

**REPORT OF THE PUBLIC PROTECTOR 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**



**PUBLIC PROTECTOR
SOUTH AFRICA**

***Allegations of improper conduct and maladministration against the John
Taolo Gaetsewe District Municipality in the Northern Cape Province***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION RELATING TO THE APPOINTMENT OF A DRIVER/
MESSENGER BY THE JOHN TAOLO GAETSEWE DISTRICT MUNICIPALITY IN THE
NORTHERN CAPE PROVINCE IN 2017**

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Executive Summary

- (i) This is my report as the Public Protector 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 23 of 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 improper conduct and maladministration relating to the appointment of a Driver/Messenger by the John Taolo Gaetsewe District Municipality (Municipality) in the Northern Cape Province in 2017.
- (iii) The complaint was lodged by Mr Kagiso Boihang (the Complainant) on 19 June 2018 with the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.
- (iv) In the main, the Complainant alleged that the appointment of a Driver/Messenger by the Municipality on 10 April 2017 was irregular as the appointed candidate did not qualify for the position and in essence it was improper, constitutes maladministration and resulted in irregular expenditure.
- (v) Based on the analysis of the complaint, the following issues were identified for the investigation:
 - (a) Whether the appointment of a Driver/Messenger by the Municipality in April 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not
 - (b) Whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure.

- (v) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Municipality, an analysis of the relevant documents and information obtained during the investigation, consideration and application of the relevant laws and prescripts.
- (vi) Having considered the evidence and information obtained during the investigation, I make the following findings:

(a) Regarding whether the appointment of a Driver/Messenger by the Municipality in April 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

(aa) The allegation that the appointment of a Driver/Messenger of the Municipality in April 2017 was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality, is substantiated.

(bb) Mr Qongo did not have the requisite driving experience as required by the Municipality and was therefore not suitably qualified for the position.

(b) Regarding whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure:

(aa) The allegation that the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure is substantiated.

(bb) The appointment of Mr Qongo was not in accordance with section 55(1) of the Local Government: Municipal Systems Act, 2000 as it did not comply with the

Municipality's Policy on Selection and Recruitment and resulted in irregular expenditure, as contemplated by section 1 of the Local Government: Municipal Finance Management Act, 2003 (MFMA).

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

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

(a) The Speaker of the Council of the Municipality:

(aa) To take appropriate steps in respect of disciplinary action against Mr Molusi who was responsible for the irregular appointment of Mr Qongo as Driver/Messenger in his capacity as the Acting Municipal Manager of the Municipality, in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA, within sixty (60) business days from the date of my report.

(b) The Municipal Manager of the Municipality:

(aa) To take appropriate steps in respect of disciplinary action against the other officials that were involved in the irregular appointment of Mr Qongo in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA within sixty (60) business days from the date of my report.

- (bb) To institute proceedings for the judicial review of the irregular appointment of Mr Qongo within sixty (60) business days from the date of my report.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO THE APPOINTMENT OF A DRIVER/MESSENGER BY THE JOHN TAOLO GAETSEWE DISTRICT MUNICIPALITY IN THE NORTHERN CAPE PROVINCE IN 2017

1. INTRODUCTION

- 1.1 This is my report as the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to the following persons, to inform them of the outcome of my investigation:
 - 1.2.1 Ms P Q Mogatle, the Speaker of the Council of the John Taolo Geatsewe District Municipality (Municipality);
 - 1.2.2 Ms S Mosikatsi, the Executive Mayor of the Municipality; and
 - 1.2.3 Mr D Molaole, the Municipal Manager of the Municipality.
- 1.3 A copy of the report is also provided to Mr M W Molusi, the Director; Basic Services and Infrastructure of the Municipality, who acted as Municipal Manager at times relevant to the investigation.
- 1.4 I took note that Mr Kagisho Boihang (Complainant) who lodged the complaint passed away in 2019.

1.5 The report relates to an investigation into allegations of improper conduct and maladministration relating to the appointment of a Driver/Messenger by the John Taolo District Municipality in the Northern Cape Province in 2017.

2. THE COMPLAINT

2.1 The complaint was lodged on 19 June 2018 with the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.

2.2 In the main, the Complainant alleged that the appointment of a Driver/Messenger by the Municipality on 10 April 2017 was irregular as the appointed candidate did not qualify for the position.

2.3. In essence, the Complainant alleged that the appointment by the Municipality of the Driver/Messenger was improper, constitutes maladministration and resulted in irregular expenditure.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

“The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.”

- 3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
- 3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that:
- “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”²*
- 3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

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

² *Supra* at para [73].

- 3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the *Constitution* cannot properly be upheld or enhanced (paragraph 67);
- 3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);
- 3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.6.6 The Public Protector’s power to take 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);
- 3.6.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.6.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
- 3.7 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 when confirming the powers of the Public Protector:
- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
- 3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (para 82);
- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);

- 3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Para 105);
- 3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and
- 3.7.7 *Prima facie* evidence which points to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgment).
- 3.8 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the matter falls within the jurisdiction of the Public Protector.
- 3.9 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong and what action should be taken?

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 the appointment of a Driver/Messenger by the Municipality in April 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection within the Municipality.

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 to prevent improper conduct, maladministration and irregular expenditure.

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

4.3 On analysis of the complaint, the following issues were identified for investigation:

4.3.1 Whether the appointment of a Driver/Messenger by the Municipality in April 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality; and if not

4.3.2 Whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure.

4.4 The Key Sources of information

4.4.1 Documents

- 4.4.1.1. A copy of the advertisement of the position of Messenger/Driver dated January 2017.
- 4.4.1.2. A copy of the re-advertisement of the position dated February 2017.
- 4.4.1.3. A copy of the Job Description of the Driver/Messenger position.
- 4.4.1.4. Copies of the Minutes of the Shortlisting Panel, dated 28 March 2017.
- 4.4.1.5. Copies of the Minutes of the Interview Panel, dated 04 April 2017.
- 4.4.1.6. A copy of the Appointment letter (undated).
- 4.4.1.7. Copies of Mr Qongo's two (2) CV's.
- 4.4.1.8. A copy of E-NaTIS Driver Query, dated 31 May 2019.
- 4.4.1.9. A copy of Mr Qongo's driving licence.

4.4.2 Correspondence between the Public Protector and:

- 4.4.2.1 Mr D Molaole, the Municipal Manager of the Municipality, dated 06 February 2020.

4.4.3 Legislation and other prescripts

4.4.3.1 The Constitution of the Republic of South Africa, 1996.

4.4.3.2 The Public Protector Act 23 of 1994.

4.4.3.3 The Local Government: Municipal Finance Management Act 56 of 2003. (MFMA)

4.4.3.4 The Local Government: Municipal Systems Act 32 of 2000. (Municipal Systems Act).

4.4.3.5 The Policy on Selection and Recruitment of the Municipality, 2016 (Policy).

4.4.4 Jurisprudence considered

4.4.4.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC).

4.4.4.2 *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016)* [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).

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

4.4.4.4 *The MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC).

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

4.4.5 Notice issued in terms of section 7(9) of the Public Protector Act

4.4.5.1 Notice was issued in terms of section 7(9) of the Public Protector Act to the then Acting Municipal Manager, Mr M W Molusi on 31 August 2020. He responded on 21 September 2020.

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

5.1 Regarding whether the appointment of a Driver/Messenger by the Municipality in April 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

Common cause or undisputed facts

5.1.1 It is common cause that the Municipality advertised the position of a Driver/Messenger in January 2017. The position was re-advertised in February 2017.

5.1.2 The requirements for the position of a Driver/Messenger, as stated in the first advertisement, included:

5.1.2.1 Grade 12;

5.1.2.2 A valid driver's licence; and

5.1.2.3 At least five (5) years' driving experience.

- 5.1.3 The requirement in terms of driving experience was reduced in the second advertisement from five (5) to three (3) years and that of Grade 12 was removed.
- 5.1.4 The Job Description of the post of a Driver/Messenger provided by the Municipality states that three (3) years driving experience is an essential requirement.
- 5.1.5 According to the Minutes of the Shortlisting Panel, dated 28 March 2017, four (4) candidates were shortlisted.
- 5.1.6 Interviews were conducted on 4 April 2017.
- 5.1.7 The Minutes of the meeting of the Interview Panel dated 4 April 2017 state that Mr Percy Qongo was the preferred candidate recommended for appointment.
- 5.1.8 On 10 April 2017, the then Acting Municipal Manager informed Mr Qongo of his appointment as the Driver/Messenger of the Municipality.
- 5.1.9 It appears from Mr Qongo's CV initially provided by the Municipality during the investigation that he has Grade 10. According to a second CV received from the Municipality, Mr Qongo has Grade 11. The difference and reasons why two CV's were submitted, were not explained by the Municipality during the investigation.
- 5.1.10 According to his CV, Mr Qongo had five (5) months' driving experience when he applied for the position.

Issues in dispute

- 5.1.11 The Complainant contended that the appointment of Mr Percy Qongo as Driver/Messenger by the Municipality was improper as he did not meet the requirements of the post, as advertised by the Municipality.

5.1.12 It appears from Mr Percy Qongo's driver's license obtained during the investigation that it was issued on 25 August 2016.

5.1.13 It was established from Ms M Rossouw, a Senior Administrative Officer at the eNaTIS call centre of the Department of Transport, Safety and Liaison, that a driver's licence was first issued to Mr Qongo on 25 August 2016.

5.1.14 The CV's of the other shortlisted candidates obtained during the investigation indicate that they had the requisite three (3) years driving experience at the time of their application for the position.

5.1.15 In the Municipal Manager's response to the complaint dated 6 February 2020, it was stated that the Corporate Services Department (Human Resource Unit) was not fully functional during 2017, due to a lack of sufficient capacity and further that:

“Administration concedes that the process or selection was not very clear to guide the ultimate decision making. We therefore commit to do corrective actions progressively”

5.1.16 In his response to the section 7(9) notice dated 21 September 2020, Mr Molusi conceded that he appointed Mr Qongo as Driver/Messenger in his capacity as the Acting Municipal Manager at the time. He also conceded that the appointment was not in accordance with the Policy. According to his response it was an oversight that is regretted. Mr Molusi further indicated that the Municipality had subsequently taken steps to ensure that Mr Qongo is capacitated to perform his functions.

Application of the relevant law

5.1.17 Section 55(1) of the Municipal Systems Act 32 of 2000 (Municipal Systems Act) provides, that as the head of the administration of a municipality, the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, *inter alia*, the appointment of staff other than managers directly accountable to the municipal manager, and the management, effective utilisation and training of staff.

5.1.18 Paragraph 6.3.1 of the Policy provides that selection criteria shall be objective and related to the inherent requirements of the job and realistic future needs of the Municipality. It states in this regard *inter alia* that:

“The central guiding principle for selection shall be competence in relation to the inherent requirements of the job provided that selection shall favour, as determined by the targets, suitably qualified applicants as defined in section 20(3) of the Employment Equity Act Unless formal or statutory qualifications are clearly justified as essential for the job, relevant experience/performance, training (internal/external) as reflected and measured through competencies, and potential for the prospective vacancy shall be an important criterion.”

5.1.19 The purpose of selection is, in terms of paragraph 6.3.2 of the Policy, to identify the most suitable candidates from all the persons who applied and to eliminate unsuitable candidates in the fairest way possible.

5.1.20 In terms of section 60(1)(a) of the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act.

Conclusion

- 5.1.21 Mr Qongo was not suitably qualified for the position of the Driver/Messenger, as advertised by the Municipality, as he did not have the requisite three (3) years driving experience stipulated as an essential requirement for the post.
- 5.1.22 Mr Qongo's appointment was not in accordance with the Policy as his qualifications and experience did not meet the job requirements of the position of the Messenger/Driver.
- 5.2. Regarding whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure:**

Common cause or undisputed facts

- 5.2.1 It is common cause that the Municipality advertised the position of Driver/Messenger in January 2017. The position was re-advertised in February 2017.
- 5.2.2 The essential requirements for the position of Driver/Messenger, as stated in the second advertisement and the Job Description included at least three (3) years' driving experience.
- 5.2.3 At the time, Mr Qongo applied for the position of Driver/Messenger of the Municipality, he had only five (5) months' driving experience.
- 5.2.4 Mr Qongo was appointed by the Municipality on 10 April 2017 on the basis of the second advertisement of February 2017.

5.2.5 As indicated in paragraph 5.1 above, Mr Qongo's appointment was not in accordance with the Policy that regulates the recruitment and selection of staff of the Municipality.

Application of the relevant law

5.2.6 Section 55(1) of the Municipal Systems Act 32 of 2000 provides, that as the head of the administration of a municipality, the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, *inter alia*, the appointment of staff other than managers directly accountable to the municipal manager, and the management, effective utilisation and training of staff.

5.2.7 Paragraph 6.3.1 of the Policy on Selection and Recruitment of the Municipality, 2016 (Policy) provides that selection criteria shall be objective and related to the inherent requirements of the job and realistic future needs of the Municipality.

"The central guiding principle for selection shall be competence in relation to the inherent requirements of the job provided that selection shall favour, as determined by the targets, suitably qualified applicants as defined in section 20(3) of the Employment Equity Act.

Unless formal or statutory qualifications are clearly justified as essential for the job, relevant experience/performance, training (internal/external) as reflected and measured through competencies, and potential for the prospective vacancy shall be an important criterion."

5.2.8 The purpose of selection is, in terms of paragraph 6.3.2 of the Policy, to identify the most suitable candidates from all the persons who applied and to eliminate unsuitable candidates in the fairest way possible.

- 5.2.9 Section 1 of the Local Government: Municipal Finance Management Act, 2003 (MFMA) defines irregular expenditure, *inter alia* as expenditure incurred by a municipality in contravention of or that is not in accordance with a requirement of the MFMA or the Municipal Systems Act, and which has not been condoned.
- 5.2.10 In terms of section 60(1)(a) of the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of this Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act.
- 5.2.11 Section 62(1)(d) of the MFMA, provides that the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorised, irregular and wasteful expenditure and other losses are prevented.

Conclusion

- 5.2.12 Mr Qongo's appointment as Driver/Messenger was not in accordance with the provisions of section 55(1) of the Municipal Systems Act as it did not comply with the policy considerations of the Municipality, i.e. the provisions of the Policy regulating the recruitment and selection of staff.
- 5.2.13 The remuneration paid to Mr Qongo from the date of his irregular appointment therefore constituted irregular expenditure, as contemplated by section 1 of the MFMA.
- 5.2.14 The conduct of the Municipality in appointing Mr Qongo as a Driver/ Messenger was improper, constitutes maladministration and resulted in irregular expenditure.

6. FINDINGS

6.1 Regarding whether the appointment of a Driver/Messenger by the Municipality in April 2017 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff of the Municipality:

6.1.1 The allegation that the appointment of a Driver/Messenger of the Municipality in April 2017 was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of the staff of the Municipality, is substantiated.

6.1.2 Mr Qongo did not have the requisite driving experience as required by the Municipality and was therefore not suitably qualified for the position.

6.2 Regarding whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure:

6.2.1 The allegation that the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure is substantiated.

6.2.2 The appointment of Mr Qongo was not in accordance with section 55(1) of the Municipal Systems Act as it did not comply with the Policy and resulted in irregular expenditure, as contemplated by section 1 of the MFMA.

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

7. REMEDIAL ACTION

- 7.1 The appointment by a municipality of employees is administrative action.
- 7.2 In the *Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others* 2004(6) SA 222 (SCA) the Supreme Court of Appeal ruled that until an administrative decision is set aside by a Court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.
- 7.3 This principle was confirmed by the Constitutional Court in *The MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC). The Court found that if public officials or administrators can, without recourse to legal proceedings, be allowed to disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, this would be a licence to self-help. It would be inviting officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The Court found that this would spawn confusion and conflict to the detriment of the administration and the public and that it would undermine the Court's supervision of the administration.³
- 7.4 In the matter of *Nkosinathi Lawrence Khumalo and another v MEC for Education: Kwazulu-Natal*, [2013] ZACC 46, the Constitutional Court held (at paragraph [28]) that the true nature of such an application to court is one of judicial review under the principle of legality, which is applicable to all exercises of public power and not only to 'administrative action', as defined in the Promotion of Administrative Justice Act, 2000. It requires that all exercises of public power are at a minimum, lawful and rational.

³ At para 89.

- 7.5 Consequently, it is not open to the Municipality to simply cancel its employment contract with Mr Qongo. A proper judicial review application has to be brought to firstly review the decision to appoint him and to declare the appointment invalid.
- 7.6 **Consequently, the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, is the following:**
- 7.6.1 **The Speaker of the Council of the Municipality:**
- 7.6.1.1 To take appropriate steps in respect of disciplinary action against Mr Molusi who was responsible for the irregular appointment of Mr Qongo as Driver/Messenger in his capacity as the Acting Municipal Manager of the Municipality, in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA, within sixty (60) business days from the date of my report.
- 7.6.2 **The Municipal Manager of the Municipality:**
- 7.6.2.1 To take appropriate steps in respect of disciplinary action against the other officials that were involved in the irregular appointment of Mr Qongo in terms of the disciplinary procedures of the Municipality envisaged in section 67(1)(h) of the Municipal Systems Act and section 171(4) of the MFMA within sixty (60) business days from the date of my report;
- 7.6.2.2 To institute proceedings for the judicial review of the irregular appointment of Mr Qongo within sixty (60) business days from the date of my report.

8 MONITORING

- 8.1 The Speaker of the Council of the Municipality to submit an action plan to me within 30 days from the date of receiving this report, indicating how the remedial action referred to in paragraph 7.6.1 above will be implemented.
- 8.2 The Municipal Manager of the Municipality to submit an action plan to me within 30 days from the date of receiving this report, indicating how the remedial action referred to in paragraph 7.6.2 above will be implemented.
- 9 The submission of the implementation plan and the implementation of my remedial action shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



**ADV BUSISIWE MKHWEBANE
THE PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA**

DATE: 9 / 12 /2020

Assisted by: Fayrial Adams