
REPORT NO. 1 of 2020/2021

"Allegations of maladministration against the Mogalakwena Local Municipality regarding the permanent appointment of Mr PJ Mashamaite"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF MR PJ MASHAMAITE TO A POSITION OF DEPUTY MANAGER CORPORATE SERVICES BY THE MOGALAKWENA LOCAL MUNICIPALITY
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Executive Summary

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

(ii) The report communicates my findings and appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution following an investigation into allegations of the irregular appointment of Mr. PJ Mashamaite (Mr Mashamaite) to the position of Deputy Manager Corporate Services by the Mogalakwena Local Municipality (the Municipality).

(iii) On 11 November 2018, I received a complaint from an employee (the Complainant) of the Mogalakwena Local Municipality who did not apply for the post and who wished to remain anonymous.

(iv) In the main, the Complainant alleged that:

(aa) The Municipality advertised three (03) different posts including the post of Deputy Manager Corporate Services in the Noordelike Nuus/Northern News newspaper dated 28 October 2016.

(bb) The minimum requirements for the post of Deputy Manager: Corporate Services were, a Bachelor’s degree in Public Administration, Law or equivalent. The incumbent should have a minimum of five (4-5) years relevant experience at middle management. The applicant must be computer literate and have a driver’s license.

(cc) The appointed candidate (Mr Mashamaite) applied for the position of Deputy Manager: Corporate Services and he was shortlisted though he did meet the minimum requirements for the post and he also did not attach copies of his qualifications as required by the advert.
(dd) The Municipality shortlisted, interviewed and appointed Mr Mashamaite without him meeting the minimum requirements for the post.

(v) On analysis of the complaint, the following issues were identified and investigated:

(aa) Whether the Municipality irregularly shortlisted, interviewed and appointed Mr Mashamaite to the position of Deputy Manager: Corporate Services without meeting the minimum requirements for the position;

(bb) Whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Mr Mashamaite.

(vi) The investigation was conducted by way of correspondences and interviews with the Complainant as well as perusal of all relevant documents, analysis and application of all relevant laws, policies and related prescripts.

(vii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the Municipality and prejudice caused to other candidates who applied for the position were principally those imposing administrative standards that should have been complied with by the Municipality during the recruitment process. Those are the following:

(aa) The Constitution of the Republic of South Africa, 1996 (the Constitution);

(bb) The Public Protector Act, 1994;

(cc) The Municipal Finance Management Act, 56 of 2003 (MFMA);

(dd) The Municipal Systems Act 32 of 2000 (MSA) and

(ee) The Mogalakwena Local Municipality Recruitment Policy (5/10/3/B (V)).
(viii) On 26 February 2020, I issued notices (Notice) in terms of section 7(9)(a) of the Public Protector Act to, amongst others, the Member of the Executive Council of the Department of Cooperative Governance, Human Settlement and Traditional Affairs (Cogsta), the Head of the Department (Cogsta), the Mayor of Mogalakwena Local Municipality, the Speaker of the Municipal Council of Mogalakwena Local Municipality, the Municipal Manager of the Mogalakwena Local Municipality and the appointed candidate to enable them to respond within ten (10) working days of receipt thereof.

(ix) I received a response to my section 7(9) notice from the Executive Mayor of Mogalakwena Local Municipality on 11 March 2020.

(x) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

(a) Whether the Municipality irregularly shortlisted, interviewed and appointed Mr Mashamaite to the position of Deputy Manager: Corporate Services without meeting the minimum requirements for the position?

(aa) The allegation that the Municipality irregularly shortlisted, interviewed and appointed Mr Mashamaite to the position of Deputy Manager: Corporate Services without meeting the minimum requirements is substantiated.

(bb) When the Municipality advertised three (03) different posts including the post of Deputy Manager Corporate Services in the Noordelike Nuus/Northern News newspaper dated 28 October 2016, it did not only include matric as a requirement but a Bachelor’s degree and also experience. The advert did not include National Diploma in Public Management or Recognition of Prior Learning (RPL) as one of the requirements.
(cc) It was improper for the Municipality to shortlist and subsequently appoint Mr Mashamaite, who only had a matric certificate and a diploma, but did not meet the post requirements as reflected in the advertisement. It was improper for the Municipality, in particular the shortlisting and interviewing panel to have considered a candidate who did meet the requirements for the post.

(dd) The conduct of the Municipality, particularly Ms Molala, was in violation of clauses 2.9 of the Mogalakwena Municipal Recruitment Policy.

(ee) Such conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section in section 6(4)(a) (i) of the Public Protector Act.

(b) Regarding whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Mr Mashamaite.

(aa) The allegation that the Complainant and other applicants suffered prejudice as a result of the irregular appointment of Mr Mashamaite is substantiated.

(bb) The unfair, unequitable and therefore improper selection and subsequent appointment of Mr Mashamaite by the Municipality prejudiced the Complainant and other applicants. The salary paid to Mr Mashamaite is irregular due to the fact that he has been appointed irregularly.

(cc) The shortlisting and subsequent appointment of Mr Mashamaite as a candidate with a Grade 12 certificate and National Diploma prejudiced the Complainant and other applicants who had National Diplomas in Public Administration and could have applied for the post.

(dd) The consideration of only a matric or national diploma as a requirement as opposed to a degree denied any other interested qualifying members of the public who only had matric or national diploma an opportunity to apply for the post.
(ee) The conduct of the Municipality, particularly Ms Molala, was in violation of sections and 60(a), 61(1)(c), 62(1)(d), 171(1), 173(1) of the MFMA and clauses 2.9 of Municipal Recruitment Policy.

(xi) The appropriate remedial action that I am taking in pursuit of section 182(1) (c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

(aa) The Executive Mayor must take appropriate steps in respect of disciplinary action against the Acting Municipal Manager, Ms Molala for the irregular appointment of Mr Mashamaite as the Deputy Corporate Manager: Corporate Services, in terms of 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 receiving my report;

(bb) The Executive Mayor must conduct an analysis and evaluation of Mr Mashamaite’s qualifications, experience and competence against the requirements and job description of the position of a Acting Divisional Head – Parks and Recreation that he occupied within thirty (30) business days from the date of receiving my report;

(cc) The Executive Mayor must submit a report to the Municipal Council within thirty (30) business days of the date of receiving my report for a decision on the matter;

(dd) The Executive Mayor must take appropriate steps to institute proceedings for the judicial review of the irregular appointment of Mr Mashamaite in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 200, within thirty (30) business days from the date of receiving my report;

(ee) The Municipal Manager must consider the report of the Executive Mayor referred to above and take a resolution on the matter within sixty (60) business days from the date of receiving my report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF AN IRREGULAR APPOINTMENT OF MR PJ MASHAMAITE TO A POSITION OF DEPUTY MANAGER CORPORATE SERVICES BY THE MOGALAKWENA LOCAL MUNICIPALITY

1. INTRODUCTION

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

1.2. The report is submitted in terms of section 8 of the Public Protector Act to the following people to note the outcome of my investigation and implement the remedial action:

1.2.1 The Member of the Executive Council (MEC) for Limpopo Cooperative Governance, Human Settlements and Traditional Affairs, Mr B Makamu;

1.2.2 The Head of the Department for Limpopo Cooperative Governance, Human Settlements and Traditional Affairs, Ms NR Duralisile

1.2.3 The Speaker of the Municipal Council of the Mogalakwena Local Municipality, Councillor (Cllr) HS Mathebula;

1.2.4 The Executive Mayor of the Mogalakwena Local Municipality, Cllr. RA Matsemela;

1.2.5 The Municipal Manager of the Mogalakwena Local Municipality, Ms B Gungisa;

1.2.6 The former Acting Municipal Manager of Mogalakwena Local Municipality; Ms Molala; and
1.3 A copy of the report is also provided to the Complainant, to inform him of the outcome of my investigation.

1.4 The report relates to an investigation into allegations of an irregular appointment of Mr Mashamaite to the position of Deputy Manager Corporate Support Services, Mogalakwena Local Municipality (the Municipality).

2. THE COMPLAINT

2.1 On 11 November 2018, I received a complaint from an employee (the Complainant) of the Mogalakwena Local Municipality (the Municipality) who did not apply for the post and who wished to remain anonymous.

2.2 The Complainant alleged that:

2.2.1 The Municipality advertised three (03) different posts including the post of Deputy Manager Corporate Services in the Noordelike Nuus/Northern News newspaper dated 28 October 2016.

2.2.2 The minimum requirements for the post of Deputy Manager: Corporate Support Services were, a Bachelor’s degree in Public Administration, Law or equivalent. The incumbent should have a minimum of five (4-5) years relevant experience at middle management. The applicant must be computer literate and have a driver’s license.

2.2.3 The appointed candidate (Mr Mashamaite) applied for the position of Deputy Manager: Corporate Support Services and he was shortlisted though he did meet the minimum requirements for the post and he also did not attach copies of his qualifications as required by the advert.

2.2.4 The Municipality shortlisted, interviewed and appointed Mr Mashamaite without him meeting the minimum requirements for the post.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 **The mandate of the Public Protector**

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

3.1.2 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".

3.1.3 Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purposes of an investigation.

3.1.5 In the matter of 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\(^1\). 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\(^2\)."

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

3.1.7 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);

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

3.1.9 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);

3.1.10 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);

\(^1\) [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
\(^2\) Supra at para [73].
3.1.11 The Public Protector’s power to take 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 the investigation and the type of findings made (paragraph 71);

3.1.12 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 the power that is by its nature of no consequence (paragraph 71(a));

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

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

3.1.15 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no. 91139/2016 (13 December 2017), the Court held as follows:

3.1.15.1 The Public Protector, in appropriate circumstances, has the power to direct the President to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective, (paragraphs 85 and 152);

3.1.15.2 There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92);
3.1.15.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101);

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

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

3.1.15.5 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 (Paragraph 105).

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

3.1.17 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112);

3.1.18 The Mogalakwena Local Municipality is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector’s mandate.

3.1.19 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.
4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives me the power 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; to report on that conduct; and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The investigation was conducted by way of correspondences, meetings and interviews with the Complainant and the relevant Municipal officials, analysis of the relevant documentation and consideration and application of the relevant laws, and regulatory framework.

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:

(a) What happened?
(b) What should have happened?
(c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration or other improper conduct?

(d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to place the Complainant as close as possible to where he would have been but for the 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeals\(^3\) (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the Municipality to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had a state organ compiled with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the Municipality irregularly shortlisted, interviewed and appointed Mr Mashalamfe to the position of Deputy Manager Corporate Support Services without meeting the minimum requirements for the position; and

\(^3\) Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA).
4.3.2 Whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Mr Mashamaite.

4.4 The key sources of information

4.4.1 Documents

4.4.1.1 A copy of the Municipal internal advertisement signed by the former Acting Municipal Manager Mr MM Mthombeni.

4.4.1.2 A copy of the external advertisement (Noorderlike Nuus/Northern News dated 28 October 2016.

4.4.1.3 A copy of the Municipal Recruitment register.

4.4.1.4 Copies of applications, qualifications and curriculum vitae’s for only three candidates; i.e. Mr Mashamaite; Ms Tsebe and Mr Thobejane.

4.4.1.5 A copy of the attendance register for shortlisting proceedings dated 16 March 2017.

4.4.1.6 A copy of the shortlisting minutes dated 16 March 2017.

4.4.1.7 A copy of a shortlisting and interviewing panel dated 22 November 2016.

4.4.1.8 A copy of the interview proceedings dated 20 April 2017.

4.4.1.9 A copy of the email from the former Acting Municipal Manager dated 12 April 2017.

4.4.1.10 A copy of the email from the former Acting Municipal Manager dated 18 April 2017.
4.4.1.11 A copy of individual score sheets by panelists of the top three (3) candidates with their applications and copies of qualifications.

4.4.1.12 A copy of the appointment letter signed by the former Acting Municipal Manager dated 20 April 2017.

4.4.1.13 A copy of the complaint form by the Complainant dated 09 November 2018.

4.4.1.14 A copy of a memorandum of opinion dated 17 August 2018.

4.4.1.15 A copy of the attendance register for the shortlisting proceedings dated 16 March 2016.

4.4.1.16 A copy of a memorandum from the Acting Manager Corporate Support Services dated 13 March 2017.

4.4.2 Correspondence sent and received

4.4.2.1 A letter of enquiry from my office to the Municipality dated 03 January 2019.

4.4.2.2 An email from my office to the Municipality dated 05 February 2019.

4.4.2.3 A copy of the section 7(9) Notice signed by the Public Protector on 26 February 2020 issued to the Head of Department, the MEC, the Mayor, the Speaker, the Municipal Manager and Mr Mashamaite.

4.4.2.4 A response from the Municipality dated 05 February 2019.

4.4.2.5 An email from my office to the Municipality dated 09 February 2019.

4.4.2.6 A response from the Municipality dated 20 February 2019.
4.4.2.7 A copy of an email from the former Acting Municipal Manager confirming names of the interview panel dated 18 April 2017.

4.4.2.8 A copy of an email from the former Acting Municipal Manager confirming the date, time, venue for the interview and panel list.

4.4.3 Legislation and other prescripts

4.4.3.1 The Constitution of the Republic of South Africa, 1996

4.4.3.2 The Public Protector Act, 23 of 1994

4.4.3.3 The Municipal Finance Management Act 56 of 2003 (MFMA).

4.4.3.4 The Municipal Systems Act 32 of 2000 (MSA)

4.4.3.5 The Mogalakwena Local Municipality’s Recruitment Policy (Recruitment Policy).

4.4.4 Case Law

4.4.4.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

4.4.4.2 President of the Republic of South Africa v Office of the Public Protector and Others Case no. 91139/2016 [2017] ZAGPPHC 747.

4.4.4.3 Public Protector v Mail and Guardian 2011(4) SA 420 (SCA).
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 irregularly shortlisted and appointed Mr Mashamalte to the position of Deputy Manager Corporate Support Services without meeting the minimum requirements for the position:

Common cause issues

5.1.1 The Municipality advertised three (03) different posts including the post of Deputy Manager Corporate Services in the Noordelike Nuus/Northern News newspaper dated 28 October 2016.

5.1.2 The minimum requirements for the post of Deputy Manager: Corporate Services were, a Bachelor's degree in Public Administration, Law or equivalent. The incumbent should have a minimum of five (5) years relevant experience at middle management. The applicant must be computer literate and have a driver’s license.

5.1.3 The Municipality received forty (40) applications. Of the 40 applicants, one (1) applicant did not have a National Certificate or National Diploma, one (1) applicant had a National Certificate in Human Resource Management, ten (10) applicants had a National Diploma and twenty eight (28) applicants had degrees in either Administration or Law.

5.1.4 The following six (6) candidates were shortlisted:
<table>
<thead>
<tr>
<th>Name</th>
<th>Qualifications</th>
<th>Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Thobejane CT</td>
<td>Grade 12, Certificate Local Govt. Management Skills, National Diploma HR Management, BTECH HR Management, Certificate Executive Leadership Municipal Development Programme</td>
<td>8 years</td>
</tr>
<tr>
<td>2. Tsebe M</td>
<td>Grade 12, LLB degree</td>
<td>8 years</td>
</tr>
<tr>
<td>3. Todani NA</td>
<td>Grade 12, Master's degree in Administration, B.Com degree, Diploma in Education</td>
<td>29 years</td>
</tr>
<tr>
<td>4. Molefe MM</td>
<td>Grade 12, National Diploma in Public Management</td>
<td>11 years</td>
</tr>
<tr>
<td>5. Mashishi RN</td>
<td>Grade 12; Diploma HRM; Short Course in Project Management principles and Practices in Organizations; Certificate in Advanced Labour Law</td>
<td>8 years &amp; 3 months</td>
</tr>
<tr>
<td>6. Mashamaite JP</td>
<td>Grade 12; Statement of Results for Computer course; Certificate of attendance in</td>
<td>9 years</td>
</tr>
</tbody>
</table>
5.1.5 Mr Mashamaite was shortlisted, interviewed and appointed to the position of Deputy Manager; Corporate Services by the former Acting Municipal Manager, Ms MM Molala (Ms Molala) on 20 April 2017.

5.1.6 The Complainant is an employee of the Municipality and did not apply for the position of Deputy Manager: Corporate Services.

**Issues in dispute**

5.1.7 The Complainant argued that the recruitment process and appointment of Mr Mashamaite was irregular in that the Municipality shortlisted, interviewed and appointed him even though he did not meet the minimum requirements for the post of Deputy Manager: Corporate Services and that he should therefore not have been shortlisted and eventually appointed.

5.1.8 My investigation team raised the matter with Mr K Maluleke, the Acting Municipal Manager in a letter dated 03 January 2019, requesting documents and comments on the alleged irregular appointment.

5.1.9 In an attempt to gather information from the Municipality, my team further sent a reminder through an e-mail on 09 February 2019 to the Acting Municipal Manager, Mr Maluleke, requesting documents/comments from the Municipality.
5.1.10 On 06 February 2019, the Municipality provided my office with a response without the requested documents arguing that: “Mr. Jabulani Petrus Mashamaite has been appointed to the position of Deputy Manager: Corporate Support Services since 21 April 2017 pursuant to a fair and/or lawful recruitment and selection processes. The Municipality wishes to take the Office of the Public Protector into its confidence and state that we went to the extent of enlisting the services of a firm of attorneys to provide legal opinion on the lawfulness and/or fairness of the appointment of Mr. Jabuleni Petrus (JP) Mashamaite to the position Deputy Manager: Corporate Support Services of Mogalakwena Municipality”. (sic)

5.1.11 The Municipality further indicated that: “In the result we are convinced that the permanent appointment of Mr. JP Mashamaite to the position of Deputy Manager: Corporate Support Services is justifiably lawful and/or fair and rational in that all the correct recruitment and selection procedures have been followed”. (sic)

5.1.12 In response to my Notice, the Mayor, RA Matsemela indicated in a letter dated 11 March 2020 2019 that:

“We wish to re-iterate and confirm that the municipality had requested South African Qualification Authority (SAQA), through the firm of attorneys, to conduct verification of Matric (Grade 12) and tertiary qualification checks of Mr JP Mashamaite. It was verified that Mr JP Mashamaite obtained (Matric) senior certificate at Nakonkwetlou High School in the year 1997 and National N Diploma in Public Management at Better Best College in the year 2013 respectively.

We submit, with respect, that the wording of the advertisement has not been reproduced entirely in the notice. According to the advert, the minimum academic requirements for the position were written as “Bachelor’s degree or in Public Administration, Law or equivalent” It is in this context that we wish to bring to your attention that there is an omission between the two
prepositions, namely or and in. We attach hereto a copy of the job advertisement for ease of reference marked MLM3.

There was therefore what we honestly and innocently thought to be insignificant clerical error on the part of the publisher and or newspaper which carried the advert. The intention has at all material times been that the minimum academic requirements for the post would have been captured to reflect: "Bachelor's degree or National Diploma in Public Administration, Law or equivalent". We attach hereto a copy of the job advertisement for ease of reference marked MLM4.

In the event that the Public Protector disagrees with our submission (which we maintain to be the correct approach), we would like to advice that the national diploma and or equivalent part of the minimum academic requirement would have been satisfied by the incumbent's possession of National Diploma in Public Management certificate. The National Diploma has always been a requirement for the positions of all Deputy Managers across the Municipality over the years. We attach hereto a copy of the job advertisement for both Deputy Manager Finance and Deputy Manager Technical Services for ease of reference marked MLM5.

In the premises, it cannot be correct to come to the conclusion that the municipality shortlisted, interviewed and appointed Mr JP Mashamaite to the position in question despite him falling to meet the minimum academic requirements. We attach hereto a copy of his CV and Qualifications for ease of reference marked MLM6.

Mr JP Mashamaite has since registered with MANCOSA, to further his studies in Bachelor of Public Administration, We attach hereto a copy of his CV and Qualifications for ease of reference marked MLM7.

Mr JP Mashamaite commenced employment with the municipality in the year 2007-2008 wherein he was employed as a Team Leader in the Parks and
Recreation Division of the municipality. He proceeded to be elevated to a position of Senior Building Caretaker until the year 2014 and ended up in the position of Acting Divisional Head of Parks and Recreation of the Municipality as from 13 January 2015. We attach hereto a copy of his CV and Qualifications for ease of reference marked MLM8.

Furthermore Mr JP Mashamaite acquired managerial experience as a Manager Blue Eyes Security Services for a period of five (5) effective 1998 to 2004.

You are advised that the positions of Senior Building Cater taker and (acting) Divisional Head of Parks and Recreation are in the middle position level of the municipality and that their total tally stands at no less than five (5) years. Mr JP Mashamaite therefore has sufficient work-related experience at middle management as per the job advertisement.

In conclusion, we are of the respectful view that Mogalakwena Local Municipality followed the prescriptions of the law in shortlisting, interviewing and appointing Mr JP Mashamaite to the position of Deputy Manager: Corporate Support Services as he meets the minimum academic requirements for the position and has the requisite 4-5 years' experience at middle management level”.

5.1.13 The Mayor argued that the Municipality through the SAQA verified the qualifications of Mr JP Mashamaite and it was confirmed that he obtained a matric and a National Diploma in Public Management. During the capturing and shortlisting of the applicant’s qualifications, the Municipality failed or omitted to capture Mr Mashamaite’s National Diploma in Public Management as one of his qualifications.

5.1.14 The argument that Mr Mashamaite possess a national diploma does not address the issue on whether or not Mr Mashamaite possessed a B. Degree
as the minimum academic requirements for the post as stipulated in the advertisement when he was shortlisted, interviewed and appointed by the Municipality to the position of Deputy Manager: Corporate Support Services and is therefore rejected.

5.1.15 It is argued that the wording of the advertisement was as a result of a clerical error or omission on the part of the publisher and or newspaper which carried the advert and that it should have read: "Bachelor's Degree or National Diploma in Public Administration, Law or equivalent". Though it could have been a clerical error on the part of the publisher or newspaper, the Municipality had a duty to ensure that due diligence was exercised by confirming or correcting the advert before being published or to correct it after being so published and re-advertise the post with the correct post requirements. The argument is rejected. The Municipality shortlisted, interviewed and appointed Mr Mashamaite based on the advert carried out by the publisher and or newspaper.

5.1.16 The Municipality submitted that: "... the national diploma and /or equivalent part would have satisfied by the incumbent's possession of National Diploma in Public Management certificate. The National Diploma has always been a requirement for the positions of all Deputy Managers across the Municipality over the years".

5.1.17 It is correct that Mr Mashamaite would have met the minimum requirements for the post. The Municipality failed to exercise due diligence by ensuring that a national diploma as one of the "intended" requirements for the post was captured in the advertisement and that other applicants possessing national diplomas were not excluded by the advert or discouraged to apply.

5.1.18 The Municipality argued further that it cannot be correct for me to come to a conclusion that the Municipality shortlisted, interviewed and appointed Mr
Mashamaite to the position in question despite him failing to meet the minimum academic requirements. This argument is flawed as it contradicts the submission in 5.1.19 supra.

5.1.19 The submission on the experience at middle management is noted but was never an issue in dispute.

Application of the relevant law

5.1.20 Section 195(1) of the Constitution provides, amongst others that "Public administration, must be governed by the democratic values and principles enshrined in the Constitution including the following principles —

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) ...

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) ...

(f) Public administration must be accountable.

(g) Transparency must be fostered.

(h) Good human-resource management and career-development practices, to maximize human potential, must be cultivated."

5.1.21 The Municipality was expected to maintain a high standard of professional ethics when it recruited and appointed a suitable candidate for the advertised post by ensuring that that the advert contained the correct requirements for the post prior to the advertisement to make sure that the applicants who submitted their CV’s were suitable and met the minimum requirements for the position.
Any process followed which is in contravention of the above constitutional principles would be improper.

5.1.22  The Local Government: Municipal Systems Act 32 of 2000 (MSA) which direct a municipality to develop an adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including the recruitment, selection and appointment of persons.

5.1.23  Section 55(1) of the MSA provides that:

“As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for;

(e) the appointment of staff other than those referred to in section 56(a), subject to the Employment Equity Act, 1998 (Act No. 55 of 1998);

(h) the promotion of sound labour relations and compliance by the municipality with applicable labour legislation”.

5.1.24  The former Acting Municipal Manager, Ms. Molala, as the Accounting Officer was expected to follow due processes and policy directives bestowed on her to appoint a suitably qualified candidate to the position, in line with the applicable recruitment policy and laws.

5.1.25  The Municipality has in place an adopted policy to ensure compliance with section 55(1) of the MSA.

5.1.26  The General Guidelines of the Municipal Recruitment Policy (MRP) provides that “the municipality must ensure that candidates are considered for employment on the basis of their skills, experience and qualifications”.
5.1.27 At the time when Mr Mashamaite applied for the position of Deputy Manager: Corporate Support Services, he did not have a Bachelor's Degree and the 4-5 years of relevant experience in middle management. He had a matric, national diploma, clerical experience of 09 years and Security Manager from 2003-2005, certificate of attendance in Fundamentals Property & Leasing-Law Management Workshop, and a short certificate in computer Microsoft 2010.

5.1.28 Section 2.9 of the MRP requires that the requirements of the job must be clearly specified. The advertisement clearly specified the requirements for the position by indicating that the applicants must be in possession of a Bachelor's Degree or in Public Administration, Law or equivalent and must be computer literate and have a driver's license.

5.1.29 Mr Mashamaite, who did not meet the prescribed minimum requirements for the post as per the advert was however shortlisted, interviewed and appointed to the position of Deputy Manager: Corporate Support Services.

5.1.30 There are no records or minutes indicating that the shortlisting panel met and determined another criteria or a deviation from the advert which led to the shortlisting and the appointment of Mr Mashamaite.

5.1.31 The Municipality does not have a policy and or legislation that empowers the shortlisting panel to deviate or relax the post requirements during the shortlisting process to favour certain candidates.

Conclusion

5.1.32 Based on the evidence in my possession, and though Mr Mashamaite possess a National Diploma in Public Management, it can be concluded that he did not meet the minimum requirements of the post as per the advertisement and that his appointment was not in accordance with the constitutional principles governing public administration and the MRP.
5.2 Whether the Complainant and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr Mashamaite?

*Common cause issues*

5.2.1 It is common cause that five (5) candidates who met the minimum requirements of the post, with the exception of Ms MM Molefe (Ms Molefe) were shortlisted and underwent interviews for the position of Deputy Manager: Corporate Services, together with Mr Mashamaite, who did not meet the minimum requirements for the post.

5.2.2 The Municipality shortlisted and appointed Mr Mashamaite to the post of Deputy Manager: Corporate Services despite him not meeting the minimum requirements for the post.

5.2.3 It is also common cause that the interview panel selected two (2) other candidates, that is, Ms Tsebe 239 and Mr C Thobejane 168, in addition to Mr Mashamaite who had scored 290, for possible appointment to the post of Deputy Manager Corporate Services.

5.2.4 The Municipality shortlisted Mr Mashamaite and Ms Molefe even though they did not meet the minimum requirements for the post. Both Mr Mashamaite and Ms Molefe possessed matric and a National Diploma in Public Management at the time of shortlisting.

*Issues in dispute*

5.2.5 The Complainant argued that the Municipality's decision to appoint Mr Mashamaite caused prejudice to other qualifying candidates in that they were denied an opportunity to compete fairly for the vacant post and in compliance with the MRP.
5.2.6 The Complainant further argued that the decision by Ms Molala to appoint Mr Mashamaite resulted in the Municipality incurring irregular expenditure.

Application of the relevant law

5.2.7 Section 61(1) of the Municipal Finance Management Act, 2003 (MFMA) provides that “the accounting officer of a municipality must—

(a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs.”

5.2.8 Section 62(1)(d) of the Municipal Finance Act No. 56 of 2003 (MFMA) provides that: “The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure, that unauthorized; irregular or fruitless and wasteful expenditure and other losses are prevented.”

5.2.9 The salary paid to Mr Mashamaite amounts to irregular expenditure on account that he was appointed without meeting the minimum requirements for the position and in so doing the Accounting Officer failed to act with the requisite fidelity, integrity and in the best interests of the Municipality when managing its financial affairs.

5.2.10 Section 171(1) MFMA provides that, “the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently—

(a) contravenes a provision of this Act;
(b) fails to comply with a duty imposed by a provision of this Act on the accounting officer of a municipality.”
5.2.11 Ms Molala was expected to exercise due diligence by ensuring that a candidate that met the minimum requirements for the position is appointed and paid to avoid committing financial misconduct.

5.2.12 Section 173(1) of the MFMA provides that:

"The Accounting Officer of a municipality is guilty of an offence if that accounting officer—

(a) deliberately or in a grossly negligent way—

(b) fails to take all reasonable steps to prevent unauthorized, irregular or fruitless and wasteful expenditure."

5.2.13 Ms Molala was expected to comply with the MRP when appointing Mr Mashamaite and failure to do so would result in her committing an offence. Section 1 of the MFMA defines an irregular expenditure in relation to a municipality or municipal entity as "expenditure other than unauthorized expenditure that is incurred in contravention of or that is not in accordance with the requirements of the supply chain management policy of a municipality or any of the municipality’s by-laws or policies".

5.2.14 A wrong recruitment might have a negative impact in an organisation, hence it is crucial for the leadership to apply its mind during the recruitment process. "Bad hiring decisions could not only negatively affect a company financially, but could also harm employee morale and result to time loss due to grievance, disputes and litigation processes\(^4\).

\(^4\) Bressler MS 2014 at page 2 "Building the winning organisation through high-impact hiring."
Conclusion

5.2.15 Based on the evidence, it can be concluded that other candidates who were interviewed with Mr Mashamaite suffered prejudice as a result of the Municipality's failure to administer the recruitment process properly and in compliance with the Constitution, MFMA and MRP and thereby incurring irregular expenditure.

5.2.16 Other candidates who possessed a national diploma could have applied for the post had the Municipality clearly stated the requirements for the post in the advertisement.

6. FINDINGS

6.1 Regarding whether the Municipality irregularly shortlisted, interviewed and appointed Mr Mashamaite to the position of Deputy Manager Corporate Support Services without following proper recruitment processes

6.1.1 The allegation that the Municipality irregularly shortlisted, interviewed and appointed Mr Mashamaite to the position of Deputy Manager: Corporate Services without meeting the minimum requirements is substantiated.

6.1.2 When the Municipality advertised three (03) different posts including the post of Deputy Manager Corporate Services in the Noordelike Nuus/Northern News newspaper dated 28 October 2016, it did not only include matric as a requirement but a Bachelor's degree and also experience. The advert did not include National Diploma in Public Management or Recognition of Prior Learning (RPL) as one of the requirements.

6.1.3 It was improper for the Municipality to shortlist and subsequently appoint Mr Mashamaite, who only had a matric certificate and a diploma, but did not meet the
post requirements as reflected in the advertisement. It was improper for the Municipality, in particular the shortlisting and interviewing panel to have considered a candidate who did meet the requirements for the post.

6.1.4 The conduct of the Municipality, particularly Ms Molala, was in violation of clauses 2.9 of the Mogalakwena Municipal Recruitment Policy.

6.1.5 Such conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section in section 6(4)(a) (i) of the Public Protector Act.

6.2 Regarding whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Mr Mashamaite.

6.2.1 The allegation that the Complainant and other applicants suffered prejudice as a result of the irregular appointment of Mr Mashamaite is substantiated.

6.2.2 The unfair,unequitable and therefore improper selection and subsequent appointment of Mr Mashamaite by the Municipality prejudiced the Complainant and other applicants. The salary paid to Mr Mashamaite is irregular due to the fact that he has been appointed irregularly.

6.2.3 The shortlisting and subsequent appointment of Mr Mashamaite as a candidate with a Grade 12 certificate and National Diploma prejudiced the Complainant and other applicants who had National Diplomas in Public Administration and could have applied for the post.

6.2.4 The consideration of only a matric or national diploma as a requirement as opposed to a degree denied any other interested qualifying members of the public who only had matric or national diploma an opportunity to apply for the post.
6.2.5 The conduct of the Municipality, particularly Ms Molala, was in violation of sections and 60(a), 61(1)(c), 62(1)(d), 171(1), 173(1) of the MFMA and clauses 2.9 of Municipal Recruitment Policy.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that I am taking is in pursuit of section 182(1) (c) of the Constitution and section 6(4) (c) (ii) of the Public Protector Act, is as follows:

7.1.1 The Executive Mayor must take appropriate steps in respect of disciplinary action against the Acting Municipal Manager, Ms Molala for the irregular appointment of Mr Mashamaite as the Deputy Corporate Manager: Corporate Services, in terms of 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 receiving my report;

7.1.2 The Executive Mayor must conduct an analysis and evaluation of Mr Mashamaite’s qualifications, experience and competence against the requirements and job description of the position of a Acting Divisional Head – Parks and Recreation that he occupied within thirty (30) business days from the date of receiving my report;

7.1.3 The Executive Mayor must submit a report to the Municipal Council within thirty (30) business days of the date of receiving my report for a decision on the matter;

7.1.4 The Executive Mayor must take appropriate steps to institute proceedings for the judicial review of the irregular appointment of Mr Mashamaite in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 200, within thirty (30) business days from the date of receiving my report;
7.1.5 The Municipal Manager must consider the report of the Executive Mayor referred to above and take a resolution on the matter within sixty (60) business days from the date of receiving my report.

8. **MONITORING**

8.1 I will require the Municipal Manager to submit an implementation plan to my office within fifteen (15) working days from the date of this report indicating how the remedial actions referred to in paragraph 7 above will be implemented.

8.2 The submission of the Implementation Plan and the implementation of my remedial actions 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: 31/08/2020