
PUBLIC PROTECTOR SOUTH AFRICA

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Allegations of improper conduct and maladministration against the George Local Municipality

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE GEORGE LOCAL MUNICIPALITY IN THE WESTERN CAPE PROVINCE RELATING TO THE APPOINTMENT OF THE MANAGER: SEWER NETWORK IN MARCH 2017
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Executive Summary

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

(ii) The report relates to an investigation into allegations of improper conduct and maladministration by the George Local Municipality (Municipality) in the Western Cape Province pertaining to the appointment of the Manager: Sewer Network in March 2017.

(iii) The complaint was lodged by Mr R C Van Rooi on 29 March 2017.

(iv) Based on an analysis of the complaint, the following issues were considered and investigated:

   (a) Whether the appointment of Mr R Van Staden as Manager: Sewer Network in March 2017 was fair and in accordance with the relevant legislation 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.

(v) 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 and the Engineering Council of South Africa, a meeting with officials of the Municipality, and analysis of the documents and information obtained during the investigation and application of the relevant legislation, policy and jurisprudence.
Having considered the evidence obtained during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether the appointment of Mr Van Staden as Manager: Sewer Network in March 2017 was fair and in accordance with the relevant legislation and prescripts regulating the recruitment and selection of staff of the Municipality.

(aa) The allegation that the appointment of Mr Van Staden as Manager: Sewer Network in March 2017 was unfair and not in accordance with the relevant legislation and prescripts regulating the recruitment and selection of staff of the Municipality, is substantiated.

(bb) The appointment was made in violation of section 55(1) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) and the Recruitment and Selection Policy (Policy) of the Municipality.

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

(aa) The allegation that the conduct of the Municipality referred to in paragraph (vi)(a) was improper and constitutes maladministration, is substantiated.

(bb) The appointment of Mr Van Staden was made in breach of item 2 of the Code of Conduct for Municipal Staff Members.

(cc) It also resulted in irregular expenditure in respect of the remuneration paid to Mr Van Staden, as contemplated by section 1 of the Local Government: Municipal Finance Management Act, 2003(MFMA) as
the appointment was not made in terms of section 55(1) of the Municipal Systems Act.

(dd) The appointment of Mr R Van Staden by the Municipality constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

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

(a) The Executive Mayor of the Municipality:

(aa) To take appropriate steps in respect of disciplinary action against the Municipal Manager and the other officials involved in the appointment of Mr Van Staden as the Manager: Sewer Network 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 thirty (30) days from the date of my report.

(bb) To conduct an analysis and evaluation of Mr Van Staden’s qualifications, experience and competence against the requirements and job description of the position of Manager: Sewer Network that he currently occupies, within thirty (30) business days from the date of my report;

(cc) To submit a report to the Municipal Council within thirty (30) business days of the date of my report for a decision on this matter; and
(dd) To institute proceedings for the judicial review of the irregular appointment of Mr Van Staden, in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 2000, within thirty (30) business days from the date of my report.

(b) **The Municipal Council of the Municipality**

(aa) The Municipal Council to consider the report of the Executive Mayor referred to in paragraph (vii)(a)(cc) above and to take a resolution on the matter within sixty (60) business days from the date of this report.
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, 1996 (the Constitution) and section 8(2A) 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 The Speaker of the Municipal Council of the George Local Municipality (Municipality), Mr G Pretorius; and

1.2.2 The Executive Mayor of the Municipality, Mr M Naik.

1.3 Copies of the report are also provided to Mr A Bredell, the Member of the Western Cape Executive Council responsible for Local Government, Environmental Affairs and Development Planning, Mr T Botha, the Municipal Manager of the George Municipality and Mr R C Van Rooi, who lodged the complaint, to inform them of the outcome of my investigation.

1.4 The report relates to an investigation into allegations of improper conduct and maladministration by the Municipality pertaining to the appointment of Mr R Van Staden as Manager: Sewer Network, in March 2017.
2. **THE COMPLAINT**

2.1 The complaint was lodged by Mr R C Van Rooi (the Complainant) on 29 March 2017.

2.2 In the main, the Complainant alleged that:

2.2.1 The Municipality advertised the position of Manager: Sewer Network in 2016. He applied on 29 March 2016. The closing date was 1 April 2016.

2.2.2 The position was again advertised in August 2016. The closing date was 26 August 2016.

2.2.3 He was interviewed on 23 February 2017. On 10 March 2017, he was informed that his application had not been successful, even though he was registered as a Professional Engineering Technician: Civil and the successful candidate (Mr Van Staden) was not registered as such. Mr Van Staden was only registered as a Candidate Engineering Technician on 22 March 2017, after his appointment as the Manager: Sewer Network.

2.2.4 One of the main requirements for the position, as stated in the advertisements, was registration with the Engineering Council of South Africa as a Professional Engineering Technician.

2.3 In essence, the Complainant alleged that the appointment of Mr Van Staden as Manager: Sewer Network in March 2017 was not consistent with the Municipality’s Recruitment and Selection Policy, was unfair, improper and amounted to 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) 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*, the 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);

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);

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

\(^2\) *Supra* at para[73]
3.6.5 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 (paragraph 71 of the judgment);

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 (paragraph 82 of the judgment);

3.7.3 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 (paragraph 100 and 101 of the judgment):

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 (paragraph 104 of the judgment);

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 (Paragraph 105 of the report);

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 (paragraph 107 and 108 of the Judgment); 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 (paragraph 112 of the judgment).

3.8 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 constitutes ‘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 constitutes ‘special circumstances’ depends on the merits of each case.

3.9 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.

3.10 The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.
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 amounts to maladministration?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong or, where appropriate, to place the complainant as close as possible to where he would have been, but for the improper conduct or maladministration.

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 Mr R Van Staden as Manager: Sewer Network by the Municipality was fair and complied with relevant legislation and prescripts regulating the recruitment and selection of staff of the Municipality;
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 Mr Van Staden, to prevent maladministration or prejudice.

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

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

4.3.1 Whether the appointment of Mr R Van Staden as Manager: Sewer Network in March 2017 was fair and in accordance with the relevant legislation 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 undated advertisements by the Municipality for the position of Manager: Sewer Network with closing dates of 1 April 2016 and 26 August 2016, respectively.

4.4.1.2 A copy of the Job Description Form for the Post Title: Manager: Sewer Network of the Municipality.
4.4.1.3 Copy of the Minutes of Shortlisting Meetings for the position of Manager Sewer Network, held on 20 October 2016 and 14 December 2016, respectively.

4.4.1.4 Copy of the Mark Schedule for the practical tests and interviews held for the position of Manager: Sewer Network on 23 February 2017.

4.4.1.5 Copy of the Long List of Candidates who applied for the position of Manager: Sewer Network.

4.4.1.6 Copy of a Memorandum from the Director: Civil Engineering Services addressed to the Municipal Manager under the heading: “APPOINTMENT OF MANAGER SEWER NETWORKS: MR RANDALL VAN STADEN” dated 23 March 2017.

4.4.2 Correspondence between the Public Protector and:

4.4.2.1 The Complainant, dated 29 March 2017 and 31 May 2017.


4.4.2.3 The Engineering Council of South Africa, dated 15 February 2018 and 19 February 2018.

4.4.3 Meeting held

4.4.3.1 A meeting was held with the Deputy Director: Water and Sanitation, the Director: Civil Engineering Services, and two Human Resources Managers of the Municipality, on 10 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 Systems Act No 32 of 2000 (the Municipal Systems Act).

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

4.4.4.5 The Labour Relations Act No 66 of 1995.

4.4.4.6 The Promotion of Administrative Justice Act No 3 of 2000.

4.4.4.7 The Engineering Profession Act No 46 of 2000.

4.4.4.8 The Municipality's Recruitment and Selection Policy, 2012 (Policy).

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 Seile Edwin Letsogo v The Department of Economy & Enterprise Development and others (case no: JR350/16).

4.4.5.4 City of Cape Town v SA Municipal Workers Union obo Sylvester and Others [2013] 3 BLLR 267 (LC).

4.4.5.5 Kwadukuza Municipality v Rajamoney and Others (D880/10) [2013] ZALCD (17).

4.4.5.6 Nkosinathi Lawrence Khumalo and another v MEC for Education: Kwazulu-Natal, [2013] ZACC 46.

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

4.4.5.8 The MEC for Health, Eastern Cape v Kiland Investments 2014 (3) SA 481 (CC).

4.4.5.9 Van Wyk v Unitas Hospital and Another 2008 (2) SA 472 (CC).

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 the Municipal Manager, Mr T Botha, on 22 May 2019.

4.4.6.2 Response to the section 7(9)(a) notice from the Municipal Manager, dated 5 June 2019.
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 appointment of Mr Van Staden as Manager: Sewer Network in March 2017 was fair and in accordance with the relevant legislation and prescripts regulating the recruitment and selection of staff of the Municipality.

**Common cause or Undisputed Facts**

5.1.1 It is not in dispute that the Municipality advertised the vacant position of Manager: Sewer Network in March 2016. The closing date was 29 March 2016. It was again advertised in August 2016, with a closing date of 26 August 2016.

5.1.2 According to the Municipality, the position was re-advertised because they could not find suitable candidates in the first round.

5.1.3 The contents of the two advertisements were the same, except for the closing date.

5.1.4 The Complainant applied for the position in response to both advertisements. According to the records of the Municipality, Mr Van Staden only applied when the position was re-advertised.

5.1.5 In both instances, the requirements for the position were stipulated as follows:

5.1.5.1 Registration as Professional Engineering Technician: Civil.

5.1.5.2 National Diploma Civil Engineering.
5.1.5.3 Computer Literacy (Microsoft office and CAD).

5.1.5.4 3 years relevant experience.

5.1.5.5 Ability to communicate in at least two of the three official languages of the Western Cape.

5.1.6 One of the main requirements as per the advertisements was registration (with the Engineering Council of South Africa) as a Professional Engineering Technician: Civil.

5.1.7 The Complainant applied for the position, but was unsuccessful.

5.1.8 Mr R Van Staden was appointed as the successful candidate in March 2017.

**Issues in dispute**

5.1.9 The Municipality received eleven (11) applications in response to the second advertisement, four (4) of which were previously submitted. The interviews and practical evaluation were held on the 23 February 2017.

5.1.10 According to the records of the Municipality, both the Complainant and Mr Van Staden qualified for the position in terms of their academic qualifications and relevant experience.

5.1.11 The score sheets of the Interviewing Panel indicate that Mr Van Staden scored 6.94 out of 10 whereas the Complainant received of score of 6.60 out of 10. The other four (4) shortlisted candidates scored an average of 5.61 out of 10.

5.1.12 In essence, the Complainant contended that Mr Van Staden did not qualify to be considered for the position as he did not comply with the requirement of
registration with the Engineering Council of South Africa as a Professional Engineering Technician.

5.1.13 It transpired from the investigation that Mr Van Staden was only registered with the Engineering Council of South Africa, in terms of the Engineering Profession Act, 2000, on 22 March 2017, after he was appointed. He was registered as a Candidate Engineering Technician. According to the information provided by the Engineering Council of South Africa, Mr Van Staden is still registered as such.

5.1.14 It was further established from the Engineering Council of South Africa that a registered Professional Engineering Technician, as stipulated in the advertisements, would be able to deal with well-defined problems, whereas a Candidate Engineering Technician may only undertake engineering tasks under the direction, control and supervision of a registered Professional Engineer.

5.1.15 The Municipality’s Job Specification contained in the Job Description of the post of Manager: Sewer Network, includes “professional registration” as a preferred requirement of the post.

5.1.16 In his initial response to the complaint, dated 18 October 2017, the Municipal Manager, Mr T Botha, stated that the appointment of the Manager: Sewer Network was made in accordance with the Policy. He confirmed that the requirements of the post were stated in the advertisements.

5.1.17 He further stated that the successful candidate is registered with the Engineering Council of South Africa, but that registration was not regarded as an essential requirement.

5.1.18 The Municipality’s Director: Corporate Services responded on 5 February 2019 to further enquiries made during the investigation as follows:
"This office still stands with the previous responses in this regard as assessment was conducted and the best candidate appointed.

An advertisement had professional registration listed as a requirement, however it is not an essential requirement in line with an audited Job Description. Furthermore, section 8.4.2 of our Recruitment and Selection Policy makes provision for the following:

‘Only candidates, who meet the minimum requirements or can be expected to meet the requirements within a reasonable time, can be shortlisted, unless the law prohibits such an appointment’. (emphases added)

5.1.19 In his response to the section 7(9) Notice, dated 5 June 2019 (received on 13 June 2019) the Municipal Manager stated that he had lodged an investigation into various allegations of transgressions of the Policy by the Human Resources Division of the Municipality. The Municipal Council resolved on 31 January 2019 that an external service provider should be appointed to investigate the allegations. The terms of reference of the appointed external service provider include an investigation into the appointment of Mr Van Staden as the Manager: Sewer Network.

5.1.20 Mr Botha further stated that in terms of the Policy, the Human Resource/Recruitment Manager of the Municipality was the process owner of the recruitment, but failed to comply in respect of the recruitment of the Manager: Sewer Network "insofar as the contents of the advertisement was not strictly in accordance with the audited job description..." which states that Registration as a Professional Engineering Technician: Civil is a preferred and not essential requirement of the post.
5.1.21 He confirmed that the Policy provides that the Municipal Manager is responsible for all appointments.

5.1.22 Further, that: "However, it must be stated that during further investigation following the initial complaint received from Mr Van Rooi, it has emerged that I have been misrepresented by the facts (sic) and actions on the part of the HR Manager, responsible for the HR process as well as the former Director Civil Engineering Services as the Senior Manager responsible for this Directorate".

5.1.23 In terms of the Delegations Framework of the Municipality, the Director: Corporate Services (that is also responsible for Human Resources) has a duty to assist the Municipal Manager in promoting municipal administration within the framework policy of the Council and also assist the Municipal Manager in ensuring that the Municipality gives effect to the Constitution. However, it was noted that the Delegations Framework does not include the appointment of staff, which in terms of paragraph 6 of the Policy, is the responsibility of the Municipal Manager.

5.1.24 Mr Botha further stated that in appointing Mr Van Staden, he acted in the bona fide belief that due process had been followed in the recruitment and selection process: "I had no reason to suspect that Senior Managers in positions of authority will act mala fides or in such a way that would compromise (sic) the credibility and integrity of this Municipality".

5.1.25 In his response, the Municipal Manager indicated that in addition to the appointment of an external service provider to investigate violations of the Policy by the Human Resources Division of the Municipality, he has taken the following remedial steps to ensure the credibility and integrity of the recruitment process:
5.1.25.1 The Director Corporate Services and the Deputy Director Legal Services and Compliance have been instructed to review the Policy to ensure that it complies with all legislation; and

5.1.25.2 Letters were issued to all Directors of the Municipality relating to dereliction of duty and to ensure that they undertake and adhere to their fiduciary duties.

Application of the relevant law

5.1.26 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.

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

5.1.28 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.” (emphases added)

5.1.29 Breaches of the Code must, by virtue of item 14, be dealt with in terms of the disciplinary procedures of the Municipality.

5.1.30 The Policy states in paragraph 2 that its objectives are the stability and efficiency of the municipality and that it is accordingly critical to appoint the most suitable people. Further, that the objective of the Policy is to give direction and guidelines on appropriate recruitment and selection processes by ensuring, *inter alia a fair* and efficient process for recruitment, selection and placements and an objective evaluation of all candidates.

5.1.31 Paragraph 13 of the Policy provides for a recruitment process flow in the filling of vacant positions. The Human Resources Department is to *draft an advertisement based on the requisition from the responsible Director/Line Manager and the job description of the post.*

5.1.32 Paragraph 8 of the Policy states that only candidates that meet the minimum requirements or can be expected to meet the minimum requirements within a reasonable time, can be shortlisted, unless the law prohibits such appointment.

5.1.33 Section 1 of the 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.

5.1.34 In terms of section 60(1)(a) of the MFMA, the Municipal Manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act. Section 62(1)(d) of the MFMA, provides
that the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorised, irregular and wasteful expenditure and other losses are prevented.

5.1.35 A municipality must, in terms of section 171(4) 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 investigations warrants such a step, institute disciplinary proceedings.

5.1.36 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

5.1.37 The advertisements of the post by the Municipality that was based on the job description, clearly stated registration as a Professional Engineering Technician: Civil, as a specific requirement.

5.1.38 The Job Specification contained in the Job Description of the post of Manager: Sewer Network includes “professional registration” as a preferred requirement of the post.

5.1.39 The successful candidate was not registered with the Engineering Council of South Africa at the time when he applied and was appointed in the position, but as a Candidate Engineering Technician on 22 March 2017. He was accordingly only allowed to carry out engineering work under the direction, control and supervision of a registered person, according to the Engineering Council of South Africa. Furthermore, the Engineering Council of South Africa indicated that the
Municipality by appointing a person not registered, as required in the advertisement, will result in not only disregarding this requirement but also is contrary to provisions and intentions of the Act.

5.1.40 There is no indication in the evidence and information obtained from the Municipality that there was reason to believe that the successful candidate would meet the preferred requirement of professional registration or the requirement as indicated in the advertisements of registration as a Professional Engineering Technician: Civil, within a reasonable time.

5.1.41 In terms of the advertisements, the Municipality clearly regarded registration with the Engineering Council of South Africa as Professional Engineering Technician: Civil as a requirement at the time of advertising the post. It is not clear on what basis it was later decided that this requirement could be disregarded as not essential.

5.1.42 The Municipal Manager initially indicated that Mr Van Staden’s appointment was made in accordance with the Policy. However, in his response to the section 7(9) notice he conceded that the Policy had not been complied with, but blamed officials of the Municipality for misrepresenting the facts and for the process that was followed.

5.1.43 In the matter between Seile Edwin Letsogo v The Department of Economy & Enterprise Development and others (case no: JR350/16), the Labour Court had to consider the appointment of a candidate that applied for a position, but did not qualify in terms of the requirements as set out in the advertisement for the post.

5.1.44 The Labour Court found that when the Department changed the advertised requirements for the position in accepting less than the experienced as set out in the advertisement (via the selection panel) it had to re-advertise the post, failing
which the process was flawed and unfair. The Labour Court stated in that regard (at paragraph 26) that:

"Further, as set out above, the process was also flawed in that once the advert was amended it should have been re-advertised to allow candidates who did not possess the management experience to apply and thereby to open the application process to a wider range of potential candidate".

5.1.45 Reference was also made to the case of City of Cape Town v SA Municipal Workers Union obo Sylvester and Others [2013] 3 BLLR 267 (LC) where the court expressly rejected the notion that the employer has the prerogative to decide who to appoint and that it should not be questioned when it exercises that discretion.

5.1.46 In the case of Kwadukuza Municipality v Rajamoney and Others (D880/10) [2013]ZALCD (17) the court held that where the Municipality had set out the requirements to be met for the contested post (in an advertisement), the fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach. The court further held that:

"It has to be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would be also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements."

5.1.47 In the case of Nkosinathi Lawrence Khumalo and another v MEC for Education: KwaZulu-Natal, [2013]ZACC46 the Constitutional Court held (at paragraph [62] that:

"Fairness in employment practices and labour relations requires the state to be even-handed and transparent not only to those whom it employs, but also to
those who may wish to apply for employment at a state institution. It would not be fair if the state were to employ persons who do not meet the very requirements that the state itself sets. It is neither fair nor in compliance with the dictates of transparency and accountability for the state to mislead applicants and the public about the criteria it intends to use to fill a post.

5.1.48 The Municipal Manager was aware of the requirement in the advertisement of registration with the Engineering Council of South Africa and was accordingly obliged to have satisfied himself that Mr Van Staden complied with this and all the other requirements of the position, when he made the appointment, in order for it to be fair and lawful.

5.1.49 Other prospective applicants that qualified for the position, except for the requirement of Registration with the Engineering Council of South Africa were deprived of the opportunity to compete for the position and to enable the Municipality to appoint the most suitable person in the post.

5.1.50 By appointing Mr Van Staden when he did not meet one of the requirements of the post as set out in the advertisements, the Municipal Manager acted improperly and unfairly. The appointment was not in line with the objects of the Policy and the Code of Conduct for Municipal Staff Members that requires employees of the Municipality to act impartially and to treat all people equally and without fear favour or prejudice.
5.2 Regarding whether the conduct of the Municipality was improper and constitutes maladministration.

*Common cause or Undisputed Facts*

5.2.1 It is not in dispute that the Municipality advertised the vacant position of Manager: Sewer Network in March 2016 and again in August 2016.

5.2.2 One of the requirements as per the advertisements was registration as a Professional Engineering Technician: Civil.

5.2.3 The Complainant applied for the position, but was unsuccessful.

5.2.4 Mr R Van Staden was appointed as the successful candidate in March 2017.

*Application of the relevant law*

5.2.5 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.

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

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

(f) *loyally execute the lawful policies of the municipal council*: 

30
(g) perform the functions of office in good faith, diligently, honestly and in a transparent manner;

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

(i) 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

(j) act impartially and treat all people, including other staff members, equally without favour or prejudice". (emphasis added)

5.2.8 Breaches of the Code must, by virtue of item 14, be dealt with in terms of the disciplinary procedures of the Municipality.

5.2.9 The Policy dated September 2012 states in paragraph 2 that its objectives are the stability and efficiency of the municipality and that it is accordingly critical to appoint the most suitable people. Further that the objective of the Policy is to give direction and guidelines on appropriate recruitment and selection processes by ensuring, *inter alia* a fair and efficient process for recruitment, selection and placements and an objective evaluation of all candidates.

5.2.10 Paragraph 13 of the Policy provides for a recruitment process flow in the filling of vacant positions. The Human Resources Department is to *draft an advertisement based on the requisition from the responsible Director/Line Manager and the job description of the post.*

5.2.11 Paragraph 8 of the Policy states that only candidates that meet the minimum requirements or can be expected to meet the minimum requirements within a reasonable time, can be shortlisted, unless the law prohibits such appointment.

5.2.12 Section 1 of the 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.

5.2.13 In terms of section 60(1)(a) of the MFMA, the Municipal Manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act. Section 62(1)(d) of the MFMA, provides that the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorised, irregular and wasteful expenditure and other losses are prevented.

5.2.14 A municipality must, in terms of section 171(4) 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 investigations warrants such a step institute disciplinary proceedings.

5.2.15 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

5.2.16 The appointment of Mr R Van Staden was not fair and proper, as indicated in paragraph 5.1 above. It was not in line with the objects of the Policy and the Code of Conduct that requires employees of the Municipality to act impartially and to treat all people equally and without fear, favour or prejudice.
5.2.17 In appointing Mr Van Staden, the Municipal Manager did not act in accordance with the Code of Conduct for Municipal Staff Members.

5.2.18 The conduct of the Municipality was improper and constituted maladministration.

5.2.19 It also resulted in irregular expenditure in respect of the remuneration paid to Mr Van Staden as the appointment did not comply with the provisions of section 55(1) of the Municipal Systems Act.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the provisions of the applicable legislation and policy prescripts, I make the following findings:

6.1 Regarding whether the appointment of Mr Van Staden as Manager: Sewer Network in March 2017 was fair and in accordance with the relevant legislation and prescripts regulating the recruitment and selection of staff of the Municipality

6.1.1 The allegation that the appointment of Mr Van Staden as Manager: Sewer Network in March 2017 was unfair and not in accordance with the relevant legislation and prescripts regulating the recruitment and selection of staff of the Municipality, is substantiated.

6.1.2 The appointment was made in violation of section 55(1) of the Municipal Systems Act and the Policy.
6.2 Regarding whether the conduct of the Municipality was improper and constitutes maladministration.

6.2.1 The allegation that the conduct of the Municipality referred to in paragraph 6.1 was improper and constitutes maladministration, is substantiated.

6.2.2 The appointment of Mr Van Staden was made in breach of item 2 of the Code of Conduct for Municipal Staff Members.

6.2.3 It also resulted in irregular expenditure in respect of the remuneration paid to Mr Van Staden, as contemplated by section 1 of the MFMA, as the appointment was not made in terms of section 55(1) of the Municipal Systems Act.

6.2.4 The appointment by the Municipality of Mr R Van Staden constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 The appointment of employees by a municipality 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) SA 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] ZACC46, 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, the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, is the following:

7.5.1 The Executive Mayor of the Municipality:

7.5.1.1 To take the appropriate steps in respect of disciplinary action against the Municipal Manager and the other officials involved in the appointment of Mr Van Staden as the Manager: Sewer Network 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 thirty (30) days from the date of my report.

7.5.1.2 To conduct an analysis and evaluation of Mr Van Staden’s qualifications, experience and competence against the requirements and job description of the

\(^3\) At para 89
position of Manager: Sewer Network that he currently occupies, within thirty (30) business days from the date of my report;

7.5.1.3 To submit a report, to the Municipal Council within thirty (30) business days of the date of my report for a decision on this matter; and

7.5.1.4 To institute proceedings for the judicial review of the irregular appointment of Mr Van Staden, in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 2000, within thirty (30) business days from the date of my report.

7.5.2 The Municipal Council of the Municipality

7.5.2.1 The Municipal Council to consider the report of the Executive Mayor referred to in paragraph 7.5.1.3 above and to take a resolution on the matter within sixty (60) business days from the date of my report.

8 MONITORING

8.1 The Executive Mayor of the Municipality to submit an implementation plan indicating how the remedial action referred to in paragraph 7.5.1 is implemented, within thirty (30) business days from the date of my report.

8.2 The Speaker of the Municipal Council of the Municipality to submit a copy of the resolution of the Municipal Council referred to in paragraph 7.5.2 within sixty (60) days from the date of my report.

ADV. BUSHIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 25/10/2019