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"ALLEGATIONS OF IRREGULAR APPOINTMENT OF THE MUNICIPAL MANAGER OF LEKWA-TEEMANE LOCAL MUNICIPALITY: MR. NDODA MGENGKO"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF THE MUNICIPAL MANAGER FOR LEKWA-TEEMANE LOCAL MUNICIPALITY: MR NDODA MGENGKO
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Executive Summary

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

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of the irregular appointment of Mr Ndoda Mgengo as the Municipal Manager of the Lekwa-Teemane Local Municipality.

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

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

(a) Whether the conduct of Lekwa-Teemane Local Municipality in allowing Mr Mgengo to participate in the recruitment process and his final appointment as Municipal Manager caused a conflict of interest for Mr Mgengo and amounted to maladministration;

(b) Whether the Municipality irregularly appointed Mr Mgengo who lacked the required skills, experience and competencies and qualifications for the position of the Municipal Manager in 2015 and 2018 respectively;

(c) Whether the Municipality improperly paid a twenty percent (20%) “market premium allowance” to Mr Mgengo after his appointment as Municipal Manager and whether such payment amounts to irregular expenditure; and
Whether the Municipality unduly failed to comply with processes as required by section 54A(7) of Municipal Systems Amendment Act on the appointment of Mr Mgengo as Municipal Manager in 2015.

Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the Municipality were principally those imposing administrative standards that should have been complied with by the Municipality or its officials when appointing Mr Mgengo as Municipal Manager. These are the following:

(a) Local Government: Municipal Systems Act 32 of 2000;

(b) Local Government: Municipal Systems Amendment Act 7 of 2011;

(c) Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Gazette No 37245 of 17 January 2014;

(d) Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers;

(e) The Constitution of 1996

Having considered the evidence uncovered during the investigation, as against the relevant regulatory framework, the complaint received as against the concomitant responses received from the Municipality, I make the following findings:
Regarding whether the conduct of Lekwa-Teemane Local Municipality in allowing Mr Mgengoe to participate in the recruitment process and his final appointment as Municipal Manager caused a conflict of interest for Mr Mgengoe and amounted to maladministration:

The allegation that the conduct of the Municipality by allowing Mr Mgengoe to participate in the recruitment process and his final appointment as Municipal Manager resulted in conflict of interest and amount to maladministration is not substantiated.

Schedule 2 item 2 of the Municipal Systems Act, 2000, enjoins the Municipal staff member in this instance, Mr Mgengoe, at all time to be loyal in executing the lawful policies of the Council and perform their functions of office in good faith, diligently, honestly and in a transparent manner. Further, to act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised. Mr Mgengoe conducted himself accordingly.

Mr Mgengoe’s application for the position he was seconded to had a potential of creating a conflict of interest with his mandated role as the Acting Municipal Manager. However, when developing interests on being a Municipal Manager for the Municipality, he informed the Mayor and MEC that he would apply for the position. His disclosure of interest (verbally – own emphasis) was sufficient to allow the Mayor and MEC, to manage any conflicts/perceived conflicts that could arise. He had therefore acted in good faith, honesty and transparently. Mr Mgengoe was therefore not conflicted.

The conduct of the Municipality was therefore not improper as envisaged in Section 182(1) of the Constitution and maladministration as in terms Section 6(4)(a)(i) of the Public Protector Act.
(b) Regarding whether the Municipal Council irregularly appointed Mr. Mgengo, who lacked the required skills, experience and competencies or qualifications for the position of the Municipal Manager:

(aa) The allegation that the appointment of Mr. Mgengo as the Municipal Manager was irregular and contravene the law, is not substantiated.

(bb) The Municipality was obliged to adhere to the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Gazette No 37245 of 17 January 2014 (Annexure B), when appointing Mr. Mgengo to the post of Municipal Manager. The decision to appoint Mr Mgengo in January 2018 was in line with the provisions of the law.

(cc) Mr Mgengo, is in possession of the postgraduate-diploma in management obtained in 2017, the qualification that is above the NQF level for the prescribed qualifications for the position. He met the prescribed requirement for the post advertised, and therefore the Council in appointing him upheld the democratic values and principles enshrined in the Constitution and thus acted in line with the spirit espoused in section 195(1)(a) and (f) of the Constitution.

(dd) The conduct of the Municipality in this regard constitutes no improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged by the Public Protector Act, 1994.

(c) Regarding whether the Municipality improperly paid 20% "market premium allowance" to Mr. Mgengo’s, if so does the decision amount to irregular expenditure:
(aa) The allegation that subsequent to the appointment of Mr Mgengo in 2015 as Municipal Manager, the Municipality unlawfully authorised a 20% "market premium allowance" increase on his remuneration package, is substantiated.

(bb) Regulation 10(2) enjoins the Municipality pay market premium allowance when there latter was unable to attract qualified and suitable senior managers for the position, in this instance the Municipal Manager position.

(cc) The reasons provided for the decision to pay market premium allowance to Mr Mgengo, that the candidates were going to receive a salary below that of the Directors and also that the salary received was below the one Mr Mgengo received at the time of his tenure as the Acting Municipal Manager are inconsistent with the provisions of sub-regulation 10(2).


(ee) The decision and/or action of the Municipality in this regard amounts to improper conduct as envisaged in Section 182(1) of the Constitution and maladministration in terms of Section 6(4)(a) of the Public Protector Act, 1994.

(d) Regarding whether in 2015, the Municipality unduly failed to comply with processes as required by section 54A(7) of the Municipal Systems Amendment Act on the appointment of Mr. Mgengo as Municipal Manager.
(aa) The allegation that subsequent to the appointment of Mr Mgengo in 2015, the Municipality failed to report the appointment to the MEC, is not substantiated.

(bb) The Municipality is obliged in terms of section 54(A)(7) of the Municipal Systems Amendment Act, to report the appointment of the Municipal Manager to the MEC, to enable the latter to give concurrence and also to allow the latter should it be discovered that the appointment is not in terms of the law, to take decisive steps to ensure compliance.

(cc) Subsequent to the appointment of the incumbent in 2015, the Municipality provided a report to MEC within 14 days as required.

(dd) The conduct of the Municipality in this regard constitutes no improper conduct as envisaged in Section 182(1) of the Constitution and maladministration in terms of Section 6(4)(a) of the Public Protector Act, 1994.

(vii) In the light of the above findings, I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the maladministration referred to in this report:

The Mayor is to:

(a) Take necessary steps to determine the amount of money paid to Mr Mgengo as a “market premium allowance” for the 2015 appointment as Municipal Manager, and within sixty (60) working days of this report, compile a report with recommendation for the attention of the Municipal Council.

(b) Ensure that the report is tabled before the Municipal Council in the first Council meeting to be held subsequent to the determination of the amount
and the report to allow the Council to consider and deliberate on the report with a view to resolve what should happen with the report.

The Municipal Council is to

(c) Ensure that the decision taken in (b) above, is communicated to MEC within thirty (30) working days of the decision.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR
APPOINTMENT OF THE MUNICIPAL MANAGER FOR LEKWA-TEEMANE LOCAL
MUNICIPALITY: MR NDODA MGENGO

1 INTRODUCTION

1.1 This is my report issued in terms of Section 182(1) 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(3) of the Public Protector Act
to the following officials:

1.2.1 The Premier of the North West Provincial Government: Prof Job Mokgoro;

1.2.2 The Member of the Executive Council (MEC) for the Department of
Cooperative Governance, Human Settlement and Traditional Affairs: Mr
Gordon Kegakilwe;

1.2.3 The Head for Department (HOD) for the Department of Cooperative
Governance, Human Settlement and Traditional Affairs: Mr Phihadu
Ephraim Motoko;

1.2.4 The Mayor for the Municipality: Cllr Kagiso Palagangwe;

1.2.5 The Administrator for the Municipality: Mr Moatshe;

1.3 Copies of the report are also submitted to the following to inform them about
the outcome of the investigations:

1.3.1 The Complainants: Messrs Pakiso Modise and Eliaus Muller;
1.4 The report deals with the outcomes of an investigation into allegations of irregular appointment of the Municipal Manager for the Lekwa-Teemane Local Municipality (the Municipality) Mr Ndoda Mgengo.

2 THE COMPLAINT

2.1 The complaint was lodged with my office on 20 March 2017, 10 August 2017 and 6 February 2018, respectively, by Councillor (Cllr) Pakiso Godfrey Modise and Mr Elias Muller (the Complainants), who are members of both the Municipal Council, and the Anti-Corruption Activist respectively.

2.2 Mr Pakiso Godfrey Modise in essence alleged that:

2.2.1 Mr Mgengo was initially seconded to the Municipality as the Acting Municipal Manager in July 2014, by the North West Province Member of Executive Council (MEC) for Local Government and Human Settlement Mr Collins Maine (MEC Maine). The terms of reference for his appointment included amongst others, to oversee the recruitment process and appointment of the Municipal Manager for the Municipality. His tenure of office was limited to three (3) months.

2.2.2 The position was advertised on 1 September 2014, two (2) months after the incumbent had assumed office as the Acting Municipal Manager. Subsequent to the advertisement, a Special Council meeting was held during September 2014, where it was resolved that MEC Maine be requested to extend the incumbent’s acting term to enable him to complete the process he was appointed to oversee. On 10 October 2014, MEC Maine agreed to the Municipality’s request and accepted the extension for a period not exceeding 3 (three) months, ending 31 December 2014.
However, on 23 December 2014, Cllr Palagangwe (the Mayor) issued another letter to MEC Maine for further extension to allow the incumbent to continue as the Acting Municipal Manager. The request was also accepted and the extension was granted by MEC Maine to allow the incumbent to remain in office. In the said letter it was confirmed that the Municipality had gone through all the necessary phases for recruitment of the Municipal Manager as prescribed by the applicable legislation/regulations. It is notable that what was not conveyed to MEC Maine at the time, was the following:

That there was never a Council resolution mandating the Mayor to request a further extension for the incumbent to continue as the Acting Municipal Manager; and also

That at the time, the incumbent, was one of the applicants in the process that he was appointed to oversee.

The Complainant further alleges that the Municipality appointed the incumbent, who lacked qualifications for the position and his appointment was never communicated to MEC Maine as required by the Municipal Systems Act, 2000.

That, after the appointment of the incumbent as the Municipal Manager in 2015 and 2018, without following legal prescripts, the Mayor authorised an increase to his remuneration package by twenty percent (20%) and this amounted to an irregular expenditure for the Municipality. The Complainant therefore believes that the Municipal Council should recover the money it paid to Mr Mgengo.

In January 2018, whilst the above allegations were still investigated, the Complainant (Mr Modise) advised the Investigation team that Mr Mgengo, who had resigned after the MEC’s letter of 25 October 2016, had now been reappointed in the position of Municipal Manager despite him not meeting
the requirements for the position. Further that the MEC had not given concurrence for Mr Mgengo’s appointment, and the MEC had failed to ensure that the Municipality complied with the legal requirements in the appointment of the Municipal Managers.

2.4 Mr Elias Muller on the other hand alleges that:

2.4.1 He requested the Office of the National Minister for Corporative Governance and Traditional Affairs (CoGTA) to investigate the decision of MEC Maine to second the incumbent, who was unemployed at the time, and also to investigate the salary that the incumbent received post his appointment as the Municipal Manager. The complaint was referred back to MEC Maine for investigation and to report back. The complaint was also brought to the attention of the Honourable Des Van Rooyen, subsequent to his appointment as the then Minister for CoGTA.

2.4.2 He later became aware of MEC Gaolaolwe’s letter to the Municipality dated 25 October 2016, instructing the Mayor to terminate the appointment of the incumbent, who suddenly resigned from the position before the termination of his contract.

2.4.3 He further alleges that the Council ignored or defied MEC Gaolaolwe’s instruction that the incumbent’s appointment be terminated on the basis that he did not meet the minimum requirements for the position, and MEC Gaolaolwe did not take action against the Council. He is therefore of the view that the conduct of MEC Gaolaolwe in this regard amount to a contravention of the Executive Members Ethics Code since MEC Gaolaolwe did not act in good faith and in the best interest of good governance on two occasions. Further, that MEC Gaolaolwe did not execute the obligations imposed on her by law, by acting in a way that is inconsistent with her office and that may compromise the credibility or integrity of the office she occupied or of the government.
3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

"The Public Protector has the power, as regulated by 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) of the Constitution states 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 the powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 *In re Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*¹ the Constitutional Court, per Mogoeng CJ, held that the remedial action taken by the Public Protector has a binding effect[at para 76]. The Constitutional Court further held that: "When remedial action is

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¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
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.\(^2\) The Court further confirmed the Public Protector’s powers as follows:

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

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

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

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

3.5.5 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

\(^2\) at para [73].
taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (paragraph 70);

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

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

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

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

3.5.10 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:
3.5.10.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);

3.5.10.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);

3.5.10.3 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 of the judgment):

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

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

3.5.10.5 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 of the judgment). [This was a finding on EEF judgment as well];

3.5.10.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector form taking remedial action. The Public Protector’s observations constitute **prima facie** findings that point to serious misconduct (paragraph 107 and 108 of the Judgment); and
3.5.10.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).

3.6 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 problem in the 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 complainants 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 as ‘special circumstances’ depends on the merits of each case.

3.7 The institutions mentioned in this report, viz, Lekwa-Teemane Municipality and the Department are organs of state and their conduct amounts to conduct in state affairs, as a result the complaints falls within the ambit of the Public Protector’s mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.8 The power and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of the parties.
4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, 1994.

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.

4.1.3 The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory instruments, including constitutional provisions, legislation, regulations, relevant court decisions and applicable previous Public Protector Decisions or Touchstones.

4.2 Approach to the investigation

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

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

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they 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.
4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the Municipality to prevent improper conduct and/or maladministration as well as prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. 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 the state institution complied with the regulatory framework setting the applicable standards for good administration.

4.3 Notice in terms of Section 7(9) of the Public Protector Act

4.3.1 During the investigation process, I issued notice in terms of Section 7(9)(a) of the Public Protector Act (Notice), to the Municipality and the Department dated 7 August 2019; also to Mr Mgengo dated 27 February 2020, to afford both institutions an opportunity to respond to the Public Protector’s provisional findings. On receipt of the Section 7(9) notice, the Municipality requested an extension until 2 September 2019 and 20 September 2019 respectively, the request that was granted.

4.3.2 On 26 September 2019, a response from the Municipality dated 20 September 2019 signed by the Mayor Cllr KGN Palagangwe was received through Lezel Venter Attorneys, and on 18 March 2020, a response was received from Mr Mgengo respectively. The contents thereof were noted and shall be discussed below under issues responded to. The Municipality further requested a meeting to discuss the response and the meeting was held on 16 October 2019.

4.3.3 No response was received from the office of the HOD and MEC for the Department in this regard.
4.4 On analysis of the complaint and available information, the following were issues considered and investigated:

4.4.1 Whether the conduct of Lekwa-Teemane Local Municipality in allowing Mr Mgengo to be a candidate and participate in the recruitment process and his final appointment as Municipal Manager caused conflict of interest and amounted to maladministration;

4.4.2 Whether the Municipality irregularly appointed Mr Mgengo who lacked the required skills, experience and competencies or qualifications for the position of the Municipal Manager in 2015 and 2018 respectively;

4.4.3 Whether the Municipality improperly paid a twenty percent (20%) “market premium allowance” to Mr Mgengo and whether such conduct amount to an irregular expenditure;

4.4.4 Whether the Municipality unduly failed to comply with processes as required by section 54A (7) of Municipal Systems Amendment Act on the appointment of Mr Mgengo as Municipal Manager in 2015

4.5 Key sources of information

4.5.1 Documents:

4.5.1.1 Letter from the Municipality signed by the Mayor dated 06 June 2014 addressed to the Office of the MEC, requesting MEC to second the Acting Municipal Manager;

4.5.1.2 Letter from the Office of the MEC dated 25 June 2014 addressed to the Municipality, communicating the decision to second and appoint Mr Ndoda Mgengo the Acting Municipal Manager.
4.5.1.3 Letter from the Office of the MEC dated 25 June 2014 addressed to the Mr Ndoda Mgengo, informing him about the decision to second and appoint him the Acting Municipal Manager for the Municipality;

4.5.1.4 Letter from the Municipality Office of the Mayor dated 29 September 2014 addressed to the Office of the MEC, requesting for MEC’s concurrence for extension of term of Acting Municipal Manager: Ndoda Mgengo;

4.5.1.5 Letter from the Municipality Office of the Mayor dated 23 December 2014 addressed to the Office of the MEC, requesting for MEC’s concurrence for extension of term of Acting Municipal Manager: Ndoda Mgengo;

4.5.1.6 Letter from the Office of the MEC dated 04 February 2015 addressed to the Municipality, acknowledging the Municipality letter dated 23 December 2014 and further giving consent for extension until end February 2015;

4.5.1.7 Interview Report for the position of the Municipal Manager – Accounting Officer Position for 04 December 2014 Interviews compiled by the Mayor Cllr KGN Palagangwe;


4.5.1.9 Letter from the Office of the MEC dated 25 October 2016 addressed to the Mayor, directing the Mayor to terminate the appointment of Mr N Mgengo as the Municipal Manager for the Municipality;
4.5.1.10 Municipal Report dated 24 January 2017 (sic) addressed to the MEC Hon Galaletsang F Gaolaolwe, on the appointment of the Municipal Manager for the Municipality: Mr N Mgengo;

4.5.1.11 Appointment letter of Mr Ndoda Mgengo dated 19 January 2018;

4.5.1.12 Letter from the Office of the MEC Hon Galaletsang F Gaolaolwe dated 14 March 2018 addressed to the Mayor, responding to the report on the appointment of the Municipal Manager: Mr N Mgengo.

4.5.1.13 Letter from North West University, Dr Johan Jordaan dated 22 May 2019 addressed to Kiki about the Post Graduate Diploma in Management.

4.5.2 Correspondence sent and received:

4.5.2.1 PPSA letter of enquiry to the Municipality addressed to the attention of the Mayor Cllr Kagiso Palagangwe, dated 09 May 2018;

4.5.2.2 PPSA letter of enquiry to the Department addressed to MEC Hon. Galaletsang F Gaolaolwe, dated 09 May 2018;

4.5.2.3 Response letter from MEC Hon. Galaletsang F Gaolaolwe, dated 10 May 2018;

4.5.2.4 PPSA letter of enquiry to the Department addressed to MEC Hon. Galaletsang F Gaolaolwe, dated 29 May 2018;

4.5.2.5 Response received from the Municipality dated 14 May 2018;
4.5.2.6 Letter of inquiry to the Minister for Cooperative Governance and Traditional Affairs (CogTA) Hon Dr. Zwile Mkhize, dated 20 March 2019;

4.5.2.7 Response received from CogTA Mr Jackey Maepa, in a form of an email dated 19 April 2019.

4.5.2.8 Response to a Section 7(9) Notice received from the Municipality dated 20 September 2019

4.5.2.9 E-mail inquiring about the Postgraduate Diploma in Management (PGDM) to North West University (NWU) dated 13 June 2018;

4.5.2.10 E-mail received from NWU from Johannes Jordaan Lecturer: Operations Management and Manager Community Engagement dated 13 June 2018.

4.5.3 Meetings and Interviews:

4.5.3.1 On 16 October 2019 a meeting was held at Mafikeng Provincial Office, where the Municipality was represented by the Mayor Cllr KGN Palagangwe and Mr Shuping, and the Investigation team.

4.5.4 Legal and Regulatory Framework:

4.5.4.1 The Constitution;

4.5.4.2 Local Government: Municipal Systems Act 32 of 2000;

4.5.4.3 Local Government: Municipal Systems Amendment Act 7 of 2011;
4.5.4.4 Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Gazette No 37245 of 17 January 2014;

4.5.4.5 Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers;

4.5.5 Case Law

4.5.5.1 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others[2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC);

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

5.1 Regarding whether the conduct of the Lekwa-Teemane Local Municipality in allowing Mr. Mgengo to be a candidate and participate in the recruitment process and his final appointment as Municipal Manager caused conflict of interest and amounted to maladministration:

Common cause issues

5.1.1 It is common cause that Mr Mgengo was seconded to the Municipality to facilitate the recruitment process of the Municipal Manager.

5.1.2 One of the conditions of Mr. Mgengo’s secondment was that the Municipal Manager’s position be advertised immediately and he should report monthly to MEC Maine on steps taken to fill the vacant post to which he was
seconded. Subsequent to his secondment the Municipality advertised the position and Mr Mgengo was named as the contact person on the advert.

5.1.3 Subsequent to the Municipality advertising the position, Mr. Mgengo also applied for the position and was duly appointed the Municipal Manager, despite being seconded to head the municipal administration and the recruitment process for the same position.

Issues in dispute

5.1.4 The Complainant contended that the conduct of the Municipality particularly in allowing Mr. Mgengo to apply for the position he was mandated to fill and failure to inform MEC Maine accordingly created conflict of interest and amounted to maladministration.

5.1.5 The Municipality in a letter dated 14 May 2018 signed by the Mayor, disputed the contention raised by the Complainant and responded "inter alia" that:

"33 In line with the Municipal Systems Act section 54A read with the Local Government: Regulations on the appointment of Senior Managers of 2014, the process of recruitment is a Municipal Council process that is overseen or led by the Mayor. The municipal manager or the Acting Municipal Manager is at no stage, by operation of the Law, involved in the process.

34 The letter of the MEC …….. did not at any stage confer Mr. Ndoda Mgengo with powers to oversee the recruitment process. The issues relating to recruitment raised in the letter were addressed to the Municipality as conditions for the secondment. In that letter, the Municipality had to inter alia, advertise the post immediately and
provide monthly progress reports on the recruitment process to the Office of the MEC.

35 On page 9 of the bundle, in a letter addressed to Mr. Mgengo from the MEC, Mr. Mgengo, as a seconded official had to inter alia report on steps taken to fill the vacant post of the Municipal Manager.

36 It is totally absurd to suggest that Mr. Mgengo was mandated to oversee the recruitment process as then this would effectively usurp the functions of Council in terms of the Act and the regulations. This is due to the fact that by Law, in the recruitment process, Council establishes a committee led by the Mayor to conduct the process.

"............................"

5.1.6 In terms of a letter dated 25 June 2016 from MEC Maine to the Municipality, paragraph 4 of the letter reads thus:

"Mr. Ndoda Mgengo is hereby seconded to Act as the Municipal Manager as prescribed in the above legislative requirements. (..........................). The following are the conditions for secondment.

- Advertise the post immediately......"
- .................................
- Monthly progress report on the recruitment process be requested within 7 days after each month of your period of secondment".

5.1.7 Whereas a letter dated 25 June 2016 issued by MEC Maine to Mr. Mgengo “inter alia” provides that:

“The following are the conditions for which you are seconded”
1. **Report monthly to the MEC in terms of section 54A(6) of the Municipal Systems Act and Regulations on, the following prescribed terms and conditions of secondment.**

   a) **Steps taken to fill the vacant post to which you are seconded**
   
   b) ........
   
   e) **Ensure the implementation of municipal council resolutions by the administration**
   
   f) ...........

5.1.8 The Attendance Registers for both the shortlisting process and Special Council Meeting of 3 March 2015 for the discussion of the Selection Panel report were received, perused; and noticeably the incumbent names does not appear in the attendance register. Therefore it can be concluded that though he was privy to the information and process he was not part of the discussions or the meetings.

5.1.9 The two letters dated 29 September 2014 and 23 December 2014, respectively, addressed to the MEC requested concurrence on an extension of the acting appointment of the Acting Municipal Manager, Mr Mgengo; and further updated the MEC about the progress made in filling the position of Municipal Manager. Although the Municipality was aware that Mr Mgengo was an applicant, the Municipality did not report to the MEC that Mr Mgengo is also a candidate for the position.

5.1.10 No evidence was obtained or provided by the Municipality to the Investigation team indicating that the incumbent had informed the MEC that he was interested in applying for the position he was mandated to fill. The conduct of the incumbent at the time raised questions and suspicions that his conduct was not in good faith.
5.1.11 It is evident that by virtue of being seconded to the Municipality, he was the Accounting officer and obliged to ensure that the position is advertised. He had access to all administrative actions undertaken by the Municipality, including the recruitment process to fill the position he was acting in. He was therefore expected at all times to be honest and act in good faith. When he developed interest in the position, he was under a duty to inform the MEC, to enable the MEC to decide accordingly.

5.1.12 In response to my Section 7(9)(a) notice on this issue, the Mayor submitted the following written response:

"9.1 ..................

9.3 Mgengo, did in fact inform the Mayor of the LTLM (who he was reporting to as the Acting Municipal Manager) and the MEC, Mr Collen Maine of his intention to apply for the position of Municipal Manager of the LTLM prior to applying for the position. Neither the MEC, nor the Mayor had any objections with him submitting an application for the position and he thus proceeded to apply for the position of Municipal Manager.

9.4 ..................

9.5 The appointment process for the position of Municipal Manager of the LTLM was managed, controlled, implemented, executed and finalized by the Mayor of the LTLM, on the instruction of the Municipal Council.

9.6 ..................

5.1.13 Though Mr Mgengo was mandated to assist the Municipality to fill the position and appeared as a contact person for enquiries in the
advertisement, no evidence suggested that he participated in the process to appoint the Municipal Manager. The submission of the Municipality in this regard is noted and on the balance of probabilities accepted.

5.1.14 Despite the fact that the enquiries in the advert were to be referred to Mr Mngengo, it does not appear, from the evidence in my possession that he was involved in any process that resulted in his appointment as the Municipal Manager.

*Application of the relevant legal framework*

5.1.14.1 According to the Organisation for Economic Cooperation and Development (OECD) conflict of interest is defined as:

"A conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities".

5.1.14.2 Section 195(1)(a) of the Constitution, provides that the:

"(1) 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) ................

5.1.14.3 Section 195(1)(a) of the Constitution, requires that the Municipality must be governed by the democratic values and principles enshrined in the Constitution which include, *inter alia*, the promotion and maintenance of a high standard of professional ethics. The Municipality administration
therefore must be conducted with a spirit of: integrity; honesty; transparency; openness; independence; and good faith.

5.1.14.4 Regulation 12 of the Local Government: Regulation on Appointment and Conditions of Employment of Senior Managers provides that the:

"(1) A municipal council must appoint a selection panel to make recommendations for the appointment of candidates to vacant senior manager posts.

(2) ....................

(3) The selection panel for the appointment of a municipal manager must consist of at least three and not more than five members, constituted as follows:
(a) the mayor, who will be the chairperson, or his or her delegate;
(b) A councillor designated by the municipal council; and
(c) At least on other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post".

5.1.14.5 Regulation 12 enjoins the Municipality to appoint a selection panel that excludes the Municipal Managers and/or the Acting Municipal Managers. The Municipality had appointed a selection panel that excluded Mr Mgengo, who was seconded to assist the Municipality to fill the position of Municipal Manager. He was therefore not privy to the process and proceedings.

5.1.14.6 Schedule 2 item 2 of the Municipal Systems Act, 2000, provides for general conduct of the municipal staff "inter alia" that:

"A staff member of a municipality must at all times-
(a) loyally execute the lawful policies of the municipal council;
(b) Perform the functions of office in good faith, diligently, honestly and in a transparent manner;
(c) ..................;
(d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised”.

5.1.14.7 To ensure that there was transparency, honesty and also that the incumbent performed his mandate and functions in good faith, he had a duty to advice/inform the MEC about his interest in the position to enable the latter to manage any perceived conflict of interest that should arise, and or to be recalled from the position as he had vested interest in it.

Conclusion

5.1.14.8 I am of the view that at the time Mr Mgengo was appointed the acting Municipal Manager, he had a legal duty to perform his duties in the best interest of the Municipality and to perform his work with trust both to the MEC and the Municipality. The Municipality’s contention that Mr Mgengo informed the MEC verbally is accepted and his application for the position subsequent declaration of interests to the Mayor and the MEC was sufficient to allow the Mayor and MEC to put measures in place to manage any perceive conflict of interest.

5.1.14.9 The Municipal Council’s decision to appoint the selection panel, without including Mr Mgengo despite him being seconded to assist the Municipality to fill the position, mitigated perceived conflict of interest as the incumbent was not allowed to participate in the process that appointed him the Municipal Manager.
5.2 Regarding whether the Municipality irregularly appointed Mr. Mgengo, who lacked the required skills, experience and competencies or qualifications for the position of the Municipal Manager:

Common cause issues

5.2.1 During September 2014, the Municipality advertised the position of Municipal Manager in both “The Sunday Times” and the “Sowetan” newspapers dated 07 September 2014 and 09 September 2014, respectively.

5.2.2 The requirements for the position of Municipal Manager were listed as follows:

(a) A Bachelor’s degree in Public Administration, Political Sciences, Social Sciences, Law or equivalent;
(b) Relevant experience at Senior Management level
(c) Must meet (or be in the process of meeting) the Competency Level as prescribed by the National Treasury (Regulation 18)”.

5.2.3 Mr Mgengo had the following qualifications when he was shortlisted:

(a) National Diploma in Town Planning & Regional Planning (NQF Level 6)
(b) National Certificate: Municipal Financial Management (NQF Level 6)
(c) Postgraduate Diploma in Management (NQF Level 8)

Work Experience:

(a) Director Development Planning (July 2007 – March 2011): Randfontein Local Municipality;
(c) Acting Municipal Manager (June 2004 – June 2005): Greater Taung Local Municipality;  
(d) Acting Director Technical Services (May 2006 – June 2007) Greater Taung Local Municipality;  
(e) Senior Planning Officer – PIMSS (March 2001 – October 2001) Alfred Nzo District; etc.

5.2.4 Mr Ndoda Mgengo applied for the position of Municipal Manager was shortlisted, interviewed together with five (5) other candidates i.e. Mr. Thabo Isaac Mokwena; Michael Moatshe; Lebu Ralekgetho; Morgan Atlholang Motswana and was subsequently appointed to the position.

5.2.5 These candidates were interviewed; competency assessment test were conducted by Gijima and Mr. Mgengo was recommended as the appointable Municipal Manager, with Mr. Mokwena and Moatshe being the second and third candidates, who were also found appointable should Mr Mgengo decline to accept the offer, respectively.

5.2.6 The Complainants challenged the appointment on the basis that it was irregular; and contravened the provisions of the Municipal Systems Act, 2000, the action that resulted in the MEC Honourable Galaletsang in October 2016, ordering the Mayor to terminate the incumbent’s appointment. The incumbent then resigned before his appointment was terminated by the Municipality. The MEC’s reason for the decision was that Mr. N Mgengo’s appointment does not comply with the Municipal Systems Act, since he does not possess the prescribed qualifications.

5.2.7 On 08 October 2017, the Municipality placed an advert in the “City Press” Newspaper bearing the same requirements on qualifications as the previous
advert and with a postgraduate qualification in the field related to public administration added as an advantage to candidates.

5.2.8 Mr Mgengo and four (4) other candidates applied and were shortlisted: Messrs Oduets Selby Boitseng; Mokgatle Ratlhogo; Ndoda Mgengo; Lebu Ralekgetho; and Michael Moatshe. The panel recommended Mr. Mgengo as the appointable candidate for the Municipal Manager’s position with Mr. Lebu Ralekgetho as a second appointable candidate should Mr. Mgengo decline the offer.

5.2.9 It is also not in dispute that Mr. Mgengo, who was seconded as the Acting Municipal Manager also applied for the position and was duly appointed the Municipal Manager in 2015.

5.2.10 Further that, despite the 2016 decision of MEC Gaolaolwe not supporting or concurring with the appointment of Mr. Mgengo in March 2015, and after the he had resigned from the position in October 2016, the Municipality advertised the position in 2017; shortlisted, interviewed and appointed Mr. Mgengo again in the position of the Municipal Manager in January 2018.

Issues in dispute:

5.2.11 The Complainant’s contention in this regard is that the Municipality had on two occasions unlawfully and irregularly appointed Mr. Mgengo who lacked the requisite qualifications for the position of Municipal Manager and thus his appointment was "null and void".

5.2.12 In responding to the contention raised by the Complainant, the Municipality did not expressly deny or dispute the allegations raised, but rather provided the Investigation team with Mr Mgengo’s curriculum vitae (CV) considered at the time of his secondment.
5.2.13 It became apparent from Mr Mgengó’s CV that he does not have a Bachelor degree in either of the fields of study mentioned in paragraph 7.3.2.6.1 above. The incumbent is in possession of the following academic qualification:

"National Diploma in Town & Regional Planning;
National Certificate: Municipal Financial Management; and
Postgraduate Diploma in Management."

5.2.14 Subsequent receipt of the report on the appointment process of Mr Ngengo, received on 24 January 2018 by MEC Gaolaolwe, the MEC evaluated the report and did not give concurrence but informed the Municipality through a letter dated 14 March 2018 that:

"The qualification of the incumbent are not consistent with the advert and Annexure B of the Regulations on the appointment of senior managers in terms of qualifications, I therefore advice that the Municipal Council apply for the waiver to the Minister in terms of Section 54A(10) for qualification requirements"

5.2.15 The question that arise now is whether the Postgraduate Diploma in Management can be regarded as an equivalent qualification required for the position?

5.2.16 To answer the above question the investigation team liaised with the North West University, and on 13 June 2018, Dr Johan Jordan, Programme Manager: Community Engagement; Alumni and Post-graduate Diploma in Management, NWU Business School, responded “inter-alia” that:

"The PGDM is on a higher NQF level than the required qualification, but it is a general qualification, whereas I think the post asked for a very specific academic discipline. If the issues is black or white, the answer is no (it is not
the required qualification). However, I am convinced that the PGDM awarded by the NWU leaves a candidate for a municipal manager in a better overall position than a subject-specific position for managing a municipality well. ............"

5.2.17 A desktop research was done and document with the heading "Understanding the South African National Qualification Framework NQF" published by Jobs.co.za [http://www.jobs.co.za/?s=jobs_search] was perused. The NQF levels bands were briefly explained as follows:

<table>
<thead>
<tr>
<th>&quot;NQF Level</th>
<th>Description</th>
<th>NQF Category</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NQF: One</strong></td>
<td>• Grade Four – Grade Nine (Standard two – Standard even)</td>
<td>GET – General Education and Training</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NQF: Six</strong></td>
<td>• Bachelor’s Degree (Three years)</td>
<td>HET: Higher Education and Training</td>
</tr>
<tr>
<td></td>
<td>• Higher Diploma</td>
<td></td>
</tr>
<tr>
<td><strong>NQF: Seven</strong></td>
<td>• Honor’s Degree</td>
<td>HET: Higher Education and Training</td>
</tr>
<tr>
<td></td>
<td>• Post Graduate Certificate</td>
<td></td>
</tr>
<tr>
<td><strong>NQF: Eight</strong></td>
<td>• Doctorate</td>
<td>HET: Higher Education and Training</td>
</tr>
<tr>
<td></td>
<td>• Masters</td>
<td></td>
</tr>
</tbody>
</table>

5.2.17.1 It was further explained that Higher Diploma and Bachelor’s Degree (NQF: Six) are attained no shorter than three (3) years of studies; whilst Post Graduate (NQF: Seven) are only obtainable after Bachelor’s Degree or can be obtained from a professional body of community experts.

5.2.18 The evidence and information received reveals that both MEC Gaolaolwe and Dr Jordan from NWU share the same sentiments that Mr Mgengo does not have the prescribed required qualification for the position. However, his
Post Graduate Diploma in Management is on an NQF level seven of studies, above the NQF level six on Bachelor's Degree.

5.2.19 The evidence further reveals that Mr Mgengo was appointed on two occasions despite lacking the relevant prescribed qualification for the position and in both occasions MEC Gaolaolwe declined to give concurrence on the appointment. Noticeably in 2017, the Municipality included a Postgraduate Diploma in a field related to public administration as added advantage, after the incumbent had obtained his Postgraduate-Diploma in Management qualification.

5.2.20 The evidence indicates that Mr Mgengo does not have the minimum required qualifications for the position of Municipal Manager as advertised but possesses a Postgraduate Diploma in Management which was required as an added advantage. The Municipality also did not dispute that Mr Mgengo does not have the prescribed required qualification for the position.

5.2.21 In response to my Section 7(9)(a) notice on this issue, the Mayor submitted the following written response:

"10.1 .............

THE 2015 APPOINTMENT

10.3 In 2015 the advertisement placed for the position of Municipal Manager by the LTLM clearly states that applicants will require “.....a Bachelor's degree in Public Administration, Political Science, Social Science, Law or equivalent” (own emphasis) in order for the applicants to qualify for the position of Municipal Manager.

10.4 The “equivalent” qualification requirement by the LTLM in the advertisement does not mean that the “alternative qualification”
must be the same in course contents as the qualification of a "....Bachelor's degree in Public Administration, Political Science, Social Science, [or] law......".

10.5 In fact, when one compares the course contents of the aforementioned four bachelor's degrees with each other it is obvious that the contents of these four degrees are vastly different from one another and cannot be described as "equivalents" to one another when utilising the criteria of "course contents", as was done by the Public Protector specifically in paragraph 8.2.2.14 of the Notice.

10.6 What is however required from an "equivalent" qualification is that that qualification must have the same NQF "rating" as the other four bachelor's degrees mentioned in the advertisement, to wit a minimum NQF level 6. This fact was also made abundantly clear by the LTLM in its response to the same allegation which were also raised by the MEC in a letter addressed to the Mayor of the LTLM dated 27 July 2016 and received on 28 July 2019, in a letter addressed to the MEC dated on 15 August 2016. A copy of the response from the LTLM addressed to the MEC dated 15 August 2016 is annexed hereto as Annexure "PP1".

10.7 In terms of the provisions of regulation 3 of the Local Government Municipal Finance Management Act Municipal Regulations on Minimum Competency Levels as promulgated in Government Gazette No 22967 of 15 June 2007 (hereafter "the Regulation") the accounting officer of a municipality must comply with "....the minimum competency levels required for higher education qualification, work related experience, core managerial and occupational competencies and be competent in the unit standards prescribed for financial and supply chain management competency
areas...." As set out in the said regulation. A copy of the Regulation is annexed hereto as annexure “PP2”.

10.8 It is clear from the schedule contained in regulation 3 of the Regulations that the “.....Higher Education Qualification...” required as a minimum competency level for accounting officer is “.....at least NQF Level 6 or Certificate in Municipal Financial Management ...” The advertisement placed by the LTLM for the position of Municipal Manager in 2015 complies with the provisions.

10.9 In terms of the contents of the National Treasury: Guideline for the Municipal Competency Levels: Accounting Officers, dated 1 July 2007 an example of a Higher Education Qualification NQF Level 6 is “....first three-year degrees & higher diplomas....”, which qualification Mr Mgengo possessed on the date of applying for the position as Municipal Manager of the LTLM in 2015.

10.10 .............

THE 2018 APPOINTMENT

10.13 When the position was advertised in 2017 the qualification requirements for the position were the same as in 2015, except it was stated that a “......postgraduate qualification in administration .......: would be “.....an advantage to candidates.....” (own emphasis) (as quoted from paragraph 8.2.2.7 of the Notice).

10.14 Allegations are made by the Public Protector that the qualification requirements were changed by the LTLM to give an advantage to Mgengo. It is not clear why this allegation is made, but we can state that it is not true. The contents of the advertisement were compiled with the criteria and requirements for the position in mind and was
done with the assistance and inputs from the Department of Local Government and Human Settlements. The advertisement was finalised subject to their inputs and approval. Email correspondence between officials of the LTLM and officials of the said Department proving same is annexed hereto as Annexure “pp4”.

10.15 When the advertisement states that a qualification will be an “advantage” to the candidates it does not mean that should a candidate not have the said “....postgraduate qualification in administration.....” that he does not have the “required qualification” in terms of the advertisement.

10.16 In paragraph 8.2.2.13 of the Notice the Public Protector elevates the “...postgraduate qualification in administration...” to a “requirement” for the position instead of it only being an “advantage” to candidates as stated in paragraph 8.2.2.7 of the Notice.

10.17 It is submitted that Mgengo, who was appointed by the LTLM as its Municipal Manager in March 2015 and again in January 2018, had a National Diploma in Town and Regional Planning (NQF Level 6), National Certificate: Municipal Finance Management (NQF Level 6) and Postgraduate Diploma in Management (NQF Level 8) a (as stated in paragraph 8.2.2.3 of the Notice) and as such he complied with the qualification requirements for the advertised positions of Municipal Manager in 2015 and 2017/2018.

10.18 ..............

10.20 It is our submission that the view of the Public Protector that the appointment of the Municipal Manager of the LTLM was flawed is
incorrect and should it be necessary we are willing explain the appointment and the processes relating thereto to the Public Protector at a meeting that will be scheduled for this purposes. The views of the LTLM was also confirmed by the North West University in documentation contained in Annexure “PP5”

10.21 It is of viral importance to note that despite the views of the MEC raised in 2016 when Mgengo resigned from the position of Municipal Manager, Mr Tebogo Terry Motlashuping, the Acting Deputy Director General (Institutional Development) of the Department of Cooperative Governance and Traditional Affairs (hereafter “COGTA”), who is the custodian of the implementation of the Regulations, and the person responsible for working with the enquiry relating to the appointment of Mgengo, on Wednesday, 11 September 2019 in a meeting held in Cape Town informed the Standing Committee on Public Accounts (hereafter “SCOPA”) that the CoGta:

10.21.1 has in fact perused the file received from the LTLM on the appointment process and the appointment of Mgengo;

10.21.2 is satisfied with the qualifications of Mgengo and that he meets the required competency levels; and

10.21.3 has in fact issued a letter of “concurrence” for the appointment of Mgengo, which has not been dispatched to LTLM for some unexplained reason.

5.2.22 The Municipality further provided a letter dated 22 May 2019 received from NWU Dr Johan Jordaan, explaining that Post Graduate Diploma in Management is on an NQF level 8, which is on par with honours degrees.
5.2.23 During the meeting held on 16 October 2019, with the Investigation Team the Municipality argued that “Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Gazette No 37245 of 17 January 2014, under scope of application provides that regulation must be read in conjunction “Local Government” Municipal Finance Management Act Municipal Regulations on Minimum Competency Levels as promulgated in Government Gazette No 22967 of 15 June 2007”, therefore Regulation 3 was evoked and therefore Mr Mgengo has a relevant qualification since he has NQF level 6 qualifications.

5.2.24 The Municipality is adamant that Mr Mgengo was/is eligible to be appointed its Municipal Manager, in terms of Regulation 3 of the “National Treasury: Local Government” Municipal Finance Management Act: Municipal Regulations on Minimum Competency Levels as promulgated in Government Gazette No 22967 of 15 June 2007, qualifies Mr Mgengo to be appointed the Municipal Manager.

5.2.20 Further that although the Municipality is aware of the provisions of Section 54A and that the scope of application, the Municipality was selective in the application of Section 54A and the “Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Gazette No 37245 of 17 January 2014, which now prescribe the qualifications for the position of the municipal manager and no longer NQF Level 6.

5.2.21 Noticeably the Municipality had only after receipt of the Section 7(9) Notice and when summoned to the Standing Committee on Public Account (SCOPA) meeting held on 11 September 2019 on other matters made follow up with COGTA about the outcome of the report submitted to the Minister on the appointment of Mr Mgengo.

5.2.22 No application requesting the Minister to waive qualifications for the position of the Municipal Manager was made by the Municipality as advised by MEC
Gaolaolwe. Therefore no concurrence was obtained either by MEC or Minister to date.

5.2.23 The contents of Mr Mgengo’s response in this regard were noted and it is not necessary to include, as it is the same as the above response received from the Municipality.

Application of the relevant legal framework

5.2.24 Section 195(1)(a) of the Constitution, provides that the:

“(1) 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.
(c) ...........
(f) Public administration must be accountable

(2) The above principles apply to:-
(a) administration in every sphere of the government;
(b) organs of state; and
(c) .........................

5.2.25 Section 195(1)(a) of the Constitution, requires that the public administration must be governed by the democratic values and principles enshrined in the Constitution which include, inter alia, the promotion and maintenance of a high standard of professional ethics and an accountable public administration.

5.2.26 These principles enjoins the Municipal Council and the Municipality to exercise a high level of professionalism and ethics including accountability
at the time of the appointment of the incumbent as the Municipal Manager. The Municipal Council and the Municipality should also strive to be above approach.

5.2.27 The decision of the Municipality to change the qualification requirements for the position by adding Postgraduate Diploma as an added advantage to the candidate, subsequent to the incumbent obtaining the qualification, does not uphold the public administration principles set in section 195. The conduct of the Municipality did not promote professional ethic envisaged in the Constitution.

5.2.28 Section 54A of the Municipal Systems Amendment Act, 2011, set out the process and requirement on the appointment of the Municipal Managers “inter alia” that:

“(1) **The municipal council must appoint** –

(a) **a municipal manager as head of the administration of the municipality**; or

(b) .........................

(2) **A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.**

(2A) .........................

(3) **A decision to appoint a person as municipal manager, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if**

(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or

(b) the appointment was otherwise made in contravention of this Act.

(4) **If the post of municipal manager becomes vacant, the municipality must**
(a) advertise the post nationally to attract a pool of candidates nationwide; and
(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.

5.2.29 Annexure B of the “Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Gazette No 37245 of 17 January 2014” provides for the following competence requirement for the municipal managers’ position inter alia:

<table>
<thead>
<tr>
<th>(a) HIGHER EDUCATION QUALIFICATION</th>
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<tbody>
<tr>
<td>Bachelor Degree in Public Administration/ Political Science/ Social Sciences/ Law or equivalent</td>
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<table>
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<tr>
<th>(b) WORK-RELATED EXPERIENCE AND KNOWLEDGE</th>
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<tr>
<td>Years of Experience</td>
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<tr>
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<tr>
<td>5 years</td>
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<thead>
<tr>
<th>Knowledge</th>
<th>Type of Knowledge</th>
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<tr>
<td></td>
<td>• Advance knowledge and understanding of relevant policy and legislation;</td>
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<tr>
<td></td>
<td>• Advance understanding of institutional governance systems and performance management;</td>
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<tr>
<td></td>
<td>• Advance understanding of council operations and delegation of powers;</td>
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<td></td>
<td>• Good governance;</td>
</tr>
<tr>
<td></td>
<td>• Audit and risk management establishment and functionality; and</td>
</tr>
<tr>
<td></td>
<td>• Budget and finance management.</td>
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</tbody>
</table>
5.2.30 In both occasions when appointing Mr. Mgengo, the Municipality was required to ensure that the incumbent, is in possession of either of the prescribed qualification as mentioned in "Annexure B" of the regulation as indicated in paragraph 5.2.25 above; and in the absence of the prescribed qualifications the applicant and in this case Mr. Mgengo was not eligible for appointment to the position by the Municipality.

5.2.31 A Postgraduate-Diploma in Management qualification possessed by the incumbent is on NQF level seven, above the NQF level of the prescribed qualification required in the Local Government Regulations. Mr Mgengo’s Postgraduate-Diploma can serve as an equivalent to the required qualification and therefore he is suitable and eligible for the position of the Municipal Manager.

Conclusion:

5.2.32 The law strictly prescribed the qualifications, skills and experience needed for the position of the Municipal Manager and further that any appointment where a person lacks the prescribed qualifications, skills and experience is against the rule and therefore "null and void". Although Mr. Mgengo does not have either of the prescribed qualifications for the position of the Municipal Manager in terms of section 54A(2) reading with the Local Government: Regulations on Appointment of Senior Managers; he is in possession of a postgraduate certificate, which is higher than the prescribed qualification, obtainable in 2017. As at 2017 Mr Mgengo was therefore eligible and appointable for the position of the Municipal Manager as prescribed by law.
5.3 Regarding whether the Municipality improperly paid 20% “market premium allowance” to Mr. Mgengo’s, if so does the decision amount to irregular expenditure:

**Common cause issues**

5.3.1 The Municipality paid Mr. Mgengo “market premium allowance” (allowance) to a maximum of 20% as part of his remuneration package, subsequent to his appointment in 2015.

**Issues in dispute**

5.3.2 The Complainant contended that the Mayor had authorised and paid the incumbent 20% allowance without the Council resolution. The conduct was perceived as improper and amounts to an irregular expenditure for the Municipality. He is therefore of the view that the Council must recoup the amount from the incumbent and the Mayor respectively.

5.3.3 The Municipality disputed the allegation and is adamant that there was no wrongdoing in giving Mr. Mgengo a 20% allowance subsequent to his appointment as the Municipal Manager. The Municipality responded as follows:

"17 The interviews were held on 4 December 2014 and a report was tabled before Municipal Council on 03 March 2015. The interview report recommended the following candidates in order of preference:

Ndoda Mgengo
Thabo Mokwena
Michael Moatshe"
20 That the Remuneration package was set at a total of R970 920-00. See appointment letter on page 45 of the bundle.

21 The salary range as per the advertisement was R661 990 – R809 100. This was in line with Government Notice 225 of 29 March 2014, determined by the then Minister for Cooperative Governance and Traditional Affairs in terms of section 72(2A) of the Municipal Systems Act 32 of 2000, attached hereunder on page 49-55 of the bundle.

22 In terms of Government Notice 225 of 29 March 2014, (..............) item 10 states that were a Municipality finds it difficult to attract suitable qualified and competent candidates due to scarcity skill in the local market as a result of the geographic location of the position, the Municipality may pay a market premium allowance to such a person.

That the allowance should not exceed 20% of the total remuneration package attached to a senior management position.

Therefore, Mr. Mgengo was offered, and accepted R809 100 plus the 20% market premium allowance hence his total package amounted to R970 920-00

23 .................

54 It should be indicated that at all material times the Mayor was acting within the boundaries of the law and any allegations to the contrary is devoid of any truth and is misleading”

5.3.4 The interview report for the position at page 130 provides “inter alia” as follows:
Having gone through the assessment reports of the three candidates coupled with the required information as prescribed by the Regulation of the Local Government Regulation on appointment of Senior Managers (Government Gazette no 37245) including Interview Report and their Personal Profiles (CV's), the panel recommends as follows:

1. That Mr. Ndoda Mgengo be appointed as Municipal Manager with effect from 01 February 2015.
2. Where for whatever reason Mr. Ndoda Mgengo is unable to accept the offer the following candidates be considered for the appointment in order of preference
   i. Mr. Thabo Mokwena
   ii. Mr. Michael Moatshe
3. That the remuneration of the appointment candidate be negotiated/made in line with Government Notice 225 Dated 29/03/2014 – Upper Limit of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to Municipal Managers.”

The Council Resolution 31/2015 of 03 March 2015 signed on 30 May 2018 (three years later) was also received and paragraph 4 thereof read as follows:

“That the remuneration of the appointed candidate be negotiated/made in line with Government Notice 225 dated 29/03/2014 – Upper limit of Total Remuneration Package Payable to the Municipal Managers and Managers Directly Accountable to Municipal Managers.”

The evidence received reveals that the Selection Panel had evoked regulation 10 of the Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers, and recommended to the Council that Mr. Mgengo’s remuneration be
negotiated. The Selection Panel provided no reasons to the Council, to support the decision why the remuneration of the appointed candidate should be negotiated, in particular because the first recommended candidate was unemployed at the time and chances of him declining the offer and the remuneration package were low.

5.3.7 On receipt of the Selection Panel report, the Council resolved that the Mr Mgengo's remuneration be negotiated, hence he received a market premium allowance. No reasons were noted by the Council at the time of the resolution to support the resolution. It is evident that the Council acted without questioning the Selection Panel recommendation in this regard.

5.3.8 In response to the Section 7(9)(a) notice on this issue, the Mayor submitted the following written response, that:

"11.1 The Public Protector, in paragraph 8.2.3.17 draws the negative, unfair and one-sided conclusion that the "...premium allowance to Mr Mgengo was irregular as it was based on an improper recommendation of the Selection Panel"

11.2 Once again it should be stated that neither the Selection Panel nor the key role players in the appointment process were interviewed by the Public Protector to obtain the reasons why the 20% market premium allowance was recommended, decided on an approved by Council prior to making this statement/finding.

11.3 The Local Government: Municipal Systems Act, Act 32 of 2000: Upper limit of total remuneration package payable to municipal managers and managers directly accountable to municipal managers, promulgated in Government Gazette No 37500 of 29 March 2014 (hereafter "The Remuneration Regulations") allows for
the LTLM to pay a market premium allowance to a senior manager in terms of the provisions of regulation 10 thereof.

10.4 It is our submission that the recommendation of the Selection Panel and the subsequent decision to allow for a 20% market premium allowance was justified and proper for the following reasons:

11.4.1 Mgengo was seconded to the LTLM and as such he was employed (and not "unemployed" as indicated by the Public Protector in par 10.3.3 of the Notice) as the "Acting Municipal Manager" of the LTLM at the time when he applied for the position of Municipal Manager. In this regard the Public Protector is also referred to the conditions of secondment wherein it is clearly stated that the MEC was willing to second Mgengo on the condition that the LTLM carries the costs involved with the appointment of Mgengo as set out and contained in Annexure "PP3" hereto.

11.4.2 During the period when Mgengo was seconded to the LTLM in July 2014 until his appointment in March 2015 and when determining his monthly salary, the following factors had to be taken into consideration by the Mayor, who was the authorised representative of Council to negotiate the salary with Mgengo:

(a) The geographic area where the LTLM is located: Due to the fact that Christiana is a rural area with only a small town in its vicinity it has been a tremendous challenge for the LTLM to find suitably qualified staff, who are willing to relocate to the rural area, take on the tremendous challenges that this small municipality is faced with and to retain the staff that is appointed.
(b) **The turn-around strategy requirements:** The turn-around strategy that was needed to improve the financial position of the LTLM and to address the large number of challenges that the LTLM was faced with was demanded the achievement of highly improved outputs. The candidates who were appointed in the position would have to work long hours under extremely stressful circumstances in order to achieve the desired outcome that was required to improve position of the LTLM.

(c) **The salary of the previous Municipal Manager which was paid until 30 June 2014:**

(i) In this regard it is standard practice that the person "acting" in the position will be remunerated at the same salary scale as the incumbent who is appointed in the position full time.

(ii) Mgengo was appointed as the Acting Municipal Manager with a salary that was based on same salary scale that was paid to the previous Municipal Manager, Mr MA Makuapane (hereafter "Makuapane") who was the Municipal Manager until 30 June 2014 and who was earning a monthly salary of **R83 486.32** as on 30 June 2014.

(iii) Mgengo was paid a monthly salary of R84 903.36 for the period that he was the Acting Manager of the LTLM, which period commenced on 1 July 2014.

(iv) A summary of the amounts earned by Makuapane and Mgengo in both his capacity as the acting Municipal
Manager and the Municipal Manager referred to in paragraphs 9.3.2 to 9.3.4 above, together with supporting documentation are annexed hereto as Annexure “PP7”

(d) The salaries of all the Managers reporting to the Municipal Manager:

(i) The Directors who were appointed during the period was already occupying the positions for an extended period of time and has received a number of annual increase over the different financial years.

(ii) This resulted in a situation where the directors were earning a higher salary than the new Municipal Manager would be earning if the Municipal Manager was appointed on the normal remuneration package for a category 2 municipality in terms of the Remuneration Regulations.

11.4.3 In terms of the provisions of regulation 9 (sic) of the Remuneration Regulations the factors that determines the offer of remuneration at appointment for a Municipal Manager are:

(a) Competencies, and

(b) Current earnings, read with the guidelines set out in regulation.

11.4.4 The Mayor was instructed by the Municipal Council to negotiate the salary with Mgengo, which is evident from the council resolution adopted by the Municipal Council under resolution number 31/2015 on 3 March 2015, ..........
11.4.5 Once Mgengo was appointed as the Municipal Manager in March 2015 his monthly remuneration was negotiated by the Mayor, who took all of the above facts and factors into account, discussed same with Mgengo and agreed on a monthly salary in the amount of R80 903.22

11.4.6 From the information set out herein above it is clear that:

(a) the salary received by Mgengo as the Acting Municipal Manager was based on the salary of the Municipal Manager who was appointed in the position at that point in time;

(b) once Mgengo was appointed as the Municipal Manager the salary that was negotiated with him was less than the salary that he was receiving when he was Acting Municipal Manager;

(c) the salary that was negotiated with Mgengo as the new Municipal Manager was:

(i) Necessary, fair, reasonable and justified in these circumstances;

(ii) in accordance with the provisions of Regulations 10 of the Remuneration Regulations;

(iii) in accordance with the Council Resolution adopted by the Municipal Council and the instructions and mandate given by the Municipal Council to the Mayor on 3 March 2015; and

(iv) authorised in accordance with the Municipal budget of the LTLM for financial period.
11.5 It should also be stated that the payment of the market premium allowance to the Municipal manager is a discretion of the Municipal Council which was exercised by the Municipal Council in accordance with the provisions of regulation 10 of the Remuneration regulations and which was clearly justified when taking all of the above facts into account.

11.6 As such, the conclusion reached by the Public Protector as set out in paragraph 8.2.3.17 and 10.3.1 to 10.3.5 is incorrect, unfair, unsubstantiated and wrong and these conclusion of the Public Protector, as contained in the Notice, are both unfair and unsubstantiated and a final finding by the Public Protector to this effect will taint the outcome of the entire investigation and the report.

5.3.9 In paragraph 10.4 of the Municipality response, the Municipality admitted that the Selection Panel chaired by the Mayor recommended a 20% market premium allowance to the candidates, and the conduct of the Selection Panel was therefore regarded justified and proper by the Municipality. Noticeably, the Municipality knowing the salaries of the then Directors-Managers reporting to the Municipal Manager and the fact that the incumbent would receive the salary less than that of the Directors went ahead to advertise the Municipal Manager position at a salary of R661 990 – R809 100, and later without following the provisions of Regulation 10 approved payment of the market premium allowance.

5.3.10 It is evident from the above response that the Municipality was well aware that a 20% market premium allowance is governed by Regulation 10 on the Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers the Municipality failed to adhere to the provisions of sub-regulation 10(2).
5.3.11 It is further immaterial whether the salary received by Mr Mgengo subsequent to his appointment was less than the salary he received when he was acting. It is further not justified to pay a 20% market premium allowance simply because the directors reporting to Mr Mgengo were earning more than what he was going to earn. What is key is whether the decision to pay a 20% market premium allowance was in accordance with the provisions of Regulation 10 on the Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers, which was not the case in this matter.

5.3.12 The contents of Mr Mgengo’s response in this regard were noted and it is not necessary to include, as it same as the above response received from the Municipality.

Application of the relevant legal framework

5.3.13 Regulation 10 of Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers: Government Notice No. 225 of 29 March 2014 provides for the payment of allowance “inter alia” that:

“10. (1) The payment of a market premium allowance is aimed at attracting and retaining suitable qualified and competent senior managers into municipalities where the approved pay range is not sufficient to attract and retain such.

(2) Where a municipality found it difficult to attract suitable qualified and competent candidates to fill a position of the senior manager such municipality may offer and pay a market premium allowance to suitable qualified and competent person.
(3) Market premium allowance may be paid to senior manager in the following instances:

(i) Scarcity of skills in the local pay-market due to the geographical location of the position.

(ii) ...........

(4) A market premium allowance of not more than 20% of total remuneration total package attached to a specific senior management position may be offered and paid.

(5) The percentage of the market premium allowance must be determined by the municipality through the assessment of the market, and the municipal council must satisfied itself that the market assessed is reflective of a sufficient sample and that a various market factors are considered sufficiently."

5.3.14 Regulation 10 of Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers allow the Municipality to pay a market premium allowance to a total of 20% of a total remuneration package to the Municipal Manager, if the Municipality found it difficult to attract suitable candidates.

5.3.15 The decision and the extent of the percentage must be determined by the Municipality through the assessment of the market, and the Municipal Council must have satisfied itself that the market assessed is reflective of a sufficient sample and the various market factors are considered sufficiently.

5.3.16 The decision of the Selection Panel to advise the Council to negotiate remuneration of package of Mr Mgengo, was against the conditions of Regulation 10. Nowhere in the report of the selection panel, does it state the reasons for such a directive that the salary had to be negotiated and rejected the offer on the salary as advertised. The decision of Council to pay the Mr
Mgengo "market premium allowance", without first exhausting all the other avenues to establish if other recommendable candidates would decline the package was against Regulation 10 of Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers. Nowhere in the report of the selection panel or minutes of Municipal Council does it state that Council:

(a) ....found it difficult to attract suitable qualified and competent candidates;
(b) ....There was scarcity of skills in the local pay-market due to the geographical location of the position,
(c) .....municipality through the assessment of the market, and the municipal council had satisfied itself that the market assessed is reflective of a sufficient sample and that a various market factors are considered sufficiently."

5.3.17 The Municipal Finance Management Act 56 of 2003 (MFMA) provides “inter alia” for the responsibilities of Municipal Officials as follows:

5.3.17.1 Section 61(1) of the MFMA provides that “the accounting officer of a municipality must –

(a) Act with fidelity, honesty, integrity and in the best interest of the municipality in managing its financial affairs.
(b) Disclosed to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor; and
(c) Seek within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality".
5.3.17.2 Section 62(1)(d) of the MFMA provides as follows:

"The Accounting Officer is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that authorised, irregular or fruitless and wasteful expenditure and other losses are prevented".

5.3.18 The Accounting Officer for the Municipality at the time was the Acting Municipal Manager Mr Mgengo, who was also a candidate. At the time he was not privy to the information and/or process to appoint the Municipal Manager including the payment of the market premium allowance to candidate appointable. Therefore he could not be expected to have taken steps to prevent irregular or fruitless and wasteful expenditure or any loss to the Municipality. Mr Mgengo therefore did not fail the Municipality by not performing his duties in terms of section 61(10)(b) of the MFMA.

Conclusion:

5.3.19 The process followed by the Municipality in paying a market premium allowance to Mr. Mgengo was irregular as it was based on an improper recommendation of the Selection Panel. The Municipal Council was expected to have acted in terms of Regulation 10 of Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers, and this never happened.

5.4 Regarding whether the Municipality unduly failed to comply with processes as required by section 54A(7) of Municipal Systems Amendment Act, 2011 on the appointment of Mr. Mgengo as Municipal Manager in 2015:
Common cause issues

5.4.1 In March 2015, the Municipality appointed Mr Mgengo into the position of the Municipal Manager and no report on the process followed on the appointment of the incumbent was provided to MEC Maine as prescribed by the Municipal Systems Amendment Act, to allow MEC Maine to exercise his oversight as required by the law. On receipt of the complaint that the appointment was irregular, MEC Gaolaolwe ordered the Municipality to terminate the appointment of Mr. Mgengo, who then resigned from the position.

5.4.2 That during a Special Council Meeting held on Tuesday 03 March 2015, the Council resolved “inter-alia” as follow:

“1. ...........
5. That the Council should within fourteen days submit a written report to the MEC for Local Government regarding the appointment process and outcome”.

5.4.3 The information received reveals that although the Council resolved that the incumbent’s appointment process report be furnished to the MEC Maine, the Municipality did not provide and/or report the appointment of Mr. Mgengo accordingly, to enable MEC Maine to exercise his oversight role in terms of the Municipal Systems Act.

5.4.4 In response to the Section 7(9)(a) notice on this issue, the Mayor submitted the following written response:

“12.1 Section 54A(7)(a) of the Local Government: Municipal systems Act, Act 32 of 2000 determine that “…the Municipal Council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.”
12.2 Mgengo was appointed by the Municipal Council of the Lekwa-Teemane Local Municipality on 03 March 2015. In this regard we refer the Public Protector to the copy of council resolution 31/2015 already annexed hereto as Annexure “PP6” as proof of the appointment.

12.3 The LTLM drafted the required report, together with all the relevant documentation annexed thereto, which report is dated 5 March 2015 and same was delivered to the MEC on 16 March 2015, which date is well within the prescribed 14 days’ timeframe stipulated in the Systems Act. A copy of this report together with the annexures thereto are annexed hereto as Annexure “PP9”.

12.4 As proof of service of the report the reader hereto is directed to the last page of the report where one Tumelo Maruping acknowledged receipt thereof on behalf of the office of the MEC.

12.5 Annexure “PP9” was submitted to the Office of the MEC for a second time, together with a letter dated 18 June 2016. A copy of the letter address to the MEC and which was submitted together with a copy of Annexure “PP9” is annexed hereto as Annexure “PP10”.

12.6 The conclusion reached by the Public Protector in paragraphs 8.2.4.6 and 11.1.1 to 11.1.5 of the Notice are thus clearly incorrect when one takes cognisance of the above referred to report and proof of service on the office of the MEC on 16 March 2015.

5.4.5 The contention and further information received in this regard confirmed by the Department Municipal Administration Support is accepted.
Application of the relevant legal framework

5.4.6 Section 54A further provides in subsection (7) and (8) that:

"(a) The municipal council must, within 14 days of the date of appointment, inform the MEC for local government of the appointment process and outcome, as may be prescribed.
(b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.

5.4.7 Subsequent to the appointment of the incumbent in March 2015, the Municipality was required to report the appointment process to the MEC within 14 days of the appointment and this never happened.

Conclusion

5.4.8 Subsequent the appointment of the Municipal manager in March 2015, the Municipality submitted the report on the appointment process followed to MEC Maine. The Municipality therefore had complied with section provisions of Section 54A(7).

6 FINDINGS

6.1 Regarding whether the conduct of the Municipality in allowing Mr. Mgengo to participate in the recruitment process and his final appointment as Municipal Manager caused conflict of interest and amounted to maladministration:

6.1.1 The allegation that the conduct of the Municipality by allowing Mr Mgengo to participate in the recruitment process and his final appointment as
Municipal Manager resulted caused conflict of interest and amount to maladministration, is not substantiated.

6.1.2 Schedule 2 item 2 of the Municipal Systems Act, 2000, enjoins the Municipal staff member in this instance, Mr Mgengo, at all time to be loyal in executing the lawful policies of the Council and perform their functions of office in good faith, diligently, honestly and in a transparent manner. Further, to act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised. With regard to the conduct of the incumbent all the above was found wanting.

6.1.3 Mr Mgengo’s application for the position he was seconded to was in conflict with his mandated role as the Acting Municipal Manager. However, when developing interests on being a municipal manager for the Municipality, he informed the Mayor and MEC that he would apply for the position. His disclosure of interest (verbally – own emphasis) was sufficient to allow the Mayor and MEC, to manage any conflicts/perceived conflicts that could arise. He had therefore acted in good faith, honesty and transparency. Mr Mgengo was therefore not conflicted.

6.1.4 The conduct of the Municipality was therefore not improper as envisaged in Section 182(1) of the Constitution and maladministration as in terms Section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Municipal Council irregularly appointed Mr. Mgengo, who lacked the required skills, experience and competencies or qualifications for the position of the Municipal Manager:

6.2.1 The allegation that the appointment of Mr. Mgengo as the Municipal Manager was irregular and contravene the law, is not substantiated.

6.2.2 The Municipality was obliged to adhere to the Local Government: Regulations on Appointment and Conditions of Employment of Senior
Managers: Gazette No 37245 of 17 January 2014 (Annexure B), when appointing Mr. Mgengo to the post of Municipal Manager. The decision to appoint Mr Mgengo in January 2018 was in line with the provisions of the law.

6.2.3 Mr Mgengo, is in possession of the postgraduate-diploma in management obtained in 2017, the qualification is above the NQF level for the prescribed qualifications for the position. He met the prescribed requirement for the post advertised, and therefore the Council in appointing him upheld the democratic values and principles enshrined in the Constitution and thus acted in line with the spirit espoused in section 195(1)(a) and (f) of the Constitution.

6.2.4 The conduct of the Municipality in this regard constitutes no improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged by the Public Protector Act, 1994.

6.3 Regarding whether the Municipality improperly paid a 20% “market premium allowance” to Mr. Mgengo’s, if so does the decision amount to irregular expenditure:

6.3.1 The allegation that subsequent to the appointment of Mr Mgengo in 2015 as Municipal Manager, the Municipality unlawfully authorised a 20% “market premium allowance” increase on his remuneration package, is substantiated.

6.3.2 Regulation 10(2) enjoins the Municipality pay market premium allowance when there latter was unable to attract qualified and suitable senior managers for the position, in this instance the Municipal Manager position.

6.3.3 The reasons provided for the decision to pay a market premium allowance to Mr Mgengo on the basis that the candidates were going to receive a
salary below that of the Directors and also that the salary received was
below the one Mr Mgengo received at the time of his tenure as the Acting
Municipal Manager are irrelevant and inconsistent with the provisions of
sub-regulation 10(2).

6.3.4 The Municipality's decision in this regard amount to contravention of the
Local Government Regulations 10 of Local Government: Municipal
Systems Act (32/2000): Upper Limits of Total Remuneration Package
Payable to Municipal Managers and Managers Directly Accountable to the
Municipal Managers, thereby incurring irregular expenditure.

6.3.5 The decision and/or action of the Municipality in this regard amounts to
improper conduct as envisaged in Section 182(1) of the Constitution and
maladministration in terms of Section 6(4)(a) of the Public Protector Act,
1994.

6.4 Regarding whether in 2015, the Municipality unduly failed to comply
with processes as required by section 54A(7) of the Municipal Systems
Amendment Act on the appointment of Mr. Mgengo as Municipal
Manager.

6.4.1 The allegation that subsequent to the appointment of Mr Mgengo in 2015,
the Municipality failed to report the appointment to the MEC, is not
substantiated.

6.4.2 The Municipality is obliged in terms of section 54(A)(7) of the Municipal
Systems Amendment Act, to report the appointment of the Municipal
Manager to the MEC, to enable the latter to give concurrence and also to
allow the latter should it be discovered that the appointment is not in terms
of the law, to take a decisive steps to ensure compliance.

6.4.3 Subsequent to the appointment of the incumbent in 2015, the Municipality
provided a report to MEC within 14 days as required.
6.4.4 The conduct of the Municipality in this regard constitutes no improper conduct as envisaged in Section 182(1) of the Constitution and maladministration in terms of Section 6(4)(a) of the Public Protector Act, 1994.

7 REMEDIAL ACTION

In light of the above findings I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution:

The Mayor is to:

7.1 Take necessary steps to determine the amount of money paid to Mr Mgengo as a “market premium allowance” for the 2015 appointment as Municipal Manager, and within sixty (60) days of this report, compile a report with recommendation for the attention of the Municipal Council.

7.2 Ensure that the report is tabled before the Municipal Council in the first Council meeting to be held subsequent the determination of the amount and the report to allow the Council to consider and deliberate on the report with a view to resolve what should happen with the report.

The Municipal Council is to

7.3 Ensure that the decision taken in (b) above, is communicated to MEC within thirty (30) days of the decision.

8 MONITORING

8.1 The Mayor must, within 30 working days of this report, submit an Action Plan to my office indicating how the remedial action will be implemented.
8.2 The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 30/03/2020

Assisted by: Mr Ditlhake Motona; Klerksdorp Regional Office, and
Mr Sechele Keebiñe: Provincial Representative: North West
REPORT NO: 149 OF 2019/2020 ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF THE MUNICIPAL MANAGER FOR LEKWA-TEEMANE LOCAL MUNICIPALITY: MR NDODA MGENGKO

1. Summary of the complaint

1.1 The Complainants allege the following:

1.1.1 That Mr Mgengo was seconded to the Municipality as the Acting Municipal Manager in July 2014, by the North West Province Member of Executive Council (MEC) for Local Government and Human Settlement Mr Collins Maine (MEC Maine) for a period of three (3) months. It was the terms of reference for his appointment to oversee the recruitment process and appointment of the Municipal Manager for the Municipality. However, when the position was advertised on 1 September 2014, two (2) months after the incumbent had assumed office as the Acting Municipal Manager, he applied and appointed to the position.

1.1.2 The Complainant is of the view that the Municipality had allowed him to be a candidate for the position and participate in the recruitment process and his final appointment as Municipal Manager therefore amount conflict of interest and amounted to maladministration:

1.1.3 That the Municipality had appointed Mr Mgengo to the position of the Municipal Manager in March 2015 and January 2018 respectively, despite him lacking the required qualifications, experience. Further that his appointment was never communicated to MEC Maine as required by
the Municipal Systems Act, 2000, and no concurrence was received from the MEC.

1.1.4 That, after Mr Mgengo's appointment as the Municipal Manager in 2015, without following legal prescripts, the Mayor authorized an increase to his remuneration package by twenty percent (20%) and this amounted to an irregular expenditure for the Municipality. The Complainant therefore believes that the Municipal Council should recover the money it paid to Mr Mgengo.

2. The following issues were considered and investigated:

2.1 Whether the conduct of Lekwa-Teemanke Local Municipality in allowing Mr Mgengo to participate in the recruitment process and his final appointment as Municipal Manager caused a conflict of interest for Mr Mgengo and amounted to maladministration;

2.2 Whether the Municipality irregularly appointed Mr Mgengo who lacked the required skills, experience and competencies and qualifications for the position of the Municipal Manager in 2015 and 2018 respectively;

2.3 Whether the Municipality improperly paid a twenty percent (20%) “market premium allowance” to Mr Mgengo after his appointment as Municipal Manager and whether such payment amounts to irregular expenditure; and

2.4 Whether the Municipality unduly failed to comply with processes as required by section 54A(7) of Municipal Systems Amendment Act on the appointment of Mr Mgengo as Municipal Manager in 2015.
3. Pursuant to the investigation of the issues, I made the following findings:

3.1 Regarding whether the conduct of Lekwa-Teemane Local Municipality in allowing Mr Mgengo to participate in the recruitment process and his final appointment as Municipal Manager caused a conflict of interest for Mr Mgengo and amounted to maladministration;

3.1.1 The allegation that the conduct of the Municipality by allowing Mr Mgengo to participate in the recruitment process and his final appointment as Municipal Manager resulted caused conflict of interest and amount to maladministration is not substantiated.

3.1.2 Schedule 2 item 2 of the Municipal Systems Act, 2000, enjoins the Municipal staff member in this instance, Mr Mgengo, at all time to be loyal in executing the lawful policies of the Council and perform their functions of office in good faith, diligently, honestly and in a transparent manner. Further, to act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised. Mr Mgengo conducted himself accordingly.

3.1.3 Mr Mgengo’s application for the position he was seconded to was in conflict with his mandated role as the Acting Municipal Manager. However, when developing interests on being a municipal manager for the Municipality, he informed the Mayor and MEC that he would apply for the position. His disclosure of interest (verbally – own emphasis) was sufficient to allow the Mayor and MEC, to manage any conflicts/perceived conflicts that could arise. He had therefore acted in
good faith, honesty and transparency. Mr Mgengoe was therefore not conflicted.

3.1.4 The conduct of the Municipality was therefore not improper as envisaged in Section 182(1) of the Constitution and maladministration as in terms Section 6(4)(a)(i) of the Public Protector Act.

3.2 Regarding whether the Municipal Council irregularly appointed Mr. Mgengoe, who lacked the required skills, experience and competencies or qualifications for the position of the Municipal Manager:

3.2.1 The allegation that the appointment of Mr. Mgengoe as the Municipal Manager in March 2015 was irregular and contravene the law is substantiated.

3.2.2 The allegation that the appointment of Mr. Mgengoe as the Municipal Manager in 2018 was irregular and contravene the law is not substantiated.

3.2.3 The Municipality was obliged to adhere to the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Gazette No 37245 of 17 January 2014 (Annexure B), when appointing Mr. Mgengoe to the post of Municipal Manager. The decision to appoint Mr Mgengoe in March 2015, who was did not meet the prescribed requirements for the position of the Municipal Manager, the Municipality clearly failed to uphold the democratic values and principles enshrined in the Constitution and thus acted contrary to section 195(1)(a); (f); (h) and (i) of the Constitution.

3.2.4 Mr Mgengoe, is in possession of the postgraduate-diploma in management obtained in 2017, the qualification that is above the NQF
level for the prescribed qualifications for the position. in January 2018, when he was appointed the Municipal Manager, he met the prescribed requirement for the post advertised, and therefore the Council in appointing him upheld the democratic values and principles enshrined in the Constitution and thus acted in line with the spirit espoused in section 195(1)(a) and (f) of the Constitution.

3.2.5 The conduct of the Municipality in this regard constitutes no improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged by the Public Protector Act, 1994.

3.3 Regarding whether the Municipality improperly paid 20% “market premium allowance” to Mr. Mgengos, if so does the decision amount to irregular expenditure:

3.3.1 The allegation that subsequent to the appointment of Mr Mgengo in 2015 as Municipal Manager, the Municipality unlawfully authorised a 20% “market premium allowance” increase on his remuneration package is substantiated.

3.3.2 Regulation 10(2) enjoins the Municipality pay market premium allowance when there latter was unable to attract qualified and suitable senior managers for the position, in this instance the Municipal Manager position.

3.3.3 The reasons provided for the decision to pay market premium allowance to Mr Mgengo, that the candidates were going to receive salary below that of the Directors and also that the salary received was below the one Mr Mgengo received at the time of his tenure as the Acting Municipal Manager are irrelevant and inconsistent with the provisions of sub-regulation 10(2).
3.3.4 The Municipality's decision in this regard amount to contravention of the Local Government Regulations 10 of Local Government: Municipal Systems Act (32/2000): Upper Limits of Total Remuneration Package Payable to Municipal Managers and Managers Directly Accountable to the Municipal Managers, thereby incurring irregular expenditure.

3.3.5 The decision and/or action of the Municipality in this regard amounts to improper conduct as envisaged in Section 182(1) of the Constitution and maladministration in terms of Section 6(4)(a) of the Public Protector Act, 1994.

3.4 Regarding whether in 2015, the Municipality unduly failed to comply with processes as required by section 54A(7) of the Municipal Systems Amendment Act on the appointment of Mr. Mgengo as Municipal Manager.

3.4.1 The allegation that subsequent to the appointment of Mr Mgengo in 2015, the Municipality failed to report the appointment to the MEC is not substantiated.

3.4.2 The Municipality is obliged in terms of section 54(A)(7) of the Municipal Systems Amendment Act, to report the appointment of the Municipal Manger to the MEC, to enable the latter to give concurrence and also to allow the latter should it be discovered that the appointment is not in terms of the law, to take a decisive steps to ensure compliance.

3.4.3 Subsequent to the appointment of the incumbent in 2015, the Municipality provided a report to MEC within 14 days as required.

3.4.4 The conduct of the Municipality in this regard constitutes no improper conduct as envisaged in Section 182(1) of the Constitution and
3.4.5 maladministration in terms of Section 6(4)(a) of the Public Protector Act, 1994.

4 Pursuant to the above findings, I have taken the following Remedial Action:

4.1 The Mayor is to:

4.1.1 Take necessary steps to determine the amount of money paid to Mr Mgengo as a “market premium allowance” for the 2015 appointment as Municipal Manager, and within 30 days of this report, compile a report with recommendation for the attention of the Municipal Council.

4.1.2 Ensure that the report is tabled before the Municipal Council in the first Council meeting to be held subsequent the determination of the amount and the report to allow the Council to consider and deliberate on the report with a view to resolve what should happen with the report.

4.2 The Municipal Council is to

4.2.1 Ensure that the decision taken in (b) above, is communicated to MEC within 15 days of the decision.

5 Monitoring of Remedial Action:

5.1 The Mayor must, within 30 working days of this report, submit an Action Plan to my office indicating how the remedial action will be implemented.
The signatures to this Certificate of Compliance below declare that the above checks have been performed.

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Institution: Tick the appropriate column for checks performed.

Think Tank: Quality Assurance

Certificate of Compliance
MEMORANDUM

TO: ADV BUSISIWE MKHWEBANE
    PUBLIC PROTECTOR

FROM: MS NELISIWE THEJANE
      EXECUTIVE MANAGER: PII

DATE: 26 MARCH 2020

SUBJECT: REQUEST FOR THE PUBLIC PROTECTOR TO APPROVE THE
DRAFT REPORT OF THE PUBLIC PROTECTOR ACT, 24 OF
1994: ON AN INVESTIGATION INTO ALLEGATIONS OF
IRREGULAR APPOINTMENT OF TO MR NDODA MGENGO AS
THE MUNICIPAL MANAGER FOR LEKWA-TEEMANE LOCAL
MUNICIPALITY: NORTH WEST PROVINCE

1. PURPOSE

1.1 To request the Public Protector to consider and approve the attached draft
report into allegation of irregular appointment of the Municipal Manager for
Lekwa-Teemane Local Municipality Mr Ndoda Mgengo.
2. MOTIVATION

2.1 The Klerksdorp Regional office of the Public Protector conducted an investigation into the above matter and has drafted the report for the attention of the Municipality, and the Complainants.

2.2 Attached hereto please find the report for the Public Protector's consideration and approval.

3. RECOMMENDATION

3.1 It is recommended that the Public Protector signs the attached report.

[Signature]

MS-N THEJANE
EXECUTIVE MANAGER: PII
DATE: 27/03/2023

[Signature]

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 27/03/2023

Comment: "EM - make sure you sign the Compliance Certificate. Please? (Ignore)"

Memo to PP regarding report in a matter of Messrs. Modise, E Muller and the Lekwa-Teemane Local Municipality
## THINK TANK: QUALITY ASSURANCE

Instruction: Tick the appropriate column for checks performed

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<th>Executive Manager</th>
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The signatories to this Certificate of Compliance below declare that the above checks have been performed.