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Allegations of improper conduct and maladministration against the Z F Mgcawu
District Municipality

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE Z F MGCAWU DISTRICT MUNICIPALITY IN THE NORTHERN CAPE PROVINCE RELATING TO THE APPOINTMENT OF MS A MATSHIMO AS UNIT MANAGER: SPECIAL PROJECTS
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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 (the Public Protector Act).

(ii) The report relates to an investigation into allegations of improper conduct and maladministration by the Z F Mgcawu District Municipality in the Northern Cape Province pertaining to the appointment of Ms A Matshimo as Unit Manager: Special Projects, in September 2016.

(iii) The complaint was lodged on 11 November 2016 by Mr M A Finger (the Complainant), in his capacity as a representative of the South African Municipal Workers Union (SAMWU).

(iv) Based on an analysis of the complaint, the following issues were considered and investigated:

(a) Whether the appointment of Ms A Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 complied with the Recruitment Policy (Indiensneming Praktyk Beleid) of the Municipality; and if not

(b) Whether the appointment of Ms Matshimo as Unit Manager: Special Projects by the Municipality was improper and constitutes maladministration.

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

(vi) Having considered the evidence obtained during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether the appointment of Ms A Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 complied with the Recruitment Policy (Indiensneming Praktyk Beleid) of the Municipality:

(aa) The allegation that the appointment of Ms Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 did not comply with the Recruitment Policy of the Municipality, is substantiated.

(bb) The position was not advertised and no other candidates were considered and evaluated, as required by the Recruitment Policy. The Recruitment Policy does not provide for a temporary appointment in a permanent position. Ms Matshimo further did not have the requisite qualifications for the position.

(b) Regarding whether the appointment by the Municipal Manager of Ms Matshimo as Unit Manager: Special Projects was improper and constitutes maladministration:

(aa) The allegation that the appointment by the Municipality of Ms Matshimo as Unit Manager: Special Projects was improper and constitutes maladministration, is substantiated.
(bb) It also resulted in irregular expenditure in respect of the remuneration paid to Ms Matshimo, as contemplated by section 1 of the Local Government: Municipal Finance Management Act, 2003 (MFMA) as the appointment was not made in terms of section 55(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act).

(cc) The appointment 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.

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

(a) **The Municipal Manager of the Municipality:**

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

(bb) To take the appropriate steps within thirty (30) business days form the date of my report to review the Recruitment Policy of the Municipality to bring it in line with the provisions of the Municipal Systems Act and to improve the provisions relating to minimum requirements for all positions and the appointment of temporary employees to ensure that the recruitment and selection process is fair and transparent;
(cc) To submit the reviewed Recruitment Policy to the Municipal Council within sixty (60) business days from the date of my report;

(dd) To conduct an analysis and evaluation of Ms Matshimo’s qualifications, experience and competence against the requirements and job description of the position of Unit Manager: Special Projects that she currently occupies within thirty (30) business days from the date of my report;

(ee) To submit a report to the Municipal Council within thirty (30) business days of the date of my report for a decision on this matter;

(ff) To institute proceedings for the judicial review of the irregular appointment of Ms Matshimo, in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 2000, within thirty (30) business days from the date of my report.

(b) The Municipal Council of the Municipality

(aa) To consider the reviewed Recruitment Policy referred to in paragraph (vii)(a)(cc) above and to take a resolution on its adoption within sixty (60) business days from the date of my report; and

(bb) To consider the report of the Municipal Manager referred to in paragraph (vii)(a)(ee) and to take a resolution on the matter within sixty (60) business days from the date of my report.
1. **INTRODUCTION**

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

1.1.1 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to:

1.1.2 The Speaker of the Municipal Council of the Z F Mgcawu District Municipality (Municipality), Mr M Moalosi;

1.1.3 The Executive Mayor of the Municipality, Mr A Vosloo; and

1.1.4 The Acting Municipal Manager of the Municipality, Mr J G Lategan.

1.1.5 Copies of the report are also provided to Mr E Ntoba, the former Municipal Manager of the Municipality and Mr M A Finge, who lodged the complaint, to inform them of the outcome of my investigation.
1.2 The report relates to an investigation into allegations of improper conduct and maladministration by the Municipality pertaining to the appointment of Ms A Matshimo as the Unit Manager: Special Projects in September 2016.

2. THE COMPLAINT

2.1 The complaint was lodged on 11 November 2016 by Mr M A Finger (the Complainant), in his capacity as a representative of the South African Municipal Workers Union (SAMWU).

2.2 In the main, the Complainant alleged that the appointment of Ms A Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 did not comply with the Municipality’s policies regulating recruitment and that she did not have the requisite qualifications to be appointed in the position.

2.3 The Complainant in essence contended that Ms Matshimo’s appointment was improper and constitutes maladministration.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

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

3.4 The Public Protector is further mandated by the Public Protector Act to investigate
and redress maladministration and related improprieties in the conduct of state
affairs. The Public Protector is also given power to resolve disputes through
conciliation, mediation, negotiation, advising the complainant regarding
appropriate remedies or any other means that may be expedient under the
circumstances.

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 effect¹. The Constitutional Court further held that:
“When the remedial action is binding, compliance is not optional, whatever
reservations the affected party might have about its fairness, appropriateness or
lawfulness. For this reason, the remedial action taken against those under
investigation cannot be ignored without any legal consequences”².

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¹ [2016]ZACC 11;2016(3) SA 580(CC) and 2016 (5) BCLR 618 (cc) at para[76].
² Supra at para[73]
3.6. In the above-mentioned matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others*, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 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 (para 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints. It is the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 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 (para 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 (para 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 (para 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; (para 71(a));

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

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

3.7 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);

3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the
Constitution if that is required to remedy the harm in question. (para 82);

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

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

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

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

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

3.7.7 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).

3.8 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favourably to
accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute 'special circumstances' depends on the merits of each case.

3.9 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.

3.10 The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

4 THE INVESTIGATION

4.1 Methodology

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

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

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

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong or, where appropriate, to place the complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration?
4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the appointment of Ms Matshimo as Unit Manager: Special Projects complied with the Recruitment Policy of the Municipality.

4.2.1.6 The enquiry regarding what should have happened, focuses on the standard that should have been met by the Municipality in the appointment of Ms Matshimo, to prevent maladministration or prejudice.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration.

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

4.3.1 Whether the appointment of Ms A Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 complied with the Recruitment Policy (Indiensneming Praktyk Beleid) of the Municipality; and if not,
4.3.2 Whether the appointment of Ms Matshimo as Unit Manager: Special Projects by the Municipality was improper and constitutes maladministration.

4.4 Key sources of information

4.4.1 Documents

4.4.1.1 A copy of the undated advertisement of the position of the Unit Manager: Special Projects at the Municipality.

4.4.1.2 A copy of the undated Temporary Employment Contract entered into between the Municipality, represented by Mr E Ntoba as the Municipal Manager, and Ms Matshimo in terms of which she commenced her services on 12 September 2016.

4.4.1.3 A copy of a Memorandum from the Human Resource Manager and the Director; Corporate Services to the Finance Unit of the Municipality, dated 22 September 2016.

4.4.1.4 A copy of the Curriculum Vitae of Ms Matshimo, as submitted to the Municipality in September 2016.

4.4.2 A copy of the Collective Agreement on Conditions of Service for the Northern Cape Division of the South African Local Government Bargaining Council (the Collective Agreement) made in terms of the Labour Relations Act, 1995, dated 24 October 2014.
4.4.3 Correspondence between the Public Protector and:

4.4.3.1 The Municipality, dated 14 November 2016 and 16 November 2016.

4.4.4 Meetings held and interviews conducted

4.4.4.1 Meeting held with the former Municipal Manager of the Municipality, Mr E Ntoba, on 1 November 2018.

4.4.4.2 Telephonic interview conducted with Mr D J Van Zyl, the Director: Corporate Services of the Municipality on 16 November 2016.

4.4.5 Legislation and other prescripts


4.4.5.2 The Public Protector Act No 23 of 1994.

4.4.5.3 The Local Government: Municipal Systems Act No 32 of 2000 (the Municipal Systems Act).

4.4.5.4 The Local Government: Municipal Finance Management Act No 56 of 2003 (MFMA).

4.4.5.5 The Municipality’s Recruitment Policy *(Indiensneming Praktyk Beleid)*, 2016.

4.4.5.6 The Labour Relations Act No 66 of 1995.

4.4.5.7 The Promotion of Administrative Justice Act No 3 of 2000.
4.4.6 Jurisprudence considered

4.4.6.1 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC).

4.4.6.2 President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).

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

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

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

4.4.7 Notices issued in terms of section 7(9) of the Public Protector Act

4.4.7.1 Notice issued in terms of section 7(9)(a) of the Public Protector Act to the Acting Municipal Manager of the Municipality, Mr G Lategan, dated 11 February 2019.

4.4.7.2 Response to the section 7(9)(a) notice from the Acting Municipal Manager, dated 25 February 2019.

4.4.7.3 Notice issued in terms of section 7(9)(a) of the Public Protector Act to the former Municipal Manager of the Municipality, Mr E Ntoba, dated 11 February 2019.
4.4.7.4 Response to the section 7(9)(a) notice from Becker, Bergh & More attorneys, on behalf of Mr E Ntoba, the former Municipal Manager, dated 26 February 2019.

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 appointment of Ms A Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 complied with the Recruitment Policy (*Indiensneming Praktyk Beleid*) of the Municipality:

**Common cause or Undisputed Facts**

5.1.1 It is common cause that the former Municipal Manager, Mr E Ntoba, appointed Ms Matshimo as Unit Manager: Special Projects, with effect from 12 September 2016.

5.1.2 It is also not in dispute that the Municipality paid to Ms Matshimo the salary and benefits pertaining to the position of Unit Manager: Special Projects from the date of her appointment.

**Issues or Facts in dispute**

5.1.3 The Complainant alleged that Ms Matshimo did not meet the minimum requirements for the position of Unit Manager: Special Projects and that the prescribed recruitment processes were not followed in her appointment.
5.1.4 In his response to the allegations, Mr D J van Zyl, the Director: Corporate Services of the Municipality indicated that the position of Unit Manager: Special Projects was advertised with the closing date of 16 July 2016.

5.1.5 The position of Unit Manager: Special Projects is a post in the Office of the Executive Mayor.

5.1.6 Mr H Mchlauli was appointed in the position as from 1 August 2016. He was subsequently transferred to a position in the Human Resources Unit.

5.1.7 Ms Matshimo was then appointed to the position of Unit Manager: Special Projects on a temporary basis, with effect from 12 September 2016.

5.1.8 According to Mr Van Zyl, the Recruitment Policy of the Municipality provides that the Municipal Manager may appoint a person on a temporary basis for a period not exceeding six months. No procedure is prescribed for temporary appointments. The only requirement is that the position must exist on the organogram of the Municipality.

5.1.9 He further stated that the instruction that Ms Matshimo should be appointed came from the Municipal Manager, but no formal Memorandum for approval was submitted during the investigation.

5.1.10 Further, that after her appointment, Ms Matshimo was requested to submit her Matric Certificate, which she failed to do. Her temporary employment in the position was therefore terminated at the end of November 2016. However, from January 2017 she was again employed in the same position on a month-to-month basis and permanently employed in the position in April 2018, at the request of SAMWU.
5.1.11 The former Municipal Manager, Mr E Ntoba, met with the investigation team on 1 November 2018.

5.1.12 He confirmed having issued the instruction that Ms Matshimo should be appointed as Unit Manager: Special Projects on a temporary basis until the vacancy was filled. The request came from the Office of the Executive Mayor.

5.1.13 Mr Ntoba further confirmed that he instructed Ms Matshimo's re-appointment after her initial employment in the position was terminated at the end of November 2016, because she had not submitted proof of her qualifications.

5.1.14 According to Mr Ntoba, Ms Matshimo was reinstated as she had informed the Municipality that she was awaiting proof of her qualifications.

5.1.15 The advertisement of the position of Unit Manager: Special Projects, dated 16 July 2016 stated that the position was permanent and listed the following as the "preferred minimum education":

"National Diploma in Public Administration
Basic Computer Skills
Good analytical report writing
Fully bilingual
Ability to work under pressure".

5.1.16 The job responsibilities stated in the advertisement included:
(a) The compiling of reports;
(b) Managing and overseeing projects;
(c) Managing of staff;
(d) Managing of the budget allocated for special projects;
(e) Developing strategic programmes;
(f) Addressing priority needs through the Integrated Development Plan; and
(g) Developing programmes.

5.1.17 The advertisement further stated that the incumbent of the position would be reporting to the Deputy Director in the Office of the Executive Mayor and that the position is a permanent post.

5.1.18 Copies of Ms Matshimo’s Curriculum Vitae (CV) and her qualifications were obtained during the investigation. According to Ms Matshimo’s CV and attachments thereto, her highest academic qualification at the time was Grade 12 and her only work experience was that of Senior Security Officer, from 2009 to 2015.

5.1.19 Attached to Ms Matshimo’s CV was a document issued by the Department of Education on 11 November 2012, stating that Ms Matshimo had passed the Senior Certificate examination and that the certificate would be issued in three months. The Senior Certificate was however not attached to Ms Matshimo’s CV that was considered in 2016.

5.1.20 The only other document relevant to her qualifications attached to Matshimo’s CV was a certificate issued by the Private Security Industry Regulatory Authority dated 15 July 2004, certifying that Ms Matshimo was registered as a security service provider and that her training qualifications were “Grade C”.

5.1.21 In their response to the section 7(9) notice on behalf of Mr Ntoba, the former Municipal Manager of the Municipality, Becker, Bergh & More attorneys stated that in making the appointment of Ms Matshimo, Mr Ntoba had to “deal with this position in terms of an appointment referred to by the local government municipal...
systems act, 2000 (sic). Our client also had in the appointment to keep in mind the collective agreement on conditions of services (sic) for the Northern Cape Division of a South African local government bargaining council, (sic) which came in to effect on 24 October 2014.

5.1.22 Further, that Mr Ntoba considered the provisions of the Municipality’s Recruitment Policy in terms of which he could “appoint employees as part of his responsibility in temporary positions.”

5.1.23 It was submitted on behalf of Mr Ntoba that the Municipal Council and SAMWU were aware of the appointment. In April 2018 SAMWU requested the permanent appointment of Ms Matshimo and the then acting Municipal Manager obliged.

5.1.24 In his response to the section 7(9) notice, the Acting Municipal Manager, Mr G Lategan only focussed on Ms Matshimo’s permanent appointment and confirmed that it was made at the request of SAMWU, in April 2018. He made no comments on the evidence relating to her temporary appointment in September 2016, which was the subject of the investigation.

Application of the relevant law and policy

5.1.25 Section 195 of the Constitution provides that the public administration must be governed by the democratic values and principles enshrined in the Constitution, including the promotion and maintaining of a high standard of professional ethics, efficient, economic and effective use of resources and the cultivation of good human resource management to maximise human potential.

5.1.26 The executive and legislative authority of a municipality is, in terms of section 11 of the Municipal Systems Act exercised by the council of a municipality and the council takes all decisions of the municipality.
5.1.27 Section 55(1) of the Municipal Systems Act provides, that as the head of the administration of a municipality, the Municipal Manager is, subject to the policy considerations of the Municipal Council, responsible and accountable for, *inter alia*, the appointment of staff other than managers directly accountable to the Municipal Manager, and the management, effective utilisation and training of staff.

5.1.28 Mr D J van Zyl, the Director: Corporate Services of the Municipality confirmed during the investigation that the Recruitment Policy (*Indiensneming Praktyk Beleid*) that was applicable to Ms Matshimo’s appointment, was adopted by the Municipal Council on 31 May 2016.

5.1.29 Paragraph 6 of the Recruitment Policy provides that the responsibility for the appointment of employees of the Municipality is that of the Municipal Manager.

5.1.30 The requirements of a post should, in terms of paragraph 6.2.2, reflect the needs of the Municipality and must be adequate to enable the Municipality to perform its service delivery obligations. Requirements such as qualifications, skills experience and knowledge for every post must be established prior to commencing with the recruitment process.

5.1.31 Paragraph 6.2.3 provides that the determined requirements of a post must form the basis of the recruitment advertisement. All vacancies have to be advertised, internally and externally.

5.1.32 The evaluation of candidates is provided for in paragraph 6.3.1. The evaluation standards have to be objective and relevant to the requirements of the post and the future needs of the Municipality. Competence relevant to the requirements of the position is the key consideration for selection of the preferred candidate.
5.1.33 Paragraph 6.4 of the Recruitment Policy regulates the appointment of employees. It provided that an appointment could only be made in compliance with the requirements of the post and the merits of the application.

5.1.34 Paragraph 6.4 further provides for fixed term appointments and appointments in temporary positions.

5.1.35 No provision is made for temporary appointments in permanent positions.

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

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

5.1.38 In terms of section 61, the accounting officer of a municipality must act with fidelity, honesty, integrity and in the best interests of the municipality in managing its affairs.

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

5.1.40 A municipality must, in terms of section 171(4) investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior
manager or other official of the municipality and if the investigations warrants such a step, institute disciplinary proceedings.

5.1.41 Section 171(1)(c) of the MFMA provides that the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently makes or permits, or instructs another official of the municipal entity to make, an irregular or fruitless and wasteful expenditure.

5.1.42 The Collective Agreement on Conditions of Service for the Northern Cape Division of the South African Local Government Bargaining Council (the Collective Agreement) made in terms of the Labour Relations Act, 1995, came into effect on 24 October 2014.

5.1.43 Clause 15.2 of the Collective Agreement provides that all appointments into positions that are not temporary, but by their very nature permanent positions below sections 54A and 56 (of the Local Government: Municipal Systems Act, 2000) shall be on a permanent basis, except for the positions that are linked to the term of office of the political office bearers, section 54A and 56 managers.

Conclusion

5.1.44 The position of Unit Manager: Special Projects became vacant when Mr Mchlauli was transferred to the Human Resources Division, in September 2016.

5.1.45 The position is a permanent post on the establishment of the Municipality.

5.1.46 In terms of the Recruitment Policy, the Municipality had to advertise the post.

5.1.47 The Recruitment Policy does not provide for a temporary appointment in a permanent position.
5.1.48 No indication could be found during the investigation that the position was ever advertised, since it became vacant when Mr Mchlauli was transferred.

5.1.49 No other candidates were considered and evaluated and there was no evaluation of Ms Matshimo's qualifications, experience and competence against the requirements of the position, as required by the Recruitment Policy.

5.1.50 Ms Matshimo did not qualify for appointment in the position as she did not have the requisite qualifications.

5.1.51 When Ms Matshimo could not provide her Matric Certificate, her temporary appointment was terminated. Despite not having submitted proof of her qualification and not having the preferred minimum qualification and experience for the position, Ms Matshimo was reinstated.

5.1.52 As she was temporarily appointed in a permanent position, SAMWU insisted that her appointment be made permanent, in terms of the Collective Agreement in 2018. The Municipality responded accordingly.

5.1.53 Neither Ms Matshimo's temporary appointment, nor her permanent appointment to the position of Unit Manager: Special Projects complied with the Recruitment Policy of the Municipality.

5.2 Regarding whether the appointment of Ms Matshimo as Unit Manager: Special Projects by the Municipal Manager was improper and constitutes maladministration:

*Common cause or Undisputed Facts*
5.2.1 It is common cause that Ms Matshimo was appointed to the position of Unit Manager: Special Projects with effect from 12 September 2016.

5.2.2 Further, that when the position was left vacant due to the transfer of Mr Mchlauli in September 2016, it was not advertised and that Ms Matshimo was eventually permanently appointed in the position, despite not having the qualifications required by the post.

**Application of the relevant law**

5.2.3 Section 55(1) of the Municipal Systems Act provides, that as the head of the administration of a municipality, the Municipal Manager is, subject to the policy considerations of the Municipal Council, responsible and accountable for, *inter alia*, the appointment of staff other than managers directly accountable to the Municipal Manager, and the management, effective utilisation and training of staff.

5.2.4 Mr D J van Zyl, the Director: Corporate Services of the Municipality confirmed during the investigation that the Recruitment Policy (*Indiensneming Praktyk Beleid*) that was applicable to Ms Matshimo's appointment, was adopted by the Municipal Council on 31 May 2016.

5.2.5 Paragraph 6 of the Recruitment Policy provides that the responsibility for the appointment of employees of the Municipality is that of the Municipal Manager.

5.2.6 The requirements of a post should, in terms of paragraph 6.2.2, reflect the needs of the Municipality and must be adequate to enable the Municipality to perform its service delivery obligations. Requirements such as qualifications, skills
experience and knowledge for every post must be established prior to commencing with the recruitment process.

5.2.7 Paragraph 6.2.3 provides that the determined requirements of a post must form the basis of the recruitment advertisement. All vacancies have to be advertised, internally and externally.

5.2.8 The evaluation of candidates is provided for in paragraph 6.3.1. The evaluation standards have to be objective and relevant to the requirements of the post and the future needs of the Municipality. Competence relevant to the requirements of the position is the key consideration for selection of the preferred candidate.

5.2.9 Paragraph 6.4 of the Recruitment Policy regulates the appointment of employees. It provided that an appointment could only be made in compliance with the requirements of the post and the merits of the application.

5.2.10 Paragraph 6.4 further provides for fixed term appointments and appointments in temporary positions.

5.2.11 No provision is made for temporary appointments in permanent positions.

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

5.2.13 In terms of section 60(1)(a) of the MFMA, the Municipal Manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act.
5.2.14 In terms of section 61, the accounting officer of a municipality must act with fidelity, honesty, integrity and in the best interests of the municipality in managing its affairs.

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

5.2.16 A municipality must, in terms of section 171(4) investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality and if the investigations warrants such a step, institute disciplinary proceedings.

5.2.17 Section 171(1)(c) of the MFMA provides that the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently makes or permits, or instructs another official of the municipal entity to make, an irregular or fruitless and wasteful expenditure.

**Conclusion**

5.2.18 The appointment of Ms Matshimo was made in violation of the Recruitment Policy, as set out in paragraph 5.1 above.

5.2.19 In making the appointment in September 2016, the former Municipal Manager, Mr E Ntoba did not comply with the provisions of section 55(1) of the Municipal Systems Act. The appointment was therefore improper, irregular and constitutes maladministration.
5.2.20 The appointment of MS Matshimo resulted in irregular expenditure, as contemplated by section 1 of the MFMA, in respect of the remuneration paid to her.

6. **FINDINGS**

Having considered the evidence uncovered during the investigation against the provisions of the applicable legislation and policy prescripts, I make the following findings:

6.1 **Regarding whether the appointment of Ms A Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 complied with the Recruitment Policy (Indiensneming Praktyk Beleid) of the Municipality:**

6.1.1 The allegation that the appointment of Ms Matshimo as Unit Manager: Special Projects by the Municipality in September 2016 did not comply with the Recruitment Policy of the Municipality, is substantiated.

6.1.2 The position was not advertised and no other candidates were considered and evaluated, as required by the Recruitment Policy. The Recruitment Policy does not provide for a temporary appointment in a permanent position. Ms Matshimo further did not have the requisite qualifications for the position.

6.2 **Regarding whether the appointment by the Municipal Manager of Ms Matshimo as Unit Manager: Special Projects was improper and constitutes maladministration:**
6.2.1 The allegation that the appointment by the Municipality of Ms Matshimo as Unit Manager: Special Projects was improper and constitutes maladministration, is substantiated.

6.2.2 It also resulted in irregular expenditure in respect of the remuneration paid to Ms Matshimo, as contemplated by section 1 of the MFMA, as the appointment was not made in terms of section 55(1) of the Municipal Systems Act.

6.2.2 The appointment 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.

7. REMEDIAL ACTION

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

7.2 In the Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others 2004(6) SA 222 (SCA) the Supreme Court of Appeal ruled that until an administrative decision is set aside by a Court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.

7.3 This principle was confirmed by the Constitutional Court in The MEC for Health, Eastern Cape v Kirland Investments 2014 (3) SA 481 (CC). The Court found that if public officials or administrators can, without recourse to legal proceedings, be allowed to disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, this would be a licence to self-help. It would be inviting officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The Court found that this would
spawn confusion and conflict to the detriment of the administration and the public
and that it would undermine the Court’s supervision of the administration.3

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

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

7.6 Mr E Ntoba, the former Municipal Manager that appointed Ms Matshimo has since
left the Municipality and is currently the Municipal Manager of the Dawid Kruiper
Municipality.

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

7.7.1 The Municipal Manager of the Municipality:

7.7.1.1 To take appropriate steps in respect of disciplinary action against the officials that
were involved in the irregular appointment of Ms Matshimo, in terms of the
disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the

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

7.7.1.2 To take the appropriate steps within thirty (30) business days form the date of my report to review the Recruitment Policy of the Municipality to bring it in line with the provisions of the Municipal Systems Act and to improve the provisions relating to minimum requirements for all positions and the appointment of temporary employees to ensure that the recruitment and selection process is fair and transparent;

7.7.1.3 To submit the reviewed Recruitment Policy to the Municipal Council within sixty (60) business days from the date of my report;

7.7.1.4 To conduct an analysis and evaluation of Ms Matshimo’s qualifications, experience and competence against the requirements and job description of the position of Unit Manager: Special Projects that she currently occupies within thirty (30) business days from the date of my report; and

7.7.1.5 To submit a report to the Municipal Council within thirty (30) business days of the date of my report for a decision on this matter;

7.7.1.6 To institute proceedings for the judicial review of the irregular appointment of Ms Matshimo, in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 2000, within thirty (30) business days from the date of my report.
7.7.2 The Municipal Council of the Municipality

7.7.2.1 To consider the reviewed Recruitment Policy referred to in paragraph 7.7.1.2 above and to take a resolution on its adoption within sixty (60) business days from the date of my report.

7.7.2.2 To consider the report of the Municipal Manager referred to in paragraph 7.7.1.5 and to take a resolution on the matter within sixty (60) business days from the date of my report.

8 MONITORING

8.1 The Municipal Manager of the Municipality to submit an implementation plan indicating how the remedial action referred to in paragraph 7.7.1 is implemented, within thirty (30) business days from the date of my report.

8.2 The Speaker of the Municipal Council to submit a copy of the resolutions of the Municipal Council referred to in paragraph 7.7.2 within sixty (60) days from the date of my report.

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

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 25/10/2019

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