
PUBLIC PROTECTOR SOUTH AFRICA

REPORT NUMBER: 133 of 2019/20

Allegations of improper conduct and maladministration against the Frances Baard District Municipality in the Northern Cape Province

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE FRANCES BAARD DISTRICT MUNICIPALITY IN THE NORTHERN CAPE PROVINCE RELATING TO THE APPOINTMENT OF A DEVELOPMENT PLANNER
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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 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct and maladministration relating to the appointment of a Development Planner by the Frances Baard District Municipality (Municipality) in the Northern Cape Province.

(iii) The complaint was lodged on 4 April 2017 by Mr Neo Sebe (the Complainant), in his capacity as a representative of the South African Municipal Workers Union (SAMWU) at the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.

(iv) In the main, the Complainant alleged that the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was irregular as she did not qualify for the position and was not recommended for appointment by the Interview Panel.

(v) In essence, the Complainant alleged that the appointment of the Development Planner was improper and constitutes maladministration.

(vi) Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

(a) Whether the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not
(b) Whether the conduct of the Municipality was improper and constitutes maladministration.

(vii) The investigation was conducted in terms of section 182(1) of the Constitution, and sections 6 and 7 of the Public Protector Act. It included correspondence with the Municipality, a meeting with the Municipal Manager of the Municipality, analysis of documents obtained during the investigation and the application of the relevant laws and other prescripts.

(viii) Having considered the evidence and information obtained during the investigation, I now make the following findings:

(a) Regarding whether the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

(aa) The allegation that the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of the staff of the Municipality is substantiated.

(bb) Ms O Gopane was not suitably qualified for the position of Development Planner and her appointment was in violation of the Municipality’s Policy on Recruitment and Selection, 2015 (Recruitment Policy).
(b) Regarding whether the conduct of the Municipality was improper and constitutes maladministration:

(aa) The allegation that the appointment of Ms O Gopane was improper and constitutes maladministration is substantiated.

(bb) The appointment was not in accordance with section 55(1) of the Local Municipal Systems Act as it was made in violation of the Municipality’s Recruitment Policy, the Employment Equity Act No 55 of 1998 and resulted in irregular expenditure, as contemplated by section 1 of the Local Government: Municipal Finance Management Act No 56 of 2003 (MFMA).

(cc) The conduct of the Municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

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

(a) The Executive Mayor of the Municipality:

(aa) To take appropriate steps in respect of disciplinary action against the Municipal Manager, Ms Mamikie Bogatsu for the irregular appointment of Ms Gopane as Development Planner, in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA within (30) business days from the date of receiving my report.
(bb) To conduct an analysis and evaluation of Ms Gopane’s qualifications, experience and competence against the requirements and job description of the position of a Development Planner that she currently occupies within thirty (30) business days from the date of receiving my report;

(cc) To submit a report to the Municipal Council within thirty (30) business days of the date of receiving my report for a decision on this matter.

(dd) To take the appropriate steps to institute proceedings for the judicial review of the irregular appointment of Ms Gopane, in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 2000, within thirty (30) business days from the date of receiving my report.

(b) The Municipal Council of the Municipality

(aa) To consider the report of the Executive Mayor referred to in paragraph (ix)(a)(cc) above and to take a resolution on the matter within sixty (60) business days from the date of receiving my report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE FRANCES BAARD DISTRICT MUNICIPALITY IN THE NORTHERN CAPE PROVINCE RELATING TO THE APPOINTMENT OF A DEVELOPMENT PLANNER

1. INTRODUCTION

1.1 This is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa (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 sections 8(1) and 8(3) of the Public Protector Act to:

1.2.1 Mr P W Marekwa, the Executive Mayor of the Frances Baard District Municipality (Municipality); and

1.2.2 Ms U Buda, the Speaker of the Municipal Council of the Municipality.

1.3 Copies of the report are also provided to the following persons to inform them of the outcome of my investigation:

1.3.1. Ms Mnikie Bogatsu, the Municipal Manager of the Municipality.

1.3.2. Mr Neo Sebe, who lodged the complaint on behalf of the South African Municipal Workers Union (Complainant).

1.4 The report relates an investigation into allegations of improper conduct and maladministration in connection with the appointment of a Development Planner by the Municipality.
2. **THE COMPLAINT**

2.1. The complaint was lodged on 4 April 2017 at the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.

2.2. In the main, the Complainant alleged that the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was irregular as she did not qualify for the position and was not recommended for appointment by the Interview Panel.

2.3. In essence, the Complainant contended that Ms Gopane’s appointment was improper and constitutes maladministration.

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

3.1 The Public Protector is an independent constitutional institution, 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) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation.
3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect\(^1\). The Constitutional Court further held that:

> "When the remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences"\(^2\).

3.6. In the above-mentioned matter of the Economic Freedom Fighters v Speaker of the National Assembly and Others, Chief Justice Mogoeng stated the following, when confirming the powers of 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);

\(^1\) [2016] ZACC 11; 2016(3) SA 580 (CC) and 2016 (5) BCLR 618 (cc) at para [76].

\(^2\) Supra at para[73].
3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints. It is 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, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e)).

3.7 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);

3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);

3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):
   a) Conduct an investigation;
   b) Report on that conduct; and
   c) To take remedial action.

3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);
3.7.5 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 (Para 105);

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

3.7.7 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).

3.8 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

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 of alleged improper conduct or maladministration.
4.2 **Approach to the investigation**

4.2.1 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 improper conduct or maladministration?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong.

4.2.1.5 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 appointment of Ms Gopane as Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not, whether the conduct of the Municipality was improper and constitutes maladministration.

4.2.1.6 The enquiry regarding what should have happened, focuses on the standard that should have been met by the Municipality in the appointment of Ms Gopane as Development Planner to prevent maladministration.
4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration.

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

4.3.1 Whether the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not

4.3.2 Whether the conduct of the Municipality was improper and constitutes maladministration.

4.4 Key sources of information

4.4.1 Documents

4.4.1.1 Copy of the Municipality's advertisement for the position of Development Planner, dated 13 July 2016.

4.4.1.2 Copy of the Municipality's re-advertisement of the position of Development Planner, dated 9 December 2016.

4.4.1.3 Copy of Minutes of the shortlisting meeting for the position of Development Planner, held on 19 January 2017.

4.4.1.4 Copy of Minutes of the interviews meeting held on 27 January 2017.
4.4.1.5. Copies of the Curriculum Vitae of the shortlisted candidates, including Ms O Gopane.

4.4.2 Meetings held

4.4.2.1 A meeting held with Ms Mamikle Bogatsu, the Municipal Manager of the Municipality on 26 January 2018.

4.4.3 Correspondence between the Public Protector and:

4.4.3.1 The Municipal Manager dated 22 January 2018 and 2 February 2018.

4.4.4 Legislation and other prescripts


4.4.4.2 The Public Protector Act No 23 of 1994.

4.4.4.3 The Local Government: Municipal Finance Management Act No 56 of 2003. (MFMA)

4.4.4.4 The Local Government: Municipal Systems Act No 32 of 2000. (Municipal Systems Act)

4.4.4.5 The Employment Equity Act No 55 of 1998. (Employment Equity Act)

4.4.4.6 The Frances Baard Municipality's Policy on Recruitment and Selection, 2015 (Recruitment Policy).

4.4.4.8 The Code of Conduct for Municipal Staff members contained in Schedule 2 to the Municipal Systems Act.

4.4.5 Jurisprudence considered

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 [2016] ZACC 11; 2016(3) SA 580 (CC).

4.4.5.2 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).

4.4.5.3 Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others 2004(6) SA 222 (SCA).

4.4.5.4 The MEC for Health, Eastern Cape v Kirkland Investments 2014 (3) 481 (CC).

4.4.5.5 Nkosinathi Lawrence Khumalo and Another v MEC for Education: Kwazulu-Natal, [2013] ZACC 46.
4.4.6 Notices issued in terms of section 7(9) of the Public Protector Act

4.4.6.1 Notice issued in terms of section 7(9)(a) of the Public Protector Act to Ms Mamikie Bogatsu, the Municipal Manager of the Municipality, dated 20 June 2019.

4.4.6.2 Response to the section 7(9)(a) Notice from Ms Mamikie Bogatsu, the Municipal Manager, dated 12 November 2019 and documents attached thereto.

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

5.1. Regarding whether the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of the staff of the Municipality:

Common cause or undisputed facts

5.1.1 It is common cause that the Municipality advertised the position of Development Planner on 13 July 2016. The position was re-advertised on 9 December 2016.

5.1.2 The requirements for the position of the Development Planner, as stated in the first advertisement, included:

5.1.2.1 A relevant National Diploma, B Tech or B Degree in Town and Regional Planning or Development Studies.

5.1.2.2 Registration as a planner with the South African Council for Planners (SACPLAN) would be an added advantage.
5.1.2.3 Comprehensive understanding of the strategic objectives, legislative responsibilities, technical knowledge and extensive experience in planning (both strategic and spatial).

5.1.2.4 Four (4) to five (5) years’ experience at middle management level. Exposure in planning and development and integrated development planning or related disciplines. Project management experience.

5.1.3 The key requirements for the post of the Development Planner, as per the second advertisement were as follows:

5.1.3.1 A relevant National Diploma, B Tech or B Degree in Town and Regional Planning or Development Studies.

5.1.3.2 Registration as a planner with the SACPLAN or a Master’s degree in Developmental or Planning Studies would be an added advantage.

5.1.3.3 A comprehensive understanding of strategic objectives, legislative responsibilities, technical knowledge and three (3) to five (5) years’ relevant experience in planning, monitoring and evaluation or development planning in a municipal environment.

5.1.3.4 Exposure in planning and development and integrated development planning or related disciplines.

5.1.3.5 Project management experience. Good presentation and facilitation skills.

5.1.4 Both advertisements included a provision that designated groups, including people with disabilities were particularly encouraged to apply.

5.1.5 Interviews were conducted on 27 January 2017.
5.1.6 According to the Minutes of the Interview Panel, seven (7) candidates were shortlisted. Five (5) females, one of whom was Ms O Gopane and two (2) males.

5.1.7 The Minutes of the Interview Meeting state that the preferred candidate recommended for appointment by the Interview Panel scored a total of 119 points.

5.1.8 It appears from the CV of the candidate preferred by the Interview Panel that he has a Bachelor’s Degree in Urban and Regional Planning, obtained from the University of Venda and is registered with the SACPLAN.

5.1.9 The Interview Panel further recommended a second preferred candidate, if the first preferred candidate did not accept the offer. This candidate is also a male. He scored a total of 111 points. He has a National Diploma in Town and Regional Planning and a B Tech degree in Town and Regional Planning, both obtained from the Cape Peninsula University of Technology. This candidate is also registered with SACPLAN.

5.1.10 Ms O Gopane was not recommended by the Interview Panel, but was appointed as the Development Planner on 6 March 2017.

*Issues in dispute*

5.1.11 The Complainant contended that the appointment of Ms O Gopane as the Development Planner by the Municipality was improper as she did not have the requisite academic qualifications.

5.1.12 Further, that Ms Gopane was not registered with the SACPLAN, which is a basic requirement for a town planning position and that she was not recommended by the Interview Panel.
5.1.13 According to the Minutes of the Interview Panel, Ms O Gopane, scored 104 points, the highest of all the female candidates.

5.1.14 Ms Gopane has a National Diploma, a Bachelor’s Degree and an M Tech Degree in Public Management. She has no indicated qualification in town and regional planning or development studies and was not registered with the SACPLAN.

5.1.15 There is no indication in her CV that her studies for the M-Tech degree in Public Management included planning and/or development studies.

5.1.16 It appears from her CV that most of her experience was in the performance management environment. It does not indicate any understanding of the strategic objectives, legislative responsibilities, technical knowledge relating to planning and she did not have the requisite three (3) to five (5) years relevant experience in planning, monitoring and evaluation or development planning in a municipal environment.

5.1.17 The Interview Panel commented in the Minutes, *inter alia* that Ms Gopane “has average knowledge of legislation guiding the IDP (Integrated Development Planning) processes. Ms Gopane understands the importance of public participation. However, she has no knowledge of SPLUMA (Spatial Planning and Land Use Act No 16 of 2013) and its principles. She was vague in explaining the strategic planning process. She has more experience in performance management and limited experience in development planning. The candidate is not recommended for the position of Development Planner.”

5.1.18 The Municipal Manager did not approve the recommendation of the Interview Panel. In her comments on the Minutes, dated 31 January 2017, the Municipal Manager stated that:
"Considering the employment equity and the number of female employees at middle management level, I appoint Ms O Gopane to the position of Development Planner as the highest female candidate in terms of scoring".

5.1.19 On 6 March 2017, the Municipal Manager informed Ms Gopane of her appointment to the position of Development Planner.

5.1.20 In a meeting held on 26 January 2018 during the investigation, the Municipal Manager indicated that in her view, Ms Gopane qualified for the position of Development Planner as set out in the re-advertisement of the position. The Municipal Manager stated further that the first advertisement gave advantage to applicants with town and regional planning qualifications and experience and did not include prospective applicants with development planning studies qualifications, hence the insertion of a Master's degree as a requirement in the second advertisement.

5.1.21 The Municipal Manager indicated in her response to the Notice issued to her in terms of section 7(9) of the Public Protector Act, dated 21 October 2019, that Ms Gopane holds a Master's Degree in Public Management. She stated that:

"At all material times it has been our understanding that development studies encompass various qualifications which are relevant to planning and/or development in the public sector. There is no specific qualification called development studies and an attempt to narrow the definition of development studies would be difficult to achieve".

5.1.22 She referred to a letter addressed to her by Dr S E Cronje, the Acting Head of the Department of Public Management of the Cape Peninsula University of Technology, dated 8 November 2019, in which he explained that development studies is considered as a subfield of study in the Public Management domain. He stated in this regard that: "An example would be of a student enrolling for a
Masters' Programme at a University registering for a Masters' in Public Management with the minor field of study indicated as Development Studies."

5.1.23 The Municipal Manager further stated that in her view, Ms Gopane satisfied the requirement of relevant experience of three to five years in the field of developmental studies and/or planning. She stated in this regard that:

"She is a female who despite that she was said not to be recommended ended up above 100 points which is reasonably higher if one looks at all other factors, including in the main, the employment equity factor. She also has extensive experience in the field of planning and development since October 2012 until her appointment to the position".

5.1.24 No details of Ms Gopane's relevant experience as stipulated by the second advertisement of the position, were provided by the Municipal Manager.

5.1.25 The Municipal Manager relied on the provisions of section 55(1)(e) of the Municipal Systems Act read with the provisions of sections 15(2) and 20(3) of Employment Equity Act, the Employment Equity Policy and the Recruitment Policy of the Municipality.

5.1.26 She stated in this regard that:

"Section 20(3) of the EEA states that a person 'may' be suitably qualified for a job as a result of any one of or a combination of the following criteria:
(a) formal qualifications;
(b) prior learning;
(c) relevant experience;
(d) capacity to acquire, within reasonable time, ability to do the job."
It is my respectful submission that when I appointed Ms O Gopane in terms of section 55(1)(e) of the Systems Act I assessed all the above factors in considering whether Ms O Gopane is suitably qualified for the job."

**Application of the relevant law**

5.1.27 Section 55(1) of the Municipal Systems Act provides, that as the head of the administration of a municipality, the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, inter alia, the appointment of staff, other than managers directly accountable to the municipal manager, and the management, effective utilisation and training of staff.

5.1.28 A Code of Conduct for Municipal Staff Members is provided for in Schedule 2 to the Municipal Systems Act.

5.1.29 Item 2 of the Code provides that a staff member of a municipality must at all times-

(a) loyally execute the lawful policies of the municipal council;

(b) perform the functions of office in good faith, diligently, honestly and in a transparent manner;

(c) act in such a way that the spirit and objects of section 50 are promoted;

(d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and

(e) act impartially and treat all people, including other staff members, equally without favour or prejudice".
5.1.30 Breaches of the Code must, by virtue of item 14, be dealt with in terms of the disciplinary procedures of the Municipality.

5.1.31 Section 2 of the Employment Equity Act provides as follows:

"The purpose of this Act is to achieve equity in the workplace by-

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce".

5.1.32 Section 15(1) of the Employment Equity Act provides that affirmative action measures are designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

5.1.33 In terms of section 20(3) of the Employment Equity Act, for the purposes of the Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's:

5.1.33.1 formal qualifications;

5.1.33.2 prior learning;

5.1.33.3 relevant experience;

5.1.33.4 capacity to acquire, within a reasonable time, the ability to do the job.
5.1.34 Section 20(4) provides that when determining whether a person is suitably qualified for a job, an employer must:

5.1.34.1 review all the factors listed in section 20(3); and

5.1.34.2 determine whether that person has the ability to do the job in terms of any one or a combination of these factors.

5.1.35 Paragraph 5 of the Municipality’s Recruitment Policy regulates employment equity in recruitment and selection. It provides that the recruitment and selection process should result in the selection by the Interviewing Committee of the person that will make the best contribution to the Municipality.

5.1.36 In terms of paragraph 5.2, the following equity measures will be taken:

"5.2.1 In determining the suitability of applicants, the standards necessary for competence (regards of knowledge, skills and personal characteristics) on the job will be determined prior to the advertising of each post. Care will be taken to ensure that the qualifications and/or work experience required do not exceed the inherent job requirements;

5.2.2 Consideration will be given to the potential of applicants from designated groups to meet the job requirements as well as to proven merit;

5.2.3 Where it is difficult to distinguish between candidates in trying to determine the best candidate, preference will be given to the member of the designated group. (emphasis added)

5.1.37 Paragraph 8.9.3.1 of the Recruitment Policy provides that consideration must be given to the potential applicants from designated groups to meet the job
requirements as well as merit in order to ensure compliance with the Municipality's Equity Policy.

5.1.38 Section 1 of the Local Government: Municipal Finance Management Act, 2003 (MFMA) defines irregular expenditure, *inter alia* as: expenditure incurred by a municipality in contravention of or that is not in accordance with a requirement of the MFMA or the Municipal Systems Act, and which has not been condoned.

5.1.39 A municipality must, in terms of section 171(4) of the MFMA investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality and if the investigation warrants such a step, institute disciplinary proceedings.

5.1.40 Section 171(1)(c) of the MFMA provides that the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently makes or permits, or instructs another official of the municipal entity to make an irregular or fruitless and wasteful expenditure.

**Conclusion**

5.1.41 The qualification required for the position of Development Planner, as indicated in the second advertisement of the position were a "relevant National Diploma, B Tech or B Degree in town and regional planning or development studies" (emphasis added). Ms Gopane has a National Diploma and B Tech Degree in Public Management. She therefore did not qualify for the position in terms of the minimum academic qualifications.
5.1.42 Registration as a professional planner with the SACPLAN or a Masters' Degree in developmental or planning studies were stated as added advantages, i.e. in addition to the minimum academic qualifications.

5.1.43 Ms Gpane was not registered with the SACPLAN. There is also no indication in her CV and it does not appear from her interview for the position that her Masters' Degree focussed on developmental or planning studies or that she undertook any studies in this regard. She accordingly also did not qualify in terms of the advertisement relating to what would be an added advantage.

5.1.44 Three to five years relevant experience in planning, monitoring and evaluation or development planning in a municipal environment were required in terms of the advertisement. Ms Gpane's CV indicates no such experience. It shows that she mainly had experience in performance management. No other verifiable evidence of her experience in planning, monitoring and evaluation or development planning in a municipal environment was provided.

5.1.45 The Interview Panel also concluded that Ms Gpane had limited experience in development planning, that she had average knowledge of the Integrated Development Planning process and that she was not recommended for the position of Development Planner.

5.1.46 The Municipal Manager defended her appointment of Ms Gpane mainly on the basis that she was suitably qualified for the job, as contemplated by section 20(3) of the Employment Equity Act. However, as indicated above, Ms Gpane did not have the formal qualifications for the job, there was no indication that she had "prior learning" for the position and she did not have the required relevant experience.

5.1.47 There was also no indication that she had the capacity to acquire, within a reasonable time, the ability to do the job of a Development Planner of the Municipality. Had this been the case, the Interview Panel would not have concluded that she was not recommended for the position.
5.1.48 Ms Gopane therefore was not suitably qualified for the job, as contemplated by section 15(1) read with section 20(3) of the Employment Equity Act.

5.1.49 The Municipality's Recruitment and Selection Policy required from the Interview Panel to select the candidate that would make the best contribution to the Municipality. The Panel had to consider whether applicants from designated groups would meet the job requirements and proven merit.

5.1.50 It was further expected of the Interview Panel to give preference to a member of a designated group, if it was difficult to distinguish between candidates to determine the best applicant.

5.1.51 The two candidates that were scored the highest by the Interview Panel both had the requisite qualifications and experience for the position, whilst Ms Gopane did not qualify. There was accordingly no justifiable basis on which she could have been selected as the preferred candidate on the basis of equity.

5.1.52 Ms Gopane's appointment as Development Planner was therefore not in accordance with the Recruitment Policy of the Municipality.

5.1.53 Her appointment was accordingly not in accordance with the provisions of section 55(1) of the Municipal Systems Act, as did not comply with the policy considerations of the Municipal Council, as contemplated by the Act.

5.2 Regarding whether the conduct of the Municipality was improper and constitutes maladministration.

Common cause or undisputed facts
5.2.1 It is common cause that the Municipality advertised the position of the Development Planner on 13 July 2016. The position was re-advertised on 9 December 2016.

5.2.2 Both advertisements included a provision that designated groups, including people with disabilities were particularly encouraged to apply.

5.2.3 Interviews were conducted on 27 January 2017.

5.2.4 According to the Minutes of the Interview Panel, seven (7) candidates were shortlisted. Five (5) females, one of whom was Ms O Gopane and two (2) were males.

5.2.5 The Minutes state that the preferred candidate recommended for appointment by the Interview Panel scored a total of 119 points.

5.2.6 It appears from the CV of the candidate preferred by the Interview Panel that he has a Bachelor’s Degree in Urban and Regional Planning, obtained from the University of Venda and is registered with the SACPLAN.

5.2.7 The Interview Panel further recommended a second preferred candidate, if the first preferred candidate did not accept the offer. This candidate is also male. He scored a total of 111 points. He has a National Diploma in Town and Regional Planning and a B Tech degree in Town and Regional Planning, both obtained from the Cape Peninsula University of Technology. This candidate is was also registered with SACPLAN.

5.2.8 Ms O Gopane was not recommended by the Interview Panel, but was appointed as a Development Planner on 6 March 2017.
5.2.9 As indicated in paragraph 5.1 above, Ms Gopane was not suitably qualified for the position of a Development Planner and her appointment was not in accordance with the Recruitment Policy of the Municipality.

Application of the relevant law

5.2.10 The relevant provisions of the applicable laws and prescripts are referred to in paragraphs 5.1.27 to 5.1.41 above.

Conclusion

5.2.11 The appointment of Ms Gopane was not in accordance with the provisions of section 55(1) of the Municipal Systems Act as it was made in violation of the Municipality's Recruitment Policy. It also did not comply with the Employment Equity Act.

5.2.12 The remuneration paid to Ms Gopane since her appointment therefore constituted irregular expenditure, as contemplated by section 1 of the MFMA.

5.2.13 The conduct of the Municipality in appointing Ms Gopane as a Development Planner was improper and constitutes maladministration and resulted in the misappropriation of public funds

6 FINDINGS

6.1. Regarding whether the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and the selection of staff of the Municipality
6.1.1 The allegation that the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of the staff of the Municipality is substantiated.

6.1.2 Ms O Gopane was not suitably qualified for the position of a Development Planner and her appointment was in violation of the Municipality’s Recruitment Policy.

6.2 Regarding whether the conduct of the Municipality was improper and constitutes maladministration

6.2.1 The allegation that the appointment of Ms O Gopane was improper and constitutes maladministration is substantiated.

6.2.2 The appointment was not in accordance with section 55(1) of the Municipal Systems Act as it was made in violation of the Recruitment Policy and the Employment Equity Act and resulted in irregular expenditure as contemplated by section 1 of the MFMA.

6.2.3 The conduct of the Municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1. The appointment by a municipality of employees is an administrative action.

7.2. In the Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others 2004(6) SA 222 (SCA) the Supreme Court of Appeal ruled that until an
administrative decision is set aside by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.

7.3. This principle was confirmed by the Constitutional Court in the MEC for Health, Eastern Cape v Kirland Investments 2014 (3) 481 (CC). The Court found that if public officials or administrators can, without recourse to legal proceedings, be allowed to disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, this would be a licence to self-help. It would be inviting officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The Court found that this would spawn confusion and conflict to the detriment of the administration and the public and that it would undermine the Court's supervision of the administration\(^3\).

7.4. In the matter of Nkosinathi Lawrence Khumalo and Another v MEC for Education: KwaZulu-Natal, [2013] ZACC 46, the Constitutional Court held (at paragraph [28]) that the true nature of such an application to court is one of judicial review under the principle of legality, which is applicable to all exercises of public power and not only to 'administrative action', as defined in the Promotion of Administrative Justice Act, 2000. It requires that all exercises of public power are at a minimum, lawful and rational.

7.5. Consequently, it is not open to the Municipality to simply cancel its employment contract with Ms Gopane. A judicial review application has to be brought to court to review the decision to appoint her and whether it is appropriate in the circumstances to declare the appointment invalid.

\(^3\) At para 89.
7.6. Consequently, the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, is the following:

7.6.1 The Executive Mayor of the Municipality:

7.6.1.1 To take appropriate action against the Municipal Manager, Ms Mamikle Bogatsu for the irregular appointment of Ms Gopane as Development Planner, in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA within (30) business days from the date of receiving my report:

7.6.1.2 To conduct an analysis and evaluation of Ms Gopane’s qualifications, experience and competence against the requirements and job description of the position of a Development Planner that she currently occupies within thirty (30) business days from the date of receiving my report;

7.6.1.3 To submit a report to the Municipal Council within thirty (30) business days of the date of receiving my report for a decision on this matter.

7.6.1.4 To take the appropriate steps to institute proceedings for the judicial review of the irregular appointment of Ms Gopane, in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 2000, within thirty (30) business days from the date of receiving my report.
7.6.2 The Municipal Council of the Municipality

7.6.2.1 To consider the report of the Executive Mayor referred to in paragraph 7.6.1.3 above and to take a resolution on the matter within sixty (60) business days from the date of receiving my report.

8.1. MONITORING

8.1.1 The Executive Mayor of the Municipality must, within 30 (thirty) days from the date of receipt of my report, submit an implementation plan, indicating how the remedial action referred to in paragraph 7.6.1 above is implemented.

8.1.2 The Speaker of the Municipal Council to submit to the office of the Public Protector a copy of the resolutions of the Municipal Council referred to in paragraph 7.6.2.1 within 07 (7) days of such resolution having been taken.

8.1.3 The submission of the implementation plan and the implementation of my Remedial action shall, in the absence of the court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.

ADV BUSISWE MKHWEBANE  
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA  
DATE: 02/03/2020
Summary of the Report

The report relates to an investigation into allegations of improper conduct and maladministration pertaining to the appointment of a Development Planner by the Frances Baard District Municipality in the Northern Cape Province.

The complaint was lodged by Mr Neo Sebe of the South African Municipal Workers Union.

Issues Investigated

Whether the appointment of Ms O Gopane as Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not

Whether the conduct of the Municipality was improper and constitutes maladministration.
(a) Regarding whether the appointment of the Development Planner by the Municipality on 6 March 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and the selection of staff of the Municipality:

(aa) The allegation that the appointment of the Development Planner by the Municipality on 6 March 2017 was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of the staff of the Municipality is substantiated.

(bb) Ms O Gopane was not suitably qualified for the position of a Development Planner and her appointment was in violation of the Municipality's Policy on Recruitment and Selection, 2015 (Recruitment Policy).

(b) Regarding whether the conduct of the Municipality was improper and constitutes maladministration:

(aa) The allegation that the appointment of Ms O Gopane was improper and constitutes maladministration is substantiated.

(bb) The appointment was not in accordance with section 55(1) of the Local Municipal Systems Act as it was made in violation the Municipality's Recruitment Policy and the Employment Equity Act No 55 of 1998 and resulted in irregular expenditure, as contemplated by section 1 of the Local Government: Municipal
(cc) The conduct of the Municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

Public Protector's Remedial Action

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

(a) The Executive Mayor of the Municipality:

(aa) To take appropriate steps in respect of disciplinary action against the Municipal Manager, Ms Mamikie Bogatsu for the irregular appointment of Ms Gopane as Development Planner, in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA within (30) business days from the date of receiving my report.

(bb) To conduct an analysis and evaluation of Ms Gopane's qualifications, experience and competence against the requirements and job description of the position of a Development Planner that she currently occupies within thirty (30) business days from the date of receiving my report;

(cc) To submit a report to the Municipal Council within thirty (30) business days of the date of receiving my
report for a decision on this matter.

(dd) To take the appropriate steps to institute proceedings for the judicial review of the irregular appointment of Ms Gopane, in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 2000, within thirty (30) business days from the date of receiving my report.

(b) The Municipal Council of the Municipality

(aa) To consider the report of the Executive Mayor referred to in paragraph (a)(cc) above and to take a resolution on the matter within sixty (60) business days from the date of receiving my report.