

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



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**INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF MR
FUKISI TO THE POSITION OF MANAGER PUBLIC SAFETY AND MR MOKOENA
TO THE POSITION OF UNIT MANAGER CLARENS BY THE FUNCTIONARIES OF
DIHLABENG LOCAL MUNICIPALITY**

TABLE OF CONTENTS		
ITEM	DESCRIPTION	PAGE
	LIST OF ACRONYMS AND ABBREVIATIONS	3
	EXECUTIVE SUMMARY	4
1.	INTRODUCTION	9
2.	THE COMPLAINT	9
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	10
4.	THE ISSUE IDENTIFIED FOR INVESTIGATION	11
5.	THE INVESTIGATION	11
6.	THE DETERMINATION OF THE ISSUE IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS	16
7.	FINDINGS	43
8.	REMEDIAL ACTION	44
9.	MONITORING	46

LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS / ABBREVIATIONS	DESCRIPTION
Constitution	Constitution of the Republic of South Africa, 1996
Email	Electronic mail correspondence
Employment Practice Policy	Dhlabeng Local Municipality: Employment Practice Policy, 2010
MSA	Municipal Systems Act, 2000
Public Protector Act	Public Protector Act, 1994
SAQA	South African Qualifications Authority
The Municipality	Dhlabeng Local Municipality
The Public Protector	Public Protector of the Republic of South Africa
The Public Protector Rules	The Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018, as amended

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 (Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, 1994 (Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into the irregular appointment of Mr Fukisi to the position of Manager: Public Safety and Mr Mokoena to the position of Unit Manager: Clarens respectively, by the functionaries of Dihlabeng Local Municipality (the Municipality)
- (iii) The investigation originates from a complaint lodged with the Public Protector by an anonymous Complainant (the Complainant) on 2 August 2021.
- (iv) In the main, the Complainant alleged that:
 - (a) On 19 November 2020, the Municipality advertised several vacant managerial positions in three newspapers published in the Free State Province; and
 - (b) During 2021, the Municipality appointed Mr Fukisi to the position of Manager: Public Safety and Mr Mokoena to the position of Unit Manager: Clarens, without them having the required qualifications and experience.

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- (v) Based on the analysis of the complaint, the following issue was considered and investigated:
- (a) Whether the functionaries of the Municipality irregularly appointed Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety, and Unit Manager: Clarens, respectively, while they did not meet the minimum requirements of the posts, and if so, whether such conduct was improper as contemplated in section 182(1)(a) of the Constitution and amounted to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
- (vii) On 08 November 2023, notices in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notices) were delivered to Mr N Ntheli (Mr Ntheli), the Municipal Manager, Mr TJ Tseki, the Executive Mayor (Mr Tseki), Mr Fukisi and Mr Mokoena, as effected parties, to afford them an opportunity to respond on the likely adverse findings and proposed remedial action. Section 7(9)(a) of the Public Protector Act, provides that persons implicated in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding same.
- (viii) Responses from Mr Fukisi, Mr Mokoena, and Mr Tseki were received on 23 November 2023. A response from Mr Ntheli was received on 29 November 2023. The responses and information/evidence submitted in response to the section 7(9) notices were duly considered by the Public Protector.

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- (ix) Having regard to the evidence and regulatory framework determining the standard that the Municipality should have complied with, the following findings are made:
- (a) **Whether the functionaries of the Municipality irregularly appointed Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety, and Unit Manager: Clarens, respectively, while they did not meet the minimum requirements of the posts, and if so, whether such conduct was improper as contemplated in section 182(1)(a) of the Constitution and amounted to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.**
- (aa) The allegation that the functionaries of the Municipality irregularly appointed Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety and Unit Manager: Clarens, respectively, while they did not meet the minimum requirements for the posts, **is substantiated**.
- (bb) The Lengau Traffic College (the College) confirmed that qualifications that were awarded to Mr Fukisi in May 1995 are not equivalent to a National Diploma as set out in the advertisement.
- (cc) Furthermore, evidence indicates that Mr Fukisi did not hold a Certificate in Fire Technology, which was a requirement for the post and necessary for the duties to be performed. It was further established that none of the shortlisted and interviewed candidates were in possession of the required Certificate in Fire Technology.
- (dd) In respect of the appointment of Mr Mokoena, evidence revealed that the National N Diploma issued to Mr Mokoena is not equivalent to a Bachelor's degree in line with the NQF levels recognized by the South African Qualifications Authority (SAQA) and as required for the post in terms of the advertisement.

- (ee) Therefore, the shortlisting and subsequent appointment of Mr Fukisi and Mr Mokoena by the functionaries of the Municipality was in contravention of the provisions of section 195(1) of the Constitution read together with paragraph 6.4 of the Municipal Employment Practice Policy.
- (ff) The conduct of the functionaries of the Municipality constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (x) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, are the following:

The Executive Mayor

- (a) Within **ninety (90) calendar days** from the date of this report, in terms of section 56(3)(f) of the Municipal Structures Act (MSA), 1998, table the report before the Municipal Council for deliberation and obtain approval for the appropriate course of action to address the irregular appointment of Mr Fukisi and Mr Mokoena as Manager: Public Safety and Unit Manager: Clarens, respectively, including pursuing a judicial review, as provided for in section 158(1)(h) of the LRA.

The Municipal Manager

- (b) Within **sixty (60) calendar days** from the date of this report, in line with in section 10(1)(a) of the Public Administration Management Act, 2014 ensure that all the Municipal Human Resource Management Officials and Senior Managers are trained to comply with paragraphs 6.3.3 and 6.3.4 of the Employment Practice Policy in every recruitment process to establish the validity and accuracy of qualifications supplied by the

applicants, in order to ensure that future appointments are made in full compliance with the Policy.

- (c) To ensure that proper screening and verification of the information contained in job applications, is conducted with an authorised institution commissioned to conduct such exercise, including verification of qualifications, including verification of qualifications before the selection and recruitment process is finalised.

1. INTRODUCTION

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

1.2 This report is submitted in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation, to affected parties, for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:

1.2.1 Mr Tseki, Executive Mayor of Dihlabeng Local Municipality;

1.2.2 Mr Ntheli, Municipal Manager of Dihlabeng Local Municipality;

1.2.3 Mr Fukisi, Manager: Public Safety;

1.2.4 Mr Mokoena, Unit Manager: Clarens; and

1.2.5 The Complainant.

1.3 The report relates to an investigation into the alleged irregular appointment of Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety and Unit Manager: Clarens, respectively, by the functionaries of Dihlabeng Local Municipality (the Municipality).

2. THE COMPLAINT

2.1 The investigation originates from a complaint submitted by an anonymous complainant (the Complainant) to the Public Protector on 03 August 2021.

2.2 The Complainant alleged *inter alia*, that:

2.2.1 On 19 November 2020, the Municipality advertised several vacant managerial positions in three (03) newspapers published in the Free State Province; and

2.2.2 During 2021, the Municipality appointed Mr Fukisi to the position of Manager: Public Safety and Mr Mokoena to the position of Unit Manager: Clarens, without them having the required qualifications and experience.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution), to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

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

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

3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which state, amongst others, that the Public Protector has the powers to investigate and

redress maladministration and related improprieties in the conduct of state affairs.

- 3.4 The Municipality is an organ of state in terms of section 239(a) of the Constitution and its conduct amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls within its competency to investigate as envisaged in section 182(1)(a) of the Constitution and section 6(4)(a)(i) of the Public Protector Act.

4. ISSUE IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

- 4.1.1 Whether the functionaries of the Municipality irregularly appointed Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety and Unit Manager: Clarens, respectively, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

5. THE INVESTIGATION

5.1 Methodology

- 5.1.1 The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act.

- 5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.1.3 The investigation process included correspondence exchanged with the Municipality. Meetings were also held with functionaries of the Municipality and documents obtained during the investigation were analysed and evaluated, including a consideration and application of the relevant law and prescripts.

5.2 Approach to the Investigation

5.2.1 The approach to the investigation included the exchange of documents between the Public Protector and the Municipality, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 The investigation was approached using an enquiry process that seeks to determine:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities. In this particular case, the factual enquiry principally focused on whether the alleged conduct of the functionaries of the Municipality was inconsistent with the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the functionaries of the Municipality in the execution of their duties relating to the subject of the complaint.

5.3 **The Investigation Process**

5.3.1 The investigation process commenced with correspondence to Mr L Mokgatlhe (Mr Mokgatlhe), the former Acting Municipal Manager on 08 November 2021, wherein he was informed of the investigation as well as the information required from him.

5.4 **Key sources of information**

5.4.1 **Documents and correspondence**

5.4.1.1 Copies of Diplomas awarded to Mr Fukisi by the College during 1995;

5.4.1.2 National Diploma in Public Administration awarded to Mr Mokoena in 2003;

5.4.1.3 Copy of the Municipality's Employment Practice Policy, dated 2010;

5.4.1.4 Municipality's internal Memorandum, dated 11 November 2020;

5.4.1.5 Advertisement for the positions of Manager: Public Safety and Unit Manager: Clarens, dated 26 November 2020;

5.4.1.6 Copy of Mr Fukisi's appointment letter, dated 03 April 2021;

5.4.1.7 Copy of Mr Mokoena's appointment letter, dated 07 April 2021;

5.4.1.8 Complaint form from Anonymous, dated 02 August 2021;

5.4.1.9 Allegations letter from the Public Protector to Mr Mokgatlhe, dated 08 November 2021;

5.4.1.10 Response from the Municipality to the Public Protector, dated 07 March 2022;

5.4.1.11 Curricula Vitae (CVs) of shortlisted candidates;

5.4.1.12 List of shortlisted candidates for each post;

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- 5.4.1.13 Copies of applications schedules, indicating the candidates' qualifications and experience for the position of Manager: Public Safety and Unit Manager: Clarens;
 - 5.4.1.14 List of panel members;
 - 5.4.1.15 The score sheets of Interview panel for positions of Manager: Public Safety and Unit Manager: Clarens;
 - 5.4.1.16 Copy of undated recruitment report;
 - 5.4.1.17 Letter from the Public Protector to Mr MS Moloi (Mr Moloi), the Deputy Director at Lengau Traffic College, dated 07 August 2023;
 - 5.4.1.18 Response from Mr Moloi to the Public Protector, dated 18 August 2023;
 - 5.4.1.19 Email from Public Protector to Mr Eugene du Plooy (Mr du Plooy), Specialist Professional Bodies: Registration and Recognition at SAQA on 12 September 2023;
 - 5.4.1.20 Email received from Mr du Plooy, dated 12 September 2023;
 - 5.4.1.21 Email from the Public Protector to Ms. Caroline Eva, Manager: Higher Education Qualifications Sub-Framework (HEQSF) Qualification: Registration and Recognition at SAQA on 15 September 2023 (Ms Eva); and
 - 5.4.1.22 Response from Ms. Eva to the Public Protector, dated 19 September 2023
- 5.4.2 Legislation and Policies**
- 5.4.2.1 Constitution of the Republic of South Africa, 1996;
 - 5.4.2.2 Labour Relations Act, 1995;
 - 5.4.2.3 National Qualifications Framework Act, 2008;
 - 5.4.2.4 Public Protector Act, 1994;
 - 5.4.2.5 The Local Government: Municipal Systems Act, 2000;
 - 5.4.2.6 The Local Government: Municipal Finance Management Act, 2003;
 - 5.4.2.7 Public Administration Management Act, 2014; and
 - 5.4.2.8 The Employment Practice Policy of the Municipality, 2010.

5.4.3 Case Law

5.4.3.1 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017);

5.4.3.2 *Kwadukuza Municipality v Rajamoney and Others* (D880/10) [2013] ZALCD 17 (13 June 2013); and

5.4.3.3 *KwaZulu-Natal Department of Transport v Hoosen and Others* 2016 37 ILJ 156 (LC).

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

5.4.4.1 On 08 November 2023, section 7(9)(a) Notices were hand delivered to Mr Ntheli, Mr Tseki, Mr Fukisi and Mr Mokoena to provide them with an opportunity to respond to the likely adverse findings and proposed remedial action, who acknowledged receipt on the same day.

5.4.4.2 Section 7(9)(a) of the Public Protector Act provides that persons implicated or affected in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding same.

5.4.4.3 A response noting the intended findings and remedial action was received from Mr Tseki, through a letter dated 23 November 2023.

5.4.4.4 Responses from Mr Fukisi and Mr Mokoena were received on 23 November 2023.

5.4.4.5 A response from Mr Ntheli was received on 29 November 2023.

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

6.1 Whether the functionaries of the Municipality irregularly appointed Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety and Unit Manager: Clarens, respectively, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act

Common cause

6.1.1 The Municipality advertised the positions of Manager: Public Safety and Unit Manager: Clarens in the *Eastern Free State Issue Newspaper* on 26 November 2020, in the *Weekly Newspaper* and the *Vrystaat Newspaper* on 29 November 2020, with a closing date for submission of applications indicated as 18 December 2020.

Issue in dispute

6.1.2 The issue for the Public Protector's determination is whether the recruitment of Mr Fukisi and Mr Mokoena were undertaken in accordance with the processes and approved procedures governing the Municipality's recruitment processes.

The Complainant's version

6.1.3 The Complainant submitted that during November 2020, the Municipality advertised various managerial positions and subsequently appointed candidates who did not meet the minimum requirements for the respective positions.

- 6.1.4 The Complainant also stated that the recruitment processes followed by the Municipality in the appointment of the Manager: Public Safety and Unit Manager: Clarens were irregular.

The Municipality's version

- 6.1.5 On 08 November 2021, the Public Protector raised the matter with Mr Mokgathe, the former Acting Municipal Manager to respond to the allegations and requested documents relating to the recruitment processes followed in the appointment of both Mr Fukisi and Mr Mokoena.

- 6.1.6 On 07 March 2022, Mr B Molatseli, the former Municipal Manager (Mr Molatseli) submitted the following documents, but did not provide a narrative in response to the allegations:

Memorandum for placement of Advertisement for positions Manager: Public Safety and Unit Manager: Clarens, dated 19 November 2020

- 6.1.6.1 On 19 November 2020, a memorandum was submitted by Ms SM Mabula (Ms Mabula), Director: Corporate Services, to Mr Mokgathe, for approval of the advertisement of four (04) vacant managerial positions within the Municipality, including the positions of Manager: Public Safety and Unit Manager: Clarens.

- 6.1.6.2 The memorandum was approved by the Chief Financial Officer (CFO) (no name indicated on the memorandum) and Mr Mokgathe, however, no date of approval is indicated thereon.

Advertisement for the positions Manager: Public Safety and Unit Manager: Clarens, dated 26 November 2020

- 6.1.6.3 According to the advertisement, the requirements for the position of Manager: Public Safety were: "National Diploma in Law Enforcement,

Traffic or equivalent and Certificate in Fire Technology and 3-5 years managerial experience”.

- 6.1.6.4 The duties listed in the advertisement for the position of Manager: Public Safety were to “*manage and perform tasks/activities associated with the provision of traffic and associated with minimizing traffic congestion, to manage and control the Traffic Department and Fire Brigade sections. Ensure public safety and protect life and property as stipulated in the Fire Brigade Act*”.

CV of Mr Fukisi

- 6.1.6.5 The Investigation Team was provided with a copy of the CV of Mr Fukisi. Attached to the CV, were the following:
- (a) Vascar Enforcement Programme Certificate of Proficiency, issued by Signal Systems (Pty) Ltd in 1999;
 - (b) Diplomas issued by the Lengau Traffic College in Bloemfontein (the College), from 03 January 1995 to 24 May 1995 in the following:
 - i Diploma for Traffic Officer;
 - ii Diploma for Examiner for Drivers Licences;
 - iii Diploma for Examiner of Vehicles; and
 - iv Diploma for Inspector of Licences.
 - (c) Mr Fukisi was employed by the Provincial Department of Transport as a Senior Provincial Inspector from 1995 to 2007 and as an Assistant Director, Driving Licences in the National Department of Transport from 2007 to the date of appointment as Manager: Public Safety.

Requirements for the position of Unit Manager: Clarens

6.1.6.6 According to the advertisement, the requirements for the position of Unit Manager were: *“An appropriate B-degree or equivalent with 2-3 years municipal experience; knowledge and understanding of the administrative duties and functions of local authority; knowledge and understanding of local government legislations; sound managerial skills; good presentation, communication and report writing skills; ability to perform under pressure and maintain high standard of ethics and integrity; computer literacy and a valid driver’s license”*.

6.1.6.7 The duties listed in the advertisement for the position of Unit Manager: Clarens were, *“To manage the implementation, monitoring evaluation and reporting sequence of outcome associated with plans and programs designated to accomplish key service delivery objectives and statutory requirements and related to municipal activities in order to better quality of life in the local municipality. The post is accountable for all outcomes associated with the administration unit under the guidance of the Municipal Manager”*.

CV of Mr Mokoena

6.1.6.8 The Investigation Team was provided with a copy of the CV of Mr Mokoena. Attached to the CV were the following:

- (a) Matric Certificate issued in December 1997;
- (b) National N Diploma in Public Management awarded on 01 February 2003;
- (c) Certificate in Development and Management of Local Government attended from 24 March 2014 to 08 August 2014;
- (d) Certificate in Skills Development Programme in Disaster Risk Management dated 03 February 2017;

- (e) Short learning programme in New Development Framework dated 08 December 2005; and
- (f) Short learning Project Management Programme for Development Practitioners dated 08 December 2005.

Memorandum for approval of shortlisted candidates for the positions of Manager: Public Safety and Unit Manager: Clarens dated 02 February 2021

6.1.6.9 On 02 February 2021, Ms Mabula submitted a memorandum to Mr Mokgathe for approval of six (06) shortlisted candidates to be interviewed for the position of Manager: Public Safety on 23 March 2021 and six (06) shortlisted candidates to be interviewed for the position of Unit Manager: Clarens on 24 March 2021.

6.1.6.10 The list of candidates shortlisted for the post of Manager: Public Safety was submitted with the memorandum. Information obtained from candidates' CVs for the post of Manager: Public Safety indicates the following:

Manager Public Safety			
Candidate	Qualification	Experience	Internal/External
Candidate A	Grade 12 Public Management N6 Bachelor's Degree in Public Management	Sport Administration 2014 to 2016 Finance Department Finance and Billing Clerk at Dihlabeng Local Municipality 2016 to date: Student	External
Candidate B	Grade 12 Diploma in Public Management Certificate in Development and Management of Local Government; Certificate of Competence- Skills;	2001-2007 Development Officer in the Municipality 2007-2012 Administrative Officer at the Municipality Fouriesburg Unit 2012- 2014 Acting Unit Manager at Fouriesburg, Acting Office	Internal

Manager Public Safety			
Candidate	Qualification	Experience	Internal/External
	<p>Development Programme in Disaster Risk Management;</p> <p>Credit-Bearing Short Learning Programme in New Development Framework;</p> <p>Credit Bearing Short Learning Programme in Project Management for Development Practitioners</p>	<p>Manager at the Speakers Office</p> <p>2015 - 2020 Acting Manager Sports within the Municipality</p> <p>2020 - Current Acting Manager: Public Safety</p>	
Makaku Lazurus Fukisi	Diploma Traffic Officer Vascar Inspector Course	<p>1995- 2007 Senior Provincial Inspector, Free State Provincial Department of Transport</p> <p>2007 to date Assistant Director, Driving License, National Department of Transport</p>	External
Candidate D	<p>Grade 12 Farm Management</p> <p>National Diploma in Metropolitan and Traffic Policing from Lyceum College</p> <p>Basic Business Skill</p>	<p>2004 - 2006 Cashier at Dihlabeng Local Municipality</p> <p>2007 to date Traffic Officer at Dihlabeng Local Municipality</p> <p>Traffic Officer Law Enforcement Practitioner Dihlabeng Local Municipality</p>	Internal
Candidate E	Grade 12 Traffic Diploma	Traffic Officer Superintendent	External
Candidate F	Grade 12 National Diploma in Law	<p>1997 - 2004 Traffic Officer: Moqhaka Local Municipality</p> <p>2004-2016 Senior Traffic Officer Matjhabeng Local Municipality</p> <p>2017 – current Traffic Officer Dihlabeng Local Municipality</p>	Internal

6.1.6.11 The memorandum also contained the list of candidates shortlisted for the post of Unit Manager: Clarens and information obtained from candidates' CVs indicates the following:

Unit Manager: Clarens			
Candidate	Qualification	Experience	Internal/External
Candidate A	<p>Grade 12 B. Tech Corporate Administration Completed 2006</p> <p>National Diploma in Accounting Year Completed 2001</p> <p>Certificate in Municipal Financial Management NQF level 6 Date 22 November 2012</p>	<p>January 2005 - October 2005 Auditor at CPG Chartered Accountants</p> <p>17 October 2005 - 30 March 2006 Supply Chain Clerk at Durban Institute of Technology</p> <p>01 April 2006 - 12 September 2009 State Accountant at the Department of Labour</p> <p>14 September 2009 - 31 May 2013 Asset and Risk Officer, Financial Accountant Intern and Supply Chain Officer Intern, Dihlabeng Local Municipality</p> <p>01 June 2013- Current Manager Supply Chain at Maluti A Phofung Water</p>	External
Candidate B	<p>Grade 12</p> <p>National Diploma: Human Resource Management</p> <p>Occupational Health and Safety.</p> <p>Basic Personal Information Management Programme</p> <p>First Aid Level 1</p>	<p>August 2008 - January 2009 Receptionist at Protea Hotel Clarens</p> <p>January 2009 - March 2009 Admin Clerk at South African Police Service</p> <p>April 2009 - March 2016 Assistant Librarian at the Department of Sports, Arts Culture and Recreation</p> <p>March 2016 - December 2017 Acting Unit Manager: Clarens</p>	Internal

Unit Manager: Clarens			
Candidate	Qualification	Experience	Internal/External
	Computer Training Computer Orientation Computer Training Prolen Computer Training User Guidance Capacity Building Workshop	January 2018- September 2022 Acting Manager Office of the Municipal Manager Dihlabeng Local Municipality April 2022 – Current Acting Manager: Office of the Municipal Manager	
Candidate C	Grade 12 Bachelor of Social Sciences	Training and Social Project Manager, Consultant, Development Officer 2001 to 2003 HR Officer at South African Police Services January 2003 - December 2003 Training and Social Development Officer at South African National Parks 2004 - 2018 Project Manager Consultant at Rand Water Foundation	External
Candidate D	Grade 12 B. Com General Management	Finance Intern Waiter	External
Candidate E	Grade 12 N. Dip in Teaching from Tshiya College of Education Advanced Diploma in Teaching from RAU	1991 – current Educator	External
Kobedi Mokoena	Grade 12 Diploma in Public Management Certificate in Development and Management of Local Government;	2001-2007 Development Officer in the Municipality 2007-2012 Administrative Officer at the Municipality Fouriesburg Unit 2012- 2014	Internal

Unit Manager: Clarens			
Candidate	Qualification	Experience	Internal/External
	Certificate of Competence- Skills; Development Programme in Disaster Risk Management; Credit-Bearing Short Learning Programme in New Development Framework; Credit Bearing Short Learning Programme in Project Management for Development Practitioners	Acting Unit Manager at Fouriesburg, Acting Office Manager at the Speakers Office 2015 - 2020 Acting Manager Sports within the Municipality 2020 - Current Acting Manager: Public Safety	

Recruitment Report seeking approval for the appointments of Mr Fukisi and Mr Mokoena, undated

6.1.6.12 The undated Recruitment Report submitted by Ms Mabula, to Mr Mokgathe, seeking approval for the appointments of Mr Fukisi and Mr Mokoena indicated the following:

- (a) The interview panel for both positions consisted of the following persons:
- (i) Ms Mabula, (the Chairperson);
 - (ii) Ms MAB Mosima, Director: Community Service; and
 - (iii) Mr N Mondji, Director: Local Economic Development.
- (b) Interviews for shortlisted candidates for the position Manager: Public Safety were held on 23 March 2021 and for Unit Manager: Clarens on 24 March 2021, respectively. The interview panel for both positions agreed on the ground rules for the interview processes and resolved that the highest score would be considered, the score sheet of performance would include a scale from poor to excellent and the

questionnaire would be based on a total of thirty (30) to forty-five (45) marks.

- (c) The final scoring of the panel members for the position of Manager: Public Safety was listed as follows:

Candidate	Total average score	Ranking (position)
Candidate A	58	4
Candidate B	62	3
Mr Fukisi	88	1
Candidate D	41	6
Candidate E	66	2
Candidate F	49	5

- (d) The final scoring of the panel members for the position Unit Manager: Clarens was listed as follows:

Candidate	Total average score	Ranking (position)
Candidate A	54	4
Candidate B	65	2
Candidate C	58	5
Candidate D	53	6
Candidate E	44	3
Mokoena KE	83	1

- (e) Mr Fukisi and Mr Mokoena were considered as the best performing candidates during their respective interviews and were recommended by the interview panel for appointment.

- (f) The undated Recruitment Report was recommended by Ms Mabula and approved by Mr Mokgathe.

Appointment Letter dated 03 April 2021 for the position Manager: Public Safety

- 6.1.6.13 In the appointment letter dated 03 April 2021, signed by Mr Mokgathe, Mr Fukisi was appointed as the Manager: Public Safety with effect from 01 May 2021.

Appointment Letter dated 07 April 2021 for the position Unit Manager: Clarens

- 6.1.6.14 In the appointment letter dated 07 April 2021, also signed by Mr Mokgathe, Mr Mokoena was appointed as the Unit Manager: Clarens with effect from 01 May 2021.

Independently sourced information from Lengau Traffic College

- 6.1.7 In an email dated 08 August 2023, the Investigation Team requested Mr MS Moloji (Mr Moloji), the Head of Lengau Traffic College (the College), to verify if the four (04) qualifications issued to Mr Fukisi, were equivalent to a National Diploma.

- 6.1.8 On 18 August 2023, a response was received from Mr Moloji indicating that:

- 6.1.8.1 The College is a registered training provider to offer Further Education and Training Certificates: Road Traffic and Law Enforcement (US ID 62289) National Qualification Framework (NQF) level 6 accreditation number 111999691941;

- 6.1.8.2 The College is also registered with the Quality Council of Trade and Occupation (QCTO) as an Assessment Centre to assess the qualification:

Occupational Certificate: Traffic Officer NQF level 4 with Assessment Centre accreditation number: QCTO/OQOC/17/00064;

6.1.8.3 The College confirms that Mr Fukisi was a learner at the College from 03 January 1995 until 24 May 1995;

6.1.8.4 Based on the College's curriculum for Traffic Officer qualifications during 1995, Mr Fukisi was found competent in respect of the following:

- (a) Inspector of licenses;
- (b) Traffic Officer;
- (c) Examiner of drivers' licenses; and
- (d) Examiner of Vehicles.

6.1.8.5 The certificates issued during 1995 were neither allocated credits nor registered with the South African Qualification Authority (SAQA) or assigned an NQF level; and

6.1.8.6 The qualification issued to Mr Fukisi empowers him to exercise duties as an authorised Traffic Officer in terms of the National Traffic Act, 1996, and is not equivalent to a National Diploma.

Independently sourced information from the South African Qualifications Authority (SAQA)

6.1.9 The Investigation Team enquired through an email dated 12 September 2023, addressed to Mr Eugene du Plooy, Specialist Professional Bodies: Registration and Recognition at the SAQA, regarding the certificates (Diploma) issued by the College to Mr Fukisi, to verify whether they were equivalent to a National Diploma.

6.1.10 The Investigation Team also enquired whether the Diploma issued to Mr Mokoena was equivalent to a Bachelor's degree.

6.1.11 On 04 October 2023, an email response was received from Mr J Nel, the Senior Manager, Registration and Recognition, stating the following:

Qualifications of Mr Fukisi

6.1.11.1 The NQF was implemented in 1998. Mr Fukisi obtained the following qualifications prior to the establishment of the NQF:

- (a) Diploma – Inspection of licenses (1995);
- (b) Diploma – Examiner of vehicles (1995);
- (c) Diploma – Examiner for drivers' license (1995); and
- (d) Diploma – Traffic Officer (1995).

Qualifications of Mr Mokoena

6.1.11.2 Mr Mokoena obtained a National N Diploma in Public Management in 2003. Mr Mokoena is registered on the NQF at NQF level 6. The Diploma qualifications and Bachelor's degrees were registered at NQF level 6 on the 8-level NQF; and

6.1.11.3 The NQF was reviewed in 2001 and the 8-level NQF was replaced by the 10-level NQF in 2009. Diplomas are still registered at level 6, whereas Bachelor's degrees are now registered at level 7.

Visit by the Investigation Team to the Municipality

6.1.12 On 11 September 2023, the Investigation Team conducted an inspection *in loco* at the Municipality to obtain further documentation relating to advertised positions.

6.1.13 The Investigation Team could not find any information on the Municipal files to indicate that all applications received for the positions of Manager: Public Safety and Unit Manager: Clarens were captured on a master list.

6.1.14 The Investigation Team was also not able to find any information that indicates that the validity and accuracy of the qualifications submitted by applicants were verified by the Municipality.

Response to the section 7(9) Notice: Mr Fukisi

6.1.15 On 08 November 2023, the Investigation Team delivered the section 7(9) Notice to Mr Fikisi. On 23 November 2023, Mr Fukisi responded to the section 7(9) Notice and stated *inter alia* the following:

6.1.15.1 He applied for the position of Manager: Public Safety as advertised in the *Issue Newspaper* around November 2020 and submitted his full CV with copies of every qualification that he possesses;

6.1.15.2 He was telephonically invited to attend the interview for the position in March 2021 and weeks later he received a call informing him about his appointment;

6.1.15.3 He is of the opinion that he was the best candidate amongst the six (06) shortlisted candidates for the position, as all his qualifications are relevant to traffic related matters and none of the shortlisted candidates had the same qualifications as him;

6.1.15.4 The experience he acquired over the years enabled him to deal with every traffic related matter including, testing of both drivers' licenses and vehicles; conducting inspections around the country at different traffic buildings for compliance; evaluation of examiners; and being the Assistant Director at the National Department of Transport; and

6.1.15.5 The two unions namely South African Municipal Worker's Union (SAMWU) and Independent Municipal And Allied Trade Union (IMATU) were present at the interview process.

Response to section 7(9) Notice: Mr Mokoena

- 6.1.16 On 08 November 2023, the section 7(9) Notice was delivered to Mr Mokoena. On 23 November 2023, Mr Mokoena responded to the section 7(9) Notice and submitted *inter alia* the following:
- 6.1.16.1 Candidate B claimed experience which he/she does not have and the Public Protector is therefore requested to provide clarity in this regard;
- 6.1.16.2 He obtained a National Diploma in Public Management in 2003, registered on the same NQF level with B-degree, but only became aware that the 8 level NQF was replaced by the 10 level NQF in 2009;
- 6.1.16.3 During the interview process he made the interview panel aware that he is in the process of finalising his Advanced Diploma in Public Administration which he completed a few months after the interview;
- 6.1.16.4 The Public Protector should not have relied on the “*received complaint (Advert) only*” but on the general practice or the correct level that the Unit Manager position is structured on, including all Municipalities that have Unit Manager positions;
- 6.1.16.5 Mr Mokoena submitted copy of an advertisement for the Unit Manager: Thembelihle Local Municipality, where the minimum requirements for the position are Grade 12 and National Diploma at NQF level 6;
- 6.1.16.6 He further submitted an advertisement of various Director positions advertised by the Municipality, and contended that NQF level 7 is only applicable to Senior Managers at the Municipality;
- 6.1.16.7 He applied with good intention without misleading anybody and therefore his appointment should not be affected by what should have been done by the administration of the Municipality;

-
- 6.1.16.8 The Public Protector did not acknowledge his experience in the section 7(9) Notice which indicates that he qualifies for the position and that he has the capacity to hold a managerial position within the Municipality; and
- 6.1.16.9 His personal observation is that the Complainant has realised that the Municipality erred in its advertisement and therefore wants to take advantage of the situation.

Response to the section 7(9) Notice from the Executive Mayor, Mr Tseki

- 6.1.17 On 08 November 2023, the section 7(9) Notice was delivered to Mr Tseki. The Public Protector received Mr Tseki's response to the section 7(9) Notice, dated 23 November 2023, stating that he noted the contents of the section 7(9) Notice and the role the Executive Mayor must play in respect of the Notice. Mr Tseki stated that he will await the final report which will provide direction as to *"what is expected to happen going forward"*.

Response to the section 7(9) Notice by the Municipal Manager, Mr Ntheli

- 6.1.18 On 08 November 2023, the section 7(9) Notice was delivered to Mr Ntheli. On 29 November 2023, the Public Protector received Mr Ntheli's response to the section 7(9) Notice, wherein he submitted *inter alia* the following:
- 6.1.18.1 The Municipality intends to conduct an internal independent investigation into allegations of irregular appointments and train all Municipal Human Resource Management Officials and Senior Managers as recommended in the section 7(9) notice; and
- 6.1.18.2 The Municipality will await the final report with the Public Protector's finding, as well as clear recommendations on any proposed remedial action.

Applicable law

The Constitution of the Republic of South Africa, 1996 (the Constitution)

6.1.19 Section 195(1) of the Constitution provides that *“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;

(b) ...

(c) ...

(d) ...

(e) ...

(f) Public administration must be accountable;

(g) ...

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.”

Local Government: Municipal Systems Act, 2000 (MSA)

6.1.20 Section 50(1) of the MSA states that local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution.

6.1.21 In relation to Municipal Managers, section 55(1) of the MSA states that:

“As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for-

- a. ...;
 - b. *the management of the municipality's administration in accordance with this Act and other legislation applicable to the municipality;*
 - c. ...;
 - d. ...;
 - e. *the appointment of staff other than those referred to in section 56(a), subject to the Employment Equity Act, 1998 (Act 55 of 1998);*
 - f. ...;
 - g. *the maintenance of discipline of staff;*
 - h. *the promotion of sound labour relations and compliance by the municipality with applicable labour legislation;*
- ..."

The Code of Conduct for Municipal Staff Members, Schedule 2 of the Municipal Systems Act (the Code of Conduct)

6.1.22 The Code of Conduct for municipal staff members is provided for in schedule 2 of the MSA.

6.1.23 Item 2 of the Code of Conduct provides that a staff member of the Municipality must at all times:

- (a) *loyally execute the lawful policies of the municipal council;*
- (b) *perform the functions of office in good faith, diligently, honestly and in a transparent manner;*
- (c) *act in such a way that the spirit and objects of section 50 are promoted;*
- (d) *act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and*
- (e) *act impartially and treat all people including other staff members, equally without favour and prejudice."*

- 6.1.24 According to Item 14 of the Code of Conduct, breaches of the code must be dealt with in terms of the disciplinary procedures of the municipality.

The Local Government: Municipal Finance Management Act, 2003 (MFMA)

- 6.1.25 The fiduciary responsibilities of accounting officers are outlined in section 61(1) of the MFMA:

“The accounting officer of a municipality must-

(a)

(b) disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable and which in any way might influence the decisions or actions of the council or the mayor...”

Public Administration Management Act, 2014 (PAMA)

- 6.1.26 Section 2 of the PAMA states that the act is applicable to public administration. In terms of the definitions in the Act, “*Public Administration*” means public service, municipalities, and their employees.

- 6.1.27 Section 10(1)(a) of the PAMA provides that the head of an institution must through the education and training of its employees develop its human resource capacity to a level that enables it to perform its functions in an efficient, quality, collaborative and accountable manner.

Labour Relations Act, 1995 (LRA)

- 6.1.28 According to section 158(1)(h) of the LRA the Labour Court may “*review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law*”.

Dihlabeng Local Municipality: Employment Practice Policy (the Employment Practice Policy), 2010

- 6.1.29 Paragraph 4 of the Employment Practice Policy indicates that the scope and application of this policy is to ensure a fair and equitable employment process and it is applicable to all appointments made within the Municipality.
- 6.1.30 Paragraph 5 of the Employment Practice Policy states that the Municipality recognises that its employment policies, practices, and procedures must comply the principle of the rule of law, which requires the Municipality to comply at all times and without exception, with relevant legal prescripts governing the situation concerned.
- 6.1.31 Paragraph 5 further states that Human Resources management in the Municipality must –
- (a) *be characterized by a high standard of professional ethics;*
 - (b) *...;*
 - (c) *be conducted in an accountable manner;*
 - (d) *be transparent; ...*
- 6.1.32 Paragraph 6.3.1 of the Employment Practice Policy provides that the selection criteria shall be objective and related to the inherent requirements of the job and realistic future needs of the Municipality.
- 6.1.33 In terms of paragraph 6.3.2 the purpose of the selection is to identify the most suitable candidate from all the persons who applied and to eliminate unsuitable candidates in the fairest way possible.
- 6.1.34 Paragraph 6.3.3 of the Employment Practice Policy states that after the closing date of an advertisement all applications received for every specific

position should be captured on the master list compiled by the Director Corporate Services. The Director Corporate Services must during the compilation of the master list, take all reasonable steps and actions to establish the validity and accuracy of any certificates, diplomas and other information supplied by an applicant.

6.1.35 Paragraph 6.3.4 of the Employment Practice Policy states that the departmental head must select from the master list the most suitable candidates to be subjected to the selection process.

6.1.36 Paragraph 6.4 provides that the appointment of an applicant may take place in accordance with the requirements of the post concerned and merits of the applicant.

The Higher Education Qualifications Sub-Framework, 2013 (the HEQSF)

6.1.37 Page 29 of the Higher Education Qualification Descriptors in the HEQSF distinguishes Diploma qualifications as follows:

“Diploma

(d) *Type specifications:*

NQF Exit Level: 6

Minimum total credits: 240

Minimum credits at level 6: 120

or

NQF Exit Level: 6

Minimum total credits: 360

Minimum credits at level 6: 120

...There are two key distinctions between the 240- and 360-credit Diploma variants. The latter may provide for up to 120 credits of workplace-based

learning, while the 240-credit variant does not, and the 240-credit variant may only be offered where it leads to a professional designation or occupational role as determined by a professional body.”

6.1.38 Page 29 of the Higher Education Qualification Descriptors in the HEQSF distinguishes Bachelor’s Degrees as follows:

“Bachelor’s Degree

(b) *Type specifications*

NQF Exit Level: 7

Minimum total credits: 360

Minimum total credits at Level 7: 120

or

NQF Exit Level: 8

Minimum total credits: 480

Minimum total credits at Level 8: 120

...There are two types of Bachelor’s Degrees, namely general and professionally-oriented Bachelor’s Degrees. Both types of degree may be structured as a 360-credit qualification with an exit at level 7 or as a 480-credit qualification with an exit at level 8 on the National Qualifications Framework. (It is also possible to structure a 480-credit Bachelor’s Degree with an exit at NQF level 7). The 480-credit Bachelor’s Degree at NQF level 8 has both a higher volume of learning and a greater cognitive demand than the 360-credit degree at Level 7 and should prepare students to be able to undertake Master’s level study by providing them with research capacity in the methodology and research techniques of the discipline.”

Case Law

6.1.39 In *Kwadukuza Municipality v Rajamoney and Others*¹, the court set out the following:

“For the requirements of an advertised post to be met therefore, cognisance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed. The short listing of a candidate who least meets the set selection criteria will ordinarily fly on the clear face of the objective of the policy. Such short listing would then be arbitrary as contrary to the selection criteria.

The applicant set out requirements to be met for the contested post. The fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach. It must be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements.”

6.1.40 In the case of *KwaZulu-Natal Department of Transport v Hoosen and Others*², where the facts were very similar to the present case, the court held that the promotion of a candidate who did not meet the requirements of the advertised post amounted to unfair labour practice. The court pointed out that the employee’s *“promotion was irregular by want of his meeting the minimum criterion for the position.”*

¹ D880/10) [2013] ZALCD 17 (13 June 2013), paragraph 15.

² 2016 37 ILJ 156 (LC), paragraph 23.

Analysis

Manager: Public Safety

- 6.1.41 The evidence at the Public Protector's disposal indicates that the requirements for the position Manager: Public Safety were a National Diploma Law Enforcement, Traffic or equivalent and a Certificate in Fire Technology.
- 6.1.42 On 18 August 2023, the College confirmed that it is an Assessment Centre to assess the qualification: Occupational Certificate: Traffic Officer NQF level 4 with the Quality Council of Trade and Occupation (QCTO). The college confirmed that the qualification issued to Mr Fukisi empowers him to exercise duties as an authorised Traffic Officer in terms of the National Traffic Act, 1996, but is not equivalent to a National Diploma. Furthermore, that the Certificates issued to Mr Fukisi are neither allocated credits nor registered on the NQF or with SAQA.
- 6.1.43 The duties of the Manager: Public Safety as stipulated in the advertisement included management and control of the Traffic Department and Fire Brigade sections as well as ensuring public safety and protecting life and property as stipulated in the Fire Brigade Act, 1987.
- 6.1.44 In his response to the section 7(9) Notice, Mr. Fukisi did not dispute that he is not in possession of a National Diploma Law Enforcement, Traffic or equivalent and a Certificate in Fire Technology. He, however, submitted that his qualifications are relevant to traffic related matters.
- 6.1.45 Mr Fukisi's submission is noted, however in *Kwadukuza Municipality v Rajamoney and Others*,³ the court discouraged shortlisting that does not meet the objectives of the policy and noted the fairness of the selection

³ D880/10) [2013] ZALCD 17 (13 June 2013), paragraph 15.

process lay in the screening of all candidates against the set requirements in a similar approach. The Court further held that people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements. Therefore, even though Mr Fukisi contends that his qualifications are relevant to traffic related matters, shortlisting of a candidate that did not meet the requirements of the advertisement is in violation of the Constitution and contrary to the Employment Practice Policy.

Unit Manager: Clarens

- 6.1.46 The evidence at the Public Protector's disposal indicates that the post of Unit Manager: Clarens was advertised in November 2020 and the qualification requirement was an appropriate B-Degree or equivalent.
- 6.1.47 The evidence obtained from Mr Mokoena's CV indicates that he was issued a National N Diploma in Public Management, on 01 February 2003. Information obtained from SAQA indicates that in 2003, Diplomas and Bachelor degrees were both registered at NQF level 6. The NQF was, however, replaced in 2009 by a 10-level NQF system, which differentiated Diplomas at level 6 and Bachelor degrees at level 7. As a result, at the time when Mr Mokoena applied for the post in 2020, his National N Diploma qualification was therefore not at a Bachelor degree level, as was required by the advertisement. The conduct of the Municipality in appointing Mr Mokoena despite him not having the required qualification, was contrary to paragraphs 6.3.1 read with 6.3.2 of the policy which is intended to identify the most suitable candidate and eliminate those that do not qualify.
- 6.1.48 Mr Mokoena's submission to the section 7(9) notice that Candidate B claimed experience which he/she does not have is noted. However, the investigation of the Public Protector focussed on the alleged irregular appointment of Mr Mokoena. It was incumbent on the functionaries of the

Municipality to ensure that during the recruitment process the information submitted by applicants are verified.

- 6.1.49 Mr Mokoena contended that the Public Protector should have relied on the general practice, or the correct level, that the Unit Manager positions are structured on and that director positions are advertised on NQF level 7 and applicable to Senior Managers and not to Unit Managers. His submission does not consider that the Municipality stipulated the requirements for the position in the advertisement and therefore, the functionaries of the Municipality had a duty to shortlist candidates who met the requirements of the advertisement.
- 6.1.50 The evidence at the Public Protector's disposal indicates that the functionaries of the Municipality did not ensure that the appointment process was conducted in a manner which maintained a high standard of professional ethics, fairness and equity, as Mr Fukisi and Mr Mokoena were shortlisted, interviewed, and appointed despite them not meeting the minimum requirements for the posts. This was in violation of section 195(1) of the Constitution and contrary to section 50 of the MSA which enjoins the functionaries of the Municipality to maintain a high standard of professional ethics and to cultivate sound human resource management in its recruitment processes. This is also echoed in paragraphs 4 and 5 of the Employment Practice Policy.
- 6.1.51 The Public Protector could not find any evidence to indicate that the functionaries of the Municipality compiled a master list of all applications received or that it took steps to establish the validity, accuracy, and the level of the qualifications supplied by the applicants, as required in terms of Paragraph 6.3.3 of the Employment Practice Policy. As a result, the applicants that were shortlisted were not the most suitable candidates that were subjected to the selection process as required by Paragraph 6.3.4 of the Employment Practice Policy.

- 6.1.52 Paragraph 6.4 of the Employment Practice Policy requires the functionaries of the Municipality to appoint persons who meet the requirements of the post and further Paragraph 5 of the Employment Practice Policy requires the Municipality to comply with the principle of the rule of law, which in this instance, did not occur, as both Mr Fukisi and Mr Mokoena were appointed even though they did not meet the requirements of the post.
- 6.1.53 The need to adhere to proper recruitment practices has been echoed by the courts, particularly in the case of *KwaZulu-Natal Department of Transport v Hoosen and Others*⁴ wherein the Labour Court discouraged the shortlisting of candidates who least meet the requirements and selection criteria and further held that any deviation from the advertised requirements of the position, would be tantamount to an unfair labour practice.
- 6.1.54 Similar sentiments were echoed by the court in *Kwadukuza Municipality v Rajamoney and Others*⁵. Accordingly, it was incumbent on the functionaries of the Municipality, during the recruitment process, to ensure that the requirements and selection criteria for the posts were met.
- 6.1.55 The Public Protector notes the response of Mr Ntheli to the section 7(9) notice indicating that the Municipality intends to conduct an internal independent investigation into allegations of irregular appointments and train all Municipal Human Resource Management Officials and Senior Managers as recommended in the section 7(9) notice.
- 6.1.56 The Public Protector notes the response of Mr Tseki to the section 7(9) Notice, wherein he indicated that he noted the contents of the section 7(9) notice and the role that the Executive Mayor was to play.

⁴ 2016 37 ILJ 156 (LC), paragraph 23.

⁵ D880/10) [2013] ZALCD 17 (13 June 2013), paragraph 15.

Conclusion

- 6.1.57 Mr Fukisi and Mr Mokoena did not meet the minimum requirements for the posts to which they were appointed. The conduct of the functionaries in appointing them despite both not meeting the minimum requirements for the posts, was not in line with paragraphs 6.3. of the Employment Practice Policy, section 50 of the MSA and the basic values and principles governing the Municipality's recruitment process.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that the functionaries of the Municipality should have complied with and the impact thereof on good administration, the Public Protector makes the following findings:

- 7.1 Whether the functionaries of the Municipality irregularly appointed Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety and Unit Manager: Clarens, respectively, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

- 7.1.1 The allegation that the functionaries of the Municipality irregularly appointed Mr Fukisi and Mr Mokoena to the positions of Manager: Public Safety and Unit Manager: Clarens, respectively, while they did not meet the minimum requirements for the posts, **is substantiated.**

- 7.1.2 The College confirmed that the qualifications that were awarded to Mr Fukisi in May 1995 are not equivalent to a National Diploma.

- 7.1.3 Furthermore, the evidence indicates that Mr Fukisi did not hold a Certificate in Fire Technology, which was a requirement for the post and necessary for the duties to be performed. It was further established that none of the shortlisted and interviewed candidates were in possession of the required Certificate in Fire Technology.
- 7.1.4 In respect of the appointment of Mr Mokoena, the evidence revealed that the National N Diploma issued to Mr Mokoena is not equivalent to a Bachelor's degree in line with the NQF levels recognised by SAQA and required for the post in terms of the advertisement.
- 7.1.5 Therefore, the shortlisting and subsequent appointment of Mr Fukisi and Mr Mokoena by the functionaries of the Municipality was in contravention of the provisions of section 195(1) of the Constitution read together with paragraph 6.4 of the Municipal Employment Practice Policy.
- 7.1.6 The conduct of the functionaries of the Municipality constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

8. REMEDIAL ACTION

- 8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this notice upon the conclusion of an investigation where adverse findings are made.
- 8.2 In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng, CJ held that the remedial action taken by the Public Protector has a binding effect.

8.3 The senior functionaries of the Municipality (Mr Mokgathe, the former Municipal Manager and Ms Mabula, the Director Corporate Services) who recommended and approved the appointment processes and appointment of the two incumbents, are no longer in the employ of the Municipality.

8.4 The appropriate remedial action in terms of section 182(1)(c) of the Constitution, are the following:

The Executive Mayor

8.4.1 Within **ninety (90) calendar days** from the date of this report, in terms of section 56(3)(f) of the Municipal Structures Act (MSA), 1998, table the report before the Municipal Council for deliberation and obtain approval for the appropriate course of action to address the irregular appointments of Mr Fukisi and Mr Mokoena as Manager: Public Safety and Unit Manager: Clarens, respectively, including pursuing a judicial review, as provided for in section 158(1)(h) of the LRA.

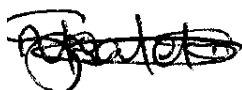
The Municipal Manager

8.4.2 Within **sixty (60) calendar days** from the date of this report, in line with section 10(1)(a) of the Public Administration Management Act, 2014 ensure that all the Municipal Human Resource Management Officials and Senior Managers are trained to comply with paragraphs 6.3.3 and 6.3.4 of the Employment Practice Policy in every recruitment process to establish the validity and accuracy of qualifications supplied by applicants, in order to ensure that future appointments are made in full compliance with the Policy.

8.4.3 To ensure that proper screening and verification of the information contained in job applications, is conducted with an authorised institution commissioned to conduct such exercise, including verification of qualifications before the selection and recruitment process is finalised.

9. MONITORING

- 9.1 The Municipal Manager to submit an action plan to the Public Protector within **thirty (30) calendar days** from the date of this report on the implementation of the remedial action referred to in paragraph 8 above.
- 9.2 The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.
- 9.3 In line with the Constitutional Court Judgement in the matter of *Economic Freedom Fighters*, and in order to ensure the effectiveness of the Public Protector, the remedial action prescribed in this Report is legally binding on the Municipality unless there is an Interim Interdict or Court Order directing otherwise.



ADV KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 29 DECEMBER 2023

Assisted by: Ms Nthoriseng Motsitsi
Executive Manager: PII: Inland