

**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 by the Kai!Garib
Local Municipality***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION RELATING TO THE APPOINTMENT OF THE ACTING
MUNICIPAL MANAGER BY THE KAI! GARIB LOCAL MUNICIPALITY IN THE
NORTHERN CAPE PROVINCE IN 2018**

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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 the Acting Municipal Manager by the Kai! Garib Local Municipality (Municipality) in the Northern Cape Province in 2018.
- (iii) The complaint was lodged by Mr A R Smith (Complainant) on 12 March 2018 with the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.
- (iv) In the main, the Complainant alleged that the Municipality was functioning without a suitably qualified Municipal Manager at the time. According to him, Mr I De Waal who was appointed by the Municipality as the Acting Municipal Manager on 1 February 2018, did not have the requisite qualifications for the position.
- (v) In essence, the Complainant alleged that the appointment by the Municipality of Mr De Waal as the Acting Municipal Manager was improper and constitutes maladministration.
- (vi) During the preliminary investigation of the matter, it transpired that the Municipality permanently appointed Mr De Waal as the Municipal Manager, with effect from 1 September 2019 and that he apparently did not qualify for the position.

- (vii) Based on the analysis of the complaint, the following issues were identified for the investigation:
- (a) Whether the appointment of Mr I De Waal as the Acting Municipal Manager by the Municipality on 01 February 2018 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality; and if not
 - (b) Whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure.
 - (c) Whether the appointment of Mr De Waal as the Municipal Manager by the Municipality on 01 September 2019 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality; and if not
 - (d) Whether the conduct of the Municipality was improper, constitutes maladministration and resulted in irregular expenditure.
- (viii) 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 and consideration and application of the relevant laws and prescripts. The documents obtained during the investigation were analysed and the relevant laws and other prescripts applied.
- (ix) Having considered the evidence and information obtained during the investigation, I make the following findings:

(a) Regarding whether the appointment of Mr I De Waal as the Acting Municipal Manager by the Municipality on 01 February 2018 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality:

(aa) The allegation that the appointment of Mr De Waal as the Acting Municipal Manager by the Municipality was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality, is substantiated.

(bb) Mr De Waal did not qualify for appointment in terms of section 54A of the Municipal Systems Act, 2000 (Municipal Systems Act) and the Local Government: Regulations on appointment and conditions of employment of Senior Managers, made in terms of the Municipal Systems Act and published on 17 January 2014 (Regulations), as he did not have the prescribed relevant experience.

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

(aa) The allegation that Mr De Waal's appointment by the Municipality as Acting Municipal Manager was improper, constitutes maladministration and resulted in irregular expenditure, is substantiated.

(bb) His appointment was in violation of the Municipal Systems Act and the Regulations and resulted in irregular expenditure, as contemplated by the Local Government: Municipal Finance Management Act, 2003

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

(c) Regarding whether the appointment of Mr De Waal as Municipal Manager by the Municipality on 01 September 2019 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality:

(aa) The allegation that the appointment of Mr De Waal as Municipal Manager by the Municipality on 1 September 2019 was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality, is substantiated.

(bb) Mr De Waal did not qualify for appointment in terms of section 54A of the Municipal Systems Act and the Regulations as he did not have the prescribed relevant experience.

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

(aa) The allegation that Mr De Waal's appointment by the Municipality as Municipal Manager was improper, constitutes maladministration and resulted in irregular expenditure, is substantiated.

(bb) His appointment as Municipal Manager was in violation of the Municipal Systems Act and the Regulations and resulted in irregular expenditure, as contemplated by the MFMA.

(cc) The Municipality's conduct accordingly constitutes improper conduct as envisaged by 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 Northern Cape MEC for Co-operative Governance Human Settlements and Traditional Affairs to:

(aa) Appoint a person or committee to investigate whether the conduct of Municipal Councillors of the Municipality in appointing Mr De Waal as the Acting Municipal Manager and subsequently as the Municipal Manager in violation of the provisions of the Regulations constitutes a breach of the Code of Conduct for Municipal Councillors as provided for in Schedule 1 to the Municipal Systems Act, and to take further action accordingly, within 60 business days from the date of this report.

(b) The Municipal Manager of the Municipality to:

(aa) To take appropriate steps in respect of disciplinary action against officials that were involved in the irregular appointment of Mr De Waal, 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;

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO THE APPOINTMENT OF THE ACTING MUNICIPAL MANAGER BY THE KAI! GARIB LOCAL MUNICIPALITY IN THE NORTHERN CAPE PROVINCE IN 2018

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 Mr Bentley Vass, the Member of the Executive Council of the Northern Cape Provincial Government responsible for Cooperative Governance, Human Settlements and Traditional Affairs;

1.2.2 Mr V Sacco, the Acting Speaker of the Council of the Kai! Garib Local Municipality (Municipality);

1.2.3 Mr M Louw, the Executive Mayor of the Municipality; and

1.2.4 Dr J Mac Kay, the Acting Municipal Manager of the Municipality.

1.3 A copy of the report is also provided to:

1.3.1 Mr Andre Smith, who lodged the complaint.

1.4 The report relates to an investigation into allegations of improper conduct and maladministration by the Municipality in connection with the appointment of the Acting Municipal Manager on 1 February 2018.

2. THE COMPLAINT

2.1 The complaint was lodged by Mr A R Smith (Complainant) on 12 March 2018 with the Northern Cape Provincial Office of the Public Protector South Africa.

2.2 In the main, the Complainant alleged that the Municipality was functioning without a suitably qualified Municipal Manager at the time. According to him, Mr I De Waal who was appointed by the Municipality as the Acting Municipal Manager on 1 February 2018, did not have the requisite qualifications for the position.

2.3 In essence, the Complainant alleged that the appointment by the Municipality of Mr De Waal as the Acting Municipal Manager was improper and constitutes maladministration.

2.4 During the preliminary investigation of the matter, it transpired that the Municipality permanently appointed Mr De Waal as the Municipal Manager, with effect from 1 September 2019 and that he apparently did not qualify for the position.

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:

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

² *Supra* at para [73].

- 3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 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 Mr De Waal as Acting Municipal Manager and thereafter as the Municipal Manager complied with the relevant laws and prescripts that regulate the appointment of senior managers of 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 the misappropriation of public funds.

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 Mr I De Waal as the Acting Municipal Manager by the Municipality on 01 February 2018 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality; and if not

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

4.3.3 Whether the appointment of Mr De Waal as the Municipal Manager by the Municipality on 01 September 2019 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality; and if not

4.3.4 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 Minutes of a Special Meeting of the Municipal Council meeting held on 30 January 2018.

4.4.1.2. A copy of a letter of the Mayor of the Municipality , Mr M Louw, addressed to the Member of the Executive Council for Cooperative Governance, Human Settlements and Traditional Affairs of the Northern Cape Provincial Government (MEC), dated 30 January 2028

4.4.1.2 A copy of the letter from the MEC to the Municipality, dated 14 February 2018.

4.4.1.3 Copies of the letters from the Mayor addressed to both the MEC and Minister of Cooperative Governance and Traditional Affairs (Minister), dated 16 March 2018.

4.4.1.4 Memorandum addressed to the Minister by the Executive Mayor of the Municipality, dated 17 April 2018.

4.4.1.5 A copy of Mr Isak De Waal's CV.

4.4.2 Correspondence between the Public Protector and:

4.4.2.1 The Municipality, dated 16 March 2018, 19 March 2018, 25 May 2020, 8 June 2020 and 17 June 2020

4.4.3 Legislation and other prescripts

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

4.4.2.2 The Public Protector Act 23 of 1994.

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

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

4.4.2.5 The Local Government: Regulations on appointment and conditions of employment of Senior Managers, made in terms of the Municipal Systems Act and published on 17 January 2014 (Regulations).

4.4.3 Notices issued in terms of section 7(9) of the Public Protector Act

4.4.3.1 A notice was issued in terms of section 7(9) of the Public Protector Act to the Speaker of the Council of the Municipality on 31 August 2020. The Acting Municipal Manager, Dr Mac Kay responded on 14 September 2020. No response was received from the Speaker.

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 Mr I De Waal as the Acting Municipal Manager by the Municipality on 01 February 2018 was in accordance with the relevant laws and prescripts regulating the recruitment of senior managers of the Municipality:

Common cause or undisputed facts

5.1.1 It is common cause that Mr De Waal was appointed by the Municipal Council as the Acting Municipal Manager of the Municipality, with effect from 01 February 2018.

5.1.2 He was the Acting Municipal Manager until he was permanently appointed in the position, as from 1 September 2019.

Issues in dispute

5.1.3 The Complainant contended that Mr De Waal did not meet the prescribed minimum requirements to act in the position of the Municipal Manager of the Municipality.

5.1.4 According to the Minutes of a Special Municipal Council meeting held on 30 January 2018, the Council resolved that Mr De Waal be appointed as Acting Municipal Manager of the Municipality from 01 February 2018.

5.1.5 It was further resolved that the Municipal Council should apply in writing to the “MEC/Minister” for a waiver of the prescribed post requirements of Acting Municipal Manager to appoint Mr De Waal for the period 1 February 2018 to 31 April 2018 as Acting Municipal Manager, in the interest of stability and growth in the Municipality.

5.1.6 On 30 January 2018, the Mayor of the Municipality, Mr M Louw, approached the Member of the Executive Council for Cooperative Governance, Human Settlements and Traditional Affairs of the Northern Cape Provincial Government (MEC), in writing, requesting a waiver of the prescribed minimum requirements for the position of Acting Municipal Manager, in terms of section 54A(10) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act), in order to appoint Mr De Waal.

5.1.7 The MEC responded on 14 February 2018, indicating that Mr De Waal did not meet the minimum requirement of five years’ experience at a senior management level and that the Municipal Council should terminate his contract.

5.1.8 On 16 March 2018, the Executive Mayor wrote to the MEC and the Minister of Cooperative Governance and Traditional Affairs (Minister), again requesting a waiver of the prescribed minimum requirements of the position of Acting Municipal Manager, in terms of section 54A(10) of the Municipal Systems Act.

5.1.9 The Executive Mayor submitted a further Memorandum to the Minister on 17 April 2018, requesting a waiver of the prescribed minimum requirements.

5.1.10 In the Memorandum, the Executive Mayor stated *inter alia* that:

“Council is of the view that retaining Mr De Waal to act in the Municipal Manager position will not only be one of consistency for the municipality but also ensure stability and growth for Kai! Garib Municipality”.

5.1.11 No evidence was found during the investigation that the Minister responded to the Executive Mayor and granted the requested waiver of the minimum requirements and that the MEC granted an extension of the three months appointment of Mr De Waal.

5.1.12 According to his CV obtained from the Municipality during the investigation, Mr De Waal has a BA Degree in Municipal Governance. The only management experience indicated is that of team manager of the 3rd Rugby Team of a University Rugby Club, in 2003.

5.1.13 In a response to the section 7(9) notice dated 14 September 2020, the Acting Municipal Manager, Dr J Mac Kay agreed with the finding of the Public Protector that Mr De Waal’s appointment as the Acting Municipal Manager was not in accordance with the Local Government: Regulations: Appointment and Conditions of Service of Senior Managers (referred to below). He further confirmed that the

Municipality applied to the MEC and the Minister for the waiver of the minimum requirements, but did not receive any approval thereof.

Application of the relevant law

5.1.15 Section 54A of the Municipal Systems Act, 2000 regulates the appointment of municipal managers and acting municipal managers, and provides *inter alia* that:

- “(1) *The municipal council must appoint-*
- (a) *a municipal manager as head of the administration of the municipal council; or*
 - (b) *an acting municipal manager under circumstances and for a period as prescribed.*
- (2) *A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.*
- (2)A(a) *A person appointed in terms of subsection (1)(b) may not be appointed to act for a period that exceeds three months.*
- (b) *A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.*
- (3) *A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-*

- (a) *the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or*
- (b) *the appointment was otherwise made in contravention of this Act. (emphasis added)*

(10) A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (2) if it is unable to attract suitable candidates.

5.1.16 The Local Government: Regulations on appointment and conditions of employment of Senior Managers made in terms of the Municipal Systems Act and published on 17 January 2014 (Regulations), regulates, *inter alia*, the competence requirements for senior managers of municipalities.

5.1.17 Regulation 1 of the Regulations provides that “*senior manager*” means a municipal manager or acting municipal manager, appointed in terms of section 54A of the Municipal Systems Act.

5.1.18 In terms of Regulation 9(2), a person appointed as a municipal manager or acting municipal manager must comply with the minimum requirements for higher education qualification, work experience and knowledge as set out in Annexure B.

5.1.19 The higher education qualification required for a municipal manager or acting municipal manager in terms of Annexure B is a Bachelor Degree in Public Administration, Political Sciences, Social Sciences or equivalent. Five (5) years’ relevant experience at a senior management level is stated as a further minimum requirement.

5.1.20 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.

Conclusion

- 5.1.21 Mr De Waal's appointment as Acting Municipal Manager by the Municipal Council on 1 February 2018 was not in accordance with the provisions of section 54A of the Municipal Systems Act and the Regulations that regulate the appointment of Senior Managers.
- 5.1.22 Mr De Waal did not qualify for the position as he had no relevant experience at a senior management level.
- 5.1.23 Despite having been advised by the MEC to terminate Mr De Waal's appointment as Acting Municipal Manager, the Municipal Council retained him in the position until the end of August 2019.
- 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 Mr De Waal was appointed by the Municipal Council of the Municipality as the Acting Municipal Manager of the Municipality with effect from 01 February 2018.
- 5.2.2 As indicated in paragraph 5.1 above, Mr De Waal's appointment as Acting Municipal Manager was not in accordance with the relevant provisions of the

Municipal Systems Act and the Regulations regulating the appointment of senior managers of the Municipality.

Application of the relevant law

5.2.3 The relevant provisions of the applicable laws and prescripts are referred to in paragraphs 5.1.15 to 5.1.20 above.

Conclusion

5.2.4 Due to the fact that Mr De Waal did not have the experience prescribed by the Regulations and as no waiver was granted by the Minister, Mr De Waal's appointment as Acting Municipal Manager was null and void, as contemplated by section 54A(3) of the Municipal Systems Act.

5.2.5 His appointment as Acting Municipal Manager by the Municipal Council was in violation of the provisions of section 54A of the Municipal Systems Act and the Regulations.

5.2.6 It was therefore improper and constitutes maladministration. Mr De Waal's appointment as Acting Municipal Manager further resulted in irregular expenditure, as contemplated by the MFMA.

5.3 Regarding whether the appointment of Mr De Waal as the Municipal Manager by the Municipality on 01 September 2019 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality:

Common Cause issues or undisputed issues

- 5.3.1 It is common cause that the Municipality advertised the position of Municipal Manager on 3 July 2019.
- 5.3.2 Three candidates were shortlisted, and interviewed by the Interview Panel.
- 5.3.3 The Executive Mayor chaired the Interview Panel. It was recorded in the Minutes that the appointment of the Municipal Manager would be made in terms of the Municipal Systems Act and the Regulations.
- 5.3.4 The Interview Panel recommended to the Municipal Council that Mr De Waal be appointed as the Municipal Manager with effect from 1 September 2019.
- 5.3.5 The Municipal Council resolved at a meeting held on 30 August 2019 to appoint Mr De Waal as the Municipal Manager with effect from 1 September 2019. The Executive Mayor signed Mr De Waal's letter of appointment on the same day, in terms of which he was appointed from 1 September 2019 to 31 August 2022.

Issues in dispute

- 5.3.6 According to the "Masterlist" of applicants for the position of Municipal Manager that was compiled by the Municipality, Mr De Waal was the Acting Municipal Manager at the time.
- 5.3.7 His qualifications indicate a BA Degree in Municipal Governance. In terms of experience, the list states that Mr De Waal was a Risk Manager at the Municipality, but there is no indication of the period of service in this regard. Further, that he had experience as a substitute teacher.

5.3.8 According to Mr De Waal's CV that was provided by the Municipality during the investigation, his only management experience was as a Team Manager of a University Rugby Team in 2003. No reference is made of any senior management experience in local government.

5.3.9 No further details of any relevant experience on the part of Mr De Waal were provided by the Municipality during the investigation.

Application of the relevant law

5.3.10 Section 54A of the Municipal Systems Act, 2000 regulates the appointment of municipal managers and acting municipal managers, and provides *inter alia* as follows:

“(1) The municipal council must appoint-

(a) a municipal manager as head of the administration of the municipal council; or

(b) an acting municipal manager under circumstances and for a period as prescribed.

(2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.

(2)A(a) A person appointed in terms of subsection (1)(b) may not be appointed to act for a period that exceeds three months.

(b) A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated

in paragraph (a), for a further period that does not exceed three months.

(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-

(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or

(b) the appointment was otherwise made in contravention of this Act.

(4) If the post of municipal manager becomes vacant, the municipal council must-

(a) advertise the post nationally to attract a pool of candidates nationwide; and

(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.

(5) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.

(10) A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (2) if it is unable to attract suitable candidates.

5.3.11 The Regulations provide, *inter alia*, for the competence requirements for senior managers of municipalities.

- 5.3.12 Regulation 1 of the Regulations provides that “*senior manager*” means a municipal manager or acting municipal manager, appointed in terms of section 54A of the Municipal Systems Act.
- 5.3.13 In terms of Regulation 9(2), a person appointed as a municipal manager or acting municipal manager must comply with the minimum requirements for higher education qualification, work experience and knowledge as set out in Annexure B.
- 5.3.14 The higher education qualification required for a municipal manager or acting municipal manager in terms of Annexure B is a Bachelor Degree in Public Administration, Political Sciences, Social Sciences or equivalent. Five (5) years’ relevant experience at a senior management level is stated as a further minimum requirement.
- 5.3.15 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.

Conclusion

- 5.3.16 Mr De Waal’s appointment as Municipal Manager by the Municipal Council with effect from 1 September 2019 was not in accordance with the provisions of section 54A of the Municipal Systems Act and the Regulations that regulate the appointment of senior managers of the Municipality
- 5.3.17 Mr De Waal did not qualify for the position as he had no relevant experience at a senior management level. He should not have been shortlisted or interviewed for the position. His appointment as Acting Municipal Manager in February 2018 was improper and irregular, as indicated in paragraph 5.1 above and could accordingly

not have been to his advantage when candidates were considered for the position of Municipal Manager.

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

Common Cause issues or undisputed issues

5.4.1 It is common cause that the Municipal Council of the Municipality resolved to appoint Mr De Waal as the Municipal Manager with effect from 1 September 2019.

5.4.2 As indicated in paragraph 5.3 above, Mr De Waal's appointment as Municipal Manager was not in accordance with the relevant provisions of the Municipal Systems Act and the Regulations that regulates that appointment of senior managers of the Municipality.

Application of the relevant law

5.4.3 The relevant provisions of the applicable laws and prescripts are referred to in paragraphs 5.3.10 to 5.3.15 above.

Conclusion

5.4.4 Mr De Waal's appointment as Municipal Manager by the Municipal Council was in violation of the provisions of section 54A of the Municipal Systems Act and the Regulations.

- 5.4.5 As he did not have the relevant experience as required by the Regulations, his appointment was null and void, as contemplated by section 54A(3) of the Municipal Systems Act.
- 5.4.6 His appointment as Municipal Manager was therefore improper and constitutes maladministration. It further resulted in irregular expenditure, as contemplated by the MFMA.

6. FINDINGS

6.1 Regarding whether the appointment of Mr I De Waal as the Acting Municipal Manager by the Municipality on 01 February 2018 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality:

- 6.1.1 The allegation that the appointment of Mr De Waal as the Acting Municipal Manager by the Municipality was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality, is substantiated.
- 6.1.2 Mr De Waal did not qualify for appointment in terms of section 54A of the Municipal Systems Act and the Regulations as he did not have the prescribed relevant experience.

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

- 6.2.1 The allegation that Mr De Waal's appointment by the Municipality as Acting Municipal Manager was improper, constitutes maladministration and resulted in irregular expenditure, is substantiated.

6.2.2 His appointment was in violation of the Municipal Systems Act and the Regulations and resulted in irregular expenditure, as contemplated by the MFMA.

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

6.3 Regarding whether the appointment of Mr De Waal as Municipal Manager by the Municipality on 01 September 2019 was in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality:

6.3.1 The allegation that the appointment of Mr De Waal as Municipal Manager by the Municipality on 1 September 2019 was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of senior managers of the Municipality, is substantiated.

6.3.2 Mr De Waal did not qualify for appointment in terms of section 54A of the Municipal Systems Act and the Regulations as he did not have the prescribed relevant experience.

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

6.4.1 The allegation that Mr De Waal's appointment by the Municipality as Acting Municipal Manager was improper, constitutes maladministration and resulted in irregular expenditure, is substantiated.

- 6.4.2 His appointment as Municipal Manager was in violation of the Municipal Systems Act and the Regulations and resulted in irregular expenditure, as contemplated by the MFMA.
- 6.4.3 The Municipality's conduct accordingly constitutes improper conduct as envisaged by 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 As indicated above, the decisions of the Municipal Council to appoint Mr De Waal first as the Acting Municipal Manager and subsequently as Municipal Manager were null and void, by virtue of the provisions of section 54A(3) of the Municipal Systems Act.
- 7.2 Mr De Waal resigned from the Municipality on 31 July 2020.
- 7.3 Schedule 1 to the Local Government Municipal Systems Act provides for a Code of Conduct for Municipal Councillors (Code of Conduct)
- 7.4 Item 2 of the Code states that:
- “A councillor must-*
- (a) Perform the functions of office in good faith, honestly and in a transparent manner; and*
 - (b) 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.”*
- 7.5 Breaches of the Code are regulated by Item 14 of the Code of Conduct. Item 14(4) provides that the MEC for local government may appoint a person or a committee to investigate any alleged breach of a provisions of the Code and to

make a recommendation on whether the councillor should be suspended or removed from office.

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

7.6.1 The Northern Cape MEC for Co-operative Governance Human Settlements and Traditional Affairs to:

7.6.1.1 Appoint a person or committee to investigate whether the conduct of Municipal Councillors of the Municipality in appointing Mr De Waal as the Acting Municipal Manager and subsequently as the Municipal Manager in violation of the provisions of the Regulations, constitutes a breach of the Code of Conduct and to take further action accordingly, within 60 business days from the date of this report.

7.6.2 The Municipal Manager of the Municipality to:

7.6.3 To take appropriate steps in respect of disciplinary action against officials that were involved in the irregular appointment of Mr De Waal as Acting Municipal Manager and Municipal Manager, 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 this report.

8 MONITORING

8.1.1 The Northern Cape MEC for Co-operative Governance Human Settlements and Traditional Affairs 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.

8.1.2 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.

8.1.2 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: 4 / 12 /2020

Assisted by: PII Coastal, Public Protector South Africa