
PUBLIC PROTECTOR
SOUTH AFRICA

"Allegations of maladministration and improper conduct in connection with the affairs of the Tshwane Metropolitan Municipality".

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT IN CONNECTION WITH THE FAILURE TO IMPLEMENT RECOMMENDATIONS MADE IN AN INTERNAL FORENSIC INVESTIGATION REPORT AND THE IRREGULAR APPOINTMENT OF PERSONNEL PROSECUTORS AND PRESIDING OFFICERS IN DISCIPLINARY PROCEEDINGS BY THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY.
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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 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 the provisions of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration and improper conduct in connection with the failure by the City of Tshwane Metropolitan Municipality (CoT) to implement recommendations made in the Group Audit and Risk Department (GARD)’s Forensic Investigation Report Number FIS03/09/2012, published on 28 September 2012; the irregular appointment of the Tshwane Metropolitan Police Department (TMPD)’s Director of Police and the irregular appointment of presiding officers and prosecutors by the Director of Police in disciplinary proceedings against metropolitan police officials without requisite authority.

(iii) The investigation was conducted following a complaint I received from a Freedom Front Plus’ Member of Parliament, Adv. Anton de Waal Alberts, MP (Adv. Alberts, MP) on 2 March 2016.

(iv) THE COMPLAINT

(aa) The allegations by Adv. Alberts, MP are that, the CoT failed to implement recommendations made in the Group Audit and Risk Department’s Forensic Investigation Report Number FIS03/09/2012, published on 28 September 2012, following an investigation into allegations of improper conduct on the part of the TMPD’s Director of Police, Mr Moloko Frans Rachekhu (Mr Rachekhu);
(bb) Further that, the release of impounded vehicles from the CoT's Pound on instruction of Mr Rachekhu was contrary to legislative prescripts regulating the release of impounded vehicles by the CoT, which allegedly resulted in CoT incurring the loss of income attributed to storage and towing fees;

(cc) Following media reports published in the *Pretoria News and Business Report* newspapers dated 18 September 2015, relating to the failure by the former TMPD's Chief of Police, Mr Steven Ngobeni (Mr. Ngobeni) to disclose his criminal record prior to his appointment as the Chief of Police, a grievance was lodged by Mr J M Khumalo, on 13 July 2015, in which Mr Rachekhu's educational qualifications and his suitability to hold the position of the Director of Police was challenged; and

(dd) In addition, that the appointment of presiding officers and prosecutors by Mr Rachekhu in disciplinary proceedings, as well as the institution of disciplinary action against metropolitan police officials, in particular, Ms. Pauline Moncha (Ms Moncha), who was subsequently not found guilty by the Disciplinary Committee for the alleged transgressions, was improper and constituted abuse of power on the basis that Mr Rachekhu was not authorised to appoint presiding officers and prosecutors, as well as institute disciplinary proceedings against metropolitan police officials, thus his conduct caused the Council to incur irregular, fruitless and wasteful expenditure to an amount of approximately one hundred and two thousand rand, (R102, 000.00).

(v) Based on the analysis of the complaint and the allegations contained therein, the following issues were identified to inform and focus the investigation:

(a) **Issue 1**: Whether the CoT failed to implement recommendations made in the GARD Forensic Investigation Report published on 28 September 2012, and if so, whether the conduct constituted maladministration or improper conduct;
(b) **Issue 2:** Whether Mr Rachekhu was in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police and if not so, whether his appointment was improper; and

(c) **Issue 3:** Whether the appointment of presiding officers and prosecutors by Mr Rachekhu in disciplinary proceedings against metropolitan police officials, as well as the institution of same was improper, and if so, whether the conduct constituted maladministration and caused the Council to incur fruitless and wasteful expenditure.

(vi) The investigation process included exchange of documentation between the Public Protector and the CoT’s former City Manager, Dr. Moeketsi Mosola, as well as senior officials of the CoT. Correspondence was exchanged between, the Public Protector and the Deputy-Director: Democracy Development Citizen Relationship Management in the Office of the City Manager, Mr. Thivhulawi Nyambeni.

(vii) All relevant documents and correspondence were obtained and analysed in particular, copies of the impugned GARD’s Forensic Investigation Report Number FIS03/09/2012. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.

(viii) Key laws and policies taken into account to determine if there had been maladministration or improper conduct on the part of the CoT and the Director of Police were principally those imposing administrative standards that should have been complied with by the CoT, and its employees when releasing impounded vehicles, appointing the employees, as well as presiding officers and persecutors in disciplinary proceedings against its employees.
(ix) Having considered the evidence obtained during the investigation weighed against the relevant regulatory framework as well as the complaint received when weighed against the standard that was expected to be upheld by the CoT, I now make the following findings:

(a) **Issue 1:** Whether the City of Tshwane Metropolitan Municipality failed to implement recommendations made in the GARD Forensic Investigation Report published on 28 September 2012, and if so, whether the conduct constituted maladministration or improper conduct;

(aa) The allegation that the CoT failed to implement recommendations made in the GARD Forensic Investigation Report Number FIS03/09/2012 published on 28 September 2012, is **substantiated**.

(bb) In terms of section 165(1) of the MFMA, 2003, each municipality and municipal entity must have an internal audit unit whose primary objective is to, amongst others, advise the accounting officer and report to the audit committee on the implementation of internal audit plan and matters relating to risk and risk management, loss control and compliance with the MFMA, 2003, as well as to perform such other duties as may be assigned to it by the accounting officer.

(cc) It was established during the investigation that, in compliance with section 165(1) of the MFMA, 2003, the CoT established a Group Risk and Audit Department in 2012, whose primary objective was to add value and improve the organisation’s operations and further to assist the organisation to accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes as set out in the Internal Audit Charter approved by the Audit and Performance Committee.
(dd) In addition, it was also established that the GARD was charged with an investigation into the improper release of impounded vehicles from the CoT’s Pound in 2010, allegedly on instruction of the Director of Police, Mr Moloko Rachekhu which subsequently led to the loss of revenue attributed to towing and storage fees.

(ee) The CoT conceded in a letter dated 21 September 2018, that it had received recommendations made in the GARD forensic investigation report published on 28 September 2012, however, for reasons unknown the former Chief of Police, Mr. Steven Ngobeni failed to institute disciplinary proceedings as recommended.

(ff) Additionally, on 27 March 2019, the CoT conceded that it should have acted on the recommendations made in the GARD forensic report when the matter was brought to its attention. Further thereto, the CoT made an undertaking to implement the findings and recommendations made in the report notwithstanding the fact that the matters arose prior to the appointment of the City Manager and the current TMPD Chief of Police.

(gg) In the circumstances, I find that the failure by the CoT to implement recommendations made by the GARD constituted improper conduct envisaged in section 182(1)(a) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

(b) **Issue 2:** Whether Mr Rachekhu was in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police and if not so, whether his appointment was improper;

(aa) The allegation that Mr Rachekhu was not in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police, **is not substantiated.**
(bb) In terms of Paragraph 5.2.4 of the CoT' Staffing Policy, a candidate is considered to be suitably qualified for appointment to a position based on one or a combination of his /her formal qualifications; recognition of prior learning; relevant experience; the ability to perform the job; the capacity to acquire, within a reasonable time, the ability to perform the tasks; and applicable legislation and legal aspects.

(cc) According to the advertisement for the Director of Police's position, the peremptory requirements to be met by candidates for consideration and appointment in same were set as an appropriate tertiary, career-related qualification (a three (3) year National Diploma or Degree); relevant experience in the Metro Police environment; and management experience.

(dd) The information and documentation obtained during the investigation indicates that Mr Rachekhu was in possession of qualifications mentioned hereunder, which rendered him a competent incumbent to hold the position of the TMPD's Director of Police;

(i) A Diploma for Traffic Officers approved by the former Administrator of the Transvaal in accordance with the Road Traffic Act, 29 of 1989; and

(ii) A Certificate in Traffic Management obtained from the Institute of Traffic and Municipal Police Officers of Southern Africa, which subsequent to the promulgation of the Higher Education Act, 1997 (Act 101 of 1997), was accredited by the South African Qualifications Authority to a Diploma with a National Qualification Framework Level 6 status. Furthermore, Mr Moloko Rachekhu was registered as a Traffic Officer on 3 February 1994.
(ee) In addition to the educational qualifications, it was established that prior to Mr. Rachekhu’s appointment to the position of Director of Police TMPD, he acted in the position of Commander Protection Services: Community Safety for the period 2002 to 2004. He also held a position of Senior Superintendent: Community Safety for the period 2006 to 2007.

(ff) Furthermore, Mr. Rachekhu was subsequently appointed to a position of Commander Central Region: Community Safety from 19 February 2007 until his appoint to the position of Director of Police on 1 July 2009, which brought his experience within the Metro Police environment to a total of sixteen (16) years.

(gg) Therefore, the allegation that Mr. Moloko Rachekhu was not in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police has no merit and could not be supported by the evidence obtained and analysed during the investigation.

(hh) In the circumstances, I am not making a finding and taking any appropriate remedial action as contemplated in section 182(1)(c) of the Constitution of the Republic of South Africa, 1996(Act 108 of 1996)

(c) **Issue 3:** Whether the appointment of presiding officers and prosecutors by Mr. Rachekhu in disciplinary proceedings against metropolitan police officials, as well as the institution of same was improper, and if so, whether the conduct constituted maladministration and caused the Council to incur fruitless and wasteful expenditure.

(aa) The allegation that the appointment of Presiding Officers and Prosecutors in disciplinary proceedings instituted against certain metropolitan police officials, as well as the institution of same at the behest of Mr Rachekhu was improper, is **substantiated.**
(bb) In terms of section 62(1)(e) of the MFMA, 2003, it is the responsibility of the accounting officer to take reasonable steps to ensure that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct.

(cc) Further thereto, in terms of Paragraph A13 of the CoT Corporate System of Delegations of 26 January 2012 read with Paragraphs 7.3 and 7.6 of the CoT Disciplinary Policy, it is the responsibility of the accounting officer or his/her authorised representative to institute disciplinary proceedings and appoint a presiding officer in the event *prima facie* causes to believe that an act of misconduct has been committed by an employee of the municipality exists.

(dd) According to the information received during the investigation, it was established that Mr. Rachekhu conceded in his testimony before the South African Local Government Bargaining Council’s Commissioner Magale Matlala, in a matter between *Independent Municipal and Allied Trade Union (IMATU) obo Pauline Moncha and The City of Tshwane Metropolitan Municipality* under Case Number PMD 051302, that he was the Director: Quality Policing and that his responsibilities included but not limited to overseeing disciplinary processes within the TMPD.

(ee) Further thereto, Mr Rachekhu conceded that he had indeed signed the notice informing Ms Pauline Moncha of her imminent disciplinary enquiry, as well as signing the approval of the appointment of presiding Officers and prosecutors in the same disciplinary enquiry.
(ff) I could not find evidence indicating that in 2012, Mr Rachekhu was authorised by the City Manager or the TMPD’s Chief of Police to institute disciplinary proceedings against metropolitan police officials and appoint presiding officers, as well as prosecutors in same as envisaged in Paragraph A13 of the CoT Corporate System of Delegations of 26 January 2012, read with Paragraphs 7.3 and 7.6 of the CoT Disciplinary Policy, thus his conduct caused the CoT to incur irregular expenditure.

(gg) In the circumstances, I find that the institution of disciplinary proceedings against metropolitan police officials by Mr Rachekhu and appointment of presiding officers and prosecutors in same constituted improper conduct envisaged in section 182(1)(a) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

(x) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying maladministration, improper conduct and the abuse of power referred to in this report is the following:

(a) The Municipal Council of the City of Tshwane Metropolitan Municipality must;

(aa) Take cognisance of the findings of maladministration and improper conduct by the City Manager and the Director of Police identified in the report and ensure that such action is not repeated.

(b) The City Manager of the City of Tshwane Metropolitan Municipality must;

(aa) Take cognisance of the findings on the improprieties identified in the report and ensure that such conduct is not repeated and appropriate corrective action is taken to prevent the recurrence of the improprieties referred to in the report;
(bb) Consider recommendations made in internal forensic investigation reports on investigations conducted by the Group Audit and Risk Department and ensure that same is tabled in the Municipal Council for deliberation.

(cc) Report to the National Treasury and the Auditor-General particulars of the identified financial misconduct and the steps taken in connection with such financial misconduct, as contemplated in section 175 of the MFMA 2003;

(dd) Ensure that delegations to take disciplinary action and appoint presiding officers and prosecutors in disciplinary actions against municipal officials are in place.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT IN CONNECTION WITH THE FAILURE TO IMPLEMENT RECOMMENDATIONS MADE IN AN INTERNAL FORENSIC INVESTIGATION REPORT AND THE IRREGULAR APPOINTMENT OF PERSONNEL PROSECUTORS AND PRESIDING OFFICERS IN DISCIPLINARY PROCEEDINGS BY THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY.

1. INTRODUCTION

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

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1. The Executive Mayor of the Tshwane Metropolitan Municipality, Cllr Stevens Mokgalapa;

1.2.2. The Acting City Manager of the Tshwane Metropolitan Municipality, Mr Mooketsi Ntsimane;

1.2.3. The Chief of Police, Tshwane Metropolitan Police Department, Lt-Gen Johanna Nkomo;

1.2.4. A copy of the report is also provided to the complainant, Adv Anton de Waal Alberts, MP to inform him about the outcome of the investigation.
1.3. The report relates to an investigation into allegations of maladministration and improper conduct in connection with the failure to implement recommendations made in the Group Audit and Risk Department’s Forensic Investigation Report number FIS03/09/2012, published on 28 September 2012, the irregular appointment of the Director of Police, as well as presiding officers and prosecutors by the TMPD’s Director of Police, Mr Moloko Rachekhu in disciplinary proceedings against metropolitan police officials.

2. **THE COMPLAINT**

2.1. The allegations by Adv. Alberts, MP are that, the CoT failed to implement recommendations made in the Group Audit and Risk Department’s Forensic Investigation Report Number FIS03/09/2012, published on 28 September 2012, following an investigation into allegations of improper conduct on the part of the Tshwane Metropolitan Police Department’s Director of Police, Mr Moloko Rachekhu;

2.2. Further that, the release of impounded vehicles from the CoT’s Pound on instruction of Mr Rachekhu was contrary to legislative prescripts regulating the release of impounded vehicles by the CoT, which allegedly resulted in CoT incurring the loss of income attributed to storage and towing fees;

2.3. Following media reports published in the *Pretoria News and Business Report* newspapers dated 18 September 2015, relating to the failure by the former Tshwane Metropolitan Police Department’s Chief of Police, Mr Steven Ngobeni (Mr Ngobeni) to disclose his criminal record prior to his appointment as the Chief of Police, a grievance was lodged by a certain Mr J M Khumalo, on 13 July 2015, in which Mr Rachekhu’s educational qualifications and his suitability to hold the position of the Director of Police was challenged; and
2.4. In addition, the appointment of presiding officers and prosecutors in disciplinary proceedings, as well as the institution of disciplinary action against metropolitan police officials, in particular, Ms Pauline Moncha (Ms Moncha), who was subsequently not found guilty by the Disciplinary Committee for the alleged transgressions was improper and constituted abuse of power on the basis that Mr Moloko Ratchekhu had no delegated authority to do so, thus his conduct caused the Council to incur irregular, fruitless and wasteful expenditure to an amount of approximately one hundred and two thousand rands (R102, 000.00).

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. 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.
3.5. The Public Protector is also bestowed with power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6. In the constitutional court, (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 (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers the public protector:

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

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

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

3.6.4. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69)
3.6.5. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);

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

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

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

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

3.7. The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and 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.”
3.8. Key stakeholders who were implicated in the investigation were afforded a further opportunity to respond as contemplated in section 7(9) of the Public Protector Act and all of them responded, however, Mr. Rachekhu failed to respond to the notice issued to him on a previous occasion.

3.9. In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation. Such legislation includes *inter alia*, the Public Protector Act 23 of 1994 and legislations such as the Municipal Finance Management Act 56 of 2003.

3.10. The Public Protector Act elaborates on the investigation powers of the Public Protector. Section 6(4) of the Public Protector Act specifically provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged:

3.9.1. Maladministration in connection with the affairs of government at any level; or
3.9.2. Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function; or
3.9.3. Improper or dishonest act; or
3.9.4. Improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
3.9.5. Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

3.11. Section 6(4)(c)(i) of the Public Protector Act provides that the Public Protector may, during or after an investigation, if he or she is of the opinion that the facts disclose a commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions.
3.12. Section 6(4)(c)(ii) of the Public Protector Act provides that the Public Protector may if he or she deems it advisable, refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

3.13. Section 6(9) of the Act provides that except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.

3.14. Section 7(4)(a) of the Public Protector Act provides that, for purposes of conducting an investigation, the Public Protector may direct any person to submit an affidavit or affirmed declaration to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on a matter being or to be investigated.

3.15. The Public Protector Act goes further and provides in section 7(5) that a direction referred to in subsection (4)(a) shall be by way of a subpoena containing particulars of the matter in connection with which the person subpoenaed is required to appear before the Public Protector and shall be signed by the Public Protector and served on the person subpoenaed either by a registered letter sent through the post or by delivery by a person authorised thereto by the Public Protector.

3.16. Section 7(4)(b) that, The Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on the matter being or to be investigated.
3.17. Section 7(9)(a) of the Act provides that if it appears to the Public Protector during the course of the investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

3.18. In upholding the "audi alteram partem" principle and in keeping with the promotion of just the administrative action, implicated persons in the investigation were afforded an opportunity to respond as contemplated in section 7(9) of the Public Protector Act and only the municipality responded.

3.19. The Tshwane Metropolitan Municipality is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector's mandate to investigate. The Public Protector's power and jurisdiction to investigate, report and take appropriate remedial action was not disputed by any of the parties.

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

4. **THE INVESTIGATION**

4.1. **Methodology**

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

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

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 or not the CoT failed to implement recommendations made in a forensic investigation report following an investigation by the Group Audit and Risk Department into allegations of improper release of impounded vehicles by the Director of Police, Mr Moloko Rachekhu, the irregular appointment of Mr Moloko Rachekhu to a position of Director of Police, as well as the appointment of presiding officers and prosecutors in disciplinary proceedings by Mr Moloko Rachekhu without the requisite delegation of authority.

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 Tshwane Metropolitan Municipality and/or its employees to prevent maladministration and improper conduct.

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

4.3. **Based on the analysis of the complaints the following issues were identified to inform and focus the investigation**

4.3.1. **Issue 1:** Whether the CoT failed to implement recommendations made by the Group Audit and Risk Department Forensic Investigation Report issued on 28 September 2012, and if so, whether the conduct constituted maladministration or improper conduct;

4.3.2. **Issue 2:** Whether Mr Rachekhu was in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police and if not so, whether his appointment was improper; and
4.3.3. **Issue 3:** Whether the appointment of presiding officers and prosecutors by Mr Rachekhu in disciplinary proceedings against metropolitan officials, as well as the institution of same was improper, if so, whether the conduct constituted maladministration and caused the Council to incur fruitless and wasteful expenditure.

4.4. **The Key Sources of information**

4.4.1. **Documents**

4.4.1.1. A copy of the Complainant’s claim documents dated 2 August 2016;

4.4.1.2. A copy of an Arbitration Award between the Independent Municipal and Allied Trade Union on behalf of Ms Pauline Moncha dated 13 March 2012;

4.4.1.3. A copy of a letter dated 22 July 2015 from the Acting Chief of Police, Ms Jenny Malan addressed to Ms Cynthia Ramulifho and Mr Obed Thenga;

4.4.1.4. A copy of the Group Audit and Risk Department’s Forensic Investigation Report Number FIS03/09/2012 published on 28 September 2012;

4.4.1.5. A copy of an internal advertisement for the position of Director of Police with reference number Job Forum 3;

4.4.1.6. A copy of an application form submitted by Mr Rachekhu on 2 February 2009, in response to an advertised position of Director of Police, accompanied by his curriculum vitae and educational qualifications;

4.4.1.7. Copies of scoring sheets in connection with interviews conducted in respect of the Director of Police position;

4.4.1.8. A copy of Job Offer dated 2 June 2009 from the CoT’s Executive Director: Human Resource Management addressed to Mr Rachekhu;
4.4.1.9. A copy of Mr Rachekhu's undated Acceptance of Appointment Letter;

4.4.1.10. A copy of Proclamation R.62 of 2010 published in Government Gazette Number. 33744 of 8 November 2010;

4.4.1.11. A copy of a letter dated 11 September 2018 from the TMPD Chief of Police to Mr Thivhulawi Nyambeni in response to the Public Protector's inquiry;

4.4.1.12. A copy of Delegation of Authority Letter dated 2 February 2015 from the Chief of Police, Mr Khazamula Ngobeni to Ms Cynthia Ramulifho;

4.4.1.13. An unintelligible copy of Delegation of Authority Letter dated 2015 from the Chief of Police, Mr Khazamula Ngobeni to Mr Rachekhu;

4.4.2. Correspondence sent and received

4.4.2.1. A copy of a letter dated 28 February 2017 from the Public Protector to the Acting City Manager of the CoT, Mr Mayur Manganlal;

4.4.2.2. A copy of an email dated 3 May 2017 from the Acting City Manager of the CoT, Mr Mayur Manganlal to the Public Protector;

4.4.2.3. A copy of a letter dated 23 June 2017 from the Cot's Acting Group Head: Legal and Secretariat, Mr Priza Mantsena to the Public Protector;

4.4.2.4. A copy of a letter dated 21 August 2018 from the Public Protector to the City Manager of the CoT, Dr Moeketsi Mosola;

4.4.2.5. A copy of a letter dated 1 March 2019 from the Public Protector to Mr Thivhulawi Nyambeni;

4.4.2.6. A copy of a letter dated 27 March 2019 from Mr Thivhulawi Nyambeni to the Public Protector;
4.4.3. Websites consulted/ electronic sources

4.4.3.1. www.tshwane.gov.za;
4.4.3.2. www.publicprotector.org;

4.4.4. Legislation and other prescripts

4.4.4.2. The Public Protector Act, 23 of 1994;
4.4.4.3. The Municipal Finance Management Act, 56 of 2003;
4.4.4.4. The National Road Traffic Regulations of 2000
4.4.4.5. The City of Tshwane Metropolitan Municipality’s Staffing Policy of 8 October 2008;

4.4.5. Case law

4.4.5.1. Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT143/15; CCT171/15) [2016] ZACC 11; (2016) (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)
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. With regard to whether the City of Tshwane Metropolitan Municipality improperly failed to implement recommendations made by the Group Audit and Risk Department Forensic Investigation Report issued on 28 September 2012, and if so, whether the conduct constitute maladministration or improper conduct;

**Issues that are Common Cause**

It is not disputed that,

5.1.1. In 2012, the CoT commissioned an internal forensic investigation through the GARD in connection with the allegations of the improper release of impounded vehicles from the CoT’s Central Pound by the Director of Police, Mr Rachekhu in December 2010, which is alleged to have resulted in the CoT incurring loss of income attributed to towing and storage fees.

5.1.2. It is also not disputed that, following the finalisation of the forensic investigation in 2012, the GARD released a Final Forensic Investigation Report, with reference number FIS03/09/2012, comprising the following recommendations:

5.1.2.1. That, the Accounting Officer must take appropriate action against Mr. Rachekhu for contravening section 78 of the Municipal Finance Management Act 53 of 2003; the Code of Conduct for Municipal Staff Members issued in terms of the Municipal Finance Management Act 53 of 2003; the Standard Operating Procedures, and the improper release of impounded motor vehicles contrary to the provisions of Regulations 304 to 306, as well as 320 of the National Road Traffic Regulations of 17 March 2000.
Issues that are in Dispute

5.1.3. The issue for my determination is whether the CoT improperly failed to implement recommendations contained in the GARD’s Forensic Investigation Report issued on 28 September 2012, and if so, whether the conduct constitutes maladministration.

5.1.4. Adv.Alberts, MP alleged that following an investigation by the GARD into allegations of improper conduct on the part of Mr Rachekhu in connection with the release of impounded vehicles from the CoT’s Pound the CoT failed to implement recommendations contained therein.

5.1.5. On 28 February 2018, following the receipt of the complaint, a letter was issued in accordance with the provisions of section 7(4)(a) of the Public Protector Act, 1994, requested the Acting City Manager, Mr Mayur Manganlal to provide information and documentation pertinent to the investigation.

5.1.6. In response to the request, Mr. Mayur Manganlal stated in an email dated 3 May 2017, conveyed his apologies for the delay in the submission of the information and documentation pertinent to the investigation on the basis that he was acting in the capacity of City Manager for the month of February 2017, and that he was not available during the week of 28 February 2017, due to him attending training presented by the National Treasury. Further thereto, he stated that a new City Manager had since been appointed and resumed his duties on 1 March 2017.

5.1.7. As a consequence thereof, a similar letter was prepared and submitted on 21 August 2018, to Dr. Moeketsi Mosola in the capacity of City Manager. On 21 September 2018, part of the documents requested, including the Group Audit and Risk Department’s Final Forensic Investigation Report, were accordingly submitted.
5.1.8. In a letter dated 11 September 2018, from the Chief of Police, Lieutenant-General (Lt-General) Johanna Nkomo (Lt-General Nkomo) addressed to the Deputy-Director: Democracy Development Citizen Relationship Management in the Office of the City Manager, Mr. Thivhulawi Nyambeni, and Lt-General Nkomo acknowledges that the Department (Tshwane Metropolitan Police Department) had received the recommendations made by the GARD. Further that the matter was with the former Chief of Police, Mr. Steven Ngobeni, who failed to implement the recommendations for reasons unknown.

5.1.9. In a response dated 27 March 2019, to further inquiries made on 1 March 2019, in connection with the alleged failure by the CoT to implement recommendations made by the GARD, as well as progress made relating to the submission of the outstanding documentation, the City Manager, Dr. Moeketsi Mosola conveyed his apologies for the delay in dealing with the matter.

5.1.10. He continued by stating that it is common cause that the investigation was conducted in 2012, which was prior to his and the current Chief of Police’s appointments, however, he emphasised that this did not preclude them to act on the matter subsequent to same being brought to their attention and committed to implement recommendations thereof.

5.1.11. On 8 July 2019, in response to a Notice issued in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994, Mr. Thivhulawi Nyambeni submitted a letter dated 4 July 2019, from the Chief of Police: Tshwane Metropolitan Police Lt-General, Nkomo addressed to the City Manager, Dr. Moeketsi Mosola.

5.1.12. In the letter referred to above, Lt-General Nkomo stated that following a meeting with the Director: Labour law Advisory Services, Ms. Seipati Segoleta, disciplinary process would be instituted against Director MF Rachekhu during the month of July 2019, in connection with the appointment of prosecutors and presiding officers by Mr. Rachekhu in disciplinary proceedings against metropolitan police officials.
Application of the relevant law and prescripts

5.1.13. The fiduciary responsibilities of the accounting officer is regulated by the Municipal Finance Management Act 56 of 2003 (MFMA).

5.1.14. In terms of section 78(1)(b) of the MFMA, each senior manager of a municipality and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure that the financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently.

5.1.15. In terms of section 61(1)(c) MFMA, the accounting officer of a municipality must seek within the sphere of influence of the accounting officer to prevent any prejudice to the financial interests of the municipality.

5.1.16. In terms of section 165(1) of the MFMA, each municipality and each municipal entity must have an internal audit unit, subject to sub-section 3.

5.1.17. In addition, in terms of section 165(2) of the MFMA, the internal audit unit of a municipality or municipal entity must-

(a) Prepare a risk-based audit plan and internal audit program for each financial year;

(b) Advise the accounting officer and report to the audit committee on the implementation of the internal audit plan and matters relating to-

(i) ...
(ii) ...
(iii) ...
(iv) risk and risk management;
(v) ...
(vi) loss control; and
(vii) …

(ii) perform such other duties as may be assigned to it by the accounting officer.

5.1.18. It is the responsibility of the accounting officer to ensure that the resources of the municipality are utilised effectively, efficiently, economically and transparently.

5.1.19. Furthermore, it is the responsibility of the GARD to advise the accounting officer on matters relating to compliance to the MFMA and any other legislation applicable to the municipality, as well as to perform such other duties as may be assigned to it by the accounting officer, including but not limited to the conducting of internal investigations.

5.1.20. The evidence discussed above indicates that, following allegations of improper conduct on the part of Mr. Rachekhu in connection with the release of vehicles impounded by the municipality, the accounting officer commissioned the GARD to conduct an investigation with a view to determining whether Mr. Rachekhu was authorised to release the vehicles, as well as whether his conduct caused the Council to incur financial attributed to towing and storage fees.

**Conclusion**

5.1.21. Based on the evidence and information obtained during the investigation, as well as the application of the relevant legislative prescripts to the facts of the matter, it can be concluded that, the failure by the accounting officer to implement recommendations made in an internal forensic investigation report was not in the best interest of the municipality and amounted to the improper utilisation of resources.
5.2. With regard to whether Mr Rachekhu was not in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of TMPD’s Director of Police and if not so, whether his appointment was improper

Issues that are Common Cause

It is not disputed that;

5.2.1. On 2 February 2009, the CoT’s Community Safety Department: Operations Section advertised three (3) positions of Director: Regional Policing on its Internal Job Forum of 3/2009, with reference number 172 Director. Closing date for submission of applications was set for 6 February 2009.

Issues that are in Dispute

5.2.2. The issue for my determination is whether Mr. Rachekhu was in possession of educational qualifications which rendered him a competent incumbent to be appointed in the position of the Director: Regional Policing with the TMPD, if not so, whether the appointment in this regard was improper.

5.2.3. Adv. Alberts alleged that, following media reports published in the Pretoria News and Business Report newspapers dated 18 September 2015, relating to the failure by the former TMPD’s Chief of Police, Mr Steven Ngobeni to disclose his criminal record prior to his appointment as the Chief of Police, a grievance was lodged by a certain Mr Jacob Matheogela Khumalo on 13 July 2015, in which Mr Rachekhu’s educational qualifications and his suitability to hold the position of the Director of Police was challenged.
5.2.4. It was established from the documentation obtained during the investigation that, on 9 July 2015, Mr Matheogela Jacob Khumalo lodged a complaint with the CoT in accordance with the Grievance Procedure applicable at the time, in which he alleged that Mr Rachekhu was apparently in possession of fraudulent educational qualifications, which in essence disqualified him from holding the position of Director: Regional Policing;

5.2.5. Following the complaint, on 22 July 2015, Mr Rachekhu appeared before a committee chaired by the TMPD’s Acting Deputy Chief for Regional Policing, Ms Jenny Malan in the presence of the complainant, Mr Khumalo represented by Commander Mikosi Rasuba, as well as representatives of the TMPD Human Resource Support, Superintendent S Masipa and Sergeant Mkhabela.

5.2.6. According to a letter dated 22 July 2015, from Ms Malan addressed to the Strategic Executive Director: Corporate and Shared Services, Ms. Cynthia Ramulifho, Mr Rachekhu refused to participate in the process and suggested that the matter must be referred to the GARD for further investigation. As a consequence thereof, all the parties present agreed without dissent that the grievance fell beyond the scope of the Grievance Procedure and as such a formal investigation must be instituted.

5.2.7. It was established that, subsequent to Mr Jacob Matheogela Khumalo lodging a complaint against Mr Rachekhu, an investigation was conducted by the GARD and on 22 September 2015, a report with reference number FS21/08/2015, was issued in which it was found that Mr Rachekhu was a eligible for appointment to a position of the Director: Regional Policing on the basis that he possessed qualifications relevant to the position, as well as experience required for the position. Therefore, allegations by Mr Khumalo were not substantiated.
5.2.8. In addition, the CoT submitted a copy of the advertisement of the position of the Director: Regional Policing, indicating the minimum requirements to be met by candidates for eligibility for appointment in the position. According to the advertisement, the minimum requirements to be met by the applicants were set as an appropriate tertiary, career-related qualification and experience (a three year National Diploma or Degree) and be a registered metropolitan police officer.

5.2.9. It was established that, following the advertisement eighty four (84) candidates, including Mr Rachekhu, responded to the advertised position and in support of his application he attached copy of his curriculum vitae indicating his experience, as well as copies of educational qualifications and proof that he was registered as a traffic officer.

5.2.10. According to the information and documentation obtained during the investigation, Mr Rachekhu obtained his matriculation certificate in 1983, from Mokomene High School in the Limpopo Province. Further thereto, on 26 November 1993, Mr Rachekhu successfully passed the examination for Traffic Officers approved by the then Administrator of the Transvaal in accordance with the provisions of the Road Traffic Act, 1989, Act 29 of 1989). In addition, it was established that Mr Rachekhu was registered as a Traffic Officer on 3 May 1994.

5.2.11. It was further established from the information and documentation obtained during the investigation that Mr Rachekhu successfully passed the final of the Associate Examination offered by the Institute of Traffic and Municipal Police Officers of Southern Africa, which subsequent to the promulgation of the Higher Education Act, 1997 (Act 101 of 1997), was registered and accredited a status of a Diploma with National Qualification Framework Level 6 with 360 credits with South African Qualification Authority Identity Number 48896.
5.2.12. Following the submission of an application form for consideration to be appointed in the position of Director: Regional Policing, accompanied by supporting documents, i.e. educational qualifications and a copy of a curriculum vitae detailing his experience, Mr Rachekhu was subsequently shortlisted and invited to attend an interview which was scheduled for 22 May 2009.

5.2.13. Following the interview, on 25 May 2009, the Interview Panel chaired by the Executive Director: Regional Policing Operations, Mr Ndumiso Jaca, unanimously agreed that Ms. Jenny Malan, Mr Moloko Rachekhu and Mr Zakhele Mbatha were the most suitable for appointment and as a result recommended them as the successful candidates for the positions.

5.2.14. It was further established that, on 6 June 2009, following the recommendation the Director: Human Resource Shared Services, Mr M P Ratsiane escalated same to the Executive Director: Strategic Human Resource Management, Ms Mamma Mokaba for approval and on 17 June 2009, the latter approved the recommendation.

5.2.15. It was confirmed that subsequent to the approval of the recommendation by the Executive Director: Strategic Human Resource Management, Ms Mamma Mokaba, Mr Moloko Rachekhu was provided with a letter indicating that he had been appointed to the position of Director: Regional Policing and further advising him that the offer in that regard was valid for seven (7) days.

*Application of the relevant laws and prescripts*

*Municipal Systems Act 32 of 2000 (MSA)*

5.2.16. In terms of section 56(a) of the MSA, a municipal council, after consultation with the municipal manager, appoints 35 a manager directly accountable to the municipal manager.
5.2.17. In addition, in terms of section 56 (b) of the MSA, a person appointed as a manager in terms of paragraph (a) must have the relevant skills and expertise to perform the duties associated with the post in question taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

Staffing Policy of the City of Tshwane Metropolitan Municipality of 8 October 2008

5.2.18. The Staffing Policy of the City of Tshwane Metropolitan Municipality (the Policy) is the key prescript regulating the procedure regarding recruitment and selection of staff members. Paragraph 4.1.1 provides that potential incumbents are recruited through advertising that complies with the principle of fairness and representativeness.

5.2.19. Paragraph 5.2.1 of the Policy provides that selection criteria must be based on key performance areas and inherent requirements of the position and must be applied consistently.

5.2.20. Paragraph 5.2.4 of the Policy provides that a candidate is considered suitably qualified for appointment based on one or a combination of the following aspects;

(a) Formal qualifications;
(b) Recognition of prior learning;
(c) Relevant experience;
(d) The ability to perform the job;
(e) The capacity to acquire, within a reasonable time, the ability to perform the tasks; and
(f) Applicable legislation and legal aspects.
The Departmental Head or his/her nominee, and the Executive Director: Strategic Human Resources or his/or her nominee will assess the applicability of the candidate’s formal qualifications in terms of the job specification.

5.2.21. It follows that for a candidate to be considered suitably qualified for appointment to a position by the municipality, such a candidate must possess one or a combination of formal qualifications; recognition of prior learning; relevant experience; and the ability to perform the job.

5.2.22. The evidence obtained during the investigation and analysed indicates that Mr Rachekhu was in possession of a career-related qualification, relevant experience in the Metro Police environment; and management experience.

**Conclusion**

5.2.23. Based on the information and documentation obtained during the investigation, it is can be concluded that the appointment of Mr. Moloko Rachekhu to the position of the Director: Regional Policing was grounded on him meeting the minimum requirements for the position as advertised, which included but not limited to, an appropriate tertiary, career-related qualification (a three (3) year National Diploma or Degree); experience; relevant experience in the Metro Police environment; and management experience

5.3. **With regard to whether the appointment of presiding officers and prosecutors by the Director of Police, Mr Rachekhu in disciplinary proceedings against metropolitan police officials, as well as the institution of same by Mr Rachekhu was improper, and if so, whether the conduct constituted maladministration and caused the Council to incur fruitless and wasteful expenditure.**

**Issues that are Common Cause**
It is not disputed that;

5.3.1. On 4 March 2013, Ms Pauline Moncha, an employee of the TMPD in her capacity as a Sergeant, was dismissed following a disciplinary inquiry held on several days, i.e. 3 September 2012, 17 September 2012, 3 October 2012, 19 October 2012, 16 November 2012, 8 January 2013, 24 January 2013 and 26 February 2013, into the alleged failure to perform her tasks and job responsibilities with diligence, carefully, as well as to the best of her ability, thereby contravening Paragraph 1.2.3 of the Code of Conduct for Municipal Officials issued in terms of the Municipal Finance Management Act 56 of 2003.

Issues that are in Dispute

5.3.2. The issue for my determination is whether Mr Rachekhu had the necessary delegation of authority to institute disciplinary action against members of the TMPD, as well as appoint presiding officers and prosecutors in same, and if not so, whether the conduct constitute maladministration or improper conduct.

5.3.3. The complainant alleged that the appointment of presiding officers and prosecutors, as well as the institution of disciplinary action against certain metropolitan police officials, in particular, Ms Pauline Moncha, who was subsequently not found guilty by the Disciplinary Committee for the alleged transgressions was improper and constituted abuse of power, on account that Mr Rachekhu had no delegated powers or authorised to institute same, thus his conduct resulted in the Council to incurring fruitless and wasteful expenditure to an amount of R102, 000.00.
5.3.4. In substantiating his allegations, Adv Alberts, MP submitted a copy of an Arbitration Award dated 11 March 2015, with Case Number PMD 051302, which indicates that the Commissioner of the Local Government Bargaining Council, Mr Lazarus Matlala found that the dismissal of Ms Pauline Moncha was substantively fair, however, it was procedurally unfair.

5.3.5. As a consequence thereof, the Commissioner ordered the Respondent to pay the Applicant compensation equal to six (6) months remuneration calculated as follows: R17 000.00 x 6=R102 000.00, and the compensation amount less tax must be paid within fourteen(14) days of the receipt of the award.

5.3.6. According to the information and documentation obtained during the investigation, on 9 December 2011, Ms Pauline Moncha together with other metropolitan police officials, whilst engaged in road policing activities around Soshanguve Township, North of Pretoria, was involved in an argument with a passenger of a motor vehicle which they stopped and as a result, she arrested the passenger for obstruction of justice and placed same in the Soshanguve Police Station’s police holding cells.

5.3.7. However, Ms Moncha failed to follow the proper arresting procedure, which included but not limited to, registering a police docket, register the arrestee into the South African Police Service (SAPS) 14 Register, completion of the Occurrence Book indicating the reasons for detaining the arrestee, and the completion of the SAPS 13.

5.3.8. Consequently, a civil claim to the amount of R500 000.00 for unlawful arrest was lodged against the City of Tshwane Metropolitan Municipality by Messrs K.P Seabi and Associates Attorneys acting on behalf of Mr Mangope, which was subsequently settled out of court following the claimant’s acceptance of a full and final settlement R20 000.00, emanating from the CoT’s Contingency Fund.
5.3.9. It was also established that Mr Rachekhu conceded in his testimony before the South African Local government Bargaining Council’s Commissioner Magale Matlala in a matter between Independent Municipal and Allied Trade Union (IMATU) obo Pauline Moncha and The City of Tshwane Metropolitan Municipality under Case Number PMD 051302, that he was the Director: Quality Policing and that his responsibilities included but not limited to overseeing disciplinary processes within the TMPD.

5.3.10. Further that, he had indeed signed the notice informing Ms Pauline Moncha of her imminent disciplinary enquiry, as well as signing the approval of the appointment of Presiding Officers and Prosecutors in the same disciplinary enquiry.

5.3.11. On 2 April 2019, following a request for the provision of Mr Rachekhu’s historical delegation of authority, including that of 2012, which in essence afforded him the authority to institute disciplinary inquiries against metropolitan police officials and the appointment of presiding officers, as well as prosecutors in same, the CoT responded through the Chief of Police, Lt. General Johanna Nkomo on 4 April 2019, and stated that, there existed no record of delegation of authority conferred to Mr Moloko Rachekhu in 2012.

5.3.12. On 20 June 2019, a notice issued in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994, was issued to Mr Rachekhu and the City Manager, Dr Mosola respectively, with a view of affording them an opportunity to respond to the preliminary findings made during the course of the investigation. Unfortunately, Mr Rachekhu failed to respond to the notice, whilst the City Manager, submitted a peculiar response in a form of a letter he had received from the Chief of Police, Lt-Gen. Johanna Nkomo.
5.3.13. On 8 July 2019, in response to a Notice issued in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994, Mr. Thivhulawi Nyambeni submitted a letter dated 4 July 2019, from the Chief of Police: Tshwane Metropolitan Police Lt-General, Nkomo addressed to the City Manager, Dr. Moeketsi Mosola.

5.3.14. In the letter referred to above, Lt-General Nkomo stated that following a meeting with the Director: Labour law Advisory Services, Ms Seipati Segolela, disciplinary process would be instituted against Director MF Rachekhu during the month of July 2019, in connection with the appointment of prosecutors and presiding officers by Mr Rachekhu in disciplinary proceedings against metropolitan police officials.

**Application of the relevant law and prescripts**

**Municipal Finance Management Act 56 of 2003**

5.3.15. In terms of section 62(1)(e) of the MFMA, 2003, it is the responsibility of the accounting officer to take reasonable steps to ensure that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct.

**CoT’s Disciplinary Procedure of 21 April 2010**

5.3.16. Paragraph 7.1 of the CoT’s Disciplinary Procedure of 21 April 2010 (Disciplinary Procedure), provides that “an allegation of misconduct against an employee shall be brought before the Municipal Manager or his authorised representative for consideration and decision.”
5.3.17. Paragraph 7.3 of the Disciplinary Procedure provides that "if the Municipal Manager or his authorised representative is satisfied that there is prima facie causes to believe that an act of misconduct has been committed, he may institute disciplinary proceedings against the employee concerned."

5.3.18. Paragraph 7.6 of the Disciplinary Procedure provides that "in the event of a misconduct that appears sufficiently serious to warrant a sanction more serious than a written warning, the Municipal Manager or his authorised representative shall institute disciplinary proceedings against the employee and appoint a Presiding Officer as follows:

7.6.1. The Municipal Manager or his authorised representative shall appoint, in the first instance, a suitably qualified person employed by the municipality, preferably one level or two above the employee's position, to serve as the Presiding Officer;

7.6.2. For the purposes of this Paragraph 7.6, a suitably qualified person means a person sufficiently competent to preside over a Disciplinary Hearing;

7.6.3. Should it not be possible to appoint a suitably qualified person, employed by the municipality, to serve as the Presiding Officer, due to a lack of suitably qualified persons, or where the Presiding Officers are threatened or intimidated, the Municipal Manager or his authorised representative may appoint a suitably qualified external person not employed by the municipality, to serve as the Presiding Officer."

5.3.19. It is apparent that it is the responsibility of the City Manager or his/her authorised representative in the form of a delegation of authority by the City Manager, to appoint presiding officers and prosecutors in the event the City Manager becomes aware of a more serious misconduct on the part of any of the CoT’s officials which warrants the commissioning of a disciplinary enquiry.
Conclusion

5.3.20. In the circumstances, the appointment of presiding officers and prosecutors by the Director of Police, Mr Racheleku in disciplinary proceedings against metropolitan police officials, as well as the institution of disciplinary proceedings without the requisite and/or delegated authority constituted improper conduct envisaged in section 182(1)(a) the Constitution, 1996 or maladministration envisaged in section 6(4)(a)(i) the Public Protector Act, 1999.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

6.1 Regarding whether the CoT of failed to implement recommendations made in the GARD Forensic Investigation Report published on 28 September 2012, and if so, whether the conduct constituted maladministration or improper conduct;

6.1.1. The allegation that the CoT failed to implement recommendations made in the GARD Forensic Investigation Report Number FIS03/09/2012 published on 28 September 2012, is substantiated.

6.1.2. In terms of terms of section 165(1) of the MFMA, 2003, each municipality and municipal entity must have an internal audit unit whose primary objective is to, amongst others, advise the accounting officer and report to the audit committee on the implementation of internal audit plan and matters relating to risk and risk management, loss control and compliance with the MFMA, 2003, as well as to perform such other duties as may be assigned to it by the accounting officer.
6.1.3. It was established during the investigation that, in compliance with section 165(1) of the MFMA, 2003, the CoT established a Group Risk and Audit Department in 2012, whose primary objective was to add value and improve the organisation's operations and further to assist the organisation to accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes as set out in the Internal Audit Charter approved by the Audit and Performance Committee, as well as to perform such other duties as may be assigned to it by the accounting officer, such as conducting internal investigations as and when required.

6.1.4. In addition, it was also established that the GARD was charged with an investigation into the improper release of impounded vehicles from the CoT’s Pound in 2010, allegedly on instruction of the Director of Police, Mrm Moloko Rachekhu which subsequently led to the loss of revenue attributed to towing and storage fees.

6.1.5. The CoT conceded in a letter dated 21 September 2018, that it had received recommendations made in the GARD forensic investigation report published on 28 September 2012, however, for reasons unknown the former Chief of Police, Mr. Steven Ngobeni failed to institute disciplinary proceedings as recommended.

6.1.6. Additionally, on 27 March 2019, the CoT conceded that it should have acted on the recommendations made in the GARD forensic report when the matter was brought to its attention. Further thereto, the CoT made an undertaking to implement the findings and recommendations made in the report notwithstanding the fact that the matters arose prior to the appointment of the City Manager and the current TMPD Chief of Police.

6.1.7. In the circumstances, I find that the failure by the CoT to implement recommendations made by the GARD constitutes improper conduct envisaged in section 182(1)(a) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.
6.2 **Issue 2:** Whether Mr Rachekhu was in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police and if not so, whether his appointment was improper.

6.2.1. The allegation that Mr Rachekhu was not in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police, is **not substantiated**.

6.2.2. In terms of Paragraph 5.2.4 of the CoT' Staffing Policy, a candidate is considered to be suitably qualified for appointment to a position based on one or a combination of his/her formal qualifications; recognition of prior learning; relevant experience; the ability to perform the job; the capacity to acquire, within a reasonable time, the ability to perform the tasks; and applicable legislation and legal aspects.

6.2.3. According to the advertisement for the Director of Police’s position, the peremptory requirements to be met by candidates for consideration and subsequently appointed in same were set as follows;

(a) An appropriate tertiary, career-related qualification (a three (3) year National Diploma or Degree);
(b) Experience;
(c) Relevant experience in the Metro Police environment; and
(d) Management experience

6.2.4. The information and documentation obtained during the investigation indicates that Mr Rachekhu was in possession of qualifications mentioned hereunder, which rendered him a competent incumbent to hold the position of the TMPD’s Director of Police;
(a) A Diploma for Traffic Officers approved by the former Administrator of the Transvaal in accordance with the Road Traffic Act, 1989 (Act 29 of 1989); and

(b) A Certificate in Traffic Management obtained from the Institute of Traffic and Municipal Police Officers of Southern Africa, which subsequent to the promulgation of the Higher Education Act, 1997 (Act 101 of 1997), was accredited by the South African Qualifications Authority to a Diploma with a National Qualification Framework Level 6 status. Furthermore, Mr Moloko Rachekhu was registered as a Traffic Officer on 3 February 1994.

6.2.5. In addition to the educational qualifications, it was established that prior to Mr Rachekhu’s appointment to the position of Director of Police TMPD, he acted in the position of Commander Protection Services: Community Safety for the period 2002 to 2004. He also held a position of Senior Superintendent: Community Safety for the period 2006 to 2007.

6.2.6. Furthermore, Mr Rachekhu was subsequently appointed to a position of Commander Central Region: Community Safety from 19 February 2007 until his appoint to the position of Director of Police on 1 July 2009, which brought his experience within the Metro Police environment to a total of sixteen (16) years.

6.2.7. Therefore, the allegation that Mr Moloko Rachekhu was not in possession of the relevant educational qualifications which rendered him a competent incumbent to hold the position of Tshwane Metropolitan Police Department’s Director of Police has no merit and could not be supported by the evidence obtained and analysed during the investigation.

6.3 **Issue 3:** Whether the appointment of presiding officers and prosecutors by Mr Rachekhu in disciplinary proceedings against metropolitan police officials, as well as the institution of same was improper, and if so, whether the conduct constituted maladministration and caused the Council to incur fruitless and wasteful expenditure.

6.3.1. The allegation that the appointment of Presiding Officers and Prosecutors by the Director of Police, Mr Rachekhu in disciplinary proceedings instituted against metropolitan police officials, as well as the institution of same by Mr Rachekhu was improper, **is substantiated.**

6.3.2. In terms of section 62(1)(e) of the MFMA, 2003, it is the responsibility of the accounting officer to take reasonable steps to ensure that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct.

6.3.3. Further thereto, in terms of Paragraph A13 of the CoT Corporate System of Delegations of 26 January 2012 read with Paragraphs 7.3 and 7.6 of the CoT Disciplinary Policy, it is the responsibility of the accounting officer or his/her authorised representative to institute disciplinary proceedings and appoint a presiding officer in the event *prima facie* causes to believe that an act of misconduct has been committed by an employee of the municipality exists.

6.3.4. According to the information received during the investigation, it was established that M. Rachekhu conceded in his testimony before the South African Local Government Bargaining Council’s Commissioner Magale Matlala, in a matter between *Independent Municipal and Allied Trade Union (IMATU) obo Pauline Moncha and The City of Tshwane Metropolitan Municipality* under Case Number PMD 051302, that he was the Director: Quality Policing and that his responsibilities included but not limited to overseeing disciplinary processes within the TMPD.
6.3.5. Further thereto, conceded that he had indeed signed the notice informing Ms Pauline Moncha of her imminent disciplinary enquiry, as well as signing the approval of the appointment of presiding Officers and prosecutors in the same disciplinary enquiry.

6.3.6. I could not find evidence indicating that in 2012, Mr Rachekhu was authorised by the City Manager or the TMPD's Chief of Police to institute disciplinary proceedings against metropolitan police officials and appoint presiding officers, as well as prosecutors in same as envisaged in Paragraph A13 of the CoT Corporate System of Delegations of 26 January 2012, read with Paragraphs 7.3 and 7.6 of the CoT Disciplinary Policy, thus his conduct caused the CoT to incur irregular expenditure.

6.3.7. In the circumstances, I find that the institution of disciplinary proceedings against metropolitan police officials by Mr Rachekhu and appointment of presiding officers and prosecutors in same without the requisite and/or delegated authority constituted improper conduct envisaged in section 182(1)(a) the Constitution, 1996 or maladministration envisaged in section 6(4)(a)(i) the Public Protector Act, 1994.

7 REMEDIAL ACTION

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following:-

7.1. The Municipal Council of the City of Tshwane Metropolitan Municipality must:
7.1.1. Take cognisance of the findings of maladministration and improper conduct by the City Manager and the Director of Police and ensure that such action is not repeated and appropriate corrective action is taken.

7.2. The City Manager of the City of Tshwane Metropolitan Municipality must:

7.2.1. Take cognisance of the findings on the improprieties identified in the report and ensure that such conduct is not repeated and appropriate corrective action is taken to prevent the recurrence of the improprieties referred to in the report;

7.2.2. Consider recommendations made in internal forensic investigation reports on investigations conducted by the Group Audit and Risk Department and ensure that same is tabled in the Municipal Council for deliberation.

7.2.3. Report to the National Treasury and the Auditor-General particulars of the identified financial misconduct and the steps taken in connection with such financial misconduct, as contemplated in section 175 of the MFMA 2003;

7.2.4. Ensure that delegations to take disciplinary action and appoint presiding officers and prosecutors in disciplinary actions against municipal officials are in place.

7.2.5. Consider the report and, where appropriate, take appropriate action to recover losses incurred as a result of maladministration and improper conduct thereof, in terms of section 176(2) of the MFMA, 2003;

7.2.6. Ensure that delegations to take disciplinary action and appoint presiding officers and prosecutors in disciplinary actions against municipal officials are in place.
8 MONITORING

8.1 The Municipal Council must, within thirty (30) working days from the date of this report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.2 of this Report will be implemented.

8.2 The City Manager must, within thirty (30) working days from the date of this report submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.2 of this Report will be implemented.

8.3 In line with the Constitutional Court decision 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, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the City of Tshwane Metropolitan Municipality, unless a Court Order directs otherwise.

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