

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1) (b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)
OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

***“Allegations of improper conduct and maladministration relating to Travel
and Subsistence Allowances paid by Hantam Local Municipality”***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION BY THE MAYOR, MR R SWARTZ AND COUNCILLORS
H DE WEE, G GOUS AND K ALEXANDER OF THE HANTAM LOCAL MUNICIPALITY
RELATING TO TRAVEL AND SUBSISTENCE ALLOWANCES PAID TO THEM IN MAY
2017**

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Executive Summary

- (i) This is my report as the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1) (c) of the Constitution, following an investigation into allegations of improper conduct and maladministration by the Mayor, Mr R Swartz and Councillors H De Wee, G Gous and K Alexander of the Hantam Local Municipality (Municipality) relating to travel and subsistence allowances paid to them in May 2017.
- (iii) The complaint was lodged by Dr Isak Fritz (Complainant) on 4 December 2017 at the Northern Cape Office of the Public Protector South Africa in Kimberley.
- (iv) In the main, the Complainant alleged that:
 - (a) The Northern Cape Department of Social Development (Department) invited the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipal Council (Councillors) of the Municipality to attend a workshop on its Social Relief Programme, which was to be held in Colesberg from 10-15 May 2017.
 - (b) The dates of the workshop coincided with that of the Provincial Conference of the African National Congress (ANC), which was also held in Colesberg.
 - (c) The workshop that the Mayor and the Councillors were invited to did not take place. Instead, they attended the ANC's Provincial Conference before returning home.

- (d) The Mayor and the Councillors travelled to Colesberg to attend the ANC's Provincial Conference at the expense of the Municipality, under the pretext of attending the workshop of the Department.
- (e) In essence, the Complainant alleged that the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander misappropriated public funds by utilising the travel and subsistence allowances that were paid to them for official purposes to attend the Provincial Conference of the ANC. The Complainant therefore contended that the conduct of the Mayor and Councillors was improper and constitutes maladministration.
- (v) Based on the analysis of the complaint, the following issues were identified for the investigation:
- (a) Whether the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality acted in accordance with the relevant laws and prescripts regulating the travel and subsistence allowances paid by the Municipality in respect of a trip undertaken by them to Colesberg in May 2017; and if not,
- (b) Whether the conduct of the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander was improper, constitutes maladministration and resulted in the misappropriation of public funds
- (vi) 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 Office of the Northern Cape MEC for Social Development, the Municipality and the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander. A meeting was also held with the Mayor and the three Councillors during the

investigation. The documents obtained during the investigation were analysed and the relevant laws and other prescripts applied.

(vii) Having considered the evidence and information obtained during the investigation, I make the following findings:

(a) Regarding whether the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality acted in accordance with the relevant laws and prescripts regulating travel and subsistence allowances paid by the Municipality in respect of a trip undertaken by them to Colesberg in May 2017:

(aa) The allegation that the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality did not act in accordance with the relevant laws and prescripts regulating travel and subsistence allowances paid by the Municipality in respect of a trip undertaken by them to Colesberg in May 2017, is substantiated.

(bb) The Mayor and Councillors, De Wee, Gous and Alexander did not inform the Acting Municipal Manager of the cancellation of the workshop. They also attended the ANC Conference whilst in Colesberg at the expense of the Municipality and failed to reimburse the Municipality for the amount paid to them or a portion thereof.

(b) Regarding whether the conduct of the Mayor, Mr R Swartz and Councillors, De Wee, Gous and Alexander was improper, constitutes maladministration and resulted in the misappropriation of public funds:

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- (aa) The allegation that the conduct of the Mayor, Mr R Swartz and Councillors, De Wee, Gous and Alexander was improper and amounts to maladministration is substantiated. It further resulted in the misappropriation of public funds and fruitless and wasteful expenditure, as contemplated by section 1 of the Local Government: Municipal Finance Management Act, 2003 (MFMA).
- (bb) The conduct of the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander may also constitute a breach of the Code of Conduct contemplated by section 54 of the Local Government: Municipal Systems Act, 2000.
- (cc) The conduct of the Mayor and Councillors, De Wee, Gous and Alexander accordingly constitutes improper conduct as envisaged by section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (viii) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution is the following:**
- (a) The Northern Cape MEC for Co-operative Governance, Human Settlements and Traditional Affairs to:**
- (aa) Appoint a person or committee in terms of Item 14(4) of the Code of Conduct for Councillors to investigate whether the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander breached the Code of Conduct and, if so to take action as contemplated in Item 14(2) against them within sixty (60) business days from the date of this report.

(b) The Municipal Manager of the Municipality:

- (aa) To take appropriate steps in terms of the MFMA to recover the travel and subsistence allowance paid to the Mayor, Mr Swartz, and Councillors De Wee, Gous and Alexander by the Municipality for the period 11 to 14 May 2017, within 60 business days from the date of this report.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE MAYOR, MR R SWARTZ AND COUNCILLORS H DE WEE, G GOUS AND K ALEXANDER OF THE HANTAM LOCAL MUNICIPALITY RELATING TO TRAVEL AND SUBSISTENCE ALLOWANCES PAID TO THEM IN MAY 2017

1. INTRODUCTION

1.1 This is my report as the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to the following persons, to inform them of the outcome of my investigation:

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

1.2.2 Mr Jan Swartz, the Municipal Manager of the Hantam Local Municipality (Municipality).

1.3 Copies of the report are also provided to:

1.3.1 Mr Rogers Swartz, the Mayor of the Municipality;

1.3.2 Mr Henry De Wee, Ms Geraldine Gous and Mr Koos Alexander, members of the Municipal Council of the Municipality; and

1.3.3 Dr Isak Fritz, who lodged the complaint.

1.4 The report relates to an investigation into allegations of improper conduct, and maladministration by the Mayor, Mr R Swartz and Councillors, H De Wee, G Gous and K Alexander of the Municipality, in connection with to travel and subsistence allowances paid to them in May 2017.

2. THE COMPLAINT

2.1 The complaint was lodged by Dr Isak Fritz (Complainant) on 4 December 2017 at the Northern Cape Provincial Office of the Public Protector South Africa, in Kimberley.

2.2 In the main, the Complainant alleged that:

2.2.1 The Northern Cape Department of Social Development (Department) invited the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipal Council (Councillors) of the Municipality to attend a workshop on its Social Relief Programme, which was to be held in Colesberg from 10-15 May 2017.

2.2.2 The dates of the workshop coincided with that of the Provincial Conference of the African National Congress (ANC), which was also held in Colesberg.

2.2.3 The workshop that the Mayor and the Councillors were invited to did not take place. Instead, they attended the ANC's Provincial Conference before returning home.

2.2.4 The Mayor and the Councillors travelled to Colesberg to attend the ANC's Provincial Conference at the expense of the Municipality, under the pretext of attending the workshop of the Department.

2.3 In essence, the Complainant alleged that the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander misappropriated public funds by utilising the travel and subsistence allowances that were paid to them for official purposes to attend the Provincial Conference of the ANC. The Complainant therefore contended that the conduct of the Mayor and Councillors was improper and constitutes maladministration.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action.”*

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

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

3.5 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that:

“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”²

3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

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);

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

² *Supra* at para [73].

- 3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.6.6 The Public Protector’s power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);
- 3.6.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));
- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.6.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
- 3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017)*, the Court held as follows when confirming the powers of the Public Protector:

- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
- 3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (para 82);
- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);
- 3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Para 105);
- 3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and

3.7.7 *Prima facie* evidence which 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 power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

- 4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?
- 4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong and what action should be taken?
- 4.2.1.5 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 Mayor and the Councillors acted improperly in respect of the travel and subsistence allowance that was paid to them by the Municipality on 9 May 2017, whether their conduct constitutes improper conduct, maladministration and the misappropriation of public funds.
- 4.2.1.6 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Mayor and the Councillors to prevent improper conduct, maladministration and the misappropriation of public funds.
- 4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration where possible and appropriate.

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

- 4.3.1 Whether the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality acted in accordance with the relevant laws and prescripts

regulating the travel and subsistence allowances paid by the Municipality in respect of a trip undertaken by them to Colesberg in May 2017; and if not,

4.3.2 Whether the conduct of the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander was improper, constitutes maladministration and resulted in the misappropriation of public funds

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1. A copy of an invitation to the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander to attend a workshop on the Social Relief Programme of the Department from Mr Neo Maneng, Head of the Office of the Northern Cape MEC for Social Development, dated 3 May 2017.

4.4.1.2 A copy of the affidavit of Mr Riaan Van Wyk, the former Acting Municipal Manager of the Municipality, dated 20 July 2020.

4.4.1.3 Copies of the approved Travel and Subsistence Allowance Claims forms of the Mayor, Mr Swart and Councillors De Wee, Gous and Alexander, dated 9 May 2017.

4.4.2 Correspondence between the Public Protector and:

4.4.2.1 The MEC for Social Development dated 7 February 2018 and 25 February 2018.

4.4.2.2 Mr Neo Maneng, the Head of the Office of the Northern Cape MEC for Social Development, dated 15 February 2018.

4.4.2.3 Mr J Swartz, the Municipal Manager of the Municipality, dated 23 May 2018 and 11 March 2020.

4.4.2.4 Ms Elise de Wet, Secretary of the Municipality dated 24 May 2018.

4.4.3 Meetings held

4.4.3.1 Meeting with the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality, held on 3 September 2019.

4.4.4 Legislation and other prescripts

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

4.4.4.2 The Public Protector Act 23 of 1994.

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

4.4.4.4 The Local Government: Municipal Structures Act 117 of 1998.

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

4.4.4.6 The Travel and Subsistence Policy of the Municipality (Policy).

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

4.4.5.1 Notices were issued in terms of section 7(9) of the Public Protector Act to the Mayor, Mr Roger Swartz, and Councillors De Wee, Gous and Alexander on 16 July 2020. They responded on 28 July 2020.

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

5.1. Regarding whether the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality acted in accordance with the relevant laws and prescripts regulating the travel and subsistence allowances paid by the Municipality in respect of a trip undertaken by them to Colesberg in May 2017:

Common cause or undisputed facts

- 5.1.1. It is common cause that on 3 May 2017, Mr Neo Maneng, the Head of the Office of the Northern Cape MEC for Social Development, invited the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander of the Municipality, to attend a workshop on the Social Relief Programme of the Department in Colesberg, from 10 to 15 May 2017.
- 5.1.2. On 9 May 2017 the Mayor and the Councillors applied to the Municipality for a travel and subsistence allowance for the trip to be undertaken to Colesberg in order to attend a “*social relief programme*”, including accommodation for four (4) nights from 10 to 14 May 2017.
- 5.1.3. Their applications were approved by the then Acting Municipal Manager. The Mayor and Councillors Gous and Swartz were paid an amount of R2 700 each. Councillor De Wee was paid an amount of R6324, 32.

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- 5.1.4. The Mayor and the other three Councillors travelled to Colesberg on 10 May 2017.
- 5.1.5. The workshop that they were invited to was cancelled, and they were only informed accordingly on their arrival.

Issues in dispute

- 5.1.6. In a meeting held during the investigation on 3 September 2019 with the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander, it was stated that after having been informed of the cancellation of the workshop, they remained in Colesberg and had informal meetings with officials of the District Municipality and the Department on 11 May 2017. On 12 May 2017 they attended the ANC Conference and returned to Calvinia on 13 May 2017.
- 5.1.7. It was further indicated that they did not inform the Acting Municipal Manager when they arrived in Colesberg that the workshop was cancelled and that they did not refund the Municipality the travel and subsistence allowances that were paid to them, or a portion thereof, for the period 10-14 May 2017.
- 5.1.8. It transpired during the investigation that due to media reports alleging that the Mayor and the Councillors travelled to Colesberg at the expense of the Municipality to attend the ANC Conference, under the pretext of attending an official meeting of the Department, the Municipal Council appointed an independent legal practitioner to investigate the matter. The legal practitioner concluded that the Mayor and the other Councillors were indeed invited to attend the workshop and that they did not obtain the travel and subsistence allowances in a fraudulent manner.

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- 5.1.9. The Municipal Council accepted the investigation report in April 2018 and no further action was taken. The Council further resolved that no disciplinary steps be taken against the Mayor and the Councillors.
- 5.1.10. The Mayor, Mr Swartz in his response to the Notice issued to him in terms of section 7(9) of the Public Protector Act, dated 28 July 2020, indicated that he did not travel from Calvinia to Colesberg to attend the ANC Conference. He further stated that it was not an offence for him to have attended the Conference as he also had *“ongoing engagements with colleagues and stakeholders to ensure programs for Hantam Municipality is (sic) formulated and later executed.”*
- 5.1.11. In his response to the section 7(9) Notice dated 28 July 2020, Councillor De Wee stated that there is no requirement in the Policy that an official or councillor must inform the Municipal Manager if an event has been cancelled. He further stated that:
- “We have in any event operated from the premise that the support that the Municipality required must be obtained, hence we continued with informal engagements with the officials that were present not only did we execute the reason why we were invited we also ensured projects and programmes came to the Municipality and were executed”.*
- 5.1.12. Councillor Koos Alexander, indicated in his response to the section 7(9) Notice dated 28 July 2020 that they had planned to attend the *“programme”* until 14 May 2017. When they arrived at the venue in Colesberg, they were informed that the workshop was postponed. He further indicated that:

“We had to decide to come back from Colesberg or engage the officials and office bearers that were in Colesberg. We decided that it would have been fruitless and wasteful to return to Calvinia without doing work which would benefit the municipality. The good thing was that many of the people we wanted to see we could see and many programmes were implemented. We planned to return on the 13th of May 2017. We met with the officials on the 13th May 2017 and then some of us, I cannot remember if everyone went, attended the ANC Conference on our day of departure. At that conference we continued to network in the interest of the Municipality and left Colesberg on the 13th May 2017”.

- 5.1.13 Councillor Alexander denied having misappropriated public funds or that he had to reimburse the Municipality.
- 5.1.14 Councillor Geraldine Gous, confirmed in her response to the Notice issued to her in terms of section 7(9) of the Public Protector Act, dated 28 July 2020 that she travelled to Colesberg after being invited to attend a “social relief programme arranged by a government department of the Northern Cape Provincial Government”. She stated further that “...there is no directive in the Hantam Policy that if a meeting is cancelled that monies claimed must be repaid”.
- 5.1.15 Mr Riaan Van Wyk, the former Acting Municipal Manager of the Municipality, confirmed in an affidavit made on 27 July 2020 that he approved the claims for subsistence and travel allowance. He further confirmed that there were allegations that the Mayor and the three Councillors travelled to Colesberg under false pretences to actually attend an ANC Conference. An investigation was conducted and it was found that the expenditure was not incurred fraudulently “or as a result of any wrongdoing by the Councillors.”
- 5.1.16 He also stated that: “I recall having been informed that the formal meetings were cancelled, but also know that the meetings proceeded informally.” Further, that

the “*informal meetings*” had practical implementation plans which were executed and or delivered in the municipal area. No details were provided in this regard.

5.1.17 According to Mr Van Wyk, there was no obligation on the Mayor and Councillors/or any Councillor to have informed him that the formal meeting was cancelled. He further stated that:

“I am of the view that the expenses incurred were legitimately (sic). It was authorised and in line with the Municipality’s policy. If the Councillors attended the ANC Conference, there was nothing prohibiting them from doing so. It will be untenable if the thinking that the Mayor and Councillors had to return to the Municipal area first, and then drive back to attend the ANC Conference”.

5.1.18 The Mayor, Mr Swartz, Councillors De Wee, Gous and Alexander did not provide any Minutes of Municipal Council Meetings, Minutes of the meetings that they attended when the workshop was cancelled, attendance registers or any other documentary evidence supporting their version that they attended to business of the Municipality from 10 to 14 May 2017.

5.1.19 The former Acting Municipal Manager, Mr Van Wyk also did not provide any such documentation.

5.1.20 There is no indication in the records of the Municipality that the Acting Municipal Manager was informed that the workshop was cancelled and that the Mayor and the Councillors would be utilising the expenditure already incurred by the

Municipality for their trip to Colesberg for the period 10 to 14 May 2017 for different official purposes.

Application of the relevant law

- 5.1.21 Travel and subsistence allowances are regulated by Policy.
- 5.1.22 In terms of paragraphs 2 and 3 of the Policy, it also applies to the Mayor and Councillors, who have to comply with same.
- 5.1.23 According to the provisions of paragraph 6.2 of the Policy, an invitation to attend a workshop, meeting or related event is not an automatic authorization to attend such workshop or event. The required authorization to attend such workshop or event must be obtained from the municipal manager or executive mayor, executive committee or director as the case may be.
- 5.1.24 Paragraph 7 of the Policy provides that delegates or representatives attending any conference, workshop or meeting must ensure that they arrive on time and attend until the conclusion of such event. It further provides that:
- “If any representative fails to do so, the executive mayor or executive committee, the municipal manager or director as the case may be, may recover all allowances and disbursements paid to enable such delegate or representative to attend such event, provided that such delegate or representative is afforded the opportunity to submit reasons for not being able to be present from the commencement to conclusion of such event”.*
- 5.1.25 Paragraph 8 of the Policy provides that in any instance where a delegate (representative) of the Municipality **did not attend the business as approved in accordance with the Policy**, any expenditure incurred by the Municipality should be refunded by the delegate (representative).

5.1.26 Item 12 of Schedule 1 of the *Code of Conduct for Councillors* as contained in the *Local Government: Municipal Systems Act* provides that a Councillor may not use, take, acquire or benefit from any property or asset owned, controlled or managed by the Municipality to which that Council has no right.

Conclusion

5.1.22 The object of the trip of the Mayor, Mr Swartz and the Councillors De Wee, Gous and Alexander to Colesberg at the expense of the Municipality on 10 May 2017 did not materialize when the Department's workshop was cancelled.

5.1.23 The Mayor and Councillors did not inform the Acting Municipal Manager of the cancellation of the workshop in order to obtain approval to expend the travel and subsistence allowance already paid to them for a different purpose. They claimed engagement with stakeholders from 10 to 14 May 2017 was not "*business as approved in accordance with the policy*".

5.1.24 The records of the Municipality still show that the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander were paid a travel and subsistence allowance by the Municipality to attend a workshop or programme of the Department for the period 10-14 May 2020. There is no indication that the official records were amended to indicate that approval was granted to them to use the travel and subsistence allowance paid to them for a different purpose. No minutes of meetings, attendance registers or any other documents were provided during the investigation in support of their evidence that they attended meetings and discussion with other stakeholders.

5.1.25 It is also not clear why the Mayor and the three Councillors did not return home when they were informed that the workshop was cancelled, but decided to do so only after they had attended the ANC Conference. There is no provision in the

Policy that would allow attendance to the business of a political party at the expense of the Municipality, as indicated by the former Acting Municipal Manager.

5.1.26 The Mayor and the Councillors therefore attended to business, other than that of the Municipality, during the time that they were in Colesberg at the expense of the Municipality.

5.1.27 The Mayor and Councillors did not reimburse the Municipality for the travel and subsistence allowances paid to them to attend the workshop, which was not held.

5.1.28 Their conduct was therefore in violation of the provisions of Paragraph 8 of the Policy that regulates travel and subsistence allowances paid by the Municipality.

5.2 Regarding whether the conduct of the Mayor, Mr R Swartz and Councillors, De Wee, Gous and Alexander was improper, constitutes maladministration and resulted in the misappropriation of public funds:

Common cause issues or undisputed facts

5.2.1 It is common cause that on 3 May 2017, Mr Neo Maneng, the Head of the Office of the Northern Cape MEC for Social Development, invited the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander of the Municipality, to attend a workshop on the Social Relief Programme of the Department in Colesberg, from 10 to 15 May 2017.

5.2.2 On 9 May 2017, the Mayor and the Councillors applied to the Municipality for a travel and subsistence allowance for the trip to be undertaken to Colesberg in order to attend a “*social relief programme*”, including accommodation for four (4) nights from 10 to 14 May 2017.

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- 5.2.3 Their applications were approved by the then Acting Municipal Manager. The Mayor and Councillors Gous and Swartz were paid an amount of R2 700.00 each. Councillor De Wee was paid an amount of R6324, 32.
- 5.2.4 The Mayor and the other three Councillors travelled to Colesberg on 10 May 2017.
- 5.2.5 The workshop that they were invited to was cancelled and they were informed accordingly on their arrival.

Issues in dispute

- 5.2.6 As indicated in paragraph 5.1 above, the conduct of the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander subsequent to the cancellation of the Department's workshop was not in accordance with the provisions of the Policy that regulates travel and subsistence allowances paid by the Municipality.

Application of the relevant law

- 5.2.7 Section 54 of the Municipal Systems Act provides that the Code of Conduct for Councillors contained in Schedule 1 to the Act (Code of Conduct), applies to every member of a municipal council.
- 5.2.8 Item 2 of Code of Conduct provides that a Councillor must perform the functions of office in good faith, honestly and in a transparent manner, at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality is not compromised.
- 5.2.9 In terms of Item 14(4) of the Code of Conduct, the MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation as to the appropriate sanction in

terms of sub item (2) if a municipal council does not conduct an investigation contemplated in sub item (1) and the MEC for local government considers it necessary.

- 5.2.10 Section 32(1) (d) of the MFMA provides that any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.
- 5.2.11 Section 32(2) of the MFMA provides that a municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure.
- 5.2.12 In terms of section 1 of the MFMA, “*fruitless and wasteful expenditure*” means: “*expenditure that was made in vain and would have been avoided had reasonable care been exercised*”.

Conclusion

- 5.2.13 As indicated in paragraph 5.1 above the failure by the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander to obtain approval from Acting Municipal Manager to utilise the travel and subsistence allowance that was already paid to them to attend the Department’s workshop for the period 10-14 May 2017 for a different purpose, was in violation of the Policy.
- 5.2.14 On their version of events, the Mayor and the three Councillors also attended the ANC Conference at Colesberg, before returning home. However, they travelled to Colesberg at the expense of the Municipality with the sole purpose to attend the workshop that was not held.

5.2.15 The conduct of the Mayor, Mr R Swartz and Councillors, De Wee, Gous and Alexander was accordingly improper and amounts to maladministration. It further resulted in the misappropriation of public funds and fruitless and wasteful expenditure, as contemplated by section 1 of the MFMA.

5.2.16 The conduct of the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander may also constitute a breach of the Code of Conduct contemplated by section 54 of the Municipal Systems Act.

6. FINDINGS

6.1. Regarding whether the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality acted in accordance with the relevant laws and prescripts regulating the travel and subsistence allowances paid by the Municipality in respect of a trip undertaken by them to Colesberg in May 2017:

6.1.1. The allegation that the Mayor, Mr R Swartz and Councillors De Wee, Gous and Alexander of the Municipality did not act in accordance with the relevant laws and prescripts regulating travel and subsistence allowances paid by the Municipality in respect of a trip undertaken by them to Colesberg in May 2017, is substantiated.

6.1.2. The Mayor and Councillors, De Wee, Gous and Alexander did not inform the Acting Municipal Manager of the cancellation of the workshop and to obtain authorisation to utilise the travel and subsistence allowance already paid to them for a purpose different from what it was approved for. They also attended the ANC Conference whilst in Colesberg at the expense of the Municipality and failed to reimburse the Municipality for the amount paid to them or a portion thereof.

6.2 Regarding whether the conduct of the Mayor, Mr R Swartz and Councillors, De Wee, Gous and Alexander was improper, constitutes maladministration and resulted in the misappropriation of public funds:

6.2.1 The allegation that the conduct of the Mayor, Mr R Swartz and Councillors, De Wee, Gous and was improper and amounts to maladministration is substantiated. It further resulted in the misappropriation of public funds and fruitless and wasteful expenditure, as contemplated by section 1 of the MFMA.

6.2.2 The conduct of the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander may also constitute a breach of the Code of Conduct contemplated by section 54 of the Municipal Systems Act.

6.2.3 The conduct of the Mayor and Councillors, De Wee, Gous and Alexander accordingly constitutes improper conduct as envisaged by section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

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

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

7.1.1.1. Appoint a person or committee in terms of Item 14(4) of the Code of Conduct for Councillors to investigate whether the Mayor, Mr Swartz and Councillors De Wee, Gous and Alexander breached the Code of Conduct and, if so to take action against them accordingly within 60 business days from the date of this report.

7.1.2. The Municipal Manager of the Municipality:

7.1.2.1 To take appropriate steps in terms of the MFMA to recover the travel and subsistence allowance paid to the Mayor, Mr Swartz, and Councillors De Wee, Gous and Alexander by the Municipality for the period 11 to 14 May 2017, within 60 business days from the date of this report.

8 MONITORING

8.1.1 The Northern Cape MEC for Co-Operative Governance, Human Settlements and Traditional Affairs to submit an action plan to me within 30 days from the date of receiving this report, indicating how the remedial action referred to in paragraph 7.1.1 above will be implemented.

8.1.2 The submission of the implementation plan and the implementation of my remedial action shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE
THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 18 / 09 /2020

Assisted by: PII Coastal, Public Protector South Africa