
PUBLIC PROTECTOR
SOUTH AFRICA

Report No: 66 of 2019/20

“Allegations of maladministration in the irregular appointment of Ms Jane Sethini by the Ratlou Municipality”

REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF MALADMINISTRATION BY RATLOU LOCAL MUNICIPALITY IN THE IRREGULAR APPOINTMENT OF MS JANE SETHINI AS OFFICE ADMINISTRATOR FOR THE OFFICE OF THE SPEAKER
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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 (the Constitution) and published in terms of section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1) of the Constitution, following an investigation into allegations of maladministration to an investigation into allegations of maladministration by Ratlou Local Municipality (the Municipality) in the appointment of Ms Jane Sethini as Office Administrator for the Office of the Speaker without grade 12 as per the required qualification.

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

(iv) The complaint was lodged with my office on 24 March 2017, by Mr Tshepiso Reginald Dipheko (the Complainant).

(v) In essence the complaint is that in September 2016, the position of Office Administrator in the Office of the Speaker was advertised by the Municipality. However, the Municipality appointed an applicant who did not satisfy the minimum requirements for the advertised position.

(vi) Based on the analysis of the allegations, the following were issues were identified and investigated:

(a) Whether the Ratlou Local Municipality irregularly appointed Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker; and
(b) Whether the Ratlou Local Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Sethini.

(viii) Key laws and policies taken into account to determine if there had been maladministration by the Municipality and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Department when processing this complaint and include:

(a) The Constitution and Municipal Finance Management Act (MFMA) which provides principles and values governing accountable public administration and managing the financial administration of the municipality. The Municipality must for this purpose take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented.

(ix) I issued notices to the Premier of the North West Province, the Administrator; the MEC and to the Head of Department in terms of section 7(9)(a) of the Public Protector Act, but no response was received from the said officials. I also issued notices to the former Municipal Manager, Acting Municipal Manager, the Speaker and the Chairperson of the Shortlisting Panel and Responses are due on 3 September 2019.

(x) Having considered the evidence received during the investigation, the regulatory framework determining the standard that should have been complied with, I make the following findings:

(a) Regarding whether the Ratlou Local Municipality Irregularly appointed Ms Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker:
(aa) The allegation that the Municipality irregularly appointed Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker is substantiated.

(bb) The Municipality violated the provisions of Section 195(1) (a) in that it failed to uphold a high standard of professional ethics in the appointment of Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker. Such failure constitutes improper conduct as envisaged in section 182(1) (a) of the Constitution and maladministration as envisaged in section 6(4) (i) of the Public Protector Act.

(cc) The Municipality contravened Clause 4 of the Ratlou Local Municipality Recruitment and Selection Policy when it deviated from the Policy by appointing Ms Sethini on humanitarian grounds which is not one of the valid reasons for such deviation. Such contravention constitutes improper conduct as envisaged in section 182(1) (a) of the Constitution and maladministration as envisaged in section 6(4) (i) of the Public Protector.

(b) Regarding whether the Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Sethini.

(aa) The allegation that the Municipality and the other candidates suffered prejudice as a result of the irregular appointment of Ms Sethini is substantiated.

(bb) There were other qualifying applicants that were prejudiced in that all were not considered for the position despite the fact that they met all the requirements and in compliance with the Municipal Personnel Provisioning Policy (MPPP).
(cc) The decision by Mr Lekomanyane to appoint Ms Sethini under the circumstances resulted in the Municipality incurring an irregular expenditure.

(dd) The conduct of Mr Lekomanyane in the irregular appointment of Ms Sethini which led to the Municipality incurring irregular expenditure constitutes a contravention of sections and 60(a), 61(1)(d), 62(1) (d), 171(1) 173(1) of the MFMA.

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

(xi) The appropriate remedial action I am taking as envisaged in section 182(1)(c) of the Constitution are the following:

The Municipal Manager must:

(aa) Within thirty (30) working days from the date of this report, put processes in place to terminate the employment of Ms Sethini;

(bb) Within thirty (30) working days from the date of this report, recover all monies irregularly spent through unlawful and improper actions from the Mr Lekomanyane by instituting a civil claim, and

(cc) Within sixty (60) working days from the date of this report, ensure that disciplinary steps are taken against officials who conducted shortlisting, interview during the appointment of Ms Sethini.
1. INTRODUCTION

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

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to inform them of the outcome of the investigation and implementation of the remedial actions:

1.2.1. The Premier of the North West Provincial Government, Professor JT Mokgoro for noting;

1.2.2. The Administrator of the North West Provincial Government, Mr S Mpanza for noting;

1.2.3 The Member of the Executive Council for the Department of Cooperative Governance and Traditional Affairs, MEC G Kegakilwe;

1.2.3. The Head of Department of Cooperative Governance and Traditional Affairs, Mr PE Motoko, the HOD;

1.2.4. The Former Municipal Manager, Ratlou Local Municipality; Mr G Lekomanyane

1.2.5. The Acting Municipal Manager, Ratlou Local Municipality Mr C Sejake
1.2.6. The Speaker, Cllr O Seabelo,

1.2.7. The former Speaker Cllr M Dala

1.2.8. The Chairperson: Shortlisting & Interview Panel; Mr CM Muji

1.2.9. The Complainant, Mr TR Dipheko

1.3. The report relates to an investigation into allegations of maladministration and impropriety by Ratlou Local Municipality (the Municipality) in the appointment of the Office Administrator in the Office of the Speaker, Ms Jane Sethini (Ms Sethini) who applied for the position of Office Administrator without the required qualification of Grade 12.

2. **COMPLAINT**

2.1. The complaint was lodged with my office on 24 March 2017 by Mr TR Dipheko (the Complainant).

2.2. In the main, the Complainant alleged that:

2.2.1. In September 2016, the position of Office Administrator for the office of the Speaker was advertised by the Municipality.

2.2.2. One of the main requirements of the post was Grade 12, however the successful applicant did not have Grade 12.

2.2.4. Ms Sethini is getting a salary which she does not deserve.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

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

3.4. In *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 (5) BCLR 618 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."
3.5 In the above-mentioned Constitutional matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*, the Chief Mogoeng stated the following, when confirming the powers of the Public Protector:

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 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 the 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 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 judgement);
3.5.10.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(10) afford the Public Protector with the following three separate powers (paragraphs 100 and 101 of the judgement):
   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 judgement);

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 report). This a finding on NEF judgement 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 from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108 of the judgement); 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 judgement).

3.6 Section 182 (2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation;

3.7 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and abuse or unjustifiable exercise of power in the conduct of state affairs or an improper or dishonest act by any person in the employ of government at any level;
Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.9 The Municipality is an organ of state and its conduct falls within the Public Protector’s mandate to investigate; and

3.10 The Public Protector’s powers and jurisdiction to investigate and take appropriate remedial action were not disputed by the Department.

4. THE INVESTIGATION

4.1 The investigation Process

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

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

4.1.3. The investigation process included an exchange of correspondence the Municipal Manager, analysis of relevant documentation, conducted research and the consideration and application of relevant laws, regulatory framework and jurisprudence.
4.1.4. During the investigation process, notices in terms of section 7(9) (a) of the Public Protector Act (section 7(9) notice) were served on the Premier of the North West Provincial Government Prof. Job Mokgoro, the Administrator Mr S Mpanza; the MEC, Mr G Kegakilwe, the HOD Mr E Motoko, Former Municipal Manager Mr G Lekomanyane, Acting Municipal Manager Mr C Sejake, Councillor Seabelo, Councillor Dala, Chairperson Shortlisting panel Mr Muji, dated 21 August 2019, respectively, to afford them an opportunity to respond to my provisional findings. Responses are due on 03 September 2019.

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. In this particular case, the factual enquiry principally focused on Whether the Municipality irregularly appointed Ms Sethini to a position Office Administrator in the Office of the Speaker; and if so Whether the Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Sethini.
4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality or organ of state to prevent maladministration and improper prejudice to the Municipality and other candidates.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered any prejudice, in appropriate cases the idea is to place him or her as close as possible to where he/she would have been had the Municipality or organ of state complied with the regulatory framework setting the applicable standards for proper conduct and good administration.

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

4.3.1 Whether the Ratlou Local Municipality irregularly appointed Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker; and

4.3.2 Whether the Ratlou Local Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Sethini.

4.4 **The Key Sources of information**

4.4.1 **Documents received and considered**

4.4.1.1 A copy of an advertisement of the position of Office Administrator;
4.4.1.2 A copy of Ms Sethini's CV and application letter;
4.4.1.3 A copy of minutes of the interviews held 14 March 2017;
4.4.1.4 A copy of score sheet of the interviews held 14 March 2017;
4.4.1.5. A copy of offer of employment dated 5 April 2017;

4.4.2 Correspondence sent and received

4.4.2.1 A copy of the letter dated 20 June 2017 to Mr Glen Lekomanyane;
4.4.2.2 A copy of a reminder email dated 10 July 2017 to Mrs Patience Lekgetho (former Acting Municipal Manger);
4.4.2.3 A copy of the letter dated 13 July 2017 from Mrs Patience Lekgetho;
4.4.2.4 A copy of the letter dated 12 September 2017 to Mrs Patience Lekgetho,
4.4.2.5 A copy of the Recruitment and Selection Policy from Mrs Lekgetho;

4.4.3 Notices issued and responses received

4.4.3.1 Section 7(9)(a) notices to the Premier of the North West Provincial Government Prof Job Mokgoro; the Administrator Mr S Mpanza; MEC Mr G. Kegakilwe, The HOD Mr E Motoko, the Former Municipal Manager Mr G Lekomanyane, the Speaker Cllr Seabelo, the former Speaker Cllr Dala; the current Acting Municipal Manager Mr C Sejake, Chairperson of the shortlisting an interview panel Mr Muji, dated 20 August 2019.

4.4.3.2 At the time of the finalisation of the report I had not received any written submissions as they are due on 03 September 2019.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution Act 108 of 1996;
4.4.4.2 The Public Protector Act 23 of 1994;
4.4.4.3 The Municipality Finance Management Act, No 56 of 2003 (MFMA)
4.4.4.4 Ratlou Local Municipality Recruitment, Selection Policy dated August 2010 revised 01 July 2016 (the Recruitment and Selection Policy)
4.4.4.5. Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal 2014 (3) BCLR 333 (CC) paras [35] & [36]

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

5.1 Regarding whether the Ratlou Local Municipality irregularly appointed Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker:

Common cause issues

5.1.1. In September 2016 the Municipality internally advertised a position of Office Administrator to the Speaker with the closing date of 26 September 2016.

5.1.2. The requirements for the position of Office Administrator as stipulated in the internal advert were as follows:

- Grade 12 and computer literacy
- Tertiary qualification will be an added advantage
- Good interpersonal and communication skills
- Relevant secretarial administrative experience
- Ability to work under pressure
- Willingness to work over time
- Ability to write an executive report.
5.1.3. As per the advertisement, one of the main requirements was Grade 12 and the successful candidate Ms Sethini did not have Grade 12 at the time of applying for the position of Office Administrator.

5.1.4. Ms Sethini had previously worked as an Office Administrator in the office of the Speaker. As per the letter dated 30 September 2016 from the then Municipal Manager Mr Glen Lekomanyane, Ms Sethini was offered a temporary contract of three (3) months from 3 October 2016 to 31 December 2016.

5.1.5. Subsequent to the three (3) months contract, on 31 January 2017, Ms Sethini received a notice of extension of her contract, effective from 1 February 2017 until 31 March 2017.

5.1.6. The Municipality on 5 April 2017 offered Ms Sethini a permanent contract of employment valid from 1 April 2017 stating as follows:

"Note that the initial contract appointment letter dated 17 March 2017 has been withdrawn due to mutual agreement between yourself and the management"

5.1.7. There were eight (8) candidates who were shortlisted and two (2) could not make it to the interviews. Five (5) of the 6 candidates that were interviewed possessed Grade 12 which was the paramount requirement. Other candidates like Mr Tlhalele Daniel Molifi had an FET certificate in Human Resource Management and Practices Support in addition to a Grade 12.

5.1.8. The Municipality in their letter dated 13 July 2017 to my Office stated as follows:

"This communiqué serves to acknowledge your letter requesting the municipality to respond to the alleged maladministration relating to the appointment of Office Administrator (PA) in the office of the Speaker without matric."
Councillor Margaret Mataleho Dala was elected as the Speaker of Ratlou Local Municipality subsequent to the 2016 Local Government Elections. Ms Thethiwe Jane Sethini was then appointed as the Office Administrator on a temporary basis for six (6) months. Thereafter recruitment and selection procedures followed with the inclusion of Ms Thethiwe Jane Sethini by virtue of having served in the same position for six (6) months.

She performed exceptionally well during interviews amongst other candidates and the panel recommended her to be officially appointed as the Office Administrator to the Speaker (see attached documents)

The management realised that the recommended candidate being Ms Thethiwe Jane Sethini did not have matric although she performed well. This necessitated consultation between all participated stakeholders (Speaker, Applicant and Management)

Finally it was agreed that the salary package be reduced from a fixed term contract of five (5) years to a permanent position with level five (5) salary package. This consensus was made on humanitarian grounds and the fact that the applicant had experience, did not have matric and the Speaker preferred her."

5.1.9. Ms Sethini served the Municipality as an Office Administrator for a period of five (5) months before she was permanently employed in April 2017, contrary to the response from the Municipality that she had worked for 6 months.

5.1.10. In my considered view I am unable to find a reasonable basis for the response offered by the Municipality that the Complainant performed exceptionally well at the interviews despite her having no Grade 12 as the main requirement. There were other suitable candidates who met the requirement. It was a preconceived idea by the Municipality that Ms Sethini would be employed in the position that she
already occupied. To advertise the position, was a simply formality that had to be met by the Municipality, particularly the Speaker, who expressed her preference for Ms Sethini despite her not having Grade 12. The Municipality had no intention of appointing anyone else besides Ms Sethini.

5.1.11. This was further evident in the conversion of Ms Sethini’s fixed-term contract to a permanent contract of employment. Whilst the Municipality contended that Ms Sethini was employed at a lower level 5 salary package by virtue of her not having a Grade 12, she was compensated with a permanent appointment instead of a fixed-term contract of five (5) years.

Application of the relevant law

5.1.12. In terms of section 195 of the Constitution, the public administration must be governed by the democratic values and principles enshrined in the Constitution which include, \textit{inter alia}, the promotion and maintenance of a high standard of professional ethics and an accountable public administration.

5.1.12. The issue regarding the procedure that the Municipality should have followed is regulated by section 195(1) (a) of the Constitution which provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

\begin{itemize}
  \item \textit{(a) A high standard of professional ethics must be promoted and maintained.}
\end{itemize}
5.1.13. The Municipality must perform its duties within a high standard of professional ethics\(^1\). The officials of the Municipality should have been professional at all times and uphold the ethical code that goes with being a public servant.

5.1.14. In Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal 2014 (3) BCLR 333 (CC) paras [35] & [36] the Constitutional Court said the following concerning the duty of a functionary to correct any unlawfulness in public administration:

Public functionaries, as the arms of the State, are further vested with the responsibility, in terms of section 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights. As bearers of this duty and in performing their functions in the public interest public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public section as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.

This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a) (of the Constitution).

5.1.15. The former Municipal Manager had a duty to correct any unlawfulness in public administration by holding the relevant officials accountable and reversing the appointment of Ms Sethini.

5.1.16. The former Municipal Manager had a responsibility to respect, protect, promote and fulfil the rights in the Bill of Rights.

\(^1\) http://www.businessdictionary.com/definition/professional-ethics.html-The business dictionary defines professional ethics as: "Professionally accepted standards of personal and business behavior, values and guiding principles"
5.1.17. The former Municipal Manager had a duty in performing his functions in the public interest where faced with an irregularity in the public administration, in the context of employment or otherwise seek to redress it.

5.1.18. The Local Government, Municipal Systems Act 32 of 2000 (MSA) directs a municipality to develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including the recruitment, selection and appointment of persons. The Municipality adopted a recruitment, selection and appointment of its employees.

5.1.19. Section 9.1 of the Municipal Personnel Provisioning Policy (MPPP) no.101/2015 provides that the selection criteria must be based on the inherent requirements of the job.

5.1.20. The selection criteria for the position was that the applicants must possess Grade 12 and computer literacy, a tertiary qualification will be an added advantage. Relevant secretarial/administrative experience. Ms Sethini, who was appointed to the post did not meet the minimum requirements as she did not have Grade 12 at the time of the advertisement.

5.1.21. It is clear that the appointment of Ms Sethini made it difficult for more suitably qualified applicants to have the opportunity to contest for the position.

5.1.22. The Municipality has a Recruitment and Selection Policy (the Policy) that was initially approved in August 2010 and revised on 1 July 2016 and it is the guiding tool when it comes to appointments within the Municipality.

5.1.23. In terms of paragraphs 1.4 and 1.6 respectively of the policy of the Municipality, the Municipality defines Recruitment and Selection as follows:
“Recruitment” means the activities or process undertaken in the Human Resource Management by the Employer in order to attract sufficient job candidates who have the necessary potential, skills, knowledge, expertise, compliance and the traits to fill job requirements and to assist the Municipality in achieving its objectives.

“Selection” means the process of making the decision about the matching of candidates taking into account individual differences and the requirements of the job.

5.1.24. The Municipality had a duty to abide by the principles espoused in the Policy when appointing Ms Sethini. It was upon the officials of the Municipality to be mindful of the provisions of the Policy when appointing Ms Sethini. The policy emphasises the filling of a position with a candidate who meets the requirements of the position and does not make exceptions to the rule.

5.1.25. The former Municipal Manager, Ms P Lekgetho in her response letter dated 13 July 2017 stated that “This consensus was made on humanitarian grounds and the fact that the applicant had experience, did not have matric and the Speaker preferred her”.

5.1.26. However in the Policy, under paragraph 4, it clearly states that:

“This policy will apply to all recruitment activities within the Ratlou Local Municipality except where precluded for valid reason such as:

4.1 Organisational Structure; employee will be transferred and appointed where possible to revise structures in accordance with negotiated/ approved, matching & slotting procedure.

4.2 Re-deployment, existing employees at risk of redundancy, employees
whose disability causes to seek re-deployment or employees who otherwise have to retire due to ill health may be granted prior consideration for suitable positions as means of averting termination if employment to employees who are temporary appointment.

4.3 Moratorium on recruitment, in such situation online above consultation will take place with recognised trade unions.

4.4 Casual appointments, Casual workers are not guaranteed work is also not required to accept work when it is offered such duties are occasional or ad-hoc.”

5.1.27. The Municipality deviated from the Policy by appointing Ms Sethini on humanitarian grounds and it is not one of the valid reasons prescribed for deviation from the Policy. It is not clear why the Municipality did not re-advertise the position if the other shortlisted candidates did not meet the calibre of an individual that is best suited for the position.

5.1.28. There were seven (8) shortlisted candidates and two (2) did not come to the interview. Ms Sethini is the only one without Grade 12 of the six (6) candidates that attended the interview,. The other candidates had post matric qualifications in addition to Grade 12.

5.1.29. It was expected of the Municipality to adhere to the principles as stipulated in the Policy in an effort to uphold good governance in Local Government.
Conclusion:

5.1.30. In terms of Section 195 of the Constitution, the Municipality was constitutionally obliged to be accountable for its conduct in ensuring that proper processes are followed in appointing Ms Sethini to the position of Office Administrator in the Office of the Speaker. I am of the view that the conduct of the Municipality is in violation of the provisions of the Constitution as well as the Municipality’s Recruitment and Selection Policy in place, to regulate the procedure to follow in appointing candidates.

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

5.2 Regarding whether the Ratlou Local Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Sethini.

5.2.1. The Municipality’s decision to irregularly appoint Ms Sethini caused prejudice to other qualifying applicants as well as the Municipality itself in terms of irregular and wasteful expenditure. The other candidates were prejudiced in that were not considered for the vacant post despite meeting the requirements in compliance with the Municipal Systems Act.

5.2.2. The decision by Mr Lekomanyane to appoint Ms Sethini under the circumstances, resulted in the Municipality incurring an irregular expenditure.
Application of the relevant legal prescripts

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

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

5.2.2.2. 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 unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented”.

5.2.2.3. Mr Lekomanyane was expected to ensure that correct recruitment and selection processes were followed in the appointment of Ms Sthini. The appointment of any employee without following the prescribed recruitment and selection processes would result in an irregular expenditure.

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

(a) contravenes a provision of this Act;
(b) fails to comply with a duty imposed by a provision of this Act on the accounting officer of a municipality”.

5.2.2.5. Mr Lekomanyane was expected to comply with sections 61 and 62 of the MFMA to avoid committing financial misconduct.
5.2.2.6. Section 173(1) of the MFMA provides that:

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

(a) deliberately or in a grossly negligent way—

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

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

5.2.2.8. Section 32 regulates the process of reporting and recovery of unauthorized, irregular or fruitless and wasteful expenditure. It provides that

"(2) A municipality must recover unauthorized, irregular or fruitless and wasteful expenditure from the person liable for the expenditure…"

(6) The accounting officer must report to the South African Police Service all cases of alleged-

(a) Irregular expenditure that constitute a criminal offence…"
(7) The council of a municipality must take all reasonable steps to ensure that all cases referred to in subsection (6) are reported to the South African Police Service...”

5.2.2.9. The above provision obliges both the Municipal Manager and Council to report and recover any irregular expenditure that constitutes a crime.

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

Conclusion

5.2.2.11. Based on the evidence obtained above, it can be concluded that the appointment of Ms Sethini was not in compliance with the Constitution, MFMA and MPP.

The Municipality's response to the section 7(9)(a) notice

5.2.2.12. At the conclusion of my investigation, the following persons were served with a section 7(9), namely: - Section 7(9) (a) notices to the Premier of the North West Provincial Government Prof Job Mokgoro; the Administrator Mr S Mpanza; MEC Mr G Kegakilwe, The HOD Mr E. Motoko, the Former Municipal Manager Mr G Lekomanyane, the Speaker Cllr Seabelo, the former Speaker Cllr Dala; the current Acting Municipal Manager Mr C Sejake, Chairperson of the shortlisting an interview panel Mr Muji, dated 20 August 2019.

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3 Bressler MS 2014 at page 2 “Building the winning organisation through high-impact hiring.”
5.2.2.13. The purpose of the Notice was to afford them an opportunity to comment on the possible findings arising from the investigation. The recipients were afforded 10 working days to respond to the notices. However in terms of the Section 7(9) Notice they are expected to respond by 3 September 2019.

6. **FINDINGS**

Having considered the evidence received during the investigation, the regulatory framework determining the standard that should have been complied with, I make the following findings:

6.1 **Regarding whether the Ratlou Local Municipality irregularly appointed Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker.**

6.1.1. The allegation that the Municipality irregularly appointed Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker is substantiated.

6.1.2. The Municipality violated the provisions of Section 195(1) (a) in that it failed to uphold a high standard of professional ethics in the appointment of Ms Jane Sethini who lacked the qualifications for the position of Office Administrator in the Office of the Speaker. Such failure constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act.

6.1.3. The Municipality contravened Clause 4 of the Ratlou Local Municipality Recruitment and Selection Policy when it deviated from the Policy by appointing Ms Sethini on humanitarian grounds which is not one of the valid reasons for such deviation. Such contravention constitutes improper conduct as envisaged in
section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector.

6.2. Regarding whether the Ratlou Local Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Sethini.

6.2.1. The allegation that the Municipality and the other candidates suffered prejudice as a result of the irregular appointment of Ms Sethini is substantiated.

6.2.2. There were other qualifying applicants that were prejudiced in that all were not considered for the position despite the fact that they met all the requirements and in compliance with the MPPP.

6.2.3. The decision by Mr Lekomanyane to appoint Ms Sethini under the circumstances resulted in the Municipality incurring an irregular expenditure.

6.2.4. The conduct of Mr Lekomanyane in the irregular appointment of Ms Sethini which led to the Municipality incurring irregular expenditure constitutes a contravention of sections and 60(a), 61(1)(d), 62(1)(d), 171(1) 173(1) of the MFMA.

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

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

7.1. The Municipal Manager must:

7.1.1 Within thirty (30) working days from the date of this report, put processes in place to terminate the employment of Ms Sethini;

7.1.2 Within thirty (30) working days from the date of this report, recover all monies irregularly spent through unlawful and improper actions from Mr Lekomanyane by instituting a civil claim, and

7.1.3 Within sixty (60) working days from the date of this report, ensure that disciplinary steps are taken against officials who conducted shortlisting, interview during the appointment of Ms Sethini.

8. **MONITORING**

8.1 The Municipal Manager must, within fifteen (15) 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 30 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 Manger, Ratlou Local Municipality unless the Municipal Manger, Ratlou Local Municipality obtains a Court order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 16/09/2019