
PUBLIC PROTECTOR SOUTH AFRICA

REPORT No. 152 of 2019/2020
ISBN 978-1-990942-64-8

"ALLEGATIONS OF IRREGULAR APPOINTMENT OF DISTRICT COORDINATOR FOR SPORTS, RECREATION, ARTS, CULTURE & HERITAGE BY DR KENNETH KAUNDA DISTRICT MUNICIPALITY: MR MOTSUMI KGANG

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IRREGULAR APPOINTMENT OF MR EZEKIEL MOTSUMI KGANG TO THE POSITION OF SPORTS, RECREATION, ARTS, CULTURE & HERITAGE COORDINATOR BY THE DR KENNETH KAUNDA DISTRICT MUNICIPALITY
# TABLE OF CONTENTS

**Executive Summary** 3

1. **INTRODUCTION** 7

2. **THE COMPLAINT** 8

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR** 8

4. **THE INVESTIGATION** 13

5. **THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS** 17

6. **FINDINGS** 27

7. **REMEDIAL ACTION** 28

8. **MONITORING** 29
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 Ezekiel Motsumi Kgang to the position of Sports, Recreation, Arts, Culture & Heritage Coordinator by the Dr Kenneth Kaunda District 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 Dr Kenneth Kaunda District Municipality irregularly appointed Mr Ezekiel Motsumi Kgang to the position of District Sports Coordinator, and

(b) Whether the Complainant and/or other candidates suffered prejudice as a result of the alleged irregular appointment of Mr Ezekiel Kgang.

(v) 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 District Municipality or its officials when appointing Mr Kgang as the District Sports Coordinator. These are the following:
In the matter between Anonymous Complaint and Dr Kenneth Kaunda District Municipality

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

(b) District Municipality Selection of Staff Policy

(c) The Constitution;

(vi) 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:

(a) Whether the Dr Kenneth Kaunda District Municipality irregularly appointed Mr Ezekiel Motsumi Kgang to the position of District Sports Coordinator:

(aa) The allegation that the Municipality irregularly appointed Mr Kgang, who lacks the required relevant qualifications and experience for the position of District Sports Coordinator, is substantiated.

(bb) According to the curriculum vitae submitted by Mr Kgang at the time he applied for the position, it is evident that he lacks the necessary qualifications; did not have 3-5 years' experience in sports management; and had no relevant skills required for the position. His appointment therefore compromised the Appointment and Selection Policy of the Municipality.

(cc) By appointing Mr Kgang who did not meet the prescribed requirements for the position of District Sports Coordinator, 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.

(dd) The appointment of Mr Kgang and the conduct of the Municipality in this regard was irregular, and amounts to improper conduct in terms of section 182(1) (a) of the Constitution and constitutes maladministration in terms of section 6 (4) (a) of the Public Protector Act 23 of 1994.

(b) Whether the Municipality, the Complainant and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr Ezekiel Kgang:

(aa) The allegation that the Municipality and other candidates who were interviewed with Mr Kgang suffered prejudice as a result of his irregular appointment, is substantiated.

(bb) The shortlisting and subsequent appointment of Mr Kgang prejudiced other applicants who had applied on the strength of their qualifications as stated in the advertisement. Had Mr Kgang not been shortlisted and appointed, the other recommendable candidates would have been considered for appointment.

(cc) The Municipality incurred fruitless and wasteful expenditure by conducting a recruitment process which was irregular and in contravention of the provisions of section 62(1) (d) of the MFMA.

(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 Speaker must:

(a) Within ninety (90) working days from the date of the report, ensure that the Municipal Council, in consultation with Municipal Manager declare the appointment of Mr Kgang to the position of Sports, Recreation, Arts, Culture & Heritage Coordinator as irregular. The salary of Mr Kgang should reflect as an irregular expenditure in the Municipality’s financial statement for the period 01 April 2014 to date;

The Municipal Manager must:

(b) Within ninety (90) working days from the date of this report, take disciplinary action against all officials who caused the irregular appointment of Mr Kgang;

(c) Within ninety (90) working days from the date of this report, recall Mr Kgang from the position of Sports, Recreation, Arts, Culture & Heritage Coordinator, as undertaken in their response to the Section 7(9) notice;

(d) Within ninety (90) working days from the date of this report, approach the Court to review the irregular appointment of Mr Kgang.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IRREGULAR APPOINTMENT OF MR EZEKIEL MOTSUMI KGANG TO THE POSITION OF SPORTS, RECREATION, ARTS, CULTURE & HERITAGE COORDINATOR BY THE DR KENNETH KAUNDA DISTRICT MUNICIPALITY

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 of the Public Protector Act to the following officials:

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

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

1.2.3 The Executive Mayor for the Municipality: Cllr Barel E Mosiane-Segotso;

1.2.4 The Municipal Manager: Mrs Sherly B Lesupi;

1.3 A copy of the report cannot be submitted to the Complainant who has selected to remain anonymous.

1.4 The report deals with the outcomes of an investigation into allegations of the irregular appointment of Mr Ezekiel Motsumi Kgang to the position of Sports,
Recreation, Arts, Culture & Heritage Coordinator by the Dr Kenneth Kaunda District Municipality (District Municipality)

2

THE COMPLAINT

2.1 The complaint was lodged with my office on 27 October 2017, by an anonymous complainant (the Complainant).

2.2 In essence the complaint is that:

2.2.1 The Complainant was one of the applicants for the position of District Sports Coordinator. The Municipality shortlisted and appointed Mr Ezekiel Motsumi Kgang (Mr Kgang) who did not meet the minimum requirements for the position.

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 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);

\(^1\) [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
\(^2\) at para [73].
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 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. I submit that there is a huge public interest in the public administration or in the governing of public affairs.

3.7 The institutions mentioned in this report, viz, Dr Kenneth Kaunda District Municipality is an organs of state and its 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 the District Municipality.

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 District Municipality dated 5 March 2020, to afford the institutions an opportunity to respond to the Public Protector’s provisional findings. Section 7(9) notice, was received by the District Municipality on 10 March 2020.

4.3.2 On 23 March 2020, the District Municipality met with the Investigator and discussed the Section 7(9) Notice; and 25 March 2020, a response from the District Municipality signed by the Municipal Manager Mrs MS Lesupi was received. The meeting discussions and the contents of the response were noted and shall be discussed below under issues responded to respectively.

4.4 **On analysis of the complaint and available information, the following were issues identified and investigated:**

4.4.1 Whether Dr Kenneth Kaunda District Municipality irregularly appointed Mr Ezekiel Motsumi Kgang to the position of District Sports Coordinator, and

4.4.2 Whether the Complainant and/or other candidates suffered prejudice as a result of the alleged irregular appointment of Mr Ezekiel Kgang?

4.5 **Key sources of information**

4.5.1 **Documents:**

4.5.1.1 Copy of page 14 of Klerksdorp Record dated 25 January 2013, bearing the District Municipality advert for the vacancy existed at the time.
4.5.2 Correspondence sent and received:

4.5.2.1 Public Protector letter of enquiry to the District Municipality addressed to the attention of the Municipal Manager dated 5 March 2018;

4.5.2.2 Letter received from the District Municipality signed by the Municipal Manager Mrs SM Lesupi, dated 26 July 2018.

4.5.2.3 E-mail sent to the following address modisem@kaundadistrict.gov.za and mmsecretary@kaundadistrict.gov.za, dated 10 September 2018 at 12:38 pm;

4.5.2.4 E-mail received from Morakane Modise <modisem@kaundadistrict.gov.za responding to the above e-mail send paragraph 4.5.2.3.

4.5.3 Legal and Regulatory Framework:

4.5.3.1 The Constitution;

4.5.3.2 Local Government: Municipal Systems Act 32 of 2000;

4.5.3.3 District Municipality Selection of Staff Policy

4.5.4 Case Law

4.5.4.1 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

4.6 Whether the Dr Kenneth Kaunda District Municipality irregularly appointed Mr Ezekiel Motsumi Kgang to the position of District Sports Coordinator:

Common cause issues:

4.6.1 The Municipality advertised the position of “Sports, Recreation, Arts, Culture & Heritage Coordinator” (District Sports Coordinator) in the Klerksdorp Record Newspaper on 25 January 2013. The requirements for the position of District Sports Coordinator as per the advert were as follows:

(i) "BA Degree/Diploma in sports management or equivalent
(ii) Code EB Drivers Licence
(iii) 3-5 years' experience in Sports management
(iv) Communication skills
(v) Conflict management
(vi) Leadership skills"

4.6.2 Mr Kgang applied for the position of District Sports Coordinator, attaching his Curriculum Vitae (CV), which indicated that he had the following qualifications and experience. No certificate was attached to his CV.

(i) National Diploma in Travel Tourism;
(ii) Drivers licence Code B; and
(iii) Worked in the Office of Gauteng ANCYL, and SMMT
Issues in dispute

4.6.3 The Complainant's argument is that Mr Kgang did not have the required qualifications for the position of District Sports Coordinator, therefore his appointment was irregular.

4.6.4 On 6 March 2018, the complaint was raised with the District Municipality and the Municipal Manager, Ms SM Lesupi responded in a letter dated 26 July 2018, inter alia that:

"We refer to the above mentioned matter.

The Municipality has attached the following documents as requested by your good self:

1. The copy of the advert, is attached hereto as annexure “PP1”
2. The advert was external;
3. The Recruitment and selection policy is attached hereto as annexure “PP2”;
4. The position was filled on 1 April 2013, all process were met;
5. The minutes of the shortlisting process could not be located at the Human resources department;
6. A number of 28 candidates applied for the position and 6 candidates were shortlisted and interviewed respectively.
7. The Municipality no longer has the minutes of the shortlisting and interview session, however the CV’s of the top five candidates are attached hereto as annexure “PP3”;
8. (sic) 8.1: The CV of E Kgang is attached hereto as annexure “PP4”,
8.2: In terms of the CV provided by the incumbent, the employee possessed a National Diploma in Travel Tourism;

8.3: The employee was considered suitable for the position according to the score sheet of the interview panel.

8.4: The employee was employed as a secretary to the Executive Mayor.

The Municipality has conducted an investigation into the matter, after having received your request into the matter. Therefore the Municipality is considering its options to bring the matter to finality, without causing unfair labour disputes”.

4.6.5 On 12 September 2018, the Municipality through an e-mail from Mr. Morakane Modise, further responded to the enquiry about the qualifications of Mr Kgang that “The employee is not in possession of National Diploma in Tourism”. (own emphasis added)

4.6.6 A copy of the Klerksdorp Record newspaper bearing the advert issued by the Municipality for the position, copies of Appointment and Selection of Staff Policies and Curriculum Vitae(s) of the top five shortlisted and interviewed candidates, including that of Mr Kgang were received and studied. Noticeably, it was discovered that of the four (4) Curriculum Vitae(s) received, three (3) candidates who had applied for the position had qualifications in either Sports Management or Administration and also met other requirements of the position.

4.6.7 The evidence received indicated that Mr Kgang had no qualification in sports management. He only had a code B driver’s license at the time of his appointment.

4.6.8 In response to my Section 7(9)(a) notice on this issue, the District Municipality on 23 March 2020, informed the Investigator that Mr Kgang was
its employee at the time of appointment and further proposed to recall him from the position and consider replace him respectively.

4.6.9 The District Municipality further submitted the following written response:

"With reference to the abovementioned matter and the report received on 10 March 2020

The Municipality does not dispute the findings of the Public Protector in this regard

Therefore the Employee will be recalled from the position as a remedial action.

We trust you will find the above in order".

4.6.10 The District Municipality does not dispute the findings in this matter and rather decided to terminate Mr Kgang’s appointment to the position of the Sports Coordinator, he is currently holding. The District Municipality’s decision in this regard is accepted and welcome as it will place the District Municipality in a position to appoint a competent and suitable candidates for the position.

Application of the relevant legal framework:

4.6.11 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) 

(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) .........................

4.6.12 Section 195(1)(a) of the Constitution enjoins the Municipality to exercise a high level of professional ethics, accountability including fairness when employing staff. The Municipality was therefore required at the time it employed Mr Kgang as District Sports Coordinator to act professionally and appoint a candidate with the ability and knowledge of the responsibilities assigned to the position; ensure that there is fairness in the recruitment process and no candidate is favoured above others.

4.6.13 The key instrument regulating the appointment of Mr Kgang is the Local Government Municipal Systems Act, 2000, and the Municipality's Selection of Staff and Appointment Policy. Section 50(1) of the Municipal Systems Act provides "inter alia" that: "Local public administration is governed by the democratic values". Section 50(1) emphasises constitutional obligations of the District Municipality as contained in section 195 of the Constitution.

4.6.14 The Municipal Systems Act, further provides for the staff establishment of the Municipality as follows:

(i) Section 67(1) "A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including-
(a) the recruitment, selection and appointment of persons as staff members,
(b) ..............
(e) the promotion and demotion of staff;
(f) ...............;
(g) grievance procedures;
(h) ...............;
(j) the dismissal and retrenchment of staff, and
(k) any other matter prescribed by regulation in terms of section 72."

(ii) Section 67(1) of the Municipal Systems Act enjoins the municipalities’ to establish staffing components and developed systems and procedures to ensure fairness, efficiency, effectiveness and transparent personnel administration which includes recruitment, selection and appointment of persons as staff members.

4.6.15 Based on sections 66 and 67 of the Municipal Systems Act, the Municipality (then the Southern District Municipality) drafted policies in line with sections 66 and 67 of the Municipal Systems Act – “Appointment Policy” and “Selection of Staff Policy”. The Appointment Policy provides for the following:

(i) Paragraph 1 for “Aim of Policy” as follows:

“The aim of the Appointment Policy is to create a sound procedure to appoint employees within the framework of the adopted Employment Equity Plan and in line with the Local Government Systems Act 32 of 2000 as well as other relevant legislation.”

(ii) Paragraph 3 for “Policy Objectives” as follows:

“To make appointment within the stipulations of the approved Employment Equity Plan and promoting affirmative action.
To provide employees access to training and the development of skills on a continuing basis.

To enhance the Batho Pele principles by appointing suitable personnel.

To, by appointing suitably qualified persons as defined in Chapter 3, section 20(3), (4) and (5) of the Employment Equity Act, render equitable. Efficient effective and sustainable services”.

(iii) Paragraph 6 for “Appointments” as follows:

“6.1 Municipal Manager

..............

6.4 Other officials

All other appointments starting from Post level 4 and below shall be done by the Department Manager as may be delegated by the Municipal Manager in consultation with the Executive Mayor, the Municipal Manager and the relevant MMC”.

4.6.16 The Municipality’s “Selection of Staff Policy” on the other hand provides for the following:

(i) At Paragraph 1 for “Preamble” as follows:

“The SDM believes in selection on merits to ensure that the Department recruits and promotes people of the highest calibre. The aim is to ensure that the person selected is the person best suited for the position on the basis of his/her skills, experience, abilities, personal attributes, potential
as well as the need to achieve a representative and diverse workforce in the SDM”.

(ii) At Paragraph 5 for Policy Principles as follows:

“5.1 ...............”

5.2 The suitability of a candidate must be determined with due consideration to the specific requirements as stipulated in the relevant CORE, post descriptions, post and person specifications as well as the key performance areas of the post. In other words only a person’s competence, knowledge, level of training, and skills potential in respect of the Affirmative Action Policy for a specific post may be taken into consideration.

5.3 Educational Qualifications should not alone predetermine suitability of candidates.

5.4 ...............”

(iii) Paragraph 8 provides for “Selection Procedure” as follows:

“8.2.1 Human Resources Practitioners should pre-screening of all applicants to determine candidates who clearly distinguish themselves from the others in meeting the relevant requirements for the posts”.

Conclusion

4.6.17 The Selection Policy allows the Municipality to consider educational qualifications to predetermine the suitability of candidates during
shortlisting, as in this instance for the position of the District Sports Coordinator. The Municipality was obliged during the pre-screening phase to determine whether the incumbent was competent to perform the responsibilities attached to the position. In determining whether Mr Kgang was competent to hold the position, the Municipality had to consider his work experience and training.

4.6.18 The Municipality shortlisted and duly appointed Mr Kgang, who lacked the qualification, knowledge and experience or skills for the position of District Sports Coordinator. The Municipality therefore failed to adhere and comply with the constitutional principles contained in Section 195, which governs public administration; and also failed to observe and comply with the internal recruitment and selection process at the time it filled the position of District Sports Coordinator.

4.6.19 Based on the evidence gathered Mr Kgang was not a suitable candidate for appointment to the position District Sports Coordinator. The conduct of the Municipality in this regard was therefore improper and amounts to maladministration.

4.7 Whether the Municipality, the Complainant and/or other candidates suffered prejudice as a result of the alleged irregular appointment of Mr Ezekiel Kgang:

Common cause issues:

4.7.1 The Complainant was neither shortlisted nor interviewed for the position of District Sport Coordinator. However, four (4) other candidates were shortlisted and interviewed.
Issues in dispute:

5.2.1 The Complainant argued that since Mr Kgang is receiving a salary that he does not deserve, the Municipality is incurring unauthorised, irregular or fruitless and wasteful expenditure since he did not meet the minimum requirements of the post. Further that other candidates, who may have qualified for appointment also suffered prejudice due to the irregular recruitment process.

5.2.2 The Municipality on the other hand informed the investigation team that:

“The Municipality has conducted an investigation into the matter, after having received your inquest into the matter. Therefore the Municipality is considering its options to bring the matter to finality, without causing unfair labour disputes”.

5.2.3 Though the Municipality did not expressly concede to wrongdoing at the time of appointing Mr Kgang, it undertook to take steps to address the complaint surrounding the appointment of the incumbent, without causing unfair labour disputes.

Application of the relevant law

5.2.4 Section 62(1)(d) of the Municipal Finance Management Act 56 of 2003 (MFMA) provides that: “The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure, that unauthorised, irregular, fruitless and wasteful expenditure and other losses are prevented.”
5.2.5 Failure to follow proper recruitment and selection process would lead to the Municipality incurring unauthorised, irregular or fruitless and wasteful expenditure.

Conclusion

5.2.6 Based on the evidence gathered, it can be concluded that the Municipality and other candidates who were interviewed with Mr Kgang suffered prejudice as a result of the incumbent’s irregular appointment contrary to the recruitment and selection prescripts.

6. FINDINGS

6.1 Whether the Dr Kenneth Kaunda District Municipality irregularly appointed Mr Ezekiel Motsumi Kgang to the position of District Sports Coordinator:

7.1.1 The allegation that the Municipality irregularly appointed Mr Kgang, who lacks the required relevant qualifications and experience for the position of District Sports Coordinator, is substantiated.

7.1.2 According to the curriculum vitae submitted by Mr Kgang at the time he applied for the position, it is evident that he lacks the necessary qualifications; did not have 3-5 years’ experience in sports management; and had no relevant skills required for the position. His appointment therefore compromised the Appointment and Selection Policy of the Municipality.

7.1.3 By appointing Mr Kgang who did not meet the prescribed requirements for the position of District Sports Coordinator, 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.

7.1.4 The appointment of Mr Kgang and the conduct of the Municipality in this regard were irregular, and amounts to improper conduct in terms of section 182(1) (a) of the Constitution and constitutes maladministration in terms of section 6 (4) (a) of the Public Protector Act 23 of 1994.

7.2 Whether the Municipality, the Complainant and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr Ezekiel Kgang:

7.2.1 The allegation that the Municipality and other candidates who were interviewed with Mr Kgang suffered prejudice as a result of his irregular appointment, is substantiated.

7.2.2 The shortlisting and subsequent appointment of Mr Kgang prejudiced other applicants who had applied on the strength of their qualifications as stated in the advertisement. Had Mr Kgang not been shortlisted and appointed, the other recommendable candidates would have been considered for appointment.

7.2.3 The Municipality incurred fruitless and wasteful expenditure by conducting a recruitment process which was irregular and in contravention of the provisions of section 62(1) (d) of the MFMA.
7. REMEDIAL ACTION

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

7.1 The Speaker must:

7.1.1 Within ninety (90) working days from the date of the report, ensure that the Municipal Council, in consultation with Municipal Manager declare the appointment of Mr Kgang to the position of Sports, Recreation, Arts, Culture & Heritage Coordinator as irregular. The salary of Mr Kgang should reflect as an irregular expenditure in the Municipality’s financial statement for the period 01 April 2014 to date;

The Municipal Manager must:

7.1.2. Within ninety (90) working days from the date of this report, take disciplinary action against all officials who caused the irregular appointment of Mr Kgang;

7.1.3. Within ninety (90) working days from the date of this report, recall Mr Kgang from the position of Sports, Recreation, Arts, Culture & Heritage Coordinator, as undertaken in their response to the Section 7(9) notice;

7.1.4. Failing which, the Municipal Manager must within ninety (90) working days from the date of this report, approach the Court to review the irregular appointment of Mr Kgang.
8. MONITORING

8.1 The Municipal Manager must, within sixty (60) working days from the date of the issuing of this Report, and for my approval, submit the implementation Plan to me indicating how the remedial action will be implemented;

8.2 The Municipal Manager must submit a report, within ninety (90) days as of the date of the report, to my office on the progress made in respect of the implementation of the remedial action.

8.3 In line with the Constitutional Court judgment in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Municipal Manager, Kenneth Kaunda District Municipality unless the Municipal Manager, obtains a Court order directing otherwise.

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

DATE: 21/03/2020

Assisted by: Mr Ditklhake Motona; Klerksdorp Regional Office, and
Mr Sechele Keebine: Provincial Representative: North West