
PUBLIC PROTECTOR SOUTH AFRICA

“Allegations of maladministration in the matter between Anonymous and the Ventersdorp Local Municipality”

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REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR APPOINTMENT OF THE DIRECTOR: ENGINEERING SERVICES BY THE VENTERSDORP LOCAL MUNICIPALITY
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Executive Summary

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

(ii) The report relates to an investigation into the alleged maladministration and impropriety by the Ventersdorp Local Municipality (the Municipality) in the appointment of a Director: Engineering Services. The complaint was lodged with the Public Protector on 14 April 2014.

(iii) The Complainant is an employee of the Municipality and wished to remain anonymous.

(iv) In the main, the Complainant alleged that the Municipality irregularly appointed Mr O G Moremedi to the position of Director: Engineering Services despite the fact that the MEC for Local Government and Human Settlements (the MEC) declined to give concurrence since the appointment was not done in compliance with the Municipal Systems Act, 2000.

(v) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Municipal Council irregularly appointed a candidate, Mr O G Moremedi, who lacked the required qualifications, skill and competencies for the position of Director: Engineering Services?

(b) Whether the Municipal Council unduly disregarded the directive of Hon Tlhape (the MEC) to appoint a registered engineer on secondment to assume duties as Acting Director: Engineering Services until the new recruitment processes were completed? and
(c) Whether the MEC has in any way failed to take decisive corrective measures in terms of section 56(5) of the Municipal Systems Amendment Act?

(vi) The investigation process was conducted through interviews and meetings with the Complainant; correspondence with the Municipality and the Department for Local Government and Human Settlements (the Department); analysis of all relevant documentation; and consideration of and application of all relevant laws, policies and related prescripts.

(vii) Section 7(9) notices were issued to the Member of the Executive Council for Local Government and Human Settlements (MEC), the Speaker of the Venterdorp Local Municipality and the then Acting Municipal Manager. The MEC agreed to implement the remedial action in the notice.

(viii) Key laws and policies taken into account to determine if there had been maladministration by the Municipality were principally those imposing administrative standards that should have been complied with by the Municipality and/or Municipal Council as well as the MEC during the appointment of Mr OG Moremedi to the position of Director: Engineering Services. Those are the following:

a. In terms of section 195(1)(a) and (f) of the Constitution, the public administration must be governed by the democratic values and principles enshrined in the Constitution which include, *inter alia*, the promotion and maintenance of a high standard of professional ethics and an accountable public administration. These principles enjoin the Municipality and the Municipal Council to exercise a high level of professionalism and ethics including accountability in the performance of their duties. The Municipality and the Municipal Council should also strive to be above reproach;

b. Section 56 of the Municipal Systems Act, 2000 (MSA) sets out the processes and requirements for the appointment of managers directly accountable to the
Municipal Managers and it was relied on to determine whether the Municipal Council failed to comply with the MSA when it appointed Mr Moremedi to the position of Director: Engineering Services as alleged; and

c. Section 56(5) of the MSA was relied on to determine whether the MEC failed to take corrective measures which may include an application to Court for a declaratory order on the validity of Mr Moremedi's appointment.

(ix) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding whether the Municipal Council irregularly appointed a candidate, Mr OG Moremedi, who lacked the required qualifications

(aa) The allegation that the Municipality irregularly appointed Mr OG Moremedi to the position of Director: Engineering Services is substantiated;

(bb) By appointing an incumbent who did not meet the prescribed requirements for the post advertised, the Municipal Council clearly failed to uphold the democratic values and principles enshrined in the Constitution and thus acted contrary to the spirit espoused in section 195(1)(a) and (f) of the Constitution. Such conduct by the Municipal Council was improper and constitutes maladministration;

(cc) Mr Moremedi did not possess the required qualifications and lacked the skills required for the position of Director: Engineering Services as advertised in August 2013. His shortlisting and subsequent appointment by the Municipal Council was in contravention of section 56(a) and (b) of the MSA, and therefore amounts to maladministration;
(dd) The contract concluded between the Municipality and Mr OG Moremedi who lacked the required skills, expertise, competencies and qualifications as provided for by the MSA, was improper and as a result is null and void, in terms of section 56(2) of MSA and in violation of section 56(1)(b) of the MSA and therefore amounts to maladministration;

(ee) The Municipal Council when dealing with Mr Moremedi’s application and subsequent appointment elected to appoint him despite the fact that he did not meet the requirements for the post. The decision by the Municipal Council to appoint Mr Moremedi was not only in violation of Clause 4.2.2 of the Venterdorp Local Municipality Recruitment and Selection Policy, but it was improper and amounted to maladministration;

(ff) If cognizance is taken of the provisions of Item 2 of Schedule 1 of the MSA: Code of Conduct for Councilors, the Municipal Council, by appointing Mr Moremedi to the position of Director: Engineering Services while aware of the fact that he lacked the prescribed skill, expertise, competencies and qualifications articulated in the advertisement, did not perform the functions of its office in good faith, honestly and in a transparent manner. It is also clear that the decision by the Municipal Council to appoint this incumbent compromised the credibility and integrity of the Municipality’s service delivery and such conduct is accordingly improper and amounts to maladministration;

(gg) Despite the MEC’s directive that the Municipal Council should consider another candidate who complied with the criteria, the Municipal Council resolved to go against this directive and appointed Mr Moremedi who did not comply with the requirements of the position. This conduct by the Municipal Council was in violation of Item 11(d) of the Code of
Conduct for Councillors as it contributed to maladministration in the Municipal Council; and

(hh) The Municipal Council when appointing Mr Moremedi to the post of Director: Engineering Services were supposed to adhere to the provisions of National Treasury Regulations with which they are expected to be au fait. The Municipal Council therefore contravened these Regulations and this conduct is improper and constitutes maladministration.

(ii) The current Acting Municipal Manager of NW 405 Municipality, Dr Blaai-Mokgethi, was issued with a Section 7(9) notice dated 26 October 2016, which was emailed to her on 28 October 2016 and also hand-delivered on 10 November 2016. Despite having been approached by the Public Protector’s investigation team at a meeting on 10 November 2016 and through email correspondence for inputs on the matter, the acting Municipal Manager failed to respond to the notice. Such failure by the acting Municipal Manager to respond contravened the Constitution and the Public Protector Act. This conduct by the acting Municipal Manager is improper and constitutes maladministration.

(b) Regarding whether the Municipal Council unduly disregarded the directive of the MEC to appoint a registered engineer on secondment:

(aa) The allegation that the Municipal Council unduly disregarded the directive of the MEC to appoint a registered engineer on secondment is substantiated.

(bb) Albeit the Municipal Council followed the procedure set out in section 56(4A) of the Municipal Systems Amendment Act, 2011 and submitted its report relating to the processes and outcomes of the interview, it
failed to implement the MEC's directive of appointing a candidate who complied with the required criteria on secondment. Such flagrant action by the Municipal Council was improper and amounts to maladministration.

(cc) There is no evidence to the effect that the Municipal Council had applied to the Minister to waive the prescribed requirements in accordance with section 56(6) of the Municipal Systems Amendment Act, 2011. The Municipal Council instead chose to appoint an incumbent who lacked skills, expertise, competencies and qualifications as prescribed. This decision by the Municipal Council was irresponsible and such conduct was accordingly improper and tantamount to maladministration.

(dd) The Municipal Council in electing to rescind its earlier Resolution C 076/2013-2014 and adopting Resolution number C 083/2013-2014 clearly failed to comply with its own resolution. It is also apparent that the Municipal Council when rescinding Resolution number C 076/2013-2014 did not follow due process since there is no evidence to suggest that a notice was given to move for the rescission in accordance with the Rules and Procedures. The failure by the Municipal Council to comply with its own rules therefore amounts to maladministration.

(c) Regarding whether the MEC has in any way failed to take decisive corrective measures in terms of section 56(5) of the Municipal Systems Amendment Act:

(aa) The allegation that the MEC failed to take decisive corrective measures in terms of section 56(5) of the Municipal Systems Amendment Act is substantiated;
In terms of the provisions of section 56(5) of the Municipal Systems Amendment Act, the MEC, upon becoming aware of the appointment of an incumbent (in this instance, Mr Moremedi), should have taken appropriate steps which may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the Municipality to enforce compliance by the Municipality with the Municipal Systems Amendment Act. Failure by the MEC to invoke the provisions of section 56(5) of the Municipal Systems Amendment Act amounts to maladministration; and

The Evaluation Committee: Directorate Municipal Administration in the Department recommended that the MEC should take decisive and corrective action that may include a court order as per the Municipal Systems Amendment Act, however, the MEC failed to implement those recommendations. Failure by the MEC to take cognizance of the recommendations by the Evaluation Committee in her own Department amounts to maladministration on her part.

In the light of the above findings and the amalgamation of the Venterdorp and Tlokwe Municipalities, the Public Protector is directing the following remedial actions be taken as contemplated in section 182(1)(c) of the Constitution:

a) The Speaker of the Municipal Council must ensure that within 30 working days from the date of receipt of this report, the Municipal Council in consultation with the Municipal Manager declares as irregular payments, the salary payments made to Mr OG Moremedi, the Director: Engineering Services since his appointment is in terms of section 56(2) of the MSA, is null and void and should reflect the salary paid to Mr OG Moremedi for the duration of his term as Director: Engineering Services as an irregular expenditure in the Municipality's financial statements for the period 2017/18;
b) The MEC must investigate the reasons why the Municipal Council elected to deviate from the MEC’s directive to consider other candidates who complied with the required criteria as well as its Resolution to appoint Mr Moremedi after the MEC declined to concur with said appointment. The MEC must further take action against all the Councillors in terms of the Code of Conduct for Councillors and/or officials responsible so as to ensure that the situation is never repeated; and

c) The MEC must, in accordance with section 56(5) of the Municipal Systems Amendment Act, ensure that the Municipal Council confirms the termination of the employment contract entered into between the Municipal Council and Mr Moremedi, the Director: Engineering Services.
REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR APPOINTMENT OF DIRECTOR: ENGINEERING SERVICES BY THE VENTERSDORP LOCAL MUNICIPALITY

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 (the Public Protector Act).

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

1.2.1. The Acting Municipal Manager of NW 405 Municipality.

1.2.2. The Speaker of Municipal Council of the NW 405 Municipality.

1.2.3. The Executive Mayor of the NW 405 Municipality; and

1.2.4. The MEC for Local Government and Human Settlements in North West Province.

1.3. A copy of the report is also provided to the Anonymous Complainant to inform him about the outcome of the investigation.

1.4. The report relates to an investigation into the alleged maladministration and impropriety by the then Ventersdorp Local Municipality (the Municipality) in the appointment of a Director: Engineering Services.
2. THE COMPLAINT

2.1 The complaint was lodged by an anonymous person (the Complainant) on 14 April 2014.

2.2 The Complainant in essence alleged that:

2.2.1 The position of Director: Engineering Services for the Municipality was advertised nationally on 1 August 2013 in the Sowetan and Sunday World newspapers. The closing date for applications was 16 August 2013. Of the fifteen (15) applications that were received, five (5) candidates were shortlisted for the post on 5 September 2013. The interviews were conducted on 13 September 2013;

2.2.2 On 23 October 2013 the Municipal Council took a resolution in terms of Resolution C 076/2013-2014 to appoint Mr OG Moremedi as Director: Engineering Services for the Municipality;

2.2.3 Subsequent to the appointment, correspondence was sent by the Speaker/Mayor, Councillor C N Phoyane, Honourable Manketsi Tlhape, the former Member of the Executive Council (the MEC) for Local Government & Human Settlements (the Department), to give a "concurrence" to the appointment;

2.2.4 The MEC did not concur with the appointment as the candidate did not have the relevant qualifications, skills and competencies as per the advertisement, and accordingly advised the Municipal Council as per a letter dated 11 November 2013;

2.2.5 The Speaker/Mayor then requested the Office of the MEC to second another person to assume duties as the Acting Director: Engineering Services until a new recruitment processes were completed;
2.2.6 A registered engineer was seconded by the MEC in a letter dated 05 December 2013 and signed on 06 December 2013 addressed to the Speaker/Mayor; however, the Municipal Council did not appoint that incumbent;

2.2.7 On 31 March 2014, the Municipal Council again took a resolution to appoint Mr OG Moremedi despite him not having the required qualifications, skill and competencies for the position, and against the advice of the MEC;

2.2.8 The MEC had to give a "concurrence" to this appointment before Mr OG Moremedi could assume duties; and

2.2.9 The Complainant further asserts that this appointment was not in line with the Municipal Systems Act, 2000 (the MSA).

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

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

3.2 Section 182(1) of the Constitution provides:

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

(b) to report on that conduct; and

(c) to take appropriate remedial action."
3.3 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.\textsuperscript{1} The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”\textsuperscript{2}

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

3.5 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

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

3.7 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties

\textsuperscript{1} [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
\textsuperscript{2} Supra at para [73].
4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.2. 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?
4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. 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. In this particular case, the factual enquiry principally focused on whether or not the Municipality acted improperly and/or irregularly in appointing Mr OG Moremedi as the Director: Engineering Services.

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 by the Municipality or organ of
state to ensure good governance and to prevent maladministration and prejudice to anyone concerned.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration and/or improper conduct.

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

4.3.1 Whether the Municipal Council irregularly appointed a candidate, Mr OG Moremedi, who lacked the required qualifications, skills and competencies for the position of Director: Engineering Services and if so, did this amount to maladministration?

4.3.2 Whether the Municipal Council unduly disregarded the directive of the MEC to appoint a registered engineer on secondment to assume duties as Acting Director: Engineering Services until the new recruitment processes were completed?

4.3.3 Whether the MEC in any way failed to take decisive corrective measures in terms of section 56(5) of the Municipal Systems Amendment Act?

4.4 **The Key Sources of information**

4.4.1 **Documents**

4.4.1.1 A copy of the Council Resolution C015/2013-2014 approving that the position of Director Engineering Services be advertised;

4.4.1.2 A copy of the advertisement which appeared in the Sowetan and Sunday World newspapers dated 01 August 2013;

4.4.1.3 A copy of the Register of applications for the position, received by the Municipality;
4.4.1.4 A copy of the Curriculum Vitae of Mr OG Moremedi, one of the five (5) candidates who were shortlisted and interviewed for the position of Director: Engineering Services, which listed as his qualifications a National Diploma – Land Surveying; Bachelor of Public Administration and also indicated that he was registered with the Council for Professional Land Surveyors;

4.4.1.5 A copy of the Shortlisting Report;

4.4.1.6 A copy of the Attendance Register Shortlisting Session (panel) dated 05 September 2013;

4.4.1.7 A copy of the Matrix schedule of the candidates;

4.4.1.8 A copy of the Attendance Register Interview Session dated 12 September 2013;

4.4.1.9 A copy of the Report from the Municipal Manager to the Mayor, re: Interview process;


4.4.1.11 A copy of the Report from the Senior Managers Appointment Evaluation Committee to the MEC dated 11 November 2013;

4.4.1.12 A copy of a letter from the MEC to the Speaker/Mayor dated 11 November 2013;

4.4.1.13 A copy of a Letter from the MEC to the Speaker/Mayor dated 05 December 2013;

4.4.1.14 A copy of a Letter from the MEC to the Speaker/Mayor dated 05 March 2014 (which included Mr Mphahlele’s CV, who the MEC considered a suitably qualified engineer); and


4.4.2 Interviews conducted

4.4.2.1 Meeting with Complainant on 14 April 2014.

4.4.2.2 Meeting with Complainant on 03 February 2015 during the Deputy Public Protector’s visit at the Mahikeng Provincial Office.

4.4.2.3 Telephone interview with Mr Seth Ramagaga on 14 April 2015, the former Head of Department: Local Government and Human Settlements (now the Administrator at City of Matlosana Local Municipality) requesting information on (a) his experiences
about Council Resolutions vis-à-vis obtaining concurrence from the MEC and (b) the Rules and Orders of Municipalities in North West Province.

4.4.2.4 Meeting with Mr James Mashigo, the former Acting Municipal Manager of the now dissolved the Municipality, on 19 June 2015.

4.4.2.5 Meeting with Dr Blaai-Mokgethi, the Acting Municipal Manager: NW 405 Municipalities on 10 November 2016.

4.4.3 Correspondence sent and received by the Public Protector

4.4.3.1 A copy of a letter dated 16 May 2014 to the Municipal Manager: Ventersdorp Local Municipality requesting documentation relating to the matter.

4.4.3.2 A copy of a letter dated 16 May 2014 to the Office of the MEC requesting documentation relating to the matter.

4.4.3.3 A copy of a letter dated 16 July 2014 (including attachments) from the Head of Department: Local Government and Human Settlements.

4.4.3.4 A copy of a letter dated 16 September 2014 to the Head of Department: Local Government requesting further information relating to compliance by the MEC in terms of section 54A(8) of the Municipal Systems Act, 2011.

4.4.3.5 Section 7(9) notice signed by the Public Protector on 24 October 2016 and addressed to the MEC as well as the Acting Municipal Manager: NW 405 Municipality.

4.4.3.6 A copy of a letter dated 24 November 2016 from the MEC: Local Government and Human Settlements, Honourable Gaolaolwe to the Public Protector requesting an extension to respond to the section 7(9) Notice.

4.4.3.7 Email dated 22 December 2016 from the Acting Municipal Manager of NW 405 Municipality, Dr Blaai-Mokgethi advising of the Council Resolution C42/2016-12-16.

4.4.3.8 Email dated 12 January 2017 from the Acting Municipal Manager of NW 405 Municipality to PPSA advising of Mr OG Moremedi’s resignation.

4.4.3.9 Letter dated 17 January 2017 from the MEC: Local Government and Human Settlements, Hon. Gaolaolwe responding to the Section 7(9) Notice.
4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution;
4.4.4.2 The MSA;
4.4.4.3 The Municipal Systems Amendment Act, No. 7 of 2011;
4.4.4.4 The Municipality Recruitment and Selection Policy adopted on 19/05/2010 per Council Resolution C099/2009 - 2010;
4.4.4.5 Code of Conduct for Councillors in terms of Schedule 1 of the Municipal Systems Act;
4.4.4.6 The National Treasury: Local Government: Municipal Finance Management Act: Municipal Regulations on Minimum Competency Levels: Government Gazette No. 29967 of 15 June 2007 Vol. 504 (Chapter 4); the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Government Gazette No. 37245 of 17 January 2014 (Annexure B);

4.4.5 Public Protector’s Touchstones

4.4.5.1 “Saved by the Notice”: Report on an investigation into the alleged irregular appointment and the extension of the Chief Financial Officer’s employment contract by the Senqu Municipality in the Eastern Cape… Report No: 8 of 2014/2015. In this Report the Public Protector took the following remedial actions:

4.4.5.1.1 The MEC for local Government in Eastern Cape must take appropriate steps in terms of section 56(5) of the Municipal Systems Act No. 32 of 2000 to enforce compliance by the Senqu Municipal Council with the Act; and
4.4.5.1.2 The Senqu Municipal Council must ensure that the position of Chief Financial Officer for the Senqu Municipality is advertised and filled in compliance with the requirements of the Municipal Systems Act No. 32 of 2000.

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

5.1 Regarding whether the Municipal Council irregularly appointed a candidate, Mr OG Moremedi, who lacked the required qualifications, and if so, whether such conduct constitutes maladministration:

Common cause issues

5.1.1 The Municipality placed an advertisement in the Sowetan and Sunday World newspapers of 01 August 2013 and listed under the post of Director: Engineering Services the following as minimum qualifications/requirements for the post:

(a) A certified Electrical Engineer (G.C.C.) or relevant B. Tech./B. Sc. Engineering qualification;
(b) Must be registered with the Engineering Council of South Africa;
(c) Computer Literacy;
(d) Must be in possession of a Code EB driver’s licence;
(e) Excellent communication skills (verbal and written) coupled with presentation and facilitation skills;
(f) Inter-personal, problem-solving, strategic planning and management skills;
(g) Project Management Skills;
(h) Extensive knowledge of legislation, procedures and processes pertaining to the Local Government Legislative Framework;
(i) Knowledge of IDP processes and Performance Management;
(j) At least five (5) years managerial experience in the electrical or civil engineering field preferably gained within a Municipal Environment; and

(k) All other minimum competencies as listed in Government Gazette 29967 of 15 June 2007.

5.1.2 The Curriculum Vitae of Mr OG Moremedi, one of the five (5) candidates who were shortlisted and interviewed for the position of Director: Engineering Services, listed as his qualifications a National Diploma – Land Surveying; Bachelor of Public Administration and also indicated that he was registered with the Council for Professional Land Surveyors.

5.1.3 A copy of the shortlisting matrix for the position of Director: Engineering Services revealed the scores on some of the requirements as follows:

5.1.3.1 Qualification requirement: three (3) other candidates scored two (2) points each and Mr OG Moremedi scored zero (0) points;

5.1.3.2 Managerial experience requirement: all five (5) candidates, including Mr OG Moremedi, scored two (2) points each, and

5.1.3.3 Locality requirement: two (2) candidates scored two (2) points each while three (3) candidates, including Mr OG Moremedi, scored zero (0) points each.

5.1.4 Pursuant to the interviews that were conducted on 13 September 2013, the Municipal Council met on 23 October 2013 and while aware that Mr OG Moremedi did not meet the requirements, resolved in terms of Council Resolution C 076/2013-2014 that: “Council appoints Mr. OG Moremedi on a 4 years fixed term performance based contract, after receipt of concurrence from the MEC: Local Government & Human Settlements”. 
5.1.5 On 30 October 2013, the Municipal Council submitted a report to the MEC as required by the MSA. The MEC, in a letter dated 05 December 2013 which was addressed to the Speaker/Mayor, declined to give a "concurrency" citing non-compliance with the provisions of section 56 of the MSA.

5.1.6 The MEC, in a letter dated 11 November 2013 addressed to the Speaker/Mayor, wrote: "...It is my opinion that the appointment of your Director: Engineering Services was not done [Hon. Tlhape’s emphasis] in compliance with the Act...After having evaluated your appointment and taking into consideration other relevant factors including the annual budget of your municipality, I have come to the conclusion that the appointment was otherwise done in contravention of the Act. It will be appreciated if the municipality can remedy this defect".

5.1.7 A letter dated 05 December 2013 from the MEC to the Speaker/Mayor advised that: “Your report is noted and has been assessed in line with section 56(4A(a) of the Local Government: Municipal Systems Act (Act No. 7 of 2011 hereinafter referred to as the Act and evaluated accordingly. [sic]

In [sic] is my opinion that the appointment of your Director, Engineering Services is not in compliance with section: 56 (1) of the act, and I accordingly do not concur to it being effected and advise you to consider other compliant candidates and still seek my concurrence.”

5.1.8 At a Special Council Meeting that was held on 31 March 2014 per Item: C 112/2013 – 2014, Council was reminded that on 30 January 2014 the Municipal Council resolved under Resolution Number C 083/2013-2014 that “Council appoints Mr OG Moremedi as Director Engineering Services with effect from 03 February 2014 and a report be submitted to the Office of the MEC within 14 days”.

5.1.9 While in October 2013 the Municipal Council passed a Resolution, C 076/2013-2014, in terms of which it sought to appoint Mr OG Moremedi after the receipt of
concurrency of the MEC, three (3) months later on 30 January 2014 the Municipality changed its tune. The Municipal Council after receiving a response from the MEC which in effect declined to give a concurrency went against its own resolution namely, Resolution number C 076/2013-2014 and passed another Resolution, C 083/2013-2014 in terms of which it appointed Mr OG Moremedi to assume duty as Director: Engineering Services with effect from 03 February 2014.

Application of the relevant law

5.1.10 Section 195(1)(a) and (f) of the Constitution, provides that:

"(1) 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) ..... 
(e) ..... 
(f) Public administration must be accountable..."

The principles articulated above, enjoin the Municipality and the Municipal Council to exercise a high level of professionalism and ethics including accountability in the performance of their duties. The Municipality and the Municipal Council should also strive to be above reproach.

5.1.11 Section 56 of the MSA sets out the processes and requirements for the appointment of managers directly accountable to Municipal Managers.

5.1.11.1 Section 56(a) and (b) of the MSA, provides that:

"A Municipal Council after consultation with the Municipal Manager must appoint a manager directly accountable to the Municipal Manager and such an incumbent
must have the relevant skills and expertise to perform the duties associated with the post in question. The incumbent must have the competencies and qualifications as prescribed."

5.1.11.2 Section 56(2)(a) of the Municipal Systems Amendment Act, 2011, provides that: "where the incumbent does not possess the prescribed skills, expertise, competencies or qualifications, the decision to appoint such an incumbent or any contract concluded between the Municipal Council and that incumbent shall be null and void."

5.1.12 The MSA as well as its amended version makes it peremptory for the Municipal Council to take into account the prescribed skills, expertise, competencies or qualification of applicants before shortlisting them. The same measure of caution must be exercised when appointing an incumbent, such as the Director: Engineering Services, to take up office because any appointment that is found to be in contravention of the provisions of these Acts shall be null and void and of no legal force.

5.1.13 Clause 4.4.2.2 of the Municipality Recruitment and Selection Policy of 2010 provides that "shortlisting will be concluded in terms of minimum requirements of the job as specified in the advert."

The Municipality Recruitment and Selection Policy which was adopted at a Council meeting of 19/05/2010 per Council Resolution C099/2009 – 2010 (the policy) was established for the purpose of ensuring a fair, efficient, effective and transparent system of recruitment. The policy serves as a guideline for shortlisting appointable candidates. It therefore follows that when advertising a vacant post, requirements such as prescribed skills, expertise, competencies or qualifications, are indicated on the advertisement. It is a prerequisite to consider such requirements prior to making an appointment or filling a vacant position.
5.1.14  Item 2 of Schedule 1 of the MSA: Code of Conduct for Councillors provides that: “Councillors must perform the functions of office in good faith, honestly and a transparent manner, and at all times act in the best interest of the Municipality and in such a way that the credibility and integrity of the Municipality are not compromised”.

This provision seeks to ensure that the Municipal Council in the performance of their duties will act in the best interests of the Municipality and uphold the integrity of the Municipality at all times.

5.1.15  Item 11(d) of the Code of Conduct for Councillors, provides that: “a Councillor may not, except as provided by law, encourage or participate in any conduct which would cause or contribute to maladministration in the Municipal Council.”

The provision seeks to encourage the Municipal Council to avoid conduct that is likely to bring the Municipality into disrepute.

5.1.16  The National Treasury: Local Government: Municipal Finance Management Act: Municipal Regulations on Minimum Competency Levels: Government Gazette No. 29967 of 15 June 2007, Vol. 504 (Chapter 4) and the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers: Government Gazette No. 37245 of 17 January 2014 (Annexure B) provide for the minimum qualifications and requirements for a person to be appointed in the position of Director: Engineering Services. Such person must be a holder of a Bachelor of Science Degree in Engineering or B Tech Degree in Engineering; he must have a Government Competence Certificate required in terms of the general Machinery Regulations; and should be registered with a professional body or relevant council such as the Engineering Council of South Africa (ECSA).
Both Regulations, that is, Government Gazette No. 29967 of 15 June 2007 and Government Gazette No. 37245 of 17 January 2014 prescribe to the Municipal Council the qualifications and requirements that the incumbent, Mr OG Moremedi, was supposed to have in order to qualify for the position of Director: Engineering Services.

5.1.17 It follows from the evidence discussed above that Mr OG Moremedi did not qualify to be appointed to the post of Director: Engineering Services.

Conclusion

5.1.18 The Municipal Council should not have appointed Mr OG Moremedi to a post of Director: Engineering Services under the circumstances.

5.2 Whether the Municipal Council unduly disregarded the directive of the MEC to appoint a registered engineer on secondment until the new recruitment processes were completed:

Common cause issues

5.2.1 The MEC having evaluated the report of the Municipal Council relating to the appointment of Mr OG Moremedi as Director: Engineering Services, wrote a letter dated 05 December 2013 to the Speaker/Mayor in terms of which she declined to give a "concurrence" citing non-compliance with the provisions of section 56 of the MSA, and advised the Municipal Council to consider other compliant candidates and still sought her "concurrence". The Municipal Council instead went into a declaration regarding the appointment of the Director: Engineering Services with six (6) Councillors declaring in favour of Mr OG Moremedi; two (2) Councillors declaring
and "concurring" with the report of the MEC while two (2) Councillors objected to the appointment of Mr OG Moremedi and "concurered" with the report of the MEC.

5.2.2 In a letter dated 05 March 2014 addressed to the Speaker/Mayor, the MEC directed the following immediate actions for the Municipal Council:

- Take a resolution to appoint Mr. CT Mphahlele, a suitably qualified engineer as the Acting Director-Infrastructure for the period not exceeding three (3) months;
- Enter into employment contract and performance contracts with the incumbent and submit a copy thereof to my Office as prescribed.
- Report monthly on the appointment progress and related matters."

5.2.3 The MEC further directed that "the appointment should be in line with Council's policies and the remuneration should be according to the budgeted amount attached to the same position. Council be advised to expedite the recruitment process to ensure that the post is filled within three (3) months."

5.2.4 The Municipal Council, despite all the interventions by the MEC elected to deviate from the directive as well as its own Resolution as per Council Resolution C 076/2013-2014 that: "Council appoints Mr. OG Moremedi on a four (4) years fixed term performance based contract, after receipt of concurrence from the MEC: Local Government & Human Settlements". No concurrence was received from the MEC, yet the Municipal Council, at a Special Council Meeting on 31 March 2014 per Item: C 112/2013 - 2014 proceeded to appoint Mr. OG Moremedi as Director: Engineering Services with effect from 01 April 2014 for a period of three (3) years.

5.2.5 The view held by the Municipality that the matter (of appointing a Director: Engineering Services) was long overdue and could not be delayed any longer for purposes of service delivery, effective and efficient management and proper accountability by the Municipal Manager is not sustainable if regard be had to the
fact that Mr. OG Moremedi lacked the required qualifications, skills and competencies for the position of Director: Engineering Services.

5.2.6 The Rules and Procedures: A4/2003 dated 28 January 2003 for the Municipal Council allowed for the rescission of Council Resolutions. However the Rules clearly stipulated the procedure for such rescission which is that, a Councillor who intended to move for the rescission of a resolution, he/she shall give notice by delivery to the Municipal Manager of a notice of motion in writing, which must be signed and dated by him/her and also state at which meeting of council it will be introduced. The notice must be in the hands of the Municipal Manager within five (5) working days before the meeting.

5.2.7 At a meeting held on 19 June 2015 with the Acting Municipal Manager, Mr. James Mashigo at the Municipality Offices, the Public Protector requested a copy of the notice of motion as well as the minutes relating to compliance with the Rules and Procedures: A4/2003 dated 28 January 2003. The Committee Clerk was instructed to search for the requested documents, but advised that Council did not have such records. There is no evidence that the Municipal Council in this instance complied with the said Rules and Procedures.

5.2.8 The Public Protector signed a section 7(9) notice against the Municipality on 24 October 2016. The notice was served on the Acting Municipal Manager, Dr Blaai-Mokhethi through an email on 28 November 2016 and further hand-delivered during a meeting between her and the Public Protector’s investigation team on 10 November 2016. The Acting Municipal Manager, however, failed to respond to the section 7(9) notice.

Application of the relevant law

5.2.9 Section 160(6) of the Constitution makes provision for the Municipal Council to make by-laws which prescribe rules and orders for, *inter alia*, its internal arrangements; its business and proceedings.
The Municipality in this instance has accordingly put in place such rules and orders per Rules and Procedures for Venterstorp Local Municipality: A4/2003 dated 28 January 2003 for its Council. According to item 12 of the said Rules and Procedures, when a Councillor wishes to make a motion for the rescission or alteration of a council resolution or part thereof, he/she must give the motion in writing to the Municipal Manager. Such motion must be signed and dated by the Councillor and state at which council meeting it will be introduced.

5.2.10 Section 56(4A) of the Municipal Systems Amendment Act, 2011, deals with the procedure that must be followed at the conclusion of the interviews and provides that: “The Municipal Council must, within 14 days of the date of appointment of the incumbent, inform the MEC of the appointment process and outcomes as prescribed. The MEC on the other hand, must within 14 days of receipt of such information from the Municipal Council submit a copy of the report relating to processes and outcomes to the Minister of Corporative Governance and Traditional Affairs.”

5.2.11 Section 56(6) of the Municipal Systems Amendment Act, 2011 provides that “where the Municipal Council is unable to attract suitable candidates, it may apply in writing to the Minister to waive any of the requirements provided for in subsection (1)(b), that is prescribed skills, expertise, competencies or qualifications.”

If the Municipal Council therefore believed that from the pool of applications it received there was no candidate who had the prescribed skills, expertise, competencies or qualifications for the position of Director: Engineering Services, the Municipal Systems Amendment Act grants it the opportunity to seek the intervention of the Minister by applying to the Minister to allow them not to insist on the prescribed requirements.
5.2.8 The evidence discussed above indicates that despite the interventions by the MEC, the Municipal Council elected to deviate from the MEC’s directive as well as its own Council Resolution, C 076/2013-2014.

5.2.9 It then follows that the conduct of the Municipal Council was improper and compromised the integrity of the Municipal Council.

Conclusion

5.2.10 In the circumstances the Municipal Council failed to follow the processes laid down in the Municipal Systems Act.

5.3 Whether the MEC in any way failed to take a decisive corrective measures in terms of section 56(5) of the Municipal Systems Amendment Act:

Common cause issues

5.3.1 A report dated 11 November 2013 which had been compiled by the Acting Chairperson of the Evaluation Committee: Director Municipal Administration in the Department and which was addressed to the MEC, recommended, among other things, that the MEC “…in the event that the municipality does not comply, take decisive corrective action that may include a court order as the last resort…”

5.3.2 The MEC elected not to give an opinion on this recommendation, instead she wrote the following comment (dated 30 November 2013) on the report: “The Candidate does not comply. Therefore concurrence is not issued. A letter be written to the municipality to the effect. Consideration be given to other compliant Candidates interviewed.”
5.3.3 There is no record of any reasons whatsoever that may have been advanced why the MEC failed to explore the courts route.

5.3.4 The Public Protector Office wrote a letter to the Office of the MEC on 16 September 2014 enquiring (a) if the recommendation by the Evaluation Committee was ever considered and/or implemented; and (b) if not, what were the reasons for not going ahead with the courts process.

5.3.5 In a letter dated 17 January 2017, the current MEC for Local Government and Human Settlements, Hon. Gaolaolwe when responding to the section 7(9) notice stated that: "...

2. This letter serves to advise your Office that the erstwhile Department of Local Government had instructed the State Attorney to enforce the provisions of Section 56 of the Municipal Systems Act, to obtain a declaratory order nullifying the appointment of Mr Moremedi.

3. Adv. T Seboko was then briefed by the State Attorney and the matter was since not finalized for the reasons to be explained by the State Attorney and Adv. Seboko.

4. In view of the above, as the MEC for Local Government and Human Settlements, I decided to engage with the new 405 Municipality, since there is a new Council to remedy the situation.

5. A meeting being [sic] planned with the Municipality for finalizing the matter in the spirit of Intergovernmental Relations Framework Act.

6. The Department will revert to your Office on the outcome of such engagements."

Application of the relevant law

5.3.6 Section 56(5) of the Municipal Systems Amendment Act provides that "where the MEC for Local Government becomes aware of the appointment of an incumbent, in cases where such appointment was made in contravention of the Act, he/she must
take appropriate steps in enforcing compliance by the Municipality. Such steps may include an application to court for a declaratory order on the validity of the appointment. It may also include any other legal action against the Municipality.

Upon learning that the Municipal Council acted ultra vires in the appointment of Mr Moremedi, it was incumbent upon the MEC to approach the courts for relief and/or take any appropriate measure against the Municipal Council. This exercise by the MEC would be to ensure that the Municipal Council does the right thing, that is, to appoint an incumbent who satisfies the requirements of the MSA and its amended version as well as the Treasury and Local Government Regulations.

5.3.7 The evidence discussed above indicates that the MEC only took the matter as far as the State Attorney and left it at that.

5.3.8 It indicates that the MEC failed to approach the courts for appropriate relief to ensure that the Municipal Council rights the wrong and appoints an incumbent who qualified to fill the post of Director: Engineering Services.

Conclusion

5.3.9 In the circumstances the MEC, failed to exercise her legal obligation in terms of the law.

6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
6.1 Regarding whether the Municipal Council irregularly appointed a candidate, Mr OG Moremedi, who lacked the required qualifications:

6.1.1 The allegation that the Municipality irregularly appointed Mr OG Moremedi to the position of Director: Engineering Services is substantiated.

6.1.2 By appointing an incumbent who did not meet the prescribed requirements for the post advertised, the Municipal Council clearly failed to uphold the democratic values and principles enshrined in the Constitution and thus acted contrary to the spirit espoused in section 195(1)(a) and (f) of the Constitution. Such conduct by the Municipal Council was improper and constitutes maladministration.

6.1.3 Mr OG Moremedi did not possess the required qualifications and lacked the skills required for the position of Director: Engineering Services as advertised in August 2013. His shortlisting and subsequent appointment by the Municipal Council was in contravention of section 56(a) and (b) of the MSA, and therefore amounts to maladministration.

6.1.4 The contract concluded between the Municipality and Mr OG Moremedi who lacked the required skills, expertise, competencies and qualifications as provided for by the Act, was improper and as a result is null and void, and in violation of section 56(2) of the MSA. Consequently, any expenditure incurred by the Municipality in the form of a salary paid to Mr OG Moremedi for the duration of his term as Director: Engineering Services was irregular and therefore amounts to maladministration.

6.1.5 The Municipal Council when dealing with Mr OG Moremedi's application and subsequent appointment elected to appoint him despite the fact that he did not meet the requirements for the post. The decision by the Municipal Council to appoint Mr OG Moremedi was not only in violation of Clause 4.2.2 of the Ventersdorp Local Municipality Recruitment and Selection Policy, but it was improper and amounted to maladministration.
6.1.6 If cognizance is taken of the provisions of Item 2 of Schedule 1 of the MSA: Code of Conduct for Councillors, the Municipal Council, by appointing Mr Moremedi to the position of Director: Engineering Services while aware of the fact that he lacked the prescribed skills, expertise, competencies and qualifications articulated in the advertisement, did not perform its functions of office in good faith, honestly and in a transparent manner. It is also clear that the decision by the Municipal Council to appoint this incumbent compromised the credibility and integrity of the Municipality and such conduct is accordingly improper and amounts to maladministration.

6.1.7 Despite the MEC’s directive that the Municipal Council should consider another candidate who complied with the required criteria, the Municipal Council resolved to go against the directive and appointed Mr Moremedi who did not comply with the requirements. This conduct by the Municipal Council was in violation of Item 11(d) of the Code of Conduct for Councillors as it contributed to maladministration in the Municipal Council.

6.1.8 The Municipal Council when appointing Mr Moremedi to the post of Director: Engineering Services was supposed to adhere to the provisions of National Treasury Regulations with which it is expected to be au fait. The Municipal Council therefore contravened these Regulations and this conduct is improper and constitutes maladministration.

6.1.9 The current Acting Municipal Manager of NW 405 Municipality, Dr Blaai-Mokgethi was issued with a Section 7(9) Notice dated 26 October 2016, which was emailed to her on 28 October 2016 and also hand-delivered on 10 November 2016. Despite having been approached by the Public Protector’s investigation team at a meeting on 10 October 2016 and via email correspondence for inputs on the matter, the Acting Municipal Manager failed to respond to the notice. Such failure by the Acting Municipal Manager to respond to the section 7(9) notice contravened the Constitution and the Public Protector Act. This conduct by the Acting Municipal Manager is improper and constitutes maladministration.
6.2 Regarding whether the Municipal Council unduly disregarded the directive of the MEC to appoint a registered engineer on secondment:

6.2.1 The allegation that the Municipal Council unduly disregarded the directive of the MEC to appoint a registered engineer on secondment is substantiated.

6.2.2 Albeit the Municipal Council followed the procedure set out in section 56(4A) of the Municipal Systems Amendment Act, 2011 and submitted its report relating to the processes and outcomes of the interview, it failed to implement the MEC’s directive of appointing a candidate who complied with the required criteria on secondment. Such flagrant action by the Municipal Council was improper and amounts to maladministration.

6.2.3 There is no evidence to the effect that the Municipal Council had applied to the Minister to waive the prescribed requirements in accordance with section 56(6) of the Municipal Systems Amendment Act, 2011. The Municipal Council instead chose to appoint an incumbent who lacked skills, expertise, competencies and qualifications as prescribed. This decision by the Municipal Council was irresponsible and such conduct was accordingly improper and tantamount to maladministration.

6.2.4 The Municipal Council in electing to rescind its earlier Resolution, C 076/2013-2014 and adopting Resolution number C 083/2013-2014 clearly failed to comply with its own resolution. It is also apparent that the Municipal Council when rescinding Resolution number C 076/2013-2014 did not follow due process since there is no evidence to suggest that a notice was given to move for the rescission in accordance with the Rules and Procedures. The failure by the Municipal Council to comply with its own rules therefore amounts to maladministration.
6.3 Regarding whether the MEC in any way failed to take decisive corrective measures in terms of section 56(5) of the Municipal Systems Amendment Act:

6.3.1 The allegation that the MEC failed to take decisive corrective measures in terms of section 56(5) of the Municipal Systems Amendment Act is substantiated.

6.3.2 In terms of the provisions of section 56(5) of the Municipal Systems Amendment Act, the MEC, upon becoming aware of the appointment of an incumbent (in this instance, Mr OG Moremedi), should have taken appropriate steps which may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the Municipality to enforce compliance by the Municipality with the Municipal Systems Amendment Act. Failure by the MEC to invoke the provisions of section 56(5) of the Municipal Systems Amendment Act amounts to maladministration.

6.3.3 The Evaluation Committee: Directorate Municipal Administration in the Department recommended that the MEC should take a decisive corrective action that may include a court order as per the Municipal Systems Amendment Act, however, she failed to implement those recommendations. Failure by the MEC to take cognizance of the recommendations by the Evaluation Committee in her own Department amounts to maladministration.

7. REMEDIAL ACTION

7.1 In the light of the above findings and the amalgamation of the Ventersdorp and Tlokwe Municipalities the Public Protector is directing the following remedial action as contemplated in section 182(1)(c) of the Constitution:

7.1.1 The Speaker of the Municipal Council must ensure that within 30 working days from the date of receipt of this report, the Municipal Council in consultation with the Municipal Manager declares as irregular payments, the salary payments made to Mr
OG Moremedi, the Director: Engineering Services since his appointment is in terms of section 56(2) of the Municipal Systems Act, is null and void and should reflect the salary paid to Mr OG Moremedi for the duration of his term as Director: Engineering Services as an irregular expenditure in the Municipality's financial statements for the period 2017/18;

7.1.2 The MEC must investigate the reasons why the Municipal Council elected to deviate from the former MEC's directive to consider other candidates who complied with the required criteria as well as its Resolution to appoint Mr OG Moremedi after the MEC declined to concur with the appointment. The MEC must further take action against the implicated Councillors and/or officials responsible so as to ensure that the situation is never repeated; and

7.1.3 The MEC must in accordance with section 56(5) of the Municipal Systems Amendment Act ensure that the Municipal Council confirms the termination of the employment contract entered into between the Municipal Council and Mr OG Moremedi, the Director: Engineering Services.

8 MONITORING

8.1 The MEC and Speaker must submit to the Public Protector an Action Plan indicating how the remedial action will be implemented, within 30 working days of the date of this report.

8.2 The Public Protector will monitor the implementation of this report on a quarterly basis.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 29/09/2017