

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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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE EPHRAIM MOGALE LOCAL MUNICIPALITY RELATING TO THE APPOINTMENT OF MS M L MASOMBUKA TO THE POSITION OF CHIEF INTERNAL AUDITOR

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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, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- (ii) The report communicates findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into allegations of maladministration by the Ephraim Mogale Local Municipality relating to the appointment of Ms M L Masombuka to the position of Chief Internal Auditor.
- (iii) On 10 July 2019, an anonymous complaint was received from concerned employees of the Ephraim Mogale Local Municipality (EMLM) (the Complainants), who requested the Public Protector to investigate allegations of maladministration by the EMLM relating to the appointment of Ms M L Masombuka to the position of Chief Internal Auditor.
- (iv) In the main, the Complainants alleged that:
 - (aa) The position of Chief Internal Auditor became vacant when the person who occupied it, resigned;
 - (bb) The Municipality advertised the position and received several applications from interested persons, including from Ms Masombuka;
 - (cc) A Selection and Interview Panel (the panel) was appointed to conduct the shortlisting and interviews. The normal recruitment processes were undertaken wherein two (2) candidates were recommended for appointment in order of performance during the interview process;

- (dd) The then Acting Municipal Manager, Mr Makoko Lekola (Mr Lekola) decided to appoint Ms Masombuka, who was the third candidate in order of performance, although she had not been recommended by the panel for appointment;
 - (ee) Mr Lekola decided to appoint Ms Masombuka without checking whether the first two (2) candidates were interested in taking up the position or not. His conduct was therefore irregular as it contravened the Recruitment, Selection and Appointment Policy (RSAP) of the Municipality.
 - (ff) Mr Lekola further did not consult with the Executive Committee of the Municipal Council, as prescribed by the RSAP, when overriding the recommendations of the panel to appoint Ms Masombuka. His conduct therefore constituted another contravention of the RSAP.
- (v) On analysis of the complaint, the following issues were identified and investigated:
- (aa) Whether the Municipality irregularly appointed Ms Masombuka to the position of Chief Internal Auditor?
 - (bb) Whether the recommended candidates or any other person(s) suffered any prejudice as a result of the irregular appointment of Ms Masombuka?
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence, meetings and interviews conducted with the Complainant, Municipal officials and members of the shortlisting and interview panels, as well as the perusal of all relevant documents, the analysis and application of all relevant laws, policies and related prescripts.
- (vii) A number of key legislative prescripts and policies were taken into account to determine if the Municipality irregularly appointed Ms Masombuka to the position of

Chief Internal Auditor in contravention of the RSAP of the Municipality and to determine if the recommended candidates suffered any prejudice as a result of the alleged irregular appointment of Ms Masombuka. These legal prescripts are principally those imposing administrative standards that should have been complied with by the Municipality during the recruitment process. These are as follows:

- (aa) The Constitution of the Republic of South Africa, 1996 (the Constitution);
 - (bb) The Public Protector Act 23 of 1994 (the Public Protector Act);
 - (cc) The Local Government: Municipal Finance Management Act, 56 of 2003;
 - (dd) The Local Government: Municipal Systems Act 32 of 2000;
 - (ee) The Employment Equity Act 55 of 1998;
 - (ff) The Labour Relations Act 66 of 1995; and
 - (gg) Ephraim Mogale Local Municipality RSAP
- (viii) On 08 February 2021, the Public Protector issued a Notice in terms of Section 7(9)(a) of the Public Protector Act to the Mayor of Ephraim Mogale Local Municipality, the Speaker of the Municipal Council of Ephraim Mogale Local Municipality, the Municipal Manager of the Ephraim Mogale Local Municipality, the Head of the Department of Cooperative Governance Human Settlements and Traditional Affairs and the Member of the Executive Council of the Department of Cooperative Governance, Human Settlements and Traditional Affairs to enable them to respond within thirty (30) working days of receipt thereof.
- (ix) The Notice was transmitted to all the aforementioned recipients on 10 February 2021. Only the Acting Municipal Manager of Ephraim Mogale Local Municipality acknowledged receipt of the Notice and noted the contents thereof on 22 February 2021.
- (x) By 08 March 2021, no acknowledgement or response was received by the Public Protector.

- (xi) However, the acting Public Protector received two (2) submissions from Mushwana Incorporated, acting on behalf of Ms Masombuka, dated 19 and 25 March 2021 respectively. Through the submission of 19 March 2021, the attorneys wished “to provide input into the investigation as [the] final report into this matter ha[d] the potential to adversely impact on [their] client.” (sic)
- (xii) Having considered the evidence uncovered during the investigation against the applicable laws and related prescripts, the Public Protector makes the following findings:
- (a) Regarding whether the Municipality irregularly appointed Ms Masombuka to the position of Chief Internal Auditor:**
- (aa) The allegation that the Municipality irregularly appointed Ms Masombuka to the position of Chief Internal Auditor, is substantiated.
- (bb) The Municipality advertised the post of Chief Internal Auditor in the *Sowetan* newspaper dated 05 October 2018.
- (cc) Ms Masombuka was shortlisted, interviewed and appointed by the Municipality despite not being in possession of the relevant Bachelor’s Degree in Internal Audit/Accounting or Equivalent, as required by the advertisement at the time she applied for the position of Chief Internal Auditor. She was still studying for a B Tech in Internal Auditing with UNISA and in her final year.
- (dd) The highest qualification that Ms Masombuka had at the time she applied for the post (i.e. National Diploma in Internal Auditing) is not equivalent to a Bachelor’s Degree in Internal Auditing/Accounting. This was confirmed by the South African Qualifications Authority (SAQA).

- (ee) The shortlisting and subsequent appointment of Ms Masombuka by the Municipality was in contravention of the provisions of section 195(1) of the Constitution, the Municipal Systems Act and the Recruitment, Selection and Appointment Policy of the Municipality.
- (ff) The conduct of the Municipality accordingly constitutes improper conduct that resulted in prejudice as envisaged in section 182(1) of the Constitution and section 6(4)(a)(v) of the Public Protector Act.
- (b) Regarding whether the recommended candidates or any other person(s) suffered any prejudice as a result of the irregular appointment of Ms Masombuka:**
 - (aa) The allegation that the recommended candidates and any other person(s) suffered prejudice as a result of the irregular appointment of Ms Masombuka, is substantiated.
 - (bb) The shortlisting, interview and subsequent appointment of Ms Masombuka prejudiced other applicants who applied on the strength of their qualifications as stated in the advertisement as well as their performance during the interview.
 - (cc) The other candidates who were recommended by the interview panel would have been considered for appointment, had the former Municipal Manager not deviated from procedure and decided, on his own accord and without consulting the Executive Committee, to appoint Ms Masombuka.
 - (dd) Furthermore, had the former Municipal Manager followed the Recruitment, Selection and Appointment Policy of the Municipality and not deviated from the recommendations of the panel, the first recommended candidate might have been appointed, subject to a vetting process and if he declined the offer, the second recommended candidate might have been appointed to the position of Chief Internal Auditor, also subject to the outcome of the vetting process.

- (ee) The decision to appoint the third, but not recommended candidate prejudiced the first and second recommended candidates respectively.
- (ff) The conduct of the Municipality accordingly constitutes improper conduct that resulted in prejudice as envisaged in section 182(1) of the Constitution and section 6(4)(a)(v) of the Public Protector Act.
- (xiii) The appropriate remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution, is as follows:
 - (aa) The Speaker of the Municipal Council in consultation with Municipal Council must within thirty (30) working days from the date of this report, take disciplinary action against Mr Makoko Lekola and current employees who participated in the irregular appointment of Ms. Masombuka;
 - (bb) The Speaker of the Municipal Council, in consultation with the Acting Municipal Manager must, within thirty (30) working days from the date of this report, develop internal controls to safeguard the integrity of the recruitment and selection process in all phases of the recruitment processes to avoid a recurrence of a similar incident;
 - (cc) The Acting Municipal Manager to institute proceedings for judicial review of the appointment of Ms Masombuka as the Chief Internal Auditor of the Municipality within sixty (60) business days from the date of this report.
 - (dd) The Acting Municipal Manager to submit a report on the progress made with instituting the judicial review proceedings to the Municipal Council within ninety (90) working days from the date of this report.
 - (ee) The Acting Municipal Manager must within thirty (30) working days from the date of this report, conduct training and capacitate officials on the recruitment and selection policy/process to avoid a recurrence.

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY
THE EPHRAIM MOGALE LOCAL MUNICIPALITY RELATING TO THE APPOINTMENT
OF MS M L MASOMBUKA TO THE POSITION OF CHIEF INTERNAL AUDITOR**

1. INTRODUCTION

- 1.1. This report is 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 section 8 of the Public Protector Act to:
 - 1.2.1 The Member of the Executive Council (MEC) responsible for the Limpopo Department of Cooperative Governance, Human Settlements and Traditional Affairs, Mr B R Makamu;
 - 1.2.2 The Head of Department of Limpopo Cooperative Governance, Human Settlements and Traditional Affairs, Ms. NR Dumalisile;
 - 1.2.3 The Mayor of the Ephraim Mogale Local Municipality, Cllr. M Mothogoane;
 - 1.2.4 The Speaker of the Municipal Council of the Ephraim Mogale Local Municipality, Councillor (Cllr), Ms. L B Modisha;
 - 1.2.5 The Acting Municipal Manager of the Ephraim Mogale Local Municipality, Mr. H M Phaahla;
 - 1.2.6 The former Municipal Manager of Ephraim Mogale Local Municipality, Mr Makoko Lekola; and to
 - 1.2.7 The Complainants, to inform them of the outcome of the investigation.

1.2.8 A copy of the report is also provided to Mushwana Incorporated Attorneys representing Ms Masombuka, to inform them of the outcome of the investigation based on their submissions to the Public Protector.

1.3 The report relates to an investigation into allegations of maladministration by Ephraim Mogale Local Municipality relating to the appointment of Ms M L Masombuka to the position of Chief Internal Auditor.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector anonymously by concerned employees of the Municipality (the Complainants) on 10 July 2019.

2.2 The Complainants alleged that:

2.2.1 The position of Chief Internal Auditor became vacant when the person who occupied it resigned;

2.2.2 The Municipality advertised the position and received several applications from interested persons.

2.2.3 The Selection and Interview Panel (the panel) was appointed to conduct the shortlisting and interview processes.

2.2.4 The normal recruitment processes were undertaken wherein two (2) candidates were recommended for appointment, in order of performance during the interview process. The then Acting Municipal Manager, Mr Makoko Lekola (Mr Lekola) decided to appoint Ms Masombuka who was the third candidate in order of performance, however she had not been recommended by the panel for appointment.

- 2.2.5 Mr Lekola decided to appoint Ms Masombuka without checking whether the first two (2) candidates were interested in taking up the position or not. His conduct was therefore irregular as it contravened the Recruitment, Selection and Appointment Policy (RSAP) of the Municipality.
- 2.2.6 Mr Lekola further did not consult with the Executive Committee of the Municipal Council as directed by the RSAP, when overriding the recommendation of the panel in appointing Ms Masombuka. His conduct was therefore in contravention of the RSAP.
- 2.2.7 A complaint was raised through Thobela FM's "*Hlokwa La Tsela*" radio program wherein the Municipality was requested to provide answers as to why Mr Lekola appointed candidate number three (3) without consulting with the Executive Committee. Mr Lekola tried to justify the appointment by citing a discretion conferred on him by the RSAP and the Employment Equity Act.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The mandate of the Public Protector

- 3.1.1 The Public Protector is an independent constitutional institution, established in terms of section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.1.2 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”.*

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

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers powers on the Public Protector to resolve disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purposes of an investigation.

3.1.5 In the matter of *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 consequences².”*

3.1.6 In the above-mentioned matter, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

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

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

² Supra at para [73].

- 3.1.8 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);
- 3.1.9 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);
- 3.1.10 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);
- 3.1.11 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);
- 3.1.12 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 the investigation and the type of findings made (paragraph 71);
- 3.1.13 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 these words suggests that she necessarily 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));

3.1.14 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and

3.1.15 “*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)).

3.1.16 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)³, the Court held as follows when confirming the powers of the Public Protector:

3.1.16.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);

3.1.16.2 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 (paragraph 82);

3.1.16.3 The taking of remedial action by the Public Protector is not contingent upon a finding of impropriety or prejudice. The Public Protector’s powers are clearly set out in Section 182(1) of the Constitution. It is clear from the wording of the section that the Public Protector is afforded three separate powers: (1) to investigate conduct that is alleged or suspected to be improper; (2) to report on that conduct, and (3) to take appropriate remedial action. (paragraphs 100 and 101);

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

³ [2017] ZAGPPHC 747

- 3.1.16.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105).
- 3.1.16.6 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112);
- 3.1.17 The Ephraim Mogale Local Municipality is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector's mandate.
- 3.1.18 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.
- 4.1.3 The investigation was conducted by way of correspondence, meetings and interviews held with the Complainant and the relevant municipal officials, an analysis of the relevant documentation and consideration and application of the relevant laws, and regulatory framework.

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:
- (a) What happened?
 - (b) What should have happened?
 - (c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration or other improper conduct?
 - (d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to place the Complainant as close as possible to where he/she 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. *The Supreme Court of Appeal (SCA)*⁴ made it clear that “it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.”
- 4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the Municipality to prevent maladministration and prejudice.
- 4.2.4 The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the Municipality complied with the regulatory framework setting the applicable standards for good administration.

⁴ *Public Protector v Mail and Guardian* 2011(4) SA 420 (SCA).

4.3 On analysis of the complaint, the following issues were considered and investigated:

4.3.1 Whether the Municipality irregularly appointed Ms Masombuka to the position of Chief Internal Auditor?

4.3.2 Whether the recommended candidates or any other person(s) suffered any prejudice as a result of the irregular appointment of Ms Masombuka?

4.4 The key sources of information

4.4.1 Documents

- 4.4.1.1 A copy of the advertisement of the post of Chief Internal auditor;
- 4.4.1.2 A copy of a list of the shortlisted candidates for the post of Chief Internal Auditor;
- 4.4.1.3 A copy of the Shortlisting Report for the position of Chief Internal Auditor;
- 4.4.1.4 A copy of the Minutes of the Interview process;
- 4.4.1.5 A copy of the appointment letter of Ms. M L Masombuka dated 29 April 2019;
- 4.4.1.6 A copy of Letter from South African Municipal Workers' Union (SAMWU) to the Municipal Manager dated 30 April 2019;
- 4.4.1.7 A copy of the response letter from the Municipality to SAMWU' dated 06 June 2019;
- 4.4.1.8 A copy of Letter from Independent Municipal and Allied Trade Union (IMATU) to the Municipal Manager dated 02 May 2019;
- 4.4.1.9 A copy of the response letter from the Municipality to IMATU dated 06 May 2019;
- 4.4.1.10 A copy of the letter from IMATU to the Municipal Manager dated 25 June 2019;
- 4.4.1.11 A copy of the Ephraim Mogale Local Municipality Recruitment, Selection and Appointment Policy accented to on 31 March 2014;
- 4.4.1.12 A copy of Delegation of Powers (Delegation Number 5) document;

- 4.4.1.13 Copies of CV's and qualifications of Raphela John Ntsokoe, Ramphisa Jim Mmesi and Masombuka Lina Mavis.
- 4.4.1.14 A copy of the Ephraim Mogale Local Municipality Employment Equity Report for 2013/2014 and Employment Equity Plan.

4.4.2 Correspondence sent and received

- 4.4.2.1 A letter of enquiry from the Public Protector to the Municipality dated 17 July 2019;
- 4.4.2.2 A response letter from the Municipality dated 15 August 2019;
- 4.4.2.3 A letter of response from the Public Protector to the Municipality dated 03 August 2018;
- 4.4.2.4 A letter from the Public Protector to the Municipality dated 05 September 2019;
- 4.4.2.5 A response letter from the Municipality to the Public Protector dated 18 September 2019;
- 4.4.2.6 A letter from the Municipality to the Public Protector dated 05 March 2020;
- 4.4.2.7 A response letter from the Public Protector to the Municipality dated 19 March 2020;
- 4.4.2.8 An email from the Public Protector to the South African Qualifications Authority (SAQA) dated 14 July 2020;
- 4.4.2.9 A response letter from SAQA to the Public Protector dated 20 July 2020;
- 4.4.2.10 A letter from the Municipality to the Public Protector dated 25 June 2020;
- 4.4.2.11 A response letter from the Public Protector to the Municipality dated 14 July 2020;
- 4.4.2.12 A copy of section 7(9)(a) Notice signed by the Acting Public Protector on 08 February 2021 issued to the Mayor of Ephraim Mogale Local Municipality, the Speaker of the Municipal Council of Ephraim Mogale Local Municipality, the Municipal Manager of the Ephraim Mogale Local Municipality, the Head of the Department of Cooperative Governance, Human Settlements and Traditional Affairs and the Member of the Executive Council responsible for the

Department of Cooperative Governance, Human Settlements and Traditional Affairs;

- 4.4.2.13 A letter from the Municipality to the Public Protector dated 22 February 2021;
- 4.4.2.14 A letter from Mushwana Inc. Attorneys to the Public Protector dated 19 March 2021;
- 4.4.2.15 An email from this office to Mushwana Inc. Attorneys dated 19 March 2021;
- 4.4.2.16 A letter from Mushwana Inc. Attorneys to the Public Protector dated 25 March 2021.

4.4.3 Legislation and other prescripts

- 4.4.3.1 The Constitution of the Republic of South Africa, 108 of 1996 (the Constitution);
- 4.4.3.2 The Public Protector Act, 23 of 1994 (the Public Protector Act);
- 4.4.3.3 The Local Government: Municipal Systems Act, 32 of 2000 (MSA);
- 4.4.3.4 The Employment Equity Act 55 of 1998;
- 4.4.3.5 The Labour Relations Act 66 of 1995; and
- 4.4.3.6 Ephraim Mogale Local Municipality Recruitment, Selection and Appointment Policy (RSAP).

4.4.4 Interviews

- 4.4.4.1 Interview with the then Acting Municipal Manager Ms K V Sithole on 22 November 2019.
- 4.4.4.2 Interviews held with the shortlisting and interview panel on 15 January 2020.
- 4.4.4.3 Interviews held with the then Acting Municipal Manager Makoko Lekola on 15 January 2020.

4.4.5 Case Law

- 4.4.5.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).*
- 4.4.5.2 *President of the Republic of South Africa v Office of the Public Protector and Others Case [2017] ZAGPPHC 747.*
- 4.4.5.3 *Public Protector v Mail and Guardian 2011(4) SA 420 (SCA).*
- 4.4.5.4 *Leonard Dingler (Pty) Ltd v Ngwenya (JA110/97) [1999] ZALAC 1.*
- 4.4.5.5 *SAMWU obo M. Abrahams v City of Cape Town (C 611/07) [2008] ZALC 27; [2008] 7 BLLR 700 (LC); (2008) 29 ILJ 1978 (LC).*
- 4.4.5.6 *Chubisi v South African Broadcasting Corporation (SOC) Ltd and Others (J 1169/20) [2020] ZALCJHB 218; (2021) 42 ILJ 395 (LC) (2 November 2020)*
- 4.4.5.7 *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013)*

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 irregularly appointed Ms Masombuka to the position of Chief Internal Auditor:

Common cause issues

- 5.1.1 The Municipality advertised the post of Chief Internal Auditor in the *Sowetan* newspaper dated 05 October 2018.
- 5.1.2 The minimum requirements for the post of Chief Internal Auditor were:

- (a) Grade 12 or Matric Certificate;
- (b) Bachelor's Degree in Internal Audit/Accounting or Equivalent;
- (c) Registration with the Institute of Internal Auditors;
- (d) Code B driver's Licence;
- (e) No criminal record;
- (f) 5 years relevant experience of which 3 years were at a supervisory level;
- (g) Conflict management and labour relations skills;
- (h) MFMP/CPMD certificate of competency as per MFMA will be an added advantage.

5.1.3 Ms Masombuka applied for the position and presented the following towards meeting the requirements for the position of Chief Internal Auditor:

- (a) Grade 12 or Matric Certificate;
- (b) National Diploma in Internal Auditing awarded by Tshwane University of Technology 2004;
- (c) Registration with the Institute of Internal Auditors of South Africa in 2015 under Certificate Number: 36665627;
- (d) Advanced ACCPAC with Tshwane University of Technology;
- (e) Certificate in Municipal Finance Management Programme awarded by the Enterprise University of Pretoria 2018;
- (f) Certificate in Auditing the Management and Reporting of Performance Information in the Public Sector awarded by the Institute of Internal Auditors of South Africa in 2016;
- (g) Certificate in Financial Audit for the Internal Auditors in the Public Sector awarded by the Institute of Internal Auditors of South Africa in 2017;
and

5.1.4 She was in her final year of studies towards an Advanced Diploma in Internal Auditing/B Tech Degree with the University of South Africa.

5.1.5 Ms Masombuka applied for the position of Chief Internal Auditor, and was shortlisted and interviewed together with eight (8) other candidates. She was eventually appointed to the position after achieving the third position in terms of scoring during the interview process. She had not been recommended for appointment by the panel.

5.1.6 The other eight (8) candidates had the following qualifications and experience:

Name	Qualifications	Experience
1. Ramatamba F D	Bachelor of Commerce in Accounting	Ten (10) years
2. Ramphisa J M	Bachelor of Administration National Diploma in Internal Auditing Certificate Program in Management Development	Eleven (11) years
3. Gwebu V C	Bachelor of Commerce in Accounting	Twelve (12) years
4. Raphela J N	Bachelor of Commerce in Accounting Certificate Program in Management Development Certificate in Criminal Justice and Forensic Investigation	Fifteen (15) years
5. Mononyane L M	Bachelor of Commerce in Accounting	Ten 10) years
6. Matlou J M	Honours Bachelor of Commerce in Auditing	Six (6) years

7.Moloantoa T J	National Diploma in Internal Auditing National Higher Certificate Accountancy	Five (5) years
8. Ramokolo J	National Diploma in Internal Auditing B-Tech Internal Auditing	Five (5) years

5.1.7 The panel recommended Mr John Ntshokoe Raphela (Mr Raphela) for appointment to the position of Chief Internal Auditor, as he scored the highest points in the interviews. He scored 90%. Mr Jim Mmesi Ramphisa (Mr Ramphisa), the second highest scoring candidate obtained 68%, while Ms Masombuka came third with a score of 61%.

5.1.8 The panel also recommended (Mr Ramphisa) for appointment to the position of Chief Internal Auditor as the second highest scoring candidate.

5.1.9 The panel further recommended that should the candidate who obtained the highest score decline the appointment, the candidate who obtained the second highest score should be appointed and that should he too decline, the post should then be re-advertised.

5.1.10 Ms Masombuka was the candidate who obtained the third highest score. No recommendation was made by the panel regarding her suitability for appointment. Instead, as indicated above, the panel specifically recommended that the post should be re-advertised if the first two highest scoring candidates should respectively decline the appointment.

Issues in dispute

- 5.1.11 The Complainants argued that the appointment of Ms Masombuka by Mr Lekola deviated from the recommendation of the panel, and in so doing, breached the provisions of the RSAP of the Municipality.
- 5.1.12 The investigation team raised the matter with the Municipality on 17 July 2019, by way of an allegations letter. The then acting Municipal Manager, Mr Lekola, responded as follows in a letter dated 15 August 2019:

“Indeed the position of Chief Internal Auditor became vacant when the person who previously occupied it, resigned.

The position was then advertised and several applications were received. A selection and interview panel was constituted and the first two recommended candidates were males and the third female.

After considering of, amongst others, the fact that at Divisional Manager’s level at the Municipality, we have twenty-one (21) position of which two (2) are occupied by women, which poses gender imbalance in that employees’ category, and that Ephraim Mogale local municipality as a designated employer in terms of the provision of Employment Equity Act, “...to achieve employment equity, implement affirmative action measures for people from the designated groups in terms of this Act” and also after considering the Purpose of the Employment Equity Act as outlined in section 2(b), which reads: “The purpose of this Act is to ensure equitable representation of people from designated groups in all occupational levels of the workforce”, the Acting Municipal Manager decided to appoint the third candidate who is a woman, namely Ms Mavis Lina Masombuka, as Chief Internal Auditor. The appointment letter is attached as Annexure E. The decision was therefore meant to endeavour to narrow the equity and gender imbalance gap at Divisional Managers’ level and to work towards ensuring equitable representation of people from designated groups within the divisional

manager' category. The Acting Municipal Manager also considered section 6(2)(a) of the Employment Equity Act which states that "It is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act.

The appointment is indeed contrary to the recommendations of the selection and interview panel which recommended males candidates in order of priority (this panel only recommends and the final decision vests with the Municipal Manager after considering all the facts), and the decision of the Acting Municipal Manager was based on addressing equity at the divisional managers' level.

Clause 8.3 of the Recruitment, Selection and Appointment policy reads in part about the Municipal Manager that he/she: "... has the final decision and may override the decision of the Selection and Interview panel based on fair and transparent processes".

The first two recommended candidates, who are males, were not considered for appointment as the Acting Municipal Manager was endeavouring to narrow the equity gap at the category of the divisional managers". (sic)

5.1.13 In a letter dated 05 September 2019 clarity was sought from the Municipality on the Employment Equity which was relied upon by the Municipality in appointing Ms Masombuka.

5.1.14 The former Acting Municipal Manager, Ms KV Sithole (Ms Sithole) responded in a letter dated 18 September 2019 as follows:

"the Acting Municipal Manager, in effecting the appointment of the Chief Internal Auditor, did not consult with the Executive Committee, but however, he derived his powers from, amongst others, Section 55 (e), (m) and (p) of the Local Government: Municipal System Act, Delegation Number 5 of powers

delegated to him by the Delegation of Powers Document approved by the Council and section 8.3 of the Recruitment, Selection and Appointment policy of the Municipality.”

- 5.1.15 After receipt of the response, an interview was conducted with Ms Sithole on 22 November 2019. Ms Sithole indicated that she was not the one who made the appointment, but she confirmed that the consultation prescribed in terms of section 8.3(g) of the RSAP was not done.
- 5.1.16 As part of the investigation process, the team conducted further interviews with members of the panel on 15 January 2020.
- 5.1.17 All members of the panel indicated that the issue of Employment Equity was never considered during shortlisting and interviewing phases of the recruitment process.
- 5.1.18 Candidates were shortlisted based on their qualifications and experience and were scored based on their performance during the interviews. The scores of all candidates who were interviewed were incorporated in the minutes/report of the panel. The two highest scoring candidates were recommended for appointment and both of them were males.
- 5.1.19 When questioned as to whether Ms Masombuka met the minimum requirements for the post, all members of the panel acknowledged and agreed that Ms Masombuka did not meet the minimum requirements for the post in that she was not in possession of a Bachelor's Degree in either Internal Auditing or Accounting or a qualification equivalent thereto.
- 5.1.20 The members of the panel then indicated that the reason why Ms Masombuka was shortlisted, even though she did not meet the minimum requirements, was

that she was an internal candidate and that she had been acting in the position of Chief Internal Auditor at the time when the post was advertised.

5.1.21 The decision to shortlist Ms Masombuka was captured in the shortlisting minutes dated 22 January 2019, as follows:

“The panel discussed about, and then resolved on the shortlisting of the applied internal staff on reasons which were furnished”.

5.1.22 During the interview held with the panel on 15 January 2020, it was indicated that the reasons referred to above were that:

5.1.22.1 Ms Masombuka was acting in the position of Chief Internal Auditor and she was performing her duties satisfactorily;

5.1.22.2 She was an internal candidate;

5.1.22.3 The Municipality never received any complaint against her in relation to her work while she was acting as Chief Internal Auditor.

5.1.23 On 15 January 2020, the investigation team conducted an interview with Mr Lekola, the Acting Municipal Manager who appointed Ms Masombuka.

5.1.24 During the interview, he indicated that in terms of section 55(1) of the Municipal System Act 32 of 2000 (MSA), read with Delegation No. D.5 of the Power Delegated to Municipal Manager as contained in Delegations of Powers OC3/11/2018 of the Municipal Council dated 22 March 2018, he had the power and the discretion to deviate from the recommendation of the panel and to appoint any shortlisted candidate he deemed fit for the position.

5.1.25 He further confirmed that he did not consult with the executive committee as required by the RSAP, when deviating from the recommendations of the panel

and appointing Ms Masombuka to the position of Chief Internal Auditor. He contended that the Delegation No. D.5 of the Power Delegated to Municipal Manager as contained in Delegations of Powers OC3/11/2018 of the Municipal Council dated 22 March 2018 absolved him from undertaking such a consultation.

5.1.26 When asked whether he was aware that Ms Masombuka did not meet one of the minimum requirements for the position in that she did not possess a Bachelor's Degree in Internal Auditing or Accounting, he responded by indicating that he only became aware that Ms Masombuka did not meet the requirement of a Bachelor's Degree in Internal Auditing or Accounting or Equivalent when it was brought to his attention during the interview with the Public Protector investigation team. He further accepted and agreed that Ms Masombuka did not meet this requirement.

5.1.27 On 14 July 2020, the investigation team made an enquiry with the South African Qualification Authority (SAQA) to verify whether a National Diploma in Internal Auditing can be regarded as an equivalent to a Degree in Internal Auditing/Accounting.

5.1.28 In its response, dated 20 July 2020, SAQA indicated the following:

“The National Diploma was a qualification type that was registered on the pre-2008 8-level National Qualifications Framework (NQF) at NQF Level 6. Post 2008, the National Diploma: Internal Auditing was re-registered at NQF Level 6 on the 10-level NQF. In the Higher Education Qualifications Sub-Framework (HEQSF) determined by the Minister: HEST in 2013, the “old type” National Diploma qualifications is equivalent to the 360 credit Diploma qualification type registered on NQF Level 6.

The Bachelor of Technology (BTech) which was on Level 6 of the 8-level NQF is re-registered at NQF Level 7 of the 10-Level NQF and is equivalent to a

Bachelor's degree registered at NQF Level 7. More specifically, a Bachelor Degree in Internal Auditing is registered at NQF Level 7 of the 10-level NQF”.

5.1.29 It is evident from the response of SAQA that a National Diploma in Internal Auditing is not regarded by SAQA as equivalent to a Bachelor's Degree in Internal Auditing.

5.1.30 On 19 March 2021, after dissemination of the Section 7(9) Notice to relevant parties, the Public Protector received a submission from Mushwana Incorporated, acting on behalf of Ms Masombuka. A reproduction/retyping of the letter follows hereunder:

***“NOTICE IN TERMS OF SECTION 7 (9) OF THE PUBLIC ACT 1994:
NOTICE TO THE ACTING MUNICIPAL MANAGER ON AN INVESTIGATION
INTO ALLEGATIONS OF MALADMINISTRATION BY EPHRAIM MOGALE
LOCAL MUNICIPALITY RELATING TO THE APPOINTMENT OF MS M
MASOMBUKA TO THE POSITION OF CHIEF INTERNAL AUDITOR.***

OUR CLIENT: MAVIS LINA MASOMBUKA

Kindly be advised that we act on behalf of our above mentioned client and it is on her instruction that this letter is addressed to your goodselves.

We direct this letter to your goodself in response to your letter dated 08 February 2021 to the acting Municipal Manager of Ephraim Mogale Local Municipality wherein our client's appointment to Chief Internal Auditor is put into question by means of an investigation.

We deem it necessary to direct this letter to your goodself in order to provide input into your investigation as the final report into this matter has the potential to adversely impact our client.

BACKGROUND

As provided in your aforementioned letter, the municipality advertised the position of Chief Internal Auditor and received several applications.

A selection and interview panel was appointed to conduct shortlisting and interview process.

Pursuant to a normal recruitment process, 8 (eight) prospective appointees were shortlisted, from which 2 (two) were recommended for appointment in order of performance during the interview process, our client ranked third in order of performance and was not recommended for appointment.

The then Acting Municipal Manager, Mr Makoko Lekola however appointed our client as Chief Internal Auditor.

Clause 8.3 (g) of the Municipality's recruitment, selection and appointment policy provides that:-

"The Municipal Manager in consultation with the Executive Committee has the final decision and may override the decision of the selection and interview panel based on fair and transparent process".

EMPLOYMENT EQUITY ACT 55 OF 1998 (EEA)

Section 2 (b) of EEA provides that the purpose of this Act is to achieve equity in the workplace by implementing affirmative measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workplace.

“Designated groups for the purpose of the Act and as defined by the Act means: black people, women and people with disabilities who-

(a) Are citizens of the Republic of South Africa by birth of descent; or

(b) Became citizens of the Republic of South Africa by naturalization

(i) Before 27 April 1994

(ii) After 26 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date but were predated by apartheid policies.

In paragraph 10.2.1.11 of your letter you make mention of a letter from Mr Lekota on 15 August 2019 in which he advised you that at the Municipality, they have 21 positions of which only two are occupied by women posing gender imbalance in the employees category.

From the above it is apparent that our client (a woman) is a deserving, candidate for affirmative action measures as contemplated in section 2 (b) of the EEA.

RECRUITMENT SELECTION AND APPOINTMENT POLICY (RSAP)

As contained in your letter the municipality’s RSAP was intended to regulate the process and activities relating to recruitment and appointment of staff for the purpose of ensuring fair, efficient and effective transparent system of recruitment.

Your letter further provides that the RSAP serves as a “guideline for shortlisting appointable candidates”, we hereby submit that the RSAP is just that, a guideline/policy and not enforceable legislation.

The above submission is reminiscent of the judgment in SOUTH AFRICAN BROADCASTING CORPORATION (SOC) Ltd v Kevvy and others (J1652/19)

[2020] ZAL (JHB 31; [2020] 6 BLLR 607 (LG) (7 FEBRUARY 2020) (henceforth SABC V Keevy and others).

In the above matter, the applicants alleged that the appointments, promotions or transfers of certain respondents were irregular as they did not conform to the prescripts alluded to in the company policy. In delivering the judgement Moshwana J quoted (sic) Leonard Dingler (Pty) LTD v Ngwenya [1999] 20 ILJ 1171 (LAC) and SAMWE obo Abrahams and others vs city (sic) of Cape Town [2208] 29 IL;J 1978 (LC), and remarked that:-

“Policies themselves allow an exercise of discretion and are guidelines”.

In Paragraph [73] of the case in question reads as follows:-

“Policy determinations lack force of law and have no public binding effect. In terms of section 43 of the Constitution the legislative authority rests in Parliament, provincial legislature, and Municipal Council. It is apparent that these policies were drawn up by the Executive Committee and approved by the board as guidelines in recognition of Labour Legislations. In drawing them up, the Executive Committee was not creating legislation and / or subordinate legislation which would attract force of law”.

It is apparent at this point that in as much as clause 8.3 (g) of the RSAP requires the Municipal Manager to consult with the Executive Committee to override the decisions of the selection and interview committee, the judgement in SABC v Christelle Keevy and others, appears to overrides that policy in the sense that it still allows for some semblance of discretion, and does not render the discretion of the Municipal Manager irrational / void.

AUTHORITY

In establishing that clause 8.3 (g) of the RSAP serves mainly as a guideline it become necessary to show that the Municipal Manager had the authority to diverge from the panel's recommendations.

Section 55 (c), (m) and (p) of the Local Government: Municipal Systems Act allow the Municipal Manager of a Local Municipality to inter alia, appoint staff subject to the EEA, (Affirmative action as discussed above is incorporated in the EEA).

Makate V Vodacom (Pty) Ltd (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR; 2d6 (4) SA 121 (CC) (26 April 2016), (henceforth Makate V Vodacom), concerned payment of compensation relating to the use of the Applicant's idea. In resisting the claim the Respondent raised the claim that, amongst others, that the agent had no authority to enter into the agreement.

The Court pointed at the judgment of the Lord Pearson in "Hely Jutchison CA" where it agreed when Diplock said that:-

"Such representation has to be made by a person or persons having actual authority to manage the business, be it supposed for convenience that such persons are the board of directors how there is not usually any direct communication in such cases between the board of directors and the outside contactor".

In paragraph 165 of the same judgement, the Honourable Court also noted that:-

"The statement or conduct constituting the representation must be those of persons, individually or collectively, who have actual authority to bind the principal to the transaction in dispute. The conduct may include the appointment of an individual to a position ordinary carrying with it a particular

level of authority”. As is the case when appointing a Municipal Manager we submit.

CONCLUSION

Makate V Vodacom and Section 55 of the Local Government Municipal Systems Act seems to bestow the Acting Municipal Manager at the time with the necessary Authority to appoint our client as Chief Internal Auditor.

SABC V Keevy and others as well as the quoted provisions of the RSAP and EEA also make it clear that the courts will readily accept the notion that in house policy is not intended have legislative effect and a deviation from the same should not render a decision, in this case by the Municipal Manager, fatal.

What is binding however is the Employment Equity Act, and as already shown our client is a deserving candidate of affirmative action, her appointment to the post in question over two preferred candidates should only be seen as a consequence of affirmative action”.(sic)

- 5.1.31 On 25 March 2021, the Public Protector received a follow up letter from Mushwana Incorporated. A reproduction/retyping of the letter follows hereunder:

“NOTICE IN TERMS OF SECTION 7 (9) OF THE PUBLIC ACT 1994: NOTICE TO THE ACTING MUNICIPAL MANAGER ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY EPHRAIM MOGALE LOCAL MUNICIPALITY RELATING TO THE APPOINTMENT OF MS M MASOMBUKA TO THE POSITION OF CHIEF INTERNAL AUDITOR.

OUR CLIENT: MAVIS LINA MASOMBUKA

Your email dated 19 March 2021 bears reference.

Kindly be advised that our client was never served with the section 7 (9) (a) notice as quoted in the heading of this letter, nor was the same directed to her.

Our letter and submissions transmitted to your goodself, as therein mentioned, were meant to provide input as the outcome of the investigation has the potential to adversely impact our client.

As reflected in your letter dated 09 February 2021 the notice was specifically addressed to the Acting Municipal Manager of Ephraim Mogale Local Municipality.

It is on this basis that we submit that the time period stipulated in your letter (30 days) should not apply to our client”.

5.1.32 In their letter of 19 March 2021, Mushwana Incorporated Attorneys argued that the RSAP is just a guideline and not enforceable legislation and therefore, contravention of Clause 8.3(g) of the RSAP by the Municipal Manager in opting not to consult the Executive Committee when deviating from the recommendations of the panel does not render the exercise of his discretion irrational or void. The decision taken by the Municipal Manager should not be rendered fatal.

5.1.33 In so arguing, they cited Moshwana J in the case of *Leonard Dignler v Ngwenya*⁵ and *SAMWU obo Abrahams and Others v City of Cape Town*⁶ where it was said “policy determinations lack force of law and have no public binding effect”. In terms of section 43 of the Constitution, the legislative authority rests in Parliament, provincial legislature and Municipal Council. It is apparent that these policies were drawn up by the executive committee and approved by the board as guidelines in recognition of Labour Legislation. In

⁵ [1999] 20 ILJ 1171 (LAC)

⁶ [2208] 29 ILJ 1978 (LC)

drawing them up, the Executive Committee was not creating legislation and/or subordinate legislation which would attract the force of law”.

5.1.34 Mushwana Incorporated further argued that the employment equity imperative gave support to the Municipal Manager’s decision to deviate from the recommendation of the panel and appoint Ms Masombuka to the position of Chief Internal Auditor in that the Municipality had only two (2) female divisional managers out of a total of twenty one (21).

5.1.35 Although in their submission, Mushwana Incorporated Attorneys admitted that Ms Masombuka was not in possession of a Bachelor’s Degree in Internal Auditing/Accounting or Equivalent, they fell short of admitting that her appointment was irregular.

Application of the relevant law

5.1.36 Section 195(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides amongst other things 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) *Efficient, economic and effective use of resources must be promoted.*
- (c) *...*
- (d) *Services must be provided impartially, fairly, equitably and without bias.*
- (e) *...*
- (f) *Public administration must be accountable*
- (g) *Transparency must be fostered*
- (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.”*

- 5.1.37 It was required of the Municipality to maintain a high standard of professional ethics in recruiting and appointing a suitable candidate for the advertised post. Any process followed which is in contravention of the above constitutional principles would be improper.
- 5.1.38 Section 67(1)(a) of the Municipal Systems Act 32 of 2000 (MSA) provides that:
- “A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures, consistent with any uniform standards prescribed in terms of section 72(1)(c), to ensure fair, efficient, effective and transparent personnel administration, including the recruitment, selection and appointment of persons as staff members”.*
- 5.1.39 The Municipality adopted a Recruitment, Selection and Appointment Policy (RSAP) to regulate the process and activities relating to recruitment and appointment of staff.
- 5.1.40 The RSAP was established for the purpose of ensuring a fair, efficient, effective and transparent system of recruitment. The RSAP serves as a guideline for shortlisting appointable candidates.
- 5.1.41 Clause 5.1.4.1(i) of RSAP provides that: *“In developing an advertisement for a post, the Human Resource Division must “be specific about abilities, skills and competencies applicants must have to qualify for consideration”.* It therefore follows that when advertising a vacant post, there are set requirements, such as specific prescribed competencies or qualifications, which must be met by any candidate for him/her to qualify for consideration for the said post in line with the advertisement.

- 5.1.42 Clause 8.3(a) of the RSAP states that one of the functions and duties of the Selection and Interview Panel (the panel) is to determine the (selection and interview) criteria in accordance with the requirements as set out in the advertisement.
- 5.1.43 It was, therefore, required of the panel to shortlist only those candidates who met the requirements for the post as set out in the advertisement. Shortlisting a candidate who did not meet the requirements for the post constitutes an irregular step in the recruitment process in that the candidate would have not met the prescribed competencies or qualifications set out in the advertisement.
- 5.1.44 In the matter of *Sedibeng District Municipality v South African Local Governing Bargaining Council and Others*⁷ the Labour Appeal Court held that where a requirement advertised is inherent to the operation of the job then the employer is by no means allowed deviation from the advertisement.
- 5.1.45 Adonis (2015⁸) explains that the fundamental reason why an employer should not ignore a minimum requirement is that there could be others who would have applied for the post had they known that a stated minimum requirement was in fact flexible. The procedurally fair response is for the employer to withdraw the advertisement and to re-advertise the post with that minimum requirement withdrawn or stated as simply a desirable attribute.
- 5.1.46 In terms of the test developed by our courts, the exercise of a discretion of an employer in respect of appointment of employees can only be interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased

⁷ *JR 1559/09* [2012] ZALCJHB 45 (31 May 2012)

⁸ Adonis, T. 2015. The employment recruitment and promotion process: legal regulation and practice. University of Cape Town.

manner⁹. Changing or disregarding the requirements as set out in the advertisement without authority or a legal basis, would mean that the employer failed to apply his/ her mind, and was arbitrary, capricious, unfair or failed to comply with applicable procedural requirements, and therefore unlawful.¹⁰

5.1.47 In exercising a discretion to rely on employment equity, it was required of the Acting Municipal Manager to ensure that the appointed candidate met all the minimum requirements of the post in compliance with the RSAP.

5.1.48 The advertisement as carried in the Sowetan of 05 October 2018 carried a preamble as follows:

“Ephraim Mogale Local Municipality is committed to employment practices as enshrined in the Employment Equity Act. People living with disabilities, Coloureds, Indians and women are encouraged to apply.”

5.1.49 Members of the shortlisting and interview panel indicated during the interview with the Public Protector investigating team held on 15 January 2020 that employment equity was never an issue taken into account when they considered candidates during the shortlisting process. The members of the panel confirmed that Ms Masombuka was shortlisted purely on the basis that she was an internal candidate and that she had been acting in the position of Chief Internal Auditor at the time when the post was advertised. She was not shortlisted based on the fact that she was a woman. She was, however, shortlisted even though she did not meet all the requirements as stated in the advertisement.

⁹ see *Rex v Zackey* 1945 AD 505 at 513; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398; Ex parte Neethling & others 1951 (4) SA 331 (A) at 335D; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781J and 783C; *Shepstone H & Wylie & other v Geysers NO* 1998 (3) SA 1036 (SCA) at 1045A.”³¹

¹⁰ *Letsogo v Department of Economy and Enterprise Development and Others* (JR350/16) [2018] ZALCJHB 48; (2018) 39 ILJ 851 (LC) (9 January 2018)

5.1.50 Clause 8.3(g) of the RSAP provides that:

“The Municipal Manager, in consultation with the Executive Committee, has the final decision and may override the decision of the Selection and Interview panel based on fair and transparent processes.”

5.1.51 The clause enjoins the Municipal Manager to consult with the Executive Committee (EC) when he/she intends to override or adopt the recommendations of the panel. It is only after the consultation with the EC that the he/she can override the decision of the selection and interview panel but in doing so, he /she must ensure that the process is fair and transparent.

5.1.52 The dictionary meaning of the phrase “***in consultation with***” is described as “***after having a discussion with***”. The word “***consultation***” is defined as “***an act of seeking opinion or advice***”. The process of consultation is an extremely important concept in the context of managing an organisation. There must have been specific reasons why the writers of the RSAP included the above clause in the said policy.

5.1.53 Though the Municipal Manager has the final say, it was required of him to consult with the EC when considering deviating from the recommendations of the panel. Delegation No. 5 does not take away the requirement for the Municipal Manager to consult the executive committee when considering a deviation from the recommendation of the panel.

5.1.54 Section 55(1)(e) of the MSA reads as follows:

*“As head of administration, the municipal manager of a municipality is, **subject to the policy directions of the municipal council**, responsible and **accountable** for the appointment of staff other than those referred to in section*

56(a), subject to the Employment Equity Act, 1998 (Act 55 of 1998)". (own emphasis)

- 5.1.55 The section indicates that the responsibility and accountability conferred upon the Municipal Manager for the appointment of staff is subject to both the policy directions of the Municipal Council and the Employment Equity Act. The Municipal Manager cannot disregard the fact that he is subjected to the policy directions of the Municipal Council in carrying out his responsibility and accountability in the appointment of staff as indicated in section 55(1)(e) of the MSA.
- 5.1.56 The Municipal Manager, in making appointments, is subjected to policy considerations of the Municipality in terms of section 55(2), the applicable policy regulating recruitment in the Municipality(RSAP) which required that he must consult with the EC prior to rendering a final decision on the recruitment. This did not occur but he chose only to subject himself to the provisions of the Employment Equity Act and not those of section 55(1) in so far as they enjoin him to appoint staff subject to “the policy direction of the municipal council”. The RSAP of the Municipality is the applicable policy direction of the municipal council in this regard.
- 5.1.57 As outlined above, such disregard of the policy direction of the municipal council contravenes the provisions of Section 55(1) and renders the process of appointment of Ms Masombuka defective.
- 5.1.58 Clauses 8.9, 8.10 and 8.11 of the RSAP give guidance to the Municipality regarding the recruitment, selection and appointment process which must be fair, equitable, and transparent. Failure to adhere to the process would render the appointment irregular.

5.1.59 The contention of Mushwana Incorporated Attorneys, in their aforementioned submission, that a policy is a mere guideline in executing a function and lacks the force of law and has no public binding effect, is noted.

5.1.60 In the matter of **Chubisi v South African Broadcasting Corporation (SOC) Ltd and Others (J 1169/20) [2020] ZALCJHB 218; (2021) 42 ILJ 395 (LC) (2 November 2020)** the court dealt with the situation where the employer resolved “not to recognize” an employee’s purported Contract of Employment due to it being *void ab initio*, as her appointment was deemed to be irregular and unlawful. The Court criticized this approach and observed that –
It how does the SABC explain the easy option it took, when the Public Protector had guided it on how to deal with the applicant’s appointment? There is no reasonable explanation why the SABC could not have invoked the provisions of the LRA as suggested by the Public Protector to terminate the contract of employment, or why it did not look at its own policies as to how best to deal with the matter (ie including judicial review).

The SABC as already indicated, knew what it was supposed to do where there were concerns with the applicant’s appointment as with effect from April 2016. Even if the SABC can claim to have been in a quandary, the remedial action of the Public Protector were clear, as well as the sound advice of Moshoana J in South African Broadcasting Corporation (Soc) Ltd v Keevy and Others¹¹ (Own emphasis)

The “sound advice” that the Court dispensed in the Keevy case to employers in dealing with irregular appointments, include the following:

“If the appointment and or promotion is inappropriate because the incumbent is not appropriately qualified, incapacity procedures contemplated in section 188 read with the Code of Good Practice may be invoked. If the appointment and or promotion arose as a result of dishonesty and or misrepresentation, the

¹¹ (J1652/19) [2020] ZALCJHB 31; [2020] 6 BLLR 607

misconduct procedures may be invoked. If there is non-compliance with a policy which may be a collective agreement on the evidence before me, section 24 may be invoked.”

And further

... *“where the unlawfulness of the impugned decision is clearly established, the risk of reviewing that decision on the basis of unreliable facts does not arise. In my mind a party seeking a review of a decision on the basis of illegality, bears the onus to show the alleged illegality. The other party, the respondents in this case, bears very little risk, which may translate to inconvenience, which may be remedied with an appropriate order of costs, if the party heard, after a passage of time, fails to show the alleged unlawfulness. On the other hand, where a Court of law refuses to hear a matter in the face of apparent unlawfulness, in my mind, that Court would be failing the foundational principle of the rule of law.... It is no longer permissible for a Court of law to avoid its constitutional obligation simply because of the passage of time. In line with the constitutional imperatives of a rule of law, it does seem to me that a Court of law is more exalted to ascend to the altar, where an allegation is raised – not proven – that a particular decision is threatening the rule of law.”*

5.1.61 Taking corrective action in terms of the options described by the Court in the above-mentioned matters, including initiating judicial review, is also in line with the directions issued by the Constitutional Court in **Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal**¹²

“Section 195 provides for a number of important values to guide decision makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195

¹² (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013)

lays a compelling basis for the founding of a duty on the functionary to investigate and, **if need be, to correct any unlawfulness through the appropriate avenues.** This duty is founded, *inter alia*, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who **seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.**

[36] Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to “respect, protect, promote and fulfil the rights in the Bill of Rights.” As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.” (Own emphasis)

- 5.1.62 An incorrect recruitment process has a negative impact in an organisation, hence it is crucial for the leadership to apply its mind during the recruitment process. “*Bad hiring decisions could not only negatively affect a company financially, but could also harm employee morale and result to time loss due to grievance, disputes and litigation processes.*”¹³

Conclusion

¹³ Bressler MS 2014 at page 2 “*Building the winning organisation through high-impact hiring.*”

- 5.1.63 Based on the evidence in my possession, it can be concluded that the Municipality did not follow its internal RSAP in the shortlisting, interviewing and appointment of Ms Masombuka to the position of Chief Internal Auditor.
- 5.1.64 The shortlisting and interview panel shortlisted Ms Masombuka despite her not meeting one of the requirements for the position of Chief Internal Auditor, i.e. she was not in possession of a Bachelor's Degree in Internal Auditing or Accounting or equivalent at the time of shortlisting.
- 5.1.65 The former Municipal Manager appointed Ms Masombuka despite her not meeting the minimum requirements for the position and her not being recommended or considered appointable by the panel.
- 5.1.66 The Municipal Manager conceded during the interview with the Public Protector's investigation team on 15 January 2020 that Ms Masombuka did not meet all the requirements for the post.
- 5.1.67 The Municipal Manager further failed to consult with the Executive Committee on the deviation from standard recruitment procedures, when making the appointment, as required in the RSAP.

5.2 Whether the recommended candidates suffered any prejudice as a result of the irregular appointment of Ms Masombuka:

Common cause issues

- 5.2.1 Eight (8) candidates were shortlisted and invited for interviews together with Ms Masombuka, for the position of Chief Internal Auditor.

- 5.2.2 The panel recommended Messrs Raphela and Ramphisa as the first and second successful candidates respectively, and as appointable to the position of Chief Internal Auditor.
- 5.2.3 The minutes of the Selection and Interview Panel indicated that the panel did not recommend Ms Masombuka as appointable to the position, but instead it recommended that *“should the first two recommended candidates decline the appointment, the post should be re-advertised.”*
- 5.2.4 The former Municipal Manager deviated from the recommendations of the panel and appointed Ms. Masombuka to the post of Chief Internal Auditor based on the need to strive towards employment equity at the Divisional Managers’ level in the Municipality.
- 5.2.5 Ms Masombuka did not meet one of the minimum requirements for the post of Chief Internal Auditor in that she did not hold a Bachelor’s Degree in Internal Auditing or Accounting or equivalent.

Issues in dispute

- 5.2.6 The Complainants argued that in appointing Ms Masombuka as the Chief Internal Auditor, the Acting Municipal Manager was not transparent as he could have verified with the Chairperson of the Selection and Interview Panel who made the recommendation to appoint the first or second candidate. He should also have consulted with the Executive Committee before making any appointment which deviated from the recommendation of the Selection and Interview Panel.
- 5.2.7 During an interview with the investigating team on 15 January 2020, the then Acting Municipal Manager, Mr Lekola argued that he did not appoint Mr Raphela because, before making the appointment, a vetting process and a

background check were conducted and it was found that Mr Raphela was involved in the Venda Building Society (VBS) Mutual Bank scandal. Even though the advertisement indicated that all shortlisted candidates must be vetted, the information at the disposal of the Public Protector indicates that only Mr Raphela was vetted.

5.2.8 Mr Raphela's reference check with Provincial Treasury was however provided to the Municipality after Ms Masombuka had already been appointed. Mr Raphela's reference check response from Provincial Treasury was only provided on 07 May 2019 whilst Ms Masombuka had already been appointed on 29 April 2019.

5.2.9 The reference check indicated that *"due to a pending VBS Disciplinary Case against Mr Raphela the Limpopo Provincial Treasury is not in a position to make any recommendations on the official's conduct or competency."* There was no pronouncement on his guilt or innocence.

Application of the relevant law

5.2.10 Section 23(1) of the Constitution guarantees the right of every employee and employer to fair labour practices.

5.2.11 Section 186(2)(a) of the Labour Relations Act defines unfair labour practice as any unfair act or omission that arises between an employer and an employee involving **unfair conduct** by the employer relating to the **promotion, demotion, probation** (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (own emphasis added)

5.2.12 Section 55(1)(e) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) provides 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-

(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)”

5.2.13 This section gives the Municipal Manager the powers to appoint staff subject to the Recruitment Policy and Employment Equity Act.

5.2.14 Section 15(1) of the Employment Equity Act No. 55 of 1998 (EEA) states:

*“Affirmative action measures are measure designed to ensure that **suitably qualified people** (own emphasis) from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.”*

5.2.15 Although Ms Masombuka qualifies as member of a designated group as defined in section 1(e) of the EEA, she is excluded from suitability to be appointed as Chief Internal Auditor by the requirement of *“**suitably qualified people**”* as stated in section 15(1) of the EEA. It has been established that she did not possess one of the requirements for the position of Chief Internal Auditor, namely, a Bachelor’s Degree in Internal Auditing or Accounting or equivalent. Failure to meet this requirement renders her not appointable even as a member of a designated group. *“Designated groups”* is defined in section 1(e) to mean “black people, women and people with disabilities.”

Conclusion

- 5.2.16 Based on the evidence in my possession, it can be concluded that the first two recommended candidates and other applicants who met all the requirements for the post suffered prejudice as a result of the irregular appointment of Ms Masombuka to the position of Chief Internal Auditor by the former acting Municipal Manager.
- 5.2.17 The panel shortlisted Ms Masombuka even though they knew that she did not meet the minimum requirements for the position of Chief Internal Auditor.
- 5.2.18 The Acting Municipal Manager appointed her to the position of Chief Internal Auditor despite her not meeting the minimum requirements for the position and despite the panel not recommending her for appointment.
- 5.2.19 In terms of the Employment Equity Act, an employer is entitled to legitimately place reliance on race, gender and or disability of an applicant during the recruitment and appointment process. It does not however authorise a deviation from the prescribed recruitment processes.

6. FINDINGS

6.1 Regarding whether the Municipality irregularly appointed Ms Masombuka to the position of Chief Internal Auditor without following the Recruitment, Selection and Appointment Policy of the Municipality and without her meeting the minimum requirements for the position:

- 6.1.1 The allegation that the Municipality irregularly appointed Ms Masombuka to the position of Chief Internal Auditor without following the Recruitment, Selection and Appointment Policy of the Municipality and without her meeting the minimum requirements for the position, is substantiated.

- 6.1.2 The Municipality advertised the post of Chief Internal Auditor in the Sowetan newspaper dated 05 October 2018.
- 6.1.3 Ms Masombuka was shortlisted, interviewed and appointed by the Municipality despite not holding the relevant Bachelor's Degree in Internal Audit/Accounting or Equivalent at the time she applied for the position of Chief Internal Auditor, as required by the advertisement. She was still studying towards a B Tech in Internal Auditing with UNISA and was in her final year.
- 6.1.4 The highest qualification that Ms Masombuka had at the time she applied for the post (i.e. Advanced Diploma in Internal Auditing) is not considered as an equivalent to a Bachelor's Degree in Internal Auditing/Accounting. This was confirmed by the South African Qualifications Authority (SAQA).
- 6.1.5 The shortlisting and subsequent appointment of Ms Masombuka by the Municipality was in contravention of the provisions of section 195(1) of the Constitution, section 55(1)(e) of the MSA and the RSAP of the Municipality.
- 6.1.6 The conduct of the Municipality accordingly constitutes improper conduct that resulted in prejudice as envisaged in section 182(1) of the Constitution and section 6(4)(a)(v) of the Public Protector Act.
- 6.2 Regarding whether the recommended candidates suffered any prejudice as a result of the irregular appointment of Ms Masombuka:**
- 6.2.1 The allegation that the recommended candidates suffered prejudice as a result of the irregular appointment of Ms Masombuka, is substantiated.
- 6.2.2 The shortlisting, interview and subsequent appointment of Ms Masombuka prejudiced other applicants who applied on the strength of their qualifications as stated in the advertisement.

- 6.2.3 The other candidates who were recommended by the interview panel would have been considered for appointment, had the former Municipal Manager not deviated from procedure and decided, on his own accord and without consulting the Executive Committee, to appoint Ms Masombuka.
- 6.2.4 Furthermore, had the former Municipal Manager followed the RSAP of the Municipality and not deviated from the recommendations of the panel, the first recommended candidate might have been appointed, subject to a vetting process and if he declined the offer, the second recommended candidate might have been appointed to the position of Chief Internal Auditor, also subject to the outcome of the vetting process.
- 6.2.5 The decision to appoint the third, but not recommended candidate, prejudiced the first and second recommended candidates respectively.
- 6.2.6 The fact that Ms Masombuka was shortlisted, interviewed and appointed to the position of Chief Internal Auditor despite her not meeting all the requirements for the post had a prejudicial effect on all applicants who met the said requirements, but were neither shortlisted nor considered for appointment.
- 6.2.7 The conduct of the Municipality accordingly constitutes improper conduct that resulted in prejudice as envisaged in section 182(1) of the Constitution and section 6(4)(a)(v) of the Public Protector Act.

7. REMEDIAL ACTION

- 7.1 The appointment of a Chief Internal Auditor by the Municipality is an administrative action.

- 7.2 In *Oudekraal Estates (Pty) Ltd v City Of Cape Town & Others 2004 (6) SA 222 SCA*, the Supreme Court of Appeal ruled that until an administrative decision is set aside by a Court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot be simply overlooked.
- 7.3 This principle was confirmed by the Constitutional Court in *The MEC for Health, Eastern Cape v Kirland Investments 2014 (3) SA 481 (CC)*. The Court found that if public officials or administrators can, without recourse to legal proceedings, be allowed to disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, this would be a license to self-help. It would be inviting officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The Court found that this would spawn confusion and conflict to the detriment of the administration and the public and that it would undermine the Court's supervision of the administration.¹⁴
- 7.4 It is not open to the Municipality to simply cancel the employment contract that was entered into with Ms Masombuka. A proper judicial review has to be brought to review the decision to appoint Ms Masombuka.
- 7.5 Consequently, the appropriate remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution, is as follows:
- 7.5.1 The Speaker of the Municipal Council in consultation with Municipal Council must within thirty (30) working days from the date of this report, take disciplinary action against Mr Makoko Lekola and current employees who participated in the irregular appointment of Ms. Masombuka;
- 7.5.2 The Speaker of the Municipal Council, in consultation with the Acting Municipal Manager must, within thirty (30) working days from the date of this report, develop

¹⁴ At para 89.

internal controls to safeguard the integrity of the recruitment and selection process in all phases of the recruitment processes to avoid a recurrence of a similar incident;

7.5.3 The Acting Municipal Manager to institute proceedings for judicial review of the appointment of Ms Masombuka as the Chief Internal Auditor of the Municipality within sixty (60) business days from the date of this report.

7.5.4 The Acting Municipal Manager to submit a report on the progress made with instituting the judicial review proceedings to the Municipal Council within ninety (90) working days from the date of this report.

7.5.5 The Acting Municipal Manager must within thirty (30) working days from the date of this report, conduct training and capacitate officials on the recruitment and selection policy/process to avoid a recurrence.

8. MONITORING

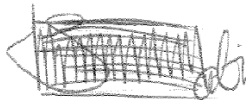
8.1.1 The Acting Municipal Manager and the Municipal Council of the Municipality are required to submit an implementation plan to the Public Protector within fifteen (15) working days from the date of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

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

8.1.3 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of ***Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others*** [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding unless you obtain an *Interim Interdict* or *Court Order* directing otherwise.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30 / 06 / 2021



Assisted by the Limpopo Provincial Office: Adv. Mashaba Matimolane