

**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**

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*“Allegations of improper conduct and maladministration by the! Kheis Local Municipality
in the Northern Cape Province”*

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION BY THE !KHEIS LOCAL MUNICIPALITY IN THE
NORTHERN CAPE PROVINCE RELATING TO THE PAYMENT OF THE MONTHLY
CONTRIBUTIONS OF MR JAFTA BOTHMAN TO THE CAPE JOINT PENSION FUND,
LETSATSI FINANCE, AVBOB AND OLD MUTUAL IN 2018**

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Executive Summary

- (i) This is a report of 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 the 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 by the !Kheis Local Municipality in the Northern Cape Province (the Municipality) relating to the payment of the monthly contributions of Mr Jafta Bothman to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual in 2018.
- (iii) The complaint was lodged by Mr Jafta Bothman (the Complainant) on 18 June 2019 at the Upington Regional Office of the Public Protector South Africa (PPSA).
- (iv) The Complainant alleged that the Municipality failed to pay contributions deducted from his salary to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB Mutual Society (AVBOB) and Old Mutual Limited (Old Mutual).
- (v) In July 2018, the Municipality took a decision to stop deductions per stop orders from employees' salaries and making direct payments to identified beneficiaries. However, the Municipality continued to deduct his monthly contributions, but failed to pay them to the beneficiaries.
- (vi) In essence, the Complainant alleged that failure by the Municipality to pay the monthly contributions deducted from his salary to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual was improper, constitutes maladministration and prejudiced him.

- (vii) Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
- (a) Whether the Municipality failed to pay the Complainant's monthly contributions to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual and if yes, whether such conduct was improper, constitutes maladministration and prejudiced him.
- (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, meetings with officials, an analysis of the relevant documents and information obtained during the investigation and consideration and application of the relevant laws and prescripts.
- (ix) Having considered the evidence and information obtained during the investigation, the following findings are made:
- (a) **Regarding whether the Municipality failed to pay the Complainant's monthly contributions to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual and if yes, whether such conduct was improper, constitutes maladministration and prejudiced him:**
 - (aa) The allegation that the Municipality failed to pay the Complainant's monthly contributions to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual from June 2018, is substantiated.
 - (bb) The allegation that the conduct of the Municipality prejudiced the Complainant is also substantiated as it caused the Complainant to default on his obligations towards the said beneficiaries and exposed him to the risk of forfeiting the benefits that these contributions sought to secure. The Municipality failed to comply with

its duties towards the Complainant as well as other employees that potentially found themselves in the same situation than the Complainant, in violation of section 62 of the MFMA, section 13A of the PFA, section 195 of the Constitution and the Code.

- (cc) The conduct of the Municipality in this regard 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. It also prejudiced the Complainant who became indebted to the entities to whom the payments deducted from his salary had to be made.
- (x) **The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:**
- (a) **The Acting Municipal Manager of the Municipality:**
- (aa) Within **60 (sixty) working days** from the date of the report, take appropriate steps to conduct a full audit of its payroll system with effect from May 2018 to date, to verify that all contributions deducted from its employees after suspension of the stop order system, were paid over to the beneficiaries for which such contributions were intended, and to identify any other employees whose beneficiaries were not paid accordingly.
- (bb) Within **ninety (90) working days** of the date of this report, engage the National and Provincial Treasuries to assist in restoring any benefits that may have been suspended as a direct result of the maladministration found by the Public Protector on the part of the Municipality, by inter alia paying the outstanding arrears to the Pension Fund and other entities that have not received payments of the amounts deducted from the salary of the Complainant and other employees of the Municipality that is due to them

since May 2018, in order to comply with the provisions of section 13A of the Pension Funds Act, 1956 (PFA) and section 62 of the Municipal Finance Management Act, 2003 (MFMA).

- (cc) Take appropriate steps in respect of disciplinary action against the officials of the Municipality whom a determination has been made that they contributed to the expenditure mismanagement of the Municipality, which resulted in the failure to make payments to the Pension Fund and other entities, as agreed with the employees of the Municipality, of the amounts that were deducted from their salaries from May 2018 in respect thereof, **within sixty (60) working days** from the date of the report in terms of the Code and the Municipality's systems and procedures as envisaged by section 67(1)(h) and (i) of the Municipal Systems Act, 2000.
- (dd) Apologise in writing to the Complainant and other affected employees of the Municipality for the failure to pay the amounts deducted from their salaries to the Pension Fund and other beneficiaries and informing them of the steps that are being taken to remedy the situation, within **thirty (30) working days** from the date of the report.
- (ee) Establish, within **one hundred and twenty (120) working days** from the date of the report, an internal complaints mechanism to ensure that complaints against process failures and internal control deficiencies of the Municipality are expeditiously resolved.
- (ff) Ensure that the Internal Audit Unit, on an annual basis, review the adequacy and effectiveness of the Municipality's system of internal control to manage risks and ensure compliance in terms of section 165 of the MFMA.

- (gg) Ensure that the Audit Committee of the municipality, in all its quarterly meetings, consider the internal audit, AGSA and other related reports to ensure that the recommendations are implemented in terms of section 166 of the MFMA; and
 - (hh) Submit a report to the Council on the implementation of the remedial action taken in paragraphs (x)(a)(aa) to (gg) above **within sixty (60) working days** from the date of the report and provide the Public Protector with a copy thereof.
- (b) The Speaker of the Municipality to:**
- (aa) Take the appropriate steps to ensure that the Municipal manager regularly reports to the Council on all expenditure incurred by the Municipality on staff benefits, as contemplated by section 66 of the MFMA.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE !KHEIS LOCAL MUNICIPALITY IN THE NORTHERN CAPE PROVINCE RELATING TO THE PAYMENT OF THE MONTHLY CONTRIBUTIONS OF MR JAFTA BOTHMAN TO THE CAPE JOINT PENSION FUND, LETSATSI FINANCE, AVBOB AND OLD MUTUAL IN 2018

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 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 the investigation and the remedial action taken:

1.2.1 Dr Zamani Saul, the Premier of the Northern Cape Province;

1.2.2 Mr B Vass, the Northern Cape MEC for Cooperative Governance, Human Settlements and Traditional Affairs (COGHSTA);

1.2.3 Mr BS Lenkoe, the Head of the Northern Cape Department of COGHSTA;

1.2.4 Mr Koos Esau, the Speaker of the !Khei Local Municipality (Municipality);

1.2.5 Mr Rolf Christie, the Mayor of the Municipality; and

1.2.6 Mr C S van Eck, the Acting Municipal Manager of the Municipality.

1.3 A copy of the report is also provided to Mr Jafta Bothman, who lodged the complaint.

1.4 The report relates to an investigation into allegations of improper conduct and maladministration by the Municipality relating to the payment of the monthly contributions of Mr Jafta Bothman to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual, in 2018.

2. THE COMPLAINT

2.1. The complaint was lodged by Mr Jafta Bothman (the Complainant) on 18 June 2019 at the Upington Regional Office of the Public Protector South Africa (PPSA).

2.2. The Complainant alleged that the Municipality failed to pay contributions deducted from his salary to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual.

2.3. In July 2018, the Municipality took a decision to stop deductions per stop orders from employees' salaries and making direct payments to identified beneficiaries. However, the Municipality continued to deduct his monthly contributions, but failed to pay it to the beneficiaries.

2.4. In essence, the Complainant alleged that the failure by the Municipality to pay the monthly contributions deducted from his salary to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual was improper, constitutes maladministration and prejudiced him.

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) of the Constitution 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

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

or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”²

3.6 The Constitutional Court further held that:

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);

² *Supra* at para [73].

- 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 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords 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.

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

3.7.4 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);

3.7.5 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

3.7.6 *Prima facie* evidence which point 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 powers 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 Municipality failed to pay the Complainant's monthly contributions deducted from his salary to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual and if yes, whether such conduct was improper, constitutes maladministration and prejudiced him.

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 prejudice.

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 issue was identified to inform and focus the investigation:

4.3.1 Whether the Municipality failed to pay the Complainant's monthly contributions to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual and if yes, whether such conduct was improper, constitutes maladministration and prejudiced him.

4.4 The Key Sources of information

4.4.1 Documents and correspondence with the PPSA

4.4.1.1. A copy of the allegations letter sent to Mr TF Leeuw, the Municipal Manager dated 5 August 2020.

4.4.1.2. A copy of an e-mail from Mr D Block, the Chief Financial Officer of the Municipality, dated 17 August 2020.

4.4.1.3. A copy of an e-mail from Mr F Leeuw, the Municipal Manager of the Municipality dated 30 June 2021.

4.4.1.4. Letter from Mr APJ Griesel, the Manager: Financial Administration of AVBOB Mutual Assurance Society, dated 4 July 2019.

- 4.4.1.5. Letter from Mr Carlo Subban, the Legal Advisor at Momentum Corporate dated 26 July 2019.
- 4.4.1.6. Letter from Mr Leeuw, dated 13 October 2020.
- 4.4.1.7. Letter from Mr Leeuw dated 4 November 2020.
- 4.4.1.8. Copy of a letter from the Deputy Director-General: Intergovernmental Relations of the National Treasury to the Municipality, dated 30 November 2018.
- 4.4.1.9. Letter from Ms S Mahonie, former Acting Chief Financial Officer of the Municipality, dated 23 February 2021.
- 4.4.1.10. Copy of the Acknowledgement of Debt and Deed of Settlement Agreement entered into between the Consolidated Retirement Fund for Local Government and the Municipality, dated 22 July 2021
- 4.4.1.11. Email received from Ms Charlene Hendricks, Team Leader: Contributions of the Consolidated Retirement Fund for Local Government, dated 1 October 2021.

4.4.2. Meetings held

- 4.4.2.1 Meeting held on 21 January 2022 with Mr Floyd Leeuw, the Municipal Manager of the Municipality.
- 4.4.2.2. Meeting held on 2 February 2022 with Mr C S van Eck, the Acting Municipal Manager of the Municipality.

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 No 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 No 32 of 2000. (Municipal Systems Act).

4.4.3.5. The Pension Funds Act 24 of 1956.

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

4.4.4.1. A Notice was issued in terms of section 7(9) of the Public Protector Act to Mr Floyd Leeuw, the Municipal Manager of the Municipality, on 22 December 2021 and Mr C S van Eck, the Acting Municipal Manager of the Municipality on 20 January 2022 respectively, affording them an opportunity to respond to the evidence obtained during the investigation. They both responded to the section 7(9) Notices and their responses are incorporated in the report.

4.4.4.2. Letters were also sent to Dr Zamani Saul, the Premier of the Northern Cape, Mr B S Lenkoe, the Head of Department of COGHSTA, Mr B Vaas, the MEC for COGHSTA to note the contents of the section 7(9) Notice, in as far as it affects or impact on them, on 22 December 2021. No responses were received from them.

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 Municipality failed to pay the Complainant's monthly contributions to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual and if yes, whether such conduct was improper, constitutes maladministration and prejudiced him

Common cause or undisputed facts

- 5.1.1. It is common cause that the Complainant is employed by the Municipality as a "Waterklerk Topline", since 1 July 1997.
- 5.1.2. The evidence obtained during the investigation shows that the Municipality made monthly deductions from the Complainant's salary towards Letsatsi Finance, AVBOB, Old Mutual and the Cape Joint Pension Fund (Pension Fund), until May 2018, but that the deducted amounts were not paid over to the beneficiaries.
- 5.1.3. Mr D Block, the Chief Financial Officer (CFO) of the Municipality indicated during the investigation, in an email dated 17 August 2020, that the Complainant was refunded an amount of R7 407.55 on 17 July 2019, in respect of all the deductions made from his salary that were not paid over to Letsatsi Finance. A further payment of R8 844.02 in this regard was made to the Complainant on 25 July 2019.
- 5.1.4. According to the Complainant's salary advices, the Municipality made the last deduction for payment to Old Mutual on 25 May 2018. The Municipality made no deductions from his salary towards Old Mutual as from June 2018 and his monthly contribution was paid to the Complainant as part of his salary.
- 5.1.5. In his letter in response to the complaint, dated 4 July 2019, Mr A P J Griesel, the Manager: Financial Administration of AVBOB Mutual Assurance Society stated

that AVBOB had reviewed the premium payment history of the Complainant's policy and the records indicate that stop order deductions were paid by the Municipality as from August 2011 up to May 2018. Mr Griesel further stated that no deductions were made from the Complainant's salary towards AVBOB, as from 1 June 2018.

- 5.1.6. Mr Carlo Subban, the Legal Advisor at Momentum Corporate responded on behalf of the Consolidated Retirement Fund for Local Government and Momentum Retirement Administrators in a letter dated 26 July 2019. He stated that the Municipality is a participating employer in the Consolidated Retirement Fund for Local Government (Fund), which is administered by Momentum. Mr Subban further indicated that the Municipality has been in arrears with the payment of contributions of employees of the Municipality as from October 2018. By the end of June 2019, the outstanding amount was R3 222 081.44. The Fund obtained default judgment in the High Court against the Municipality for the November 2018, December 2018, January 2019 and February 2019 outstanding contributions. He further stated that the Fund was in the process of instituting legal proceedings against the Municipality for the other outstanding amounts.
- 5.1.7. It is common cause that the Municipality did not pay the Complainant's monthly contributions to the Pension Fund even though the deductions appear on the Complainant's payslip.

Issues in dispute

- 5.1.8. From the documents obtained during the investigation it was found that the then Acting Municipal Manager of the Municipality, Mr D Jacobs informed AVBOB in writing on 29 August 2018 that the Municipality had decided to cancel all stop orders agreements of employees due to the inherent risk that it posed to the Municipality. He stated, *inter alia*, that:

“The latter decision was informed and or brought about by our current financial position, in that salaries were paid late for the months of May 2018 as well as June 2018 and we were as a result unable to pay over any deductions that were made from salaries. The above stance is also consistent with preventing similar occurrence from happening in future as we are not quite out of the woods yet as it regards our financial position”.

5.1.9. In his response to the allegations during the investigation, in a letter dated 13 October 2020, Mr Floyd Leeuw, the Municipal Manager of the Municipality stated that:

5.1.9.1. His preliminary investigation into the matter revealed that the Municipality did not comply with the Division of Revenue Act and therefore R6.4 million would be offset from its equitable share and returned to the National Revenue Fund.

5.1.9.2. The Northern Cape Provincial Treasury was duly informed of the situation, which meant that the Municipality would be R6.5 million poorer for the 2018/2019 financial year. He stated that:

“Having mentioned this, I must hasten to add that there has been some dereliction of duty from the side of those charged with the financial management have been economical with the truth in reporting to Council with regard to the following concerns you raised:

The joint pension fund had not been paid despite the fact that there were opportunities to do so during the transfer of the Equitable Share to reduce the arrears. This came to the fore during our recent extensive internal audit exercise in July 2020 and the matter was reported to the Mayor and Chairperson of the Audit Committee. My assertion is in no way indicating that the contributions to the fund would have been up to date, but the age

analysis could have been reduced to at least three months. We have introduced internal control and transaction control systems where all payments have to be authorised and prioritised by the Accounting Officer to negate this issue. We have also paid up to date all those that have retired, were dismissed or are about to retire”

- 5.1.9.3. Mr Leeuw further stated that the Municipality took a decision in the previous financial year that employees must be responsible for their payment to third parties including Letsatsi, personal insurance, etc. The administrative burden of stop orders was cumbersome and led to many adverse findings by the Auditor General South Africa. He stated that: *“The CFO assured me that the administrative process has been handled and all variances were corrected for all employees including the complainant.”*
- 5.1.10. Mr Leeuw provided a further response during the investigation, on 4 November 2020 in which he explained that the Municipality contravened section 22(4)(a) of the Division of Revenue Act as it utilised the grant for operational expenditure to pay salaries. He stated that: *“National Treasury will use the opportunity to offset the unspent conditional grants if the funds are not available in the municipality’s bank by the end of the financial year which will subsequently be returned to the National Revenue Fund”*.
- 5.1.11. He further indicated that Mr Davy Jacobs who was the Municipal Manager at the time this happened, has since been dismissed from the Municipality for an unrelated matter.
- 5.1.12. Mr Leeuw also submitted copy of a letter from the Deputy Director-General: Intergovernmental Relations of the National Treasury, dated 30 November 2018, which was the approval to his request on 19 November 2018 for the repayment

of R6, 6 million of unspent grants for the 2017/18 financial year. The amount was to be repaid as follows:

5.1.12.1. December 2018: 1.9 million

5.1.12.2. March 2019: R1.9 million

5.1.12.3. July 2019: R2.6 million.

5.1.13. Ms S Mahonie, the former Acting Chief Financial Officer (CFO) of the Municipality responded to the allegations on 23 February 2021. She stated that when she started to act as CFO on 15 March 2018, the Municipality had a bank balance of R 1 046 645 (grants included), which should have been R9 418 367.89, according to the financial reports. The outstanding creditors as reported to the National and Provincial Treasury amounted to R 10 094 387 and debtors to R60 037 736.

5.1.14. She also stated that it was reported to the Council on 17 March 2018 that R9, 6 million was owed “*to the conditional grants, which had been used for operational expenses.*” Revenue received on debtors’ accounts was just enough to pay employees’ salaries and in some months employees got paid in batches as there was not enough funds to pay all at once.

5.1.15. Ms Mahonie further stated that in May 2018, the then Acting Municipal Manager called a meeting to inform all staff on the financial position of the Municipality and that there might be a possibility that salaries would not be paid as there were not sufficient funds in the bank account.

5.1.16. Further, that she and the then Acting Municipal Manager met with the National Treasury in October 2018, explaining the Municipality’s financial predicaments and requesting financial assistance. They were advised that the Council should

take a resolution apologising for using conditional grant monies to pay salaries and submit a repayment plan to the National Treasury.

- 5.1.17. On the last day that Ms Mahonie was acting as CFO, the Municipality's payment of pension fund contributions was four months in arrears due to financial difficulties.
- 5.1.18. It was noted during the investigation that News24 published an article on 13 December 2020 under the heading: '*1 600 municipal employees pensions have lapsed due to 'non-payment of pension fund contributions*³'. Mr Tito Mboweni, the former Minister of Finance, in a reply to a Parliamentary question from the DA MP Samantha Graham, stated that the Free State, North West and Northern Cape were mostly affected by the default in pension fund contributions.
- 5.1.19. According to the *Acknowledgement of Debt and Deed of Settlement Agreement* entered into between the Consolidated Retirement Fund for Local Government and the Municipality, dated 22 July 2021, the Municipality agreed to pay the Consolidated Retirement Fund for Local Government R1 500 000.00 on or before 31 July 2021, R2 000 000.00 on or before 30 September 2021 and R2 000 000.00 on or before 30 December 2021.
- 5.1.20. In an email dated 30 June 2021 received by the PPSA investigation team from Mr Floyd Leeuw, the Municipal Manager of the Municipality, he stated that he had engaged the attorneys representing the Pension Fund and informed them that the Municipality was willing to pay a lump sum exceeding R2 million in the second week of July 2021 to reduce the arrears while continuing to pay the current account.
- 5.1.21. In an email, dated 28 September 2021 received from Mr Leeuw, he indicated that the Municipality had made a payment plan with the Pension Fund where an

³ <https://www.news24.com/news24/southafrica/news/1-600-municipal-employees-pension-fund>.

agreement was entered into for the Municipality to pay the Pension Fund the outstanding arrears over three (3) tranches.

5.1.22. In a response to a request for an update on the claims status of Municipal officials who had retired during the period when the Municipality did not make contributions to the Pension Fund, Ms Charlene Hendricks, Team Leader: Contributions of the Consolidated Retirement Fund for Local Government provided the claims status in an email, dated 1 October 2021 as follows:

5.1.22.1. JK Esau: Claim Finalised.

5.1.22.2. E Job: Claim Finalised.

5.1.22.3. SM Jansen: Outstanding claim form.

5.1.22.4. P Sauls: Pending claim payment.

5.1.22.5. H van Staden: Pending Death Claim Investigation.

5.1.22.6. D Booysen: Pending Death Claim Investigation.

5.1.22.7. S de Wee: Arrear contributions and Outstanding claim form.

5.1.22.8. D Mouton: Arrear contributions.

5.1.22.9. B Geswind: Arrear contributions - Retirement 31/10/2019.

5.1.23 In a response to the Notice issued in terms of section 7(9) of the Public Protector Act on 20 December 2021 during the investigation, in a meeting held on 21 January 2022, Mr Floyd Leeuw, the Municipal Manager of the Municipality stated that he cooperated with the Public Protector during the investigation and also tried to address the issue of non-payment of third parties which led to the conclusion of the Settlement Agreement between the Municipality and the Pension Fund.

5.1.24 He further stated that:

5.1.24.1. The Municipality received an Audit Report on 25 May 2021, which returned a disclaimer audit opinion from the Auditor General South Africa;

5.1.24.2. The Council met on 27 May 2021 to deliberate on the report and passed a resolution to appoint a member of the Audit Committee to conduct a preliminary investigation. The report of the Audit Committee Member was tabled before Council that resolved that there were elements of maladministration and a *prima facie* case for financial misconduct on the part of the CFO.

5.1.24.3. The Council resolved after deliberating on the preliminary report to put the CFO on precautionary suspension and to refer the matter to the Disciplinary Board for further investigation, especially on matters of financial misconduct.

5.1.24.4. On 14 December 2021, he received a letter from the new Mayor placing him on precautionary suspension and the suspended CFO was then recalled back to the Municipality.

5.1.25 In another response to the section 7(9) Notice, Mr C S van Eck, the Acting Municipal Manager, in a meeting held on 2 February 2022, conceded that the Municipality did not contribute to the Pension Fund and also accepted the proposed findings and remedial action of the Public Protector, as indicated in the section 7(9) Notice. He further stated that the Municipality had already started implementing some of the remedial actions proposed by the Public Protector.

Application of the relevant law

5.1.26 Section 2 of the Constitution⁴, states that “*the Constitution is the supreme law of*

⁴ Constitution of the Republic of South Africa, 1996.

the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

5.1.27 Section 8(1) of the Constitution, further states that *“the Bill of Rights, applies to all law, and binds the legislature, the executive the judiciary and all organs of state”.*

5.1.28 Section 195(1) of the Constitution, 1996 provides, amongst other things, that:

“Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a);

(b);

(c);

(d);

(e) People’s needs must be responded to.....;

(f) Public Administration must be accountable.

5.1.29 It is axiomatic that the Municipality’s employees are public servants who are constitutionally enjoined to respond to people’s needs and to be accountable when dealing with the Complainant, as provided for above.

5.1.30 Section 152(1) (a) and (c) of the Constitution further states that *“The objects of local government are to provide democratic and accountable government for local communities; and to promote social and economic development”.* In terms of section 152(2) of the Constitution *“A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)”.*

- 5.1.31 Section 65(1) of the Local Government: Municipal Finance Management Act (MFMA) 56 of 2003 provides, that the accounting officer of a municipality is responsible for the management of the expenditure of the municipality.
- 5.1.32 In terms of section 65(2) of the MFMA, the accounting officer of a municipality must take all reasonable steps to ensure *inter alia* that:
- 5.1.32.1 The municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds;
- 5.1.32.2 The municipality has and maintains a management, accounting and information system which-
- (aa) recognises expenditure when it is incurred;
 - (bb) accounts for creditors of the municipality; and
 - (cc) accounts for payments made by the municipality.
- 5.1.32.3 The municipality complies with its tax, levy, duty, pension, medical aid, audit fees and other statutory commitments.
- 5.1.32.4 The municipality's available working capital is managed effectively and economically in terms of the prescribed cash management and investment framework; and
- 5.1.32.5 All financial accounts of the municipality are closed at the end of each month and reconciled with its records.

5.1.33 Section 66 of the MFMA deals with expenditure on staff benefits. It provides that:

“The accounting officer of a municipality must, in a format and for periods that may be prescribed, report to the council on all expenditure incurred by the municipality on staff salaries, wages, allowances and benefits and in a manner that discloses such expenditure per type of expenditure, namely-

(a) salaries and wages;

(b) contributions for pensions and medical aid; travel, motor car, accommodation, subsistence and other allowances;

(c) housing benefits and allowances;

(d) overtime payments;

(e) loans and advances; and

(f) any other type of benefit or allowance related to staff.

5.1.34 Section 13A of the Pension Funds Act 24 of 1956 (PFA) provides that notwithstanding any provision of the rules of a registered fund to the contrary, any contribution payable in respect of any member of the fund to the fund shall be paid directly to the fund by or on behalf of the member within a period of seven days after the expiration of the period in respect of which the contribution is being paid, and the board shall not later than the first business day following the day on which the fund received the contribution, deposit the contribution in the name of the fund with an institution registered under the Banks Act 23 of 1965.

5.1.35 In this matter the Municipality conceded that it had failed to pay contributions deducted from around May 2018 from the salary of the Complainant and other employees to beneficiaries, including the Pension Fund, resulting in arrears to the Fund by December 2020 of more than R9 million. It also appeared from the

evidence that the Municipality used more than R9 million in conditional grants from the Municipality for operational expenses.

5.1.36 This conduct of the Municipality was at variance with the provisions of section 65(2) of the MFMA and section 13A of the PFA, as indicated above.

5.1.37 Section 55(1) of the 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 management of the Municipality's administration in accordance with this Act and other legislation applicable to the Municipality.

5.1.38 Section 55(2) of the Municipal Systems Act provides that the municipal manager as the accounting officer of the Municipality is responsible and accountable for all income and expenditure of the municipality as well as assets and the discharge of all liabilities of the Municipality.

5.1.39 In this case, the Municipal Manager at the time failed in his responsibility to manage the expenditure of the Municipality as far as the deductions from the salaries of staff were concerned.

5.1.40 A Code of Conduct for Municipal Staff Members is provided for in Schedule 2 to the Municipal Systems Act (Code).

5.1.41 Item 2 of the Code provides that a staff member of a municipality must at all times-

(a) loyally execute the lawful policies of the municipal council;

(b) perform the functions of office in good faith, diligently, honestly and in a transparent manner;

(c) act in such a way that the spirit and objects of section 50 are promoted;

(d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and

(e) act impartially and treat all people, including other staff members, equally without favour or prejudice”.

5.1.42 Breaches of the Code must, by virtue of item 14, be dealt with in terms of the disciplinary procedures of the Municipality.

5.1.43 The officials involved in the failure by the Municipality to pay the amount deducted from the Complainant's salary to the beneficiaries, as indicated in the evidence above, acted in violation of the standard required of the public administration in section 195 of the Constitution and the Code of Conduct for Municipal Staff Members. The Municipal Manger at the time relevant to the investigation, was dismissed and the current Municipal Manager has been suspended by the Municipality pending further investigation.

Conclusion

5.1.44 The Municipality failed to pay monthly deductions from the Complainant's salary over to the beneficiaries thereof. According to the evidence obtained during the investigation, the Municipality still owes the Pension Fund R4 million towards outstanding employees' pension contributions.

5.1.45 The conduct of the Municipality was at variance with the provisions of section 65(2) of the MFMA, section 13A of the PFA, section 195 of the Constitution and the Code of Conduct for Municipal Staff Members.

6 FINDINGS

6.1 Regarding whether the Municipality failed to pay the Complainant's monthly contributions to the Cape Joint Pension Fund, Letsatsi Finance, and Old Mutual and if yes, whether such conduct was improper, constitutes maladministration and prejudiced him:

6.1.1 The allegation the Municipality failed to pay the Complainant's monthly contributions to the Cape Joint Pension Fund, Letsatsi Finance, AVBOB and Old Mutual, is substantiated.

6.1.2 The allegation that the conduct of the Municipality was improper constitutes maladministration and prejudiced the Complainant is also substantiated. The conduct of the Municipality was not in accordance with section 62 of the MFMA, section 13A of the PFA, section 195 of the Constitution and the Code.

6.1.3 The conduct of the Municipality in this regard 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. It also prejudiced the Complainant who became indebted to the entities to whom the payments deducted from his salary had to be made.

7 REMEDIAL ACTION

7.1 The appropriate remedial action taken terms of section 182(1)(c) of the Constitution is the following:

7.1.1. The Acting Municipal Manager of the Municipality:

7.1.1.1. Within **60 (sixty) working days** from the date of the report, take appropriate steps to conduct a full audit of its payroll system with effect from May 2018 to

date, to verify that all contributions deducted from its employees after suspension of the stop order system, were paid over to the beneficiaries for which such contributions were intended, and to identify any other employees whose beneficiaries were not paid accordingly.

- 7.1.1.2. Within **ninety (90) working days** of the date of this report, engage the National and Provincial Treasuries to assist in restoring any benefits that may have been suspended as a direct result the maladministration found by the Public Protector on the part of the Municipality, by inter alia paying the outstanding arrears to the Pension Fund and other entities that have not received payments of the amounts deducted from the salary of the Complainant and other employees of the Municipality that is due to them since May 2018, in order to comply with the provisions of section 13A of the Pension Funds Act, 1956 (PFA) and section 62 of the Municipal Finance Management Act, 2003 (MFMA).
- 7.1.1.3. Take appropriate steps in respect of disciplinary action against the officials of the Municipality, whom a determination has been made that they contributed to the expenditure mismanagement of the Municipality that resulted in the failure to make payments to the Pension Fund and other entities, as agreed with the employees of the Municipality, of the amounts that were deducted from their salaries from May 2018 in respect thereof, **within sixty (60) working days** from the date of the report in terms of the Code and the Municipality's systems and procedures as envisaged by section 67(1)(h) and (i) of the Municipal Systems Act, 2000.
- 7.1.1.4. Apologise in writing to the Complainant and other affected employees of the Municipality for the failure to pay the amounts deducted from their salaries to the Pension Fund and other beneficiaries and informing them of the steps that

are being taken to remedy the situation, within **thirty (30) working days** from the date of the report.

- 7.1.1.5. Establish, within **one hundred and twenty (120) working days** from the date of the report, an internal complaints mechanism to ensure that complaints against process failures and internal control deficiencies of the Municipality are expeditiously resolved.
- 7.1.1.6. Ensure that the Internal Audit Unit, on an annual basis, review the adequacy and effectiveness of the Municipality's system of internal control to manage risks and ensure compliance in terms of section 165 of the MFMA.
- 7.1.1.7. Ensure that the Audit Committee of the municipality, in all its quarterly meetings, consider the internal audit and AGSA reports to ensure that the recommendations are implemented in terms of section 166 of the MFMA; and
- 7.1.1.8. Submit a report to the Council on the implementation of the remedial action taken in paragraphs 7.1.1.1. to 7.1.1.7 above **within sixty (60) working days** from the date of the report and provide the Public Protector with a copy thereof.

7.1.2. **The Speaker of the Municipality to:**

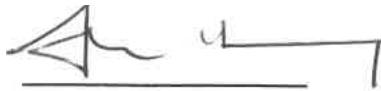
- 7.1.2.1. Take the appropriate steps to ensure that the Municipal manager regularly reports to the Council on all expenditure incurred by the Municipality on staff benefits, as contemplated by section 66 of the MFMA.

8. MONITORING

- 8.1 The Acting Municipal Manager of the Municipality to submit an action plan to the Public Protector within **thirty (30) working days** from the date of this report on the implementation of the remedial action referred to in paragraph 7.1.1 above.
- 8.2 The submission of the implementation plan and the implementation of the 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
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 27 / 02 /2022



Assisted by: Mr M Khanya, Provincial Representative:
Northern Cape
PII Coastal, Public Protector South Africa