
"Allegations of improper conduct and maladministration by the Kail Garib Local Municipality"

REPORT NUMBER 06 OF 2020/2021

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION IN RELATION TO THE APPOINTMENT OF MR WILLEM RHYN AS WATER PROCESS CONTROLLER CLASS I BY THE KAIL GARIB LOCAL MUNICIPALITY IN THE NORTHERN CAPE PROVINCE
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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 Mr Rhyn as Water Process Controller Class I by the Kai! Garib Local Municipality (Municipality) in the Northern Cape Province, in 2016.

(iii) The complaint was lodged by Mr A R Smith (Complainant) on 29 July 2016, at the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.

(iv) In essence, the Complainant alleged that Mr Rhyn’s temporary appointment was not in accordance with the laws and prescripts regulating the recruitment and selection of staff of the Municipality and that it was therefore improper and constitutes maladministration.

(v) During the investigation of the complaint, it transpired that Mr Rhyn was permanently appointed in the position of Process Controller Class II, with effect from 1 March 2017, apparently without any proper recruitment process being followed by the Municipality.

(vii) Based on the analysis of the complaint, the following issues were identified for the investigation:

(a) Whether the temporary appointment of Mr Rhyn as Water Process Controller Class I by the Municipality with effect from 1 July 2016 to 28 February 2017
was 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.

(c) Whether the permanent appointment of Mr Rhyn by the Municipality as Process Controller Class II with effect from 1 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not,

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

(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, 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 appointment of Mr Rhyn as Water Process Controller Class I by the Municipality with effect from 1 July 2016 to 28 February 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

(aa) The allegation that Mr Rhyn’s temporary appointment as Water Process Controller Class I by the Municipality with effect from 1 July 2016 was not in
accordance with the relevant laws and legal prescripts regulating the recruitment and selection of staff, of the Municipality, is substantiated.

(bb) The vacancy was not advertised, no interviews were held and Mr Rhyn did not have the requisite minimum qualifications and experience for the position, as contemplated by the Human Resources Policy of the Municipality (Policy).

(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) Mr Rhyn’s temporary appointment was not in accordance with the Policy and therefore not in compliance with section 55(1) of the Local Government: Municipal Systems Act. 2000 (Municipal Systems Act). The conduct of the Municipality resulted in irregular expenditure as contemplated by the Local Government: Municipal Finance Management Act, 2003 (MFMA)

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

(c) Regarding whether the permanent appointment of Mr Rhyn by the Municipality as Process Controller Class II with effect from 1 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:
The permanent appointment of Mr Rhyn as a Process Controller Class II was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality.

The position was only advertised internally, and only Mr Rhyn applied. He was the only applicant that was interviewed. Mr Rhyn was recommended for appointment by the Municipal Manager on the basis that he was the only candidate.

Mr Rhyn did not meet the minimum requirements of the position as he only had Grade 6 instead of Grade 10.

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

The conduct of the Municipality in appointing Mr Rhyn as Process Controller Class II was improper, constitutes maladministration and resulted in irregular expenditure.

Mr Rhyn's appointment was in violation of the Policy and therefore not in accordance with the provisions of section 55(1) of the Municipal Systems Act. The Municipality's conduct resulted in irregular expenditure as contemplated by the MFMA.

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

(aa) To take appropriate steps in respect of disciplinary action against the officials that were involved in the irregular appointment of Mr Rhyn 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 sixty (60) business days from the date of my report.

(bb) To institute proceedings for the judicial review of the irregular appointment of Mr Rhyn within sixty (60) business days from the date of my report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION IN RELATION TO THE APPOINTMENT OF MR WILLEM RHYN AS WATER PROCESS CONTROLLER CLASS I BY THE KAI! GARIB LOCAL MUNICIPALITY IN THE NORTHERN CAPE PROVINCE

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 Acting Speaker of the Council of the KAI! Garib Local Municipality (Municipality), Mr V Sacco;

1.2.2 The Executive Mayor of the Municipality, Mr M Louw; and

1.2.3 Dr J Mac Kay, the Acting Municipal Manager of the Municipality.

1.3 A copy of the report is also provided to Mr Andre Smith, who lodged the complaint.

1.4 The report relates to an investigation into allegations of improper conduct and maladministration in relation to the appointment of Mr Willem Rhyn as Water Process Controller Class I by the KAI! Garib Local Municipality in the Northern Cape Province.
2. THE COMPLAINT

2.1 The complaint was lodged by Mr A R Smith (Complainant) on 29 July 2016, at the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.

2.2 In the main, the Complainant alleged that the temporary appointment of Mr Rhyn as Water Process Controller Class I by the Municipality in July 2016 was improper in that:

2.2.1 The position was not advertised and filled internally; and

2.2.2 No formal interviews were held.

2.3 In essence, the Complainant alleged that Mr Rhyn’s temporary appointment was not in accordance with the laws and prescripts regulating the recruitment and selection of staff of the Municipality and that it was therefore improper and constitutes maladministration.

2.4 During the investigation of the complaint, it transpired that Mr Rhyn was permanently appointed in the position of Process Controller Class II, with effect from 1 March 2017, apparently without any proper recruitment process being followed by the Municipality.
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:

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1. [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

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"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."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 investigation, the findings made and the particular kind of remedial action taken, based on the

² Supra at para [73].
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 the 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) affords 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 appointment of Mr Rhyn as Water Process Controller
Class I and his subsequent permanent appointment as Water Process Controller Class II were in accordance with the laws and prescripts regulating recruitment and selection of staff of the Municipality.

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 Municipal Manager 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 appointment of Mr Rhyn as Water Process Controller Class I by the Municipality with effect from 1 July 2016 to 28 February 2017 was 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.

4.3.3 Whether the permanent appointment of Mr Rhyn by the Municipality as Process Controller Class II with effect from 1 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not,

4.3.4 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 A copy of the internal advertisement for the position of Water Process Controller Class II dated 17 January 2017.


4.4.1.3 A copy of the Memorandum for appointment of Mr Willem Rhyn from the Director: Corporate Services to the Municipal Manager, dated 13 February 2017.

4.4.1.4 A copy of Mr Rhyn’s appointment letter, dated 1 March 2017.

4.4.1.5 A copy of Mr Willem Rhyn’s CV.

4.4.2 Correspondence between the Public Protector and:

4.4.2.1 The Human Resources Officer of the Municipality, Ms M Majiedt, dated 10 June 2020.

4.4.2.2 The Human Resources Manager of the Municipality, Ms Esme Adams, dated 25 March 2020.

4.4.3 Meetings held

4.4.3.1 Meeting with the former Municipal Manager, MR J G Lategan on 20 October 2016.
4.4.4 Legislation and other prescripts


4.4.4.2 The Public Protector Act 23 of 1994.


4.4.4.5 The Collective Agreement on the Conditions of Service Northern Cape Division, South African Local Government Bargaining Council, 2014.

4.4.4.6 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] ZAGPHC 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 then Acting Municipal Manager, Adv Neethling, on 31 August 2020. The current Acting Municipal Manager, Dr Mac Kay responded on 14 September 2020.

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 appointment of Mr Rhyn as Water Process Controller Class I by the Municipality with effect from 1 July 2016 to 28 February 2017 was in accordance with the relevant laws and legal prescripts regulating the recruitment and selection of staff of the Municipality:

*Common cause or undisputed facts*

5.1.1 From the evidence and information obtained during the investigation, it appears to be common cause that Mr Rhyn was temporarily appointed by the Municipality as Process Controller Grade I, from 01 July 2016 to 28 February 2017.

5.1.2 Mr Rhyn was not an employee of the Municipality at the time and a new employment contract was entered into with him every month.

5.1.3 The post of Water Process Controller Class I is a permanent position on the Municipality’s staff establishment.
5.1.4 The minimum requirements for the position of Water Process Controller Class I, as stated in the relevant official Job Description, includes:

5.1.4.1 Grade 10;

5.1.4.2 Class 1 Operator certificate; and

5.1.4.3 6 (six) months relevant experience.

*Issues in dispute*

5.1.5 The Complainant contended that the temporary appointment of Mr Rhyn by the Municipality was improper and constitutes maladministration.

5.1.6 In a meeting held during the investigation with the former Municipal Manager, Mr J G Lategan, on 20 October 2016, he confirmed that Mr Rhyn was temporarily appointed as a Water Process Controller at the Municipality’s sewerage dam in Kakamas, when the previous incumbent left. He further indicated that the position was not advertised and that no interviews were held when Mr Rhyn was appointed.

5.1.7 This was confirmed in writing by the Human Resources Officer of the Municipality, Ms M Majiedt, on 10 June 2020. She indicated that Mr Rhyn was appointed by the former Municipal Manager, Mr Lategan.

5.1.8 Mr Rhyn’s CV obtained from the records of the Municipality states that he has grade 6 and experience as a security officer and cleaner.

5.1.9 No evidence was found that the vacant position of Water Process Controller Class I was advertised when the vacancy arose and Mr Rhyn was appointed on a temporary basis.
5.1.10 According to the records of the Municipality, the post was only advertised on 17 January 2017.

5.1.11 No evidence was found that any of the requirements of the post were lowered or waived by the Municipality, in order to appoint Mr Rhyn, who did not have the requisite qualifications.

5.1.12 In his response to the section 7(9) notice, the Acting Municipal Manager, Dr J Mac Kay conceded that Mr Rhyn’s temporary appointment was not in accordance with the provisions of the Human Resources Policy of the Municipality.

*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 Paragraph 4.1.1. of the Human Resources Policy of the Municipality (Policy), provides that when a position on the establishment of the Municipality becomes vacant, the Head of the relevant Department must submit a report to the Municipal Manager for the filling of the vacancy. The filling of the vacancy has to be approved by the Municipal Manager.

5.1.15 In terms of paragraph 4.1.2 of the Policy, vacancies of elementary positions (such as Water Process Controller) have to be advertised internally.

5.1.16 Applications for a vacant position have to be considered and a shortlist be compiled of not more than 10 (ten) of the most suitable candidates, by the Head of the relevant Department, in terms of paragraph 4.2.2 of the Policy.
5.1.17 Paragraph 4.2.5 provides that the Human Resource Manager, the relevant Head of the Department and one other senior employee of the Municipality constitutes a panel to interview the shortlisted candidates. The scoring by the panel of the candidates during the interviews and the preferred candidate are submitted to the Municipal Manager for approval of the appointment.

5.1.18 In terms of paragraph 4.3 of the Policy, only candidates that comply with the minimum requirements of the post may be appointed.

5.1.19 Paragraph 4.3 provides that the Municipal Council, Municipal Manager or Head of the relevant Department may lower or waive the minimum requirements of a post in regard to academic qualifications or experience in respect of a candidate, if he/she is otherwise suitably qualified for the job in terms of formal qualifications, previous studies, relevant experience and ability to develop the capacity to do the job within a reasonable time.

5.1.20 Paragraph 4.3.3 provides for temporary appointment in a permanent position. The Head of a Department may, with the approval of the Municipal Manager and in consultation with the managers responsible for human resources and finance, temporarily appoint a person that is not an employee of the Municipality in a permanent post if the post is vacant and will probably be vacant for some time or the current incumbent of the post is absent or will be absent for a long time.

Conclusion

5.1.21 The temporary appointment by the Municipality of Mr Rhyn in the permanent position of Water Process Controller Class I was not in accordance with the Policy.

5.1.22 The position was not advertised when it became vacant and no recruitment and selection process was followed, as required by the Policy.
5.1.23 Instead of advertising the vacancy, the Municipality continued to appoint Mr Rhyn on a month-to-month basis from July 2016 to February 2017, i.e. for eight months.

5.1.24 Mr Rhyn did not have the requisite academic qualifications and experience for the position. No decision to lower or waive the minimum requirements of the position in order to temporarily appoint Mr Rhyn was made.

5.1.25 There is no evidence that the position would have remained vacant for some time to have justified a temporary appointment in terms of the Policy.

5.1.26 Mr Rhyn’s temporary appointment was therefore not in accordance with the provisions of the Policy that regulates the recruitment and selection of staff of the Municipality.

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

*Common cause issues or undisputed facts*

5.2.1 It is common cause that Mr Rhyn was temporarily appointed by the Municipality as a Water Process Controller Class I, from 01 July 2016 to 28 February 2017.

5.2.2 Mr Rhyn was not an employee of the Municipality and a new employment contract was entered into with him every month.

5.2.3 The post of Process Controller Class I is a permanent position on the Municipality’s staff establishment.

5.2.4 As indicated in paragraph 5.1 above, Mr Rhyn’s temporary appointment was not in accordance with the Policy.
Application of 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 the 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 Paragraph 4.1.1 of the Human Resources Policy of the Municipality (Policy), provides that when a position on the establishment of the Municipality becomes vacant, the Head of the relevant Department must submit a report to the Municipal Manager for the filling of the vacancy. The filling of the vacancy has to be approved by the Municipal Manager.

5.2.7 In terms of paragraph 4.1.2 of the Policy, vacancies of elementary positions (such as Water Process Controller) have to be advertised internally.

5.2.8 Applications for a vacant position have to be considered and a shortlist be compiled of not more than 10 (ten) of the most suitable candidates, by the Head of the relevant Department, in terms of paragraph 4.2.2 of the Policy.

5.2.9 Paragraph 4.2.5 provides that the Human Resource Manager, the relevant Head of the Department and one other senior employee of the Municipality constitutes a panel to interview the shortlisted candidates. The scoring by the panel of the candidates during the interviews and the preferred candidate are submitted to the Municipal Manager for approval.

5.2.10 In terms of paragraph 4.3 of the Policy, only candidates that comply with the minimum requirements of the post may be appointed.

5.2.11 Paragraph 4.3 provides that the Municipal Council, Municipal Manager or Head of the relevant Department may lower or renounce the minimum requirements of
a post in regard to academic qualifications or experience in respect of a candidate, if he/she is otherwise suitably qualified for the job in terms of formal qualifications, previous studies, relevant experience and ability to develop the capacity to do the job within a reasonable time.

5.2.12 Paragraph 4.3.3 provides for temporary appointment in a permanent position. The Head of a Department may, with the approval of the Municipal Manager and in consultation with the managers responsible for human resources and finance, temporarily appoint a person that is not an employee of the Municipality in a permanent post if the post is vacant and will probably be vacant for some time or the current incumbent of the post is absent or will be absent for a long time.

5.2.13 Section 1 of the Local Government: Municipal Finance Management Act, 2003 (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.

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

5.2.15 Section 62(1)(d) of the MFMA provides that the accounting officer of the 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**

5.2.16 The vacancy of the post was not advertised and no recruitment and selection process was followed when Mr Rhyn was temporarily appointed, as required by the Policy. He also did not qualify for the position.
5.2.17 No evidence was found during the investigation that the position to which Mr Rhyn was appointed on a temporary basis would probably have remained vacant for some time or that there was a current incumbent of the position that was absent or would have been absent for a long time, as contemplated by paragraph 4.3.3 of the Policy.

5.2.18 By temporarily appointing Mr Rhyn on a month to month basis from July 2016 to February 2017, the Municipality acted in violation of the provisions of paragraph 4 of the Policy. Mr Rhyn’s appointment was therefore not in accordance with section 55(1) of the Municipal Systems Act.

5.2.19 The conduct of the Municipality was accordingly improper, constitutes maladministration and resulted in irregular expenditure.

5.3 Regarding whether the permanent appointment of Mr Rhyn by the Municipality as Process Controller Class II with effect from 1 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality

*Common cause issues or undisputed facts*

5.3.1 It is common cause that the Municipality internally advertised the position of Process Controller Class II (at the refuse site) on 17 January 2017.

5.3.2 According to the internal advertisement, the requirements for the position were:

5.3.2.1 Grade 10.

5.3.2.2 Reading and writing skills.

5.3.2.3 Good interpersonal and communication skills.
5.3.2.4 Good reporting skills and the ability to function independently.

5.3.3 Mr Rhyn applied for the position. According to the records of the Municipality, Mr Rhyn was the only applicant.

5.3.4 Mr Rhyn was interviewed by the interview panel appointed by the Municipal Manager, on 9 February 2017.

*Issues in dispute*

5.3.5 In a Memorandum submitted to the Municipal Manager by the Director: Corporate Services of the Municipality on 13 February 2017, it was recommended that Mr Rhyn is appointed, as he was the only candidate.

5.3.6 Mr Rhyn was appointed by the Municipal Manager as Process Controller Class II on 1 March 2017.

5.3.7 Mr Rhyn’s CV obtained from the records of the Municipality, states that he has grade 6 and experience as a security officer and cleaner.

5.3.8 Ms Esme Adams, the Human Resources Manager of the Municipality indicated during the investigation that Mr Rhyn was a temporary employee who was permanently appointed as he worked for longer than three (3) months, in line with the Collective Agreement on Conditions of Service of the Northern Cape Division of the South African Local Government Bargaining Council.

5.3.9 In a response to the section 7(9) notice dated 14 September 2020, the Acting Municipal Manager, Dr Mac Kay agreed that Mr Rhyn’s appointment was not in line with the Policy.
5.3.10 Dr Mac Kay further stated that the deviation from the Policy was on the recommendation/resolution of the Local Labour Forum that all employees that were employed longer than three (3) months on a fixed contract had to be permanently appointed, in line with Section 198B of the Labour Relations Act, 1995.

5.3.11 Dr. Mac Kay further stated that the employee had a reasonable expectation of renewal or permanent employment by the employer.

*Application of relevant law*

5.3.12 Section 55(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) provides that as the head of the administration of the 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.

5.3.13 Paragraph 4.1.1. of the Policy, provides that when a position on the establishment of the Municipality becomes vacant, the Head of the relevant Department must submit a report to the Municipal Manager for the filling of the vacancy. The filling of the vacancy has to be approved by the Municipal Manager.

5.3.14 In terms of paragraph 4.1.2 of the Policy, vacancies of elementary positions (such as Process Controller) have to be advertised internally.

5.3.15 Applications for a vacant position have to be considered and a shortlist be compiled of not more than ten (10) of the most suitable candidates, by the Head of the relevant Department, in terms of paragraph 4.2.2 of the Policy.

5.3.16 Paragraph 4.2.5 provides that the Human Resource Manager, the relevant Head of the Department and one other senior employee of the Municipality constitutes
a panel to interview the shortlisted candidates. The scoring by the panel of the candidates during the interviews and the preferred candidate are submitted to the Municipal Manager for approval.

5.3.17 Only candidates that comply with the minimum requirements of the post may be appointed, in terms of paragraph 4.3 of the Policy.

5.3.18 Paragraph 4.3 provides that the Municipal Council, Municipal Manager or Head of the relevant Department may lower or waive the minimum requirements of a post in regard to academic qualifications or experience in respect of a candidate, if he/she is otherwise suitably qualified for the job in terms of formal qualifications, previous studies, relevant experience and ability to develop the capacity to do the job within a reasonable time.

5.3.19 Clause 15.1 of the Collective Agreement on Conditions of Service of the Northern Cape Division of the South African Local Government Bargaining Council (Collective Agreement) dated 23 October 2014, provides that when an employee acts in the same position for longer than seven (7) consecutive months, the employee becomes entitled to promotion into such a position, provided the acting employee meets the job specification of the position and that the position has been budgeted for.

5.3.20 Clause 15.2 of the Collective Agreement states that all appointments that are not temporary but by their very nature permanent positions below sections 54 and 56 (of the Municipal Systems Act, such as the position of Process Controller Class II) shall be on a permanent basis except for positions that are linked to the term of office of the political office bearers, section 54A and 56 managers.
Conclusion

5.3.21 The permanent appointment by the Municipality of Mr Rhyn in the position of Process Controller Class II was not in accordance with the Policy.

5.3.22 The position was advertised internally, but no attempt was made to re-advertise or to also advertise the position externally, when only one application was received, to ensure that there was a proper recruitment and selection process.

5.3.23 The interview panel was therefore not in a position to select the best candidate available as there was only one applicant.

5.3.24 Mr Rhyn did not have the requisite academic qualifications for the position. Instead of Grade 10, he only had Grade 6.

5.3.25 Mr Rhyn’s appointment was therefore not in accordance with the provisions of the Policy that regulates the recruitment and selection of staff of the Municipality.

5.3.26 His appointment was also not the result of the application of the Collective Agreement. He did not act in the position of Process Controller Class II, but was previously temporarily irregularly appointed as Water Process Controller Class I, a position that he did not qualify for and should not have occupied.

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

Common cause issues or undisputed facts

5.4.1 It is common cause that the Municipality internally advertised the position of Process Controller Class II, on 17 January 2017.
5.4.2 Mr Rhyn was the only applicant and was appointed by the Municipal Manager on 1 March 2017.

5.4.3 As indicated in paragraph 5.3 above, Mr Rhyn’s appointment as Process Controller Class II was not in accordance with the Policy.

*Application of relevant law*

5.4.4 Section 55(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) provides that as the head of the administration of the 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.

5.4.5 Paragraph 4.1.1. of the Human Resources Policy of the Municipality (Policy), provides that when a position on the establishment of the Municipality becomes vacant, the Head of the relevant Department must submit a report to the Municipal Manager for the filling of the vacancy. The filling of the vacancy has to be approved by the Municipal Manager.

5.4.6 In terms of paragraph 4.1.2 of the Policy, vacancies of elementary positions (such as Process Controller) have to be advertised internally.

5.4.7 Applications for a vacant position have to be considered and a shortlist be compiled of not more than 10 of the most suitable candidates, by the Head of the relevant Department, in terms of paragraph 4.2.2 of the Policy.

5.4.8 Paragraph 4.2.5 provides that the Human Resources Manager, the relevant Head of the Department and one other senior employee of the Municipality constitutes a panel to interview the shortlisted candidates. The scoring by the panel of the
candidates during the interviews and the preferred candidate are submitted to the Municipal Manager for approval.

5.4.9 Only candidates that comply with the minimum requirements of the post may be appointed, in terms of paragraph 4.3 of the Policy.

5.4.10 Paragraph 4.3 provides that the Municipal Council, Municipal Manager or Head of the relevant Department may lower or renounce the minimum requirements of a post in regard to academic qualifications or experience in respect of a candidate, if he/she is otherwise suitably qualified for the job in terms of formal qualifications, previous studies, relevant experience and ability to develop the capacity to do the job within a reasonable time.

5.4.11 Section 1 of the Local Government: Municipal Finance Management Act, 2003 (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.

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

5.4.13 Section 62(1)(d) of the MFMA provides that the accounting officer of the 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*

5.4.14 The appointment by the Municipality of Mr Rhyn’s as Process Controller Class II was 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.

5.4.15 The conduct of the Municipality was accordingly improper, constitutes maladministration and resulted in irregular expenditure.

6. FINDINGS

6.1 Regarding whether the temporary appointment of Mr Rhyn as Water Process Controller Class I by the Municipality with effect from 1 July 2016 to 28 February 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

6.1.1 The allegation that Mr Rhyn’s appointment as Water Process Controller Class I by the Municipality with effect from 1 July 2016 was not in accordance with the relevant laws and legal prescripts regulating the recruitment and selection of staff, of the Municipality, is substantiated.

6.1.2 The vacancy was not advertised, no interviews were held and Mr Rhyn did not have the requisite minimum qualifications and experience for the position, as contemplated by the Policy.

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, constitutes maladministration and resulted in irregular expenditure, is substantiated.
6.2.2 Mr Rhyn's temporary appointment was not in accordance with the Policy and therefore not in compliance with section 55(1) of the Municipal Systems Act. The conduct of the Municipality resulted in irregular expenditure as contemplated by the MFMA.

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

6.3 Regarding whether the permanent appointment of Mr Rhyn by the Municipality as Process Controller Class II with effect from 1 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

6.3.1 The permanent appointment of Mr Rhyn as a Process Controller Class II was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality.

6.3.2 The position was only advertised internally, and only Mr Rhyn applied. He was the only applicant that was interviewed. Mr Rhyn was recommended for appointment by the Municipal Manager on the basis that he was the only candidate.

6.3.3 Mr Rhyn did not meet the minimum requirements of the position as he only had Grade 6 instead of Grade 10.

6.4 Regarding whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure:
6.4.1 The conduct of the Municipality in appointing Mr Rhyn as Process Controller Class II was improper, constitutes maladministration and resulted in irregular expenditure.

6.4.2 Mr Rhyn's appointment was in violation of the Policy and therefore not in accordance with the provisions of section 55(1) of the Municipal Systems Act. The Municipality's conduct resulted in irregular expenditure as contemplated by the MFMA.

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

7. REMEDIAL ACTION

7.1 The appointment by a municipality of employees is 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.

7.3 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.  

7.4 In the matter of Nkosinathi Lawrence Khumalo and another v MEC for Education: Kwazulu-Natal, [2013] ZACC46, the Constitutional Court held (at paragraph [28]) that the true nature of such an application to court is one of judicial review under the principle of legality, which is applicable to all exercises of public power and not only to ‘administrative action’, as defined in the Promotion of Administrative Justice Act, 2000. It requires that all exercises of public power are at a minimum, lawful and rational.

7.5 Consequently, it is not open to the Municipality to simply cancel its employment contract with Mr Rhyn. A proper judicial review application has to be brought to firstly review the decision to appoint him and to declare the appointment invalid.

7.6 Mr J G Lategan, the former Municipal Manager that appointed Mr Rhyn has since left the Municipality.

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

7.7.1 The Municipal Manager of the Municipality:

7.7.1.1 To take appropriate steps in respect of disciplinary action against the officials that were involved in the irregular appointment of Mr Rhyn 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 sixty (60) business days from the date of my report; and

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3 At para 89
7.7.1.2 To institute proceedings for the judicial review of the irregular appointment of Mr Rhyn within sixty (60) business days from the date of my report.

8 MONITORING

8.1.1 The Acting Municipal Manager of the Kai! Garib Local 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 7.1.1 above will be implemented.

8.1.2 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.

[Signature]

ADV BUSISIWE MKHWEBANE
THE PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 30/01/2020

Assisted by: PII Coastal, Public Protector South Africa