

**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**



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION AND IMPROPER CONDUCT BY THE MATJHABENG
LOCAL MUNICIPALITY IN CONNECTION WITH ITS FAILURE TO ENSURE THAT
EXPENDITURE RELATING TO SALARY PAYMENTS FOR ACTUAL WORK
PERFORMED BY MR M, ARE VALID**

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LIST OF ACRONYMS

AGSA	Auditor General of South Africa
COGTA	Cooperative Government and Traditional affairs
Constitution	Constitution of the Republic of South Africa, 1996
FSPG	The Free State Provincial Government
HOD	Head of Department
MEC	Member of the Executive Council
Former Municipal Manager	The Former Municipal Manager of Matjhabeng Local Municipality
Municipal Structures Act	The Municipal Structures Act 117 of 1998
Mr M	The Filing Clerk of the Municipality (Alleged Ghost Employee)
PAAA	Public Audit Amendment Act 5 of 2018
Public Protector Rules	Rules relating to investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended
Public Protector Act	The Public Protector Act 23 1994
The Municipality	Matjhabeng Local Municipality

EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution, which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of maladministration and improper conduct by the Matjhabeng Local Municipality (the Municipality) in connection with failure to ensure that expenditure relating to salary payments for actual work performed by Mr M are valid.
- (iii) The complaint was lodged with the Public Protector South Africa by an anonymous complainant (the Complainant) on 19 May 2020.
- (iv) In the main, the Complainant alleged that:
 - (a) There are many “ghost employees” on the Municipality’s payroll, including an employee whose name has been disclosed to the Public Protector, but who will for the purposes of this Report be referred to as Mr M, who had been receiving a salary from the Municipality, since 2010 and who was permanently employed by the Municipality since 2018;
 - (b) Despite Mr M receiving a full salary from the Municipality, he has never reported for duty after the date of his permanent appointment by the Municipality;
 - (c) As a result of these “ghost employees”, the Municipality is in a serious financial crisis leading to poor service delivery and non-payment of service providers;

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- (d) The main reason for the poor financial situation of the Municipality is not the lack of revenue collection but rather, the employment of “ghost employees”, such as Mr M, which fact contributes to the mismanagement of public funds at the Municipality; and
- (e) The Municipality has its main office situated in Welkom, with other offices situated in Hennenman and Ventersburg in the Free State Province. The Hennenman office also has employees based in a township called Phomolong.
- (v) Based on the analysis of the complaint, the following issue was considered and investigated:
- (a) Whether the Matjhabeng Local Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M are valid, and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution as well as maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It includes an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
- (vii) On 06 December 2022, a notice in terms of section 7(9)(a) of the Public Protector Act was issued to Mr Thanduxolo Khalipa, the Executive Mayor of Matjhabeng Local Municipality; Cllr Bhekimuzi Stofile, the Speaker of Matjhabeng Local Municipality; Ms Zingisa Tindleni, the former Municipal Manager; Dr Vuyo Adonis, the Acting Municipal Manager; Mr Odwa Duda, Business Unit Leader in the office of the Auditor General of South Africa, Free

State; the Directorate for Priority Crimes Investigation and Mr M to provide an opportunity for responses on the likely adverse findings and proposed remedial action. Sections 7(9)(a) and (b) of the Public Protector Act provides that persons implicated in an investigation by the Public Protector, are to be afforded the opportunity to make representations regarding same.

- (viii) Written responses dated 08 December 2022, 09 December 2022, 12 December 2022 and 13 December 2022, were received from the Executive Mayor, the Acting Municipal Manager, Speaker of the Municipality and Mr Duda from the Auditor General of South Africa, Free State respectively. The responses and information/evidence submitted were duly considered by the Public Protector in relation to the substance of the allegations against the Municipality. The former Municipal Manager and Mr M did not respond to the notice in terms of section 7(9)(a) of the Public Protector Act.
- (ix) Having regard to the evidence and regulatory framework determining the standard that the Municipality should have complied with, the following findings are made:
- (a) Whether the Matjhabeng Local Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M are valid and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution as well as maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (aa) The allegation that the Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M were valid, is substantiated.
- (bb) The Municipality has been paying Mr M a salary even though he has not reported for duty since 01 April 2018. As the Accounting Officer,

the former Municipal Manager failed to follow the prescribed procedures in terms of paragraph 12.2 of the Disciplinary Procedure Collective Agreement and to ensure that salaries were not paid to individuals that were ineligible to receive such remuneration.

- (cc) The former Municipal Manager failed to ensure that expenditure relating to salary payments for actual work performed by Mr M were valid, and she further failed to invoke paragraph 12.2 of the Disciplinary Procedure Collective Agreement, 2018 to 2023 of the Municipality.
- (dd) It was further observed during the course of the investigation that the Municipality failed to detect and remove unaccounted employees on its payroll system and paid salaries to persons ineligible to receive such remuneration. This observation is based on the information received from the Municipality showing employees on the Salary List for December 2021 who are allegedly receiving salaries but do not appear on the Actual Employee List for December 2021.
- (ee) Based on the information and evidence obtained during the investigation, the conduct of the former Municipal Manager in this regard is in contravention with the requirements of section 195 of the Constitution which requires public administration to be governed by high standards of professional ethics and accountability.
- (ff) The former Municipal Manager further failed to stop Mr M's salary with immediate effect, pending a full scale investigation into his whereabouts and therefore, committed an act of financial misconduct in terms of section 171 of the MFMA by failing to ensure that the

Municipality maintains proper financial management and safeguards the financial resources of the Municipality.

- (gg) The former Municipal Manager failed to take reasonable steps in terms of section 62(1) of the MFMA which requires her to ensure that the financial resources of the Municipality are used effectively, efficiently and economically in respect of salaries paid to employees for work done.
- (hh) The conduct of the former Municipal Manager amounts to financial misconduct in terms of section 171(1) of the MFMA.
- (ii) All officials tasked with financial management failed to take all reasonable steps to ensure that salaries paid to employees for work done were valid, despite the Municipality becoming aware of possible irregularity as far back as 09 June 2020.
- (jj) Accordingly such conduct of the former Municipal Manager and other officials tasked with financial management to take all reasonable steps to ensure that salaries paid to employees for work done were valid, constitutes improper conduct as envisaged in section 182(1) of the Constitution and section 6(4)(a)(ii) of the Public Protector Act; and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (x) The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action to redress the conduct referred to in this report upon the conclusion of an investigation where adverse findings are made.

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- (xi) 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.
- (xii) Taking into account the submissions that were presented before the Public Protector by the Municipality, the appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, are the following:
- (aa) The Public Protector was informed that the contract of the Municipal Manager came to an end on 30 October 2022, therefore, the Public Protector has not taken any remedial action against her as envisaged by section 182(1)(c) of the Constitution, as such remedial action would serve no judicious purpose, in light of the fact that the Municipal Manager is no longer in the employ of the Municipality.

The Acting Municipal Manager

- (bb) It was noted that the Acting Municipal Manager has already initiated steps as prescribed by the Disciplinary Procedure Collective Agreement of the Municipality against Mr M, including steps to stop his salary and to initiate formal disciplinary action against Mr M, in line with the remedial action proposed in the section 7(9)(a) notice;
- (cc) To, within **sixty (60)** calendar days from the date of this report, determine an appropriate and reasonable amount recoverable from Mr M as an irregular payment of salaries by the Municipality in terms of paragraph 12.2 of the Municipal Disciplinary Procedure Collective Agreement, taking into account taxable deduction such as pay as you earn (PAYE) deduction, Unemployed Insurance Fund (UIF) and pension contributions; and

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- (dd) To, within **sixty (60)** calendar days from the date of the determination of the amount considered as recoverable, institute civil proceedings, in terms of 32(2) of the MFMA against Mr M for the recovery of such amount.

The Executive Mayor of the Municipality

- (ee) To table the final report of the Public Protector to Council on 30 January 2023 for deliberation and adoption as per the commitment made by the Executive Mayor, in terms of paragraph 5 of the Local Government: Disciplinary Regulations for Senior Managers, 2010.

The Council of the Municipality

- (ff) It is noted that the Speaker of Council, has committed to ensure the tabling of the final report before the Ordinary Council meeting on 30 January 2023 for deliberation.
- (gg) To ensure that appropriate disciplinary proceedings are initiated in terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010 against Senior Managers tasked with financial management who failed to take all reasonable steps to ensure that salaries paid to employees for work done were valid, in terms of section 171(1) of the MFMA in respect of the following:
- (a) Failure to ensure that expenditure relating to salary payments for actual work performed by Mr M were valid; and
 - (b) Failure to ensure that the Municipality immediately stops any payment of salary to Mr M, pending a full scale investigation regarding his whereabouts.

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- (hh) To ensure that the municipality adopts appropriate expenditure control measures in line with section 62(1) of the MFMA aimed at ensuring the credibility of the salary municipal budget, including a total (100%) staff verification process aimed at establishing the authenticity of employees against the personnel and salary system.

The Auditor General South Africa

- (ii) A referral is made to the Auditor General in terms of section 6(4)(c)(ii) of the Public Protector Act, to consider taking any action deemed appropriate, if any, under the circumstances in terms of the Public Audit Act and the MFMA.

The Directorate for Priority Crimes Investigation:

- (jj) A referral is made to the DPCI in terms of section 6(4)(c)(i) of the Public Protector Act, to establish if any acts of impropriety identified herein amount to criminal conduct in terms of the Prevention and Combating of Corrupt Activities Act, 2004 and if so, consider pursuing criminal investigations against the perpetrators, including any connection to its current investigation registered under Welkom CAS 406/01/2020, into allegations that the banking details of approximately sixty nine (69) employees were changed and that their salaries were paid into the incorrect/changed banking accounts.

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant) for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:
- 1.2.1 Cllr Bhekimuzi Stofile, the Speaker of Matjhabeng Local Municipality;
 - 1.2.2 Cllr T.D Khalipha, the Executive Mayor of Matjhabeng Local Municipality
 - 1.2.3 Mr Vuyo Adonis, The Acting Municipal Manager of The Acting Municipal Manager;
 - 1.2.4 Ms Zingisa Tindleni, The Former Municipal Manager of Matjhabeng Local Municipality;
 - 1.2.5 Lieutenant General Seswantsho Godfrey Lebeya, Head: Directorate of Priority Crime Investigations;
 - 1.2.6 Mr Odwa Duda, Corporate Executive of the Free State Auditor General of South Africa;
 - 1.2.7 Mr M, an employee within the Municipality; and
 - 1.2.8 A copy of the report is also provided to the anonymous Complainant (the Complainant) to inform him about the outcome of the investigation.

- 1.3 The report relates to an investigation into allegations of maladministration and improper conduct by the Matjhabeng Local Municipality in connection with failure to ensure that expenditure relating to salary payments for actual work performed by Mr M are valid.

2. THE COMPLAINT

- 2.1 The investigation originates from a complaint lodged with the Public Protector on 19 May 2020, by an individual who requested to remain anonymous (the Complainant).

- 2.2 The Complainant raised concerns about the employment of “*unaccounted*” or “*ghost employees*” at the Municipality. The Complainant alleged that:

- 2.2.1 There are many “*ghost employees*” on the Municipality’s payroll, including an employee whose name has been disclosed to the Public Protector, but who will for the purposes of this Report be referred to as Mr M, who had been receiving a salary from the Municipality, since 2010 and who was permanently employed by the Municipality since 2018;

- 2.2.2 Despite Mr M receiving a full salary from the Municipality, he has never reported for duty after the date of his permanent appointment by the Municipality;

- 2.2.3 As a result of these “*ghost employees*”, the Municipality is in a serious financial crisis resulting in poor service delivery and non-payment of service providers;

- 2.2.4 The main reason for the poor financial situation of the Municipality is not the lack of revenue collection but rather, the employment of “*ghost employees*”,

such as Mr M, which fact contributes to the mismanagement of public funds at the Municipality; and

- 2.2.5 The Municipality has its main office situated in Welkom, with other offices situated in Hennenman and Ventersburg in the Free State Province. The Hennenman office also has employees based in a township called Phomolong.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the powers to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act 23 of 1994 (Public Protector Act), which regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.

- 3.2 The Matjhabeng Local Municipality is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls within its competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and sections 6(4) and (5) of the Act.

4. ISSUES IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issue was identified and investigated:

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- 4.1.1 Whether the Matjhabeng Local Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M are valid, and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution as well as maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 4.2 The Public Protector has concluded the investigation and based on the information and evidence obtained during the course thereof, the Public Protector is now in a position to make findings and take appropriate remedial action.
- 4.3 Evidence indicating improper conduct and maladministration against the Municipality was found and since the Public Protector did not receive further evidence that refutes the evidence in its possession, the Public Protector has made adverse findings against the Municipality and is taking appropriate remedial action in order to address the improper conduct or maladministration within the Municipality.

5. THE INVESTIGATION

5.1 Methodology

- 5.1.1 The investigation was conducted in terms of section 182 of the Constitution and Section 6 and 7 of the Public Protector Act.
- 5.1.2 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.

5.2 Approach to the investigation

- 5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.
- 5.2.2 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
- (a) What happened?
 - (b) What should have happened?
 - (c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration, abuse of power or other improper conduct?
 - (d) In the event of a violation, what action should be taken?
- 5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct was inconsistent with the applicable prescripts.
- 5.2.4 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.
- 5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration.

5.3 The Investigation Process

5.3.1 The investigation process commenced with correspondence to the Municipality on the 09 June 2020 wherein the Institution was informed of the investigation, the legislation in terms of which the investigation was conducted, as well as what information is required and the format thereof.

5.3.2 The format and the procedure followed in conducting the investigation included:

- (a) Communications by telephone, email or any other form of correspondence;
- (b) meetings with affected parties or persons reasonably believed to have information relevant to the investigation;
- (c) Obtaining records or documents relevant to the investigation which were in the possession or under the control of a state institution;
- (d) Issuing of a subpoena(s) directing the submission of an affidavit to the Public Protector for purposes of obtaining or clarifying information, producing any document or giving evidence in terms of section 7(4)(a) of the Act; and
- (e) Inspections *in loco*;

5.4 Key sources of information

5.4.1 Documents and e-mail correspondence

5.4.1.1 Letter from anonymous Complainant dated 19 May 2020;

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- 5.4.1.2 Copy of email to Mr Springkaan of the Municipality dated 9 June 2020;
 - 5.4.1.3 Copy of response and supporting documentation from the former Municipal Manager, Ms Z Tindleni dated 5 July 2020;
 - 5.4.1.4 Report on absorption of ninety five (95) employees, undated;
 - 5.4.1.5 Council Resolution C8/2015: 14 December 2015;
 - 5.4.1.6 Notice regarding new appointment of Mr M, from Acting CFO to Acting Senior Manager, Human Resources dated 22 December 2010;
 - 5.4.1.7 Copy of contract of employment in respect of Mr M dated 22 December 2010;
 - 5.4.1.8 Notice regarding new appointment of Mr M, from Acting CFO to Executive Director: Corporate Services dated 08 June 2018;
 - 5.4.1.9 Summary of payslips in respect of Mr M from Jan 2011 – May 2021, undated;
 - 5.4.1.10 Copy of response from the former Municipal Manager, Ms Z Tindleni dated 9 October 2020;
 - 5.4.1.11 Copy of letter from Public Protector South Africa (PPSA) to former Municipal Manager, Ms Z Tindleni dated 01 December 2020;
 - 5.4.1.12 Copy of affidavit of Mr T.Matsepe, the Supervisor in the Community Service and Waste Management Unit, dated 11 February 2021;
 - 5.4.1.13 Copy of affidavit of Mr V. Khaba, the Acting Unit Manager, Hennenman dated 11 February 2021;

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- 5.4.1.14 Copy of attendance register obtained during inspection *in loco* on 12 April 2021;
 - 5.4.1.15 Email from PPSA to Olyn Dikagisho, Office Manager in the office of the Municipal Manager, requesting information on 09 June 2021;
 - 5.4.1.16 Signed list of Matjhabeng employees (Henneman Office) obtained on 28 June 2021;
 - 5.4.1.17 List of employees for Henneman, undated;
 - 5.4.1.18 Personnel File of Mr M obtained on 28 March 2022;
 - 5.4.1.19 Subpoena issued to Mr M banking institution dated 01 July 2022;
 - 5.4.1.20 Response from Mr M's banking institution dated 28 July 2022;
 - 5.4.1.21 Information received from an individual requesting to remain anonymous received on 22 April 2022;
 - 5.4.1.22 Copy of Actual Employee List 1 and Salary List 1 for the month of December 2021, from an individual requesting to remain anonymous;
 - 5.4.1.23 Letter from PPSA to the former Municipal Manager requesting information dated 12 May 2022;
 - 5.4.1.24 Further enquiry letter from PPSA to the former Municipal Manager requesting information dated 23 June 2022;
 - 5.4.1.25 Subpoena issued by the Public Protector to the former Municipal Manager dated 12 July 2022;

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- 5.4.1.26 Response from the former Municipal Manager to PPSA dated 29 July 2022;
- 5.4.1.27 Copy of Actual Employee List and Salary List for the month of December 2021, from the Municipality;
- 5.4.1.28 Copy of a “*Report of the Auditor General to the Free State Legislature and Council on Matjhabeng Local Municipality*” for the financial years 2019/2020 and 2020/2021;
- 5.4.1.29 Presentation by the Directorate for Priority Crime Investigation to the Portfolio Committee on Cooperative Governance and Traditional Affairs dated 31 May 2022; and
- 5.4.1.30 Notices in terms of section 7(9)(a) and (b) of the Public Protector Act, 1994 and cover letters to the Executive Mayor, the Speaker, the Acting Municipal Manager, the former Municipal Manager, the AGSA FS, DPCI and Mr M dated 05 December 2022.

Inspection *in loco*

- 5.4.1.31 Inspection *in loco* conducted at offices of the Municipality located at Hennenman and Phomolong on 12 April 2021; and
- 5.4.1.32 Inspection *in loco* conducted at offices of the Municipality located at Hennenman and Phomolong on 28 June 2021.

Meetings held

- 5.4.1.33 Meeting between the Investigation Team and Mr T. Matsepe, the Supervisor in the Community Service and Waste Management Unit and Mr V. Khaba, the Acting Unit Manager, Hennenman on 11 February 2021;

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- 5.4.1.34 Telephonic discussion between the Investigation Team and Ms Olyn Dikagisho (Ms Dikagisho), the Manager in the Office of the former Municipal Manager, on 15 June 2021;
- 5.4.1.35 Meeting between the Investigation Team and Free State Provincial Auditor General of South Africa held on 30 March 2022;
- 5.4.1.36 Meeting between the Investigation Team, the Executive Mayor and the Acting Municipal Manager on 8 December 2022; and
- 5.4.1.37 Telephonic conference between the Investigation Team and AGSA on 12 December 2022.

Legislation and other prescripts

- 5.4.1.38 The Constitution of the Republic of South Africa, 1996;
- 5.4.1.39 Public Protector Act 23 of 1994;
- 5.4.1.40 The Municipal Finance Management Act, 56 of 2003;
- 5.4.1.41 Municipal Disciplinary Procedure Collective Agreement, 2018;
- 5.4.1.42 Local Government: Disciplinary Regulations for Senior Managers, 2010;
and
- 5.4.1.43 Public Audit Amendment Act, 2019.

Case Law

- 5.4.1.44 Khulani Fidelity Services Group v CCMA (LC JR 783/07); and

5.4.1.45 Khumalo v MEC for Education KwaZulu-Natal [2013] ZACC 49.

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

5.4.1.46 On 06 December 2022, a notice in terms of section 7(9) of the Public Protector Act was issued to Mr Thanduxolo Khalipa, the Executive Mayor of Matjhabeng Local Municipality; Cllr Bhekimuzi Stofile, the Speaker of Matjhabeng Local Municipality; Ms Zingisa Tindleni, the former Municipal Manager, Dr Vuyo Adonis, the Acting Municipal Manager, Mr Odwa Duda, the Business Unit Leader in the Office of the Auditor General of South Africa, Free State; the Directorate for Priority Crimes Investigation and Mr M to provide an opportunity for responses on the likely adverse findings and proposed remedial action. Sections 7(9)(a) and (b) of the Public Protector Act provides that persons implicated in an investigation by the Public Protector, are to be afforded the opportunity to make representations regarding same.

5.4.1.47 Written responses dated 08 December 2022; 09 December 2022; 12 December 2022 and 13 December 2022 were received from the Executive Mayor, the Acting Municipal Manager, the Speaker of the Municipality and the AGSA in the Free State respectively. The responses and information/evidence submitted in response to the notice in terms of section 7(9) of the Public Protector Act, were duly considered by the Public Protector in relation to the substance of any allegations against the Municipality.

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

6.1 Whether the Matjhabeng Local Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M are valid, and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution as well as maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act

Common cause issues

6.1.1 The employment contract of Mr M, dated 22 December 2010, indicates that the Municipality temporarily appointed him on a month to month basis, from 01 October 2010 to 31 March 2018 as a Filing Clerk, and that he received a monthly salary of seven thousand five hundred and forty six rand (R7 546.00) from the Municipality.

6.1.2 According to his letter of permanent appointment dated 08 June 2018, Mr M was permanently appointed retrospectively from 01 April 2018, to the position of Filing Clerk by the Municipality, and he receives a salary package of one hundred and forty two thousand eight hundred and ninety six rand (R 142 896.00) per annum. His appointment letter was signed by Mr F Wetes, the Executive Director: Corporate Services, who is no longer in the employ of the Municipality.

6.1.3 Mr M's work station as a Filing Clerk is based at the Community Service Department of the Municipality at the municipal offices in Phomolong, as well as at Hennenman.

Issue in dispute

- 6.1.4 The issue for the Public Protector's determination is whether the Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M were valid.

The Complainant's version

- 6.1.5 On 20 May 2020, the Complainant submitted that there are many "ghost employees" on the Municipality's payroll and further submitted that despite Mr M being permanently employed and receiving a full salary from the Municipality, he has never reported for duty.
- 6.1.6 The Complainant further submitted that the Municipality is in a serious financial crisis because of the payment of these "ghost employees" and that this has resulted in poor service delivery because of the mismanagement of funds by the Municipality.

The Municipality's version

- 6.1.7 In an email dated 09 June 2020, the Investigation Team raised the matter with the Municipality, in respect of the allegations made as well as whether any salary payments have been made to Mr M.
- 6.1.8 In a letter dated 05 July 2020, the former Municipal Manager, Ms Zingisa Tindleni, (the former Municipal Manager) submitted that Mr M is not a "ghost employee," and that he was initially employed on a month-to-month basis by the Municipality at the Phomolong Unit in Hennenman.
- 6.1.9 The former Municipal Manager further submitted that on 08 June 2018, Mr M was permanently employed by the Municipality as a Filing Clerk in the

Community Service Department, effective from 01 April 2018, following the outcome of a Special Local Labour Forum process.

- 6.1.10 In a letter dated 09 October 2020, the former Municipal Manager further submitted that a Bargaining Council Award was accepted and/or adopted by the Council in terms of a Council Resolution dated 05 June 2018. The Council Resolution was taken to absorb ninety-five (95) temporary employees into permanent positions on the following terms and conditions:
- (a) *“That the local labour Forum must deal with the structure for it to be approved by the council;*
 - (b) *That the appointment letters be issued at 14:00 by Municipal Manager and relevant Managers;*
 - (c) *That the HR Sub-Committee be present to assist in the issuing of appointment letters...”*
- 6.1.11 The former Municipal Manager also submitted in the same letter, that Mr M had been reporting for duty and submitted attendance records signed by his supervisor, Mr Pheelo Khaba (Mr Khaba) for January 2020 and February 2020 respectively, contending that the attendance records were for Mr M.
- 6.1.12 On 05 July 2021, the Investigation Team requested the Municipality to provide information relating to the Bargaining Council Award, as referred to in the response from the Municipality dated 09 October 2020.
- 6.1.13 On the same date, the Municipality submitted a Council Resolution no. C8/2015 dated 14 December 2015, wherein the Council resolved that ninety-five (95) people (including Mr M) should be absorbed as permanent employees by the Municipality. This Council resolution was not

implemented until 05 June 2018, when another Council Resolution was taken in this regard.

- 6.1.14 The evidence from the Municipality indicates that in 2015, the Council resolved to absorb 95 temporary employees as permanent employees of the Municipality. The Municipality delayed in the implementation of the Council Resolution which led to the said employees approaching the Special Local Labour Forum to compel the Municipality to implement the 2015 Council Resolution.
- 6.1.15 This labour process gave rise to a submission by the Municipality to Council, dated 05 June 2018, subsequent to the verification of the 95 employees conducted by the Special Local Labour Forum, resulting in the Municipality issuing, amongst others, an appointment letter to Mr M, dated 08 June 2018.
- 6.1.16 In an affidavit dated 11 February 2021 from Mr Tshediso Matsepe, a Supervisor in the Community Service and Waste Management Unit of the Municipality (Mr Matsepe) in Phomolong and Hennenman, he confirmed that he has never worked with Mr M and that he does not have any evidence to prove that Mr M has ever worked in his unit.
- 6.1.17 In a further affidavit dated 11 February 2021, from Mr Khaba, the Unit Manager in Hennenman, he stated that Mr M was employed with the group of 95 employees by the Municipality. He further stated that he was not aware to which unit Mr M reported and furthermore that his office does not have any records to prove that Mr M has ever reported for duty at any unit in Phomolong and/or Hennenman.

Evidence obtained and analysed by the Investigation Team in respect of Mr M

- 6.1.18 The verifications conducted by the Investigation Team revealed that Mr M is an employee of the Municipality, and that he is the only employee confirmed by Mr Matsepe as being absent from work since his date of appointment.
- 6.1.19 The payroll documents submitted by the Municipality confirmed that Mr M was receiving a salary from the Municipality. A copy of his salary advice from the Finance Department of the Municipality also attested to the payment of the salary by the Municipality to Mr M.
- 6.1.20 On 28 March 2022, the Investigation Team obtained information from the Municipality relating to the personnel records of Mr M. The information indicates that as at 25 February 2022, Mr M has over two hundred and six comma five (206.5) accumulated vacation leave days owing to him.
- 6.1.21 The Investigation Team noted that the attendance records provided by the former Municipal Manager were not for Mr M, but for another employee of the Municipality.
- 6.1.22 On 09 June 2021, the Investigation Team made a further request via email to the Municipality to provide the attendance records of Mr M. As there was no response received on this email communication, the Investigation Team telephonically contacted Ms Olyn Dikagisho (Ms Dikagisho), the Manager in the Office of the former Municipal Manager, on 15 June 2021. Ms Dikagisho conceded during this discussion that the Municipality does not have the attendance records of Mr M since the date of his permanent employment.

- 6.1.23 The Public Protector issued a subpoena on 01 July 2022 to Mr M's banking institution, to obtain his banking records, to determine if indeed he is receiving a salary from the Municipality. The information obtained from the banking records on 28 July 2022 confirms that Mr M is receiving a salary from the Municipality. According to the document titled "Confidential Customer Agreement" issued on 27 February 2018 and signed between the banking institution and Mr M, Mr M declared to the bank that he is employed by the Municipality.

Inspection in loco at Hennenman and Phomolong

- 6.1.24 On 12 April 2021, the Investigation Team conducted an inspection in loco at the offices of the Municipality at both Hennenman and Phomolong. The purpose of the inspection in loco was to establish the whereabouts of Mr M. It was established by the Investigation Team that Mr M was the only employee who was not present at work on that day.
- 6.1.25 During the inspection in loco, the Investigation Team held a meeting with Mr Khaba and Mr Matsepe. Both officials stated that it was common knowledge that Mr M was not at work and that he had never reported for duty since his appointment despite him being a permanent employee of the Municipality.
- 6.1.26 On 28 June 2021, the Investigation Team once again conducted an inspection in loco at the offices of the Municipality in Hennenman and Phomolong and it was again established that Mr M was not present at work. The Investigation Team obtained a signed list of office employees working at the Hennenman branch where Mr M was expected to have been employed as a Filing Clerk. Mr Khaba confirmed that the employees who signed the list were indeed employees, employed by the Municipality and reporting for duty at Hennenman. He again confirmed that Mr M had never reported for duty.

- 6.1.27 During the inspection in loco, the Investigation Team interviewed two other employees from Phomolong and Hennenman offices of the Municipality. The said employees confirmed that they knew Mr M from the time they were temporarily employed at the Municipality, but since 01 April 2018 they have never seen Mr M at work. The said employees requested to remain anonymous due to fear of victimisation.

Information and evidence obtained in respect of other alleged unaccounted employees

- 6.1.28 During the course of the investigation, and on 22 April 2022, the Investigation Team received information from an individual who requested to remain anonymous regarding allegations of other possible unaccounted employees at the Municipality.
- 6.1.29 It should be noted that the Complainant could not provide an indication regarding which other units at the Municipality the alleged other “ghost employees” may be “working”. On 18 November 2021, the Investigation Team obtained an employee list from the Municipality of all employees performing duties at Hennenman. The list indicated about one hundred and thirty nine (139) employees, including that of Mr M, performing duties at Hennenman, at various sections (e.g. cemetery, refuse removal, public open spaces, parks and workshop). The Investigation Team therefore focused on employee verification at the Hennenman office, where Mr M was supposedly stationed.
- 6.1.30 A document was received, which on face value, appears to be a record of actual employees (Actual Employee List 1) within the Municipality. A second document (Salary List 1) which appears to reflect a list of employees who received salaries from the Municipality for the month of December 2021 was also received from the Municipality.

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- 6.1.31 The Investigation Team observed several discrepancies between the two lists. It was observed that a number of employees on Salary List 1 allegedly receiving salaries, could not be accounted for on the Actual Employee List 1, as performing work at the Municipality.
- 6.1.32 Based on the observations made regarding the discrepancies in the two lists, in a letter dated 12 May 2022, the Investigation Team requested additional information from the former Municipal Manager regarding:
- 6.1.32.1 A list of all employees of the Municipality as at the end of December 2021; and
- 6.1.32.2 A list of all employees who were paid salaries during the month of December 2021.
- 6.1.33 The former Municipal Manager did not respond to the letter dated 12 May 2022. A further enquiry for information was made to the Municipal Manager through a letter dated 23 June 2022. Subsequently, a subpoena dated 12 July 2022 was issued to the former Municipal Manager to obtain the required information.
- 6.1.34 On 29 July 2022, the former Municipal Manager responded to the subpoena and provided the requested information including the Actual Employee List for December 2021 and the Salary List for December 2021. The following was observed from the documentation submitted by the former Municipal Manager:
- 6.1.34.1 That the Actual Employee List for December 2021, indicates that there are a total of one thousand nine hundred and three (1903) employees;
- 6.1.34.2 That a further seventy two (72) individuals (Councillors) are receiving salaries on the Salary List for December 2021; and

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- 6.1.34.3 That there are employees on the Salary List for December 2021 apparently receiving salaries, who do not appear on the Actual Employee List for December 2021.
- 6.1.35 The written response from the former Municipal Manager dated the 29 July 2022 further stated that:
- 6.1.35.1 As a prompt measure to curb “ghost employees”, at the eve of the release of the IRP5’s for all employees, the Directorate Cooperative Services, assisted by the Finance Division of the Municipality, conducted an employee verification process, which included a call for all employees to personally collect IRP5 documents, thereby submitting and verifying that the employee does exist.
- 6.1.36 The former Municipal Manager however did not indicate the outcome of the measures put in place relating to the employee verification process indicated in paragraph 6.1.35.1 above.
- 6.1.37 On 30 March 2022, the Investigation Team met with officials from the Free State Provincial Auditor General of South Africa (FS AGSA). During the meeting, the FS AGSA indicated that it had not conducted an employee verification at the Municipality. After the Investigation Team brought the matter to the attention of the FS AGSA, the FS AGSA confirmed that “*The risk of Ghost employees is included in the Risk Register and Risk Assessment and Response (RAARs) of the Municipality for the 2021/22 audit cycle*”.
- 6.1.38 The Investigation Team obtained the “*Report of the auditor-general to the Free State Legislature and council on Matjhabeng Local Municipality*” for the financial years 2019/2020 and 2020/2021. Both audit reports indicate that no employee verification was conducted at the Municipality.

Application of the relevant law

The Constitution of the Republic of South Africa, 1996

- 6.1.39 Section 2 of the Constitution provides that “*the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*”.
- 6.1.40 Section 195(1) of the Constitution, stipulates that “*public administration must be governed by the democratic values and principles enshrined in the Constitution. It requires inter alia a high standard of professional ethics and accountability in public administration*”.
- 6.1.41 The former Municipal Manager was expected to ensure that the administration of the Municipality is governed by a high standard of professional ethics and accountability in respect of the verification of employees in the Municipality.

The Municipal Finance Management Act, 56 of 2003

- 6.1.42 Section 60 of the Act describes the Municipal Manager as the Accounting Officer of the Municipality. Section 62(1) of the MFMA further stipulates 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—*
- (a) that the resources of the municipality are used effectively, efficiently and economically;*
 - (b) ...*
 - (c) that the municipality has and maintains effective, efficient and transparent systems—*
 - (i) of financial and risk management and internal control; and*

(ii) of internal audit operating in accordance with any prescribed norms and standards;

(d) that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;

(e) that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15;”

6.1.43 The former Municipal Manager was expected to take all reasonable steps to ensure that the financial resources of the Municipality are used effectively, efficiently and economically by ensuring that salaries are paid to employees for actual work done. Further thereto, the former Municipal Manager was expected to ensure that there are effective, efficient and transparent systems of financial and risk management and internal controls in place to prevent the payment of salaries to unaccounted employees.

6.1.44 Section 78 of the MFMA provides that *“Each senior manager of a municipality and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure—*

(a) that the system of financial management and internal control established for the municipality is carried out diligently;

(b) that the financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently;

(c) that any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented”;

6.1.45 Section 78 imposes an obligation on other officials of the Municipality, within their realm of responsibility to exercise financial management over the

financial resources of the Municipality, which includes the payment of salaries to employees.

6.1.46 Section 171(1) of the MFMA stipulates that “*the Accounting Officer of a Municipality commits an act of financial misconduct if that accounting officer deliberately or negligently—*

- (a) *contravenes a provision of this Act;*
- (b) *fails to comply with a duty imposed by a provision of this Act on the accounting officer of a municipality”;*

6.1.47 The former Municipal Manager was expected to act in accordance with the provisions of the MFMA in order to prevent any act of financial misconduct in that the former Municipal Manager deliberately allowed the payment of salaries to an employee who did not render a service to the Municipality and in so doing perpetuated the irregularity. This view is predicated on the fact that the Public Protector brought this matter to the attention of the Municipality as early as 2020 but no urgent corrective action was taken to address the issue notwithstanding the seriousness of the allegations.

Municipal Disciplinary Procedure Collective Agreement, 2018

6.1.48 Paragraph 12.1 of the Disciplinary Procedure Collective Agreement, 2018 to 2023 of the Municipality provides that “*an employee who has absented himself for a period longer than ten (10) days without notification to the employer, shall be deemed to have absconded from duty*”.

6.1.49 Paragraph 12.2 of the Disciplinary Procedure Collective Agreement, 2018 to 2023 also states that the employer shall attempt to establish the whereabouts of the employee and shall inform the employee, in writing by letter, of his alleged misconduct and the consequences thereof.

- 6.1.50 As soon as the Municipality became aware that Mr M was not reporting for duty, it had an obligation to initiate the corrective action prescribed in paragraph 12.1 and 12.2 of the Disciplinary Procedure Collective Agreement which included amongst other things, establishing the whereabouts of the employee.

Public Audit Amendment Act, 2019

- 6.1.51 According to section 1(g) the Public Audit Amendment Act, 2019 the concept of “*material irregularity*” (commonly referred to as “MI”), is defined as “*any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public*”.
- 6.1.52 The Auditor General South Africa (AGSA) is constitutionally mandated, as the Supreme Audit Institution (SAI) of South Africa, to conduct audits in the public sector and in terms of section 1(g) of the Public Audit Amendment Act, 2019 authorised to identify material irregularities during an audit performed under the act. The AGSA indicated to the Public Protector that they included the risk of ghost employees in the risk register and the risk assessment and response for the 2021/2022 audit cycle, which will extend to a testing and verification of employees. The AGSA also noted that in the previous year the audit team experienced a limitation on the salary control account. The information systems auditing unit could reportedly not test application controls on the HR system and the management of the Municipality (auditee) could not respond to the issues.

Presentation by the Directorate for Priority Crime Investigation to the Portfolio Committee on Cooperative Governance and Traditional Affairs

- 6.1.53 Additional research was conducted by the Investigation Team, and information regarding a presentation made by the National Head of the Directorate for Priority Crime Investigation (DPCI) to the Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA), on the status of criminal cases opened in terms of Section 106 of the Local Government: Municipal Systems Act: Free State Province, dated 31 May 2022, was obtained.
- 6.1.54 According to the presentation “*On 24 January 2020 an employee of Matjhabeng Municipality informed the complainant that she did not receive her monthly salary. Her payslip was checked and it was found that her bank account number was changed. The complainant did an audit trail and then established that the employee’s banking details was changed from Standard Bank account to Bidvest account. After an internal investigation the complainant discovered that 69 x employees banking details were changed and that their salaries were paid into the incorrect/changed banking accounts.*” A Criminal Case was registered under case number Welkom Cas 406/01/2020 and the matter is currently still under investigation by the DPCI.

Case Law

- 6.1.55 In *Khulani Fidelity Services Group v CCMA*¹ the Court found that desertion consists of absence without authorisation with the intent to remain permanently away from employment.

¹ *Khulani Fidelity Services Group v CCMA* (LC JR 783/07).

6.1.56 In *Khumalo v MEC for Education KwaZulu-Natal*², the Court accepted that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, and that the values and principles of the public administration as embodied in section 195 of the Constitution, lay a compelling foundation for a duty on such functionaries to investigate and correct unlawfulness.

6.1.57 Against the constitutional values and principles highlighted in the above judgments, the Municipality instead of responding ethically, accountably and transparently, by conceding to the impropriety and undoing it, they blatantly disregarded it.

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

6.1.58 Upon issuing of the section 7(9)(a) notice, a meeting was held on 08 December 2022 with the Executive Mayor and the Acting Municipal Manager of the Matjhabeng Local Municipality to discuss the proposed findings and remedial action in respect of the matter. On 08 December 2022 and 09 December 2022 the Executive Mayor, and the Acting Municipal Manager made written submissions in respect of the section 7(9) notice for consideration by the Public Protector before finalisation of the formal report.

6.1.59 In the written response by the Executive Mayor he welcomed the notice of the Public Protector and undertook to table the final report of the Public Protector to Council for deliberation on 30 January 2023, in terms of paragraph 5 of the Local Government: Disciplinary Regulations for Senior Managers, 2010.

² *Khumalo v MEC for Education KwaZulu-Natal* [2013] ZACC 49.

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- 6.1.60 On 09 December 2022, the Acting Municipal Manager submitted a written response to the section 7(9)(a) notice stating that he has instructed the Labour Relations Branch within the Municipality to initiate steps as prescribed by the Disciplinary Procedure Collective Agreement of the Municipality against Mr M, including steps to stop Mr M's salary and to initiate formal disciplinary action against Mr M.
- 6.1.61 On 12 December 2022, the Speaker of the Municipality submitted a written response to the section 7(9)(a) notice, indicating that he accepts the report and its remedial action in its entirety and undertakes to table the final report before the Ordinary Council meeting of the Municipality on 30 January 2023, for deliberation.
- 6.1.62 On 13 December 2022, Mr Odwa submitted in a written response to the section 7(9)(a) notice as follows :
- 6.1.62.1 "...
3. *That the requirements and processes to identify possible material irregularities is prescribed by the Public Audit Act and the Material Irregularity regulations which stipulates that it is only identified during the normal audit process.*
4. *For the non-compliance to be considered a material irregularity, there must already be an indication that the non-compliance will result in, or is likely to have a material impact in the form of, a material financial loss, the misuse or loss of a material public resource, or substantial harm to a public sector institution or the general public".*
- 6.1.62.2 Based on the above, the AGSA advised the Public Protector to reconsider the remedial action in its current form.

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- 6.1.62.3 The AGSA further confirmed that employee verification is conducted by the AGSA during the normal audit process. Further that, “*the risk of ghost employees is included as a risk, and that on a sample basis, a verification of employees is conducted and no adverse findings were identified*”.
- 6.1.63 The Public Protector has noted the submissions made by the Executive Mayor, the Acting Municipal Manager and the Speaker to accept the findings of the report and to comply with the Remedial Action thereof.
- 6.1.64 The Public Protector has further noted the submissions and inputs made by the AGSA in respect of the proposed Remedial Action.
- 6.1.65 The former Municipal Manager and Mr M did not respond to the notice in terms of section 7(9)(a) of the Public Protector Act.

Conclusion

- 6.1.66 The former Municipal Manager’s conduct as well as her duties and obligations in terms of the MFMA, is guided by section 195(1) of the Constitution that requires her to ensure that the administration of the Municipality is governed by a high standard of professional ethics and accountability. The former Municipal Manager also had a duty to investigate and correct unlawfulness, as found in the Khumalo case³.
- 6.1.67 The evidence indicates that Mr M is reflected as an employee on the Municipality’s payroll and also receiving a monthly salary. However, Mr M either never reported for duty or has been absent from duty since the date of his permanent employment on 01 April 2018.

³ Ibid.

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- 6.1.68 According to the information submitted by the Municipality on the summary of Payslips from January 2011 to May 2021, Mr M has been receiving a full monthly salary from 01 April 2018 to date, despite no evidence that he ever reported for duty.
- 6.1.69 Despite the former Municipal Manager being notified by the Investigation Team on 09 June 2020 regarding Mr M not reporting for duty, the former Municipal Manager failed to invoke the abscondment processes in terms of paragraph 12.2 of the Disciplinary Procedure Collective Agreement, 2018 to 2023.
- 6.1.70 Despite the former Municipal Manager being notified by the Investigation Team on 09 June 2020 that there is evidence indicating that Mr M has not been reporting for duty, she consistently failed to initiate any measures as envisaged in the MFMA to detect, investigate and prevent suspected losses to the Municipality.
- 6.1.71 Failure by the former Municipal Manager to consider, in the face of *prima facie* evidence of wrongdoing in its administration, to take steps to at least suspend Mr M's salary with immediate effect, pending a full scale of investigation into the matter, raises a suspicion of financial misconduct as envisaged in section 171(1) of the MFMA.
- 6.1.72 The conduct of the former Municipal Manager is in violation of section 62(1) of the MFMA and which amounts to an act of financial misconduct in terms of section 171(1) of the MFMA as she failed to comply with the provisions of the Act as mentioned above in terms of the duties imposed on her by the Constitution and the MFMA.
- 6.1.73 The evidence obtained from the Municipality indicates that there is a clear possibility that unaccounted employees exist on the Municipality's payroll, as there are employees on the Salary List for December 2021 allegedly

receiving salaries and who do not appear on the Actual Employee List for December 2021.

6.1.74 Section 78 of the MFMA places an obligation on other officials of the Municipality, except the Municipal Manager, with regard to the financial management and internal controls of resources of the Municipality, to take reasonable steps to ensure the effective, efficient, economic and transparent use of the financial and other resources of the Municipality.

6.1.75 It is concerning that the officials charged with financial responsibilities and internal controls failed to detect that salaries paid for actual work done, were valid.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard the Municipality should have complied with and the impact thereof on good administration, the Public Protector makes the following adverse findings against the Municipality.

7.1 **Whether the Matjhabeng Local Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M are valid and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution as well as maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act**

7.1.1 The allegation that the Municipality failed to ensure that expenditure relating to salary payments for actual work performed by Mr M were valid, is substantiated.

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- 7.1.2 The investigation established that the Municipality has been paying Mr M a salary even though he has not reported for duty since 01 April 2018. The former Municipal Manager, as the Accounting Officer, failed to follow the prescribed procedures in terms of paragraph 12.2 of the Disciplinary Procedure Collective Agreement and to ensure that salaries were not paid to individuals that were ineligible to receive such remuneration.
- 7.1.3 The former Municipal Manager failed to ensure that expenditure relating to salary payments for actual work performed by Mr M were valid, and she further failed to invoke paragraph 12.2 of the Disciplinary Procedure Collective Agreement, 2018 to 2023 of the Municipality.
- 7.1.4 It was further observed during the course of the investigation that the Municipality failed to detect and remove unaccounted employees on its payroll system and paid salaries to persons ineligible to receive such remuneration. This observation is based on the information received from the Municipality showing employees on the Salary List for December 2021 who are allegedly receiving salaries but do not appear on the Actual Employee List for December 2021.
- 7.1.5 Based on the information and evidence obtained during the investigation, the conduct of the former Municipal Manager in this regard is in contravention with the requirements of section 195 of the Constitution which requires public administration to be governed by high standards of professional ethics and accountability.
- 7.1.6 The former Municipal Manager further failed to stop Mr M's salary with immediate effect, The former Municipal Manager further failed to stop Mr M's salary with immediate effect, pending a full scale investigation into his whereabouts and therefore, committed an act of financial misconduct in terms of section 171 of the MFMA by failing to ensure that the Municipality

maintains proper financial management and safeguards the financial resources of the Municipality.

- 7.1.7 The former Municipal Manager failed to comply with her duty to prevent fruitless and wasteful expenditure as required in terms of section 62(1)(b) of the MFMA.
- 7.1.8 The former Municipal Manager failed to take reasonable steps in terms of section 62(1) of the MFMA which requires her to ensure that the financial resources of the Municipality are used effectively, efficiently and economically in respect of salaries paid to employees for work done.
- 7.1.9 The conduct of the former Municipal Manager amounts to financial misconduct in terms of section 171(1) of the MFMA.
- 7.1.10 All officials tasked with financial management failed to take all reasonable steps to ensure that salaries paid to employees for work done were valid, despite the Municipality becoming aware of possible irregularities as far back as 09 June 2020.
- 7.1.11 Accordingly such conduct of the former Municipal Manager and other officials tasked with financial management to take all reasonable steps to ensure that salaries paid to employees for work done were valid, constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

8. REMEDIAL ACTION

- 8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action to redress the conduct

referred to in this report upon the conclusion of an investigation where adverse findings are made.

8.2 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.

8.3 Taking into account the submissions that were presented before the Public Protector by the Municipality, the appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, are the following:

8.3.1 The Public Protector was informed that the contract of the Municipal Manager came to an end on 30 October 2022 and as a result, no remedial action can be proposed against her, as any remedial action that may be taken against her as envisaged by section 182(1)(c) of the Constitution, would serve no judicious purpose, in light of the fact that she is no longer in the employ of the Municipality.

The Acting Municipal Manager

8.3.2 It was noted that the Acting Municipal Manager has already initiated steps as prescribed by the Disciplinary Procedure Collective Agreement of the Municipality against Mr M, including steps to stop his salary and to initiate formal disciplinary action against Mr M, in line with the remedial action proposed in the section 7(9)(a) notice;

8.3.3 Within **sixty (60)** calendar days from the date of this report, determine an appropriate and reasonable amount recoverable from Mr M as an irregular

payment of salaries by the Municipality in terms of paragraph 12.2 of the Municipal Disciplinary Procedure Collective Agreement, taking into account taxable deduction such as pay as you earn (PAYE) deduction, Unemployed Insurance Fund (UIF) and pension contributions; and

- 8.3.4 Within **sixty (60)** calendar days from the date of the determination of the amount considered as recoverable, institute civil proceedings, in terms of 32(2) of the MFMA against Mr M for the recovery of such amount.

The Executive Mayor of the Municipality

- 8.3.5 To table the final report of the Public Protector to Council on 30 January 2023 for deliberation and adoption as per the commitment made by the Executive Mayor, in terms of paragraph 5 of the Local Government: Disciplinary Regulations for Senior Managers, 2010.

The Council of the Municipality

- 8.3.6 It is noted that the Speaker of Council, has committed to ensure the tabling of the final report before the Ordinary Council meeting on 30 January 2023 for deliberation.
- 8.3.7 Ensure that appropriate disciplinary proceedings are initiated in terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010 against Senior Managers tasked with financial management who failed to take all reasonable steps to ensure that salaries paid to employees for work done were valid, in terms of section 171(1) of the MFMA, in respect of the following:

- (a) Failure to ensure that expenditure relating to salary payments for actual work performed by Mr M were valid; and
- (b) Failure to ensure that the Municipality immediately stops any payment of salary to Mr M, pending a full scale investigation regarding his whereabouts.

8.3.8 To ensure that the municipality adopts appropriate expenditure control measures in line with section 62(1) of the MFMA aimed at ensuring the credibility of the salary municipal budget, including a total (100%) staff verification process aimed at establishing the authenticity of employees against the personnel and salary system.

The Auditor General South Africa

8.3.9 A referral is made to the Auditor General in terms of section 6(4)(c)(ii) of the Public Protector Act, to consider taking any action deemed appropriate, if any, under the circumstances in terms of the Public Audit Act and the MFMA.

The Directorate for Priority Crimes Investigation

8.3.10 A referral is made to the DPCI in terms of section 6(4)(c)(i) of the Public Protector Act, to establish if any acts of impropriety identified herein amount to criminal conduct in terms of the Prevention and Combating of Corrupt Activities Act, 2004 and if so, consider pursuing criminal investigations against the perpetrators, including any connection to its current investigation registered under Welkom CAS 406/01/2020, into allegations that the banking details of approximately sixty nine (69) employees were

changed and that their salaries were paid into the incorrect/changed banking accounts.

9. MONITORING

9.1 The Municipality to provide a report to the Public Protector on the implementation of the remedial action within 60 days from the date of this report.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 30 DECEMBER 2022

Assisted by: Ms V Mundree
Provincial Representative: Free State