

**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**



Report No: 16 of 2007/8

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF
IMPROPRIETY RELATING TO THE APPOINTMENT OF MR M M
MOADIRA AS THE MUNICIPAL MANAGER OF THE CITY OF MATLOSANA**

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Executive summary

The Office of the Public Protector investigated a complaint by a Member of Parliament in connection with the appointment of Mr M M Moadira as the Municipal Manager of the City of Matlosana, in the North West Province. It was alleged that the appointment was improper as an investigation conducted at the Moqhaka Local Municipality, where Mr Moadira was formerly employed as Municipal Manager, found that he was involved in financial misconduct and that disciplinary action had to be taken against him.

From the investigation it appeared that Mr Moadira resigned as the Municipal Manager of the Moqhaka Local Municipality before a hearing on the charges brought against him was held. He applied for the position of Municipal Manager of the City of Matlosana before charges were brought against him and claimed to have a valid defence in regard thereto. The majority of the charges related to his alleged failure to institute disciplinary action against one of the managers that reported to him.

Mr Moadira qualified for the position of Municipal Manager at the City of Matlosana and disclosed the fact that he was suspended on charges of misconduct to the Interviewing Panel. The Executive Mayor was also aware of Mr Moadira's suspension and the matter was duly debated by the Municipal Council. The majority of the Councillors voted in favour of Mr Moadira's appointment.

It would have been unlawful and amounted to unfair discrimination to have excluded Mr Moadira from being considered for the position of municipal manager on the premise of charges formulated against him based on an investigation that did not apply the *audi alteram partem* principle. To do so would also have infringed Mr Moadira's right to rely on the constitutional principle of the presumption of innocence.

There was no properly substantiated finding by a disciplinary enquiry indicating or suggesting that Mr Moadira would not be capable of performing the functions of Municipal Manager at the City of Matlosana effectively and efficiently.

The Public Protector found that:

- Municipalities are autonomous in exercising its executive and legislative authority. The decisions and actions of a municipality therefore has no bearing or impact on the exercising of its public powers by another municipality;
- The decision of the Municipal Council of the City of Matlosana to appoint Mr Moadira as its Municipal Manager complied with the relevant legislative prescripts and requirements and with the standards for the exercising of public power set by the Constitutional Court; and
- It was not alleged and there was no indication during the investigation that Mr Moadira is not performing his functions as Municipal Manager of the City of Matlosana properly and effectively.

It was accordingly held that the allegation that the appointment of Mr Moadira as Municipal Manager by the Municipal Council of the City of Matlosana was improper, is unfounded.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPRIETY RELATING TO THE APPOINTMENT OF MR M M MOADIRA AS THE MUNICIPAL MANAGER OF THE CITY OF MATLOSANA

1. INTRODUCTION

This report is submitted to the Municipal Council of the City of Matlosana in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution, 1996) and section 8(1) of the Public Protector Act, 1994. It relates to an investigation of an allegation of impropriety in connection with the appointment of Mr M Moadira as the Municipal Manager of the City of Matlosana in the North West Province.

2. BACKGROUND

2.1 Mr Moadira resigned as the Municipal Manager of the Moqhaka Local Municipality in the Free State with effect from 31 October 2006, shortly after his suspension, on 8 September 2006, on charges of misconduct.

2.2 Prior to his resignation, Mr Moadira had applied for the advertised vacant position of Municipal Manager of the City of Matlosana. The Municipal Council of the City of Matlosana resolved at its meeting held on 30 October 2006 to appoint Mr Moadira as Municipal Manager with effect from 1 November 2006, for a period of 5 years.

3. THE COMPLAINT

3.1 Mr P J Groenewald MP lodged a complaint with the Office of the Public Protector in connection with Mr Moadira's appointment, alleging that it was improper. He referred to the report of an investigation conducted at the Moqhaka Local Municipality which, according to Mr Groenewald, found that Mr Moadira was guilty of misconduct and that disciplinary

action had to be taken against him.

- 3.2 Mr Moadira however, resigned before the Moqhaka Local Municipality could take action against him.
- 3.3 According to Mr Groenewald it is unacceptable and cannot be allowed that an official who commits acts of maladministration at a municipality is appointed at another municipality without any steps being taken against him.

4. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

- 4.1 Section 182(1) of the Constitution, 1996 provides that the Public Protector has the power, as regulated by national legislation, 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, to report on such conduct and to take the appropriate remedial action.
- 4.2 In terms of section 6(4)(a)(i) of the Public Protector Act, 1994, the Public Protector is competent to investigate a complaint of alleged maladministration in connection with the affairs of government at any level.
- 4.3 The Public Protector therefore has the power and jurisdiction to investigate the complaint of maladministration against the City of Matlosana relating to the appointment of Mr Moadira as its Municipal Manager.

5. THE INVESTIGATION

5.1 The focus

5.1.1 The investigation focussed on the allegation of impropriety made against the City of Matlosana in respect of the appointment of Mr Moadira as its Municipal Manager. As stated above, the allegation was based on the fact that Mr Moadira had been suspended at the Moqhaka Local Municipality as Municipal Manager and that charges of misconduct had been formulated against him at the time of his application for the said position at the City of Matlosana.

5.1.2 It was not the aim of the investigation referred to in this report to determine whether the findings of the investigation conducted at the Moqhaka Local Municipality and the ensuing charges brought against Mr Moadira were justified or not.

5.2 Methodology

The investigation was conducted in terms of section 6(4) and section 7 of the Public Protector Act, 1994 and comprised:

5.2.1 Consideration of the complaint;

5.2.2 Correspondence with the Municipal Manager of the Moqhaka Local Municipality;

5.2.3 Consideration of the contents of the *Report on the investigation into various allegations regarding the Moqhaka Municipality* (the *Majavu Report*) submitted to the Member responsible for local government of the Executive Council of the Free State Provincial Government (the MEC), on 2 February 2005, by Majavu and Associates;

- 5.2.4 Correspondence and consultation with the Executive Mayor of the City of Matlosana;
- 5.2.5 Correspondence with officials of the Office of the Executive Mayor of the City of Matlosana;
- 5.2.6 Consideration of documentation submitted by the Office of the Executive Mayor of the City of Matlosana;
- 5.2.7 Correspondence with Mr M Moadira, the Municipal Manager of the City of Matlosana;
- 5.2.8 Consideration and application of the relevant provisions of the Constitution, 1996, the Public Protector Act, 1994, the Local Government: Municipal Structures Act, 1998 (the Municipal Structures Act), the Local Government: Municipal Systems Act, 2000 (the Municipal Systems Act), and the Local Government: Municipal Finance Management Act, 2003 (the Municipal Finance Management Act);
- 5.2.9 Consideration of relevant portions of *Municipal Administration-The Handbook, 5th edition*, by D L Craythorne¹; and
- 5.2.10 Consideration and application of the judgment of the Constitutional Court in the case of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*².

¹ Juta, 2002

² 2000(2)SA 674 (CC)

6. THE LEGAL FRAMEWORK REGULATING THE APPOINTMENT OF A MUNICIPAL MANAGER

6.1 The Constitution, 1996

6.1.1 Section 151 provides that the executive and legislative authority of a municipality is vested in its Municipal Council. A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation. The national government or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

6.1.2 In terms of section 160, a Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality and may employ personnel that are necessary for the effective performance of its functions.

6.2 The Municipal Structures Act

Section 82 provides that:

“(1) *A municipal council must appoint-*

(a) a municipal manager who is the head of administration and also the accounting officer for the municipality; and

(b) when necessary, an acting municipal manager.

(2) *A person appointed as municipal manager must have the relevant skills and expertise to perform the duties associated with that post.”*

6.3 The Municipal Systems Act and the Municipal Finance Management Act, 2003

6.3.1 The “*relevant skills and expertise*” required from a person appointed as municipal manager are referred to, *inter alia*, in section 55 of the Municipal Systems Act. It provides that as head of the administration the municipal manager is responsible and accountable for, *inter alia*:

6.3.1.1 The formation and development of an economical, effective, efficient and accountable administration;

6.3.1.2 The management of the municipality’s administration in accordance with the Act and other applicable legislation;

6.3.1.3 The appointment and management of staff;

6.3.1.4 The implementation of the municipality’s integrated development plan;

6.3.1.5 The management of the provision of services to the local community in a stable and equitable manner;

6.3.1.6 Advising the political structures and political office bearers of the municipality; and

6.3.1.7 Facilitating participation by the local community in the affairs of the municipality.

6.3.2 In terms of section 60 of the Municipal Finance Management Act, the municipal manager, as the accounting officer, of the municipality must:

- 6.3.2.1 exercise the functions and powers assigned to an accounting officer in terms of this Act; and
- 6.3.2.2 provide guidance and advice on compliance with this Act to:
- (a) the political structures, political office bearers and officials of the municipality;
 - (b) any municipal entity under the sole or shared control of the municipality.
- 6.3.3 Dr D Craythorne³ expressed the following view in regard to the functions and duties of a municipal manager referred to above:

“The above constitutes a formidable list of responsibilities and duties, and clearly, the position calls for a person of character, drive and with leadership qualities of the highest order. However, the municipal manager is vulnerable in respect of finance: if the council does not allocate sufficient funds in its budget for training, communications, law enforcement or public participation, for example, the municipal manager will be accountable (responsible), but without the authority to rectify the situation.”

7. THE ‘MAJAVU REPORT’

- 7.1 The MEC commissioned an investigation in terms of the relevant provisions of the Municipal Systems Act into a number of aspects of the administration of the Moqhaka Local Municipality, on 6 December 2004.
- 7.2 Majavu and Associates, attorneys based in Johannesburg, were appointed to conduct the investigation.

³ *Municipal Administration: The Handbook 5th Edition (supra) on page 186*

- 7.3 The report on the investigation, which included a forensic audit, was submitted to the MEC on 2 February 2005.
- 7.4 The investigation was conducted mainly by interviewing “witnesses” individually. It was a feature of the investigation that the official(s) implicated by during the interviews were not present when the witness was questioned and were therefore not afforded an opportunity to challenge the evidence by putting questions to him/her or to respond properly to all the evidence that implicated him/her. It was also noted that Mr Moadira testified 10th on a list of 36 witnesses. Mr Senhanke, to whom the report refers to in much detail, testified 33rd.
- 7.5 The purpose of the investigation was clearly to establish the cause of the problems within the administration of the municipality and the credibility of the testimony of the witnesses was left for a possible ensuing disciplinary enquiry to determine. This was made clear by the Chairperson of the investigation in his response to an objection raised by Mr Senkhane to the process and in regard to the protection of his right to challenge the testimony of witnesses implicating him in alleged wrongdoing:

“It was also pointed out to him that this investigation is not a Commission of Enquiry as he seemed to suggest and therefore the Chairperson does not have the right to subpoena anyone to testify. Instead, all witnesses who testified before the inquiry did so voluntarily including some members of the public. It was therefore felt appropriate that Managers should also be afforded the opportunity to also shed light in (sic) the investigations. It was stressed that no particular individual is the target of this particular investigation as is clear from the Terms of Reference. However, it is also an open secret that an institution of this nature is run and governed by individuals and therefore it would not be surprising if some of the evidence led in this investigation were to lead (sic) or suggest impropriety by certain individuals.”

His assumptions were therefore fundamentally wrong on the basis that he assumed that this investigation is a tribunal whose mandate is to determine the guilt or otherwise of those who might have had allegations levelled against them. It was further pointed out to him that at the end of this exercise, findings and recommendations would be made which might possibly result in certain processes been (sic) undertaken.

*For example: In the event that recommendations were to be made that certain individuals should be charged, either internally or by the SAPS, it is at that stage that those affected individuals would have their constitutional rights protected.*⁴ (emphasis added)

7.6 The most significant findings of the report in respect of Mr Moadira were that:

7.6.1 *"There were indeed numerous instances of financial irregularities which arose as a result of poor fiscal control measure (sic), including inconsistent procurement process and using suppliers who are not voted (sic) and most importantly downright fraudulent misrepresentation by the Manager Corporate Service, Mr Valentine Senkhane. This resulted in unauthorized, fruitless or improper expenditure by the Municipality, which was not picked up by the Municipal Manager (Mr Moadira), as he is obliged to do in terms of s62 of the Municipal Finance Management Act.*

....

*In this instance, it is clear that the Municipal Manager allowed Mr Senkhane a full Carte Blanche, without sufficient checks and balances, hence a litany of irregular expenditure by the latter. The Municipal Manager has in this instance **failed** to exercise due care as contemplated in s65-65 (sic).⁵"*

⁴ On page 132-133 of the Report

⁵ On page 169-171

7.6.2 *"In this instance the Municipal Manager has failed to maintain cohesion amongst his 57 Managers, instead he has, in his wisdom deemed it prudent to openly and consistently show contempt towards other Managers except the Manager Corporate Services, Mr Senkhane. He has told other Managers how useless they are instead of seeking to capacitate them in their perceived areas of weakness."*⁶

7.6.3 A lack of good, fair, unbiased, consistent and decisive leadership has resulted in the fragmentation of top management into disruptive cliques, involving mainly the Mayor, Speaker, Municipal Manager and Mr Senkhane⁷.

7.6.4 Failure on the part of the Municipal Manager to monitor the performance of managers *"ensuring that everybody is kept on their toes."*⁸

7.7 As far as Mr Moadira is concerned, the report recommended that:

7.7.1 He is reprimanded for failing to take disciplinary action against Mr Senkhane⁹;

7.7.2 He is instructed in writing to institute disciplinary action and to take associated steps against Mr Senkhane in respect of a number of irregularities identified in the report; and

7.7.3 Should he fail to take the recommended action against Mr Senkhane, he is charged with contravening the relevant provisions of the Municipal Finance Management Act, 2003.

⁶ On page 173

⁷ On page 173-174

⁸ On page 176

⁹ On page 178

- 7.8 The report also found that political interference in the affairs of the municipality was rife and recommended disciplinary action against a number of Councillors, including the Speaker.
- 7.9 The MEC forwarded a copy of the report to the Municipal Manager of the Moqhaka Local Municipality on 4 May 2006, i.e. 1 year and 3 months after it was submitted to him. In his covering letter, the MEC stated:

"It is the considered view of this Department that issues forming the substance of the investigation conducted by Majavu & Associates have since been addressed by various interventions, and your Council may, therefore, take note of the recommendations and consider the matter finalised.

We, however, advice (sic) that in instances where in the opinion of your Council the report contains advices/recommendations that may help improve local governance, such advices be used to formulate policies to assist the Municipality to enhance service delivery."(emphasis added)

8. MR MOADIRA'S REACTION TO THE MAJAVU REPORT

- 8.1 During the investigation, Mr Moadira was afforded an opportunity to respond to the allegations made in respect of his appointment as the Municipal Manager of the City of Matlosana.

- 8.2 Reacting to the *Majavu Report*, he stated that:

8.2.1 "The Majavu Report was only released during March 2006 (sic), at the behest of the new Council. In their covering letter to the report the Province, who were the initiators of the Majavu Investigation, clearly indicated to the new Council, and correctly so, that the issues relating to

the Majavu Report should be considered as having been finalised premised on various interventions which unfolded in addressing the Moqhaka problems. These interventions which included Salga National, inter alia, culminated with the visit to Moqhaka by His Excellency the State President Mr Thabo Mbeki in January 2005 and laid the foundation for the withdrawal of section 139 (sic) by the Province in February 2005."

- 8.2.2 Despite the recommendation by the Provincial Government that the matter should be regarded as finalised, the Municipal Council appointed a "legal team" to advise it on how to deal with the *Majavu Report*.
- 8.2.3 During the period May 2006 until he was suspended in September 2006, various attempts were made by the Mayor and the Speaker to intimidate him to approve or condone unlawful and un-procedural actions, such as purchasing furniture to the value of R220 000 for the office of the Speaker, condoning the overpayment of councillor allowances and withdrawing disciplinary charges against a manager.
- 8.2.4 *"In a desperate attempt to make me tow the line, I started receiving correspondence from the Mayor about allegations of 'various acts of misconduct' on my part and which acts of misconduct were not only unknown to me but were also unknown to the Mayor and Council who despite this took a decision to suspend me on 8 September 2006. Paragraph two of their letter of suspension shows the reason for my suspension as being '**alleged acts of misconduct and the Majavu Report**'.*

9. THE CHARGES FORMULATED AGAINST MR MOADIRA

- 9.1 On 13 October 2006, i.e. less than 3 months prior to the expiry date of Mr Moadira's contract with the Moqhaka Local Municipality, he was served with a charge sheet containing 5 charges of gross misconduct. The majority of these charges related to the findings of the *Majavu Report* in respect of Mr Moadira's failure to take disciplinary action against Mr Senkhane.
- 9.2 It was not expected of Mr Moadira to respond in detail to these charges during the investigation. He did however, indicate that he has a legitimate defence against each of the allegations made against him.
- 9.3 Mr Moadira resigned shortly after he received the charge sheet. He left the employ of the Moqhaka Local Municipality at the end of October 2006. The Disciplinary Code of the Municipality provides that where an employee resigns after having received a notice of misconduct, the disciplinary enquiry shall not proceed.

10. MR MOADIRA'S APPOINTMENT AS THE MUNICIPAL MANAGER OF THE CITY OF MATLOSANA

10.1 The application

- 10.1.1 The vacancy was advertised on 10 September 2006. Mr Moadira applied on 21 September 2006.
- 10.1.2 From his Curriculum Vitae and the certified documents attached to his application, it appears that Mr Moadira has the qualifications B Admin

and B Hons Admin, both from the University of South Africa. He also has a Diploma in Civil Engineering and a Diploma in Local Government.

10.1.3 He has, in the main, the following experience:

10.1.3.1 8 years as an Engineering Technician;

10.1.3.2 5 years as Assistant City Engineer;

10.1.3.3 7 years as Deputy City Engineer;

10.1.3.4 5 years as Town Clerk and Acting Municipal Manager of the Mafikeng Local Municipality;

10.1.3.5 4 years as the Municipal Manager of the Moqhaka Local Municipality.

10.1.4 Mr Moadira is also a full member of the Institute of Administration and Commerce of Southern Africa.

10.2 The interview

10.2.1 The municipality received 34 applications. Six candidates, including Mr Moadira were invited for an interview on 6 October 2006.

10.2.2 The Interviewing Panel consisted of an attorney, an executive manager of the Department of Education, a lecturer at the University of the North West, a former councillor and an international advisor.

10.2.3 One of the panellists described Mr Moadira's interview as follows:

"My recollection of the interview is that Mr M M Moadira did quite well at the interview. He answered most of the questions well. He

convinced me that he knows the job of the Municipal Manager and the challenges associated with it. He is sincere and honest enough disclosing his suspension voluntarily to the panel."

10.2.4 The results of the interview were submitted to the Executive Mayor.

10.3 Further action taken by the Executive Mayor

10.3.1 From the investigation it appeared that the Executive Mayor conducted further "follow up" interviews with the top 4 candidates identified by the Interviewing Panel. He also contacted the persons stated as references by the candidates to confirm their suitability for appointment.

10.3.2 According to the Executive Mayor, he was fully aware of the fact that Mr Moadira was suspended and of the charges brought against him by the Moqhaka Local Municipality at the time when his appointment as Municipal Manager was considered. He was also aware of the contents of the *Majavu Report*. In this regard he stated:

"On the question of allegations of financial misconduct and therefore the impropriety of our subsequent appointment of Mr M M Moadira I am unable and it is impossible for me, to respond on the basis of unsubstantiated information."

10.3.3 The Executive Mayor submitted his *Report to the Council on the recruitment and appointment of a Municipal Manager* to the Municipal Council, recommending the appointment of Mr Moadira.

10.4 The decision of the Municipal Council

- 10.4.1 From the Minutes of the Eighth Meeting of the Council of the City of Matlosana, held on 30 October 2006, it appears that the recommendation of the Executive Mayor for the appointment of Mr Moadira as Municipal Manager was opposed by opposition parties.
- 10.4.2 The contents of the *Majavu Report* were referred to during the ensuing debate.
- 10.4.3 The matter was eventually put to a vote and the majority of councillors supported Mr Moadira's appointment.
- 10.4.4 It was therefore resolved that: "*Mr M M Moadira be appointed as the Municipal Manager with effect from 1 November 2006 for a period of 5 years.*"

10.5 Mr Moadira's further response to the allegation of impropriety relating to his appointment

During the investigation Mr Moadira also stated that:

"It is important to indicate the following in this regard:

- (i) That when I joined Moqhaka Municipality in January 2002, the Municipality was in a serious financial position and depended on bank overdrafts of R6m to R7m for meeting its basic operational financial obligations.*
- (ii) That by the end of May 2004, I had managed to restore the Municipality to a sound financial footing and that since then until when I was suspended for no reasons on 8 September 2006, we*

were operating on a credit balance with no need to fall back on overdrafted facilities.”

and

“It is my honest and humble opinion that the only real reason that influenced my appointment in (sic) Matlosana is because I have the relevant qualifications for the job which are not only backed by 22 years of relevant municipal experience at management level but also by undivided loyalty, integrity and commitment in ensuring that government programmes and objectives around service delivery and improvement of the quality of life of all our people are realised.”

11. EVALUATING THE DECISION OF THE MUNICIPAL COUNCIL TO APPOINT MR MOADIRA

- 11.1 The decision of the Municipal Council of the City of Matlosane to appoint Mr Moadira as its Municipal Manager was taken in terms of its executive authority.
- 11.2 The Public Protector does not have the powers of judicial review of a court of law and cannot issue orders or set aside the decisions of a municipal council.
- 11.3 In determining whether the decision of a municipal council was improper and/or amounted to maladministration, the Public Protector has to consider the application of the statutory and common law relating to the matter concerned, taking into account the relevant directions by and interpretations of the courts.

11.4 In the case of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*¹⁰, the Constitutional Court held that:

"In S V Makwanyane Ackerman J characterized the new constitutional order in the following terms: 'We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts or our new constitutional order.

...

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which power was given, otherwise they are in fact arbitrarily and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.

...

¹⁰ 2000(2)SA 674 (CC)

Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of the Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of the public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately." (emphasis added)

11.5 In determining whether the decision relating to the appointment of Mr Moadira applied to the standard set by the Constitutional Court, the following had to be taken into account:

11.5.1 The fact that Mr Moadira had not been convicted of any misconduct by the Moqhaka Municipality;

11.5.2 Mr Moadira's claim that he has a valid defence to the findings made against him in the *Majavu Report* and the related charges;

11.5.3 No hearing was held to determine the validity and credibility of the findings made against Mr Moadira in the *Majavu Report*. The *Majavu* investigation was not a commission or disciplinary enquiry and did not follow a process that afforded Mr Moadira an opportunity to properly challenge the allegations made against him;

11.5.4 The investigation that culminated in the *Majavu Report* was commissioned by the MEC and not by the municipality concerned. Its

findings were only revealed to the municipality more than a year after it was submitted to the MEC. During this time, Mr Moadira was not suspended and still performed his functions as Municipal Manager. The MEC indicated that he was satisfied that the findings had been satisfactorily addressed and that no further action was necessary;

11.5.5 Despite the said contention of the MEC, Mr Moadira was charged on the basis of the findings of the *Majavu Report*, more than 17 months after it was issued and only three months before the expiry of his contract. According to Mr Moadira the reasons for the charges brought against him related to his refusal to condone improper conduct of certain Councillors;

11.5.6 The majority of the charges formulated against Mr Moadira related to his alleged failure to institute disciplinary action for misconduct against the Manager: Corporate Services of the Moqhaka Municipality;

11.5.7 Mr Moadira applied for the position of Municipal Manager at the City of Matlosana and was interviewed before he was charged, as stated above;

11.5.8 He qualified for the position in terms of his qualifications and experience;

11.5.9 Mr Moadira disclosed to the Interviewing Panel that he was suspended by the Moqhaka Local Municipality at the time when he applied for the position concerned;

11.5.10 The Executive Mayor of the City of Matlosana was aware of Mr Moadira's suspension and the contents of the *Majavu Report*. He held a further interview with Mr Moadira and contacted his references. The Executive Mayor was satisfied that despite what was stated in the *Majavu Report*, Mr Moadira was the best candidate for the position of Municipal Manager;

11.5.11 The Municipal Council of the City of Matlosana debated the recommendation of the Executive Mayor that Mr Moadira should be appointed. Reference was made to the contents of the *Majavu Report*. The matter was put to a vote and the majority of Councillors supported Mr Moadira's appointment; and

11.5.12 There is no indication of impropriety in respect of the process followed in appointing Mr Moadira as Municipal Manager.

11.6 It would have been unlawful and amounted to unfair discrimination to have excluded Mr Moadira from being considered for the position of municipal manager on the premise of charges formulated against him based on an investigation that did not apply the *audi alteram partem* principle. To do so would also have infringed Mr Moadira's right to rely on the constitutional principle of the presumption of innocence.

11.7 There was no properly substantiated finding by a disciplinary enquiry indicating or suggesting that Mr Moadira would not be capable of performing the functions of Municipal Manager at the City of Matlosana effectively and efficiently. The Municipal Council of the City of Matlosana was fully aware of the charges formulated against him and the contents of the *Majavu Report* and still decided that he was the best candidate.

11.8 Under the circumstances it cannot be found that the said decision of the Municipal Council was not rationally related to the purpose for which the power to appoint a municipal manager was afforded to it by the Constitution and the relevant national legislation. The purpose that the Municipal Council sought to achieve, i.e. to appoint a person with the necessary skills and experience as municipal manager, was within its authority and its decision cannot be interfered with simply because a court or the Public Protector might disagree with it or hold the view that it was inappropriate.

12. OBSERVATIONS AND FINDINGS

The following observations and findings have been made from the investigation:

- 12.1 Municipalities are autonomous in exercising its executive and legislative authority. The decisions and actions of a municipality therefore has no bearing or impact on the exercising of its public powers by another municipality;
- 12.2 The decision of the Municipal Council of the City of Matlosana to appoint Mr Moadira as its Municipal Manager complied with the relevant legislative prescripts and requirements and with the standards for the exercising of public power set by the Constitutional Court;
- 12.3 It was not alleged and there was no indication during the investigation that Mr Moadira is not performing his functions as Municipal Manager of the City of Matlosana properly and effectively, nor that he is not a suitable and competent person to be appointed.

13. KEY FINDING

The key finding made from the investigation is that:

The allegation that the appointment of Mr Moadira as Municipal Manager by the Municipal Council of the City of Matlosana was improper, is unfounded.

ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 31 July 2007