
Report No: 64 of 2019/20

"Allegations of maladministration relating to payment of overtime to a seconded Chief Financial Officer, encashment of leave days and appointment of Senior Manager: Strategic services"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE RAND WEST CITY LOCAL MUNICIPALITY REGARDING PAYMENT OF OVERTIME TO A SECONDED CHIEF FINANCIAL OFFICER, ENCASHMENT OF LEAVE DAYS AND APPOINTMENT OF SENIOR MANAGER: STRATEGIC SERVICES
TABLE OF CONTENTS

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

1. INTRODUCTION ...........................................................................................................12

2. THE COMPLAINT .........................................................................................................12

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR .................................13

4. THE INVESTIGATION ..................................................................................................19

5. DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED
   AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND
   PRESCRIPTS ..................................................................................................................24

6. FINDINGS .....................................................................................................................41

7. REMEDIAL ACTION ....................................................................................................46

8. MONITORING ..............................................................................................................47
Executive Summary

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

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration against the then Westonaria Local Municipality (now known as Rand West City Local Municipality) arising from the payment of overtime to a seconded Chief Financial Officer (the CFO), encashment of leave days and appointment of a Senior Manager: Strategic Services.

(iii) The complaint was lodged by Mr Nkgobe Mphahlela (Complainant) on 28 August 2014.

(iv) The Complainant alleged that:

(a) The former Municipal Manager, Mr TC Ndlovu (the former Municipal Manager), unduly authorised payment of overtime to the Acting CFO, Ms NM Khumalo who was seconded to the Municipality by the Gauteng Provincial Treasury (GPT);

(b) The former Municipal Manager also appointed Mr KJ Njingolo in the position of a Senior Manager: Strategic Services without following the Municipal recruitment processes. This post was not funded and established in the Municipal structure and had no job description. This post was also not advertised and there were no interviews that were conducted;
On 11 September 2013, the former Municipal Manager unduly authorised the encashment of leave days due to Mr Njingolo while he was only few months in the position of a Senior Manager. This was despite the fact that the Municipality had placed a moratorium on the encashment of leave. The moratorium was therefore applied inconsistently.

The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on such conduct and to take appropriate remedial action; and in terms of Section 6 (5) of the Public Protector Act, 1994 (Public Protector Act), that regulates the manner in which power conferred by section 182 of the Constitution may be exercised in respect of public entities. In 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. The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.” of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4)(a) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in state affairs, or in the public administration in any sphere of government.

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1 [2016] ZACC 11; 2016 (3)SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
Based on analysis of the complaint, the following issues or conduct were identified and investigated:

(aa) Whether the former Municipal Manager unduly authorised the payment of overtime to the Acting Chief Financial Officer, Ms NM Khumalo, who was seconded to the Municipality by the GPT;

(bb) Whether the former Municipal Manager appointed Mr K J Njingolo in the position of a Senior Manager: Strategic Services without following the Municipal recruitment processes;

(cc) Whether the former Municipal Manager unduly authorised the encashment of leave days due to Mr Njingolo while he was only few months in the position of a Senior Manager, Strategic Services; and

(dd) Whether the Municipality or any other person suffered prejudice as a result of the alleged authorisation of overtime payment to the Acting Chief Financial Officer Ms NM Khumalo, the improper appointment of Mr KJ Njingolo and authorization of leave encashment of Mr Njingolo in the circumstances.

(vii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the Municipality and prejudice to the Complainant and or the Municipality were principally those imposing administrative standards that should have been complied with by the Municipality and or its officials are the following:

(aa) Section 95(1) of the Constitution provides, amongst others, that Public Administration must be governed by the democratic values and principles enshrined in the Constitution,
(bb) The Municipal Finance Management Act 56 of 2003 (MFMA) provides amongst others the Municipal Manager’s responsibility for managing the financial and human resources administration of the municipality.

(cc) Principles of Co-operative government as contained in Chapter 3 section 41 is applicable in that sub-section (1) (h) enjoins all organs of state to co-operate with one another in mutual trust and good faith by:-

(i) ..............................................................

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) ..............................................................

(v) adhering to agreed procedures; and

(vi) ..............................................................

(dd) The Municipal Recruitment and Selection Policy (the Policy) that regulates the recruitment and selection processes and procedures of the Municipality.

(ee) The Municipality’s Leave Encashment Policy (Encashment Policy) regulates the conditions of approval of leave encashment.

(viii) I issued a section 7(9)(a) notice (Notice) to the Municipality in which adverse findings were made against the former Municipal Manager. The current Municipal Manager indicated that the Municipality would accept the outcome of my investigation, had no contradictory evidence to adduce to counteract my findings and would accept my findings. He further indicated that he would refer the matter to Council together with my proposed remedial action to give effect to the findings encapsulated in my final report acknowledging that the HR policies needed to be amended.
The former Municipal manager in response to my Notice, however sought to challenge my preliminary findings against him by stating that there was no non-compliance with the MFMA in that the reason for the Gauteng Provincial Treasury (GPT) not paying for Ms Khumalo’s overtime was the lack of funds. However this reasoning fails to take into account that the Consultancy agreement clearly delineates the conditions of working hours. The former Municipal Manager failed to manage the working hours of Ms Khumalo hence the overtime payment is regarded as “unauthorised, irregular or fruitless and wasteful expenditure”.

Similarly, the former Municipal Manager, although he did not comment on the irregular appointment of Mr Njingolo submitted in his response to my Notice that the appointment did not prejudice the Municipality or the Complainant because the Municipality benefitted from the expertise of Mr Njingolo’s services and that if the recruitment and selection process was followed, any other qualifying person could have got a fair chance to compete for the position, therefore, someone would have been prejudiced. The contention fails to take into account that the best candidate would be selected through an open, fair and transparent recruiting process in compliance with the Municipal legislative prescripts.

With regard to the leave encashment for Mr Njingolo, the former Municipal Manager submitted that a precedent had already been set by his predecessor and he thereafter sought to redress the irregular application of the Leave Encashment Policy. This reasoning does not justify the improper approval of Mr Njingolo’s application for leave encashment.

Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
(a) Regarding whether the former Municipal Manager unduly authorised the payment of overtime to the Acting CFO, Ms NM Khumalo who was seconded to the Municipality by the GPT:

(aa) The allegation that the former Municipal Manager, Mr TC Ndlovu, unduly authorised the payment of overtime of Ms Khumalo acting as CFO in the Municipality is substantiated.

(bb) Mr Ndlovu failed to comply with Clause 4.3 of the Consultancy Agreement by not obtaining prior approval from GPT for the overtime hours worked by Ms Khumalo.

(cc) The expenditure in terms of the overtime payment to Ms Khumalo is therefore regarded as an unauthorised and irregular expenditure and amounts to a contravention of section 61(1) and section 62(1)(d) of the MFMA and Chapter 3 section 41 of Principles of co-operative government.

(dd) Accordingly, such a violation by Municipality amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether the former Municipal Manager appointed Mr KJ Njingolo in the position of a Senior Manager: Strategic Services without following the Municipal Recruitment & Selection Policy.

(aa) The allegation that the former Municipal Manager, Mr TC Ndlovu appointed Mr Njingolo as a Senior Manager: Strategic Services without following Municipal Recruitment and Selection Policy is substantiated.

(bb) Mr Ndlovu appointed Mr Njingolo through a headhunting process on the basis that the Municipality needed to prepare for the year end audit and this position needed to be filled. The Municipality Recruitment and Selection Policy does not cater for headhunting process and the use of this process contravenes the said policy.
Other potential qualifying candidates who could have applied for the post, were improperly prejudiced as the post was not advertised causing them to be disadvantaged.

The conduct of the Municipality, particularly the former Municipal Manager, during the recruitment and selection of Mr Njingolo amounts to a contravention of Clause 4.3 of the Recruitment Policy in that he failed to implement the Municipality's Recruitment and Selection Policy and his decision to recruit through a headhunting process was flawed. The Municipality further violated section 195(1) of the Constitution, section 56(3) of the Municipal Systems Act, section 62(1)(d) MFMA as explained above.

Accordingly, such a violation by Municipality and in particular Mr TC Ndlovu amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Regarding whether the former Municipal Manager unduly authorised the encashment of leave days due to Mr Njingolo while he was only few months in the position of a Senior Manager, Strategic Services.

The allegation that Mr TC Ndlovu unduly authorised the encashment of leave days due to Mr Njingolo while he was only few months in the position of a Senior Manager, Strategic Services is substantiated.

The total payment of R13 204.52 was paid to Mr Njingolo by the Municipality. The approval of the application of encashment of eight (8) leave days of Mr Njingolo was improperly authorised by Mr TC Ndlovu. Mr Njingolo had not accumulated nor did not have more than forty eight (48) leave days as required in terms of the Municipality's Leave Encashment Policy. The approval of the leave encashment was therefore irregular or in violation of the Clause 5 of Municipality's Leave Encashment Policy.
(cc) 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.

(d) Regarding whether the Complainant, the Municipality or any other person suffered prejudice as a result of the alleged authorisation of overtime payment to the Acting Chief Financial Officer Ms NM Khumalo, the improper appointment of Mr KJ Njingolo and authorisation of leave encashment of Mr Njingolo in the circumstances.

(aa) The expenditure of the overtime payment to Ms Khumalo prejudiced the Municipality's finances as it was unauthorised and irregular expenditure in contravention of section 61(1) and section 62(1)(d) of the MFMA and Chapter 3 section 41 of Principles of Co-operative government.

(bb) Notwithstanding the fact that Mr Njingolo might have rendered a commendable job to the Municipality, the salary paid to him was an irregular expenditure since the appointment was made in contravention of the relevant legal prescripts.

(cc) The position of Senior Manager: Strategic Services was not advertised in line with the procedure set out in Chapter 2 of the Public Service Handbook and in terms of Clause 4.3 of the Recruitment and Selection Policy of the Municipality. Such failure to advertise this post improperly prejudice other qualifying and potential candidates who might have applied for the post. Similarly, the salary paid to Mr Njingolo was irregular expenditure since his appointment was made in contravention of the applicable legal prescripts, thereby prejudicing the Municipality's finances.

(dd) An amount of R13 204.52 (thirteen thousand two hundred and four rand fifty two cents) was paid to Mr Njingolo by the Municipality as leave encashment in violation of Clause 5 of the Municipality's Leave
Encashment Policy. The approval of the leave encashment was therefore irregular or in violation of the Municipality’s Leave Encashment Policy. Such payment was therefore irregular, wasteful and fruitless expenditure and prejudicial to the Municipality’s finances.

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

(a) The Rand West City Local Municipality must ensure that

(aa) Within sixty (60) working days from the date of this report, Council committee determines an appropriate and reasonable amount recoverable as irregular expenditure from the former Municipal Manager, Mr Ndlovu and/or any other person liable in law, taking into account any taxable deductions;

(bb) Within thirty (30) working days from date of receipt of the amount certified by Council as recoverable, institute civil proceedings in terms of section 32(2) of the MFMA, against Mr Ndlovu and/or any person liable in law, for the recovery of such appropriate and reasonable amount.

(cc) Within sixty (60) working days of this report, ensure that all the Municipality’s Human Resources Policies are reviewed and amended accordingly and staff undergo training on all Human Resources and Financial Management policies, MFMA and Treasury Regulations.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY
THE RAND WEST CITY LOCAL MUNICIPALITY REGARDING PAYMENT OF OVERTIME
TO A SECONDED CHIEF FINANCIAL OFFICER, ENCASHMENT OF LEAVE DAYS AND
APPOINTMENT OF SENIOR MANAGER: STRATEGIC SERVICES

1. INTRODUCTION

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

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

1.2.1 The Premier of the Gauteng Provincial Government, the Mr David
Makhura;

1.2.2 The Executive Mayor of Rand West City Local Municipality, Cllr Mzi Khumalo

1.2.3 The Speaker of the Rand West City Local Municipality Cllr V Nqina-
Mzondeki; and

1.2.4 The Municipal Manager Mr Themba Goba.

2. THE COMPLAINT

2.1 The complaint was lodged by Mr Nkgobe Mphahlela (the Complainant) on 28
August 2014 alleging that:
2.1.1 The former Municipal Manager, Mr TC Ndlovu (the former Municipal Manager), unduly authorised the payment of overtime to the Acting CFO, Ms NM Khumalo who was seconded to the Municipality by the Gauteng Provincial Treasury (GPT);

2.1.2 The former Municipal Manager also appointed Mr KJ Njingolo in the position of a Senior Manager: Strategic Services without following the Municipal recruitment processes. This post was not funded and established in the Municipal structure and had no job description. This post was also not advertised and there were no interviews that were conducted;

2.1.3 On 11 September 2013, the former Municipal Manager unduly authorised the encashment of leave days due to Mr Njingolo while he was only a few months in the position of a Senior Manager. This was despite the fact that the Municipality had placed a moratorium on the encashment of leave. The moratorium was therefore applied inconsistently.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Mandate of the Public Protector

3.1.1 The Public Protector is an independent constitutional institution established in terms of section 18(1) (a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.1.2 Section 182(1) of the Constitution provides that:

“The Public Protector has the power, as regulated by national legislation,
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action”.

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

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that 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 purpose of an investigation.

3.1.5 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.² The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.” The Court further confirmed the Public Protector’s powers as follows:

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

a) 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);

b) 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);

c) 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);

d) 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);

e) 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);
f) 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));

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

h) “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)).

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

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

b) There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4) (c) (ii) of the Public Protector Act (paras 91 and 92)
c) 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 (paras 100 and 101):

I. Conduct an investigation;
II. Report on that conduct; and
III. To take remedial action.

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

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

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

g) Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (Para 112)."

3.1.7 However the Public Protector would like to emphasise that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature4. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of

4 Sidumo et al vs Rustenburg Platinum Mines Limited et al, 2008(2) SA 24 (CC) at 235.
civil damages or sorry money given its adjudicative and judicial nature. The office of the Public Protector is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and prejudice. It is therefore trite that the decisions of the Public Protector are administrative actions.

3.1.8 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter. The Rand West City Local Municipality is an organ of state and its conduct amount to conduct in state affairs in the local government, consequently I have the requisite jurisdiction to investigate any conduct that is alleged or suspected to be improper or to result in any impropriety or prejudice.

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

5 Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa 1996(4) SA744 (CC) at 161.
6 Minister of Home Affairs et al vs Public Protector et al 2017(2) SA 597 (GP)
4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

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. Section 6 of the Public Protector Act recognises the Public Protector’s authority to investigate and report her/his findings regarding any complaint lodged.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?
4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal\(^7\) (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice. In this case, key reliance was placed on institutions' comprehensive SCM Policies in addition to national laws, policies and guidelines.

4.2.4 My office's own institutional touchstones, being principles from previous reports, are always, and were also taken into account.

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

\(^7\) Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA),
4.2.6 In the case of conduct failure as was the case in the complaint investigated, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

4.2.7 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

4.3 The Investigation Process

4.3.1 The investigation process commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act, which included interviews and meetings with the Complainant, analysis of the relevant documentations; conducted research; consideration and application of the relevant laws, regulatory framework and jurisprudence,

4.3.2 The Public Protector conducted interviews with Mr Petersen from the Gauteng Provincial Treasury.

4.4 On the analysis of the complaint, the following issues were identified and investigated:

4.4.1 Whether the former Municipal Manager unduly authorised payment of overtime to the Acting Chief Financial Officer, Ms NM Khumalo, who was seconded to the Municipality by the GPT;

4.4.2 Whether the former Municipal Manager appointed Mr K J Njingolo in the position of a Senior Manager: Strategic Services without following the Municipal recruitment processes;
4.4.3 Whether the former Municipal Manager unduly authorised the encashment of leave days due to Mr Njingolo while he was only few a months in the position of a Senior Manager, Strategic Services; and

4.4.4 Whether the Complainant, the Municipality or any other person suffered prejudice as a result of the alleged authorisation of overtime payment to the Acting Chief Financial Officer Ms NM Khumalo, the improper appointment of Mr KJ Njingolo and authorization of leave encashment of Mr Njingolo in the circumstances.

4.5 Key Sources of information

4.5.1 Correspondence exchanged

4.5.1.1 Allegations letter sent via email dated 20 July 2015 from Public Protector addressed to Municipal Manager.

4.5.1.2 Email dated 29 July 2015, from the Municipality and response thereto requesting an extension to respond to the allegations letter sent.

4.5.1.3 Report from the Municipality on the allegations letter dated 14 August 2015 with annexures 1 A-D, 2 E-J and 3 K-P.

4.5.1.4 Letter dated 16 November 2015 sent via email from Public Protector in terms of section 7(4)(b) addressed to Gauteng Provincial Treasury requesting an interview with Mr Shamiel Petersen.

4.5.1.5 Letter dated 16 November 2015 sent via email from Public Protector in terms of section 7(4)(b) to the former Municipal Manager Mr Ndlovu requesting an interview.
4.5.1.6 Further documents submitted in terms of the interviews held on 19 November 2015 with Deputy Director Mr Mcedisi Dlamini (Municipal Compliance and Intergovernmental Relations) and Mr Shamiel Petersen Assistant Director (GPT).

4.5.1.7 Section 7(9) Notices dated 24 June 2019 that were sent to the Municipal Manager, former Municipal Manager, Mr Ndlovu, the Executive Mayor and Premier.

4.5.1.8 Acknowledgement of receipt of Section 7(9) Notice from Premier Cllr David Makhura, Municipal Manager and former Municipal Manager Mr Ndlovu.

4.5.1.9 Response in terms of Section 7(9) Notice from the Municipal Manager dated 28 June 2019.

4.5.1.10 Emailed response in terms of Section 7(9) Notice dated 3 July 2019 from the former Municipal Manager, Mr Ndlovu.

4.5.2 Legislation and other legal prescripts

4.5.2.1 The Constitution of South Africa, 108 of 1996
4.5.2.2 The Public Protector Act, 23 of 1994
4.5.2.3 Municipal Finance Management Act, 2003 (MFMA) and Regulations
4.5.2.4 The Municipal Recruitment and Selection Policy
4.5.2.5 The Municipal Leave Encashment Policy
4.5.2.6 The Municipal Systems Act 32 of 2000(MSA)
4.5.3  Case Law

4.5.3.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

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

4.5.3.3 Sidumo et al vs Rustenburg Platinum Mines Limited et al, 2008(2) SA 24 (CC) at 235.

4.5.3.4 Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa 1996(4) SA744 (CC) at 161.

4.5.3.5 Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA).

4.5.3.6 Minister of Home Affairs et al vs Public Protector et al 2017(2) SA 597 (GP).

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

5.1 Regarding whether the former Municipal Manager unduly authorised the payment of overtime to the Acting Chief Financial Officer, Ms NM Khumalo, who was seconded to the Municipality by the Gauteng Provincial Treasury.
Common cause issues

5.1.1 Ms Khumalo was seconded by the GPT to the Municipality to assume the role of Acting CFO from August 2013 until end November 2013.

5.1.2 The secondment of the Acting CFO followed the resignation of the CFO and was part of the Municipal Support Programme implemented by GPT in order to assist Municipalities that had capacity challenges in the Finance Department.

5.1.3 The GPT contracted Ms Khumalo’s services through her company and deployed her to the Municipality. She signed a Consultancy Agreement on 10 August 2013.

5.1.4 The timesheets submitted by Ms Khumalo during the period she was seconded to the Municipality extensively detailed the activities she performed and reflects the following hours worked:

<table>
<thead>
<tr>
<th>Month</th>
<th>Total hrs worked</th>
<th>Hrs billed to GPT</th>
<th>Amount paid by GPT (R 624.67)</th>
<th>Excess additional hrs worked &amp; billed to the Municipality</th>
<th>Average of excess (additional) hrs worked</th>
<th>Amount paid by Municipality (R 624.67)</th>
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<td>R 99 947.20</td>
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<td>R399 788, 80</td>
<td>164.75</td>
<td>3</td>
<td>R102 914.39</td>
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Issues in dispute

5.1.5 The Complainant alleged that the former Municipal Manager unduly authorised the payment of overtime to Ms Khumalo.
5.1.6 My office raised the matter with the Municipality, incorporating the Complainant’s allegations, on 20 July 2015, requesting specific information, documents and comments thereto. The former Municipal Manager responded in a letter dated 14 August 2015, indicating that the GPT agreed to pay Ms Khumalo fees for the first 40 hours per week and that any other additional hours would be paid by the Municipality.

5.1.7 In addition, the former Municipal Manager also submitted a copy of the Consultancy Agreement signed between the GPT and Ms Khumalo that regulated the rights and obligations between the parties.

5.1.8 The Municipality further submitted that it was not the first time that the Municipality had this arrangement with the GPT as the same approach was adopted in the case of Ms Rianda Kruger who was also seconded as the Acting CFO for the period February 2013 to April 2013 as part of the Municipal Support Programme.

5.1.9 Ms Khumalo was paid for the additional hours worked based on the contract which she concluded with the GPT stipulating that she would be remunerated on an hourly rate on the actual hours worked.

5.1.10 Therefore according to the Municipality, the conditions of work for Ms Khumalo were different from the ordinary employee of the Municipality as she would not have been paid for the additional hours if she was a permanent employee of the Municipality.

5.1.11 In an email dated 30 August 2013 from Mr Shamiel Petersen, Assistant Director: Municipal Compliance and Intergovernmental Relations: GPT, informed the former Municipal Manager that the GPT was unable to pay for the additional hours worked by Ms Khumalo and the Municipality should therefore cover the costs.

5.1.12 My office interviewed Mr Petersen on 19 November 2015 and he submitted that Ms Khumalo was seconded to the Municipality in an Acting CFO position. The conditions of Ms Khumalo’s secondment were that she would
work eight (8) hours for five (5) days totalling one hundred and sixty (160) hours at an hourly rate of Six Hundred and Twenty Four Sixty Seven Cents (R 624,67) for a period of four (4) months from August 2013 to November 2013.

5.1.13 Mr Petersen also indicated that during the introduction of the incumbent, the GPT emphasised that Ms Khumalo should not be overworked as the GPT needed to remain within its budget. In an email dated 30 August 2013, Mr S Petersen responded to the former Municipal Manager informing him that GPT would not pay for the overtime hours worked by Ms Khumalo and the Municipality should then cover payment for additional hours.

5.1.14 In an interview with my investigation team held with the former Municipal Manager on 26 November 2015, he submitted that the secondment of Ms Khumalo coincided with the Municipal year-end, preparation and submission of Annual Financial Statement. He indicated that due to the timing in the Municipal calendar, it was impossible for Ms Khumalo not to work more hours. Further in response to my Notice in terms of section 7(9)(a), he submitted that it is highly unlikely that Provincial Treasury would have not approved the request because they knew that there is no CFO in all municipalities that works normal hours just before the submission of financial statements. In addition, that even if permission was requested from the GPT and was granted, the GPT would not have paid for the overtime hours as they did not have the necessary funds.

Application of the relevant legal framework

5.1.15 Section 61(1) of the Municipal Finance Management Act, 2003 (MFMA) states that the accounting officer must-

“(a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs”
Section 62(1)(d) 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."

The former Municipal Manager as the Accounting Officer of the Municipality was required to act in the best interests of the Municipality. He indicated that owing to an emergency situation that arose as a result of the resignation of the CFO, he sought assistance from the GPT and Ms Khumalo was part of the Municipal support programme initiated by GPT.

The principles of co-operative government as contained in Chapter 3 section 41 is applicable in that sub-section (1)(h) enjoins all organs of state to co-operate with one another in mutual trust and good faith by:

“(i) ............................................

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) ............................................

(v) adhering to agreed procedures; and

(vi) ............................................

In terms of its mandate, the GPT in an effort to assisting the Municipalities that had capacity challenges with their Finance Department, entered into Consultancy Agreement with Ms Khumalo. Ms Khumalo was then seconded to the Municipality as acting Chief Financial Officer to assist with the Municipality’s audit and year-end reporting.
5.1.20 Paragraph 4 of the Consultancy Agreement regulates the hours the Consultant is expected to work. Sub-paragraph 4.1 states that the Consultant is expected to work 24 (twenty-four) hours 5(five) days per week over a period of 4 (four) months including weekends and public holidays.

5.1.21 Sub-paragraph 4.2 notes that the Consultant's work hours should fall within the business hours/weeks of the institution where services are rendered. Public holidays and weekends will be excluded from the official work days, except where otherwise advised by GPT through electronic mail. There would be no remuneration for Public holidays and weekends, as the Consultant was an independent Contractor unless specifically requested by GPT to work on these days.

5.1.22 Ms Khumalo worked additional hours and the GPT was not informed as required by the Consultancy Agreement. The Municipality did not adhere to the Consultancy Agreement in that it stipulated that the Consultant's work hours had to fall within the business hours/weeks of the institution where services were rendered.

5.1.23 Clause 4.3 Annexure 1 provides that "the allocation of hours per municipality may be increased or decreased at the sole discretion of the GPT under certain circumstances." The Consultancy Agreement was silent on the issue of overtime payment and the municipality allowed Ms Khumalo to work overtime without first obtaining approval from GPT. The Municipality only advised GPT after she worked overtime. Only the GPT had a sole discretion to approve the number of hours allocated to the municipalities.

5.1.24 The evidence in my possession revealed that Ms Khumalo worked additional hours during the period of her secondment to the Municipality without the GPT having being advised of such overtime.
5.1.25 The former Municipal Manager informed the GPT in an email dated 30 August 2013 of Ms Khumalo’s reports and time sheets reflecting the hours worked.

5.1.26 The GPT requested the Municipality to pay Ms Khumalo for the additional hours worked. The Consultancy Agreement envisaged circumstances in which those hours could be increased and could result in the payment of additional hours.

5.1.27 In his response to my Notice, the former Municipal Manager, stated that there was no non-compliance with the MFMA in that the reason for Gauteng Provincial Treasury (GPT) not paying for Ms Khumalo’s overtime was lack of funds. However this reasoning fails to take into account that the Consultancy Agreement clearly delineates the conditions of working hours and that by failing to obtain authorisation prior to Ms Khumalo working the overtime hours Mr Ndlovu did not act in the best interests of the Municipality and therefore incurred the “unauthorized, irregular or fruitless and wasteful expenditure” noted in the section 62(1)(d) of the MFMA.

**Conclusion**

5.1.28 Based on the exposition of the evidence gathered, it can be concluded that the Municipality did not conduct itself in compliance with the applicable legal prescripts.

5.2 **Whether the former Municipal Manager appointed Mr KJ Njingolo in the position of a Senior Manager: Strategic Services without following the Municipal recruitment processes.**
Common cause issues

5.2.1 In terms of the appointment letter dated 29 April 2013 and signed off by the former Municipal Manager, Mr Njingolo was appointed to the position of a Senior Manager: Strategic Services with effect from 1 May 2013 to 31 December 2016 on a remuneration package of R650 000.00 per annum.

Issues in dispute

5.2.2 The Complainant alleged that the former Municipal Manager appointed Mr Njingolo to the position of a Senior Manager: Strategic Services without following the Municipal recruitment processes.

5.2.3 According to the Complainant, the Municipality did not advertise the position, it was not funded and it was not established on the Municipal structure. There was also no job description for the position.

5.2.4 In a letter dated 14 August 2015, the former Municipal Manager submitted to my office that the position which Mr Njingolo occupied was approved in the organisational structure of the Municipality at a Council meeting held on 25 April 2013. He further indicated that his appointment was through a headhunting process. He said that the Municipality approached two qualifying candidates to determine their availability and Mr Njingolo was available.

5.2.5 The former Municipal Manager argued that the Municipality viewed Mr Njingolo as competent for the position based on his experience in Local Government and having worked as the Chief Executive Officer of the West Rand Development Agency.

5.2.6 The former Municipal Manager also submitted that the Municipality's Recruitment and Selection Policy did not stipulate the implementation of a headhunting process.
5.2.7 It was contended further by the former Municipal Manager that, given the fact that the Municipality was preparing for the year end at the time, the post needed to be filled urgently and for that reason headhunting as an acceptable Human Resource process, was chosen.

5.2.8 In his submission the former Municipal Manager further argued that the Labour Union Representative and the Political Management Team, namely the Executive Mayor, Speaker and the Chief Whip were also consulted and all gave their support to the process of headhunting.

Application of the relevant legal framework

5.2.9 The Municipality’s Recruitment and Selection Policy (Recruitment Policy) approved as per Council Resolution C/RES214/13(02), details procedure of advertising of vacant posts, selection criteria, interviewing process and disputes relating to the appointment of candidates.

5.2.10 Paragraph 4.3, the Policy stipulates that vacant position should be advertised internally first and thereafter, if there are no suitable candidates, be advertised externally. External advertisement shall be placed in appropriate media/publications and community newspapers to ensure maximum access by the designated group. However, the Recruitment Policy does not make provisions for a headhunting process.

5.2.11 In this instance, the former Municipal Manager used the headhunting process on the basis of urgency to justify the appointment of Mr Njingolo without advertising the position and subjecting him to an interview process.
Conclusion

5.2.12 Based on the evidence gathered, it can be concluded that the Municipality did not comply with the applicable legal prescripts and resorted to the head hunting process which was not contained in the Municipality’s Recruitment policy.

5.3 Regarding whether the former Municipal Manager unduly authorized the encashment of leave days due to Mr Njingolo while he was only few months in the position of a Senior Manager: Strategic Services:

Common cause issues

5.3.1 The Municipality appointed Mr Njingolo as a Senior Manager: Strategic Services on the 1 May 2013 to December 2016. On 9 September 2013, Mr Njingolo applied for leave encashment following the death of his father. He had ten (10) days’ vacation leave at the time of submission of his application

5.3.2 Mr Njingolo applied for eight (8) days’ leave from his leave credits and was paid an amount of R 13 204, 52 by the Municipality and such payment was approved by the former Municipal Manager on the 11 September 2013.

Issues in dispute

5.3.3 The Complainant argued that the former Municipal Manager unduly authorized the encashment of leave days due to Mr Njingolo while he was
only few months in the position of a Senior Manager and despite the fact that a moratorium was placed into the encashment of leave.

5.3.4 In a letter dated 9 September 2013, the former Municipal Manager indicated that in terms of the employment contract which Mr Njingolo concluded with the Municipality, he was entitled to twenty four (24) working days as annual leave with full pay. Mr Njingolo was also entitled to a maximum of five (5) working days per calendar year for family responsibility in case of birth, illness or death of an immediate family;

5.3.5 The former Municipal Manager further indicated that the standard Leave Encashment Form that Mr Njingolo submitted, contained the following:

(a) That the applicant understood that he is compelled to take 16/19 days leave in a leave cycle and is restricted to cashing a minimum of five (5) days and a maximum of fifteen (15) days leave subject to the applicant’s reasons for encashment; and

(b) The reason for the urgent cashing of leave were as a result of the death of a family member/ funeral arrangements or unforeseen emergencies, which could not be planned.

5.3.6 In a letter dated 14 August 2015 the Municipal Manager submitted Mr Njingolo’s Leave Credit Record which indicated that as at 30 September 2013, Mr Njingolo’s had accumulated 10 days of Pro-rata leave days

5.3.7 The former Municipal Manager indicated that he discovered that there were inconsistencies in the implementation of the encashment of leave within the Municipality and subsequently issued Circular 14/HR dated 10 October
2013 in which all employees were informed that the Leave Encashment Policy was temporarily suspended pending the approval of the Leave Management Policy, which would regulate the circumstances under which leave encashment could be granted. There was therefore no longer any approval of leave encashment applications until the said policy was put in place.

**Application of the relevant legal framework**

5.3.8 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."

5.3.9 Clause 4 of the Municipality's Leave Encashment Policy dated 18 January 2010 provides that in terms of clause 7.5 of the National Collective Agreement on Conditions of Service:-

"Any leave in excess of forty-eight (48) days may be cashed should the employee be unable to take such leave as a result of operational requirements. If, despite being afforded an opportunity to take leave, an employee fails, refuses or neglects to take the remaining leave due to him during this period, such remaining leave shall fall away".
5.3.10 In Clause 5, the Policy stated that “Accumulated leave may be converted to cash subject to the provision that any encashment shall be in respect of accumulated leave and not the 16 days compulsory leave”.

5.3.11 Mr Njingolo was only four months in the employ of the Municipality and therefore he had not accumulated nor had more than 48 leave days for encashment. The leave credits that he cashed were not accumulated leave credits and therefore fell in the scope of sixteen (16) compulsory leave days. Therefore, he did not have sufficient leave days to warrant encashment of the leave days.

5.3.12 At the time when Mr Njingolo applied for Leave encashment circular 14/HR which suspended leave encashment was not in place.

5.3.13 Clause 7 read “The urgent payment of leave encashment will only be permitted for the following reasons:

(a) anything pertaining to the death of a family member/funeral arrangements; and

(b) unforeseen emergencies, which could not be planned for.

5.3.14 The inconsistency in the implementation of the Leave Encashment Policy arose when Paragraph 7 relating to urgent encashment of leave was applied regardless of the employee having compulsory leave credits instead of accumulated leave credits.
5.3.15 Clause 5 also read that "any encashment shall be restricted to a minimum of 5 days and a maximum of 15 days once per annual cycle, subject to such application for leave encashment bearing the employee's written reason/s for encashment".

5.3.16 An amount of R13 204.52 was paid to Mr Njingolo by the Municipality as leave encashment in violation of Clause 5 of the Municipality’s Leave Encashment Policy.

Conclusion

5.3.17 Based on the evidence gathered, it can be concluded that the Municipality did not comply with applicable legal prescripts in managing Mr Njingolo’s leave encashment when it approved his leave encashment.

5.4 Regarding whether the Complainant, the Municipality or any other person suffered prejudice as a result of the alleged authorization of overtime payment to the Acting Chief Financial Officer Ms N. M Khumalo, the improper appointment of Mr KJ Njingolo and undue authorization of leave encashment of Mr Njingolo in the circumstances:

Common cause issues

5.4.1 Ms Khumalo was seconded by the GPT to the Municipality to assume the position of the Acting Chief Financial Officer and the municipality authorised Ms Khumalo’s overtime worked for an amount of R102 914.39.
5.4.2 Mr Njingolo was appointed by the Municipality on the 1 May 2013 to the position of Senior Manager: Strategic Services at an amount of R650 000.00 per annum. Mr Njingolo worked for the Municipality until 31 December 2016.

5.4.3 The former Municipal Manager authorised encashment of leave days to Mr Njingolo. At the time of the approval of encashment of leave Mr Njingolo applied for eight days leave and was paid an amount of R13 204.52

Issues in Dispute

5.4.5 The Complainant contended that the former Municipal Manager unduly authorised payment of overtime to the Acting CFO, Ms NM Khumalo who was seconded to the Municipality by the GPT and accordingly, Ms Khumalo unduly benefitted from the overtime payment authorised by the Municipality without following the provisions of the Consultancy Agreement.

5.4.6 The Complainant argued that Mr Njingolo was appointed by the Municipality to the position of Senior Manager: Strategic Services without following the Municipal recruitment processes. He further asserted that he Municipality incurred irregular expenditure by paying Mr Njingolo. Other qualifying candidates who would have applied for this post were unfairly discriminated and/or disqualified in favour of a candidate who was not subjected to an interview or properly appointed.

5.4.7 In his complaint, the Complainant indicated that the former Municipal Manager authorised encashment of leave days for Mr Njingolo even though
he did not have sufficient leave days to warrant authorization of leave encashment.

5.4.8 The Municipality submitted the period in which Ms Khumalo was contracted, coincided with the financial year end preparation for the Municipality hence the necessity for working overtime. The Municipality further contended that Mr Njingolo`s appointment was through an urgent head hunting process and was competent for the position based on his experience in Local Government and having worked as the Chief Executive Officer of the West Rand Development Agency.

5.4.9 The Former Municipal Manager indicated that he discovered that there were inconsistencies in the implementation of the encashment of leave and issued a Circular temporarily suspending the Leave Encashment Policy pending the approval of the Leave Management Policy.

**Application of the relevant legal framework**

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

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

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

c) **...**

d) **Services must be provided impartially, fairly, equitably and without bias.**
e) Public administration must be accountable

f) Transparency must be fostered

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

5.4.11 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”

5.4.12 The Municipality is required to utilize its resources efficiently and economically. In this instance the Municipality authorised the irregular payments of Ms Khumalo’s overtime payment without obtaining authority from GPT which had a sole discretion to increase or decrease the number of hours worked and also approved Mr Njingolo’s leave encashment without him having accumulated sufficient leave days.

5.4.13 The Consultancy Agreement effected between GPT and Ms Khumalo regulated the working hours and payment to be effected as Ms Khumalo was contracted as an independent consultant.

5.4.14 Section 60 of the MFMA provides that “the municipal manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must—

(a) exercise the functions and powers assigned to an accounting officer in terms of this Act.”
5.4.15 The former Municipal Manager was obliged to exercise his powers and functions in line with the MFMA. The appointment of Mr Njingolo was in contravention of Recruitment Policy, thereby denying other applicants an opportunity to participate in the recruitment process.

5.4.16 The Municipal Manager as the accounting authority of the Municipality is required to act in the best interests of the municipality. The former Municipal Manager asserted that owing to an emergency situation that arose as a result of the resignation of the CFO he sought assistance from the GPT and Ms Khumalo was part of the Municipal support programme initiated by GPT.

**Conclusion**

5.4.17 It is therefore concluded that the Municipality incurred irregular expenditure and financial prejudice as a result of the appointment of Mr Njingolo as Senior Manager: Strategic Services, payment of overtime for Ms Khumalo and payment of encashment of leave of Mr Njingolo since it was all done in contravention of applicable legislation and policies.

6. **FINDINGS**

6.1 Regarding whether the former Municipal Manager unduly authorized the payment of overtime to the Acting CFO, Ms NM Khumalo who was seconded to the Municipality by the GPT:

6.1.1 The allegation that the former Municipal Manager unduly authorized the payment of overtime of Ms Khumalo acting as CFO in the Municipality is substantiated.
6.1.2 Based on the evidence in my possession, The Municipal Manager failed to comply with Clause 4.3 of the Consultancy Agreement by not obtaining prior approval from GPT for the overtime hours worked by Ms Khumalo.

6.1.3 The expenditure in terms of the overtime payment to Ms Khumalo is therefore regarded as an unauthorised and irregular expenditure and amounts to a contravention of section 61(1) and section 62(1)(d) of the MFMA and section 41 of the Constitution which deals with the principles of co-operative government.

6.1.4 Accordingly, such a violation by Municipality amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the former Municipal Manager appointed Mr K J Njingolo in the position of a Senior Manager, Strategic Services without following the Municipal Recruitment & Selection Policy:

6.2.1 The allegation that the former Municipal Manager appointed Mr Njingolo as a Senior Manager, Strategic Services without following Municipal Recruitment & Selection Policy is substantiated.

6.2.2 The former Municipal Manager appointed Mr Njingolo through a headhunting process on the basis that the Municipality needed to prepare for the year end audit and this position needed to be filled.
6.2.3 He failed to follow the procedure set out in the Recruitment Policy by not advertising the position and subjecting the earmarked candidate to an interview. Other potential qualifying candidates who could have applied for the post, were improperly prejudiced as the post was not advertised.

6.2.4 The conduct of the Municipality, particularly the former Municipal Manager, during the recruitment and selection of Mr Njingolo amounts to a contravention of Clause 4.3 of the Recruitment Policy. The Municipality further violated section 195(1) of the Constitution.

6.2.5 Such conduct by the Municipality and in particular the former Municipal Manager, constitutes improper conduct in terms of 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 former Municipal Manager unduly authorized the encashment of leave days due to Mr Njingolo while he was only few months in the position of a Senior Manager, Strategic Services:

6.3.1 The allegation that the former Municipal Manager unduly authorized the encashment of leave days due to Mr Njingolo while he was only few months in the position of a Senior Manager, Strategic Services is substantiated.

6.3.2 The approval of the application of encashment of eight days by Mr Njingolo was improper as the leave days fell within the sixteen compulsory leave days and also Mr Njingolo had not accumulated 48 leave days as he was
recently appointed by the Municipality, therefore the approval of the leave encashment was irregular.

6.3.3 The total payment R13 204.52 was paid to Mr Njingolo by the Municipality. The approval of the application of encashment of eight (8) leave days of Mr Njingolo was improperly authorized by the former Municipal Manager. Mr Njingolo did not have sixteen (16) days leave as required in terms of the Municipality's Leave Encashment Policy. The approval of the leave encashment was therefore irregular and in violation of Clause 5 of the Municipality's Leave Encashment Policy.

6.3.4 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.

6.4 Regarding whether the Complainant, the Municipality or any other person suffered prejudice as a result of the alleged authorization of overtime payment to the Acting Chief Financial Officer Ms N. M Khumalo, the improper appointment of Mr KJ Njingolo and authorization of leave encashment of Mr Njingolo in the circumstances:

6.4.1 The allegation that the Complainant and Municipality suffered prejudice as a result of the alleged authorisation of overtime payment to the Acting Chief Financial Officer, Ms NM Khumalo, the improper appointment of Mr KJ Njingolo and undue authorisation of leave encashment of Mr Njingolo is substantiated.
6.4.2 The expenditure of the overtime payment of **R102 914.39** to Ms Khumalo prejudiced the Municipality's finances as it was an irregular expenditure in contravention of sections 61(1) and 62(1)(d) of the MFMA and section 41 of the Constitution.

6.4.3 The position of Senior Manager: Strategic Services was not advertised in terms of Clause 4.3 of the Recruitment Policy. Such failure to advertise the post improperly prejudice other qualifying and potential candidates who might have applied for the post. Similarly, the salary of **R650 000.00** per annum paid to Mr Njingolo from May 2013 until December 2016 was irregular expenditure since his appointment was made in contravention of the applicable legal prescripts, thereby prejudicing the Municipality's finances.

6.4.4 An amount of **R13 204.52** was paid to Mr Njingolo by the Municipality as leave encashment in violation of Clause 5 of the Municipality's Leave Encashment Policy. The approval of the leave encashment was therefore irregular and in violation of the of Municipality's Leave Encashment Policy.

6.4.5 The manner in which the Recruitment and Leave Encashment Policies were transgressed by the former Municipal Manger during the appointment of Mr Njingolo and the authorisation of his leave encashment is a serious concern to my office and his conduct amounted to an act of financial misconduct in terms of section 171(1) of the MFMA.

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

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

7.1.1 The Rand West City Local Municipality must ensure that within 60 (sixty) working days from the date of this report, Council committee determines an appropriate and reasonable amount recoverable as irregular expenditure from the former Municipal Manager, Mr Ndlovu and/or any other person liable in law, taking into account any taxable deductions and;

7.1.2 Within 30 (thirty) working days from date of receipt the amount certified by Council as recoverable, it institutes civil proceedings in terms of section 32(2) of the MFMA, against Mr Ndlovu and/or any person liable in law, for the recovery of such appropriate and reasonable amount.

7.1.3 Within 60 (sixty) days of this report, ensure that all the Municipality’s HR Policies are reviewed and amended accordingly and staff undergo training on all HR and Financial Management policies, MFMA and Treasury Regulations.
8. MONITORING

8.1 The Municipal Manager must submit an Implementation Plan to the Public Protector within 30 (thirty) days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

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