

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

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“Allegations of improper conduct and maladministration by the Masilonyana Municipality”

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO FAILURE TO REGISTER MR ISRAEL MOGOALADI AS A MEMBER OF THE PROVIDENT FUND AND PAY ALL CONTRIBUTIONS DUE ON HIS BEHALF BETWEEN 31 JULY 2014 AND 31 MARCH 2016 AND PAY HIM FOR THE ACCUMULATED LEAVE DAYS BY THE MASILONYANA LOCAL MUNICIPALITY

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Executive Summary

- (i) 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, and section 8(1) of the Public Protector Act, 1994.
- (ii) The report communicates the Public Protector's 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 Masilonyana Local Municipality (the Municipality) relating to its failure to register Mr Israel Mogoaladi (Complainant) as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016 and pay his accumulated leave days.
- (iii) The complaint was lodged on 06 January 2020 by the Complainant, at the Head Office of the Public Protector South Africa.
- (iv) The Complainant was employed by the Municipality as a driver/messenger in the Office of the Municipal Manager on 1 July 2014. He retired on 30 September 2018, however, he was only paid his pension benefits for 1 April 2016 and 30 September 2018.
- (v) The Complainant further alleged that he accumulated 51 leave days, however, the Municipality failed to pay his leave days upon retirement.
- (vi) **Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:**
 - (a) Whether the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014

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- and 31 March 2016, and if so, whether the conduct was improper and constitutes maladministration and prejudiced the Complainant; and
- (b) Whether the Municipality failed to pay the Complainant accumulated leave days upon retirement, and if so, whether the conduct of the Municipality was improper and constitutes maladministration.
- (vii) 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 exchange of correspondence with the Municipality, an analysis of the relevant documents and information obtained during the investigation and consideration and application of the relevant laws and prescripts.
- (viii) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:
- (a) Regarding whether the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016, and if so, whether the conduct was improper and constitutes maladministration and prejudiced the Complainant:**
- (aa) The allegation that the Municipality failed to register the Complainant as a member of the provident fund between 31 July 2014 and 31 March 2016, including September 2018 and pay all contributions due on his behalf was improper and amounted to maladministration and that as a result the Complainant suffered prejudice is substantiated.
- (bb) The investigation revealed that the Complainant was employed by the Municipality as a driver/messenger on 1 July 2014 in the Office of the

Municipal Manager and retired on 30 September 2018. According to the Complainant's contract of employment dated 02 July 2014, it was compulsory for the Municipality to register him with a provident fund.

- (cc) The investigation further revealed that the Municipality only registered and paid contributions for the Complainant with SALA effective from 01 April 2016 until 31 August 2018.
- (dd) The Municipality further failed to pay his contribution for September 2018 which was the month that he retired.
- (ee) The Complainant suffered prejudice in that he forfeited provident fund benefits between 31 July 2014 and 31 March 2016, including September 2018. However, the outstanding pension benefits, amounting to R34 959.61, have since been paid and the Complainant has also acknowledged receipt of the said benefits.
- (ff) The failure by the Municipality to register the Complainant as a member of the provident fund and pay all contributions due on his behalf, was inconsistent with section 195(1)(a), (f) and (g) of the Constitution. It was also in violation of Clause 2 of the Complainant's contract of employment and section 13A of the Pension Fund Act, 24 of 1956.
- (gg) The conduct of the Municipality was also inconsistent with section 55(1)(p) of the Municipal Systems Act(MSA) which required that the head of the administration must, subject to policy of the municipal council be responsible for the promotion of sound labour relations and compliance by the municipality with applicable labour legislation.

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- (hh) The conduct of the Municipality resulted in prejudice suffered by the Complainant as envisaged in section 6(4)(v) of the Public Protector Act.
- (ii) The conduct also constitutes improper conduct in state affairs as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) Regarding whether the Municipality failed to pay the Complainant accumulated leave days upon retirement, and if so, whether the conduct of the Municipality was improper and constitutes maladministration:**
- (aa) The allegation that the Municipality failed to pay the Complainant accumulated leave days is unsubstantiated and therefore no prejudice was suffered.
- (bb) The evidence presented before the Public Protector revealed that the Complainant did not have accumulated leave days as at 31 September 2018 when he retired. The Complainant could not produce any evidence or refute the evidence submitted by the Municipality.
- (cc) The investigation further revealed that the Municipality does not have a policy to regulate the employees' leave. Failure by the Municipality to develop a leave policy was inconsistent with section 55(1)(p) of the MSA.
- (dd) The conduct of the Municipality for failing to develop a leave policy constitutes improper conduct in state affairs as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

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

(a) **The Municipal Manager of the Masilonyana Local Municipality to:**

(aa) Within **sixty (60) working days** from the date of the report, take appropriate disciplinary and remedial action in terms of the Municipality's Disciplinary Policy and section 67(1) (h) of the Municipal Systems Act; and

(bb) Within **sixty (60) working days** from the date of the report, initiate, in consultation with the Human Resources Unit, a process for the development of the Municipal Leave Policy, for purposes of regulating leave of the employees of the Municipality, as envisaged by section 67(1) (b) of the Municipal Systems Act and the relevant provisions of the Basic Conditions of Employment Act. Furthermore the leave policy must be aligned to the Basic Conditions of Employment Act.

(cc) Within **ninety (90) working days** from the date of the report, report to the Council on the implementation of the remedial action taken in paragraphs (ix)(a)(aa)(bb) and (dd) and provide the Public Protector with a copy thereof.

(dd) Within **thirty (30) working days** from the date of the report provide the Complainant with an apology in writing for the prejudice that he suffered as a result of the failure on the part of the Municipality to register him on a provident fund when he was employed by the Municipality.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO FAILURE TO REGISTER MR ISRAEL MOGOALADI AS A MEMBER OF THE PROVIDENT FUND AND PAY ALL CONTRIBUTIONS DUE ON HIS BEHALF BETWEEN 31 JULY 2014 AND 31 MARCH 2016 AND PAY HIM FOR ACCUMULATED LEAVE DAYS, BY THE MASILONYANA LOCAL MUNICIPALITY

1. INTRODUCTION

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

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

1.2.1 Mr M Dukwana, the Member of the Executive Council for Cooperative Governance and Traditional Affairs in the Free State Province;

1.2.2 Mr M V Vuma, the Head of Free State Department of Cooperative Governance and Traditional Affairs;

1.2.3 Mr Nkone Makata, the Speaker of the Masilonyana Local Municipality (Municipality);

1.2.4 Mr Maki Modise, the Mayor of the Municipality;

1.2.5 Mr Lungile Mokoteli, the Acting Municipal Manager of the Municipality;

1.2.6 Mr Peter Ziegler, the Head of Department, South African Local Authorities Pension Fund (SALA) and

1.2.7 Mr Ziska Verhagen, the Legal Advisor of the National Fund for Municipal Workers (NFMW).

1.3 A copy of the report is also provided to Mr Israel Mogoaladi, who lodged the complaint, in terms of section 8(3) of the Public Protector Act.

1.4 The report relates to an investigation into allegations that the Municipality failed to register Mr Israel Mogoaladi as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016 and payment of accumulated leave days.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector on 6 January 2020 by Mr Israel Mogoaladi (the Complainant). In essence, the Complainant alleged, *inter alia*, that:

2.1.1. He was employed by the Municipality as a driver/messenger in the Office of the Municipal Manager on 1 July 2014. He retired on 30 September 2018, however he was paid his pension benefits only for the period 1 April 2016 up until 31 August 2018; and

2.1.2. The Municipality failed to pay him for his accumulated leave days upon retirement.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body 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:

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

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

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

3.4 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 effect¹. 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

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

² *Supra* at para [73].

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- 3.5 In the above-mentioned Constitutional Court matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.5.1. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.5.2. 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);
- 3.5.3. Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);
- 3.5.4. 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);
- 3.5.5. 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);
- 3.5.6. 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);

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- 3.5.7. 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));
- 3.5.8. She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d));
- 3.5.9. “*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));
- 3.5.10. When remedial action is binding, compliance is not optional, whatever reservation the affected party might have about its fairness, appropriateness, lawfulness. For this reason the remedial action taken against those under investigation cannot be ignored without any legal consequence; (paragraph 73).
- 3.5.11. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would “*amount to a license to a self-help*”. Whether the Public Protector’s decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained (Paragraph 74).

3.6 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:

3.6.1. The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);

3.6.2. 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);

3.6.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (paragraphs 100 and 101):

- a) Conduct an investigation;
- b) Report on that conduct; and
- c) Taking appropriate remedial action.

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

3.6.5. Her 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);

3.6.6. 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

3.6.7. 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).

3.7 The Municipality is an organ of state and its conduct falls within the ambit of the Public Protector.

3.8 The Public Protector's powers and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, 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?

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- 4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
- 4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?
- 4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Municipality acted improperly in relation to failure to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016, including the accumulated leave days and if so, whether the conduct constitutes maladministration and prejudiced the Complainant.
- 4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been complied with by the Municipality to prevent maladministration and prejudice.
- 4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration. Where the Complainant has suffered any prejudice, the idea is to place him as close as possible to where he would have been had the Municipality complied with the regulatory framework setting the applicable standards for good administration.
- 4.3 **On analysis of the complaint, the following were issues considered and investigated:**
- 4.3.1 Whether the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and

31 March 2016, and if so, whether the conduct was improper and constitutes maladministration and prejudiced the Complainant; and

4.3.2 Whether the Municipality failed to pay the Complainant for accumulated leave days upon retirement, and if so, whether the conduct of the Municipality was improper and constitutes maladministration

4.4 **The key sources of information:**

4.4.1. **Documents received and considered:**

4.4.1.1. A complaint email from the Complainant.

4.4.1.2. An allegation email and letter dated 23 January 2020 and 17 April 2020 respectively submitted to the Municipality.

4.4.1.3. A copy of the employment contract received from the Complainant.

4.4.1.4. The National Fund for Municipal Workers membership form received from the Complainant.

4.4.2. **Correspondence sent and received:**

4.4.2.1. Letter dated 25 May 2020 received from the Municipality on 29 July 2020;

4.4.2.2. Email dated 8 August 2020 from Public Protector South Africa (PPSA) to Mr Peter Ziegler, the Head of Department of SALA Pension Fund (Mr Ziegler) requesting information of the pension contribution from the Municipality;

4.4.2.3. Email dated 11 August 2020 from Mr Ziegler in response to the PPSA;

4.4.2.4. Email dated 11 February 2021 from PPSA to Mr Pule Tsekedi, the former Municipal Manager (Mr Tsekedi), requesting additional information;

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- 4.4.2.5. Email dated 19 March 2021 from the PPSA to Mr Ziegler, requesting a copy of the membership form of the Complainant;
 - 4.4.2.6. Email dated 19 March 2021 from Mr. Ziegler, in response to the email from PPSA dated 19 March 2021;
 - 4.4.2.7. Email dated 19 March 2021 from PPSA to Mr Tsekedi, requesting additional information;
 - 4.4.2.8. Discretionary Notice issued to the Complainant dated 14 January 2021;
 - 4.4.2.9. Response to Discretionary Notice by the Complainant dated 20 January 2022;
 - 4.4.2.10. A copy of proof of payment of the Complainant's pension benefits of R34 959.61; and
 - 4.4.2.11. An unsigned and undated copy of the Municipal Leave policy received from the Legal Manager, Mr I Mogaecho on 07 February 2021.

4.4.3. Legislation and other prescripts

- 4.4.3.1. The Constitution of the Republic of South Africa;
- 4.4.3.2. The Public Protector Act 23 of 1994;
- 4.4.3.3. The Pensions Fund Act, 24 of 1956;
- 4.4.3.4. The Local Government: Municipal Systems Act, 32 of 2000 (MSA);
- 4.4.3.5. The South African Local Authorities Pension Fund: Revised Rules, effective from 1 July 2010

4.4.4 Case law considered

- 4.4.4.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*;³
- 4.4.4.2 *President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017),*

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

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- 4.4.4.3 *Key Moves (Pty) Ltd and the Pension Fund Adjudicator and Others* 16 (2019) (FST) (the Key Moves);
- 4.4.4.4 *Mokoena v the Transport Sector Retirement Fund and Others* 5 (2019) (PFA);
- 4.4.4.5 *Orion Money Purchase Pension Fund (SA) v Pension Fund Adjudicator and others*: consolidation of High Court case no: (2002) ZAWCHC 38; and
- 4.4.4.6 *Mgaimbiyiyana and Security Employees' Pension Fund* as per Determination reference PFA/WE/5383/05/VIA.

4.4.5 Notices issued in terms of section 7(9) of the Public Protector Act, 23 of 1994

- 4.4.5.1 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act (section 7(9)(a) Notice) to the Acting Municipal Manager of the Municipality on 25 November 2021. He responded on 14 December 2021 and on 18 January 2022

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

- 5.1 Regarding whether the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016, and if so, whether the conduct was improper and constitutes maladministration and prejudiced the Complainant:**

Common cause facts

- 5.1.1 It is common cause that the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016.

- 5.1.2 The Complainant was employed by the Municipality as a driver/messenger on 1 July 2014 in the Office of the Municipal Manager and retired on 30 September 2018.
- 5.1.3 The Municipality only registered and paid contributions for the Complainant with the SALA pension fund from 01 April 2016 until 31 August 2018. The Municipality further failed to pay his contribution for September 2018 which was the month that he retired.

Issues in dispute

- 5.1.4 The issue for determination was whether the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf from 31 July 2014 until 31 March 2016 and whether such failure was improper and amounted to maladministration, resulting in him suffering prejudice.
- 5.1.5 The Complainant contended that it was wrongful for the Municipality not to register him as a member of the provident fund and pay all contributions due on his behalf.
- 5.1.6 The complaint was raised with the Municipality's former Human Resource Manager, Mr Gabriel Tjolo (Mr Tjolo), as per an email dated 23 January 2020 and letter dated 17 April 2020. The former Municipal Manager, Mr Tsekeledi, responded on 29 July 2020 through a letter dated 25 May 2020. He reported that the Complainant commenced contributing towards the pension fund from 01 April 2016 until his retirement on 30 September 2018, therefore his pension benefits was paid in full.
- 5.1.7 The matter was also raised with Mr Ziegler as per the letter dated 08 August 2020. He responded through an email dated 11 August 2020 that in terms of the information from the contribution schedules⁴ received from the Municipality, the

⁴ A contribution schedule is filled out by the employer and contains the details of all the actual contributions made in each pay reference period. This allows them to process these contributions. An entry is made for

Complainant joined the Municipality on 1 April 2016 and was captured on the SALA pension fund records based on the contribution schedule.

- 5.1.8 Mr Ziegler further confirmed that the Complainant's pension benefits were calculated from the 1 April 2016 to 31 August 2018 and further that, the Complainant retired on 28 September 2018, however the Municipality did not pay the contribution for the month of September 2018.
- 5.1.9 In terms of the appointment letter received from the Complainant on 23 September 2020, signed by Mr S Mtakati (Mr Mtakati) the erstwhile Municipal Manager dated 02 July 2014, the membership towards a provident fund was compulsory and the Complainant had to choose between the SALA pension fund, SAMWU National Provident Fund and the NFMW pension fund.
- 5.1.10 Furthermore, the Municipality had to contribute 18% towards preferred the provident fund and the Complainant had an obligation to contribute 8.6% towards the SALA pension fund, 8.5% towards the SAMWU National Provident Fund or 7.5 % to 8.6% towards the NFMW depending on the provident fund he chose.
- 5.1.11 On 23 September 2020, the Complainant submitted to the PPSA Investigation team, a completed application form for membership of the NFMW. The application was signed by both the Municipality and Complainant with a stamp dated 14 April 2016, however there was no membership application form for the SALA pension fund that was completed by the Complainant. It is not clear why the pension benefits of the Complainant was paid to the SALA pension fund by the Municipality instead of the NFMW pension fund.

each member enrolled in the scheme and includes their name and National Insurance number, their earnings for that pay reference period and the amount of employer and worker contributions paid into their retirement pot

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- 5.1.12 An Alternative Dispute Resolution (the ADR) session facilitated by the PPSA Investigation team as envisaged by section 6(4) of the Public Protector Act was held on 11 November 2020. The ADR hearing was attended by the late Mr Gabriel Tjolo (Mr Tjolo) the former HR Manager, Mr Prince Melato (Mr Melato); the Acting Director Corporate Service, Mr Tsekedi and the Complainant. During the ADR proceedings, Mr Tsekedi submitted that in 2014, the Complainant's membership application for registration was sent to the NFMW pension fund, but it was rejected on the basis that the Complainant was too old at the time of appointment as he was 61 years old. He further indicated that in 2016, an application for membership was sent to SALA pension fund which was subsequently approved.
- 5.1.13 During the ADR meeting, the Complainant rejected the submission by Mr Tsekedi that his membership application was rejected by NFMW pension fund in 2014. He stated that in 2014 after joining the Municipality, he completed the SALA pension fund membership application. He reported that he was later informed by Mr Tjolo that his application was rejected on the basis of age. The Complainant was allegedly not provided with a copy of the rejection letter. This information was further stated by Mr Tjolo during the ADR. Mr Tjolo thereafter failed to produce the rejection letter which was requested from him on 11 November 2020.
- 5.1.14 The submission by the Complainant refutes the assertion by Mr Tsekedi, because the latter said that in 2014 the Complainant applied for the NFMW pension fund membership, but it was rejected, whereas the Complainant contended that he applied for the SALA pension fund membership and was informed by Mr Tjolo that his application was rejected.
- 5.1.15 During the ADR meeting, Mr Tjolo reported that in 2015 the Complainant approached him for assistance regarding joining a provident fund whereas he had already joined the SALA pension fund.

- 5.1.16 Mr Ziegler was requested in an email dated 19 March 2021 to confirm to the PPSA Investigation team whether the Complainant had ever completed the SALA pension fund membership application. He indicated in an email dated 19 March 2021 that *“it is a general trend of participating employers under SALA pension fund not to provide new entrant statements for members joining the fund”*. Therefore *“the employer and the member did not complete a new entrant form and did not submit one”*.
- 5.1.17 Mr Ziegler further submitted that *“in terms of SALGA mandate all members who joined the Municipality and a fund can only join a DC structure so he was placed under DC from the contribution schedule”*. It appears from this information that the Complainant completed the membership form for the SALA pension fund in 2014 and it was never submitted to SALA pension fund. It also appears that in 2014, the Municipality placed the Complainant under the Defined Contribution⁵ (the DC) from the contribution schedule, hence the deduction of pension commenced in 2016.
- 5.1.18 Mr Ziegler submitted in an email dated 29 March 2021 that the claim by the Municipality that it rejected the membership application of the Complainant in 2014, but accepted it in 2016 was inaccurate. Mr Ziegler stated that there was no correspondence as evidence in their files. The Municipality also failed to produce any document to support their statement. He also submitted that the fund’s rules were changed on 1 April 2000 for the members who joined the fund after this date to retire at the age of sixty five (65).
- 5.1.19 During the ADR session, it was brought to Mr Tsekedi’s attention that in terms of the employment contract which the Complainant signed with the Municipality, pension fund membership was compulsory. He was asked to explain the reasons for allowing the Complainant to work without applying for a provident membership

⁵ Contribution arrangements in which the Employee and the Employer contributes towards the provident fund.

between 1 July 2014 and 31 March 2016. In his response, ***Mr Tsekedi conceded that this situation was an anomaly.*** (own emphasis added)

- 5.1.20 As part of the process of settling the matter amicably at the ADR session, it was proposed to the Municipality that the SALA pension fund be approached to accept the Complainant's contributions from the Municipality and Complainant's arrears provident fund contributions. Mr Tsekedi responded as follows *"it is the first time hearing of such...and that ordinarily for any payment to be effected there has to be premium paid into and in this regard we do not have any as effected from Mr Mogoaladi and neither did we contribute as Masilonyana... and already we are talking unauthorised and irregular expenditure on our side..."* It was also proposed to the Municipality to explore the system of buying back pensionable service period.
- 5.1.21 During the ADR session, it was agreed that Mr Tsekedi would provide the PPSA Investigation team with a letter from the NFMW pension fund that was alleged to have rejected the Complainant's membership application, including any other relevant information. On 11 November 2020, an email was sent to Mr Tsekedi, listing all the documents that should be submitted to the Investigation team, however he failed to respond, despite numerous reminders.
- 5.1.22 A further enquiry was referred to the NFMW pension fund as per email dated 11 November 2020. The response was received from Mr Ziska Verhagen (Mr Verhagen), the Legal Adviser from NFMW pension fund, as per the letter dated 23 November 2020, who rejected the assertion by Mr Tsekedi that the NFMW pension fund rejected the Complainant's membership application on the basis of age. According to Mr Verhagen, the NFMW pension fund did not receive the Complainant's application from the Municipality in 2014 nor in 2016.

The Municipality's response to section 7(9) notice of the Public Protector

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- 5.1.23 In his response the section 7(9) Notice, in a letter and email dated 14 December 2021, Mr Lungile Mokoteli (Mr Mokoteli), the Acting Municipal Manager stated the *inter alia*, the following:
- 5.1.23.1 That the Municipality has no evidence to the contrary and they are in the process of calculating all outstanding contributions that were due to the Complainant; and
- 5.1.23.2 In a letter dated 18 January 2022, Mr Mokoteli reported that on 22 December 2021, the Complainant was paid an amount of R34 959.61 as his unpaid pension benefits for the period between 31 July 2014 and 31 March 2016 and the proof of payment was attached. The Complainant, through the telephonic conversation with the PPSA Investigation team on 20 January 2022, acknowledged receipt of the payment.
- 5.1.24 An email dated 23 February 2022, was sent to Mr Itumeleng Poonyane (Mr Poonyane) requesting a breakdown of the pension benefits that was paid to the Complainant, to reflect the difference between actual pension benefits and the interest. On same date Mr Diseko Ntsepe (Mr Ntsepe) responded.
- 5.1.25 According to the breakdown of the pension benefits as submitted by Mr Ntsepe, an amount of R34 959.61 was for the year 2014/2015 and 2015/2016 excluding the month of September 2018. The actual benefits was R32 582.52 and the interest was R2 377.09.
- 5.1.26 Mr Ntsepe further submitted that the outstanding amount R1 937.12 of the pension benefits for the month of September 2018 will be paid and the proof of payment will be submitted to the Office of the Public Protector.

Application of the relevant law

- 5.1.27 Section 23(1) of the Constitution provides as follows; *“everyone has a right to a fair labour practices”*.
- 5.1.28 Section 195(1) provides as follows *“the public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
- (a) *A high standard of professional ethics must be promoted and maintained;*
 - (f) *Public administration must be accountable; and*
 - (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information”*.
- 5.1.29 It was expected of the Municipality to act professionally after signing the appointment letter with the Complainant. The conditions of the Complainant’s employment contract required that he must be registered with a provident fund by the Municipality and this was not done on time. Clause 2 of the appointment letter signed by the Complainant and Mr Mtakati dated on 2 July 2014 provided that *“membership to a fund is compulsory and there is a choice between...”* The Complainant had a choice of choosing between the three provident funds, namely SALA pension fund, SAMWU National Provident Fund and NFMW pension fund.
- 5.1.30 The Human Resource Personnel of the Municipality ought to have facilitated the process of joining the provident fund before the first payment on 31 July 2014.
- 5.1.31 The Municipality was therefore expected to be accountable and transparent in the manner in which the Complainant’s pension fund issues were dealt with.
- 5.1.32 The Municipality had a contractual duty in terms of Clause 2 of the appointment letter to register the Complainant, deduct the provident fund contributions and pay over to the fund, however such obligation was not honoured by the Municipality.

5.1.33 Section 55(1) of the Municipal Systems Act, 2000 (MSA) provides that, “as the head of the administration of a Municipality the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, inter alia:

.....

(h) Promotion of sound labour relations and compliance by the municipality with applicable labour legislation”.

5.1.34 Section 67(1) of the MSA, states that, “a municipality, in accordance with the Employment Equity Act, 1998, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including-

(b) Service conditions of staff and

(h) Disciplinary procedures”.

5.1.35 It was expected of the Municipal Manager to ensure that every employee whose contract stipulated that pension or provident fund membership is compulsory, to register them accordingly. Failure to do so would be inconsistent with the provisions of the MSA and secondly the Municipality was required to develop appropriate systems and procedures to ensure fair, efficient, effective and transparent administration.

5.1.36 Section 13A(1) of the Pension Fund Act, 24 of 1956 (PFA) provides, that:

“Notwithstanding any provision on the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following in full, namely:

(a) Any contribution which, in terms of the rules of the fund, is to be deducted from the members remuneration; and

(b) Any contribution for which the employer is liable in terms of those rules.”

- 5.1.37 It is apparent from the above provisions that the Municipality was obliged by section 13A of the PFA to pay contributions over to the pension funds in which they are participating, when the Rules of such funds make provision for such payment.
- 5.1.38 In *Mokoena v the Transport Sector Retirement Fund and Others 5 (2019) (PFA)*⁶, the Pension Funds Adjudicator held as follows: *“the third respondent has a duty placed on it by the provisions of section 13A(1)(a) and (b) of the Act and the rules of the first respondent to pay contributions and submit schedules to the first respondent indicating on whose behalf payment is made, and the first respondent in turn has a duty to pay out the benefits to the members...”*
- 5.1.39 It was further held that *“it is the findings of this Tribunal that the third respondent failed to pay the provident fund contributions on behalf of the Complainant for the period December 2011 to October 2013 and December 2013 to June 2014...”* and that *“the third respondent owes a duty of good faith derived from common law to its employees. By failing to pay all provident fund contributions on behalf of the Complainant, the third respondent has breached this duty...”* The Adjudicator held that *“the respondent is ordered to register the Complainant as its member from 1 December 2011 to 02 January 2018...”* This decision was unsuccessfully appealed at the Financial Service Tribunal (the Tribunal).
- 5.1.40 In the appeal, *Key Moves (Pty) Ltd and the Pension Fund Adjudicator and Others 16 (2019) (FST)* (the Key Moves), the Tribunal held as follows: *“it is trite that the applicant has a duty by virtue of the provisions of section 13A(1)(a) and (b) of the Pension Funds Act, and the rules, to pay contributions to the fund indicating on*

⁶ The Complainant was employed by the Key Moves, and the employer failed register the Employee with a provident fund and deduct and pay the pension to the provident fund.

whose payment is being made. Key Moves as an employer had a statutory duty to pay out the benefits to the members”.

- 5.1.41 In the matter of *Orion Money Purchase Pension Fund v Pension Fund Adjudicator and others the Western Cape High Court per Judge Nel*, the High Court rejected the determination of the PFA in the matter between *Sekele and the Orion Money Purchase Pension Fund*⁷ and held that “*Bus Services(Employer) is ordered to pay Sealoga Evelyn an amount of ... as a demutualisation benefits together with interest on these amounts at the prescribed rate of interest from 1 January 1991 to date of the payment... and Lesetja Andries Gafane an amount that he would have received from the fund had he been a member of the fund when he started working”.*
- 5.1.42 In the matter between *Mgaimbiyana and Security Employees’ Pension Fund*⁸ as per determination reference PFA/WE/5383/05/VIA, the Adjudicator held that “*it cannot see any impediment which would have prevented the second respondent from registering the Complainant as a member of the first respondent or which would have disqualified the Complainant from becoming a member of the first respondent. The fact that the Complainant would have qualified for membership of the first responded is confirmed by his current membership”.*
- 5.1.43 From the above case law, it is clear that there was nothing that prevented the Municipality from registering the Complainant as a member of the provident fund and pay all contributions on his behalf from 2014 to 2016. The fact that the Complainant was a member of the SALA pension fund from 2016 until his retirement

⁷ Ms Sekete was employed from 1984 until her dismissal in 1990, however he was not registered as a member of the fund. She was therefore reinstated on 10 February 1999 as a result of compulsory participation she became a member of the fund. The Bus Service (the Employer) failed to pay pension on her behalf. When she was retrenched when she was retrenched on 31 October 1998 she had no accumulated guaranteed credit and her withdrawal was nil. The Adjudicator ordered the Orion Money Purchase Pension Fund to pay the Complainant an amount of R7 549.90 together with the interest at a prescribed rate of interest rate from 1 January 1999 until to date of payment. Mr Gafane was the second Complainant.

⁸ The determination in terms of section 30M of the Pension Fund Act, 24 of 1056 “the Act) –TE Mgaimbiyana (‘the Complainant’) v Security employees Provident Fund (“the first respondent and AZA DAY and night security CCt/a Azania Security (“the second respondent”)

proves that he qualified right from the commencement of his employment to join the pension fund.

5.1.44 The onus of ensuring that every employee is registered with the provident fund and that deduction is made from the salary and paid to the provident fund is upon the employer and cannot be transferred by the employer to the employee.

5.1.45 Rule 1.35 of the “*South African Local Authorities Pension Fund: revised rules effective from 1 July 2010*” normal retirement age means:

1.35.2 In respect of any other member who;

(a). joined the fund before 1 April 2000, the age of 60 (sixty) or 65 (sixty five) a chosen by such member, or

(b) Joined the fund on or after 1 April 2000, the age of 65 (sixty five).

5.1.46 According to these rules, any person who joins the fund on or after 1 April 2000, that person must retire at the age of sixty five (65). Therefore, when the Complainant was appointed by the Municipality and applied to join SALA pension fund in 2014, he was sixty one (61) years of age and qualified to join SALA pension fund.

Conclusion

5.1.47 The evidence and information gathered during the investigation indicate that the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016.

5.1.48 The Municipality submitted proof of payment indicating that the Complainant has since been paid an amount of R34 959.61 for his pension benefits for the period between 31 July 2014 and 31 March 2016, which was accepted by the Complainant.

5.2 Regarding whether the Municipality failed to pay the Complainant accumulated leave days upon retirement, and if so, whether the conduct of the Municipality was improper and constitute maladministration.

Common cause issues

5.2.1 It is not in dispute that the Municipality did not pay the Complainant the accumulated leave days after his retirement.

Issues in dispute

5.2.2 The issue for determination by the Public Protector is whether the Municipality failed to pay accumulated leave days to the Complainant resulting in him suffering prejudice.

5.2.3 The Complainant alleged that during his employment, he accumulated leave days. Upon his retirement, the Municipality allegedly ought to have paid him for the accumulated leave days. He further indicated that as he was employed as a driver, it was impossible for him to sign attendance register daily or every morning because he spent most of the time on the road.

5.2.4 During the ADR meeting of 11 November 2020, Mr Tsekedi submitted that *“it is the standard procedure that employees accumulates leave days monthly, ...however, it is the responsibility of employee to report for duty in order to accumulate leave days. If the employee is absent from work he must complete the leave form in order for his absent days to be deducted from his accumulated leave days.”*

5.2.5 He further reported that the Complainant was advised by the Municipal Human Resource Section to fill in the leave forms in order for the remaining days to be paid

however, he refused to comply. Mr Tsekedi submitted the Complainant's leave records which appears below.

The below is leave Section records for the said employee.

01351: I MOGOALADI

2015/08/18: Attendance register indicate "Hearing". Please submit leave form with proof.
2015/08/24 – 2015/08/31: Didn't clock. Please submit leave form.
09/09/2015 – 30/09/2015: Didn't clock. Please submit leave form.
Didn't clock for October 2015. Please submit clock sheet or leave form.
02/11/2015 – 13/11/2015: Didn't clock. Please submit leave form.
23/11/2015 – 30/11/2015: Didn't clock. Please submit leave form.
01/12/2015 – 22/01/2016: Didn't clock. Please submit leave form. *(Only a Leave form for 08/01/2015 – 16/01/2015)*
Didn't clock for February 2016. Please submit leave form or clock sheet.
Didn't clock for March 2016. Please submit leave form or clock sheet.
Didn't clock for April 2016. Please submit leave form or clock sheet.

- 5.2.6 The Complainant submitted that, when he retired in 2018, he had accumulated 51 leave days. He submitted a letter to Mr Tsekedi and Mr Vusimuzi Rajuili, the Municipality's former Director Corporate Services, dated 12 September 2018. In this letter titled '*complaint over submitted leave forms*', he submitted that he was about to retire and requested that the dispute relating to his leave days be resolved. However, no response from the relevant officials pertaining to this letter was received.
- 5.2.7 During the ADR session, Mr Tjolo submitted that the Complainant at times absconded from work and failed to complete leave forms. This matter was in dispute because the Municipality submitted that the Complainant should have completed the leave forms, however the Complainant maintained that he submitted all the leave forms to Mr Tjolo when he was on leave.

The Municipality's response to section 7(9) notice

- 5.2.8 In response to the section 7(9) notice, Mr Mokoteli and Councillor Modise as per letter dated 7 December 2021, submitted that leave credits that were due to the Complainant were audited and he has no accumulated leave days. (Own emphasis).
- 5.2.9 Ms Rinnete Coetzee (Ms Coetzee), the Municipal HR Administrator, submitted that the payday system allocate two (2) leave days per month to an employee as per collective agreement.
- 5.2.10 Ms Coetzee also submitted that the Complainant did not comply with the request that he submit outstanding leave forms. She also submitted that employees are required to sign an attendance register to confirm if they reported for duty and that the attendance register is verified with leave applications after month end. However if there is no leave form for a period which the employee did not sign the attendance register, a leave query will be sent to the employee and the manager inform him or her of the outstanding leave form.
- 5.2.11 Ms Coetzee furthermore submitted that when an employee exits the service of the Municipality, a leave audit is done. She further explained that when the audit is done, the Human Resources Section requests the department where the employee was working, to submit all outstanding leave forms and if the outstanding leave forms are not received, those leave days are captured according to the attendance register that was not signed.
- 5.2.12 She further indicated that a letter with leave balance is then submitted to the payroll section for the out payment of leave and the termination of the employee on the system. According to her, the Complainant had no leave credit to be paid.
- 5.2.13 Mr Mokoteli further submitted as per letter dated 18 January 2022 that the outcome of the audit leave days is that the Complainant has no accumulated leave days.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO FAILURE TO REGISTER MR ISRAEL MOGOALADI AS A MEMBER OF THE PROVIDENT FUND AND PAY ALL CONTRIBUTIONS DUE ON HIS BEHALF BETWEEN 31 JULY 2014 AND 31 MARCH 2016 AND PAY HIM FOR ACCUMULATED LEAVE DAYS, BY THE MASILONYANA LOCAL MUNICIPALITY



5.2.14 The below printout shows the Municipal Employee Self Service (the ESS) leave system:

Extended Leave - [Company (01) MASILONYANA LOCAL MUNICIPALITY (28/12/2021)]

Annual/Accum | Long Service | Shop Leave | Other Leave | Leave Totals | Overtime Leave

Employee Code: 01351 [S M 00 46] ESS Level Manager | ESS Pending | ESS Approvals

Employee Name: Mogoaladi I M

Pensioned | 30/09/2018

	1. Annual	2. Accumulated	3. Sick	4. Other
P. Leave per Cycle	24.00	.00	80.00	
R. Next Cycle Start Date	01/07/2019		01/07/2020	
U. Current Cycle Start Date	01/07/2018		01/07/2017	
S. Leave Due from Previous Cycle/s	24.00	47.00	80.00	
T. Leave Taken / Captured in Current Cycle	30.00	46.50	2.00	.00
Leave Total Excluding Pro-rata	5.50	6.00	78.00	.00
Pro-Rata as at 30/09/2018	6.00	.00		
Leave Total Including Pro-rata	.50	.50	.00	

Q	FROM	TO	TYPE	DAYS	START	REMARKS
1.				.00		
2.				.00		
3.				.00		
4.				.00		
5.				.00		
6.				.00		
7.				.00		
8.				.00		
9.				.00		
A.				.00		
B.				.00		
C.				.00		

D. Comment: E. Leave Type

Enter Selection Engaged Employee | Engaged or Terminated Employee

5.2.15 The below picture shows leave balance as of July 2018. The leave balance was 00 which indicates that there were no accumulated leave days which the Complainant was entitled to.

From	To	Leave Type	Days	Start	Remarks	A/AC Balance
2015/12/11	2015/12/21	Annual ✓	6.00	Fri	audit	202.02
2015/12/01	2015/12/10	Accum ✓	8.00	Tue	audit	202.02
2015/11/23	2015/11/30	Accum	6.00	Mon	ODUDIT	202.02
2015/11/02	2015/11/13	Accum	10.00	Mon	ODUDIT	202.02
2017/07/31	2017/07/31	Accum	0.50	Mon	THN106 3394	202.02
2018/04/26	2018/04/26	Accum	1.00	Thu	THN106 3394	202.02
2018/03/13	2018/03/16	Accum	4.00	Tue	THN106 3397	202.02
2017/08/25	2017/08/25	Accum	1.00	Fri	THN106 3396	202.02
2017/09/19	2017/09/19	Sick (N)	1.00	Tue	THN106 3395	202.02
2017/12/15	2018/01/05	Accum	12.00	Fri	THN106 3393	202.02
2017/05/12	2017/05/12	Accum	1.00	Fri	THN106 3394	202.02
2016/03/22	2016/03/24	Accum	3.00	Tue	THN106 3394	202.02
2018/07/01		Annual to Acc	24.00			0.00

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- 5.2.16 In response to a Discretionary Notice sent to the Complainant in this regard, in terms of the Public Protector Rules affording him an opportunity to respond to the evidence, dated 14 January 2022, the Complainant rejected the submission by the Municipality. He submitted that the Municipality did not provide an attendance register. He further submitted that the secretary and Human Resources Manager did not do their work properly as his last payslip indicated that he accumulated leave days.
- 5.2.17 The Complainant further indicated that according to the records, he had 51 leave days by the end of September 2018. According to the Complainant, the submission by the Municipality during the ADR meeting that he had 51 leave days was based on assumptions and the Municipality did not reconcile his leave days. The Complainant submitted as per email dated 20 January 2022, a payslip dated 28 September 2018 that reflected he had accumulated 30 days.
- 5.2.18 On 20 January 2022, the Investigation team requested Mr. Mogaecho of the Municipality to explain the difference between the leave days accumulated as reflected on the ESS and the payslip. He submitted that “*Accumulated Leave Days that appear on the pay slip are before an audit of leave days is done. The audit is done when you either resign or retire from employment*”. He further confirmed that the Municipality does not have a leave policy. He further submitted that the Municipality relies on the Basic Conditions of Employment Act 75 of 1997 (BCEA).
- 5.2.19 Subsequent the above discussion with Mr Mogaecho, he submitted, through an email dated 07 February 2022, an unsigned and undated copy of a document titled “*Masilonyana Municipality Leave Policy.*” The document could not be considered as its authenticity was questionable and the Municipal officials indicated that there was no Municipal leave policy.

Application of the relevant law

5.2.20 Section 20(2) of the BCEA provides that

“An employer must grant an employee at least-

- (a). 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle; or*
- (b)...*
- (c)...*

5.2.21 Subsection (3) further provides that *“An employee is entitled to take leave accumulated in an annual leave cycle in terms of subsection (2) on consecutive days.”*

5.2.22 Notwithstanding the fact that the Municipality had no leave policy, evidence gathered reflects that the employees were given leave, but the challenge was the management of the employees' leave.

5.2.23 Section 55(1) of the Municipal System Act provides that, “as the head of the administration of a Municipality the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, *inter alia*:

(h) Promotion of sound labour relations and compliance by the municipality with applicable labour legislation”.

5.2.24 It was expected of the Municipality to adopt a leave policy for its employees as part of promoting sound labour relations. Failure to develop and adopt a policy would not be in the spirit of section 55 of the MSA and could lead to conflict in the workplace like in the present matter.

Conclusion

5.2.25 Based on the evidence gathered, it can be concluded that the Complainant did not have any accumulated leave days as at the beginning of July 2018. He retired at the end of September 2018.

5.2.26 It should be noted that the Municipality does not have a leave policy.

6. FINDINGS

6.1 Regarding whether the Municipality failed to register the Complainant as a member of the provident fund and pay all contributions due on his behalf between 31 July 2014 and 31 March 2016, and if so, whether the conduct was improper and constitutes maladministration and prejudiced the Complainant:

6.1.1 The allegation that the Municipality failed to register the Complainant as a member of the provident fund between 31 July 2014 and 31 March 2016, including September 2018 and pay all contributions due on his behalf was improper and amounted to maladministration and that as a result the Complainant suffered prejudice, is substantiated.

6.1.2 The investigation revealed that the Complainant was employed by the Municipality as a driver/messenger on 1 July 2014 in the Office of the Municipal Manager and retired on 30 September 2018. According to the Complainant's contract of employment dated 02 July 2014, it was compulsory for the Municipality to register him with a provident fund.

6.1.3 The investigation further revealed that the Municipality only registered and paid contributions of the Complainant with SALA effective from 01 April 2016 until 31 August 2018.

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- 6.1.4 The Municipality further failed to pay his contribution for September 2018 which was the month in which he retired.
- 6.1.5 The Complainant suffered prejudice in that he forfeited provident fund benefits between 31 July 2014 and 31 March 2016, including September 2018. However, the outstanding pension benefits, amounting to R34 959.61, have since been paid by the Municipality and the Complainant has also acknowledged receipt of the said benefits.
- 6.1.6 The failure by the Municipality to register the Complainant as a member of the provident fund and pay all contributions due on his behalf, was inconsistent with section 195(1)(a), (f) and (g) of the Constitution. It was also in violation of Clause 2 of the Complainant's contract of employment and section 13A of the Pension Fund Act, 24 of 1956.
- 6.1.7 The conduct of the Municipality was also inconsistent with section 55(1)(h) of the Municipal Systems Act, which require that the head of the administration must, subject to policy of the municipal council be responsible for the promotion of sound labour relations and compliance by the municipality with applicable labour legislation.
- 6.1.8 The conduct of the Municipality resulted in prejudice suffered by the Complainant as envisaged in section 6(4)(v) of the Public Protector Act.
- 6.1.9 The conduct also constitutes improper conduct in state affairs as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 6.2 Regarding whether the Municipality failed to pay the Complainant accumulated leave days upon retirement, and if so, whether the conduct of the Municipality was improper and constitute maladministration:**

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- 6.2.1 The allegation that the Municipality failed to pay the Complainant accumulated leave days is unsubstantiated and therefore no prejudice was suffered.
- 6.2.2 The evidence presented to the PPSA revealed that the Complainant did not have accumulated leave days as at 31 September 2018 when he retired. The Complainant could not produce any evidence or refute the evidence submitted by the Municipality.
- 6.2.3 The investigation further revealed that the Municipality does not have a policy to regulate the employees' leave. Failure by the Municipality to develop a leave policy was inconsistent with section 55(1)(h) of the MSA.
- 6.2.4 The conduct of the Municipality for failing to develop a leave policy constitutes improper conduct in state affairs as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

- 7.1 The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:
- 7.1.1 **The Acting Municipal Manager of the Masilonyana Local Municipality to:**
- 7.1.1.1 Within **sixty (60) working days** from the date of the report, take appropriate disciplinary and remedial action in terms of the Municipality's Disciplinary Policy and section 67(1) (h) of the Municipal Systems Act; and
- 7.1.1.2 Within **sixty (60) working days** from the date of the report, initiate, in consultation with the Human Resources Unit, a process for the development of the Municipal Leave Policy, for purposes of regulating leave of the employees of the Municipality,

as envisaged by section 67(1) (b) of the Municipal Systems Act and the relevant provisions of the Basic Conditions of Employment Act. Furthermore the leave policy must be aligned to the Basic Conditions of Employment Act.

7.1.1.3 Within **ninety (90) working days** from the date of the report, report to the Council on the implementation of the remedial action taken in paragraphs (7.1.1.1), (7.1.1.2) and (7.1.1.4) and provide the Public Protector with a copy thereof.

7.1.1.4 Within **thirty (30) working days** from the date of the report provide the Complainant with an apology in writing for the prejudice that he suffered as a result of the failure on the part of the Municipality to register him on a provident fund when he was employed by the Municipality.

8. MONITORING

8.1 The Acting Municipal Manager must submit an implementation plan indicating how the remedial action referred to in paragraph 7 above will be implemented, within **thirty (30) days** from the date of this report.

8.2 The Acting Municipal Manager's submission of the implementation plan and the implementation of the remedial action shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/02/2022

Assisted by: Mr Nhlanhla John Khumalo, Investigator, Investigation Branch: National Office