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"Allegations of maladministration surrounding the designation and improper authorisation of Mpenjati Estuary as a nudist friendly beach by Hibiscus Coast (Ray Nkonyeni Municipality)"

REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR AND IMPROPER AUTHORISATION OF THE ESTABLISHMENT OF THE NUDIST FRIENDLY BEACH AT THE MPENJATI ESTUARY BY THE HIBISCUS COAST (RAY NKONYENI) MUNICIPALITY
INDEX

Executive Summary 3

1. INTRODUCTION 13

2. THE COMPLAINT 13

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR 14

4. THE INVESTIGATION 17

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS 26

6. FINDINGS 62

7. REMEDIAL ACTION 65

8. MONITORING 68
Executive Summary

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

(ii) The report communicates the Public Protector’s findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into the allegations that the Hibiscus Coast Municipality, currently known as Ray Nkonyeni Municipality (the Municipality) has irregularly and improperly authorised the establishment of a nudist friendly beach at the Mpenjati Estuary following an application by the South African Naturists Association and KwaZulu Natal Naturists Association (SANA/KZNNA).

(iii) The Complaint was lodged by Reverend M Effanga on 16 September 2015, on behalf of the Concerned Citizens of the Hibiscus Coast Municipality (Concerned Citizens), an organisation he describes as representing various faith based organisations; social and welfare organisations; business organisations; organisations largely concerned with the well-being of children and women; community structures such as the traditional councils in various areas and the majority of the citizens and residents of Hibiscus Coast Municipality.

(iv) The Complainant alleged that:

(a) The Municipality mishandled the application for a nudist friendly beach, north of the Mpenjati Estuary, in the south coast of KwaZulu-Natal.

(b) The Municipality contravened municipality by-laws and national laws with regard to the approval of a nudist friendly beach.
(c) The Municipality disregarded the views and participation of the majority of the community in the Municipality.

(d) Favouritism and bias by the Municipality towards the nudists.

(e) The South African Police conducted themselves in an inappropriate manner regarding an incident on 3 April 2015 at the Mpenjati Estuary.

(v) In essence, the complaint was that the Municipality has irregularly and improperly approved the establishment of a nudist friendly beach which amounts to contravention of municipal, provincial and national laws of the Republic of South Africa. Further, that the approval and manner in which it was done contravenes municipal by-laws and the Constitution with respect to public consultations with affected communities.

(vi) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, 1994, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(vii) Based on an analysis of the complaint, the following issues were identified to inform the focus of the investigation:

(a) Whether the Municipality improperly designated Mpenjati Estuary as a nudist friendly beach without following proper procedures and prescripts.
(b) Whether the Municipality failed to follow proper consultation processes and improperly failed to consider objections to the establishment of a nudist friendly beach

(c) Whether the conduct of members of the South African Police Service, Margate (SAPS) was appropriate regarding an incident on 3 April 2015 at Mpenjati Estuary, as required by section 205 of the Constitution of the Republic of South Africa, 1996 and Sections 40 and 41 of the Criminal Procedure Act 51 of 1977?

(viii) Key laws and policies taken into account to determine if there had been maladministration by Ray Nkonyeni Municipality and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by Ray Nkonyeni Municipality or its officials when processing this complaint. Those are the following:

(a) Section 151(3) of the Constitution of the Republic of South Africa, 1996 provides that:

"A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution" and

(b) Section 156(2) of the Constitution on the other hand provides that:

"A municipality may make and administer by-laws for the effective administration of the matters which it has a right to administer".
(c) Section 5 of the Local Government: Municipal Systems Act No 32 of 2000 (Municipal Systems Act) provides that:

"(1) Members of the local community have the right-through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to –

(i) Contribute to the decision-making processes of the municipality; and

(ii) Submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or the administration of the municipality.

(b) To prompt responses to their written or oral communications, including complaints, to the municipal council or to another political structure or a political office bearer or the administration of the municipality.

(c) To be informed of decisions of the municipal council, or another political structure or any political office bearer of the municipality, affecting their rights, property and reasonable expectations"

(d) Section 53 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (The Integrated Coastal Management Act).

This Act prescribes that before exercising any power in terms of the Act, the Minister, Member of the Executive Council, (MEC) Municipality or other person exercising that power is obligated to consult with all the Ministers, MECs or Municipalities whose areas of responsibilities will be affected by the exercise of the powers in accordance with the principles of co-operative governance as set out in Chapter 3 of the Constitution of the Republic of South Africa, 1996.
(e) **Hibiscus Coast Council Resolution C127/10/2014**

In terms of this Resolution, the Municipality purported to designate the Coastal access land in terms of section 18 of the Integrated Coastal Management Act 24 of 2008.

(f) **Part 2 of The Hibiscus Coast Municipality By-laws Relating to Beaches and Launch Sites provides that:**

"5.1. No person shall be on the sea shore or in the sea or any other place to which these by-laws, other than a booth, toilet or change room, unless so dressed that, if a female, her nipples are concealed from view and, if a male or female, his or her private parts are concealed from view, and in each case by a suitable article of opaque clothing.

5.2. No person shall on the sea-shore or in the sea or any other place to which these by-laws apply, other than a booth, toilet or change room remove or partially remove or displace or wear any article of clothing or bathing apparel in such a manner or to such an extent that, if a female, either of or both of her nipples is or are exposed to view and, if a male or female, his or her private parts are exposed to view".

(g) **Section 19(2) of the Sexual Offences Act 23 of 1969 provides that:**

"any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or any place to which the public have access, shall be guilty of an offence".

(ix) **Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:**
(a) Regarding whether the Municipality improperly designated Mpenjati Estuary as a nudist friendly beach without following proper procedures and prescripts.

(aa) The allegation that the Hibiscus Coast (Ray Nkonyeni) Municipality improperly designated Mpenjati Estuary as a nudist friendly beach and without following proper procedures is substantiated.

(bb) The Hibiscus Coast Council issued Resolution C127/10/2014 which sought to cause the relaxation of sections 5.1. and 5.2 of the Hibiscus Coast Municipality Municipal By-Laws relating to Beaches and Launch Sites, approved the request from the KwaZulu-Natal Naturists Association for establishment of the nudist friendly beach at Mpenjati Estuary before making its own application to the Department of Environmental Affairs and KwaZulu Natal Ezemvelo as required in terms of section 53 of the National Environmental Management: Integrated Coastal Management Act, 24 of 2008.

(cc) The Municipality therefore breached its own policies namely sections 5.1 and 5.2 of the HCM Municipal By-laws which basically prohibit nudism in all its beaches by unlawfully relaxing the said by-law. Municipal By-laws are amended and adopted through a formal process in terms of the Local Government: Municipal Systems Act 32 of 2000. In this case, the Municipality simply relaxed its own policy without formally amending and adopting same thereby violating and unlawfully breaching it. The use of the phrase “relaxing of the by-law” by the Municipality in the circumstances was more of a white wash attempt and sugar-coating exercise intended to cause the Municipality’s unlawful act to seem more appealing or pleasant when in actual fact it was improper and unlawful.
(dd) The Hibiscus Coast Municipality's failure to observe section 53 of National Environmental Management: Integrated Coastal Management Act, 24 of 2008 and the breach of its own sections 5.1 and 5.2 of the HCM Municipal By-laws in these circumstances, constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether the Municipality failed to follow proper consultation process and improperly failed to consider objections to the establishment of a nudist friendly beach.

(aa) The allegation that the Municipality failed to follow proper consultation processes and improperly failed to consider objections to the establishment of a nudist friendly beach is substantiated.

(bb) Despite the fact that the Municipality afforded the public an opportunity to express its views, the overwhelming views of the majority who objected to the establishment of the nudist friendly beach were not considered when Resolution C127/10/2014 was passed.

(cc) The public consultation process was therefore not proper and meaningful as the views expressed by the majority of the community members, who were objecting to the establishment of the nudist friendly beach were completely ignored by the Municipal Council without even laying the legal and factual basis for discarding the majority views of its community during the final decision-making stages.
(dd) As a result, such conduct by the Municipality constitutes conduct which results in impropriety as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(c) Regarding whether the conduct of members of the South African Police Services (SAPS) was appropriate regarding an incident on 3 April 2015 at Mpenjati Estuary, as required by section 205 of the Constitution of the Republic of South Africa, 1996 and sections 40 and 41 of the Criminal Procedure Act No. 51 of 1977.

(aa) The allegation whether the South African Police Service, Margate conducted themselves in an appropriate and ethical manner regarding the 3 April 2015 incident is not substantiated.

(bb) The members of the South African Police Services (Margate) duly responded and attended the scene on 03 April 2015 upon being alerted by the community. However, upon arrival on the beach they did not find anybody nude as the naturists might have dressed up when they saw the members of the South African Police Service (Margate) approaching Mpenjati Estuary along the footpath.

(cc) In the circumstances, the Public Protector is unable to make a legal finding which might indicate improper conduct or wrongdoing on the part of the SAPS as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
(x) The Remedial Action that the Public Protector is taking in pursuit of section 182(1) (c) of the Constitution is that:

The Ray Nkonyeni Municipal Council

(a) The Ray Nkonyeni Municipal Council must, within 30 days of issue of this final report, reconsider Municipal Council Resolution C127/10/2014, taking into account the fact that its adoption was inconsistent with sections 5.1 and 5.2 of the HCM Municipal By-laws relating to Beaches and Launch Sites as well as the legal processes and procedures prescribed in the Constitution of the Republic of South Africa, 1996, the Municipal Systems Act 32 of 2000 and the National Environmental Management: Integrated Coastal Management Act; 24 of 2008. There must always be a proper and rational basis for whatever choice the Municipal Council makes in the exercise of the constitutional power in reconsidering its Resolution C127/10/2014.

(b) In the event that in future a properly submitted application or request for the establishment of the naturist beach is submitted to the Municipality or the Municipality on its own initiative, opts to exercise its own executive and legislative authority to establish a naturist beach, the Municipality should, prior to making any determination on the request submitted or the exercise of an own initiative option, approach the Office of the KwaZulu Natal MEC: Co-operative Governance and Traditional Affairs and the Minister of Environmental Affairs for assistance, guidance and support relating to compliance with the necessary and applicable legal prescripts.

(c) In the light of the submission that naturism is practised as a religion by certain groups in our society, it is recommended that the Municipality must in future further consult with the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL) chairperson, for proper guidance and assistance in the handling of this matter. This shall
ensure that the constitutional rights of minorities in our society are also protected.

(d) In the event that there is a valid and proper decision by the Municipal Council to proceed with the application for the establishment of the naturist beach at the Mpenjati Estuary, in view of the uniqueness and seriousness of the issues involved in the matter, the Municipal Manager must always lead the process of handling/dealing with this matter and not completely remove himself and/or delegate all or a greater percentage of his authority to an official occupying a lower rank of authority than himself or herself.

(e) Should the Municipal Council decide to vote against the will of the majority of its community members the Municipality should lay a factual or legal basis for doing so in order to justify the rationality of its decision in line with the limitation clause or section 36 of the Constitution of the Republic of South Africa.

KwaZulu Natal MEC: Co-operative Governance and Traditional Affairs:

(f) The MEC must, within 60 days of publication of this report and in accordance with section 55 of the National Environmental Management: Integrated Coastal Management Act; 24 of 2008, review Ray Nkonyeni Municipality's Coastal Management Programme relating to the establishment of the Nudist Friendly Beach at the Mpenjati Estuary.

(g) The MEC must after reviewing in terms of the above legal provisions the Coastal Management Programme relating to the establishment of the Nudist Friendly Beach at the Mpenjati Estuary accordingly advise the Municipality to amend or replace the programme within a reasonable period.
REPORT RELATING TO THE ALLEGED APPROVAL BY THE HIBISCUS COAST (RAY NKONYENI) MUNICIPALITY OF THE ESTABLISHMENT OF A NUDIST FRIENDLY BEACH AT THE MPENJATI ESTUARY

1. INTRODUCTION

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

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of the investigation:

1.2.1 The Mayor, Ray Nkonyeni Municipality
1.2.2 South African Naturist Association / KwaZulu Natal Naturist Association
1.2.3 Mr V Mthethwa, KwaZulu Natal Ezemvelo Wildlife
1.2.4 Colonel CS Thabethe, Station Commissioner, Margate SAPS
1.2.5 Office of the SAPS Provincial Commissioner: KwaZulu Natal
1.2.6 The Premier of KwaZulu-Natal Province
1.2.7 The MEC Co-operative Governance & Traditional Affairs

1.3 A copy of the report is also provided to Reverend Effanga on behalf of the Concerned Citizens of the Hibiscus Coast to inform him about the outcome of the investigation

2. THE COMPLAINT

2.1 On 15 November 2015 Reverend M Effanga on behalf of the Concerned Citizens of the Hibiscus Coast submitted a complaint in which he alleged that:
2.1.1 The Municipality mishandled the application for a nudist beach, north of the Mpenjati Estuary, in the south coast of KwaZulu Natal.

2.1.2 The Municipality contravened municipality by-laws and national laws in regard to approval of a nudist friendly beach.

2.1.3 The Municipality disregarded the views and participation of the majority of the community in the Municipality.

2.1.4 Favouritism and bias by the Municipality towards the nudists.

2.1.5 The South African Police conducted themselves in an inappropriate manner regarding an incident on 3 April 2015 at the Mpenjati Estuary.

2.2 In essence, the complaint was that Municipality has irregularly and improperly approved the establishment of a nudist friendly beach which amounts to contravention of municipal, provincial and national laws of the Republic of South Africa. Further, that the approval and manner in which it was done contravenes municipal by-laws and the Constitution with respect to public consultations with affected communities.

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

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

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

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

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

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

3.5 In 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, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

3.6 In the above-mentioned constitutional court judgment, Chief Justice Mogoeng stated the following, when confirming the powers the Public Protector:

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 818 (CC) at para [76].
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 which 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 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 these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence. (paragraph 71(a)); and

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

3.7. Ray Nkonyeni Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result, this matter falls within the ambit of the Public Protector’s mandate.

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

4. THE INVESTIGATION

4.1. Methodology

4.1.1 The investigation of the complaint by the Public Protector was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.
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. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 Notwithstanding the sole discretion conferred on the Public Protector as alluded to above, in response to the Public Protector’s Section 7(9) Notice in a letter dated 17 August 2017, the Municipality submitted that it could not marry the list of allegations submitted to the Public Protector by the Complainants as captured in paragraphs 3.1 to 3.4 of the Section 7(9) Notice to the summary arrived at by the Public Protector in paragraph 3.5 thereof.

4.1.4 The Municipality’s contention in this regard does not take the matter any further since the allegations as presented by the Complainants when taken in their totality suggest that the Municipality irregularly and improperly approved the establishment of a nudist friendly beach. Furthermore, the summary arrived at by the Public Protector in paragraph 3.5 of the Section 7(9) Notice is informed by the actual complaint received from the Concerned Citizens. The Municipality seems to suggest that the Public Protector misdirected herself with regard to what the actual complaint was.

4.1.5 This conclusion is drawn from the fact that the Municipality further submitted that based on the initial complaint received by itself from the Concerned Citizens, the issue was the legality of having a nudist friendly beach. The Municipality further submitted that the issue of the legality of having a nudist friendly beach was settled by a legal opinion from COGTA dated 12 August 2015, which was addressed to the Concerned Citizens and also sent to the Public Protector by itself.
4.1.6 In this regard, it should be noted that the Public Protector's investigation was not concerned with the legality of nudism as extrapolated in the legal opinion from COGTA but rather with the process that unfolded in the establishment of the nudist friendly beach. It should further be noted that the legal opinion from COGTA was given in the context of a properly designated beach when all the legal imperatives have been complied with.

4.1.7 The summary arrived at by the Public Protector is informed by the actual original complaint received from the Concerned Citizens.

4.1.8 The investigation process commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act, for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with. The investigation process proceeded with an attempt to resolve the dispute by means of Alternative Dispute Resolution sessions chaired by the Deputy Public Protector with the aim of finding an amicable solution to the matter. When ADR processes failed and when no amicable solution could be reached by the parties, the evidence and information gathered were used to launch a formal investigation.

4.1.9 In its response to the Public Protector's Section 7(9) Notice, the Municipality submitted that conciliation could have resulted in a settlement if ventilated to its full extent as it had communicated to the Deputy Public Protector its willingness to set aside the Resolution which was the cause of the complaint and further, had the Deputy Public Protector offered the parties guidance and advice on the question of whether the establishment of the nudist beach was unlawful. The Municipality further submitted that the matter was left hanging and that the Public Protector reverted with a formal investigation which in turn deals mainly with processes that took place after the Resolution.
4.1.10 The Public Protector needs to emphasise that the investigation as already alluded to above was not concerned with the lawfulness or legality of the establishment of the nudist friendly beach but rather with the process and the conduct which unfolded in that regard. The Public Protector appreciates as argued by the legal opinion received from COGTA that under different circumstances and considerations it may not be unlawful or illegal to establish a nudist beach. The Public Protector could not have been best suited to declare the establishment of a nudist friendly beach lawful or unlawful as that would have been within the purview of the courts. Therefore, the Municipality's submission in this regard is neither here nor there as the aborted ADR process did not in any manner influence the evaluation of the evidence and the conclusions reached on the findings.

4.2. Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?
4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry focused on whether and to what extent the relevant state institutions fulfilled their responsibilities.

4.2.3. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the complainant has suffered prejudice the idea is to place him or her as close as possible to where he/she would have been had the state organ complied with the regulatory framework setting the applicable standards of good administration.

4.3. On analysis of the complaint, the following were the issues considered and investigated:

4.3.1 Whether the Municipality improperly designated Mpenjati Estuary as a nudist friendly beach without following proper procedures and prescripts.

4.3.2 Whether the Municipality failed to follow proper consultation processes and improperly failed to consider objections to the establishment of a nudist friendly beach.

4.3.3 Whether the conduct of members of the South African Police Service (Margate) was appropriate regarding an incident on 3 April 2015 at Mpenjati Estuary, as required by section 205 of the Constitution of the Republic of South Africa, 1996 and sections 40 and 41 of the Criminal Procedure Act No. 51 of 1977.
4.4 The Key sources of information

4.4.1 Documents

4.4.1.1 Complaint received from the Concerned Citizens of the Hibiscus Coast Municipality.

4.4.1.2 Written submissions received from the Concerned Citizens of the Hibiscus Coast.

4.4.1.3 Written submissions received from the Hibiscus Coast (Ray Nkonyeni) Municipality (containing records of meetings and e-mail communication with various officials and state departments).

4.4.1.4 Written submissions received from the South African Naturists Association/KwaZulu Natal Naturists Association.

4.4.1.5 Written submissions received from the Station Commissioner, Margate SAPS.

4.4.1.6 Written submissions received from Mr N Roos, who describes himself as a naturist and resident of Mpenjati.

4.4.1.7 Written submissions received from UGu House of Traditional Leaders.

4.4.1.8 Written submissions received from the KwaZulu Natal Department of Co-operative Governance & Traditional Affairs.
4.4.2 Meetings conducted.

4.4.2.1 Meeting with the members of Concerned Citizens of Hibiscus Coast Municipality on 08 July 2016, 15 July 2016 and 12 August 2016.

4.4.2.2 Meeting at the Office of the Public Protector chaired by the Deputy Public Protector on 22 August 2016.

4.4.2.3 Meeting between with the UGu House of Traditional Leaders and the Public Protector officials led by the Deputy Public Protector, Adv K Malunga.

4.4.2.4 Inspection visit and meeting at the Mpenjati beach chaired by the Deputy Public Protector, Adv K Malunga on 3 November 2016.

4.4.2.5 Meeting with Superintendent MJ Mzindle: Protection Services Department: Ray Nkonyeni Municipality.

4.4.2.6 Meeting with the following officials of the Ray Nkonyeni Municipality (former Hibiscus Coast Municipality):

4.4.2.6.1 The Mayor, Ms C Mqwebu;
4.4.2.6.2 The Deputy Mayor, Mr R Nair;
4.4.2.6.3 The Municipal Manager, Mr M Mbili;
4.4.2.6.4 The Director of Community Services, Mr S Nzimande; and
4.4.2.6.5 Municipality Communications Director, Mr S April.

4.4.2.7 Meeting with representatives of some political parties then represented at the Hibiscus Coast Municipality (Congress of the People, Democratic Alliance; Inkatha Freedom Party, and National Freedom Party)
4.4.2.8 Meeting with the then, but retired Cluster Commander and Station Commissioner of Margate Police Station, Brigadier M Moodley.

4.4.3 Inspection in loco conducted

4.4.3.1 Observations regarding the location of the beach was made during the inspection visit at the Mpenjati beach on 15 July 2016 and 03 November 2016.

4.4.4 Websites consulted/electronic sources
4.4.4.1 South African National Naturist Association (www.sanna.org.za)
4.4.2.2 Western Cape Naturist Association (www.wcna.co.za)
4.4.2.3 KwaZulu-Natal Naturist Association (www.kznna.org.za)

4.4.5 Legislation and other prescripts
4.4.5.1 The Constitution of the Republic of South Africa, 1996
4.4.5.2 The Local Government: Municipal Systems Act, 32 of 2000
4.4.5.3 The National Environmental Management: Integrated Coastal Management Act, 24 of 2008
4.4.5.4 Hibiscus Coast Municipality By-laws
4.4.5.5 Hibiscus Coast Council Resolution C127/10/2014
4.4.5.6 Sexual Offences Act 23, of 1969
4.4.5.7 Marine Living Resources Act, 18 of 1998
4.4.5.8 The South African Police Service Act, 68 of 1995
4.4.5.9 Criminal Procedure Act, 51 of 1977
4.4.6 Case law

4.4.6.1 Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC).

4.4.6.2 Fedsure Life Assurance LTD and Others v Greater Johannesburg Transitional Metropolitan Council: ZACC 17, 1999(1) SA 374(CC)

4.4.6.3 President of the Republic of South Africa v South African Rugby Football: BCLR 1999 (2) SA 14 (CC)

4.4.6.4 Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa (CCT3199), 2000 ZACC 1: (2) SA BLCR 241

4.4.6.5 The Supreme Court of the United Kingdom judgment, in the matter between R (on the application of Moseley (in substitution of Stirling Deceased)) (Appellant) v London Borough of Haringey (Respondent) [2014] UKSC 56

4.4.6.6 United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC) (22 June 2017), Union.
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 Municipality improperly designated Mpenjati Estuary as a nudist friendly beach without following proper procedures and prescripts.

Common cause issues

5.1.1 The Mpenjati Estuary wherein the proposed nudist friendly beach is to be established falls within the jurisdiction of the Municipality and accordingly the approved Municipal by-laws of the Municipality are applicable.

5.1.2 Hibiscus Coast Municipality has twenty one (21) designated public beaches and six (6) of these are Blue Flag beaches and the Mpenjati Estuary beach is not a designated swimming beach.

5.1.3 While Mpenjati Estuary beach is not a designated swimming beach, it is common cause that naturists have been illegally using this area for a considerably long period of time as a naturist beach.

5.1.4 Around May 2014, the South African Naturists Association/KwaZulu Natal Naturists Association submitted an application to the then Mayor of the Municipality to have a certain area situated at the north of Mpenjati beach declared a designated nudist friendly beach.

5.1.5 The Hibiscus Coast Council issued Resolution C127/10/2014 which provides as follows:
“C127/10/2014 RESOLVED

THAT the report dated 16 October 2014, submitted by the Head of Department Community Services, regarding the application for a Naturist Beach, north of the Mpenjati Estuary, be and is hereby received and noted.

THAT it be noted that the application from the KwaZulu Natal Naturist Association be regarded as a request to Council to consider the following:

Relaxation of section 5.1. and 5.2 of the HCM Municipal By-Laws relating to Beaches and Launch Sites
Designating the North of Mpenjati River as a Coastal Access land wherein the above By-law relaxation shall apply.

THAT it be noted that the designation of the Coastal access land is a process that is done in terms of section 18 of the Integrated Coastal Management Act, 2008 (Act no 24 of 2008) which involves a formal application to the department of Environmental Affairs and Ezemvelo.

THAT the application from the KwaZulu- Natal Naturists Association, be and is hereby approved, subject to a formal application being made to the Department of Environmental Affairs and KwaZulu Natal Ezemvelo; and

THAT it be noted that the strength of the application is based on the fact that it will create a marketing platform for Hibiscus Coast Municipality to attract National and International tourists which will lead to job creation and economic development.”

5.1.6 An inspection in loco by the Public Protector team revealed that the Municipality planted various poles which carried signage along the Mpenjati
Estuary, purporting to designate the beach as nudist friendly beach and further warning the public about the prospect of meeting nude bathers beyond certain points along the stretch of the beach.

5.1.7 The following photographs were taken when the Deputy Public Protector (Advocate K Malunga) led a delegation comprised of Complainants, Traditional Leaders, members of Naturists Associations, Officials from KwaZulu Natal Ezemvelo, members of the South African Police Service and officials from Ray Nkonyeni Municipality on an inspection in loco at the Mpenjati beach on 03 November 2016.

(a) **Photo A** depicts the main entrance to Mpenjati Estuary, where cars are parked. Access to this entrance is controlled by KwaZulu Natal Ezemvelo.

Photo A

(b) **Photo B** depicts the delegation (inspection team) led by officials from KZN Ezemvelo walking along the footpath through densely vegetated shrubs in order to access the beach front of Mpenjati Estuary:
(c) **Photos C and D** both depict the foot or pedestrian wooden bridge as one of the hurdles that one has to pass before one can access the Mpenjati Estuary beach front:

**Photo C**
(d) Photo E depicts the delegation still walking through bush/shrubs in order to reach the beach front of Mpenjati Estuary.

(e) Photos F, G and H depict the actual parts (sand, trees and water) and the stretch of Mpenjati Estuary which the Municipality had already designated for nude bathers:
(f) **Photo I and J** depict the signage which the Municipality allowed to be fitted and hoisted on poles. The signage carried a clear warning for the public of the possibility of encountering nude bathers beyond that point. Some of the signage displayed a Code of Conduct for nudists. This was clear evidence that the Municipality had already granted, approved and designated the area as a nudist friendly beach.

**Photo I**
KWA-ZULU NATAL NATURIST ASSOCIATION

CODE OF CONDUCT

WE DO NOT ACCEPT

- Obscene or offensive language.
- Racism, sexism OR homophobia.
- Sexual or erotic material.
- No sexual content of any kind e.g. dancing in a provocative manner, sitting on someone’s genitals, swapping saliva, touching genitals.
- No photographs whatsoever unless you have cleared it with each and every person in the shot. Please don’t try and persuade anyone. Their first no is their final answer. People have every right to their privacy and whether or not they wish themselves or their family to appear in a photograph. All photos need to be inspected by all people appearing in the photo immediately after the photo was taken.
- Don’t stare; it is very rude whether you have clothes on or not.
- Always take a towel and make sure you sit on it. This is for hygiene reasons such as protecting other people from your sun tan oil, sweat etc.
- We like to create a harmonious environment where everyone gets along. Please do not argue or fight and leave your aggressive behaviour at home.
- Your partner or friend you brought with you is your responsibility only. Keep them in line and make sure they know the code of conduct BEFORE attending. If they cannot be controlled, we suggest you remove them in an adult and diplomatic fashion.
- Cover up any unpredictable erections. We know they sometimes happen beyond your control, a simple towel covering it up or lying on your front and no-one will know.
- No violence or raising voices or shouting. Respect everyone.
- Don’t litter, in fact, if you see it, then pick it up and dispose of it yourself. Parents are responsible for their children also where this is concerned. The only things you should leave behind are your foot prints.
- Don’t make rude comments about anyone.
- Children sometimes like to let off steam and this is not a bad thing at all, but children must be supervised by adults so that they don’t cause problems for others.
- Binoculars are not permitted on naturist beaches.
- Don’t go naked where nakedness isn’t allowed - you are asking for trouble if you do that.
- Naturist friendly beaches are peaceful places, so be considerate about playing loud music or radios. Use earphones if possible, and if asked to ’turn it down’, do so willingly.
- Respect other people’s property.
- Privacy is Fundamental. Many are at a beach for a quiet time. Body language should tell you they don’t want to be disturbed. It’s not wrong to look for new friends - but it is rude to intrude when you’re unwelcome.
- Always come PREPARED. Bring your own supplies: beverage, food, sunscreen, towel or your own cigarettes, braai meat if at a braai.
- Speak up for standards. Don’t let some newcomer who doesn’t understand the situation or our values cause trouble. Instead of doing a slow burn, go and talk politely but firmly, to the couple starting sexual activity or the person using bad language.
**Issues in Dispute**

5.1.8 Despite the Municipality having admitted to fitting the signage along the beach, in its response to the Public Protector’s Section 7(9) Notice it argued that such was not to confirm that the Municipality has approved the nudist beach. The Municipality further argued that the signage was only meant to serve as a warning to members of the community while the process was still under way and that the signage was in no way intended to implement the Council Resolution.

5.1.9 It is both inconceivable and disingenuous of the Municipality to suggest that the signage and the Code of Conduct were merely installed to serve as a warning to members of the community while the process was still under way if there was no intention to implement the Council Resolution. The correct and natural response to nudist bathers on a beach that is not yet officially designated for nudism would be the enforcement of the laws of the Republic, including the municipal by-laws which are applicable. However in this case, the Municipality did not enforce its by-laws regarding the incident of 03 April 2015 since it had already relaxed sections 5.1. and 5.2 of the HCM Municipal By-Laws relating to Beaches and Launch Sites in favour of the establishment of the nudist friendly beach.

5.1.10 Whereas the Municipality sought to designate the Mpenjati Estuary as a nudist friendly beach as per Council Resolution purported to have been taken in terms of section 18 of the Integrated Coastal Management Act, 2008, the Complainants argued that since the Mpenjati Estuary is a marine protected area in terms of the law (Marine Living Resources Act, 18 of 1998) any erection of facilities and installation of infrastructure without the approval of the Minister of Environmental Affairs is an infringement of the law.
5.1.11 On the other hand, the Municipality contended that it is aware of all the relevant and applicable laws and has complied with all of them and acted within its legal mandate when it granted the approval of the nudist friendly beach at the Mpenjati Estuary.

5.1.12 The Municipality further contended that the argument by the Complainant is mistaken as it does not appear to show a correct understanding of the powers and authority granted by the Constitution of the Republic of South Africa, 1996 to municipalities at a local government level.

5.1.13 The issue whether the Municipality complied with the relevant and applicable laws as contended will be established by the application of the relevant law to the facts established.

5.1.14 In its response to the Public Protector’s Section 7(9) Notice, the Municipality challenged the Public Protector’s conclusion therein that the evidence obtained revealed that except for the Resolution alluded to above, the Municipality did not follow any other legal process prior to designating part of the Mpenjati Estuary as a naturist beach. The Municipality submitted that the establishment and the designation of the nudist friendly beach was subject to a formal application being made to the Department of Environmental Affairs and KwaZulu Natal Ezemvelo. Whether the Municipality’s contention in this regard can be sustained will be determined by the application of the relevant legal prescripts.

Application of the relevant law

5.1.15 Section 151(3) of the Constitution provides that:
“A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution”.

5.1.16 Section 156(2) of the Constitution on the other hand provides that:

“A municipality may make and administer by-laws for the effective administration of the matters which it has a right to administer”.

5.1.17 It then follows that in terms of the above constitutional provisions, the Municipality also had authority to make a resolution regarding the administration of the matters which falls within its area of jurisdiction.

5.1.18 However, section 156(3) of the Constitution provides that:

“Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid”.

5.1.19 Similarly, in terms of the above provision a resolution that conflicts with national or provincial legislation is invalid.

5.1.20 It has been established in the evidence that the Hibiscus Coast Council issued Resolution C127/10/2014.

5.1.21 In terms of the resolution alluded to above, the Municipality purported to designate the coastal access land in terms of section 18 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008.
5.1.22 Section 18(1) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 provides that:

"Each Municipality "whose area includes coastal public property must within four years of the commencement of this Act, make a by law that designate strips of land as coastal access land in order to secure public access to that public coastal property"."

5.1.23 On the other hand section 18(3)(a) of the above Act provides that a Municipality must implement subsection (1) subject to the other provisions of this Act.

5.1.24 It then follows that the Municipality was obliged to comply with the provisions of section 53(1)(a) of this Act.

5.1.25 Section 53(1)(a) prescribes that before exercising any power in terms of this section, the Minister, MEC, Municipality or other person exercising that power is obligated to consult with all the Ministers, MECs or Municipalities whose areas of responsibility will be affected by the exercise of the powers in accordance with the principles of co-operative governance as set out in Chapter 3 of the Constitution of the Republic of South Africa, 1996. (emphasis added)

5.1.26 On proper construction of the above provisions, the Municipality was obliged to comply with section 18(3)(a) and 53(1)(a) of the Act before the passing of the Resolution.

5.1.27 In his response to the Public Protector’s Section 7(9) Notice Mr S M Mbili, the Municipal Manager contended that the Municipality engaged the Department of Environmental Affairs prior to the Resolution. However, the Municipal Manager failed to provide the Public Protector with the Department of
Environmental Affairs’ input, submission or response to the Municipality’s engagement in that regard. It is further noted that the Municipal Manager’s contention in this regard contradicts what has been captured in the Resolution in that the Resolution indicates as follows:

“THAT the application from the KwaZulu-Natal Naturists Association, be and is hereby approved, subject to a formal application being made to the Department of Environmental Affairs and KwaZulu-Natal Ezemvelo.”

5.1.28 Whereas the same email purporting to be a consultation with affected state institutions was sent out by the Municipality to the MEC for COGTA and Ezemvelo KwaZulu Natal Wild Life and to the Minister of the Department of Environmental Affairs, serious concerns regarding the manner in which the consultation process to establish a nudist friendly beach were also raised by Mr Andy Blackmore during the discussion at a meeting held on 19 February 2015 at Uvongo Libraries which was chaired by Mr Simon April.

5.1.29 According to the record of the meeting alluded to above, Mr Blackmore raised the following issues of concern:

(a) That KZN Wildlife and Mpenjati Nature Reserve have not received any formal communication or request from Hibiscus Coast Municipality;

(b) That when KZN Wildlife sent an email to the Hibiscus Coast Municipality seeking clarity on the matter of the establishment of the nudist friendly beach, that email was erroneously construed as consultation submitted to the Municipal Council as part of Council documents;

(c) Whether the Municipality has received any correspondence from KZN Wildlife or the Department of Environmental Affairs regarding the nudist friendly beach application;
(d) Whether SANA submitted its application/request with a full proposal and concept plan; and

(e) If no full proposal or concept plan was submitted, how did the Hibiscus Coast Municipality deliberate and vote on an "application" which had no substantive details.

5.1.30 In response, Mr Simon April and council officials who were in attendance responded amongst other things by saying that "The only correspondence Council has received at that stage was from KZN Wildlife which was an email which they requested that SANA should submit a detailed application for their request to establish a nudist beach".

5.1.31 This in itself conclusively proves that at the time when the Hibiscus Coast Municipality adopted the Resolution:

(i) The Municipality was not in possession of a clear application from SANA/KZNNA indicating a clear proposal and a concept plan;

(ii) Consultation with the stakeholder state entities that would be affected by the exercise of power to establish a nudist friendly beach as required by the law, had not happened; and

(iii) An email from KZN Wildlife (as one of the other state entities that would be affected by the establishment of the nudist friendly beach) was merely seeking clarity on the matter but the Municipality mysteriously took this as satisfying a consultation requirement prescribed by the law.

5.1.32 Ezemvelo KZN Wildlife indicated in correspondence dated 22 September 2016 addressed to the Deputy Public Protector that in principle it is prepared to enter into an agreement with the Hibiscus Coastal Municipality to permit a
naturist friendly beach and that, if such a beach is to be permitted in the municipal area then the site (Mpenjati Estuary) seems well suited for such purpose given its seclusion from the relative view of the public and access. However, such submission by Ezemvelo KZN was not a response to the Municipality but it was directed to the Office of the Public Protector after the Deputy Public Protector asked Ezemvelo to give their input or position on the matter as one of the affected organs of state.

5.1.33 Another piece of evidence in the Public Protector’s possession reveals that COGTA in its correspondence dated 12 August 2015 to the Complainants and the Municipality is in principle of the view that the establishment of a nudist friendly beach as proposed is not per se criminal if entry is to be limited to persons 18 years or older. COGTA further indicated in the same correspondence that the decision to establish such a beach falls within the scope of the legislative, executive and administrative powers of the Municipality. The evidence further reveals that COGTA provided the Municipality with a legal opinion impartially sought from a Senior Counsel which also confirmed the legislative powers of the Municipality to designate a beach and further advice on the legality of the nudist friendly beach.

5.1.34 The Public Protector could not find, nor was it provided with, any evidence which indicates that the Municipality formally and properly consulted with the Minister of the Department of Environmental Affairs prior to the passing of the Resolution as required by Section 53(1)(a) of the Integrated Coastal Management Act 24 of 2008. There is no evidence of acknowledgement of receipt of correspondence by the Department of Environmental Affairs of the Municipality’s engagement neither is there any input, submission or response from the Department of Environmental Affairs with regard to the proposed establishment of the nudist friendly beach at Mpenjati Estuary.
Conclusion

5.1.35 In view of the available evidence as mentioned above, it is clear that the power to make a determination on the designation of the proposed nudist friendly beach falls within the Municipality's legislative and administrative powers subject to consultation with the relevant Ministers, MECs and other affected organs of state.

5.1.36 The approval, granting and establishment of the nudist friendly beach shall not be automatically an illegal or unlawful exercise by the Municipality provided that the Municipality after consultation with the relevant national and provincial authorities, the zoning, location, relative seclusion from the general public view, access control, installation of warning signage and imposing conditions of use relating to the proposed nudist beach are not in conflict with national laws of the country. The Constitution makes it clear that beaches are a functional area of the Municipality.

5.1.37 It follows therefore that the Municipality is in principle allowed by the Constitution and other statutory prescripts as mentioned above to designate any area under its jurisdiction as a beach provided that there is compliance with the prescribed procedures and processes contained in the legal prescripts.

5.1.38 However, in this case the Municipality violated its own sections 5.1 and 5.2 of the HCM Municipal By-Laws relating to Beaches and Launch Sites and further failed to follow the proper process and procedure for designating a beach in terms of section section 53(1)(a) of the Integrated Coastal Management Act, 24, 2008 which is to "consult with all Ministers, MECs; or municipalities whose area of responsibilities will be affected by the exercise of the powers in accordance with the principles of co-operative governance as set out in Chapter 3 of the Constitution".
5.1.39 Failure by the Municipality to formally amend and adopt sections 5.1. and 5.2 of the HCM Municipal By-Laws relating to Beaches and Launch Sites in terms of the Local Government and Municipal Systems Act 32 of 2000 was improper and unlawful. The failure to consult the Minister of the Department of Environmental Affairs and to have his/her submissions or comments with regard to this matter amounts to a breach of Section 53(1)(a) of National Environmental Management: Integrated Coastal Management Act 24 of 2008 which requires peremptory compliance therewith before passing a resolution that sought to establish the nudist friendly beach.

5.2. Regarding whether the Municipality failed to follow proper consultation processes and improperly failed to consider objections to the establishment of a nudist friendly beach.

Common cause issue

5.2.1 The Municipality did conduct and engage in a public participation process around 2014 through various means and forums and the Complainant as well as local community members were part of the process.

5.2.2 Further to this, the local community was afforded an opportunity to express its views regarding the establishment of the naturist beach and the majority of the community members who participated in the process indicated their objection to the establishment of the naturist beach.

5.2.3 According to the signed attendance registers submitted by the Hibiscus Coast Municipality, the outcome of the voting process during the public consultation is indicated in the graph below:
<table>
<thead>
<tr>
<th>PLACE</th>
<th>WARD</th>
<th>DATE</th>
<th>YES/in favour of the nudist beach</th>
<th>NO/opposed to the nudist beach</th>
<th>ABSTAINED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marina Beach</td>
<td>Unnamed</td>
<td>4</td>
<td>30</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Unnamed</td>
<td>Ward 5</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Unnamed</td>
<td>Ward 7</td>
<td>0</td>
<td>19</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Unnamed</td>
<td>Ward 8</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Unnamed</td>
<td>Ward 09</td>
<td>11</td>
<td>154</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Unnamed</td>
<td>Ward 10</td>
<td>3</td>
<td>25</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Unnamed</td>
<td>Ward 11</td>
<td>0</td>
<td>24</td>
<td>0</td>
<td></td>
</tr>
<tr>
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<td></td>
<td>19</td>
<td>225</td>
<td>02</td>
<td></td>
</tr>
</tbody>
</table>

5.2.4 The above-mentioned public consultation process effectively shows that an overwhelming majority of the community members who participated in the voting process was opposed to the establishment of the nudist friendly beach at the Mpenjati Estuary.
Issues in Dispute

5.2.5 The Complainants argued that they delivered letters on various occasions to different offices occupied by officials of the Municipality in 2014 and 2015, raising their views and objections to the establishment of the naturist beach at Mpenjati Estuary.

5.2.6 The core contention by the Complainants was that in terms of the law (Criminal Law (Sexual Offences Act 23 of 1957 and Sexual Offences and Related Matters) Amendment Act 32 of 2007) public nudity is prohibited in South Africa.

5.2.7 The Complainants argued that since the Criminal Law (Sexual Offences Act 23 of 1957 and Sexual Offences and Related Matters) Amendment Act 32 of 2007 is a law passed by national Parliament, the Municipality, being a local government is not allowed to pass any by-law that contradicts the law passed by national Parliament.

5.2.8 The question whether a municipal resolution that permits nudity in the designated coastal public property is a contravention of any national or provincial law shall be answered when the applicable legislation is discussed below.

5.2.9 The other following grounds of objection and disputes were raised by various parties:

Objections based on cultural and traditional grounds

5.2.10 The traditional leaders (the Amakhosi) affiliated to Ugu Local House of Traditional leaders submitted on 03 November 2016 during the Public
Protector’s inspection *in loco* that it is not appropriate to have a naturist beach at Mpenjati Estuary as there are ancestral graves situated in the area as a result of the factional battles that used to take place there.

5.2.11 It was alleged that some men who fought in the battles were not taken to their respective homes for burial but were instead buried in the area and therefore it will go against the African traditional belief system of respecting the gravesites to have the naturist beach established at the Mpenjati Estuary.

5.2.12 However, on more than one occasion, Inkosi Nzimakwe a traditional leader under whose jurisdiction the area falls and who specifically alleges that some of his forefathers were buried at the exact spot where the proposed beach will be situated was unable to honour the meetings that were organised on his own request in order to assist the Public Protector to point out the graves along the estuary. He nevertheless repeatedly stated that there were graves at the Mpenjati Estuary at exactly the same spot where the naturist beach was to be established.

5.2.13 The Amakhosi further argued that the naturist beach will be located approximately three kilometres from the Bhokodisa Traditional Area and this may cause unnecessary interest and curiosity amongst the communities around the area. Inkosi Nzimakwe cited an incident that occurred immediately after the naturist’s event on 3 April 2015 where young children (who presumably may have witnessed the naturist incident) were noticed walking in the nude in a tribal area as if they were imitating what happened in the nudist beach.

5.2.14 Amakhosi also argued that the establishment of the naturist beach in traditional areas is offensive to the African Zulu traditional belief system and it is the duty of the Amakhosi to protect their communities since during the
consultation meetings in the areas under jurisdiction of Amakhosi, traditional communities completely rejected the idea of the naturist beach.

**Objections based on Religious (Christian) grounds**

5.2.15 The Concerned Citizens stated that the establishment of the nudist friendly beach is against the Christian belief system and argued, amongst other things that:

"The Christian belief is that man, made in the image of God, in the state of innocence was naked and unashamed. But through indiscretion when he fell into sin he recognised his own nakedness and being ashamed sought to cover himself using fig leaves. God saw the inadequacy of the cover that man invented and gave them coats of skin to cover themselves. Our belief is that fallen man has grown progressively depraved, the result of which is evidenced by society. Until man is completely regenerated and brought back to a state of perfection through the processes God has set within his church, any show of nakedness will cause a man to act of lust of his flesh fuelled by his degenerated mind".

5.2.16 On the other hand SANA/KZNNA submitted that amongst themselves they do have members who are pastors, and in actual fact during the naturist incident on 3 April 2015 at the Mpenjati Beach, one of the naturists who was in attendance is a pastor.

5.2.17 In this regard, Mr Nicolass Roos who describes himself as naturist living at Palm Beach, Margate and who has been practising naturism at the Mpenjati Estuary since 2012 stated that:
"On one occasion I have met on the beach with pastors from the Concerns Citizens group ... I walked over to them-in the nude- and started a friendly conversation , as they were photographing the signs, they were friendly. One of them even asked for permission to photograph me, which I allowed. As they told me they were the Concerned Citizens Group, I challenged their views on the subject.

Since they claim to base their concerns of religion and the Bible - I challenged them to proof (sic) to me from the Bible that public nudity is objectionable – yet they were unable to do to so. Amongst other arguments, I pointed to them that God ordered the prophet Isaiah to walk in the nude for a term of 3 years (Isaiah 20:1-3) I am a Christian and read the Bible EVERY day: When I practice naturism, it is in accordance with my Biblical believes (sic)".

Objections based on moral grounds

5.2.18 Mr Roos further stated that: he would also like to point out that these Concerned Citizens:

"...did not at all act offended by my natural nudity when they visited the beach. Not a single one of them felt the need to ask me to put some clothes on before continuing our lengthy conversation. It is very clear to me: They are in fact not worried about nudity in itself. They are worried that public nudity will lead to something else: Immorality in that case, they should focus on fighting immorality, not nudity. We will join them in the fight against immorality. We can all act together on that issue. The best way to put their fears to rest, is to prove to them that public nudity does not lead to immorality: And for past years we have been living proof of that!"
5.2.19 In its final submission regarding this matter SANA/KZNNA indicated that:

"Naturism is healthy for children – see the report "children deserve better on the British Naturism website - www.bn.org.uk/new/news/children-deserve-better-report-2016-r381/. The Zulu ladies go topless (which is illegal), the cyclists of the Naked Bike ride each March in Cape Town and also on hundreds of cities world-wide, and at Afrikaburn and at festivals as Oppikoppi, hundreds of people are nude. The Free the Nipple project world-wide has proved that there cannot be discrimination against women - why can men legally be topless if it is illegal for women? I wonder what will happen if our women are naturists".

5.2.20 The Concerned Citizens stated that:

"The general public hold to a set of common values that clearly define public nudity as immoral, improper and indecent. The government is currently promoting the idea of moral regeneration of society, especially that of our youth. We believe that the idea of a nudist beach works contrary to what government is trying to achieve. The Society that advocates Moral regeneration knows that the avoidable alternative is Moral Degeneration and Decadence. The morality of our society is largely based on the teachings of the faith based groups. Most people in HCM subscribe to Christianity which teaches a set of virtues that are based on decency and upright living.

Public nudity is a contradiction to this standard and is proven to corrupt the mind. While this topic is exhaustive, it is sufficient in this document to state categorically that we subscribe to a set of values that oppose public nudity on moral and ethical grounds. We believe that preservation of acceptable
moral standards has been entrenched in South African law against public nudity/public indecency”.

5.2.21 The Concerned Citizens further objected to the establishment of the nudist friendly beach on the basis of the laws of the Republic that prohibit nudity in public places.

5.2.22 The Complainants submitted to the Public Protector evidence of a further formal submission dated 24 February 2015 made to the Municipality for the rescission or cancellation of Municipal Council Resolution C127/10/2014 which sought to prematurely approve the establishment of the nudist friendly beach.

5.2.23 It is clear from the evidence discussed above that despite the Municipality having afforded the public an opportunity to express its views, the overwhelming views of the majority in the community who objected to the establishment of the nudist beach were not considered in the final decision when the Council adopted Resolution C127/10/2014 which led to the approval of the nudist friendly beach.

Application of the relevant law

5.2.24 According to Professor CR Snyman who is a criminal law expert, the common law crime of Public Indecency consists of “unlawfully, intentionally and publicly engaging in conduct which tends to deprave the morals of others, or which outrages the public’s sense of decency”. (CR Snyman, 2008: 443, Criminal Law Fifth Edition).
5.2.25 The Public Protector is of the view that the critical elements of the offence of public indecency are unlawful, intentional public nudity in a general public space which is not under any form of access control by an empowered authority. There is no indication that such an offence could be extended to cover nudity which is indulged in a strictly access controlled and lawfully designated nudist friendly beach or coastal public property under the administration of the Municipality.

5.2.26 Section 19(2) of the Sexual Offences Act 23 of 1969 provides that:

"Any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or any place to which the public have access, shall be guilty of an offence".

5.2.27 Similarly, the Public Protector is not persuaded that the above section is meant to criminalise the acts of nude bathers in a designated and access controlled public coastal property where only adults who are visiting the designated area or beach are fully aware of the nudity of others and have impliedly consented to witnessing same. There is no suggestion from the wording or phrasing of the above provisions which hints to the fact that such provisions can be extended to criminalise nudity in a designated nudist friendly beach where necessary and reasonable public conditions are imposed.

5.2.28 Section 152(1)(a) and (e) of the Constitution provides that the objects of local government are to provide democratic and accountable government for local communities and to promote the involvement of communities and community organisations in the matters of local government.
5.2.29 Section 4 of the Municipal Systems Act No 32 of 2000 provides that:

"Rights and duties of Municipal Councils

(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to -

(a) ... 

(b) Provide, without favour or prejudice, democratic and accountable government

(c) Encourage the involvement of the local community"

5.2.30 Section 5 of the Municipal Systems Act No 32 of 2000 further provides that:

"Rights and duties of members of local community- (1) Members of the local community have the right-

(a) through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to –

(i) contribute to the decision-making processes of the municipality; and

(ii) submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or the administration of the municipality.

(b) to prompt responses to their written or oral communications, including complaints, to the municipal council or to another political structure or a political office bearer or the administration of the municipality."
(c) to be informed of decisions of the municipal council, or another political structure or any political office bearer of the municipality, affecting their rights, property and reasonable expectations"

5.2.31 In terms of the above provisions, the Municipality had an obligation to promote the involvement of the community prior to making a decision regarding the designation of the Mpenjati Estuary as a nudist friendly beach.

5.2.32 Similarly in Doctors for Life International v The Speaker of the National Assembly the principle of public consultation and participation in decision making was enunciated by Ngcobo J in the majority judgement at paragraph 115 when he stated that:

"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist".

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2 2006(12) BCLR 1399 (CC)
5.2.33 In the same case referred to above, Sachs J., concurring with the majority judgment, emphasised the “special meaning”\(^3\) of public participation as follows:

“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws”. (emphasis added)

5.2.34 The principles enunciated in this case are equally applicable in relation to subordinate legislation contemplated by a municipality.

5.2.35 Therefore the Municipality did not only have an obligation to accord the community participation but also to ensure that its views are taken seriously as citizens.

5.2.36 In its response to the Public Protector’s Section 7(9) Notice the Municipality contended that the Council voted in the manner that it did and that it had no obligation to vote in favour of the majority of the members of its own community who rejected the establishment of the nudist friendly beach.

5.2.37 The Municipality cited the Constitutional Court case of Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)(cct73/05)2006 ZACC2: 2006(5) BCLR 622(CC): 2006(5) SA 47(CC)(27

\(^3\) Footnote above at para 226.
February 2006) in support of its contention that the Municipal Council is not bound by what the people who are consulted want to do.

5.2.38 However, upon a closer look at the cited case it clearly appears that the Municipality conveniently cited paragraph 111 of the said case which is a dissenting judgment of the minority of the court bench by Justices Skweyiya and Yacoob JJ. Dissenting or minority judgments by their own nature do not constitute the law but merely serve to express the views of the dissenting judges. Furthermore, and upon reading the Matatiele case in its context and as a whole it clearly appears that the Court did not pronounce itself on the issues of public consultation/involvement due to the absence of a submission from KwaZulu Natal Provincial Legislature. This submission by the Municipality therefore stands to be rejected on the basis that the cited case is distinguishable and it is not analogous to the present issue at hand.

5.2.39 In contrast, the Public Protector has referred to the case of Doctors for Life International v The Speaker of the National Assembly⁴ where Justice Sachs concurred with the majority in emphasising the public participation.

5.2.40 More importantly, the Public Protector would like to draw the attention of the Municipality to the Preamble to the Constitution which highlights and emphasises from the outset a government that is based on the will of the people.

5.2.41 With regard to the content of the principle of legality, the Constitutional Court in Fedsure Life Assurance v Greater Metropolitan Council held that the principle of legality implied that an entity exercising public power had to act within the powers lawfully conferred on it.

⁴ 2006(12) BCLR 1399 (CC)
5.2.42 In the above-mentioned constitutional court judgment, the appellants challenged the resolutions on a series of grounds. At the hearing in the Supreme Court of Appeal, the parties were agreed that the resolutions relating to the rates, levies and subsidies were "administrative actions" as contemplated in section 24 of the Interim Constitution. In this Court, however, the respondents argued that they were legislative and not administrative actions. The Constitutional Court accepted this argument. Nonetheless the justices agreed that all legislation must comply with the Constitution. An important principle of our Constitution is the rule of law, which means at the very least that any exercise of power by an organ of state must fall within the limits of the power conferred on that body. Courts, including the Constitutional Court, may thus review and set aside legislative action which does not comply with this principle of "legality".

5.2.43 In President of the Republic of South Africa v South African Rugby Football Union, the Court held that it is required the holder of power to act in good faith and not to misconstrue his or her powers.

5.2.44 In Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa, the same Court held that the principle of legality demanded that the exercise of public power should not be arbitrary or irrational.

5.2.45 The Supreme Court of the United Kingdom, in the matter between R (on the application of Moseley (in substitution of Stirling Deceased)) (Appellant) v London Borough of Haringey (Respondent) [2014] UKSC 56 On appeal from [2013] EWCA Civ 116 stated:

"Lord Wilson considers that where a public authority has a duty to consult before taking a decision, whether such duty is generated by statute, as in this case, or arises as a matter of common law, the same common law
requirements of procedural fairness will inform the manner in which the consultation should be conducted [23]. The requirements of a fair consultation are as summarized in the case of R v Brent London Borough Council, ex p Gunning, (1985) 84 LGR 168: “First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, ... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.” [25]. Fairness may require that interested persons be consulted not only upon the preferred option but also upon discarded options”.

5.2.46 In the matter of United Democratic Movement v Speaker of the National Assembly and Others (CCT69/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC) (22 June 2017), the Constitutional Court held that:

“[85] The power to decide whether a motion of no confidence is to be resolved through an open or secret ballot cannot be used illegitimately or in a manner that has no regard for the surrounding circumstances that ought to inform its exercise”

“[86] More importantly, the power that vests in the Speaker to determine the voting procedure in a motion of no confidence, belongs to the people and must thus not be exercised arbitrarily or whimsically. Nor is it open-ended and unguided. It is exercisable subject to constraints. The primary constraint being that it must be used for the purpose it was given to the Speaker – facilitation of the effectiveness of Parliament’s accountability mechanisms. Other constraints include the need to allow Members to honour their constitutional obligations, regard being had to their sworn faithfulness to the Republic and irrevocable commitment to do what the Constitution and the laws require of them, for the common good of all South Africans”.

56
Conclusion

5.2.47 The Municipality breached its own policies namely section 5.1 and 5.2 of the HCM Municipal By-laws which prohibits nudism in all its beaches by unlawfully relaxing the said by-law. Municipal by-laws are amended and adopted through a formal process in terms of the Local Government: Municipal Systems Act 32 of 2000. In this case the Municipality simply relaxed its own policy thereby violating and unlawfully breaching it.

5.2.48 It also follows from the information received that the Municipality did not follow proper prescribed procedures and processes to designate an area as a nudist friendly beach and allowed it to operate as such.

5.2.49 The Municipal Council’s power for approval of the nudist friendly beach cannot be used illegitimately or in a manner that has no regard for the surrounding circumstances that ought to inform its exercise. More importantly, the power that vests in the Municipal Council to determine the approval of the nudist beach, belongs to the people and must thus not be exercised arbitrarily or whimsically. Nor is it open-ended and unguided. It is exercisable subject to constraints. The primary constraint being that it must be used for the purpose it was given to the Municipal Council, being the facilitation of the effectiveness of the Municipal Council’s accountability mechanisms. Other constraints include the need to allow the public and all Ministers and MECs whose areas of responsibilities will be affected by the exercise of the powers in accordance with the principles of co-operative governance as set out in Chapter 3 of the Constitution, to honour their constitutional obligations, regard being had to their sworn faithfulness to the Republic and irrevocable commitment to do what the Constitution and the laws require of them, for the common good of all South Africans.
5.2.50 The Municipal Council was conscious of the fact that section 53 of the National Environment Management: Integrated Act 2008 requires consultation with all Ministers and MECs whose areas of responsibilities will be affected by the exercise of the powers in accordance with the principles of co-operative governance as set out in Chapter 3 of the Constitution as well as the community before exercising a power which this Act requires to be exercised.

5.2.51 The local community was not allowed by the Municipality to partner in the decision-making process relating to the naturist beach and this, is inconsistent with the South African participatory democracy process.

5.2.52 The Municipality did not respect the dignity of the local community, particularly those who were opposed to the establishment of the naturist beach that they not only have a chance to speak openly and frankly on the issue, but will also enjoy the assurance that they will be listened to, and their views factored in during the final decision-making process.

5.2.53 The Municipality also failed to justify the factual basis of its decision to adopt Resolution C127/10/2014 which led to the approval of the nudist friendly beach against the wishes of the majority in the community.

5.2.54 The failure to take the community’s objections into consideration at the final decision-making stage was clearly at odds with the principles enunciated in the Doctors for Life case and the Preamble to the Constitution of the Republic of South Africa.
5.3 Regarding whether the members of the South African Police Services (SAPS) conducted themselves in an inappropriate and unethical manner regarding the 3 April 2015 incident as required by Section 205 of the Constitution of the Republic of South Africa, 1996 and sections 40 and 41 of the Criminal Procedure Act, 51 of 1977:

Common Cause Issues

5.3.1 On 03 April 2015 the naturists assembled at the Mpenjati Estuary for a naturist event and effectively removed all the clothing on their bodies.

5.3.2 The Complainants reported the matter to the SAPS (Margate) and the members of the Margate SAPS attended the scene of this event.

5.3.3 The Station Commissioner of the Margate Police Station, Colonel CS Thabethe submitted on 22 August 2016 in the Public Protector’s ADR session held in Durban that when the police officials arrived on the scene, they did not find anybody nude as the naturists might have dressed up when they saw the members of the SAPS approaching. The evidence submitted by the then Speaker of the Hibiscus Coast Municipality, Mr R Nair to the Public Protector indicated that the South African Police Service contacted him seeking clarity on the existing Municipality by-law relating to nudity.

5.3.4 It is also common cause that none of the Complainants nor any member of the public furnished the SAPS with a statement or an affidavit under oath in which he or she alleged having witnessed a specific person from the Naturist Association being nude, flashing or exhibiting himself or herself in a manner that is morally degrading or depraves the morals of the public as required by the applicable criminal law.
Issues in Dispute

5.3.5 The dispute was whether the SAPS failed to execute their duties by not arresting the nudists that assembled at the Mpenjati Estuary for a naturist event on 3 April 2015.

5.3.6 The contention was that adult public nudity is prohibited by law in South Africa and further that the nudists had violated the law by being naked in a public area on 3 April 2015 at Mpenjati Estuary, therefore the SAPS was expected to act accordingly by charging the offenders.

Application of the relevant law

5.3.7 Section 205(3) of the Constitution of the Republic of South Africa provides the following:

"....The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law".

5.3.8 Section 13(1) of the South African Police Service Act No 68 of 1995 provides that:

"......Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official"

5.3.9 In terms of section 40 of the Criminal Procedure Act 51 of 1977, a peace officer may without warrant arrest any person who commits or attempts to
commit any offence in his presence and whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

5.3.10 According to common law an offence of public indecency consists of "unlawfully, intentionally and publicly engaging in conduct which tends to deprave the morals of others, or which outrages the public’s sense of decency".

5.3.11 Section 9 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 prohibits exposure or display of genital organs and provides that: "Any person who unlawfully and intentionally, whether for sexual gratification or not expose or display genital organs, anus or female breasts to a person 18 years or older without his or her consent is guilty of an offence of exposing or displaying genital organs" (flashing).

5.3.12 Section 19 of the Sexual Offences Act 23 of 1957 prohibits Enticing to commission of immoral acts and provides that:

"(1) Any person who entices, solicits, or importunes in any public place for immoral purposes, shall be guilty of an offence.
(2) Any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access, shall be guilty of an offence".

5.3.13 Part 2 of The Hibiscus Coast Municipality Bylaws Relating To Beaches And Launch Sites provides that:

"5.1. No person shall be on the sea shore or in the sea or any other place to which these bylaws, other than a booth, toilet or change room, unless so
dressed that, if a female, her nipples are concealed from view and, if a male or female, his or her private parts are concealed from view, and in each case by a suitable article of opaque clothing.

5.2. No person shall on the sea-shore or in the sea or any other place to which these bylaws apply, other than a booth, toilet or change room remove or partially remove or displace or wear any article of clothing or bathing apparel in such a manner or to such an extent that, if a female, either of or both of her nipples is or are exposed to view and, if a male or female, his or her private parts are exposed to view”

5.3.14 Despite the provisions relating to the duties of the SAPS as outlined above and the definition and prohibition of public nudity, the Public Protector could not find any evidence that the SAPS acted improperly.

5.3.15 The Public Protector could not find any evidence which contradicts the evidence submitted by Colonel Thabethe. In the circumstances, the Public Protector is unable to make a factual finding which might indicate improper conduct of the part of the SAPS.

6. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that the Municipality should have complied with and the impact on the Complainants, the Public Protector is making the following adverse findings against the Municipality:
6.1 Regarding whether the Municipality improperly designated Mpenjati Estuary as a nudist friendly beach without following proper procedures and prescripts.

6.1.1 The allegation that the Hibiscus Coast (Ray Nkonyeni) Municipality improperly designated Mpenjati Estuary as a nudist friendly beach and without following proper procedures and prescripts is substantiated.

6.1.2 The Hibiscus Coast Council issued Resolution C127/10/2014 which sought to cause the relaxation of section 5.1. and 5.2 of the Hibiscus Coast Municipality Municipal By-Laws relating to Beaches and Launch Sites, approved the request from the KwaZulu-Natal Naturists Association for establishment of the nudist friendly beach at Mpenjati Estuary before making its own application to the Department of Environmental Affairs and KwaZulu Natal Ezemvelo as required in terms of section 53 of National Environmental Management: Integrated Coastal Management Act; 24 of 2008.

6.1.3 The Municipality therefore breached its own policies namely section 5.1 and 5.2 of the HCM Municipal By-laws which prohibits nudism in all its beaches by unlawfully relaxing the said by-law. Municipal by-laws are amended and adopted through a formal process in terms of the Local Government: Municipal Systems Act 32 of 2000. In this case, the Municipality simply relaxed its own policy without formally amending and adopting same thereby violating and unlawfully breaching it. The use of the phrase “relaxing of the by-law” by the Municipality in the circumstances was more of a white wash attempt and sugar-coating exercise intended to cause Municipality’s unlawful act to seem more appealing or pleasant when in actual fact it was improper and unlawful.

6.1.4 The Hibiscus Coast Municipality’s failure to observe section 53 of National Environmental Management: Integrated Coastal Management Act; 24 of 2008
and the breach of its own section 5.1 and 5.2 of the HCM Municipal By-laws in these circumstances, constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Municipality failed to follow proper consultation processes and improperly failed to consider objections to the establishment of a nudist friendly beach.

6.2.1 The allegation that the Municipality failed to follow proper consultation process and improperly failed to consider objections to the establishment of nudist friendly beach is substantiated.

6.2.2 Despite the fact that the Municipality afforded the public an opportunity to express its views, the overwhelming views of the majority who objected to the establishment of the nudist beach were not considered when Resolution C127/10/2014 was passed.

6.2.3 The public consultation process was therefore not proper and meaningful as the views expressed by the majority of the community members, who were objecting to the establishment of the nudist friendly beach were completely ignored by the Municipal Council without even laying the legal and factual basis for discarding the majority views of its community during the final decision-making stages.

6.2.4 As a result, such conduct by the Municipal Council constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.3 Regarding whether the conduct of members of the South African Police Services (SAPS) was appropriate regarding an incident on 3 April 2015 at Mpenjati Estuary, as required by section 205 of the Constitution of the Republic of South Africa, 1996 and sections 40 and 41 of the Criminal Procedures Act No. 51 of 1977.

6.3.1 The allegation whether the South African Police Service, Margate conducted themselves in an appropriate and ethical manner regarding the 3 April 2015 incident is not substantiated.

6.3.2 The members of the South African Police Services (Margate) duly responded and attended the scene on 03 April 2015 upon being alerted by the community; however, upon arrival on the beach they did not find anybody nude as the naturists might have dressed up when they saw the members of the SAPS approaching Mpenjati Estuary along the footpath.

6.3.3 In the circumstances, the Public Protector is unable to make a legal finding which might indicate improper conduct or wrongdoing on the part of the SAPS as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 The Remedial Action that the Public Protector is taking in pursuit of section 182(1) (c) of the Constitution is that:

The Ray Nkonyeni Municipal Council

7.1.1 The Ray Nkonyeni Municipal Council must, within 30 days of issue of this final report, reconsider the Municipal Council Resolution C127/10/2014,
taking into account the fact that its adoption was inconsistent with section 5.1 and 5.2 of the HCM Municipal By-laws relating to Beaches and Launch Sites as well as the legal processes and procedures prescribed in the Constitution of the Republic of South Africa, 1996, the Municipal Systems Act 32 of 2000 and the National Environmental Management: Integrated Coastal Management Act; 24 of 2008. There must always be a proper and rational basis for whatever choice the Municipal Council makes in the exercise of the constitutional power in reconsidering its Resolution C127/10/2014.

7.1.2 In the event that in future a properly submitted application or request for the establishment of the naturist beach is submitted to the Municipality or the Municipality on its own initiative, opts to exercise its own executive and legislative authority to establish a naturist beach, the Municipality should, prior to making any determination on the request submitted or the exercise of an own initiative option, approach the Office of the KwaZulu Natal MEC: Co-operative Governance and Traditional Affairs and the Minister of Environmental Affairs and Tourism for assistance, guidance and support relating to compliance with the necessary and applicable legal prescripts.

7.1.3 In the light of the submission that naturism is practised as a religion by certain groups in our society, it is recommended that the Municipality must in future further consult with Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL) chairperson, for proper guidance and assistance in handling of this matter. This shall ensure that the constitutional rights of minorities in our society are also protected.

7.1.4 In the event that there is a valid and proper decision by the Municipal Council to proceed with the application for the establishment of the naturist beach at the Mpenjati Estuary, in view of the uniqueness and seriousness of the issues
involved in the matter, the Municipal Manager must always lead the process of handling/dealing with this matter and not completely remove himself and/or delegate all or a greater percentage of his authority to an official occupying a lower rank of authority than himself or herself.

7.1.5 Should the Municipal Council decide to vote against the will of the majority of its community members, the Municipality should lay a factual or legal basis for doing so in order to justify the rationality of its decision in line with the limitation clause or section 36 of the Constitution of the Republic of South Africa.

KwaZulu Natal MEC: Co-operative Governance and Traditional Affairs:

7.1.6 The MEC must, within 60 days of publication of this report and in accordance with section 55 of the National Environmental Management: Integrated Coastal Management Act; 24 of 2008, review Ray Nkonyeni Municipality's Coastal Management Programme relating to the establishment of the nudist friendly beach at the Mpenjati Estuary.

7.1.7 The MEC must after reviewing in terms of the above legal provisions the Coastal Management Programme relating to the establishment of the nudist friendly beach at the Mpenjati Estuary accordingly advise the Municipality to amend or replace the programme within a reasonable period.
8. MONITORING

8.1 The Municipal Manager of Ray Nkonyeni Municipality is to submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7 above will be implemented within 30 (thirty) days from the date of receipt of this report.

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ADV BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 23/10/2017

Assisted by: Vusumuzi Dlamini, Vusi Sikhakhane, Isaac Matlawe and Sipho Cishe