
"Allegations of improper conduct and maladministration relating to the appointment of staff by the Dawid Kruiper Local Municipality in 2016."

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO THE APPOINTMENT OF STAFF BY THE DAWID KRUIPER LOCAL MUNICIPALITY IN THE NORTHERN CAPE PROVINCE IN 2016
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Executive Summary

(i) This is my report as the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct and maladministration relating to the appointment of staff by the Dawid Kruiper Local Municipality (Municipality) in 2016.

(iii) The complaint was lodged by Mr P T Van der Steen (Complainant), a member of the Council of the Municipality, on 1 November 2016.

(iv) In the main, the Complainant alleged that Mr S P May, Ms R George, Mr D Z Ntlanganiso and Mr Desmond van Wyk were appointed by the Municipality in 2016, without the relevant posts being advertised and interviews held.

(v) The gist of the complaint was that the appointments of Mr May, Ms George, Mr Ntlanganiso and Mr Van Wyk by the Municipality were not in accordance with the relevant laws and prescripts regulating the appointment of staff of the Municipality and that it was accordingly improper, constitutes maladministration and resulted in irregular expenditure.

(vi) Based on the analysis of the complaint, the following issues were identified for the investigation:
(a) Whether the temporary appointments of Mr S P May, Ms R George, and Mr D Z Ntlanganiso by the Municipality in 2016 were in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not,

(b) Whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure.

(vii) It was established from the analysis of the complaint that the allegations relating to the appointment of Mr Van Wyk were not substantiated.

(viii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Municipality, an analysis of the relevant documents and information obtained during the investigation and consideration and application of the relevant laws and prescripts.

(ix) Having considered the evidence and information obtained during the investigation, I make the following findings:

(a) Regarding whether the temporary appointments of Mr S P May, Ms R George and Mr D Z Ntlanganiso by the Municipality in 2016 were in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

(aa) The allegation that the temporary appointments of Mr May, Ms George and Mr Ntlanganiso by the Municipality in 2016 were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality, is substantiated.
(bb) The vacant positions were not advertised and the recruitment and selection process prescribed by the Human Resource Policy of the Municipality (Policy) not followed.

(cc) The appointments also did not comply with the requirements of the Policy relating to the filling of permanent posts on a temporary basis.

(b) Regarding whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure:

(aa) The allegation that the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure, is substantiated.

(bb) The temporary appointments of Mr May, Mr Ntlanganiso and Ms George were not in accordance with the provisions of section 55(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) as it was made in violation of the Policy.

(cc) The remuneration paid to Mr May, Mr Ntlanganiso and Ms George from the date of their appointment accordingly constitutes irregular expenditure, as contemplated by the Local Government: Municipal Finance Management Act, 2003 (MFMA).

(dd) The conduct of the Municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.
(x) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution is the following:

(a) The Municipal Manager of the Municipality to:

(aa) To take appropriate steps in respect of disciplinary action against the officials that were involved in the irregular appointment of Mr May, Mr Ntlanganiso and Ms George in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA within thirty (30) business days from the date of my report;

(bb) To institute proceedings for the judicial review in terms of applicable legislation of the irregular appointment of Mr May, Mr Ntlanganiso and Ms George within thirty (30) business days from the date of my report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO THE APPOINTMENT OF STAFF BY THE DAWID KRUIPER LOCAL MUNICIPALITY IN THE NORTHERN CAPE PROVINCE IN 2016

1. INTRODUCTION

1.1 This is my report as the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to the following persons, to inform them of the outcome of my investigation:

1.2.1 The Speaker of the Council of the Dawid Kruiper Local Municipality (Municipality), Ms M Dodds;

1.2.2 The Executive Mayor of the Municipality; Mr M Segede; and

1.2.3 The Municipal Manager of the Municipality, Mr Elias Ntoba

1.3 A copy of the report is also provided to:
1.3.1 Mr P T Van Der Steen, who lodged the complaint, to inform him of the outcome of my investigation.

1.4 The report relates to an investigation into allegations of improper conduct and maladministration pertaining to the appointment of staff by the Municipality in 2016.

2. THE COMPLAINT

2.1 The complaint was lodged by Mr P T Van der Steen (Complainant), a member of the Council of the Municipality, on 1 November 2016.

2.2 In the main, the Complainant alleged that Mr S P May, Ms R George, Mr D Z Ntlanganiso and Mr Desmond van Wyk were appointed by the Municipality in 2016, without the relevant posts being advertised and interviews being held.

2.3 The gist of the complaint was that the appointments of Mr May, Ms George, Mr Ntlanganiso and Mr Van Wyk by the Municipality were not in accordance with the relevant laws and prescripts regulating the appointment of staff of the Municipality and that it was accordingly improper, constitutes maladministration and resulted in irregular expenditure.

2.4 During the investigation it was established from the analysis of the complaint that the allegations relating to the appointment of Mr Van Wyk were not substantiated.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

"The Public Protector has the power as regulated by national legislation –
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

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

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

3.5 In the matter of the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.

The Constitutional Court further held that:

"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness,

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.\(^2\)

3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);

3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under

\(^2\) \textit{Supra} at para [73].
investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);

3.6.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);

3.6.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and

3.6.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).

3.7 In the matter of President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017), the Court held as follows when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (para 82);

3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):

a) Conduct an investigation;
b) Report on that conduct; and
c) To take remedial action.

3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (para 104);

3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Para 105);

3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108); and

3.7.7 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgment).
3.8 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the matter falls within the jurisdiction of the Public Protector.

3.9 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?
4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong and what action should be taken?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the temporary appointments of Mr S P May, Ms R George, and Mr D Z Ntlanganiso by the Municipality in 2016 were in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not, whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality to prevent improper conduct, maladministration and the misappropriation of public funds.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration where possible and appropriate.

4.3 On analysis of the complaint, the following issues were identified for investigation:

4.3.1 Whether the temporary appointments of Mr S P May, Ms R George, and Mr D Z Ntlanganiso by the Municipality in 2016 were in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not,
4.3.2 Whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure.

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1. Copies of fixed term employment contracts between the Municipality and Mr May, Mr Ntlanganiso and Ms George with effect from 8 September 2016 to 30 November 2016.

4.4.1.2. The employment records of the Municipality for the permanent appointments of Mr May as Senior Socio-Economic Development Officer and Mr Ntlanganiso as Assistant Superintendent: Civil Engineering Services, with effect from 1 May 2017 and Ms George as Senior Clerk: Community Services with effect from 1 July 2017.

4.4.1.3. Copies of CV’s of Mr May, Mr Ntlanganiso and Ms George.

4.4.1 Correspondence between the Public Protector and:

4.4.2.1 The former Municipal Manager, Mr D E Ngxanga, dated 14 November 2016.

4.4.2.2 The Senior Manager: Human Resources, Mr W George dated 17 July 2020.
4.4.3 Meetings held

4.4.3.1 Meeting with the former Municipal Manager, Mr D E Ngxanga on 15 November 2016.

4.4.3.2 Meeting with the Senior Manager: Human Resources, Mr W George on 05 September 2018.

4.4.4 Legislation and other prescripts


4.4.4.2 The Public Protector Act 23 of 1994.


4.4.4.5 The Human Resources Policy of the Municipality (Policy).

4.4.5 Jurisprudence considered

4.4.5.1 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC).
4.4.5.2 President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).

4.4.5.3 Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others 2004 (6) SA 222 (SCA).

4.4.5.4 The MEC for Health, Eastern Cape v Kirland Investments 2014 (3) SA 481 (CC).

4.4.5.5 Van Wyk v Unitas Hospital and Another 2008 (2) SA 472 (CC).

4.4.6 Notice issued in terms of section 7(9) of the Public Protector Act

4.4.6.1 A notice was issued in terms of section 7(9) of the Public Protector Act to the Municipal Manager, Mr Elias Ntoba on 31 August 2020, affording him an opportunity to respond to the evidence obtained during the investigation. The Municipal Manager did not respond to the section 7(9) Notice.

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

5.1. Regarding whether the temporary appointments of Mr S P May, Ms R George and Mr D Z Ntlanganiso by the Municipality in 2016 were in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

Common cause or undisputed facts

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5.1.1. It is common cause that Mr May, Ms George, and Mr Ntlanganiso are former members of the Council of the Municipality. Their term expired in July 2016.

5.1.2. The Municipality appointed Mr May as the Chief Officer: Integrated Development Planning (IDP), Ms George as Senior Clerk in the Office of the Speaker and Mr Ntlanganiso as the Senior Superintendent: Parks of the Municipality, on temporary basis, with effect from 1 September 2016.

5.1.3. All three positions are permanent posts on the personnel establishment of the Municipality.

5.1.4. The positions were not advertised and no interviews were held.

Issues in dispute

5.1.5. The Complainant contended that the appointments of Mr May, Ms George, and Mr Ntlanganiso were improper as they were not made in accordance with the relevant laws and prescripts regulating the appointment of staff of the Municipality.

5.1.6. In his response to the complaint during the investigation, Mr D E Ngxanga, the former Municipal Manager, in an email dated 14 November 2016 stated that:

"There was no legislation or policy of council which prohibits the municipality from appointing temporary workers, as the need arises and that the municipality has always hired and was still
employing temporary workers to address critical vacancies in the institution”.

5.1.7. In a meeting held during the investigation on 15 November 2016, Mr Ngxanga conceded that no recruitment process was followed in respect of the temporary appointments. According to him, there was no need to follow a recruitment and selection process as the appointments were made on a temporary basis.

5.1.8. Mr Ngxanga further stated that he had the authority in terms of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) to appoint staff on a temporary basis in critical positions.

5.1.9. The Municipality entered into fixed term employment contracts with Mr May, Mr Ntlanganiso and Mr George, appointing them with effect from 8 September 2016 to 30 November 2016.

5.1.10. In a meeting during the investigation held on 05 September 2018, Mr W George, the Senior Manager: Human Resources of the Municipality stated that no formal recruitment process was followed with the appointments of Mr May, Ms George and Mr Ntlanganiso on a temporary basis. The Municipality selected names from a database, considered the suitability of candidates and the Municipal Manager made the appointments.

5.1.11. The records of the Municipality, obtained from the Senior Manager: Human Resources of the Municipality during the investigation, indicate that the Municipality permanently appointed Mr May as Senior Socio-Economic Development Officer and Mr Ntlanganiso as Assistant Superintendent: Civil Engineering Services, with effect from 1 May 2017. Ms George was appointed permanently as Senior Clerk: Community Services with effect from 1 July 2017.
5.1.12. In a further response dated 17 July 2020, the Senior Manager: Human Resources stated that the fixed term contracts of Mr May, Mr Ntlanganiso and Ms George were extended on the same conditions as the initial contracts entered into with the Municipality. He further stated that:

"The appointment of Ms Ragal George was based on the principal section (sic) 198B of the Labour Relations Act, due to the fact that she was appointed on fixed term contracts for over 12 months. Mr Ntlanganiso and Mr May were appointed after negotiations with the labour unions in the Local Labour Forum where the labour caucus requested that all temporary employees who were appointed in permanent positions on the staff establishment, be appointed permanently."

Application of the relevant law

5.1.13. Section 55(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) provides that as the head of the administration of a municipality, the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, *inter alia*, the appointment of staff, other than managers directly accountable to the municipal manager.

5.1.14. Paragraphs 7.3 and 10.2(a) of the Policy provide that entry and middle level vacant posts on the permanent establishment have to be advertised internally and in the local newspapers. Senior management and professional positions also have to be advertised in national newspapers.

5.1.15. Shortlisted candidates have to be interviewed by a committee appointed by the Municipal Manager, in terms of paragraph 10.6 of the Policy.
Paragraph 10.7 provides that the candidate that obtained the highest score has to appointed.

5.1.16. Paragraph 7.15 of the Policy provides that the Municipal Manager may, in consultation with the relevant Heads of Departments, temporarily appoint a suitably qualified applicant in a vacant permanent post.

5.1.17. A temporary appointment in a permanent post may be made in terms of paragraph 7.19, when the incumbent is absent for a period of more than 22 consecutive days or the position is vacant and satisfactory alternative arrangements could not be made.

5.1.18. In terms of section 60(1)(a) of the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act.

Conclusion

5.1.19. No evidence was found during the investigation that the positions to which Mr May, Mr Ntlanganiso and Ms George were appointed to, on a temporary basis, were vacant due to the incumbents being absent at the time or were vacant and satisfactory alternative arrangements could not be made. This was clearly not the case as their fixed term contracts were extended after three (3) months.

5.1.20. The vacant positions were not advertised and the recruitment and selection process prescribed by the Policy was not followed by the Municipality in respect of the appointments of Ms May, Mr Ntlanganiso and Ms George on a fixed term basis, which were later extended. The
appointments were therefore not made in accordance with the Policy that regulates the recruitment and selection of staff of the Municipality.

5.1.21. Mr Ngxanga’s contention that the Municipal Manager had the authority in terms of the Municipal Systems Act to appoint temporary staff in critical positions did not take into account that in terms of section 55(1) of the Act, all appointments by the Municipal Manager are subject to policy considerations of the Municipal Council, such as the provisions of the Policy.

5.1.22. These irregular appointments on a fixed term were eventually converted into permanent appointments by the Municipality in terms of the Labour Relations Act, 1996 and on the basis of negotiations with the labour unions on temporary appointments.

5.2. Regarding whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure:

*Common cause or undisputed facts*

5.2.1. It is common cause that Mr May, Ms George, and Mr Ntlanganiso are former members of the Municipal Council of the Municipality whose terms as councillors of the Municipality ended in July 2016.

5.2.2. The Municipality appointed Mr May as the Chief Officer: Integrated Development Planning, Ms George as Senior Clerk in the Office of the Speaker and Mr Ntlanganiso as the Senior Superintendent: Parks of the Municipality, on a temporary basis with effect from 1 September 2016.
5.2.3. The positions of Chief Officer: Integrated Development Planning, Senior Clerk in the Office of the Speaker and the Senior Superintendent to which Mr May, Ms George and Mr Ntlanganiso were appointed, were not advertised by the Municipality.

5.2.4. As indicated in paragraph 5.1 above, the appointments by the Municipality were not in accordance with the Policy that regulates the recruitment and selection of staff of the Municipality.

*Application of the relevant law*

5.2.5. Section 55(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) provides that as the head of the administration of a municipality, the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, *inter alia*, the appointment of staff, other than managers directly accountable to the municipal manager.

5.2.6. Paragraphs 7.3 and 10.2(a) of the Policy provide that entry and middle level vacant posts on the permanent establishment have to be advertised internally and in the local newspapers. Senior management and professional positions also have to be advertised in national newspapers.

5.2.7. Shortlisted candidates have to be interviewed by a committee appointed by the Municipal Manager, in terms of paragraph 10.6 of the Policy. Paragraph 10.7 of the Policy provides that the candidate that obtained the highest score has to appointed.
5.2.8. Paragraph 7.15 of the Policy provides that the Municipal Manager may, in consultation with the relevant Heads of Departments, temporarily appoint a suitably qualified applicant in a vacant permanent post.

5.2.9. A temporary appointment in a permanent post may be made in terms of paragraph 7.19, when the incumbent is absent for a period of more than 22 consecutive days or the position is vacant and satisfactory alternative arrangements could not be made.

5.2.10. Section 1 of the MFMA defines irregular expenditure, *inter alia*, as expenditure incurred by a municipality in contravention of or that is not in accordance with a requirement of the MFMA or the Municipal Systems Act, and which has not been condoned.

5.2.11. In terms of section 60(1)(a) of the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act.

5.2.12. Section 62(1)(d) of the MFMA, provides that the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorized, irregular and wasteful expenditure and other losses are prevented.

**Conclusion**

5.2.13. The appointments by the Municipality of Mr May, Mr Ntlanganiso and Ms George on a temporary basis with effect from 1 September 2016 were not in accordance with section 55(1) of the Municipal Systems Act,
as it did not comply with the policy considerations of the Municipal Council, i.e the provisions of the Policy regulating the recruitment and selection of staff.

5.2.14. The remuneration paid to Mr May, Mr Ntlanganiso and Ms May from the date of their irregular appointment on fixed term contracts and subsequent permanent appointment, therefore constituted irregular expenditure, as contemplated by the MFMA.

5.2.15. The conduct of the Municipality in appointing Mr May, Mr Ntlanganiso and Ms George was improper, constitutes maladministration and resulted in irregular expenditure.

6. FINDINGS

6.1. Regarding whether the temporary appointments of Mr S P May, Ms R George and Mr D Z Ntlanganiso by the Municipality in 2016 were in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

6.1.1. The allegation that the temporary appointments of Mr May, Ms George and Mr Ntlanganiso by the Municipality in 2016 were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality, is substantiated.

6.1.2. The vacant positions were not advertised and the recruitment and selection process prescribed by the Policy not followed.

6.1.3. The appointments also did not comply with the requirements of the Policy relating to the filling of permanent posts on a temporary basis.
6.2. Regarding whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure:

6.2.1. The allegation that the conduct of the Municipality was improper, constitute maladministration and resulted in irregular expenditure, is substantiated.

6.2.2. The temporary appointments of Mr May, Mr Ntlanganiso and Ms George were not in accordance with the provisions of section 55(1) of the Municipal Systems Act, as it was made in violation of the Policy.

6.2.3. The remuneration paid to Mr May, Mr Ntlanganiso and Ms George from the date of their temporary appointment accordingly constitutes irregular expenditure, as contemplated by the MFMA.

6.2.4. The conduct of the Municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.

7 REMEDIAL ACTION

7.1 The appointment by a municipality of employees is an administrative action.

7.2 In the Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others 2004(6) SA 222 (SCA) the Supreme Court of Appeal ruled that until an administrative decision is set aside by a Court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.
This principle was confirmed by the Constitutional Court in *The MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC). The Court found that if public officials or administrators can, without recourse to legal proceedings, be allowed to disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, this would be a licence to self-help. It would be inviting officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The Court found that this would spawn confusion and conflict to the detriment of the administration and the public and that it would undermine the Court’s supervision of the administration.³

Consequently, it is not open to the Municipality to simply cancel its employment contracts with Mr May, Mr Ntlanganiso and Ms George. A proper judicial review application has to be brought to firstly review the decision to appoint them and to declare the appointments invalid.

Mr D E Ngxanga, the former Municipal Manager that appointed Mr May, Mr Ntlanganiso and Ms George has since left the Municipality.

Consequently, the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, is the following:

The Municipal Manager of the Municipality:

To take appropriate steps in respect of disciplinary action against the officials that were involved in the irregular appointment of Mr May, Mr Ntlanganiso and Ms George in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act

³ At para 89
and section 171(4) of the MFMA within thirty (30) business days from the date of my report;

7.6.1.2 To institute proceedings for the judicial review in terms of applicable legislation of the irregular appointment of Mr May, Mr Ntlanganiso and Ms George within thirty (30) business days from the date of my report.

8 MONITORING

8.1. The Municipal Manager of the Municipality to submit an action plan to me within 30 days from the date of receiving this report, indicating how the remedial action referred to in paragraph 7.7.1 above will be implemented.

8.2. The submission of the implementation plan and the implementation of my remedial action shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.

ADV BUSISWE MKHWEBANE
THE PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 20/01/2020

Assisted by: PII Coastal:
Public Protector South Africa