
REPORT NO 10 OF 2018/2019

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"An investigation by the Public Protector into allegations of the improper and irregular appointment of a legal advisor by the Sedibeng Municipality"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IMPROPER AND IRREGULAR APPOINTMENT OF ASSISTANT MANAGER LEGAL ADVISOR, MR SIFISO ZUNGU, BY THE SEDIBENG DISTRICT MUNICIPALITY
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Executive Summary

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

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into allegations of the improper and irregular appointment of an Assistant Manager Legal Advisor, Mr Sifiso Zungu, by the Sedibeng District Municipality.

(iii) The complaint was lodged with my office anonymously on 18 May 2015.

(iv) The Complainant alleged that:

(a) The Sedibeng District Municipality (Municipality) improperly and irregularly employed Mr Sifiso Zungu (Mr Zungu) on 10 October 2013 as its Assistant Manager Legal Advisor whilst he was not qualified nor was he an admitted Attorney or Advocate;

(b) Mr Zungu was not registered with the South African Law Society and was never interviewed for the Assistant Manager Legal Advisor position as the advertisement for the vacancy was published and closed without any interviews taking place;

(c) Mr Yunus Chamda (former Municipal Manager) was well aware of the situation and it appeared that he condoned the said appointment which was done through corrupt and illegal means; and

(d) The Municipal Recruitment and Selection Policy was not followed during Mr Zungu’s appointment.
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(4) of the Public Protector Act which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

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

Whether the Sedibeng District Municipality improperly appointed Mr Zungu as an Assistant Manager Legal Advisor without following proper recruitment processes; and

Whether the Sedibeng District Municipality suffered prejudice as a result of the alleged irregular appointment of Mr Zungu.

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

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";

The Municipal Recruitment and Selection Policy (the Policy) which regulates the recruitment and selection processes and procedures of the Municipality;
(cc) The Municipal Finance Management Act 56 of 2003 (MFMA) which, amongst others, regulates the Municipal Manager's responsibilities in the management of the municipal administration, including financial and human resources;

(dd) The Local Government: Municipal Systems Act 32 of 2000 (MSA) which directs a municipality to develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including the recruitment, selection and appointment of persons; and

(vii) 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 and had no further mitigating factors to adduce. He further indicated that in respect of the intended remedial action referred to in paragraph 12.2 of the Notice, directing the Municipal Manager to institute civil proceedings against his predecessor to recover the irregular expenditure, the Municipality was under severe financial constraints and is currently trying to limit the litigation of matters that were instituted or defended by the Municipality.

(viii) In his response to my Notice, the former Municipal Manager sought to challenge my preliminary findings against him as being irrational, grossly unfair and wholly inappropriate both procedurally and substantively. However, he failed to indicate the basis of this claim, despite having been afforded an opportunity to do so. The response was not relevant to the legality or lawfulness of the appointment of Mr Zungu.

(ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:
(a) Regarding whether the Sedibeng District Municipality improperly appointed Mr Zungu as an Assistant Manager Legal Advisor without following proper recruitment processes:

(aa) The allegation that the Municipality improperly appointed Mr Zungu as an Assistant Manager Legal Advisor without following proper recruitment processes is substantiated.

(bb) The Municipality failed to advertise the Legal Advisor's post as soon as it became vacant when the previous incumbent resigned in June 2012 as required by the Policy.

(cc) The assertion by the Municipality that it headhunted Mr Zungu due to the emergency situation arising from the resignation of the former Assistant Manager Legal Advisor is found not be supported or corroborated by any form of evidence. The Policy required the Municipality to advertise a vacant post before resorting to headhunting. Secondly, evidence at my disposal revealed that the former Assistant Manager Legal Advisor resigned in June 2012 and Mr Zungu was only appointed in October 2013, sixteen months later. It is therefore clear that the filling of this position was never an emergency given the amount of time which lapsed between 11 June 2012 and 14 October 2013. The Municipality had ample time to advertise the post, but failed to do so.

(dd) The Municipality irregularly appointed Mr Zungu as its Assistant Manager Legal Advisor as he possessed no “specific knowledge, qualification, experience and skills” contrary to its Policy. Mr Zungu was, at the time of his employment, still in the process of completing his tertiary studies and his curriculum vitae further revealed lack of experience and specific knowledge and qualification.
(ee) The conduct of the Municipality in the circumstances amounts to a contravention of section 195(1) of the Constitution and clauses 8, 13 and 18 of the Policy.

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

(b) Regarding whether the Sedibeng District Municipality suffered prejudice as a result of the alleged irregular appointment of Mr Zungu:

(aa) The allegation that the Municipality suffered prejudice as a result of the irregular appointment of Mr Zungu is substantiated.

(bb) The decision by the former Municipal Manager to appoint Mr Zungu under the circumstances resulted in the Municipality incurring an irregular expenditure.

(cc) Mr Zungu worked continuously for the Municipality for three years and five months as an Assistant Manager Legal Advisor. He commenced his duties in October 2013 and ended in March 2017. During this period of three years and five months, the Municipality remunerated him a total gross salary of R2 443 340.28.

(dd) The conduct of the former Municipal Manager in the irregular appointment of Mr Zungu led to the Municipality incurring irregular expenditure which constitutes an act of financial misconduct, in terms of section 171(1) of the MFMA and an offence in terms of section 173(1) of the MFMA.

(ee) Such conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

(a) The Sedibeng District Municipal Council must ensure that

(aa) Within 60 working days from the date of this report, the council committee determines an appropriate and reasonable amount recoverable, as irregular expenditure, from Mr Yunus Chamda and/or any other person liable in law, taking into account taxable deductions such as Pay As You Earn (PAYE), Unemployment Insurance Fund (UIF) and pension contributions; and

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

(b) In terms of section 6(4)(c)(i) of the Public Protector Act, I hereby refer to the South African Police Service (Directorate for Priority Crime Investigation) and National Prosecuting Authority, the irregular expenditure of R2 443 340.28, which, in terms of section 173 of the Municipal Finance Management Act, 2003, constitutes a criminal offence by Mr Yunus Chamda.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IMPROPER AND IRREGULAR APPOINTMENT OF A LEGAL ADVISOR, MR SIFISO ZUNGU, BY THE SEDIBENG DISTRICT MUNICIPALITY

1. INTRODUCTION

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

1.2 The report is submitted to the following:

1.2.1 The Premier of Gauteng Provincial Government, Honourable David Makhura;

1.2.2 The Gauteng Provincial MEC for Cooperative Governance and Traditional Affairs and Human Settlements, Honourable DK Moiloa, MPL;

1.2.3 The National Director of Public Prosecutions, Adv S Abrahams;

1.2.4 The Head of the Directorate for Priority Crime Investigation, Adv SG Lebeya;

1.2.5 The Speaker of Sedibeng District Municipal Council, Councillor (Cllr) Melina Gomba;

1.2.6 The Executive Mayor of Sedibeng District Municipality, Cllr Busisiwe Modisakeng; and

1.2.7 The Municipal Manager of the Sedibeng District Municipality, Mr Stanley Khanyile.

1.3 A copy of the report is also provided to the Complainant who requested that his or her identity be withheld to inform him/her about the outcome of the investigation.
2. **THE COMPLAINT**

2.1 The complaint was lodged with my office by an anonymous complainant (Complainant) on 18 May 2015.

2.2 The Complainant alleged that:

2.2.1 The Sedibeng District Municipality (Municipality) employed Mr Zungu as an Assistant Manager Legal Advisor on 10 October 2013 whilst he was not qualified nor was he admitted as an Attorney or Advocate;

2.2.2 Mr Zungu was not registered with the South African Law Society and was never interviewed for the Assistant Manager Legal Advisor position. The advertisement was published and closed without any interviews taking place;

2.2.3 The former Municipal Manager, Mr Yunus Chamda (former Municipal Manager), was aware of the situation and it appeared that he condoned the said appointment which was done through corrupt and illegal means; and

2.2.4 The Municipal Recruitment and Selection Policy (Policy) was not complied with during the appointment of Mr Zungu.

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 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.1.2. Section 182(1) of the Constitution provides that:
"The Public Protector has the power, as regulated by national legislation:

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action".

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

3.1.4. My 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 disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as to subpoena persons and information from any person for purposes 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. 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."

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

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

3.1.8. Taking appropriate remedial action is much more significant than making a mere 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 (paragraph 68).

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

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

3.1.11. The Public Protector's power to take 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. (paragraph 71).
3.1.12. Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in 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; (paragraph 71(a)).

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

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

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

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

3.1.15.2. There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraph 91 and 92).
3.1.15.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):

   a) Conduct an investigation;
   b) Report on that conduct; and
   c) To take remedial action.

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

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

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

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

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

3.1.17 The jurisdiction of my office was not disputed by any of the parties in this matter.
4. THE INVESTIGATION

4.1 Methodology

4.1.1. The investigation of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives me the power to investigate 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 me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.2. 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\(^2\) (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 the Municipality's comprehensive Supply Chain Management Policy in addition to national laws, policies and guidelines.

4.2.4. My office’s own institutional touchstones, being principles from previous reports 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.

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.

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

\(^2\) Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA)
4.3. On analysis of the complaint, the following issues and conduct were identified to inform and focus on the investigation:

4.3.1. Whether the Sedibeng District Municipality improperly appointed Mr Zungu as an Assistant Manager Legal Advisor without following proper recruitment processes

4.3.2. Whether the Sedibeng District Municipality suffered prejudice as a result of the alleged irregular appointment of Mr Zungu

4.4. The key sources of information

4.4.1. Correspondence sent and received

4.4.1.1. A copy of the allegations letter dated 23 July 2015 from my office addressed to the former Municipal Manager

4.4.1.2. A copy of an acknowledgement letter received on 23 July 2015 from Mr Thomas Mkaza, the Municipal Chief Operations Officer (COO)

4.4.1.3. An email dated 28 August 2015 from my office to the COO requesting a response to the allegations letter

4.4.1.4. An email dated 21 September 2015 from my office to the former Municipal Manager, requesting a response to the allegations letter

4.4.1.5. An email dated 20 November 2015 from my office to the former Municipal Manager, requesting a response to the allegations letter sent

4.4.1.6. A copy of the Municipal response letter dated 25 November 2015
4.4.1.7. A copy of a letter dated 15 June 2015 from my office to the former Municipal Manager

4.4.1.8. An email dated 27 July 2016 from my office to the former Municipal Manager, inviting him to an interview on 18 August 2016

4.4.1.9. An email dated 27 July 2016 from the former Municipal Manager to my office stating that he was seconded to the Emfuleni Local Municipality

4.4.1.10. An email dated 16 August 2016 from the former Municipal Manager to my office regarding postponement of a meeting

4.4.1.11. An email dated 27 July 2016 from my office addressed to the former Municipal Manager, informing him of the proposed new date for the meeting

4.4.1.12. An email dated 27 July 2016 from the former Municipal Manager addressed to my office, confirming the date of the meeting on 22 September 2016

4.4.1.13. A copy of confirmation email from my office to the former Municipal Manager

4.4.1.14. An email dated 01 November 2016 from my office addressed to the former Municipal Manager inviting him to an interview on 17 November 2016

4.4.1.15. An email dated 27 January 2017 from my office addressed to the former Municipal Manager inviting him on 21 February 2017 for an interview meeting
4.4.1.16. An email dated 24 February 2017 from my office addressed to the former Municipal Manager inviting him on 15 March 2017 for an interview meeting

4.4.1.17. An email dated 23 March 2017 from my office addressed to the former Municipal Manager inviting him on 06 April 2017 for an interview meeting

4.4.1.18. An email dated 04 April 2017 from the former Municipal Manager addressed to my office regarding his resignation from Emfuleni Municipality

4.4.1.19. An email dated 21 August 2017 from my office addressed to the former Municipal Manager, requesting further information

4.4.1.20. A reminder email dated 01 September 2017 from my office addressed to the former Municipal Manager

4.4.1.21. A reminder email dated 07 September 2017 from my office addressed to the former Municipal Manager

4.4.1.22. A reminder email dated 08 September 2017 from my office addressed to the former Municipal Manager

4.4.1.23. A reminder email dated 27 September 2017 from my office addressed to the former Municipal Manager

4.4.1.24. An email dated 05 October 2017 from the former Municipal Manager, addressed to my office with a response and supporting documents

4.4.1.25. An email dated 23 November 2017 from the former Municipal Manager addressed to my office indicating Mr Zungu’s total income
4.4.1.26. Copies of section 7(9)(a) notices (Notice) dated 22 March 2018 sent to the implicated Municipal officials

4.4.1.27. A copy of an acknowledgement of receipt of a Notice from the current Municipal Manager, Mr Stanley Khanyile, delivered on 28 March 2018 and received by Betty Pieterson

4.4.1.28. A copy of an acknowledgement of receipt of a Notice to Cllr Melina Gomba, delivered on 28 March 2018 and received by Jacky Moloi;

4.4.1.29. A copy of an acknowledgement of receipt of a Notice to Cllr Busisiwe Modisakeng, delivered on 28 March 2018 and received by EM Mateane;

4.4.1.30. A copy of the letter from Mr Khanyile delivered on 06 April 2018, addressed to my office in response to the notice

4.4.1.31. A copy of the letter from the former Municipal Manager delivered on 16 April 2018, addressed to my office in response to the notice

4.4.2. Legislation and other legal prescripts

4.4.2.1. The Constitution
4.4.2.2. The Public Protector Act
4.4.2.3. The Policy
4.4.2.4. Municipal Finance Management Act No. 56 of 2003 (MFMA)
4.4.2.5. The Local Government: Municipal Systems Act 32 of 2000 (MSA)
4.4.3. Case Law

4.4.3.1. 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)

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

4.4.3.3. Public Protector v Mail and Guardian, 2011(4) SA 420 (SCA)

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 Sedibeng District Municipality improperly appointed Mr Zungu as an Assistant Manager Legal Advisor without following proper recruitment processes:

Common cause issues

5.1.1. Mr John Nkomo, the former Municipal Assistant Manager Legal Advisor resigned on 11 June 2012 and gave the Municipality 14 days' notice.

5.1.2. Mr Zungu was appointed as an Assistant Manager Legal Advisor by the Municipality on 14 October 2013, on a one year fixed term contract. The former Municipal Manager signed his appointment letter on 14 October 2013. He did not possess a legal degree and had not completed his legal studies at the time of his employment at the Municipality.
5.1.3. The position of an Assistant Manager Legal Advisor to which Mr Zungu was appointed was never advertised for an open and competitive recruitment process by the Municipality.

5.1.4. On 14 October 2013, 04 November 2013, 11 November 2013 and 22 November 2013 respectively, the Municipality’s Human Resources Management Unit requested Mr Zungu to furnish his academic qualifications, but the same could not be furnished by him. The employment contract of Mr Zungu was extended continuously until it expired in March 2017, as confirmed in a copy of a letter dated 22 June 2017, signed by Mr S Khanyile.

5.1.5. In response to my Notice, the former Municipal Manager provided my office with the actual sample advertisement that was developed for the position of an Assistant Manager Legal Advisor in January 2013. Over and above a requirement of a tertiary qualification which included Administrative Law, Constitutional Law and Interpretation of Statutes, the position also required 3 to 4 years practical experience in the legal field as well as knowledge of local government.

5.1.6. Also attached by him in his response to the Notice was a copy of Mr Zungu’s curriculum vitae (CV). According to the CV, there was no indication that he accumulated 3 to 4 years practical experience in the legal field as well as knowledge of local government.

**Issues in dispute**

5.1.7. The Complainant reported that Mr Zungu did not possess a law degree and was also not registered or admitted as an Attorney nor as an Advocate or

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3 Provisional Report of the Public Protector issued in terms of section 7(9) of the Public Protector Act 23 of 1994 to the implicated parties against whom the findings may be detrimental in order to afford them an opportunity to comment on the provisional findings of the Public Protector before the report is made final.
affiliated with the Law Society of South Africa or any other legal profession regulatory body at the time of his appointment.

5.1.8. He further indicated that proper recruitment processes were not adhered to by the Municipality in the appointment of Mr Zungu as an Assistant Manager Legal Advisor.

5.1.9. The Municipality contended that there was no advertisement for the position as the Municipal Council was faced with an emergency given that one of its Assistant Manager Legal Advisors had resigned thus creating a vacancy. The Municipality’s contention as per its response dated 25 November 2015, signed by the Chief Operations Officer (COO), Mr Thomas Mkaza, addressed to my office was that:

“Registration with any Law Society in South Africa is not a requirement for the position of a Legal Advisor”. A Legal Advisor for the Municipality need not be a practicing Attorney or Advocate... upon his appointment, Mr Zungu was in a process of completing his studies towards a Law degree.”

5.1.10. The COO argued that the Municipality headhunted Mr Zungu in order to fill the vacancy and further that the former Municipal Manager had delegated authority to appoint persons as it was necessary and urgent. The gist of the Municipality’s argument was that an emergency situation resulting from the resignation of its Assistant Manager Legal Advisor necessitated the headhunting of Mr Zungu in order to fill the vacancy.

5.1.11. Mr Zungu was interviewed by my investigation team on 27 November 2017 and he admitted that he had not completed his legal degree at the time that the Municipality employed him.

5.1.12. Replying to my Notice, the Municipality, through the office of Mr Khanyile, indicated that the Municipality would accept the outcome of my investigation and had no further mitigating factors to adduce. He further
indicated that due to the Municipality’s financial constraints it would be a challenge to implement the intended remedial action referred to in paragraph 12.2 of the Notice, directing the Municipal Manager to institute civil proceedings against his predecessor to recover the irregular expenditure. He said that the Municipality was under severe financial constraints and was trying to limit the litigation processes.

5.1.13. In his response to my Notice, the former Municipal Manager sought to challenge my preliminary findings against him as being irrational, grossly unfair and wholly inappropriate both procedurally and substantively. However, he failed to indicate the basis of this claim, despite having been afforded an opportunity to do so.

5.1.14. He, instead, contended that in 2012 the Municipality was experiencing a financial squeeze mainly due to the low increase in its equitable share and the growing operational costs driven by the annual increases in salaries of approximately 6 to 7% percent. He also argued in his response that the Municipality was predominantly grant funded and the disparity meant that it (Municipality) was heading towards a financial crash. He and the former Executive Mayor, Simon Mofokeng, presented reports on this possibility at several strategic sessions. The reduction of staff complement was one of the difficult, but necessary measures that was required to keep the Municipality viable.

5.1.15. He further asserted that a report (A1134) entitled “Organization Design Review” which was approved by the Municipal Council on 24 October 2012, provided a contextual information on vacancies, appointment preferences and delegated authority which he relied upon when appointing Mr Zungu. In the report, four positions were identified that needed to be filled. The Council approved the filling of these four positions, which included that of an Assistant Manager Legal Advisor which was later occupied by Mr Zungu.
5.1.16. The former Municipal Manager’s response was not relevant to the process and legality/lawfulness of the appointment of Mr Zungu. The issue at point has never been to investigate his delegated authority to make an appointment, neither did it relate to the finances of the Municipality.

Application of the relevant legal framework

5.1.17. 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) …
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. The process followed by the Municipality in appointing Mr Zungu was expected to be transparent, fair and without bias. The high standard of professional ethics requires that the correct recruitment processes must always be followed in the appointment of staff. Furthermore, the recruitment process was supposed to be in line with good human resource management.
5.1.19. Section 55(1) of the MSA provides that:

"As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for:

(e) the appointment of staff other than those referred to in section 56(a), subject to the Employment Equity Act, 1998 (Act No. 55 of 1998).

(h) the promotion of sound labour relations and compliance by the municipality with applicable labour legislation."

5.1.20. The former Municipal Manager, as the Accounting Officer, was expected to follow the Municipal Council policy directions which entrusted him to appoint a suitable candidate in line with the applicable laws.

5.1.21. Section 67(1) of the MSA provides as follows:

"A municipality, in accordance with the Employment Equity Act 1998, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including:

(a) the recruitment, selection and appointment of persons as staff members..."

5.1.22. The Municipality developed and adopted the Policy to ensure compliance with section 67(1) of the MSA.

5.1.23. Clause 8.12 of the Policy provides as follows:

"In appropriate circumstances and/or where the medium of advertisement used is not successful and/or has been exhausted, the Municipal Manager
may direct that a headhunting process be undertaken to recruit a candidate for the position."

5.1.24. The Municipality was expected to first exhaust the medium of advertising the post before resorting to headhunting. The Municipality, through its COO, confirmed that the post was not advertised due to the emergency of the situation as the Municipal Council needed to fill the vacant Assistant Manager Legal Advisor post. In this case the Municipality simply embarked on a headhunting process before exhausting the medium of advertisement.

5.1.25. The assertion by the Municipality that it headhunted Mr Zungu due to the emergency situation arising from the resignation of the former Assistant Manager Legal Advisor was, however, not supported or corroborated by any form of evidence from the Municipality. On the contrary, evidence at my disposal indicates that the former Assistant Manager Legal Advisor resigned in Jurie 2012 and Mr Zungu was appointed in October 2013, sixteen months later.

5.1.26. In terms of clause 13 of the Policy; "headhunting is defined as the concept where specific persons with specific knowledge, qualification, experience and skills are needed and where suitable applicants could not be obtained by means of the normal recruitment process. It will be applied with caution at all times when:

a) Applied with the aim of identifying suitable applicants from designated groups (women, youth and people with disability)

b) For appointments in accordance with the Employment Equity plans for the Council

c) If suitable candidates could not be identified by means of the normal recruitment process to fill the vacant post. The targeted person is
normally provided with the copy of the advertisement and allowed to apply of their own accord”.

5.1.27. The Municipality was expected to comply with clause 13 of the Policy when it headhunted a suitable person. Mr Zungu did not possess any “specific knowledge, qualification, experience and skills” at the time of his appointment. When my investigation team interviewed him on 27 November 2017 he confirmed having not completed his law degree. According to Mr Zungu’s CV, there was no indication that he accumulated any practical experience in the legal field as well as any specific knowledge.

5.1.28. Clause 13(C) of the Policy provides that upon exhausting all avenues, the targeted person is given a copy of the advertisement to apply on his own accord. Although Mr Zungu claimed to have heard about the open vacancy and applied at the Municipality, the Municipal Human Resources Management Unit has no completed application forms, covering letter or academic qualification in the file of Mr Zungu to show that he had applied for the position on his own accord, after being headhunted. As indicated above, the COO confirmed that the post was not advertised.

5.1.29. In terms of clause 23 of the Policy, “Council after proper consultation with the stakeholders, may take a decision to fill urgent posts it deems necessary for the accomplishment of its objectives or special projects.”

5.1.30. In terms clause 4 of the Policy ‘Suitably Qualified’ is defined as “suitably qualified for a job as a result of any one of, or any combination of the required competencies” and Competencies is defined as “minimum requirements for a particular job and the ability to display knowledge of the requirements of the job.” A previous advertisement from the Municipality for the position of an Assistant Manager Legal Advisor showed that the requirement was a tertiary qualification that included Administrative law, Constitutional law and Interpretation of statutes.
5.1.31. Clause 18 of the Policy provides, amongst others, that adequate records of the entire selection process need to be maintained, including selection/shortlisting criteria, reasons for inclusion/exclusion of candidates, structured interview guides, copies of all other assessments ratings, reference checks, copy of advertisement, score sheets, verification of qualifications, etc. In this case, Mr Zungu's file contained only a copy of his contract. No copies of his qualifications or other selection records could be found therein.

**Conclusion**

5.1.32. Based on the evidence gathered it can be concluded that proper processes were not followed by the Municipality when it recruited and appointed Mr Zungu.

5.2. **Regarding whether the Sedibeng District Municipality suffered prejudice as a result of the alleged irregular appointment of Mr Zungu:**

**Common cause issues**

5.2.1. On 14 October 2013 the Municipality appointed Mr Zungu to the position of an Assistant Manager Legal Advisor. The former Municipal Manager approved his appointment and his contract was extended continuously from 14 October 2013 until March 2017.

5.2.2. Mr Zungu worked continuously for the Municipality for three years and five months as an Assistant Manager Legal Advisor. During this period of three years and five months, he was remunerated a total gross salary of R2 443 340.28 by the Municipality.
Issues in dispute

5.2.3. It was contended by the Complainant that Mr Zungu derived an undue benefit resulting from his irregular appointment and that the Municipality incurred irregular expenditure by paying someone who was not suitably qualified for the position of an Assistant Manager Legal Advisor.

5.2.4. In response to my Notice, the former Municipal Manager argued that Mr Zungu rendered a service and there was no failure on his part to perform his duties and thus no prejudice was suffered by the Municipality.

Application of the relevant legal framework

5.2.5. Section 61(1) of the MFMA provides that “the accounting officer of a municipality must-

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

5.2.6. Section 62(1)(d) of the MFMA provides as follows:

“The Accounting Officer is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented.”

5.2.7. The former Municipal Manager was expected to ensure that correct recruitment processes were followed in the appointment of an Assistant Manager Legal Advisor. The appointment of any employee without following the prescribed recruitment processes would result in irregular expenditure.
5.2.8. Section 171(1) 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;"

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

5.2.10. Section 173(1) of the MFMA provides that

"The Accounting Officer of a municipality is guilty of an offence if that accounting officer—
(a) deliberately or in a grossly negligent way—
(iii) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure."

5.2.11. The former Municipal Manager was expected to comply with the Policy when appointing Mr Zungu and failure to do so would result in him committing an offence. Irregular expenditure in relation to a municipality or municipal entity means "expenditure other than unauthorized expenditure that is incurred in contravention of or that is not in accordance with the requirements of the supply chain management policy of a municipality or any of the municipality’s by-laws or policies".4

5.2.12. An irregular recruitment might have a negative impact in an organisation, hence it is crucial for leadership to apply its mind during the recruitment process. "Bad hiring decisions could not only negatively affect a company

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4 Section 1 of Municipal Finance Management Act 56 of 2003 (definitions).
financially, but could also harm employee morale and result to time loss due to grievance, disputes and litigation processes.”

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

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

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

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

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

5.2.14. The above provision obliges both the Municipal Manager and Council to report and recover any irregular expenditure that constitutes a crime.

5.2.15. Section 6(4)(c)(i) of the Public Protector Act provides that

“The Public Protector shall be competent at a time prior to, during or after an investigation if he or she is of the opinion that the facts, disclose the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions…”

5 Bressler MS 2014 at page 2 Building the winning organisation through high-impact hiring.
Conclusion

5.2.16. Based on the evidence obtained above, it can be concluded that the appointment of Mr Zungu was not in compliance with the Constitution, MFMA and Policy and caused prejudice to the Municipality.

6. FINDINGS

6.1. Regarding whether the Sedibeng District Municipality improperly appointed Mr Zungu as an Assistant Manager Legal Advisor without following proper recruitment processes:

6.1.1. The allegation that the Municipality improperly appointed Mr Zungu as an Assistant Manager Legal Advisor without following proper recruitment processes is substantiated.

6.1.2. The Municipality failed to advertise the Assistant Manager Legal Advisor's post as soon as it became vacant when the previous incumbent resigned in June 2012 as required by the Policy.

6.1.3. The assertion by the Municipality that it headhunted Mr Zungu due to the emergency situation arising from the resignation of the former Assistant Manager Legal Advisor is found not be supported or corroborated by any form of evidence. The Policy required the Municipality to advertise a vacant post before resorting to headhunting. Secondly, evidence at my disposal revealed that the former Assistant Manager Legal Advisor resigned in June 2012 and Mr Zungu was only appointed in October 2013, sixteen months later. It is therefore clear that the filling of this position was never an emergency given the amount of time which lapsed between 11 June 2012 and 14 October 2013. The Municipality had ample time to advertise the post, but failed to do so.
6.1.4. The Municipality irregularly appointed Mr Zungu as its Assistant Manager Legal Advisor because he possessed no "specific knowledge, qualification, experience and skills" contrary to its Policy. Mr Zungu was, at the time of his employment, still in the process of completing his tertiary studies and his CV further revealed lack of experience and specific knowledge and qualification.

6.1.5. The conduct of the Municipality in the circumstances amounts to a contravention of section 195(1) of the Constitution and clauses 8, 13 and 18 of the Policy.

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

6.1 Regarding whether the Sedibeng District Municipality suffered prejudice as a result of the alleged irregular appointment of Mr Zungu:

6.2.1 The allegation that the Municipality suffered prejudice as a result of the irregular appointment of Mr Zungu is substantiated.

6.2.2 The decision by the former Municipal Manager to appoint Mr Zungu under the circumstances resulted in the Municipality incurring an irregular expenditure.

6.2.3 Mr Zungu worked continuously for the Municipality for three years and five months as an Assistant Manager Legal Advisor. He commenced his duties in October 2013 and ended in March 2017. During this period of three years and five months, the Municipality remunerated him a total gross salary of R2 443 340.28.

6.2.4 The manner in which the Policy was flouted by the former Municipal Manager during the appointment of Mr Zungu is of 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.

6.2.5 The conduct of the former Municipal Manager in the irregular appointment of Mr Zungu which led to the Municipality incurring irregular expenditure also constituted an offence in terms section 173(1) of the MFMA.

6.2.6 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 Sedibeng District Municipal Council must ensure that

7.1.1.1 Within 60 working days from the date of this report, the council committee determines an appropriate and reasonable amount recoverable, as irregular expenditure, from Mr. Yunus Chamda and/or any other person liable in law, taking into account taxable deductions such as Pay As You Earn (PAYE), Unemployment Insurance Fund (UIF) and pension contributions; and

7.1.1.2 Within 30 working days from the date of receipt of the amount certified by the council as recoverable, it institutes civil proceedings, in terms of section 32(2) of the MFMA, against Mr. Yunus Chamda and/or any other person liable in law, for the recovery of such appropriate and reasonable amount.
7.1.2 In terms of section 6(4)(c)(i) of the Public Protector Act, I hereby refer to the South African Police Service (Directorate for Priority Crime Investigation) and National Prosecuting Authority, the

irregular expenditure of R2 443 340.28, which, in terms of section 173 of the Municipal Finance Management Act, 2003, constitutes a criminal offence by Mr Yunus Chamda.

8 MONITORING

8.1 The Municipal Manager must submit an Implementation Plan to my office within 15 (fifteen) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 Each remedial action listed in paragraph 7 above is legally binding on the person directed to implement, unless it has been reviewed and set aside by a Court or an appropriate interim Court Order to stay the implementation of the remedial action is obtained within the compliant period stated therein.

ADV BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA  
DATE:  30/07/2018