
PUBLIC PROTECTOR SOUTH AFRICA

REPORT NO. 34 OF 2019/2020
ISBN: 978-1-928507-41-3

“Allegations of maladministration against the Mopani District Municipality regarding the permanent appointment of Ms EN Ngobeni”

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF MS EN NGOBENI TO A POSITION OF IT SYSTEMS AND NETWORK OFFICER BY THE MOPANI DISTRICT MUNICIPALITY
TABLE OF CONTENTS

Executive Summary .................................................................................................................. 3

1. INTRODUCTION .................................................................................................................. 8

2. THE COMPLAINT ................................................................................................................. 9

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR ....................... 9

4. THE INVESTIGATION ........................................................................................................... 15

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS ........................................... 19

6. FINDINGS ........................................................................................................................... 28

7. REMEDIAL ACTION ........................................................................................................... 30

8. MONITORING ....................................................................................................................... 30
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 23 of 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution following an investigation into allegations of irregular appointment of Ms. EN Ngobeni (Ms Ngobeni) to the position of IT Systems and Network Officer by the Mopani District Municipality (the Municipality).

(iii) On 15 May 2017, I received a complaint from Mr K Mhangwani (the Complainant) who was employed by the Municipality as the Information Technology Systems and Network Officer.

(iv) In the main, the Complainant alleged that:

(aa) The Municipality advertised the position of Information Technology Systems and Network Officer in the Sunday World newspaper on 9 October 2016;

(bb) The Municipality shortlisted, interviewed and appointed Ms Ngobeni despite her not meeting the minimum requirements of the post;

(cc) The Municipality ignored concerns raised internally by the Complainant on the alleged irregular appointment of Ms Ngobeni.

(iv) On analysis of the complaint, the following issues were identified and investigated:
(aa) Whether the Municipality irregularly shortlisted and appointed Ms Ngobeni to the position of IT Systems and Network Officer without following proper recruitment processes;

(bb) Whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Ms Ngobeni.

(vi) The investigation was conducted by way of correspondences, meetings and interviews with the Complainant, the Municipal officials as well as perusal of all relevant documents, analysis and application of all relevant laws, policies and related prescripts.

(vii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the Municipality and prejudice caused to other candidates who applied for the position were principally those imposing administrative standards that should have been complied with by the Municipality during the recruitment process. Those are the following:


(viii) On 9 May 2019, I issued notices (Notice) in terms of section 7(9) (a) of the Public Protector Act to, amongst others, the Executive Mayor of Mopani District Municipality, the Speaker of the Municipal Council of Mopani District Municipality, and the Municipal Manager of the Mopani District Municipality, the former Acting Municipal
Manager, the former Chairperson of the shortlisting and interviewing panel to enable them to respond within ten (10) working days of receipt thereof.

(ix) I did not receive responses to my section 7(9) notice within ten (10) working days of receipt thereof.

(x) In a letter dated 21 May 2019, the Municipal Manager requested an extension to submit his response to the notice by 15 June 2019. My investigation team communicated the request to me through a memorandum dated 22 May 2019. I declined the request on 29 May 2019 and my decision was communicated to the Municipal Manager by my investigation team in a letter dated 31 May 2019. Despite not issuing the report by the end of June 2019, the Municipal Manager still failed to submit his response to the notice.

(xi) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

(a) **Regarding whether the Municipality irregularly shortlisted and appointed Ms Ngobeni to the position of IT Systems and Network Officer without following proper recruitment processes.**

(aa) The allegation that the Municipality irregularly appointed Ms Ngobeni to the position of IT Systems and Network Officer is substantiated.

(bb) When the Municipality advertised the position of IT Systems and Network Officer in the *Sunday World* newspaper dated 9 October 2016, the minimum requirements for the post were Grade 12, certificate/diploma/degree in information technology, minimum of three (3) years’ experience and preparedness to be subjected to security clearance.
The advert did not include Recognition of Prior Learning (RPL) as one of the requirements. The consideration of only a matric as a requirement as opposed to a degree or diploma denied any other interested qualifying members of the public who only had matric an opportunity to apply for the post.

(cc) It was therefore unfair, unequitable and improper for the Municipality to shortlist and subsequently appoint Ms Ngobeni, who only had a matric certificate, but did not meet the post requirements reflected in the advertisement. It was improper for the Municipality, in particular the shortlisting and interviewing panel to have considered a candidate who did meet the requirements for the post.

(dd) The conduct of the Municipality, particularly Mr D Shithangu, was in violation of clauses 9.1, 9.2, 9.4 and 13 of the Municipal Personnel Provisioning Policy.

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

(b) **Regarding whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Ms Ngobeni.**

(aa) The allegation that the Complainant and other applicants suffered prejudice as a result of the irregular appointment of Ms Ngobeni is substantiated.

(bb) The unfair, unequitable and therefore improper selection and subsequent appointment of Ms Ngobeni by the Municipality prejudiced the Complainant and other applicants. The salary paid to the Municipal IT Systems and Network Officer is irregular due to the fact that she has been appointed irregularly.

(cc) The shortlisting and subsequent appointment of Ms Ngobeni as the only candidate with a Grade 12 certificate prejudiced the Complainant and other applicants who had
certificates/diplomas/ degrees in IT and the required minimum of three (3) years' experience as stated in the advertisement.

(dd) The conduct of the Municipality, particularly Mr Shithangu, was in violation of sections and 60(a), 61(1)(d), 62(1) (d), 171(1) 173(1) of the MFMA and clauses 9.1, 9.2, 9.4 and 13 of the Municipal Personnel Provisioning Policy.

(xii) The appropriate remedial action that I am taking in pursuit of section 182(1) (c) of the Constitution and section 6(4) (c) (ii) of the Public Protector Act, is as follows:

(aa) The Speaker of the Municipal Council must within thirty (30) working days from the date of the report, ensure that the Municipal Council, in consultation with the Municipal Manager, declare the appointment of Ms Ngobeni to the position of IT Systems and Network Officer as irregular. The salary of Ms Ngobeni should reflect as an irregular expenditure in the Municipality's financial statement for the period 1 April 2017 to date;

(bb) The Municipal Manager must within thirty (30) working days from the date of this report, take disciplinary action against all officials who caused the irregular appointment of Ms Ngobeni;

(cc) The Municipal Manager must within thirty (30) working days from the date of this report, approach the Court to review the irregular appointment of Ms Ngobeni.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF AN IRREGULAR
APPOINMENT OF MS EN NGOBENI TO A POSITION OF IT SYSTEMS AND NETWORK
OFFICER BY THE MOPANI DISTRICT MUNICIPALITY

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1) (b) of the Constitution of the
Republic of South Africa, 1996 (the Constitution) and section 8(2A) (a) of the
Public Protector Act 23 of 1994 (the Public Protector Act).

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

1.2.1 The Member of the Executive Council (MEC) for Limpopo Cooperative
Governance, Human Settlements and Traditional Affairs, Mr B Makamu;

1.2.2 The Speaker of the Municipal Council of the Mopani District Municipality,
Councillor (Cllr) W Sedibeng;

1.2.3 The Executive Mayor of the Mopani District Municipality, Cllr. P Shayi;

1.2.4 The Acting Municipal Manager of the Mopani District Municipality, Mr Q Kgotla;

1.2.5 The former Acting Municipal Manager of Mopani District Municipality; Mr DD
Shithangu; and

1.3 A copy of the report is also provided to the Complainant, Mr K Mhangwani, to
inform him of the outcome of my investigation.
1.4 The report relates to an investigation into allegations of an irregular appointment of Ms Nqobeni to a position of IT Systems and Network Officer by the Mopani District Municipality (the Municipality).

2. THE COMPLAINT

2.1 On 15 May 2017, I received a complaint from Mr K Mhangwani (the Complainant) who was employed by the Municipality as the Manager: Finance-Expenditure with a request that I must intervene and investigate an allegation of maladministration relating to the irregular appointment of Ms EN Nqobeni (Ms Nqobeni) to a position of IT Systems and Network Officer by the Municipality.

2.2 The Complainant alleged that:

2.2.1 The Municipality advertised the position of IT Systems and Network Officer in the *Sunday World* newspaper dated 9 October 2016;

2.2.2 The Municipality shortlisted, interviewed and appointed Ms Nqobeni despite not meeting the minimum requirements of the post;

2.2.3 The Municipality ignored concerns raised internally by the Complainant on the alleged irregular appointment of Ms Nqobeni as an IT Systems and Network Officer.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The mandate of the Public Protector

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

3.1.2 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”.

3.1.3 Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purposes of an investigation.

3.1.5 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 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 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\(^2\).”

\(^1\) [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
\(^2\) Para [73]
3.1.6. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

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

3.1.8 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 the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

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

3.1.10 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);

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

3.1.12 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 the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

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

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

3.1.15 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no. 91139/2016 (13 December 2017), the Court held as follows:

3.1.15.1 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective, (paragraphs 85 and 152);

3.1.15.2 There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92);

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

3.1.15.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (Paragraph 104);

3.1.15.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105).

3.1.16 To this end, I would like to emphasise that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its adjudicative and judicial nature. The office of the Public Protector is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and prejudice. It is therefore trite that the decisions of the Public Protector are administrative actions.

3.1.17 The fact that there is 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 (paragraphs 107 and 108);

---

3 Sedumo et al vs Rustenburg Platinum Mines Limited et al, 2008(2) SA 24 (CC) at 235.
4 SABC vs DA (393/2015 [2015] ZASCA 156
5 Minister of Home Affairs et al vs Public Protector et al 2017(2) SA 597 (GP).
3.1.18 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112);

3.1.19 The Mopani District Municipality is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector’s mandate.

3.1.20 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.

3.1.21 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 of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives me the power 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; to report on that conduct; and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The investigation was conducted by way of correspondences, meetings and interviews with the Complainant and the relevant Municipal officials, analysis of the relevant documentation and consideration and application of the relevant laws, and regulatory framework.

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:

(a) What happened?
(b) What should have happened?
(c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration or other improper conduct?
(d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to place the Complainant as close as possible to where he 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeals\(^6\) (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

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 or complied with by the Municipality to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had a state organ complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the Municipality irregularly shortlisted and appointed Ms Ngobeni to the position of IT Systems and Network Officer without following proper recruitment processes; and

4.3.2 Whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Ms Ngobeni.

\(^6\) Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA).
4.4 The key sources of information

4.4.1 Documents

4.4.1.1 A copy of the Municipal Advertisement placed on the *Sunday World* newspaper dated 9 October 2016.

4.4.1.2 A copy of the Municipal Recruitment register.

4.4.1.3 Copies of applications, qualifications and curriculum vitae for the shortlisted candidates.

4.4.1.4 A copy of the unsigned minutes of the shortlisting proceedings, attendance register and agenda dated 17 January 2017.

4.4.1.5 A copy of the scheduled time for the shortlisted candidates dated 17 February 2017 but signed on 18 October 2017.

4.4.1.6 A copy of the shortlisted candidates (undated)

4.4.1.7 A copy of the unsigned interview minutes/proceedings dated 17 February 2017.

4.4.1.8 A copy of the interview proceedings dated 6 July 2017.

4.4.1.9 A copy of the attendance register for the shortlisting panel dated 17 January 2017.

4.4.1.10 A copy of the attendance register for the interview panel dated 17 February 2017.

4.4.1.11 A copy of the outcome (results) for all candidates interviewed signed by MMC-Governance, Acting Municipal Manager, Audit Committee Member and the Deputy Manager Information Technology dated 12 February 2017.

4.4.1.12 A copy of individual score sheets by panelists, the appointment Report by the interview committee for the approval of the successful candidate.

4.4.1.13 A copy of the appointment letter signed by the former Acting Municipal Manager dated 6 March 2017.


4.4.1.15 A copy of the complaint form by the Complainant dated 11 May 2017.
4.4.2 Correspondence sent and received

4.4.2.1 A letter of enquiry from my office to the Municipality dated 1 June 2017.
4.4.2.2 An email from my office to the Municipality dated 18 August 2017.
4.4.2.3 A letter of concern for lack of response from my office to the Municipality dated 7 September 2017.
4.4.2.4 A letter of concern for lack of response from my office to the Municipality dated 6 October 2017.
4.4.2.5 A copy of the section 7(9) Notice signed by me on 9 May 2019 issued to the MEC, the Executive Mayor, Speaker, the Municipal Manager, former Acting Municipal Manager and former Chairperson of the shortlisting panel.

4.4.3 Legislation and other prescripts

4.4.3.1 The Constitution, 108 of 1996.
4.4.3.2 The Public Protector Act, 23 of 1994.
4.4.3.3 The Municipal Finance Management Act, 2003 (MFMA)
4.4.3.4 The Mopani District Municipality Personnel Provisioning Policy No. 101/2015 (Recruitment Policy).

4.4.4 Interviews

4.4.4.1 A meeting with the Deputy Manager Human Resource, Mr NG Lebepe and the former Head of Legal, Mr MJ Mafa on 6 October 2017.
4.4.4.2 A meeting with the former Head of Legal, Mr MJ Mafa on 25 October 2017.
4.4.4.3 A meeting with the Municipal Manager, Mr R Monakedi on 7 September 2018.
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* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

4.4.5.2 *Sedumo et al v Rustenburg Platinum Mines Limited et al* 2008(2) SA 24 (CC) at 235.

4.4.5.3 *Ex Parte Chairperson of the Constitutional Assembly; In re; Certificate of the Constitution of the Republic of South Africa* 1996(4) SA744 (CC) at 161.

4.4.5.4 *Minister of Home Affairs et al v Public Protector et al* 2017(2) SA 597 (GP).

4.4.5.5 *President of the Republic of South Africa v Office of the Public Protector and Others* Case no. 91139/2016 [2017] ZAGPPHC 747.

4.4.5.6 *Public Protector v Mail and Guardian* 2011(4) SA 420 (SCA).

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

5.1 Regarding whether the Municipality irregularly shortlisted and appointed Ms Ngobeni to the position of IT Systems and Network Officer without following proper recruitment processes:

*Common cause issues*

5.1.1 The Municipality advertised the position of IT Systems and Network Officer in the *Sunday World* newspaper date d 9 October 2016.

5.1.2 The minimum requirements for the post were Grade 12, certificate/diploma/degree in information technology, minimum of three (3) years' experience and preparedness to be subjected to security clearance.
5.1.3 According to the recruitment register, there were two hundred and eighty one (281) applicants. Of the 281 applicants, hundred and fifty six (156) applicants had either a National Diploma or Degree in IT.

5.1.4 On 17 January 2017, the following six (6) candidates were shortlisted:

<table>
<thead>
<tr>
<th>Name</th>
<th>Qualifications</th>
<th>Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Malatji MD</td>
<td>Bachelor of Science (BSc) in IT</td>
<td>Two (2) years and three (3) months</td>
</tr>
<tr>
<td>2. Rerani TG</td>
<td>Higher Diploma Advance IT</td>
<td>Eleven (11) Years</td>
</tr>
<tr>
<td>3. Ngobeni EN</td>
<td>Grade 12</td>
<td>Nine (9) years</td>
</tr>
<tr>
<td>4. Maponya MD</td>
<td>International Computer Driving Licence (ICDL)</td>
<td>Seven (7) years</td>
</tr>
<tr>
<td>5. Mahaleamela MD</td>
<td>Diploma in IT</td>
<td>Thirteen (13) years</td>
</tr>
<tr>
<td>6. Makhubele MS</td>
<td>Diploma in IT Engineering</td>
<td>sixteen (16) years</td>
</tr>
</tbody>
</table>

5.1.5 Ms Ngobeni was shortlisted and appointed to the position of IT Systems and Network Officer. The appointment was approved by the former Acting Municipal Manager, Mr Shithangwe on 1 March 2017.

5.1.6 The Complainant was not shortlisted to the position of IT Systems and Network Officer. In an undated letter received by the Municipality on 3 April 2017, the Complainant requested the Municipality to furnish him with reasons for not being shortlisted and the criteria used during the shortlisting process, but the Municipality failed to respond to his request. He subsequently met with the Municipal’s Labour Relations Officer, Mr P Lathani, who promised to consider his request, but no response was ever provided to him.
5.1.7 My office wrote a letter to the Municipality dated 1 June 2017 requesting it to provide reasons for not shortlisting the Complainant. The Municipality responded by providing my investigation team with documents relating to the shortlisting and appointment of Ms Ngobeni through the Municipal’s Head of Legal, Mr MJ Mafa.

Issues in dispute

5.1.8 The Complainant alleged that Ms Ngobeni did not meet the minimum requirements for the post.

5.1.9 My office raised the matter with the Municipality on 1 June 2017 requesting documents and comments on the alleged irregular appointment. After several attempts to gather information and a response from the Municipality, my investigation team finally met with the Municipality’s Director: Corporate Services, Mr N G Lebepe, and Mr Mafa on 6 October 2017 wherein the nature of the complaint was clarified and documents were requested.

5.1.10 On 25 October 2017, the Municipality provided my office with the following documents:

(a) Minutes of the shortlisting panel;

(b) Minutes of the interview panel;

(c) Copies of qualifications of the shortlisted candidates;

(d) The Municipality’s Recruitment Policy;

(e) The Municipality’s Recruitment Register; and

(f) A letter dated 27 March 2017 titled “Notice of intention to withdraw the appointment letter for the position of IT Systems and Network Officer/Yourself”
5.1.11 The minutes of the shortlisting meeting dated 17 January 2017 indicated the following: “The below candidates were shortlisted as they were found to be qualifying in terms of the advertisement:

(a) Malatji M D;
(b) Rerani T G;
(c) Ngobeni E N;
(d) Makhubele M S;
(e) Maponya M D; and
(f) Mahaleamela M T”.

5.1.12 Before Ms Ngobeni could assume her duties on 1 April 2017, the Municipality conducted security checks and qualifications verification, where after a letter dated 27 March 2017 was written to her indicating the following: “It has however come to the attention of the Acting Municipal Manager that you do not meet the minimum requirements as stipulated in the advertisement for the said position.”

5.1.13 Ms Ngobeni approached Shiviri Manzini Masetlia Inc. who then wrote back to the Municipality and requested that the Municipality should not withdraw the appointment as Ms Ngobeni was studying towards a Diploma. The attorneys further indicated the following: “…her experience, the legitimate expectation created by the Mopani Municipality that she qualifies for the post, which we submit she does, potential financial and/or career prejudice to both our client and the Municipality we request the Mopani District Municipality not to withdraw our client’s appointment.”

5.1.14 The Municipality did not withdraw the appointment of Ms Ngobeni as contained in its letter dated 27 March 2017.
5.1.15 The Municipal Manager, Mr R Monakedi, at a meeting held on 7 September 2018, indicated that all the shortlisted candidates did not meet the minimum requirements and the panel took a decision to “relax” the requirements for the post as advertised.

Application of the relevant legal prescripts

5.1.16 Section 195(1) of the Constitution provides, amongst others, that “Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient and economic use of resources must be promoted.

(c) …

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) …

(f) Public administration must be accountable

(g) Transparency must be fostered

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.”

5.1.17 It was expected of the Municipality to maintain a high standard of professional ethics when it recruited and appointed a suitable candidate for the advertised post. Any process followed which is in contravention of the above constitutional principles would be improper.

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

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

5.1.20 The selection criteria for the position was that the applicants must possess Grade 12, certificate/diploma/degree in IT and a minimum of three (3) years' experience. Ms Ngobeni, who was appointed to the post did not meet the minimum requirements as she only possessed a Grade 12 at the time of the advertisement.

5.1.21 Section 9.2 of the MPPP provides further that the qualification of the applicant as well as prior learning and experience relevant to the position must be considered. Where applicable and practical, the learning potential to acquire skills and knowledge of the position within a reasonable period must be afforded significant relevance.

5.1.22 Ms Ngobeni did not have the qualification as required by the MPPP. She enrolled with Vaal University of Technology for a B.Tech Computer Systems in 2002, but only passed the following courses:

(a) Computer Skills 1
(b) Mathematics 1
(c) Electrical Engineering 1
(d) Entrepreneurship 2
(e) Programming 1

5.1.23 Section 9.4 of the MPPP provides that the selection panel should, before any shortlisting of candidates, meet to determine the selection criteria to be used, taking into account the advertisement for the position.
5.1.24 There are no records or minutes indicating that the panel met and determined other criteria for the shortlisting and appointment of Ms Ngobeni. She indicated in her application that she only possessed a Grade 12 certificate and no other qualifications.

5.1.25 Clause 13 of the MPPP provides that letters of appointment are drafted by the Corporate Services Directorate and signed by the Municipal Manager unless specifically delegated. The appointment letter of Ms Ngobeni was drafted by Corporate Services Directorate and it was approved by the Municipal Manager.

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

**Conclusion**

5.1.27 Based on the evidence in my possession, it can be concluded that the appointment of Ms Ngobeni was not in line with the constitutional principles governing public administration and the Municipal’s recruitment and selection policy.

5.2 **Regarding whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Ms Ngobeni:**

5.2.1 The Complainant argued that the Municipality’s decision to irregularly appoint Ms Ngobeni caused prejudice to him and other qualifying applicants. They were prejudiced in that all were denied an opportunity to compete fairly for the vacant post and in compliance with the MPPP.

5.2.2 He further argued that the decision to appoint Ms Ngobeni under the circumstances resulted in the Municipality incurring an irregular expenditure.
Application of the relevant legal prescripts

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

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

5.2.4 Section 62(1) (d) of the MFMA provides as follows: "The Accounting Officer is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented."

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

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

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

5.2.7 Mr Shithhangu was expected to comply with sections 61 and 62 of the MFMA to avoid committing financial misconduct.

5.2.8 Section 173(1) of the MFMA provides that:
"The Accounting Officer of a municipality is guilty of an offence if that accounting officer—

(a) deliberately or in a grossly negligent way—

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

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

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

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

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

(a) Irregular expenditure that constitute a criminal offence…"

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

5.2.11 The above provision obliges both the Municipal Manager and Council to report and recover any irregular expenditure that constitutes a crime.
5.2.12 A wrong recruitment might have a negative impact on the organisation’s performance, hence it is crucial for leadership to apply its mind during the recruitment process. “Bad hiring decisions could not only negatively affect a company financially, but could also harm employee morale and result to time loss due to grievance, disputes and litigation processes”.

Conclusion

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

6. FINDINGS

6.1 Regarding whether the Municipality irregularly shortlisted and appointed Ms Ngobeni to the position of IT Systems and Network Officer without following proper recruitment processes

6.1.1 The allegation that the Municipality irregularly appointed Ms Ngobeni to the position of IT Systems and Network Officer is substantiated.

6.1.2 When the Municipality advertised the position of IT Systems and Network Officer in the Sunday World newspaper dated 9 October 2016, it did not only include matric as a requirement but also experience. The advert did not include Recognition of Prior Learning (RPL) as one of the requirements. The consideration of only a matric as a requirement as opposed to a degree or diploma denied any other interested qualifying members of the public who only had matric an opportunity to apply for the post.

6.1.3 It was therefore unfair, unequitable and improper for the Municipality to shortlist and subsequently appoint Ms Ngobeni, who only had a matric certificate, but did not meet the post requirements reflected in the advertisement. It was improper for the Municipality, in particular the shortlisting and interviewing panel to have considered a candidate who did meet the requirements for the post.

6.1.4 The conduct of the Municipality, particularly Mr D Shithanghu, was in violation of clauses 9.1, 9.2, 9.4 and 13 of the Municipal Personnel Provisioning Policy.

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

6.2 Regarding whether the Complainant and other applicants suffered prejudice as a result of the alleged irregular appointment of Ms Ngobeni.

6.2.1 The allegation that the Complainant and other applicants suffered prejudice as a result of the irregular appointment of Ms Ngobeni is substantiated.

6.2.2 The unfair, unequitable and therefore improper selection and subsequent appointment of Ms Ngobeni by the Municipality prejudiced the Complainant and other applicants. The salary paid to the Municipal IT Systems and Network Officer is irregular due to the fact that she has been appointed irregularly.

6.2.3 The shortlisting and subsequent appointment of Ms Ngobeni as the only candidate with a Grade 12 certificate prejudiced the Complainant and other applicants who had certificates/diplomas/ degrees in IT and the required minimum of three (3) years' experience as stated in the advertisement.
6.2.4 The conduct of the Municipality, particularly Mr Shitlhangu, was in violation of sections and 60(a), 61(1)(d), 62(1) (d), 171(1) 173(1) of the MFMA and clauses 9.1, 9.2, 9.4 and 13 of the Municipal Personnel Provisioning Policy.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that I am taking is in pursuit of section 182(1) (c) of the Constitution and section 6(4) (c) (ii) of the Public Protector Act, is as follows:

7.1.1 The Speaker of the Municipal Council must within thirty (30) working days from the date of the report, ensure that the Municipal Manager tables the report to the Council, for consideration of my report on the irregular appointment of Ms Ngobeni to the position of IT Systems and Network Officer as irregular. The salary of Ms Ngobeni should reflect as an irregular expenditure in the Municipality’s financial statement for the period 01 April 2017 to date;

7.1.2 The Municipal Manager must within thirty (30) working days form the date of this report, take disciplinary action against all officials who caused the irregular appointment of Ms Ngobeni;

7.1.3 The Municipal Manager must within thirty (30) working days from the date of this report, approach the Court to review the irregular appointment of Ms Ngobeni.

8. MONITORING

8.1 I will require the Municipal Manager to submit the implementation plan to my office within fifteen (15) working days from the date of this report indicating how the remedial actions referred to in paragraph 7 above will be implemented.
8.2 The submission of the Implementation Plan and the implementation of my remedial actions 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 BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/12/2019