupted.

Comprac Safety Reports

205 King Civil representatives' attention was drawn to the Comprac health and safety reports. Specifically, the October 2018 report and the December 2020 report.

206 In relation to the October 2018 report, King Civil was asked what they did in response to Comprac's contravention notice requiring solid barricading. Again, this question was posed because Comprac recommended that solid barricading be used to secure the water areas. King Civil stated that safety nets and warning signs were put in place and not solid barricading. King Civil stressed that this was a decision discussed and adopted by the construction role players.

- 207 In relation to the December 2020 report, King Civil was asked about the measures taken in response to the report. Comprac issued a contravention notice in which it is noted that children were seen in the water area and that proper access control management was required.
- 208 In response, King Civil stated that “active measures” were taken, and that is, the deployment of security guards. King Civil deployed Maudi security guards. King Civil again stressed that the active measures were agreed to by the construction role players. Further that if Comprac was unhappy about the measures, they were entitled to shut down the site.
- 209 King Civil further noted that the community has made it hard to secure the area. First, through the ongoing encroachment and secondly, by severely assaulting a security guard in August 2020 for doing his job. The security guard was hospitalised and never returned to Maudi.
- 210 In addition to the security guards deployed around the pond, King civil also ensured there was signage in three different languages placed 3 meters apart.
- 211 King Civil was asked to speak more about the security measures put in place. They explained that two guards were posted to secure the attenuation pond. However, King Civil could not provide confirmation on whether the security guards deployed around the pond could swim or had the necessary equipment, such as life jackets to assist in case of drowning.

Site Meeting Minutes

- 212 The King Civil representatives' attention was drawn to the site meeting minutes. In these minutes it was noted that there was theft and other forms of vandalism. In response to the theft, particularly of the fence, King Civil's initial approach was to report the theft to the police and then to approach its insurance to replace the panels of fencing stolen. This approach was however stopped and King Civil opted to remove panels of fencing along the road reserve. King Civil was requested to explain the problems around fencing; the removal of the fence and the approach taken in this regard.
- 213 King Civil stated that as part of the road design, a fence was to be put around the road reserve and the wetland, however, when panels of fencing were placed, they were stolen allegedly by some members of the community. The initial approach was to replace the fencing as and when it was stolen and then to claim money from insurance. However, this was unsustainable as the theft was ongoing and continuous, and despite efforts to secure the area, elements of criminality prevailed. Therefore, the parties, including King Civil, opted for the removal of the fence and installation of the final fence once the Project had been completed. King Civil stressed, however, that a fence was never going to be installed around the attenuation pond. This was because the pond designs never included a fence. The only safety measures that were included in the designs of the pond was to flatten the side slopes.

The tragic incident of 27 February 2021

- 214 When asked about the incident, King Civil explained that from their point of view, the children went to swim unsupervised at the attenuation pond. They are unsure of how they passed the security guards who were on duty, however, by the time security noticed the children's presence, the children were undressing and jumping into the water. Unfortunately, the children drowned.
- 215 When asked about what in their view caused the incident, King Civil noted that the children were playing more than 500 meters away from their homes and out of sight of their parents. Further, they noted that while the site was under their control, they could not actually continue construction because of the encroachments. They, nevertheless, put in place safety measures to secure the site and that previous passive measures such as a fence, netting and signs were stolen.
- 216 King Civil also explained the steps they took after the tragic incident. They explained that they met with the family on the day of the incident, as well as the days after. They extended their condolences and offered support to cover the funeral arrangements and to make a contribution towards a trust fund that could be opened on behalf of the family by all the construction stakeholders. King Civil also stated that they contributed R95 000.00 for the funeral.

217 When asked about how this incident could be avoided in future, King Civil stated that community awareness needs to be conducted in order for them to understand what is happening in the construction process and the related safety risks. They also said that the City needs to deal with the illegal occupation around the road reserve and the pond area in order to ensure that construction is completed without further delays.

218 King Civil also noted that there is ongoing illegal sand mining in the area, around 300 meters away from the construction site. They stressed that this would create ongoing safety risks for the community, in particular for children who may drown during the rainy season.

219 Lastly, King Civil confirmed that they had erected a temporary fence around the pond area to prevent any further drownings. This they stated, was prompted by instructions from the politicians.

King Civil's report of the incident

220 King Civil submitted an occupation health and safety incident investigation report compiled by EMPOWERisk Management Services (Pty) Limited dated March 2021.

221 In terms of the report,

“the focus of the investigation is to determine whether King Civil at the time of the incident adhered to its legal duty as employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe for its employees and that the health and safety of persons other than employees were not negatively affected by its activities.”

222 The investigation was apparently “undertaken at the site office on Thursday, 11 March 2021”.

223 The report noted that:

- “a. King Civil was not responsible for the excavations filled with water that led to the tragic incident.*
- b. King Civil could not yet access the area where the incident occurred, and this was reported to the client for intervention.*
- c. King Civil nevertheless took and maintained reasonable steps to mitigate the risk.*
- d. Some elements in the community are seemingly not supporting but working against the measures taken by King Civil to mitigate the risk.*
- e. The risk mitigation measures maintained at the time of the incident was in line with that agreed with the Client, Client’s Representative (Resident Engineer) and Client’s Construction Health and Safety Agent (Comprac Holdings) during a site inspection in December 2020 to ensure that the site was safe for the construction holiday break.”*

224 The report states that King Civil had complied with its statutory obligations. It concludes that King Civil took and maintained reasonable and foreseeable steps to mitigate the risk; “passive as well as active measures as detailed elsewhere in the report”.

225 A copy of the report is attached as annexure “**KTR 10**”.

Follow up consultation

226 A follow up consultation was held with King Civil on 25 September 2021. The purpose of which was to enquire about progress made, remaining challenges and to put to King Civil further details that had emerged during the investigation.

227 In terms of updates, King Civil explained that:

227.1 About 178 dwellings were removed from the road reserve, this has created additional access for King Civil to continue construction.

227.1.1 The removals are led by the City’s Housing Development Department. They are assisted by the CLOs. There really isn’t much communication between the City and King Civil.

227.1.2 However, dwellings covering 1.160 km of the K54 road construction area and 1.1 km of the Tsamaya road construction area still need to be cleared.

227.1.3 The area around the attenuation pond is still occupied and work is not taking place.

227.2 As a result of the delays in clearing the road reserve, King Civil’s contract has been extended to 12 April 2022, this is subject to people moving by January 2022. Given that this movement has not been completed, the

contract will probably require further extensions. This will have an ongoing impact on the fiscus.

227.3 The illegal sand mining close by is continuing and has created deep holes in the ground and will be a continued safety hazard for the community. Although the police were called to stop the illegal sand mining, operations stopped for a week and then continued.

227.4 GMH Tswelelo has a new representative on site. There is a dispute between King Civil and GMH regarding the security line item. According to King Civil, GMH has removed over R7 million in security costs. This, King Civil explained, means that they are not and will not in future be paid for the security line item.

Interview with Maudi A 'Matlakala Security Company

228 The interview with the Maudi was conducted on 16 April 2021 and 26 August 2021, the consultation was attended by the following:

228.1 Ms Makhanya attorneys;

228.2 Mr Stemmer Monageng – Director of Maudi;

228.3 Mr Johannes Masemola – Director of Maudi;

228.4 Mr Marvel Phumulo Mashego – Security officer; and

228.5 Mr Lucas Maibela – Security officer.

229 Maudi was appointed by King Civil to provide security services for the Project in Mamelodi Township. Maudi operates from Unit 44 Block 3 Lombardy Business Park, Pretoria East.

About Maudi

230 During 2019, Mr Monageng, the co-director of Maudi, was invited to the site as a Deputy Chairperson of the local taxi association (Mamelodi Local and Long-Distance Taxi Association) and taxi owner. The invite came because no work had been undertaken due to protests by the community. Mr Monageng was asked to mediate a deadlock between the GDRT, King Civil and the community.

231 Mr Monageng was specifically requested to intervene because the taxi association had in the past written many letters to the MEC regarding the need for the road. King Civil asked the taxi association to negotiate with the community to resolve the impasse.

232 The GDRT facilitated the meeting and invited King Civil to their offices to discuss all the issues. King Civil was represented by Johannes van Tonder and Johan Venter. According to Mr Monageng, King Civil proposed that he assists with providing security services.

- 233 Although Mr Monageng had multiple companies providing a number of services, he did not have a security company. Mr Monageng decided to register a security company which started operating in 2018. Maudi now has 60 permanent staff, 10 are experienced supervisors. Only 17 are currently working on the Project. These 17 security guards rotate. At any given time, there are always 8 security guards deployed at the main site and two satellite camps.
- 234 Mr Monageng went back to the community and started engaging the community telling them that the protests have stopped job creation. After some negotiating, the community agreed for the project to continue.

Security services provided for the Project

- 235 Maudi started with 8 security guards. However, it was agreed that as the need arises, more security guards will be appointed. The security guards that are appointed are predominantly from the community. They are appointed through the community forum process which includes the CLOs. In essence, the CLOs are informed of the number of people required, and they select people for appointment.
- 236 Once people were appointed, Maudi ensured that they receive training and a PSIRA certificate.

237 The relationship between Maudi and King Civil is not regulated through a formal service level agreement. Instead, they have a purchase order indicating the basic terms of the agreement. The bulk order provides for the provision of security for the duration of the contract [29 months] at R100 000,00/ month from July 2018. After the initial period, they continued providing security services on a month-to-month basis. They also agreed to a 30-day termination notice.

238 Maudi deploy 8 guards at a time:

238.1 The main office has two guards during the day and two at night;

238.2 The satellite camp has 1 during the day and 1 at night;

238.3 The attenuation pond/dam had 2 guards stationed at night and over the weekend;

238.4 There will also be guards along the road works where machines are left overnight.

239 Mr Monageng explained that their security guards are not trained to swim, however, one of them can swim.

240 When on duty, the security guards are required to wear their uniform. The prescribed uniform is a security cap, t-shirt, name tag and trousers and jacket with the name tag. They have also provided our security guards with two types

of boots. For security, they also have a baton, pepper spray, two-way radio. They, however, do not have life jackets or water safety equipment.

241 Their responsibility around the attenuation pond is to prevent people from going into the water area.

About the area

242 As far as Maudi knows, the area had holes dug from illegal sand mining before King Civil started working in the area. At first, King Civil did not do any work in the pond area. The area around the pond has also overtime been completely occupied by illegal occupiers. This means that the entire parameter is not accessible for purposes of carrying out work. The pond is also oddly shaped, on the one side: the boarders are high making access difficult and on the other side, the boarders are a little more levelled.

243 Maudi was deployed at the dam/pond area in 2019 when King Civil started doing work on the area. They only provided one guard on weekends only. The rationale was that during the week, King Civils will be working on the area during weekdays. During the week, King Civil excavated soil and use some of the soil to fill the road. Further that it was not only King Civil that was digging, even members of the community or “Zama Zamas” also used to dig the area. The excavation started in 2019 and ended in 2020.

244 Three months into providing security, one of the security guards was severely assaulted by community for securing the pond area. The community didn't want a person stationed there. The community assaulted the security guard for chasing away children from the water area. The security guard ended up in hospital with serious injuries and resigned from Maudi. The accident report from the security guard is attached. The community made it clear that they do not want security there as they use the water due to the lack of water in the area.

245 The matter was reported to King Civil. Together, they agreed to increase the number of guards deployed to that area. Maudi requested 5 guards given the size of the dam and the difficulty of getting from one side to another. They were of the opinion that 5 guards would be sufficient to cover the area and a large number would mean that the community would not easily intimidate security guards. According to Maudi, King Civil declined the request and only approved one additional guard to secure the area. The rationale was that the contract was coming to an end, and they could not make decisions with huge budgetary implications.

246 After the assault of the Maudi security guard, Maudi started monitoring the area more closely. They made the following observations:

246.1 Because of the water challenges in the area, community members frequently used the area to do their washing.

246.2 Whenever community members did their laundry in the pond, their children would also be playing in the water.

246.3 Whenever they reprimanded the community, members of the community would threaten the security and tell them that their children would not drown because the parents were there with them. So, children were accustomed to playing in the water and learned how to access the pond even when nets and barricades were put up on the one side.

247 In addition to the security guards, King Civil placed nets and the yellow plastic barricades on the eastern side of the pond. According to Mr Monageng, these were constantly stolen.

Day of the tragic incident

248 Marvel Phumulo Mashego and Lucas Maibela were on duty. Lucas Maibela's statement of the incident is attached as annexure "**KTR 11**".

249 Mr Monageng received a call from Lucas Maibela informing him that two children had drowned in the pond and that the community was approaching the dam/pond and requested backup. Mr Monageng and the backup security guards arrived at the same time.

After the incident

- 250 Mr Monageng returned to the scene and visited the family every day after the tragic accident. He tried to assist the families and bought food, petrol, clothes, blankets.
- 251 On Sunday, Mr Monageng returned to the scene and met with three MMCs from the City of Tshwane. Their concern was about the lack of a fence around the pond. They argued about the fence – GDRT was told to instruct contractor to put up a fence and then add to the security. The MMCs also said there must be more security guards around the parameter because the area was vast.
- 252 A fence was erected by King Civil who hired local community members to install the fence. Maudi paid the community members who worked on the fence and was reimbursed by King Civil.
- 253 Mr Monageng expressed the view that the children would not have died if they had the 5 security guards they had asked for. They would be able to cover the parameter of the pond.
- 254 The Maudi team noted that since the fence was erected and security around the pond increased there has not been any incident of unauthorised access to the ponds.

Knowledge of safety regulations

255 Mr Monageng stated that they were never informed of any laws and regulations applicable to construction and specifically those that deal with construction around water areas.

Recommendations by Maudi

256 Maudi provided the following suggested recommendations:

256.1 Rules must be followed. The laws and regulations must be known by all parties and then followed to ensure safety.

256.2 There must be a play area for children. At the moment, children do not have safe spaces to play. This creates challenges and children using the pond area as a playground.

Interview with Community Liaison Officers

257 The interview with the CLOs was conducted on 20 May 2021. The following CLOs were in attendance:

257.1 Lucky Sidi – CLO Ward 100

257.2 Gloria Tsiane – CLO Ward 93

257.3 Thabo Seoka – CLO Ward 10

257.4 David Moloyi – CLO Ward 40

257.5 Jeff Tlhwaele – CLO Ward 99

257.6 Nico Sithole – CLO Ward 17

257.7 Elias Thopola – CLO Ward 97

Employment as CLOs

258 The CLOs explained that they started working on the project in February of 2018. They were all selected by the Ward Councillor, Councillor Maleka and hired by King Civil.

259 They all signed contracts with King Civil – for the duration of the construction Project. Although I requested a copy of the contracts, none was provided.

260 After their appointment, the CLOs attended a one-day induction meeting conducted by King Civil. They were inducted into their roles as CLOs. I asked the CLOs if the induction included an explanation of the applicable regulatory framework especially the risks and safety measures. The CLOs explained that none of the safety related construction measures nor any of the applicable regulatory framework was explained to them.

261 This is a full-time employment. Their role is primarily to act as a link between the construction stakeholders and the community. In practical terms, this includes:

261.1 facilitating work opportunities to members of the community;

261.2 hosting meetings with the community about the project only when necessary;

261.3 attending various meetings including the PSC meeting and site meetings;

261.4 attending to strikes and other community related issues;

261.5 when there are labour disputes, negotiating with King Civil on behalf of community members appointed as labourers on the Project;

261.6 taking issues to the Councillors on behalf of the community.

262 Although they are employed full time, they are not required to be on site full-time. They are only required on site for meetings, issues and/or complaints.

The area affected by the Project

263 When asked about the genesis of the community, the CLOs explained that in June 2015, the City moved communities from Wards 10, 16, 17, 40 and 97 to Ward

100 and divided the area into 10 sections and 2600 permanent stands created. The area with the pond was named Mountain View. Relocations to the area were completed on 3 October 2015.

264 According to the CLOs, the pond area was previously used for illegal sand mining and had holes in the ground. When it rained, these holes would fill up with water. The City had promised the community that the area around holes would be turned into a school and a clinic to service the newly formed community. However, when the City saw the extent of the holes, they informed the community that the school and the clinic would be moved to another area. The area was always full of water whenever it rained.

265 When asked about basic services, the CLOs explained that there were no basic services such as water and electricity. The City provides Jojo tanks for water and portable toilets on each street as ablution facilities. Some of the community is electrified illegally. There were 78 Jojo tanks and now there are 102 tanks some bought by the community.

266 The CLO of Ward 100, Mr Sidu, explained that a huge challenge affecting the pond area is the illegal invasion. There are people who have invaded all around the pond. He stated that he had always been concerned about the lack of a fence around the area because he always witnessed community members regularly doing their washing in the area with the children playing in the water. When he confronted parents about the children playing in the water, the parents said that

the children will not drown while in the company of their parents. Mr Sidu informed the City about the need for water in the area. He even sent pictures of the effects of the lack of water to the Group Head for the City of Tshwane. No response was received according to Mr Sidu.



[Pic: Taken by Mr Sidu depicting community members using pond to do laundry.]



[Pic: Taken by Mr Sidu depicting children in the pond.]

Work on the pond

267 The CLOs confirmed that the construction project started in February 2018; the Contractor came but did not work on the pond area. It was only in 2020 that King Civil started working on the illegal mining area. The CLOs explained that King Civil started by taking sand from the pond area and shaping it into a dam. They also started digging a trench leading the water to the pond area. Part of the sand was removed and used as part of construction of the road and to level the borders of the pond. All that the CLOs saw around the area as a safety measure was a soft net.

268 Mr Sidu, as the CLO from the pond area, was not told about what was going on in the area. He asked his fellow CLOs Nico Sithole, Gloria Tsiane and Thabo Seoka to accompany him to King Civil to enquire about the work that had commenced at the pond. It was only then that he was informed that the area was going to be developed into an attenuation pond. At that point, Mr Sidu explained, the community was questioning him about what was happening in the area because they wanted employment, and no one had informed them of construction in the area. All the community had seen were machines and trucks busy in the area. This caused friction in the community.

Safety measures around the water areas

269 Mr Sidu stated me that historically, children always used to play in the water area. Parents used to refuse for them and security to stop their children from playing in the area. In fact, he confirmed that one of the security guards was assaulted for advising children to stop playing in the water area.

270 Mr Sidu explained that in March 2020, construction on the area stopped because of the National Shutdown caused by the COVID-19 pandemic. During that time, King Civil placed a net around the area and a single security guard.

271 Mr Sidu noted that the security was not always there. On one occasion, he came to the area and found no one stationed there. He says that he called the security supervisor, Mr Monageng, who confirmed that one of the security guards was

securing the area around the gabions and culverts. One security emerged but was not properly dressed in full uniform.

272 Apart from the soft nets and security guards, the CLOs confirmed that there were no other safety measures taken around the area.

The tragic incident

273 Mr Sidu explained that because it was a Saturday, he was not around when the incident happened. At around 16:30, he received a call informing him that there are people near the pond looking for the CLO. He then received another call, this time from Ivan from King Civil saying there are children who drowned at the pond. By the time he arrived, the divers had taken out the bodies of the children who drowned. He then received a call from the King Civil site manager saying that he should locate the families.

274 Mr Sidu explained that the atmosphere was tense and that members of the community were claiming that King Civil killed the children.

Events after the tragic incident

275 That evening, Mr Sidu explained that he went on behalf of King Civil to check on the families. He asked for the particulars of the children to ensure that King Civil knew the full particulars of the children.

- 276 On Sunday, representatives from GMH Tswelelo, two MMCs from the Municipality, Maudi and King Civil met at the pond area. According to Mr Sidu, the MMCs enquired about why there was no fence around the pond area. King Civil responded by saying that there was no fence because there were security guards stationed around the clock. One of the MMCs told King Civil that another child could fall in and drown because there is no fence. She requested that a fence be erected to secure the area. Ivan, from King Civil, said that he couldn't take a decision but would take it to King Civil. Mr Monageng from Maudi undertook that they would ensure that a fence is erected.
- 277 They then went to the families to pay their respects and extend condolences. The MMCs undertook to ensure that the area was properly barricaded and promised that this would be the last time that an incident like this will occur.

Erection of the fence

- 278 According to Mr Sidu, on Tuesday after the accident, King Civil donated a fence. The community said that they as a community wanted to erect the fence. Ivan from King Civil demarcated where the fence must be erected. Twelve (12) people installed the fence (4 men and 8 women). This was done over a period of three days.
- 279 After the fence was set up, King Civil, through Maudi, paid the community workers who erected the fence.

280 The fence is still intact.

Current status of the Project

281 The CLOs noted that there are a number of challenges affecting the project. One of the struggles affecting the Project is the unlawful occupation. Although there is a relocation plan, only 115 shacks have been moved, 994 more still need to be moved. Further, every time some shacks are moved, more unlawful occupiers settle in.

282 Another issue highlighted by the CLOs is the lack of cooperation between stakeholders. The CLOs explained that they have reported during meetings that the PSC meetings have completely stopped. King Civil has been struggling with key role players. This also impedes their ability to do safety awareness programmes and other community engagements. The CLOs claim to have tried to speak to Audry from GDRT to explain these challenges but they feel like the GDRT has not been monitoring the Project adequately and that King Civil does not take them seriously especially without the backing from GDRT.

Interview with City of Tshwane

283 The consultation with the City was held on 1 June 2021.

284 The delegation from the City included:

- 284.1 Mr Pheko Letlonkane the Group Head - Roads and Transport;
- 284.2 Mr Sello Chipu, the Acting Group Head - Human settlement;
- 284.3 Ms Dikeledi Selowa, the MMC - Roads and Transport; and
- 284.4 Mr James Muffy, the COO.

Background

285 The City is made up of 7 Regions:

- 285.1 Region 1 – Soshanguve, Mabopane, Winterveld, Ga-Rankuwa and Pretoria North;
- 285.2 Region 2 - Wonderboom, Sinoville, Montana, Temba, Hammanskraal;
- 285.3 Region 3 – Pretoria CBD, Brooklyn, Hatfield and Pretoria West;
- 285.4 Region 4 - Centurion, Irene and surrounds;
- 285.5 Region 5 - Rayton, Roodeplaat, Cullinan;
- 285.6 Region 6 – Pretoria East, Eersterust, Mamelodi, Shere;
- 285.7 Region 7 - Bronkhorstspuit and surrounds.

286 Mr Chipu started by explaining the establishment of the municipal transitional settlement. According to him, in 2013 the City Council decided to expedite the formalisation of informal settlements. At the centre of this was the idea that the

City needed to move with speed to ensure security of tenure of the resident and that resident must have to basic services. A number of areas were identified, and majority of them are areas that were previously disadvantaged. Informal settlements around Mamelodi, Hammanskraal, Soshanguve and Atteridgeville were identified.

287 In 2013, the City Council decided that although providing housing is not a core competence, they do own land and are responsible for service provision. They then decided to give people residential stands and the provincial government, which would be in charge of building houses, will come at a later stage. The area where the tragic incident happened, is in Pienaarspoort and was identified as one of the areas where a municipal transitional settlement would be established. This means the City will allow parallel or incremental development. A town planner and a surveyor were procured, who then divided the area into stands and then they allocated people to the stands. People were identified from congested informal settlements and then they started providing services. The first thing the City provided was electricity. The area is known as Pienaarspoort, Extension 20. The municipal transitional settlement Report is attached as annexure "**KTR 12**".

288 The City relocated 2800 households to City land from Stovel Park, Extension 11 and Phomolong. The layout map of the municipal transitional settlement Pienaarspoort, Extension 20 is attached as annexure "**KTR 13**". The City is still busy with the establishment of the township.

- 289 One of the challenges identified by the City is that the land in the area is owned by various people including the GDRT, Old Mutual, private people and the City. People started invading privately owned land. The City decided to try and stop some of the invasions. Old Mutual was very firm and used to effect evictions. But people insisted and the invasions became unmanageable. The City could no longer control the area. Additionally, it is very difficult to evict people through the courts. People invade all the areas including the road reserve, sports fields and areas that were designated for schools and clinics.
- 290 The City knew that access to Mamelodi was difficult and there were various road constructions that needed to happen to increase access to Mamelodi. For that to happen, people needed to be relocated outside of the road reserves for the various projects.
- 291 The GDRT asked the City to assist with relocating people for the various construction projects to continue. The GDRT acquired property so that the City could then relocate people. The GDRT acquired Leeufontein 427JR. From the City's side, they marked and registered 1192 structures located in the road reserve.
- 292 The Housing Development Agency ("HDA") was appointed to prepare a layout map and a surveyor was appointed. However, before movement, the City needed consent from the Gauteng Department of Agriculture and Rural Development ("GDARD") (the custodians of the Environmental Impact Assessment). The City

wrote to the Premier of Gauteng and GDARD for an exemption. Although exemptions were given for other portions of land, GDARD did not give an exemption for the land purchased by the GDRT because it was located in a strategic priority area. They would need to do an environmental impact assessment.

293 The City then told GDRT that it would use its land (the City had acquired Portion 20, 364 and 415 of Farmway Plaza and was in the process of acquiring proposed Piensaarspoort ex 15,16, 22 and 23) to address the backlog. This backlog would not only be people who invaded the Project area but also from other areas. The City intended to relocate 600 households in phase 1 and 10 000 in phase two.

294 The City in phase two (a), relocated 199 households from K54. The remainder will be relocated once the procurement process is complete.

295 In terms of the Leeufontein land procured by GDRT, the City appointed a town planner to conduct all the necessary approvals. The town planner came back to say only a small portion is developable. The land was seen as not economically viable.

296 In any event, the City still prioritised relocating people in order to ensure that the Project is completed. The City still needs to move about 770.

The quarry area

297 During consultations, the City was not certain who owned the land. However, they had been informed that King Civil also excavated the area and used the soil as part of the construction. They characterised this as contributing to illegal activities. The City nevertheless undertook to establish who owned the property.

298 The City later transmitted the ownership reports which indicated that the City was the owner of the land. These are attached as annexure “**KTR 14**”.

The establishment of the attenuation pond

299 The City was asked what they knew of the attenuation pond and the related approvals given by the City. The City did not have sufficient information on hand but undertook to make its own internal investigation and provide a report.

The City's involvement in the Project

300 The City was asked about its involvement in the Project. The City claimed that once a tender process is undertaken, the department that initiated the project would be in charge of the contractual provisions and the construction process. In terms of this specific Project, the City needed to do its own internal investigation to respond to the questions.

301 The City, however, stressed that they do not think proper approvals were given and that the documents in the Investigation Team's possession did not constitute proper approvals.

302 The City's attention was draw to the fact that there were City officials that formed part of site meetings in the initial phases. The City explained that the officials who were there were the Director responsible for Road Maintenance in Region 6, Mr Jerry Nyati, and the Functional Head, Mr Louis Havenger. They are responsible for maintenance of the road in the Region. They were not there as representatives of the City. The City could not explain why these City officials stopped attending these meetings.

303 The City was asked if they were aware of the dangers around the project. Mr Letlonkane stated that in January, after heavy rains drove around the site and noticed that all safety measures were blown away. He sent a text to alert.

After the incident

304 The City explained that they were notified of the incident and on Sunday morning, after the incident, they attended to the scene. Three MMCs were there, together with Cllr Maleka and the Regional Executive Director for Region 5, Ms Nomsa Mabasa. They sought to talk to the GDRT, CLOs and the person in charge of security. They went to the scene and found that there was no security stationed there.

305 They asked about security measures, community engagement and various aspects of the Project.

306 They also visited the family. They offered social services but nothing more because they expected that the GDRT would have their own process as the incident occurred during their project.

Lessons from the incident

307 The MMC Selowa was asked what she thinks caused the incident because she was there and had engaged the community and still maintains contact. Her view was that it was caused by negligence on the side of the contractor because there were insufficient security guards to secure the parameter of the pond, particularly given the known fact that children regularly played in the water areas; and lack of safety warnings and signs. MMC Selowa also noted that there was absolutely no security on the Sunday after the incident.

308 The City noted that they had experienced drownings at construction sites on other occasions. In particular, an incident in Hamanskraal was cited wherein 3 children died at 2 different sites over two days. The City noted that they learned a number of lessons from these incidents including:

308.1 the need for a guardhouse for 24-hour patrol;

308.2 fences and nets around water areas;

- 308.3 where there is theft, the immediate involvement of police;
- 308.4 issuing of firm directives to all contractors to secure their sites;
- 308.5 constant community engagement about the construction works;
- 308.6 door to door information sessions and safety briefings with the community; and
- 308.7 Establishment of safety monitoring team within the office of the COO.

Access to services

- 309 The City was asked about service delivery issues that are faced by the community. The City explained that because it is a municipal transitional settlement, the area is still under development. The City does not have bulk infrastructure in the area.
- 310 There are challenges, the first is water. Rand water, the water service provider, informed them that they were running at full capacity and were waiting on the Lesotho Highlands Water Scheme infrastructure to be built in order for the area to be provided with permanent water facilities. Second is electricity. Again, Eskom is running at full capacity and there isn't new infrastructure capable of electrifying the area. A new powerplant is necessary to provide electricity to the area. Eskom will only be able to complete new infrastructure in 2027 and 2028.

- 311 All the other departments have been provided with land to build other infrastructure including schools and clinics.
- 312 The City also stressed that the community must also take responsibility. The community was told about all the development and people have invaded all the areas where the amenities were meant to be built. This creates delays that compromise development in the area.
- 313 The City was asked about the alternative illegal electrical infrastructure and the danger that it poses. The City stated that they regularly undertake disconnection projects but after the disconnection, new illegal connections are done.
- 314 The City also noted that there are intergovernmental relationship issues which are hindering developmental programmes. The various departments are not working together and this causes further delays. The City acknowledged that it would take a number of years to fix all the issues.

Report from the City

- 315 The City conducted its own internal investigations regarding the attenuation pond and provided the following answers:

315.1 First, there was no “formal approval” for the construction of the attenuation pond. What was provided to the Investigation Team was an “in principle” approval from a subdivision of the City’s Road and

Transport Department. Final approval was never sought as final designs and drawing were never submitted; hence the City did not monitor the processes.

315.2 Second, it was Leap Consultants and GMH Tswelelo who approached the City about the inclusion of the quarry area into the Project and the conversion of the water area into an attenuation pond.

315.3 The City's Roads and Transport Department commented on the proposal by Leap Consultants and GMH Tswelelo that if they want to utilize the quarry as an attenuation dam, they have to do a proper attenuation dam design and the dam must be connected back into Pienaarspoort Spruit downstream where the illegal occupiers have settled. Further requirements were that the proposed attenuation dam must be designed, not only to accommodate the 1:50 and 1:100 year floods:

315.3.1 Because it is a man-made structure within a developing area, the Consultant must ensure that 1:200 year (RMF) flood can pass safely through the area.

315.3.2 A channel/pipe/culvert must be designed and installed to drain the dam into the spruit and the embankments of the existing quarry must be sloped to a max of 1 :3 to 1 :4 slope for safety.

316 A key revelation from the report was that the fencing of the proposed dam was discussed but “due to the likely theft of fences”, the parties decided that flattening the sides slopes of the proposed dam will be a safer long-term option.

Interview with Ward Councillor, Councillor Maleka

317 The interview with Councillor Maleka took place on 4 August 2021, at Tshwane Society of Advocates Chambers in Pretoria at 12:00.

Background

318 Councillor RR Maleka indicated that she had been a councillor for the area from August 2016. She confirmed that for projects conducted by the GDRT, the Councillors appoint the CLOs for the projects.

319 When asked about the establishment of the community, Councillor RR Maleka explained that the community was established in 2015; people were relocated from Mamelodi. When they were relocated, there were no facilities in the area, so the City provided potable water and electricity. She also stated that the community was made up of formal/established stands and informal stands in the area.

320 In response to a question about her engagements with the City, she said there were issues and the City was not responsive to issues the councillors raise about service delivery, especially in relation to informal settlements.

- 321 When asked about the number of councillors servicing the project area, Councillor Maleka indicated that there are seven councillors involved in the Project. It was the GDRT that informed them of the Project.
- 322 The councillors are involved in the monthly PSC meetings of the project. She said the meetings are held once a month, unless there are issues that urgently have to be discussed and addressed. At the meetings, the attendees discuss the progress of the project and issues relating to encroachment in the area.
- 323 About the attenuation pond, she said the area was smaller initially and grew bigger as a result of illegal sand mining. Once the project commenced, there was an issue of encroachment in the area. Councillor Maleka stated that she was not aware when the attenuation pond had expanded to its current size. She said that she had raised an issue about the attenuation pond and the safety risks concerning the attenuation pond with the CLOs. But the safety risks concerning the attenuation pond were never discussed at the PSC meetings.

Relocations

- 324 Councillor Maleka said the GDRT purchased land to allow for the relocation of people from the informal stands.

The incident

325 On the events of 27 February 2021, she said she was informed of the incident on the same day; however, she was in Limpopo when the incident occurred. The CLO (Mr Sidu) sent him photos of the incident.

326 Counsellor Maleka stated that the following morning she was called by the Member of the Municipal Council for Housing and the Member of the Municipal Council for Roads and they went to the scene of the incident. A representative of the GDRT, Valerie, joined them at the scene. They all met with the families, and offered support by enlisting them to benefit from a food parcels support programme.

After the incident

327 According to Councillor Maleka, the fence was installed a few days after the incident. She did not know who installed the fence.

328 In response to a question about how the incident may be avoided, she said that the City should be more efficient in relocating people. She believes the City drags its feet whenever projects are done on behalf of the GDRT.

329 She also said the illegal electricity connections in the area also pose a risk to the community.

Interview with GDRT Project Manager, Ms Nenongwe

330 The interview with Ms Nenongwe took place on 4 August 2021, at Tshwane Society of Advocates Chambers in Pretoria.

Background

331 Ms Nenongwe introduced herself as the project manager on the Project. She further explained that GMH Tswelelo was appointed to manage the project and ensure that the project is completed in accordance with the specifications and the agreed timeframes.

332 Ms Nenongwe said her role is to support GMH Tswelelo on the project and attends to issues that the GDRT has to address. Ms Nenongwe works “*hand-in-hand*” with GMH. She manages the quality assurance of the project, ensures that the project is conducted according to the specifications and the scope of work, and the time frames as agreed between the GDRT and King Civil. Ms Nenongwe said she does not address or consider safety issues on the project because she is not qualified to do so. She is primarily concerned with the quality and progress of the project.

333 In terms of the line of communication to the GDRT, letters are addressed to Mr Ramasindi and Ms Nenongwe.

334 In terms of engagement of all the stakeholders, Ms Nenongwe explained that whenever the GDRT appoints a contractor for a particular project, she initiates engagements with the City and the Ward Councillor(s) for the Ward(s) in which the project will be carried out or which will be affected by the project. She works with the consulting engineers, in this case GMH Tswelelo, in engaging with the Ward Councillors and the City. They inform the Ward Councillors of the details of the Project – the estimated duration, the nature of the project and the estimated cost. The Ward Councillors then nominate and appoint the CLOs for each Ward that will be affected to represent that Ward on the Project.

335 In terms of the meetings, Ms Nenongwe explained that there are three types of monthly meetings that are held in relation to the Project.

335.1 The PSC meetings:

335.1.1 These meetings are attended by the Ward Councillor(s), CLO(s), contractor and the consulting engineers. At these meetings, the Councillors are informed of the status and the programme of the project. The attendees discuss various issues and challenges on the project and subcontractors that are appointed on the project. Although these meetings are supposed to be held monthly, the meetings may be called whenever there are issues that have to be addressed within the month.

335.2 The technical committee meetings:

335.2.1 These meetings involve the discussion of quality issues on the project.

335.3 The site progress meetings:

335.3.1 During these meetings the attendees discuss the progress of the project, the budget and expenditure, environmental issues, safety issues, the programme of work and various issues and challenges.

336 I indicated to Ms Nenongwe that I was interested in the discussions at the site progress meetings because that is where the safety issues are discussed. I asked if she received and considered the safety inspection reports.

337 Ms Nenongwe said she attended the meetings at which Comprac's, the health and safety consultants, inspection reports were submitted. But she said she did not read all the reports: "*some I'd read; some I wouldn't*". Ms Nenongwe said the GDRT reiterated safety on the project. In particular, Ms Nenongwe said the primary safety issues that were discussed were motor vehicle speeding in the area and children climbing on trucks while the trucks were moving.

338 I specifically enquired about safety issues relating to the attenuation pond, Ms Nenongwe said that the discussion concerning the attenuation pond were

about the construction of the outlet pipe at the pond. Ms Nenongwe said barricading of the attenuation pond was not discussed or considered before the incident.

Relocations

339 Ms Nenongwe was asked about the relocation of unlawful occupiers. In response, she stated that only 200 people were moved, and a further 800 were scheduled to be moved but the relocation had not been initiated.

340 Ms Nenongwe was requested to provide more detail of the engagements between the GDRT and the City regarding this issue. In response, she indicated that in 2018, the GDRT approached the City's Department of Human Settlements to move people who lived in the area around and within the project. The City's Human Settlement Department informed the GDRT that the City did not have funds to move people. So, the GDRT considered using funds from penalties paid by the contractor on the Project to purchase land to which people would be moved. Then the GDRT requested a cost estimate for purchasing the land from the City. The City referred the GDRT to the Gauteng Department of Human Settlements.

341 The GDRT purchased land in 2019. After that, the GDRT informed the City's Department of Human Settlements. In response, the City informed the GDRT that it did not have a budget for relocating people and developing the area. The City

compiled a programme for moving people, and presented the programme to the GDRT. The proposal was for people to be moved to different land, not the land purchased by the GDRT. Only 200 people have been moved in terms of the programme.

The Incident

- 342 When asked about the tragic death of Lawrence and Siyabonga, Ms Nenongwe said she was informed by the director (Ms Ruth Morena) by a text message sent via WhatsApp.
- 343 Ms Nenongwe said when the incident occurred the Ward Councillors had not been participating in the Project because Tshwane Municipality was under administration.
- 344 GMH Tswelelo issued a written instruction to King Civil to install the fence and to barricade the attenuation pond after the incident occurred. King Civil installed the fence.
- 345 In response to a question about whether she foresaw or anticipated the incident, she said she *“did not see it coming”*.

After the incident

346 Ms Nenongwe said that it was further confirmation that the project had to be completed urgently. She said that the process of moving people from the area immediately around the attenuation pond is not being undertaken fast enough. So, she suggested that the GDRT should recommend an instruction for King Civil to “*de-establish*” the project. She believes this will result in progress in the project.

347 In response to questions about how the incident could have been avoided or prevented, Ms Nenongwe said the following:

347.1 If the project was completed within the initial timeframe the incident would not have occurred.

347.2 GMH Tswelelo should have ensured that the safety issues that arose were addressed. She noted that the GDRT stopped paying GMH Tswelelo at the beginning of 2021. Then GMH Tswelelo informed the GDRT that it could not afford to pay its subcontractors including the health and safety consultant. So, the health and safety consultant stopped conducting the health and safety inspection because it was not being paid. Therefore, the contractor did not have a representative to manage the safety issues on site.

ENGAGEMENTS WITH BOTONG CIVILS

348 BoTong were, in broad terms, given the following instructions:

- “1. *At a technical level, how the work around the construction of the pond, and given the particular location of the pond, should be carried out taking into account, amongst others, the following*
 - 1.1 *Engineering standards*
 - 1.1.1 *Drainage measures*
 - 1.1.2 *Storm water management handbooks*
 - 1.1.3 *Risks factors for attenuation ponds or barrow pits*
2. *What measures should be adopted from safety, legislative or regulatory compliance in order to avoid human access to areas such as the pond*
3. *In particular:*
 - 3.1 *What the consulting engineer is supposed to do as part of its supervisory or management functions*
 - 3.2 *What or how the contractor is expected to put in place during construction of the pond as part of road construction given the particular environment around the attenuation pond.”*

349 BoTong were required to do this without expressing views around capability on the part of any of the role players.

350 BoTong provided a report on Thursday, 2 September 2021. In sum, in addition to the regulatory framework discussed above, BoTong considered the following standards:

350.1 Sans1200 Standardised Specification For Civil Engineering Works;

350.2 COLTO Standard Specifications For Road And Bridge Works For South African Road Authorities; And

350.3 CTMM Standard Specification City of Tshwane Metropolitan Municipality Standard Specifications for Municipal Civil Engineering Works.

351 Assisted by IRCA Global, a health and safety plan that addresses all aspects of occupational health and safety to ensure compliance with the relevant legislation and compliance to the Client Safety Specification, as issued to the Principal Contractor, was developed.

352 Thereafter, a construction technical report was prepared. I wish to highlight the following aspects from the technical report;

352.1 First, in 2018, when the Project commenced, the closest dwelling was about 100 m from the centre of the pond. However, currently the closest dwelling is about 30 m from the centre of the pond. This places these structures at risk of being flooded.

352.2 Second, given that the pond is located within a community, temporary fencing may have to be an adequate measure to limit public access. Temporary fencing, if installed, should include lockable gates, with applicable signage and guarded. Gates will be unlocked and opened to allow traffic flow and locked and guarded during times when no

construction activities are taking place, i.e., weekends, public holidays and after hours.

352.3 Construction should preferably be undertaken during the dry winter months, if possible, to prevent rain and stormwater from flooding the designated area before construction can start. Should this not be possible, there should be a pump to remove the water.

353 I have considered BoTong's report and wish to thank them for the technical assistance provided to the investigation.

SECTION D

ANALYSIS OF THE ISSUES

- 354 The crisp question is: How do two children, one aged 4 and the other aged 7, end up drowned in a body of water surrounded by dwellings during a construction project in and around that body of water?
- 355 In context, the issues around the tragic incident of 27 February 2021 are complex and vast. They range from social factors, contractual matters, inter-governmental relations and human factors, including actions and inactions.
- 356 The tragedy cannot be attributable to a singular act or omission, the issues around it are multi-layered. But for the two bereaved families, the pain of loss of their children is not complex. It is internal and enduring. This is not to say that one should indulge in emotions, the task is to determine what caused or led to the tragic incident and how to ensure that there is no recurrence of similar tragedies.
- 357 It would be short-sighted and superficial to focus on the immediate causes of the tragedy and ignore or underplay contributory factors that led to the incident. The approach I adopt would entail not just who was or were responsible, but also to help find answers why an incident of this nature occurred and how to prevent similar incidents in the future.

358 Below, I undertake an analysis of the evidence presented to me and the implications of the actions and/or inactions of various role players. To give context I shall begin by briefly setting out the scope of work to be carried out and the related evidence provided to be undertaken.

Scope of work

359 There are three main areas that fall within the construction site.

359.1 The construction of the road.

359.2 The wetland. The wetland is along the main road. The work involved the rehabilitation and channelling of the Wetland.

359.3 The attenuation pond. The attenuation pond is surrounded by homes of the Skielik Informal Settlement. The work included the conversion of an old illegal quarry into an attenuation pond.

360 During the interview conducted on 13 April 202, the representatives of King Civil explained that the scope of work was initially limited to the construction of the road as defined in the agreement between King Civil and the GDRT.

361 King Civil distinguished between the wetland (which is on the side of the road) and the attenuation pond. King Civil explained that the construction of the road goes through the wetland, and a new wetland had to be constructed in terms of

the scope of work for the project. The attenuation pond was previously an illegal sand mining operation conducted in that area. Stormwater runoff, groundwater and rainwater accumulated or ponded in the area as a result of the mining.

362 The attenuation pond was not in the original design drawings for the K54/Tsamaya Road upgrading and rehabilitation project. The attenuation pond was only included in December 2019 and January 2020. According to these designs, the attenuation pond would be connected to the wetland and would be at the end of the wetland. The masterplan drawings that included the wetland and attenuation pond are attached as annexure “**KTR 15**”.

363 There was a dispute of fact about whether King Civil mined sand from the quarry for the project.

363.1 King Civil submitted that all resources were sourced from private commercial parties. The work involved the excavations that took place, outlet to install pipes, constructed a canal (towards the pond) and reshaping of the banks of the pond. King Civil indicated that it did not use material from the excavations for purposes of the project, but used it mainly to create them.

363.2 One of the CLOs submitted that King Civil did mine sand from the attenuation pond and used the sand on the project. King Civil indicated

that only a small amount was used on the road from the excavation that took place.

364 GMH had to apply to the City of Tshwane for approval and authorisation for the work on the attenuation pond. So, GMH had to get approval for the design around the management of the attenuation pond and the wetland from the City of Tshwane.

365 There was a dispute between the City of Tshwane and GMH about whether or not formal approval for the work on the attenuation pond was granted. What is clear though is that an in-principle approval was granted by the City of Tshwane on 2 December 2019.

366 Following the addition of the attenuation pond to the designs for the project, King Civil began the construction in the attenuation pond in January 2020. King Civil started on the South side of the attenuation pond. When I conducted a site visit, there was evidence of work having been done on the South side of the *attenuation pond*.

Responsibility for health and safety

367 The agreement concluded in terms of section 12 of the OHSA was signed on 11 December 2017.¹⁶ King Civil's managing director, Francois van Iddekinge, represented King Civil.

368 In terms of the preamble of the agreement in terms of the OHSA, King Civil agreed to "*certain arrangements and procedures to be followed in order to ensure compliance . . . with the provisions and procedures to be followed in order to ensure compliance . . . with the provisions of the Occupational Health and Safety Act 1993 (Act 85 of 1993) and the Construction Regulations, August 2014.*"¹⁷

369 King Civil declared that it was conversant with all the requirements, regulations and standards of the OHSA and the GDRT's procedures and safety rules.¹⁸ King Civil also assumed responsibility for the compliance with the OHSA by all its subcontractors.¹⁹

370 Clause C31.5.15(a) provides that "It is a requirement of this contract that the Contractor shall provide a safe and healthy working environment and to direct all his activities in such a manner that his employees and any other persons, who may be directly affected by his activities, are not exposed to hazards to their health and safety. To this end the Contractor shall assume full responsibility to

¹⁶ Contract between the GDRT and King Civil page 114, Part C1.2.

¹⁷ Contract between the GDRT and King Civil page 114, Part C1.2.

¹⁸ Contract between the GDRT and King Civil pages 114 and 115, Part C1.2 clause 3.

¹⁹ Contract between the GDRT and King Civil pages 115, Part C1.2 clause 4.

conform to all the provisions of the Occupational Health and Safety (OHS) Act (Act 85 and Amendment Act 18) of 1993, and the Construction Regulations 2014 issued on 7 February 2014 by the Department of Labour. Contractor to complete Schedules T2.1 R: Occupational Health and Safety and T2.4A Occupational Health and Safety Act: Statement by Contractor.” [emphasis added]

371 Part E of the agreement stipulates the health and safety specifications. The scope of the specifications is detailed as covering:

“... the requirements, notwithstanding the provisions of all other appropriate legislation and regulations in this regard, for ensuring the continued health and safety of all personnel having access to the construction site, and in ensuring that persons not having such access may not enter the site for the duration of all construction works undertaken on the site.”

372 In terms of clause E02.01, the specifications apply in respect of King Civil (as the contractor appointed by the GDRT) for work on the site, as well as to all sub-contractors appointed by King Civil, their personnel and assigned agents expected to work on the site.

373 In relation to excavation work, clause E06.1 states that:

“The complete contents of Regulation 13, and all of its sub-paragraphs, of the Construction Regulations published in Government Notice no. R. 84 dated 7 February 2014, read verbatim, and with all meanings assigned thereto by the definitions included in the said Construction Regulations, shall be deemed to constitute the contents of this specification.”

374 Regulation 13 is already quoted above. In sum it requires that where excavations take place, a contractor must cause every excavation which is accessible to the public or which is adjacent to public roads or thoroughfares, or whereby the safety of persons may be endangered, to be adequately protected by a barrier or fence of at least one metre in height and as close to the excavation as is practicable.

375 Clause E17.1 provides for the management of water environments in the following terms:

“The complete contents of Regulation 26, and all of its sub-paragraphs, of the Construction Regulations published in Government Notice no. 84 dated 7 February 2014, read verbatim, and with all meanings assigned thereto by the definitions included in the said Regulation 26, shall be deemed to constitute the contents of this specification.”

376 Regulation 26 of the Construction Regulations provides that:

“(1) A contractor must ensure that where construction work is done over or in close proximity to water, provision is made for -

(a) preventing persons from falling into water; and

(b) the rescuing of persons in danger of drowning.

(2) A contractor must ensure that where a person is exposed to the risk of drowning by falling into the water, the person is provided with and wears a lifejacket. [emphasis added]

377 All the minutes of the monthly site meetings compiled by GMH and signed by the representatives of the GDRT and King Civil state the following –

“It is the Contractor's duty to maintain safety on site.”

Party representatives on site

- 378 King Civil is represented by Mr Johan Venter, Mr Anani Yapi, who is the construction manager, Mr Raymond Scrooby, who is the construction health and safety manager, and Mr Lance Whitaker, who is the construction health and safety officer.
- 379 The GDRT is represented by two officials that are directly employed by the GDRT: Mr Ramasindi, who is the chief engineer, and Ms Nenongwe, who is the project manager.
- 380 The two officials are civil engineers. They supervise the implementation of the project by ensuring compliance with the project specifications, assisting the consultant with GDRT related processes and attending to issues that require the GDRT's intervention. Ms Nenongwe works from the GDRT's offices in Tshwane and only goes to site for meetings or when there are issues that should be resolved.
- 381 The GDRT does not have a health and safety specialist that represents the GDRT directly on site who ensures compliance with the health and safety requirements as it does with the project specifications. This responsibility is left with GMH

Tswelelo as the Agent of the GDRT. GMH Tswelelo also appointed the Health and Safety specialists, Comprac.

382 The consulting engineers, GMH Tswelelo, are or were represented by Mr Rhida Jaffer who is the contract manager. Mr Jaffer is or was responsible for the implementation of the contract. He attends and attended all the site meetings, and is or was responsible for the implementation of decisions taken at the site meetings. My use of the past tense is deliberate. It has since been confirmed that Mr Jaffer and some of the GMH Tswelelo representatives on the project have left the company.

383 Comprac was appointed to conduct health and safety inspections and prepare inspection reports which are submitted to King Civil and presented to the parties during the monthly technical meetings and site meetings. The site inspection reports specifically set out the legal compliance and risk management, top hazards, improvement opportunities and positive observations.

384 During the technical and site meetings, King Civil is obliged to report risks and the health and safety audits are considered. GMH Tswelelo must report on the progress of mitigation procedures and must communicate the steps have been taken to ensure that identified risks do not materialise.

385 Either of GMH Tswelelo and Comprac has the authority to stop the project if there is non-compliance and the risks are not being mitigated or attended to.

386 Issues are escalated from the health and safety consultants (Comprac) to the
GDRT when the issues are not being resolved. The GDRT only intervenes when
requested to do so. Before the GDRT is involved, it is GMH's sole responsibility
to ensure compliance with safety issues by King Civil.

Compliance with the safety obligations

387 During the interview in April, King Civil's representatives confirmed King Civil's
obligations in terms of the applicable legislations and regulations, and the
contract concluded between King Civil and the GDRT.

388 King Civil appointed a safety officer Mr Lance Whitaker. At the interview in April
2021, Mr Whitaker confirmed that he was responsible for the safety affairs on
site.

389 As noted above, Comprac was appointed by GMH Tswelelo as the health and
safety consultants, and conducted health and safety inspections and prepared
inspection reports, which were presented at the site meetings.

390 Since the attenuation pond was not part of the project until December 2019, I
will refer to the inspection reports submitted since January 2020 as these will
include observations around the health and safety at the attenuation pond site.

391 In an inspection report dated 21 December 2020, Comprac reported that there
was no access management identified that was implemented at the main

entrance to the site of the attenuation pond. The inspection report has photographs of children who were found playing in the pond. Comprac identified this as creating a risk of members of the public sustaining serious injuries in the event of unauthorised access to the attenuation pond and children drowning resulting in public liability claims. The photographs are attached as annexure **“KTR 16”** to **“KTR 19”**.

392 As a remedial measure, Comprac suggested that access management should be implemented and maintained and that, if a security guard has to leave his post, there must be another security that relieves them and the entrance is not left unattended.

393 In response to the findings in the 21 December 2020 report, King Civil stated that the problems that Comprac identified were remedied whilst Comprac was conducting the site inspection.

394 According to the minutes of site meeting number 30 dated 25 February 2021, Comprac did not conduct health and safety inspections in January 2021 and February 2021.²⁰ The reason appears to have been that Comprac’s appointment lapsed in December 2020 and could not be renewed before the consulting

²⁰ Minutes of site meeting number 30 dated 25 February 2021 page 16, clause 1.24.1.

engineers' appointment was renewed.²¹ However, after the incident occurred, Comprac was reappointed and conducted an inspection in March 2021.

395 Despite King Civil stating that the observations identified in December 2020 report were remedied while Comprac was conducting the inspection in December 2020, in the inspection report dated 10 March 2021, Comprac raised the same issue about the barricading around other attenuation pond areas. Comprac made the following observation:

“Danger tape and soft barricading was found around water ponding area. This causes the risk of employees / members of the public sustaining serious injuries or fatality in the event of falling and drowning.”

396 Comprac identified the failure to barricade the ponding area as a top hazard. Copies of photographs taken by Comprac during the inspection in March 2021 are attached as annexure “**KTR 20**” to “**KTR 21**”.

397 Comprac's proposed remedial action was for King Civil to “*ensure that all construction water ponding areas are barricaded with solid barricading and ensure that barricading is maintained at all times.*”

398 King Civil stated that the measures it took in response to the directions of the health and safety consultant prior to the tragic incident were “active measures” which comprised sign posting and security personnel. King Civil maintained that there were issues of access to the attenuation pond because of illegal

²¹ Minutes of site meeting number 30 dated 25 February 2021 page 16, clause 1.24.1.

encroachments (people were building homes closer to the attenuation pond). King Civil stated further that there was signage in three languages. The only barricading around the attenuation pond was safety netting. During consultation, King Civil admitted that the safety netting is not “*solid barricading*”.

399 During the interview with King Civil in April, the community liaison officer, Mr Sidu, stated that he had raised the issue about children accessing the attenuation pond and playing in the surrounding area and in the water. Mr Sidu said he raised the issue with the City of Tshwane in September 2020. Mr Sidu also confirmed that there was no fence around the attenuation pond before the incident occurred.

400 During a consultation on 1 June 2021, Mr Pheko Letlonkane, who is the City’s Group Head: Roads and Transport, stated that, in January 2021, while driving along Solomon Mahlangu Road, he noticed that the site of the attenuation pond looked abandoned. There had been heavy rains at the time. The barriers were blown off. Mr Pheko Letlonkane says he saw the state of the site and raised a safety concern. He sent a WhatsApp text message to the GDRT HoD stating:

“Morning Sir - I need to talk to you about the Solomon Mahlangu road project by your department-the construction seemed to have been abandoned and trenches left unattended and the safety nets and barriers blown by winds and so on. The current site poses a serious risk to the residents of Mamelodi. Safety has been an issue given the fatal incidents we had in Hammanskraal and this one look like disaster waiting to happen. Water have dammed on the trenches and kids may end up playing in those trenches. Can you check with your team what is the problem - there has been no movement of the projects for months now and wondering what is the issues there - already my Mayco and Councillors are

questioning me about the project. Can you refer me to the project manager as well. Regards”

401 The response, was as follows:

“The problem is you guys 🤔

There’s an issue of land invasion. We bought land for the settlers to be moved to, but your guys have been dragging their feet.

I met with all concerned, GDARD, Gauteng Human Settlements, your guys, and we agreed on an approach.

But the guys from Tshwane don’t honour commitments, make promises they don’t deliver on and keep shifting timeframes.

Lately, they don’t even attend meetings.

It’s anger inducing.”

402 This exchange between senior officials of the City of Tshwane and the GDRT signifies lack of cooperation between the two spheres of government as I later highlight in this report.

403 It is clear that concerns were raised about the risk of members of the public, including children, easily accessing the attenuation pond and other water areas. These issues were raised by the health and safety specialist, Comprac, and recommendation for remedial action were not fully implemented. There was no solid barricading around the attenuation pond since King Civil began doing work

in and around the attenuation pond after the pond was included in the scope of the project.

404 King Civil's explanation for not installing a solid fence before the incident occurred was that when they installed fences in other areas or sites of the project, the fencing or solid barricading would be stolen overnight. The other reason that King Civil advanced during the consultation was that solid barricading would result in King Civil not being able to conduct any work in the area around the attenuation pond and within the attenuation pond as set out in the plans or the scope of work.

405 During an interview on 12 April 2021, the GDRT submitted that, after receiving the Comprac December 2020, it conducted a site visit before the shut down for the December break and discovered that there was no fencing around the attenuation pond, and there were security officers. The GDRT submitted that it was concerned that the safety would not be maintained over the December break and requested King Civil to improve the access management around the attenuation pond.

Health and safety measures adopted by King Civils after the incident

406 After the incident a fence was installed around the attenuation pond. The entire area is now enclosed. According to King Civil, the fence was not part of the design and therefore was not installed in accordance with or as required in terms of the

specification or scope of the agreement with the GDRT. When asked directly whether such a fence was within the ambit of their legislative and contractual responsibilities, King Civil contended that the measures adopted by the parties were adequate, i.e., the signage and the deployment of security guards. It further contended that these measures were deemed adequate by all the parties including the health and safety specialist engaged on the project.

407 It is difficult to comprehend King Civil's contention above. This is because the Attenuation Pond Report submitted by GMH for approval by the City of Tshwane in November 2019 states the following under the heading "Safety Features":

"A shallow area just inside the perimeter of the wet pond is designed to promote growth of aquatic and wetland plants. This area also serves as a safety feature, reduces shoreline erosion, and conceals floatable trash. This area will be landscaped with vegetation that hinders or prevents access to the pool. Thick shoreline vegetation also serves to discourage geese. The principal spillway is designed and will be constructed to prevent access by small children. The designed wet pond will be fenced to keep pedestrians out of the pond and to prevent a fall hazard and warning signs prohibiting swimming will be posted. An emergency spillway and associated freeboard will be provided in accordance with applicable local and state dam safety requirements. The emergency spillway must be located so that downstream structures will not be impacted by spillway discharges." (own underlining)

Site Meeting Minutes

408 The parties held monthly site meetings. The purpose of the meeting is to record decisions made, actions taken and future actions that need to be taken. To ensure authenticity of the record of the meeting, the minutes were signed by the representatives of all parties to the contract as being a true record of the

proceedings, will become a final part of records of the contract and as such, may be used as evidence in any dispute.

409 Site meetings were attended by officials from the GDRT, representative from GMH Tswelelo, King Civil, CLOs, and in the initial stages, officials from the City. The level of representation at the Site Meetings was such as to permit decisions to be taken by all key stakeholders in the project. Key personnel, if unable to attend, were required to arrange for a suitably qualified and authorised deputy to be present.

410 A few factors are apparent from the Site Meeting Minutes:

410.1 First, encroaching illegal dwellings were identified from as early as February 2018 and throughout the course of construction. While some measures were taken, illegal occupation grew until none of the parties had control over the construction area.

410.2 Second, from the outset, safety and security was characterised as King Civil's responsibility. The minutes noted on each occasion that: "It is the Contractor's duty to maintain safety on site."

410.3 Third, theft and vandalism of construction material and construction sites were repeatedly noted as a great concern. Signage, material and in particular, the fencing were regularly stolen. The initial approach taken was to report theft of the fence to the police and make an insurance

claim. However, in mid 2020, the approach changed to removal of fencing completely.

410.4 Fourth, the parties knew that Comprac's appointment lapsed in December 2020 and could not be renewed as GMH Tswelelo's appointment was not extended. Comprac therefore was not on site in January 2021 and February 2021.

410.5 Fifth, in August 2020, CLOs stopped presenting reports. Despite noting this, it does not appear that there were any steps taken to address this. This should have been seen as a clear breakdown in communication, yet no steps were recorded to remedy the situation.

Comprac Reports

411 Comprac were the health and safety auditors appointed by GMH Tswelelo to evaluate the site and ensure that it was compliant with the relevant legislation and health and safety standards. I was provided with all the reports prepared by Comprac.

412 Comprac raised a number of contravention notices indicating safety issues around the Project. As early as 2018, the parties were warned about the safety risks.

412.1 In October 2018, Comprac issues the following contravention notice:



P10

OBSERVATION:
Photos 10-12

CONTRAVENTION NOTICE – C.R.13;

Numerous excavations were identified insufficiently barricaded. This causes the risk of members of the public / employees sustaining serious injuries in the event of falling.

REMEDIAL ACTION:

Ensure all excavations are barricaded with solid barricading, visibly displaying the required warning signage.

[Extract: Comprac October 2018 H.S.I. Report.]

412.2 In December 2020, two months before the incident Comprac issued the following notice:

	H.S.I. REPORT	Document Number
		ADM-037
		Revision Number
		4
		Revision Date
		1 December 2019

 <p>P7</p> 	<p>OBSERVATION: Photos 7-10</p> <p>PROHIBITION NOTICE – C.R.8; C.R.27</p> <p>No access management was identified implemented at the main entrance to site e.g. children were found playing in water environment. This causes the risk of members of the public sustaining serious injuries in the event of unauthorized access to construction site / children drowning resulting in public liability claims.</p> <p>REMEDIAL ACTIONS:</p> <p>Ensure access management is implemented and maintained and that if the safety guard has to leave his post, he is relieved and the entrance is not left unattended.</p>
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[Extract: Comprac December 2020 H.S.I. Report.]

413 It is apparent that these notices were not properly or adequately attended to by any of the parties. The remedial measures implemented were inadequate.

Security services employed by King Civils

414 Maudi was appointed to provide security services on site. Maudi was appointed on 1 September 2018. The security was appointed following protests from the community that resulted in the site being closed for approximately six months.

415 When Maudi was initially appointed to provide the security services, it started at the site camp (and satellite camps) in Pienaarspoort in Mamelodi. Maudi provided eight security guards to the main site camp and the satellite camps.

416 During the consultations, Maudi stated that it started placing security personnel around the attenuation pond in 2019. The one security officer was stationed at the pond during the day. There was no fence around the pond.

417 Maudi informed me of an assault of one of their guards by members of the community that occurred in August 2019. Before the incident, Maudi only had one security officer stationed at the attenuation pond site, and after the assault occurred a second security officer was deployed.

Maudi security's report of the incident

418 Two security officers were on duty on the day of the incident. They were in a patrol car. They are normally there without a car. But, because it was raining on the day in question, they are given a car.

419 According to the report there were several children playing in the area of the attenuation pond. One of the security officers, Mr Maibela, got out of the car to chase a group of children out of the area surrounding the attenuation pond. The other security officer, Mr Mashego, drove towards a different direction to chase away a different group of children. A different group comprising three boys went towards the attenuation pond. Two of the three children jumped in and one stood on the bank of the pond. Mr Maibela ran to the area from which they jumped. Mr Maibela ran towards the one boy that was standing on the bank of the water area. The community noticed the commotion and approached the area of the attenuation pond. So, Mr Maibela became concerned and called one of the directors of the security company, Mr Monageng, to inform him of what was happening.

420 Maudi state that given the diameter of the pond and the encroachment, it was difficult to reach the children in time.

421 In consultation, Maudi alerted me to the fact that they had requested that 5 security guards be deployed around the pond to ensure that the full circumference is covered. Unfortunately, due to financial considerations, this request was denied.

422 This meant that the only security around the pond was 2 guards who would have never been able to secure the entire pond area adequately.

Assessment of King Civil's responsibilities

423 At the core of this investigation are the safety measures that ought to have been put in place to protect all who may have been at risk around the water areas. The OHSA and the Construction Regulations prescribe safety measures that are required in construction works around water areas. These safety measures are not just a formality, they are requirements that are necessary and must be met. It can never be adequate compliance to claim, as the King Civil seeks to, that all the other parties were satisfied with the safety measures adopted by it around the pond. This is particularly so when these measures were not in compliance with the legal framework.

424 It is clear from the legislation, the contract documents and the various minutes of the site meetings that King Civil is responsible for all safety measures on site, including the attenuation pond area. King Civil's assertion that the measures it adopted, such as signage and a security guards, were considered adequate by all those that were involved, points to a degree of apathy towards the prescribed safety requirements around water areas including the pond. This runs across all those who approved or accepted that the measures were adequate.

425 It is apparent that the pond was not regarded by the parties as constituting serious danger to the public. It was for this reason that the prescribed safety measures and standards were not adequately adopted to guard against danger,

such as drowning. This constituted a measure of failure on the part of those who were tasked with the responsibility for safety.

426 It is distressing that it had to take the loss of young innocent lives for the parties to adopt the prescribed measures, such as fencing around the pond and adequate security personnel.

427 It is so that the risk of drowning was highlighted by Comprac in its reports since October 2018. The measures prescribed by Comprac to guard against this risk were solid barricading around water areas, including the attenuation pond. These are measures stipulated and prescribed in the legislation and are adequate to guard against notable and obvious danger such as drowning.

428 Sadly, it was only after the tragic incident of 27 February 2021 that a used fence was hastily scrambled and erected; a measure that was required and spelled out by health and safety specialists, Comprac, and also GMH in its report to the City of Tshwane during November 2019.

429 GMH Tswelelo's response to all of this is that it looked up to the safety experts, Comprac, to enforce the measures as they had the power to halt the Project in the event of non-compliance with health and safety measures. This does not absolve GMH Tswelelo who took the responsibility, not only in terms of the contract, to ensure compliance with safety legislation, but also in terms of the Health and Safety Act.

430 An ancillary, yet important issue, that has arisen in the context of security is the payment dispute between GMH Tswelelo and King Civil.

430.1 During consultation with King Civil, it was indicated that the consultant, GMH Tswelelo, has removed the security line item in the payment certificates.

430.2 This will have the result of the security around the pond, other water areas and sites being compromised. When the issue was put to GMH Tswelelo, GMH Tswelelo claimed that King Civil could not explain some of the invoices submitted relating to security costs.

430.3 Whatever the issue, the situation whereby security costs are not catered for in this project and with the experience of the tragic incident, is untenable.

431 This issue will need immediate resolution as it will compromise safety and security, including around the pond and other water areas.

GMH Tswelelo's responsibility for oversight

432 GMH Tswelelo were engaged because the GDRT lacked capacity to supervise and manage huge construction projects such as the K54/Tsamaya Road Construction Project. They were engaged on the terms set out in the contract. The duties and

responsibilities imposed by the GDRT included those set out in the relevant legislation.

433 Comprac issued notices of contraventions in its reports since October 2018. The measures prescribed by Comprac to guard against this risk were solid barricading around water areas including the pond.

434 GMH Tswelelo's response to all of this is that it looked up to the safety experts, Comprac, to enforce the measures as they had the power to halt the Project in the event of noncompliance with health and safety measures. This does not absolve GMH Tswelelo who took the responsibility not only in terms of the contract to ensure compliance with safety legislation, but also in terms of the health and safety act.

435 GMH Tswelelo may very well have engaged Comprac to deal with safety issues, but that was only part of compliance with legislative requirements. Much more than that is required in the current circumstances where construction is taking place around water areas. Primary responsibility is on the contractor, King Civil, in respect of safety measures. However, GMH Tswelelo is also required to oversee and ensure compliance.

436 GMH Tswelelo, as the GDRT's agent on the project, has specific duties in terms of clause 3.6.6 of the agreement to manage and supervise the contractors' work.

This includes monitoring the contractor's compliance with the provisions of the Health and Safety Act.

437 Furthermore, in terms of clause 3.3.6, GMH Tswelelo is not absolved from conforming to all the requirements of the Health and Safety Act together with the Regulations.

Contract management by the GDRT

438 A key contractual issue that emerged from the evidence was the stopping of payments due to GMH by the GDRT on the assumption that the contract had come to an end. Despite the contractual provisions being clear that the contract will terminate once the scope of work is complete, the Supply Chain Management division of the GDRT appears to have imposed an end date to the contract prematurely. When this date arrived, the GDRT stopped paying GMH Tswelelo.

439 The result was that for a period of two months, Comprac who were engaged by GMH Tswelelo to deal with safety issues was not in place due to GMH Tswelelo's inability to pay for their services, as a result of the GDRT withholding of payments. This, however, does not go to the core of the relevant issues as Comprac had since 2018 warned about the dangers related to poor safety measures around the water areas.

440 For as long as GMH Tswelelo were on site and performing all responsibilities, they remained obligated despite the contractual issues that arose. This is not to say it was acceptable that the GDRT should have stopped making payments based on its interpretation of the contract. GMH were ultimately fully paid by the GDRT for all work done, as was expected, and their contract was reinstated in line with King Civil's contract from March 2021.

441 GMH still had the capacity and responsibility of attending to the safety issues by virtue of remaining on site. GMH contended that it remained on site because it understood the duration of the contract to be until all works have been completed by the contractors. This is correct, in my view. For as long as GMH remained on site and claimed to have continued to discharge its duties and responsibilities, it was obligated to ensure compliance with the safety measures imposed in terms of the legislation and the terms of the agreement.

442 That said, it remains absolutely necessary for safety specialists to be in place at all times during the construction project. This is prescribed by legislation as part of the safety requirements.

443 Therefore, an important point in this regard is that proper contractual management systems must be in place, at the level of the GDRT, to prevent this kind of situation arising which results in an important safety protocol not being observed.

Community issues

444 Safety measures adopted by the parties are deeply concerning. So are the acts of those who illegally encroach around the pond area, vandalise or remove construction property including barricades. All of these point to safety risks and lapses and this much is clear from the evidence gathered. To those who steal, remove or vandalise, they endanger lives as well. A number of community related issues have emerged from the evidence. These include:

444.1 The first issue is theft of construction property and material. The minutes reveal that there was theft of construction supplies and safety equipment such as netting, signage and fences. This is apparent from site meeting minutes. For example, in the Site Meeting minutes number 19 dated 27 November 2019, it was reported that 7 panels of fencing were stolen. In the Site Meeting minutes number 22 dated 2 May 2020, it was reported that 17 panels of fencing were stolen. This was followed by the theft of 27 panels as reported in the Site Meeting minutes number 23 dated 29 June 2020. The theft continued until 60 fencing panels were stolen on site. All of these resulted in the removal of all fencing “to prevent further theft”.

444.2 I characterise these as acts of criminality by some individual members of the community. These acts do not define the whole community.

1.23	SECURITY AND SAFETY	Contractor
	<p>It is the Contractor's duty to maintain safety on site.</p> <p>Contractor moved all fencing material in site materials yard to their head office for the December shut down period. There are 2 containers on site</p> <p>Security notified not to let MK military veterans into the site office as they need to visit the site office only when an appointment is scheduled</p> <p>Stolen 60 fencing panels on site. The Contractor will remove the fencing to prevent further theft.</p> <p>Another break-in at the site office in August 2020</p> <p>All theft was reported to the SAPS</p>	

[Extract: Site Meeting Minutes, 27 August 2020.]

444.3 The second issue is the brutal assault of a security guard formally employed by Maudi. From the report it is apparent that his sin was to try and maintain safety by chasing away children from the pond. However, the security guard was badly assaulted resulting in his hospitalisation. He also never returned to work after that assault.

444.4 Encroachment around the attenuation pond and the road reserve.

444.4.1 About 1111 (one thousand one hundred and eleven) illegal dwellings were found encroaching in the pond area as well as the road reserve. These dwellings include churches and children's day care centres. They are also situated about 30 meters from the centre of the pond, placing them at high risk of flooding.

444.4.2 In fact, the encroachment is so significant that King Civil no longer has access to the pond for construction purposes or to perform the necessary work in terms of the drawings and

designs. The continued encroachment also impedes the much-needed development around the pond, such as building of a school and clinic as promised by the City.



[Pic: Taken by Investigation Team during inspection in loco demonstrating proximity of illegal dwellings to the water.]

444.4.3 There are many illegal electrical connections running everywhere. These are obviously dangerous for the community, particularly children. They are also a hinderance to the construction works as equipment cannot be used safely.



[Pic: Taken by BoTong during technical inspection depicting extent of illegal electrical connections.]

444.5 Furthermore, it is also distressing that some members of the community have started another illegal sand quarry some 300 m away from the construction site. Although this quarry does not form part of the Construction project, it poses safety risks such as drowning during the rainy season. This was communicated to the City officials during consultation, however, the illegal sand mining persists.

Intergovernmental relations

445 During consultations with the officials from the City, they complained about the lack of proper communication between the City and the province, including the GDRT, particularly around the project.

446 It is also noted that whereas the City initially had representatives at site meetings, the City stopped sending representatives to the meetings. These meetings in my view, are an important avenue for communication on the important issues around the project. It is unclear why the city stopped sending representatives to these meetings which are about a project that is taking place in the area that falls under the City's administration. The importance of these meetings is underscored by the WhatsApp message exchanges between Mr Letlonkane, the City's Group Head: Roads and Transport and the GDRT's Head of Department, Mr Mampuru, about the state of the project, which has been cited above.

447 What complicates the issue further is that even the Councillors for some period did not convene or attend the PSC meetings as a result of the City having been placed under administration. In the result the City would have missed important information and what was taking place around the Project

448 Another apparent glaring inaction is the City's attitude towards the encroachments. This is highlighted by the following communication from Head of Department: Department of Roads and Transport, Mr Makhukhu Mampuru and dated 20 July 2021:

"With reference to the letter sent to you on 26/11/2020 intervening on the slow progress in relocation of informal residence along K54 road reserve, the Department would like to thank City of Tshwane (CoT) for completing Phase 2A relocation of 200 families.

It is critical for the city to relocate the remainder of the encroaching informal houses along K54, K69 and Tsamaya road to make way for the construction and completion of the road. The Department would like to bring to your attention that Project K54 and Tsamaya road construction should have been completed by November 2020 and still the project cannot be completed due to encroaching informal houses, resident's boundary walls with backrooms and informal business. Using the City's relocation plan, the Department extended the project K54's construction duration by 15 months to end on April 2022 with a cost amounting to R40 million.

The 200 relocated informal houses from K54 made available 300 meters of the road reserve for road construction and the project still needs about 3.5km of road reserve to be cleaned off from encroachments (K54 and Tsamaya road).

Project K69 is scheduled to complete in February 2022. The encroachment on K69 are not included on the CoT relocation plan in Mamelodi but is reported that the encroaching houses will be included on the second round/phase of K54 relocations. The current number of encroaching informal houses on K69 can be estimated to be less than 50. The road reserve is also encroached by informal business and resident's boundary walls with backrooms, preventing the construction of the road.

The city relocation plan indicates that Phase 2B should have commenced from 01 June 2021 to finish on 30 August 2021. This phased relocation has not commenced to date."

- 449 Out of 1111, only 199 illegal dwellings have been moved. About 912 more illegal dwellings must be moved for the construction to continue without hinderance.
- 450 It appears from various interviews that the City has been lethargic in its approach to the relocation of illegal dwellers not only around the pond, but also on the road construction areas. This has resulted in delays in the completion of the project with consequent extensions and costs to the fiscus. The important point in this regard is that the longer the project takes, the more safety risks arise.

451 What should not be lost in all of these issues are the City's constitutional and statutory obligations to;

451.1 give priority to the basic needs of the local community;

451.2 promote the development of the local community; and

451.3 ensure that all members of the local community have access to at least the minimum basic municipal services.

452 There is even a suggestion that had the Project been completed in November 2020 as scheduled, in all probability, the tragic incident would not have occurred. The longer it takes to relocate illegal occupiers, the more the risks persist.

453 The facts reveal lack of cooperation and coordination between the GDRT and the City. This failure to cooperate and coordinate will inevitably lead to further delays. The issue of lack of cooperation was pertinently raised by officials of the City during consultation.

The City's responsibilities

454 The City was responsible for the approvals of the various project plans, including the approval of the attenuation pond designs and drawings. The original position adopted by the city in its approval of the plans was that fencing was not required due to the likely theft of the fence. The City's decision was that flattening the side slopes would be a safer long term solution.

455 Indeed, this appears to be King Civil's reason for not constructing a fence during
the construction phase. GMH Tswelelo for its part, has not insisted on the
erection of a fence as per its report to the City which clearly indicated that a fence
will be installed around the pond.

456 The position adopted by GMH Tswelelo, followed by King Civil and taken by the
City is unsustainable in view of the legislative prescripts. The legislation requires
fencing around all water areas including the attenuation pond during the
construction phase. Ironically, it was the City's officials, in the form of MMCs,
immediately after the incident, that ordered King Civil to erect the fence. The
fence was erected and remains intact with no further incidents of breach,
according to all reports.

457 There is also no clear explanation for the City's failure to relocate the encroaching
dwellers and provide adequate services and recreational facilities and amenities
for the local community and build a school next to the pond, as was originally
planned.

458 From an analysis of the facts and the evidence, it appears that Siyabonga Mabila
and Lawrence Tshwenu were lured to the pond by the sudden abundance of a
scarce resource in the area, water, following a summer afternoon storm. With no
barricades or security in sight the accessible and unprotected pond was an
invitation to play. It appears that the pond was one of the very few places of
recreation in the area for the two young boys. They would, previously and on

many occasions, have seen members of the community use the pond for washing purposes, etc, with children in attendance and playing around. The pond is also surrounded by dwellings.

459 It was this open access to the pond with dwellings in close proximity, which created a situation of vulnerability for children, including Siyabonga and Lawrence. Tragically, Siyabonga Mabila and Lawrence Tshwenu succumbed.

460 Despite this tragic ending, there seems to be ongoing safety and security concerns that pose a risk to the safety of the community. I deal with these below.

Ongoing safety and security issues

461 There is a dispute between King Civil, GMH Tswelelo and the GDRT regarding the security line item. According to King Civil, GMH has removed over R7 million in security costs. This, King Civil explained, means that they are not and will not in future be paid for the security line item which includes payments for the required number of security guards around the attenuation pond.

462 In order to provide us with a clear sense of the dispute, the Investigation Team was copied in some of the correspondence. From that correspondence, the following is evident that:

462.1 On or about 6 August 2021, a Site Instruction was issued by GMH Tswelelo relating to payment certificates that had been reversed. The reversal was substantial and would have significant implications for King Civil.

462.2 On 11 August 2021, King Civil responded to GMH Tswelelo requesting that the GDRT agree to add this issue to the ongoing alternative dispute resolution processes.

462.3 It appears that King Civil met with GMH Tswelelo on 12 August 2021 wherein GMH Tswelelo indicated that the scope of the ongoing alternative dispute resolution processes would not be extended. Instead, King Civil was requested to provide background to the actual costs incurred for the additional security costs.

462.4 In line with this agreement, on 27 August 2021, King Civil transmitted correspondence providing a summary of the background to this issue and the actual balance claimed. In sum, King Civil explained that:

462.4.1 On or about August 2021, a Site Instruction was issued by GMH relating to payment certificates that had been reversed. According to King Civil, the reversal of the certification amounted to a substantial amount previously certified in respect of security personnel being reversed. This King Civil considered as a contradiction to the implied consensus between the GDRT, GMH

and King Civil. King Civil thus provided information to GMH objecting to the decision to reverse the certification.

462.4.2 King Civil explained the genesis of the security contract with Maudi and the implied consensus that was reached by all the parties to enter into this contract. They explained further that due to the ongoing encroachments, their access is limited to various areas of the Project causing additional security needs for areas requiring protection. This includes the protection of ROR1 and ROR2; wetland outlet, protection of completed work where lack of access is preventing completion, e.g. paving blocks, fencing, etc and prevention of re-invasion of areas where illegal dwellings were removed.

462.4.3 Lastly King Civil noted that the total security costs up to 31 July 2021 was R13 219 638.54. They noted that R4 090 690.46 is to be deducted and to be borne by King Civil and a further reduction of R1 188 030.00, being a deduction of an approved claim. Leaving a claimed balance of R7 940 918.08. King Civil indicated that should there not be an outcome to this process, the security issue will be referred through the dispute procedures agreed to by the parties.

462.5 It appears the GDRT's position was to leave this matter to GMH Tswelelo and adopted a hands off approach. This is seen through an email dated 20

September 2021, where Mr Ramasindi responded by requesting that GMH deal with this matter. His email stated that:

“Good afternoon Christian

Can you please respond to King Civil on this security matter. This is a contractual matter that GMH can respond to.

It should be noted that it is the contractor’s responsibility to provide security on site for the entire project. All I know is that the site is still King Civil’s responsibility to make it safe until the project is complete.”

463 On 27 September 2021, King Civil addressed a letter to Maudi advising of the termination of additional security service on the Project. The reason advanced was the ongoing payment dispute. King Civil noted that although the matter has been referred for dispute resolution, the process is lengthy and King Civil cannot in the meantime cover the security costs with no assurance of payment in future. The only security that was to be retained was two guards for the site camp and one for ROR2.

464 On 28 September 2021, GMH wrote to the GDRT drawing their attention to King Civil’s letter of 27 September 2021 terminating additional security services. GMH advised the GDRT to consider areas that require security and areas that, in their opinion, do not require additional security.

465 On 29 September 2021, GMH Tswelelo wrote to King Civil responding to King Civil’s past correspondence. In sum, GMH Tswelelo took issue with King Civil’s

motivations for the additional security costs. Having taken issue, King Civil was nevertheless given another opportunity to revise and add to the motivation written explanations for the inclusion of the additional security costs.

466 In order to fully appreciate the effects of this dispute, particularly in relation to ensuring the attenuation pond and wetland area are properly secured, the Investigation Team arranged additional consultations with the parties.

467 On 13 October 2021, a follow up consultation was scheduled with GMH Tswelelo. There, the representatives from GMH Tswelelo Mr Hattingh and Mr Birihanze explained that the reversal of the payment certificates related to irregularities with the payment of security arising from the inception of the Project. According to GMH, King Civil submitted payments for certification related to security costs beyond the scope of what is permitted and further that their previous representative on site, Mr Jaffer, approved these certificates. When asked to explain what this means, Mr Hattingh explained that King Civil is responsible for security on the Project, these costs are incorporated in the main costs of the Project. Therefore, King Civil cannot submit payment certificates for these, such as a guard for their site office. However, there are instances where new security needs arise as an incident of construction, such as securing a half built bridge which will need security guards and additional barricading to protect the general public and avoid accidents. These incidental security guards and costs, according to GMH Tswelelo, can be invoiced. From GMH's perspective, King Civil had

charged all security costs including those costs that ought to have been carried by King Civil. This resulted in the reversal of the payment certificates.

468 When asked whether this means that they are refusing to pay for security guards around the attenuation pond, GMH Tswelelo responded by saying that King Civil must motivate and provide a full explanation for the costs in order for the client, the GDRT, to consider making payment. They stressed that this was being implemented to ensure that irregular payments are not certified.

469 During the consultation, the Investigation Team was also informed that the Project was due to be suspended for a period of 12 months in order for the state actors to remove people who are currently settled in and around the road reserve restricting construction. This decision was taken because the encroachments effectively do not allow for further work to be carried out. The period of suspension will allow for the City, together with the GDRT, to determine where people will be relocated to. During this period, King Civil is required to secure the site as far as possible and ensure that where construction has occurred, that infrastructure is secured. King Civil was therefore in the process of preparing a plan. GMH Tswelelo stressed that provision would be made for securing the water areas.

470 On 14 October 2021, the Investigation Team met with King Civil to better understand this issue from their perspective.

471 King Civil explained that they are currently at odds with the GDRT and GMH Tswelelo over a number of aspects including the payment for additional security. According to King Civil, GMH Tswelelo reversed over R7 million in payment certificates related to the payment of security.

472 King Civil indicated that they first objected to this reversal, and during the time that GMH Tswelelo was considering their submissions, they paid for the security from their own funds. However, over the past few months it is clear to them that this issue could not be resolved unless it is sent for resolution through the agreed dispute resolution mechanisms. They noted further that they could no longer cover the costs of security because the security payments, since the inception of the contract, were reversed. They accordingly were left with no option but to cancel the security contract with Maudi. This effectively meant some areas, in particular the water areas such as the attenuation pond, were left unsecured. King Civil explained that the risks were explained to GMH Tswelelo and that they were aware of the effect of the reversal on the continued provision of security.

473 In so far as the status of the Project is concerned, King Civil confirmed that the Project is due to be suspended because the encroachments have made it impossible for construction to continue. As a result they are preparing a plan outlining how the site is to be secured during the period of suspension.

474 They explained that they, together with Compraq, would walk through the site and identify safety risks and outline these in the plan, together with the measures

for responding to those risks. At the time of updating the report, the Investigator had not been furnished with the plan despite a request having been made to King Civil and GMH Tswelelo.

- 475 The follow up consultation with Maudi also took place on 14 October 2014.
- 476 Maudi was requested to confirm the status of their contract with King Civil and which areas remain secured. Maudi confirmed that in line with their agreement with King Civil, a notice of termination of their services was sent on 27 September 2021. The contract was thus terminated and security personnel were removed from some of the security points. Maudi explained that in relation to the attenuation pond area, 5 guards who were previously stationed there (three at day and two at night) were removed. These security guards have been retrenched. As far as the reasons for termination, it is Maudi's understanding that the GDRT and GMH Tswelelo no longer wanted to pay for security costs and that King Civil could no longer cover the costs out of pocket.
- 477 Maudi explained that without the security, the fence that is currently securing the area may be stolen and the area accessed by members of the community, including children. Mr Monageng stressed that while the fence is still there, once it is realised that the area is no longer secured, the theft that plagued the site is likely to continue. Mr Monageng further explained that his company had built a good relationship with the community and that the community was finally cooperating with the guards on duty and considered them part of the community.

The termination is unfortunate as this relationship will now cease to exist. When asked if it were possible for Maudi to return to site, Mr Monageng explained that should the negotiations or dispute resolution process between King Civil and GMH Tswelelo yield positive results, Maudi would return to site immediately.

478 In relation to the encroachment, Maudi observed that the City was not cooperating and that the encroachment has continued resulting in the halting of all construction due to lack of access.

479 It is undoubtably clear that this ongoing dispute has created a significant risk and if left unresolved, may result in a tragic consequences. It is important that the water areas, be secured now and throughout the period of suspension to ensure that the events of 27 February 2021 are not repeated.

Ongoing illegal mining

480 Illegal sand mining continues to plague the community. During the inspection in loco, I was also taken to the area. While I witnessed the extent of the mining then, I am advised that the conditions have worsened.

481 It is important to stress that the attenuation pond that took the lives of Siyabonga Mabila and Lawrence Tshwenu started off as an abandoned sand mine. When left unattended, these mines pose a continued risk to the health and safety of the community and children in particular.

482 During the follow up consultations, I was informed that although the illegal sand mining stopped after the death of Siyabonga Mabila and Lawrence Tshwenu, it continued a short while after the funeral. King Civil representatives confirmed that the illegal mining activities have left large holes that even when a truck is inside collecting soil, it is not visible.

483 This state of affairs is deeply troubling.

SECTION E

RECOMMENDATIONS

- 484 One of the critical issues that arises in the context of the incident of 27 February 2021 is: at what price should much needed infrastructure development take place in townships and underdeveloped communities?
- 485 The experience that children should die tragically in the mist of road construction in the community is a blot and blemish on construction and development. Preservation of human life must override everything else during any construction project. It should not be accepted as a truism that in townships and informal settlements child mortality is high and nothing can be done. We must always intervene and stop unnecessary loss of life and hold people to account when children's lives are endangered, whether through violence, disease or accidents.
- 486 Linked to this is the trend, seen in this Project and many others, that inadequate substitute measures can be employed to deal with safety risks as long as everyone working on the project agrees to these measures. From some of the evidence, it seems that the parties often prioritised half measures and costs over adequate safety measures that could potentially save lives. When asked about a fence – the King Civil bemoaned the cost. When asked about adding the number of security guards, again – the King Civil bemoaned the cost.

487 It has to be stressed that life is precious anywhere, everywhere and for everyone. Life must be preserved. We must always be mindful of this, in our planning, in our work, and in our daily lives and existence. If we deviate from holding life dear anywhere, we must expect consequences. This is the substantive point of this investigation.

488 Every one of the parties involved in this Project accept that more could have been done to prevent the tragic incident of 27 February 2021. The question is what needs to be done to avoid a recurrence of similar incidents in the future. Prevention would entail various steps being taken by each of the role players. The recommended steps and measures are set out below.

Community involvement and engagement

489 In this project, it is very clear from the evidence that community engagement and involvement was characterised by disputes and poor communication. This is demonstrated by the following:

489.1 First, the project was held to ransom by the community for failing to engage them on the details of the project. This was caused by the community's lack of understanding of what the project involved and the benefits of the project to the community.

489.2 Second, the PSC meetings, which go to the heart of community engagement, failed to take place for a prolonged period of time with no proper communication from any of the parties. This meant that community grievances, and grievances from the parties, were not communicated to each other.

489.3 Third, the encroaching community was being restrained to use the pond as a water resource, due to the lack of water in their community. This seems to have happened due to the lack of communication or proper engagement with this community about the dangers of the pond.

489.4 Fourth, the CLOs indicated that they were not being taken seriously on this project. In fact, the monthly site meeting minutes noted that CLOs were not providing reports. This again signified a breakdown in communication as one of the key role players was not executing its duty.

490 The above factors demonstrate the need for proper communication between the parties and the community before and during the construction project. The community must be aware of the Project, the impact of the Project, safety and security issues and mechanisms of channelling community complaints to the parties.

491 I recommend the following:

- 491.1 that prior to commencement with any construction project, a public campaign be undertaken to educate the community about the importance of public infrastructure; safety and security; the benefits of these types of projects to the community; and the importance of infrastructure development in general;
- 491.2 the community must always be fully apprised of the construction that is about to happen or is happening in the community;
- 491.3 the community must know the implementing agents and their responsibilities in the Project through structures such as CLOs;
- 491.4 the community must be given regular progress reports on the Project, again through structures such as the CLOs;
- 491.5 the community must be given means through which they are able to communicate effectively with various role players, particularly through the CLOs;
- 491.6 where important forums, like the PSC meetings, collapse, it is incumbent on the parties to ensure that these platforms are revived and are effective;

491.7 key links to communities, such as CLOs, must be taken seriously, and when they fail to provide reports, proper follow ups must be made to ensure that they are functioning properly.

Effective safety measures

492 Safety and security is the responsibility of everyone involved in the Project including the community within which construction takes place. In this Project, safety and security were an ongoing concern. This is demonstrated by the following:

492.1 First, Comprac, the health and safety auditors, raised a number of contravention notices indicating safety issues around the Project. Specific to this case, a number of contravention notices related to children accessing the water area. These areas did not have proper barricading and access management.

492.2 Second, there were a number of reports of vandalism of the road infrastructure and theft of material, including fencing meant to provide safety to the public. This resulted in the removal of fencing completely, and a decision by the parties to exclude a fence around the pond during the design process.

493 While the parties claim to have dealt with the contravention notices issued by Comprac, the measures taken were clearly not adequate. This is demonstrated by the repeated contravention notices stating that the water areas were not properly barricaded and there was poor access control.

494 The relevant prescribed legislation is sufficient to deal with the risks and must be followed without fail. Parties must not think that they can replace prescribed measures with cost effective alternative measures that do not satisfy the legislative requirements.

495 I recommend as follows:

495.1 First, effective safety and security measures must be employed at all times, where repeated contravention notices arise on the same issue, it is indicative of ineffectiveness. Therefore, parties must review these measures on a continuous basis.

495.2 Second, the GDRT's SCM division must be strengthened. Related to this is that it must be ensured that consulting engineer contracts such as the one concluded between the GDRT and GMH Tswelelo, are aligned with the related construction contracts, in particular the end date.

495.3 Third, the CLOs must be made aware of safety requirements and measures and communicate them with the community. The community

must understand what the health and safety measures are and the harms associated with removal or vandalism.

496 The reports of vandalism and theft are equally concerning. However, it is indicative of a Project devoid of proper communication between the community and the parties.

Proper oversight by the Consulting Engineers

497 The Project has also been plagued by what appears to be lack of sufficient and proper oversight by the Consulting Engineers. This is demonstrated in the following respects:

497.1 First, the Comprac reports were not properly implemented. Repeated contravention notices were issued on the same subject matters. Relevant to the case, the lack of adequate safety measures around water areas. When measures were put in place, they were inadequate. The Consulting Engineers, GMH, did not address this shortcoming.

497.2 Second, there was non-compliance with legislation. As noted in the section dealing with the legislative framework, Regulation 26 provides specific interventions when working around water areas. Compliance with this Regulation was not ensured. This is the duty and responsibility of GMH.

497.3 Third, an important platform, the PSC meetings, collapsed and did not take place for months. Yet no oversight was exercised to understand the issues and rectify the situation. Related to this was the failure by CLOs to submit their reports, again no oversight was exercised.

498 I recommend that proper oversight must be put in place in projects of this nature. It is clear that oversight was not fully accomplished in a number of respects and the GDRT had no way of recognising these shortcomings and deal with them effectively.

Intergovernmental cooperation

499 There is a clear breakdown in communication between the GDRT and the City. This is evinced by the lack of cooperation between these state institutions.

500 This is further demonstrated by the fact that City officials stopped attending Project meetings and it appears that some of the approvals were never finalised. The City also made no effort to monitor the Project even though it is clear they knew about the project.

501 I therefore recommend that a concerted effort should be made to cooperate for the benefit of the project and the residents of Mamelodi. Further that the City re-join the Site meetings so that they are aware of the challenges, particularly those that fall within their competencies.

Relocations, access to basic services and recreational facilities

- 502 There is no doubt that the issue of the relocation of encroaching dwellers has to be dealt with expeditiously. Failing which there will be longer delays and continued risks with far reaching implications for the fiscus and the community in general.
- 503 I recommend that the City find ways to expedite this process and communicate its efforts effectively to the various role players including the GDRT, GMH Tswelelo, King Civil and the affected community.
- 504 It is also clear that the community was relocated to their current area without adequate basic amenities and recreational facilities. This has resulted in desperation from the community and the use of the pond as a water resource by some even though this proved to be risky. Without the provision of these basic services, safety and security on the Project will remain compromised. The City is reminded of its obligations to provide basic services to local communities in this regard.
- 505 King Civil pointed out that there were so many illegal electricity connections around the area that it is dangerous to work in the area. Again this is a consequence of illegal encroachment. This community needs to be relocated to a habitable piece of land with basic services as promised by the City.

506 The lack of recreational facilities has meant that children play in areas that are dangerous.

507 I recommend the following:

507.1 First, that the City put in place a plan for the provision of services to the community and communicate such plans to the community.

507.2 Second, the City must make a concerted effort to expedite the removal of those who are encroaching around the pond and construction areas.

507.3 Third, I recommend that recreational facilities be added in the area to ensure that children have a safe environment to play. After all this will be part of the development of the area as required by legislation, in particular, the Local Government: Systems Act 32 of 2000.

Illegal sand mining in the area

508 It goes without saying that the continued illegal sand mining in the area remains a risk to the community and in particular to children. The area is exposed and there are no measures taken to secure the area or restrict access.

509 It is recommended that the City, working with law enforcement agencies, see to the halting of illegal sand mining and ensure that the pits created are covered or the area is flattened.

Effective use of procurement processes

510 The procurement process is a powerful tool in the hands of the GDRT to ensure compliance with prescribed standards and safety measures in construction projects. This can be used by the GDRT in the tender documents and agreements to prioritise safety.

511 Although the tender documents currently require safety plans and compliance with the Health and Safety Act, these requirements need to be stringently scrutinised for safety measures particularly where construction is going to involve work around water areas. The provisions of solid barricading including, fencing, should be insisted upon. The safety plans submitted by a contractor should not be idealistic but should be concrete and be verified for full compliance with the legislation.

Possible restorative action

512 The two bereaved families are owed more than just words and promises. Almost all of the parties owe a degree of debt to the two bereaved families. I say this without making any finding of liability, criminal or civil, on the part of anyone.

513 When asked about what the role players could do to bring about restoration to the families, both families indicated that they wanted accountability and justice.

This would be in the form of knowing what happened, who was responsible and some form of compensation.

514 In consultations with the bereaved families, it is clear that the families want to know the truth of what happened on 27 February 2021 and justice for their late children. Nothing more than a full disclosure of the circumstances that resulted in their minor children's drowning and responsiveness from those engaged on the Project is required.

515 In the context of a civil action, the Mabila and Tshwenu family could potentially institute action in which they could claim monetary damages for "emotional trauma and shock" arising from Lawrence and Siyabonga's deaths. These damages can ordinarily only follow if the claimant is able to demonstrate the existence of a psychiatric injury such as post-traumatic stress or depressive disorder. However, South African law does not recognise a claim for damages based on the right to rear a child nor damages for grief and bereavement independent of a recognisable psychiatric injury or illness. This was confirmed recently in the matter of *Komape and others v Minister of Basic Education and others* [2019] JOL 46462 (SCA) ("Komape").

516 I do not express a view on whether a claim based on "emotional shock" would succeed because there is no evidence before me as to the consequences of the boys' passing on their parents and siblings. As the Supreme Court of Appeal commented in *Komape*: "attempting to determine an adequate solatium for the

appellants' suffering is, of course, a daunting task as no monetary compensation can ever make up for their loss.”

517 The Courts have repeatedly stressed that the determination of damages is fact specific and comparisons should be used with care. However, in recent times our courts have done as follows:

517.1 In the *Kompape* matter, a five-year old boy, fell into a pit latrine and drowned at his school in Limpopo province. The Court awarded the sum of R350 000 for each of his parents, R200 000 to each of his adult siblings, and R100 000 to each of his minor siblings for psychiatric injury.

517.2 In *Mbhele v MEC for Health for the Gauteng Province*²², the SCA awarded the appellant (the mother of a stillborn child) damages of R100 000 in a wrongful death claim. In determining the quantum, the SCA considered a number of wrongful death claims related to minors including:

517.2.1 In *Majiet v Santam Limited*,²³ the plaintiff, a mother of a nine year old boy experienced emotional and psychogenic shock as a result of her coming upon the body of her son lying in the road shortly after he had been struck and killed by a motor vehicle.

²² (355/2015) [2016] ZASCA 166 (18 November 2016).

²³ *Majiet v Santam Limited* [1997] 4 All SA 555 (C).

Having considered all the relevant facts, the court awarded an amount of R35 000 in respect of general damages. This amount adjusted amounted to R99 000 in 2015.

517.2.2 In *Lett & another v The Minister of Safety and Security & another*,²⁴ the plaintiffs, who were married, claimed damages as a result of trauma suffered from witnessing their daughter's wrongful shooting. The court awarded the husband R100 000 and the wife R120 000 for damages in April 2011. The adjusted value of the amounts in 2015, are respectively R127 000 and R152 000.

517.2.3 In *Kritzinger & another v Road Accident Fund*,²⁵ the plaintiff was informed of a collision and discovered that his two daughters had been killed when he arrived at the scene. He suffered from chronic bereavement, post-traumatic stress disorder and a major depressive disorder. He was awarded R150 000 in March 2009. The adjusted value in 2015 amounts to R208 000.

518 Whilst I accept that nothing could ever bring Lawrence and Siyabonga back to life, I am of the considered view that a restoration process would go a long way in healing the Mabila and Tshwenu families' wounds and to make amends for this

²⁴ *Lett & another v The Minister of Safety and Security & another* 2011 (6K3) QOD 1 (ECP).

²⁵ *Kritzinger & another v Road Accident Fund* ECP unreported case no 337/2008 (24 March 2009).

tragic occurrence. Therefore, I propose the following recommendation in order to bring about restoration and some form of closure to the families;

518.1 Reparations to the Mabila and Tshwenu family by the role players, including the City of Tshwane, King Civil, GMH Tswelelo and the GDRT. This step is to be undertaken without apportioning blame and is to be facilitated by the GDRT. I am also mindful of the reported proposal initially made by King Civil to create a trust fund for the families.

519 Although my view is that the GDRT may not be responsible given that they had appointed an agent, GMH Tswelelo, to oversee, manage and supervise the works, including the safety issues; the GDRT is best placed to facilitate this restorative process and contribute as a party with a primary interest in the smooth and safe running and completion of the Project. This can also serve as a gesture of good will since the Project belongs to them.

520 In addition, I recommend that the Department of Social Development be tasked with ensuring there are reliable counselling services that are available and accessible to the families to assist them with their needs.

CONCLUSION

521 This report and the recommendations should not be understood to be imposing liability, civil or otherwise, on anyone for the tragic death of Siyabonga Mabila and Lawrence Tshwenu. There are appropriate institutions, fora for such.

522 I am also alive to the fact that there may be questions about the extent to which each party's actions and inactions contributed to the tragedy. These questions are not answered in this report. As I have already indicated, the issues and circumstances that led to the incident are multi-layered.

523 Finally, I wish to thank all of the parties, without exception, for their full cooperation with the investigation. One can only hope that such cooperation will endure and extend to the Project itself so that it may be finalised speedily without further safety issues. It is a pity though that the City did not attend the follow up meetings to which they had been invited to clarify some of the issues, including the issue of the relocation of the occupiers.

524 A special word of thanks to Adv Thabang Pooe and Adv Mfundo Salukazana for their invaluable and outstanding work and contribution throughout the investigation.

Thomas Joseph Bogoshi Bokaba

Dated at Sandton on this the _____ of _____ 2021.