
PUBLIC PROTECTOR
SOUTH AFRICA

"Allegations of maladministration by the Victor Khanye Local Municipality regarding an irregular appointment"

REPORT NO. 113 OF 2019/2020
ISBN: 978-1-928507-73-4

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IRREGULAR APPOINTMENT OF MR MASANGO AS ASSISTANT MANAGER: YOUTH DEVELOPMENT BY VICTOR KHANYE LOCAL MUNICIPALITY
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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, and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution following an investigation into allegations of maladministration and irregular appointment of an Assistant Manager: Youth Development by the Victor Khanye Local Municipality.

(iii) On 10 May 2016, I received a complaint from Ms CN Kubheka (the Complainant) who was one of the candidates who had applied for the position of Assistant Manager: Youth Development.

(iv) In essence the Complainant alleged that:

(aa) The Municipality advertised a vacancy for the position of Assistant Manager: Youth Development and one of the requirements for the position was a Degree (NQF 6);

(bb) The Municipality appointed Mr NE Masango, who did not meet the minimum requirements of the position as he did not have a Degree;

(cc) Due to public outcry, the Municipality was directed by Council to investigate the qualifications of Mr Masango and the process followed in his appointment.

(dd) It also came to my attention during the finalisation of this investigation that the Complainant has since been appointed to the position of Assistant Manager: Youth Development, the same position she had complained about, after Mr Masango was transferred to the position of Assistant Manager: Local Economic Development, which I have decided to include in my investigation.
(v) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Municipality irregularly appointed Mr NE Masango who did not meet the minimum requirements for the position of Assistant Manager: Youth Development.

(b) Whether the Complainant and the Taxpayers of the Municipality suffered prejudice as a result of the Municipality's failure to follow proper recruitment processes.

(c) Whether the transfer of Mr Masango from the position of Assistant Manager: Youth Development to the position of Assistant Manager: Local Economic Development complied with the recruitment processes and legal prescripts.

(d) Whether the subsequent appointment of Ms Kubheka to the position of Assistant Manager: Youth Development after it was re-advertised, complied with recruitment processes and legal prescripts.

(vi) The investigation process included an exchange of correspondence and conducting meetings and interviews with relevant officials of the Municipality as well as analysis of relevant documents and application of all relevant laws, policies and related prescripts.

(vii) Key laws and policies taken into account to determine if there had been maladministration and/or improper conduct by the Municipality and prejudice caused to the Complainant, were principally those imposing administrative standards and procedures that should have been complied with when the Municipality appointed Mr Masango to the position of Assistant Manager: Youth Development and later transferred to another position. Those are the following:

(a) The Constitution of the Republic of South Africa, 1996;
(b) Municipal Finance Management Act, 2003;
(c) The Municipal Systems Act, 2001;
(d) The Municipality’s Employment Practice

(viii) On 26 June 2019, I issued notices (Notice) in terms of section 7(9) (a) of the Public Protector Act to, amongst others, the Executive Mayor of Victor Khanye Local Municipality, the Speaker of the Municipal Council of Victor Khanye Local Municipality, and the former Municipal Manager of Victor Khanye Local Municipality to enable them to respond within ten (10) working days of receipt thereof. However, they all failed to respond to the said Notice.

(ix) Having regard to the evidence uncovered during the investigation, the regulatory framework determining the standard the Municipality should have complied with and the impact on the Complainant, I therefore make the following findings:

(a) **Regarding whether the Municipality irregularly appointed Mr NE Masango who did not meet the minimum requirements for the position of Manager: Youth Development.**

(aa) The allegation that the Municipality improperly appointed Mr NE Masango as Manager: Youth Development without the minimum requirements, is substantiated.

(bb) The Municipality appointed Mr NE Masango despite the fact he did not possess the relevant qualification nor the required experience for the post at the time of his appointment to the position of Assistant Manager: Youth Development.

(cc) The conduct of the Municipality was in violation of paragraph 2.2 and 6.2 of the Municipality’s own Employment Practice dated August 2012. The conduct of the Municipality also contravened section 195 of the Constitution and section 62 of the Municipal Finance Management Act 56 of 2003.
(dd) Such conduct 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.

(b) Regarding whether the Complainant and the Taxpayers of the Municipality
suffered prejudice as a result of the Municipality’s failure to follow proper
recruitment processes.

(aa) The allegation that the Complainant suffered prejudice as a result of the
conduct of the Municipality, is unsubstantiated. However, the allegation that
the Taxpayers of the Municipality suffered prejudice, is substantiated.

(bb) Initially the Municipality did not appoint Ms Kubheka even though she
qualified for the position of Assistant Manager: Youth Development.
However, the Municipality subsequently re-advertised the position and Ms
Kubheka was selected and appointed as the successful candidate after an
appropriate recruitment process, thus remedying the prejudice that had been
suffered by the Complainant.

(cc) The Municipality incurred fruitless and wasteful expenditure as a result of an
irregular recruitment process which resulted in the appointment of Mr
Masango to the position of Assistant Manager: Youth Development.

(dd) The conduct of the Municipality was in contravention of section 62(1)(d) of
the MFMA.

(ee) The Municipality also incurred unnecessary additional costs associated with
the re-advertisement of the position of Assistant Manager: Youth
Development. These costs also constitute further irregular expenditure.
(ff) The conduct of 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.

(c) Regarding whether the transfer of Mr Masango from the position of Assistant Manager: Youth Development to the position of Assistant Manager: Local Economic Development complied with the Municipality's recruitment processes and procedures.

(aa) The transfer of Mr Masango from the position of Assistant Manager: Youth Development to the position of Assistant Manager: Local Economic Development was in line with the Municipality's recruitment processes and procedures and in particular the Municipality's Employment Practice.

(bb) Therefore, the conduct of the Municipality was not in violation of paragraph 6.2.7 of the Municipality's Employment Practice as the employment conditions of the two relevant positions were made are similar.

(d) Regarding whether the subsequent appointment of Ms Kubheka to the position of Assistant Manager: Youth Development after it was re-advertised, complied with the Municipality's recruitment processes and procedures.

(aa) The appointment of Ms Kubheka to the position of Assistant Manager: Youth Development after the position was re-advertised was in line with the recruitment policy of the Municipality.

(bb) The decision to re-advertise the position of Assistant Manager: Youth Development and to appoint the Complainant addresses the prejudice that the Complainant may have suffered when this position was given to Mr Masango.
(cc) The appointment was in line with section 195 of the Constitution as it promoted good human resource management and transparency.

(dd) The conduct of the Municipality does not in this regard 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.

(x) The appropriate remedial action 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:

(a) **The Speaker of the Council, Cllr R.K Segone must:**

(aa) Within thirty (30) working days from the date of this report, ensure that the Municipal Council, in consultation with the Municipal Manager, declare the appointment of Mr Masango to the position of Assistant Manager: Youth Development, as irregular. The salary of Mr Masango should also reflect as an irregular expenditure in the Municipality's financial statement for the period between 4 May 2015 and 01 August 2018 when he was transferred to the position of Assistant Manager: Local Economic Development;

(bb) Within sixty (60) working days from the date of this report, disclose to the Provincial Treasury and to the Auditor General, all the irregular expenditure incurred by the Municipality in connection with the irregular appointment of Mr Masango to the position of Assistant Manager: Youth Development.

(b) **The Municipal Manager, Mrs ST Matladi must:**

(aa) Within sixty (60) working days institute an investigation into the irregular appointment of Mr Masango to the position of Assistant Manager: Youth Development as well as the irregular expenditure incurred as a result of the
salary paid to him occupying the position of Assistant Manager: Youth Development.

(bb) Within thirty (30) working days from the date of the issuing of the investigation report referred to above, take disciplinary action against all officials who were involved in the irregular appointment of Mr Masango.

(cc) Within sixty (60) working days of this report, conduct or provide training to employees at all relevant levels, on recruitment and selection processes and the importance of complying with approved policies.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF MR MASANGO AS ASSISTANT MANAGER: YOUTH DEVELOPMENT BY VICTOR KHANYE LOCAL 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, 108 of 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act, Act No. 23 of 1994] (the Public Protector Act).

1.1. The report is submitted in terms of section 8(1) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1. The Head of the Department of Co-operative Governance and Traditional Affairs in Mpumalanga Province, Mr P Nyoni;

1.2.2. The Executive Mayor of Victor Khanye Local Municipality, Mr KV Buda;

1.2.3. The Speaker of Victor Khanye Local Municipality, Mr RK Segone; and

1.2.4. The Municipal Manager of Victor Khanye Local Municipality, Mrs ST Matladi.

1.2. A copy of the report is also provided to Ms CN Kubheka, the Complainant to inform her about the outcome of my investigation.

1.3. The report relates to an investigation of the alleged irregular appointment of the Assistant Manager: Youth Development by the Victor Khanye Local Municipality (the Municipality).
2. THE COMPLAINT

2.1. On 10 May 2016, my office received a complaint from Ms CN Kubheka (the Complainant) who was one of the applicants for the position of Assistant Manager: Youth Development.

2.2. She alleged that the Municipality advertised a vacancy for the position of Assistant Manager: Youth Development and one of the requirements for the position was a Degree (NQF 6);

2.3. The Municipality appointed Mr NE Masango who did not meet the minimum requirements of the position as he did not have a Degree;

2.4. Due to public outcry the Municipality was directed by Victor Khanye Municipal Council (the Council) to investigate the qualification of Mr Masango and the process that was followed in his appointment.

2.5. It later came to my attention during the finalisation of this investigation that the Complainant has since been appointed to the position of Assistant Manager: Youth Development, the same position she had complained about, after Mr Masango was transferred to the position of Assistant Manager: Local Economic Development. I therefore decided to investigate these two issues even though they did not form part of the initial complaint, in order to determine if the appointment of the Complainant and the transfer of Mr Masango complied with the Municipality’s recruitment processes and procedures.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

"The Public Protector has the power as regulated by national legislation—
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

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

3.4. The Public Protector'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.

3.5. In the constitutional court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11(5); 2016(5) BCLR 618 (CC); 2016(3) SA 580 (CC) (31 March
2016), Chief Justice Mogoeng stated the following, when confirming the powers of the public protector:

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

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

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

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

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

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

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

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

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

3.6. The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”

3.7. 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.
3.8. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (Paragraph 104);

3.9. Victor Khanye Local 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 Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

3.11. Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.12. Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. In this case, I submit that there is a huge public interest in the manner in which public administration or governing of public affairs are handled.
3.13 The appointment of public officials to senior positions would inordinately generate huge public interest and scrutiny. The community, other applicants and public servants themselves would be keen to know or enquire into the just, fairness or transparency of the processes followed in the filling of positions within local government departments.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The rationale of this report is to identify possible maladministration by the Municipality, to determine if the Complainant was prejudiced, and to direct remedial action to remedy the identified maladministration and prejudice, if any is found.

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.

4.1.3. The investigation process included an exchange of correspondence with Municipality and the analysis of relevant documentation, conducted research, and consideration and application of relevant laws, regulatory framework and jurisprudence.

4.1.4. My investigation team interviewed the Municipal Manager (Mr Mveselwa), Manager: Corporate Services (Mr Rudi du Toit), SCM (Mr David Mahlangu), Assistant Manager: HRM/D (Mr Abram Moshaba) on 22 June 2017.

4.1.5. During the investigation process, notices in terms of section 7(9)(a) of the Public Protector Act (Notice) were served on the former Executive Mayor, Cllr Eva
Makhabane, the Council Speaker, Cllr RK Segone and the former Acting Municipal Manager, Mr Vusi Magqaza, dated 26 June 2019 to afford them an opportunity to respond to my provisional findings within ten (10) working days of receipt thereof. However, none of the above mentioned respondents responded to my Notice.

4.2. Approach to the investigation

4.2.1. When I conduct an investigation, the mandate given to me, requires that I conduct an enquiry on the merits of the complaint that transcends lawfulness and include considerations of equality, good administration and proper conduct.

4.2.2. As with every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1. What happened?
4.2.2.2. What should have happened?
4.2.2.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
4.2.2.4. In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Municipality failed to follow proper recruitment procedures.
4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality to prevent maladministration.

4.2.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration. 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 the Municipality 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 appointed Mr NE Masango who did not meet the minimum requirements for the position of Assistant Manager: Youth Development.

4.3.2. Whether the Complainant and the Taxpayers of the Municipality suffered prejudice as a result of the Municipality’s failure to follow proper recruitment processes.

4.3.3. Whether the transfer of Mr Masango from the position of Assistant Manager: Youth Development to the position of Assistant Manager: Local Economic Development complied with the Municipality’s recruitment processes and procedures.

4.3.4. Whether the subsequent appointment of Ms Kubheka to the position of Assistant Manager: Youth Development after it was re-advertised, complied with the Municipality’s recruitment processes and procedures.
4.4. **The Key Sources of information**

4.4.1: **Documents**

4.4.1.1 A copy of a memorandum from the Acting Director Corporate Services, Mr TM Mashabela to the Acting Municipal Manager, Mr BSS Riba, dated 30 April 2015;

4.4.1.2 A copy of a memorandum from the Director Corporate Services to the Acting Municipal Manager, dated 14 April 2015;

4.4.1.3 Copies of the undated interview scores as provided by the five panel members;

4.4.1.4 Copies of the application form, Curriculum Vitae, ID and Qualifications of the interviewed candidates;

4.4.1.5 An undated copy of the schedule for the shortlisted candidates for the position of Assistant Manager: Youth Development;

4.4.1.6 A copy of the advertisement for the position of Assistant Manager: Youth Development with the closing date 12 March 2015;

4.4.1.7 A copy of the Municipality’s Attraction and Retention Policy, undated;

4.4.1.8 A copy of the application form, Curriculum Vitae, ID, Qualifications of Mr NE Masango;

4.4.1.9 A copy of the Municipality’s Employment Practice Policy, approved in August 2012;

4.4.1.10 A copy the register and the minutes of a meeting held with the Municipality held on 22 June 2017;

4.4.1.11 Copies of Mr NE Masango’s qualifications.

4.4.2. **Correspondence sent and received**

4.4.2.1. A copy of a letter dated 10 June 2016 from the Public Protector to the Municipality;

4.4.2.2. A copy of a letter dated 22 June 2016 from the Municipality to the Public Protector;

4.4.2.3. A copy of a letter dated 05 July 2016 from the Public Protector to the Municipality;
4.4.2.4. A copy of a letter dated 25 October 2016 from the Public Protector to the Municipality;
4.4.2.5. A copy of a letter dated 24 November 2016 from the Public Protector to the Municipality;
4.4.2.6. A copy of a letter dated 13 March 2017 from the Public Protector to the Municipality;
4.4.2.7. A copy of a letter dated 15 May 2017 from the Public Protector to the Municipality.

4.4.3. Meetings held

4.4.3.1. Meeting between the Public Protector, the former Municipal Manager (Mr Mveselwa J Mahlangu), Manager: Corporate Services (Mr Rudi du Toit), SCM (Mr David Mahlangu), Assistant Manager: HRM/D (Mr Abram Moshaba) on 22 June 2017.

4.4.4. Legislation and other prescripts

4.4.4.2. Municipal Finance Management Act 56 of 2003;
4.4.4.3. The Municipal Systems Act, 2001;
4.4.4.4. The Municipality’s Employment Practice (Policy Number: EP/06/2012)

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 appointed Mr NE Masango who did not meet the minimum requirements for the position of Assistant Manager: Youth Development.
Common cause issues

5.1.1. It is common cause that the Municipality advertised a vacant position of Manager: Youth Development although the title was changed to Assistant Manager: Youth Development and all correspondence including the appointment letter, refer to the position as Assistant Manager: Youth Development.

5.1.2. The Municipality submitted an undated advertisement for the position of Manager: Youth Development with a closing date of 12 March 2015.

5.1.3. The advertisement listed the qualifications and requirements, *inter alia*, as:

a) A qualification in Public Management/Administration or Development Studies at NQF level 6;
b) Three (3) years' experience in Youth matters; and
c) A valid code 8 (EB) drivers licence.

5.1.4. The Municipality received twenty seven (27) applications and shortlisted five (5) candidates on 08 April 2015. The shortlisted candidates were:

a) Kubheka C;
b) Masango N.E;
c) Phakula R;
d) Sibanyoni MB; and
e) Vuma LT.

5.1.5. It is also not disputed that the Municipality held the interviews for the position of Assistant Manager: Youth Development on 17 April 2015 and recommended that Mr NE Masango be appointed.
5.1.6. The former Acting Municipal Manager, Mr BSS Riba, approved the appointment of Mr Masango on 04 May 2015.

Issues in dispute

5.1.7. It is in dispute whether the Municipality appointed the right person for the position of Assistant Manager: Youth Development and in a fair and proper manner.

5.1.8. The Complainant argues that the Municipality irregularly appointed Mr Masango to the position of Assistant Manager: Youth Development when he did not meet the minimum requirements of the position as he did not have a Degree.

5.1.9. In a meeting held between my investigation team and the Municipality on 22 June 2017, Mr Moshaba, the Municipality’s Assistant Manager: HRM/D, indicated that at the time of the appointment of Mr Masango, NQF Level 6 was equivalent to a National Diploma and a 3 year degree. He stated that it is now after the new development that a degree is now at NQF Level 7 and a National Diploma at NQF Level 6 and that is why Mr Masango was shortlisted for the position as he had a Diploma in Business Management.

5.1.10. Regarding whether the Municipality vetted the candidates' qualifications, Mr Moshaba stated in the same meeting that they normally receive candidates' certificates/qualifications from institutions that are well known. He stated that after the Skills Development Act 97 of 1998, many institutions were registered with the South African Qualification Authority (SAQA). Mr Moshaba indicated that it was their responsibility as the Municipality to visit the SAQA website or call SAQA to verify if the institution from which a qualification was obtained, was registered.
5.1.11. Mr Moshaba, however, stated that he could not recall if the authenticity of the institution where Mr Masango had obtained his qualification was verified and/or vetted.

5.1.12. Mr Masango’s Curriculum Vitae indicated that he was in possession of a Diploma in Website Development, a Diploma in Business Management and a certificate in Human Resources. Further, Mr Masango had (6) years’ experience, however, it was not in youth development, but in payroll as a Senior Admin Official at Transnet Freight Rail and as a Senior Personnel Officer at the South African Police Service (SAPS).

5.1.13. The Complainant further alleged that due to public outcry, the Municipality was directed by Council to investigate the qualifications of Mr Masango and the process that was followed in his appointment.

5.1.14. In the same meeting with my investigation team, Mr Moshaba indicated that he was not aware of any investigation that was conducted relating to the appointment of Mr Masango. He further indicated that the Municipality never received any complaints regarding his appointment.

5.1.15. On 3 July 2017, the Municipality provided to my office the qualifications that Mr Masango had submitted with his applications. These included the qualifications he obtained after his appointment. The documents indicate that as at 3 July 2017, Mr Masango was in possession of a National Certificate in Municipal Governance and in the process of acquiring a Degree in Public Administration.

5.1.16. It was brought to the attention of the investigation team that the Complainant is currently occupying the position of Assistant Manager: Youth Development, the same position which had formed the basis of her complaint. The Municipality informed my investigation team that the Complainant was subsequently
appointed to the position of Assistant Manager: Youth Development, when it was re-advertised.

*Application of the relevant law*

5.1.17. Section 195(1) of the Constitution provides amongst other things 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."

5.1.18. These principles enjoin the Municipality and its officials to exercise a high level of professionalism and ethics, including accountability in the performance of their duties. The process followed by the Municipality in the appointment of Mr Masango was neither transparent, fair nor without bias. Verification of qualifications was never done to ensure that the principles enshrined in s195 (1) (a) of the Constitution were upheld. Furthermore, the recruitment process was not in line with good human resource management as it was irregular.

5.1.19. Section 62 of the Municipal Finance Management Act 56 of 2003 states that:
(1) 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-
(a) that the resources of the municipality are used effectively, efficiently and economically;
(b)...
(c) that the municipality has and maintains effective, efficient and transparent systems-
   (i) of financial and risk management and internal control; and
   (ii) of internal audit operating in accordance with any prescribed norms and standards;
(d) that unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented.

5.1.20. The Municipal Manager as the Accounting Office is obliged to ensure that unauthorised, irregular or fruitless and wasteful expenditure is prevented and to further ensure that the resources of the Municipality are utilised effectively, efficiently and economically. The Municipal Manager was also expected to ensure that correct recruitment and selection processes were followed in the appointment of Mr Masango. The appointment of any employee without following the prescribed recruitment and selection processes would result in an irregular expenditure.

5.1.21. Paragraph 2.2 of the Municipality’s Employment Practice (Policy Number: EP - 01) adopted in August 2012 the states the following:

   “2.2. Suitably qualified applicant means

   A person may be suitably qualified for a job as a result of any of, or any combination of that person’s-
   (a) Formal qualifications
   (b) Prior learning
   (c) Relevant experience
   (d) Capacity to acquire, within a reasonable time, the ability to do the job.
5.1.22. The implication of the above paragraph is that in selecting a candidate, the Municipality was expected to choose or appoint a suitable candidate who had any or a combination of the following: formal qualification, prior learning, relevant experience and capability to acquire the ability to do the job (within a reasonable time). The candidate the Municipality appointed did not have the qualification required, prior learning nor the experience in the relevant field i.e. ‘Youth Development’.

5.1.23. Paragraph 6.5 the Municipality’s Employment Practice provides the following:

“6.5. Security Clearance/ Vetting

Advertisements (at the discretion of VKLM) should state applicants must undergo security clearance. Security clearance must be done in respect of recommended candidates with assistance from a service provider and/or the National Intelligence Agency.

...  
In addition to the above, the service provider must supply the VKLM with independent reports on individuals after detail vetting was done on the following areas:

(a) Credit reference,
(b) SAPS criminal,
(c) Qualification check and
(d) Employment verification”

5.1.24. In terms of the above paragraph, the applicants should have been subjected to clearances, which includes checking the candidates’ credit record, criminal record, qualifications and their employment record. However, in this instance the Municipality, through Mr Moshaba, stated in the meeting of 22 June 2017 that
they could not recollect if this was done with regard to Mr Masango’s qualifications. The decision by the Municipality to re-advertise the position was a mere attempt to correct the irregularity.

Conclusion

5.1.25. Based on the evidence obtained during the investigation, the Municipality initially did not comply with the legal prescripts regulating recruitment and selection of staff. However, due to the public outcry the appointment of Mr Masango was reversed, the Municipality re-advertised the post and appointed the Complainant as Assistant Manager: Youth Development.

5.2. Regarding whether the Complainant and the Taxpayers of the Municipality suffered prejudice as a result of the Municipality’s failure to follow proper recruitment processes

Common cause issues

5.2.1. It is common cause that Complainant had also applied for the position of Assistant Manager: Youth Development and was invited to the same interviews that Mr NE Masango attended.

5.2.2. The Complainant’s Curriculum Vitae indicated that she was in possession of a Bachelor’s Degree in Social Work from the University of Johannesburg. Furthermore, she had the following 3 years’ experience in youth matters:

(a) One (1) year at the Mpumalanga Mental Health Society as a Social Worker;
(b) Seven (7) months at SANCA Witbank as a Social Worker;
(c) Six (6) months at the Municipality as a Youth Development Officer; and
(d) Eleven (11) months at Headway Gauteng as a Student Social Worker.
5.2.3. The Municipality held the interviews on 17 April 2015. The results were listed as:

a) Kubheka C 41%;
b) Mahlangu SP 29%;
c) Masango N.E 49.4%;
d) Phakula R 21.6%;
e) Sibanyoni M.B 39.4%.

5.2.4. The interview results above indicate that the Complainant was the second best candidate i.e. she obtained the second position in the interviews, after Mr Masango, which means that had the Municipality adhered to the provisions of its own Employment Practice, the Complainant would have been the recommended candidate. In redressing the prejudice that would have been suffered by the Complainant, the Municipality then re-advertised the position and the Complainant was subsequently appointed.

Issues in dispute

5.2.5. It is in dispute that the Complainant and taxpayers of the Municipality suffered prejudice as a result of the conduct of the Municipality.

5.2.6. Although Mr Masango was appointed as the Assistant Manager: Youth Development, the Municipality rectified this irregular appointment by re-advertising the position and appointing Ms Khubeka.

Application of the relevant law

5.2.7. Section 61(1) of the Municipal Finance Management Act 56 of 2003 (MFMA) provides that "the accounting officer of a municipality must-
(a) act with fidelity, honesty, integrity and in the best interest of the municipality in managing its financial affairs”.

5.2.8. The former Municipal Manager appointed Mr Masango without following the prescribed recruitment process, he further failed to conduct an investigation into Mr Masango’s qualifications, thereby failing to act with utmost honesty and integrity. As a result, the said appointment could not have been in the best interest of the Municipality.

5.2.9. Section 62(1)(d) of the MFMA provides that: “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 unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented”.

5.2.10. The former Municipal Manager was expected to ensure that correct recruitment and selection processes were followed in the appointment of Mr Masango. The appointment of any employee without following the prescribed recruitment and selection would result in an irregular expenditure. Therefore, the actions of the former Municipal Manager caused irregular and wasteful expenditure when Mr Masango was on average paid a salary amounting to R1 007 808 from the date of appointment which is 04 May 2015 to 1 August 2018 which is the date of his transfer, excluding any other benefits.

5.2.11. Section 94(2)(a) of the MFMA provides that “the accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this Act”. The former Municipal Manager used his position to appoint Mr Masango irregularly and that was inconsistent with financial and ethical responsibilities of an Accounting Officer as directed by MFMA.
5.2.12. Section 171(1) of 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".

5.2.13. The former Municipal Manager was expected to comply with sections 61, 62 and 94 of the MFMA to avoid committing financial misconduct.

Conclusion

5.2.14. Based on the evidence obtained above, it can be concluded that the Complainant initially suffered prejudice as a result of the decision to appoint Mr Masango as the Assistant Manager: Youth Development without complying with the Municipality’s own recruitment and selection procedures and the MFMA.

5.2.15. However, the prejudice suffered by the Complainant was later rectified by the Municipality in that the position of Assistant Manager: Youth Development was re-advertised and the Complainant who met the requirements for the position was appointed. The subsequent conduct of the Municipality put the Complainant where she would have been had the Municipality initially acted according to its recruitment and selection policy.

5.3. Regarding whether the transfer of Mr Masango from the position of Assistant Manager: Youth Development to the position of Assistant Manager: Local Economic Development complied with the Municipality’s recruitment processes and procedures.
Common cause issues

5.3.1. It is common cause that Mr Masango who was initially appointed to the position of Assistant Manager: Youth Development in 2015 was later transferred to the office of the Municipal Manager to occupy the position of Assistant Manager: Local Economic Development.

5.3.2. It is not disputed that the position of Assistant Manager: Local Economic Development was vacant and not advertised at the time that Mr Masango was transferred.

5.3.3. On 16 October 2019, my investigation team forwarded a letter to the current Municipal Manager, Mrs Thabitha Matladi requesting clarity and more information on the process that was followed in transferring Mr Masango to the position of Assistant Manager: Local Economic Development and in appointing Ms Kubheka to the position of Assistant Manager: Youth Development.

5.3.4. In her response letter dated 30 October 2019, the Municipal Manager stated that Mr Masango was transferred to the Local Economic Development office due to the fact that he is on fixed term contract and the position of Assistant Manager: Youth Development requires that the incumbent be within the age of youth, a requirement that Mr Masango no longer meet. Mrs Matladi stated further that the transfer of Mr Masango was a horizontal transfer which is sanctioned by the Municipal Employment Practice.

5.3.5. It was also discovered that from the response from the Municipal Manager that Mr Masango has since obtained a Bachelor Degree in Business Management which is equivalent to the minimum requirements for the position of Assistant Manager: Local Economic Development. After the transfer of Mr Masango to the Local Economic Development office, which took place on 01 August 2018, the
Municipality advertised the position of Assistant Manager: Youth Development on 04 November 2018.

Application of the relevant law

5.3.6. Paragraph 6.2.7 the Municipality’s Employment Practice (Policy Number: EP/06/2012) provides the following:

Secondments, Loans and Exchanges

"It is in the municipality’s interest to encourage greater mobility within the municipality. Secondments, loans or exchanges may therefore be instigated either by the employer or the employee, provided that there is a clear and specific municipality’s interest in the experience to be gained, over and above the individual’s personal development, and subject to the following principles:"

(a) No additional expenditure costs may be incurred.
(b) The employee’s existing financial position will be maintained.
(c) ....
(d) Only employees on similar employment conditions may be seconded, loaned, and/or exchanged, that is, Fixed Term Contracts, Temporary Employment or Permanent Employment.

5.3.7. A letter obtained as evidence authored by the Municipal Manager Mrs Matladi to Mr Masango dated 1 August 2018 states as follows:

“You are hereby transferred horizontally from the post of an Assistant Manager: Youth Development to the office of the Municipal Manager as an Assistant Manager: Local Economic Development with immediate effect i.e. from date of this letter.
You are moving with your current package, benefits and other condition of service remain the same.”

5.3.8. Mr Linda Zwane, the Office Manager in the Office of the Municipal Manager confirmed that the position of Assistant Manager: Local Economic Development in the office of the Municipal Manager is a permanent position, however, when Mr Masango was transferred to the said position, he was not transferred on a permanent basis but that he is continuing on his five year contract from his previous position of Assistant Manager: Youth Development. He added that Mr Masango’s contract will end in May 2020 after which the position of Assistant Manager: Local Economic Development will be advertised and be filled on a permanent basis.

5.3.9. Mr Masango’s employment as Assistant Manager: Youth Development, was a fixed term contract and he was transferred to his current position on the same package, benefits and other conditions of service also remain the same. As such this makes the employment conditions of the two positions similar as required in paragraph 6.2.7 (d) above. Therefore Mr Masango’s transfer was in line with the Employment Practice of the Municipality.

Conclusions

5.3.10. Based on the evidence gathered, it can be concluded that the Municipality did substantially comply with its own internal secondment processes when it transferred Mr Masango as the employment conditions of the two positions were similar.

5.4. Regarding whether the subsequent appointment of Ms Kubheka to the position of Assistant Manager: Youth Development after it was re-advertised, complied with the Municipality’s recruitment processes and procedures.
Common cause issues

5.4.1. It is common cause that the Municipality re-advertised the position of Assistant Manager: Youth Development after Mr Masango was transferred to the position of Assistant Manager: Local Economic Development.

5.4.2. It is also common cause that Ms Kubheka re-applied for the position and was appointed after going through the recruitment processes.

5.4.3. It is also common cause that when the Complainant was contacted by my investigation team on 22 July 2019 she confirmed that she was indeed appointed to the position of Assistant Manager: Youth Development after the position was re-advertised.

5.4.4. It is not disputed that the position of Assistant Manager: Youth Development was vacated on 01 August 2018 when Mr Masango was transferred to Assistant Manager: Local Economic Development. The position was then re-advertised on 04 November 2018 and the Complainant was appointed after a recruitment process was undertaken by the Municipality.

Application of the relevant law

5.4.5. Section 195(1) of the Constitution provides amongst other things that "Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

1) A high standard of professional ethics must be promoted and maintained.
2) Efficient and economic use of resources must be promoted.
3) ...
4) Services must be provided impartially, fairly, equitably and without bias."
m) ....

n) Public administration must be accountable.

o) Transparency must be fostered.

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

5.4.6. It follows from the above section that in performing their function, the Municipality must be transparent and accountable and cultivate a principle of good human resource management. After the position was re-advertised, the Municipality followed a proper recruitment process in the appointment of Ms Kubheka to the position of Assistant Manager: Youth Development.

5.4.7. However, it was the submission of Ms Matladi that the position of Assistant Manager: Youth Development is a five year contract and requires someone who is within the youthful age. Therefore, the Municipality should have foreseen from the onset that Mr Masango would no longer be of youthful age by the time his contract expired, and this could have prevented the Municipality from appointing someone who did not qualify.

Conclusion

5.4.8. Based on the evidence gathered, it can be concluded that the Complainant had initially suffered prejudice as a result of the decision to appoint Mr Masango as Assistant Manager: Youth Development but the position has since been rectified when she was appointed to the said position.
6. FINDINGS

Having regard to the evidence uncovered during the investigation, the regulatory framework determining the standard the Municipality should have complied with and the impact on the Complainant, I therefore make the following findings:

6.1. Regarding whether the Municipality irregularly appointed Mr NE Masango who did not meet the minimum requirements for the position of Manager: Youth Development.

6.1.1. The allegation that the Municipality improperly appointed Mr NE Masango when they appointed him to the position of Manager: Youth Development, is substantiated.

6.1.2. The Municipality appointed Mr NE Masango despite the fact he did not possess the relevant qualifications nor the required experience for the post at the time of his appointment to the position of Assistant Manager: Youth Development.

6.1.3. The conduct of the Municipality was in violation of paragraph 2.2 and 6.2 of the Municipality’s own Employment Practice dated August 2012. Its conduct also contravened section 195 of the Constitution and section 62 of the Municipal Finance Management Act 56 of 2003.

6.1.4. Such conduct 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.
6.2. Regarding whether the Complainant and the Taxpayers of the Municipality suffered prejudice as a result of the Municipality's failure to follow proper recruitment processes.

6.2.1. The allegation that the Complainant suffered prejudice as a result of the conduct of the Municipality, is unsubstantiated. However, the allegation that the Taxpayers of the Municipality suffered prejudice, is substantiated.

6.2.2. Initially the Municipality did not appoint Ms Kubheka even though she qualified for the position of Assistant Manager: Youth Development. However, the Municipality subsequently re-advertised the position and Ms Kubheka was selected as the successful candidate after an appropriate recruitment process, thus remedying the prejudice that had been suffered by the Complainant.

6.2.3. The Municipality incurred fruitless and wasteful expenditure as a result of an irregular recruitment process which resulted in the appointment of Mr Masango to the position of Assistant Manager: Youth Development.

6.2.4. The conduct of the Municipality was in contravention of section 62(1)(d) of the MFMA.

6.2.5. The Municipality also incurred additional costs associated with the re-advertisement of the position of Assistant Manager: Youth Development, recruitment and selection process. These costs also constitute further irregular expenditure.

6.2.6. The conduct of 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.
6.3. **Regarding whether the transfer of Mr Masango from the position of Assistant Manager: Youth Development to the position of Assistant Manager: Local Economic Development complied with the Municipality’s recruitment processes and procedures**

6.3.1. The transfer of Mr Masango from the position of Assistant Manager: Youth Development to the position of Assistant Manager: Local Economic Development was in line with the Municipality’s recruitment processes and procedures and in particular the Municipality’s Employment Practice.

6.3.2. Therefore, the conduct of the Municipality was not in violation of paragraph 6.2.7 of the Municipality’s Employment Practice as the employment conditions of the two relevant positions were made are similar.

6.4. **Regarding whether the subsequent appointment of Ms Kubheka to the position of Assistant Manager: Youth Development after it was re-advertised, complied with the Municipality’s recruitment processes and procedures**

6.4.1. The appointment of Ms Kubheka to the position of Assistant Manager: Youth Development after the position was re-advertised was properly done in accordance with the recruitment policy of the Municipality.

6.4.2. The decision to re-advertise the position of Assistant Manager: Youth Development and to appoint the Complainant addresses the prejudice that the Complainant may have suffered when this position was given to Mr Masango.

6.4.3. The appointment was in accordance with section 195 of the Constitution as it promoted good human resource management and transparency.
6.4.4. The conduct of the Municipality does not in this regard 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

In the light of the above, and having taken into account evidence before me, the fact that honesty and integrity are paramount for the execution of duties by the Speaker of the Legislature as the Executive Authority and all the relevant facts before me, the appropriate remedial actions I am taking in terms of section 182(1)(c) of the Constitution are the following:

7.1. The Speaker of the Council, Cllr R.K Segone must:

7.1.1. Within thirty (30) working days from the date of this report, ensure that the Municipal Council, in consultation with the Municipal Manager, declare the appointment of Mr Masango to the position of Assistant Manager: Youth Development as irregular. The salary that was paid to Mr Masango as Assistant Manager: Youth Development should also reflect as an irregular expenditure in the Municipality's financial statement for the period between 4 May 2015 and 01 August 2018 when he was transferred to the position of Assistant Manager: Local Economic Development.

7.1.2 Within sixty (60) working days from the date of this report, disclose all the irregular expenditure to the Provincial Treasury and to the Auditor General incurred by the Municipality in connection with the irregular appointment of Mr Masango to a position of Assistant Manager: Youth Development.
7.2. The Municipal Manager, Mrs ST Matladi must:

7.1.1. Within sixty (60) working days institute an investigation into the irregular appointment of Mr Masango to the position of Assistant Manager: Youth Development as well as the irregular expenditure incurred as a result of the salary paid to him whilst occupying the position of Assistant Manager: Youth Development.

7.1.2. Within thirty (30) working days from the date of the issuing of the investigation report referred to above, take disciplinary action against all officials who were involved in the irregular appointment of Mr Masango.

7.1.3. Within sixty (60) working days of this report, conduct or provide training to employees at all relevant levels on recruitment and selection processes and the importance of complying with approved policies. Ensure that any principle that has to be recognised during the recruitment and selection processes promotes the provisions of section 195 of the Constitution.

8. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTION

8.1. The Accounting Officer of the Municipality must, within 30 days from the date of the issuing of this Report and for approval by the Public Protector, submit the implementation plan to her indicating how the remedial action referred to in paragraph 7 will be implemented.

8.2. I wish to bring to your attention that in line with the Constitutional Court judgement in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report
are legally binding on the Premier and the Acting Director-General of Mpumalanga Province, unless they obtain a Court order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 24.02.2020

Assisted by: Botromia Sithole, Provincial Representative: Mpumalanga; and Comfort Mokoena, Senior Investigator.