

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



**PUBLIC PROTECTOR  
SOUTH AFRICA**

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*Allegations of improper conduct and maladministration against the Walter  
Sisulu Local Municipality*

**REPORT ON INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT  
AND MALADMINISTRATION BY THE WALTER SISULU LOCAL MUNICIPALITY IN  
THE EASTERN CAPE PROVINCE RELATING TO THE FAILURE TO TRANSMIT  
PENSION FUND CONTRIBUTIONS DEDUCTED FROM EMPLOYEES' SALARIES  
TO THE SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND**

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## Executive Summary

- (i) This is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct and maladministration by the Walter Sisulu Local Municipality (Municipality) in the Eastern Cape Province relating to the failure to transmit pension fund contributions deducted from employees' salaries to the South African Local Authorities (SALA) Pension Fund.
- (iii) The complaint was lodged on 28 February 2018 by Ms A Pati. She lodged the complaint on behalf of nine (9) employees of the former Gariep Local Municipality (Complainants) who are all members of the SALA Pension Fund.
- (iv) In the main, the Complainants alleged that:
  - (a) The former Gariep Local Municipality deducted pension fund contributions from the Complainant's salaries during the period from July 2011 to July 2016 and the Municipality failed to transmit the amounts to the SALA Pension Fund. The failure on the part the Municipality was improper, constitutes maladministration and prejudiced them.
- (v) Based on the analysis of the complaint, the following issues were identified for investigation:

- (a) Whether the Municipality failed to transmit pension fund contributions deducted from the Complainants' salaries during the period from July 2011 to July 2016 to the SALA Pension Fund; and if so
  - (b) Whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainants.
- (vi) The investigation was conducted in terms of section 182(1)(a) of the Constitution and section 6 and 7 of the Public Protector Act. It included correspondence with the Municipality and the SALA Pension Fund, analysis of the information received and application of the relevant laws and prescripts.
- (vii) Having considered the evidence and information obtained during the investigation, I make the following findings:

**(a) Regarding whether the Municipality failed to transmit pension fund contributions deducted from Complainants' salaries during the period from July 2011 to July 2016 to the SALA Pension Fund.**

- (aa) The allegation that the Municipality as the successor of the Gariep Local Municipality failed to transmit pension fund contributions deducted from Complainants' salaries during the period July 2011 to July 2016 to the SALA Pension Fund, is substantiated.
- (bb) The SALA Pension Fund indicated during the investigation that the amount due to it by the Municipality as a result of its failure to pay outstanding contributions for the period July 2011 to July 2016 is in excess of R20 million.
- (cc) The Municipal Manager of the Municipality conceded during the investigation that the Municipality is by law indebted to the SALA Pension Fund in respect of the historic debt of the former Gariep Local Municipality.

**(b) Regarding whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainants.**

(aa) The allegation that the failure by the Municipality to transmit the pension funds contributions deducted from the Complainants' salaries to the SALA Pension Fund was improper, constitutes maladministration and prejudiced the Complainants, is substantiated.

(bb) The failure by the Municipality to transmit the pension fund contributions of the Complainants to SALA Pension Fund, as it was obliged to do in terms of the Local Government: Municipal Structures Act, 1998 (Municipal Structures Act) and the Pension Fund Act, 1956, (PFA) unfairly exposed the Complainants to improper prejudice since their contributions to the fund has a shortfall and could have an impact on their benefits.

(cc) Accordingly, the conduct of the Municipality in the circumstances constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.

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

**(a)The Municipal Manager of Municipality to:**

(aa) Determine the exact total amount due and payable by the Municipality to the SALA Pension Fund, representing the debt of the former Gariep Local Municipality in respect of the pension fund deductions made from the salaries of employees and interest thereon, within 30 business days from the date of this report; and

(bb) Take the appropriate steps to pay the outstanding debt and interest to the SALA Pension Fund within 60 business days from the date of this report.

**(b) In the event that the Municipality is unable to pay the outstanding debt and interest to the SALA Pension Fund:**

**(aa)The Municipal Manager to:**

(i) Inform the Eastern Cape MEC for Co-operative Governance and Traditional Affairs of the total amount as determined in paragraph (viii)(a) above and that it constitutes a serious financial problem for the Municipality, as contemplated by section 136 of the Local Government: Municipal Finance Management Act, 2003 (MFMA), within 30 business days from the date of this report ;

(ii) Submit a report to the Council of the Municipality on the actions taken as referred to in paragraphs (viii)(a)(aa) and (viii)(b)(aa) above within 30 business days from the date of this report; and

(iii) Inform the Complainants in writing of the actions taken referred to in paragraphs (viii)(b) above and of the progress made with resolving the matter within 30 business days from the date of this report and every 90 days thereafter until the debt and interest is paid to the SALA Pension Fund.

**(bb) The Eastern Cape MEC for Cooperative Governance and Traditional Affairs to:**

(i) Take the appropriate action in terms of section 136 of the MFMA to determine whether the situation justifies or requires the intervention of the Provincial Executive and take necessary steps accordingly, within 90 business date

of this report to ensure that payment of the outstanding debt and interest to the SALA Pension Fund is made.

# **REPORT ON INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE WALTER SISULU LOCAL MUNICIPALITY IN THE EASTERN CAPE PROVINCE RELATING TO THE FAILURE TO TRANSMIT PENSION FUND CONTRIBUTIONS DEDUCTED FROM EMPLOYEES' SALARIES TO THE SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND**

## **1. INTRODUCTION**

1.1 This is my report 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 (Public Protector Act).

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

1.2.1 The Mr Lubabalo Oscar Mabuyane, the Premier of the Eastern Cape;

1.2.2 Ms X Nqatha, the Member of the Executive Council of the Eastern Cape Provincial Government responsible for Cooperative Governance and Traditional Affairs (MEC);

1.2.3 Mr Nalisile Mathetha, the Speaker of the Council of the Walter Sisulu Local Municipality (Municipality)

1.2.4 Ms Bulelwa Khweyiya, the Executive Mayor of the Municipality;

1.2.5 Ms F K P Ntlemeza, the Municipal Manager of the Municipality;

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

1.2.7 Mr Sipho Sidu, the Principal Officer of the SALA Pension Fund.



1.2.8 A copy of the report is also provided to Ms A Pati who lodged the complaint.

## 2. THE COMPLAINT

2.1 The complaint was lodged on 28 February 2018 by Ms A Pati. She lodged the complaint on behalf of nine (9) employees (including herself) of who are all members of the SALA Pension Fund (Complainants), namely:

Name of the employee	Pension number
Agnes Nontuthuzelo Pati	40462
Lenah Menemene	40432
Jeffrey Tukani	40468
Thembeni Johnson Pama	41846
Norintsi Khohliso	41840
Yangati Geelbooi Swelindawo	40466
Piet Campbell	40448
Miekie Toie Allens	41849
Sanders Boorman	*****1

2.2 In essence, the Complainants alleged that:

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<sup>1</sup> Could not be verified.

- 2.2.1 The former Gariep Local Municipality deducted pension fund contributions from the Complainant's salaries during the period from July 2011 to July 2016 and the Municipality failed to transmit the amounts to the SALA Pension Fund.
- 2.2.2 The failure on the part of the Municipality was improper, constitutes maladministration and prejudiced them.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

3.2 Section 182(1) of the Constitution provides 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) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation.

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

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

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

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

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

3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);

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

- 3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (para 82);
- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- a) Conduct an investigation;
  - b) Report on that conduct; and
  - c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);
- 3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Para 105);
- 3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and
- 3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).
- 3.8 Municipalities are organs of state and their conduct amounts to conduct in state affairs, and as a result, this matter falls within the jurisdiction of the Public Protector.

- 3.9 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.
- 3.10 Regarding the exercise of the discretion of the Public Protector in terms of section 6(9) of the Public Protector Act to entertain matters where the incident or the matter complained of occurred two years or longer prior to the complaint, only in special circumstances, I concluded that the alleged failure on the part of the Municipality to pay the pension fund contributions deducted from the Complainant's salaries was still continuing at the time the complaint was lodged and is still continuing to date. The "*incident or matter complained*" of is therefore a continuous occurrence until payment is made and the Complainants' prejudice is addressed.
- 3.11 Moreover, the alleged failure on the part of the Municipality has a serious impact on the pension fund investments of the Complainant that was supposed to have been made on their behalf by the Municipality from salaries that they already earned, which in my view in any event constitutes special circumstances that warrant an investigation by the Public Protector.

## **4 THE INVESTIGATION**

### **4.1 Methodology**

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

## 4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong and what action should be taken?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the Municipality failed to transmit pension fund contributions deducted from the Complainants' salaries to the SALA Pension Fund, and if so, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainants.

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 by the Municipality to prevent improper conduct and/or maladministration as well as prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration, where possible and appropriate.

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

4.3.1 Whether the Municipality failed to transmit pension fund contributions deducted from the Complainants' salaries during the period from July 2011 to July 2016 to the SALA Pension Fund; and if so

4.3.2 Whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainants.

**4.4 The Key Sources of information**

**4.4.1 Correspondence between the Public Protector and:**

4.4.2 The Complainant, dated 27 February 2018;

4.4.3 Mr K Mpungose, the former Administrator of the Municipality, dated 17 October 2018;

4.4.4 Ms F K P Ntlemeza, the Municipal Manager of the Municipality, dated 12 December 2018, 30 January 2020 and 6 May 2020 respectively;

4.4.5 Ms Saneliwe Mbo of the SALA Pension Fund, dated 5 November 2019;

4.4.6 Mr Peter Ziegler, the Head of Department of the SALA Pension Fund dated, 5 November 2019; and

4.4.7 Mr Siphon Sidu, Principal Officer of the SALA Pension Fund, dated 7 May 2020.

**4.5 Legislation and other legal prescripts**

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



- 4.5.2 The Public Protector Act 23 of 1994;
- 4.5.3 The Pension Fund Act 24 of 1956 (the PFA);
- 4.5.4 Local Government: Municipal Structures Act 117 of 1998 (the Municipal Structures Act);
- 4.5.5 The SALA Fund Rules – Revised rules effective from 1 October 2008: Issued under the PFA; and
- 4.5.6 The Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)

#### **4.6 Notice issued in terms of section 7(9) of the Public Protector Act**

- 4.6.1 A notice was issued in terms of section 7(9) of the Public Protector Act to the Municipal Manager of the Municipality on 16 July 2020. She responded on 24 July 2020.

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

- 5.1 **Regarding whether the Municipality failed to transmit pension fund contributions deducted from Complainants' salaries during the period from July 2011 to July 2016 to the SALA Pension Fund.**

#### **Common cause or undisputed facts**

- 5.1.1 The Municipality is a duly constituted municipality in terms of the Municipal Structure Act.

- 5.1.2 It was established by the amalgamation of the Gariep and Maletswai Local Municipalities on 3 August 2016, in terms of section 12 of the Municipal Structures Act.
- 5.1.3 The Municipality lawfully became the successor in law and by extension incurred all the legal and financial obligations of its predecessors. The amalgamation involved the transfer of employees, assets, rights, liabilities and obligations of the disestablished Municipalities, in terms of section 14 of the Municipal Structures Act.
- 5.1.4 The Complainants were employees of the former Gariep Local Municipality and are all members of the SALA Pension Fund.
- 5.1.5 The SALA Pension Fund is registered in terms of the PFA. The former Gariep Local Municipality was a registered employer as defined in the SALA Fund Rules, as is the Municipality.<sup>2</sup>
- 5.1.6 The SALA Pension Fund administers the pension scheme for its members who are employees of the Municipality. The Municipality pays pension contributions to the Fund on behalf of its employees and the SALA Pension Fund invests the contributions to maximise returns on the investments for payment of a better pension pay-out to the members, when they retire.
- 5.1.7 It is further common cause that the former Gariep Local Municipality deducted pension fund contributions from the salaries of the Complainants, as recorded on their salary advices during the period from July 2011 to July 2016, but failed to transmit all the contributions to the SALA Pension Fund account.
- 5.1.8 Salary advices obtained during the investigation from the Complainants indicate deductions from their salaries and marked as SALA Pension Fund contributions by the former Municipality, from 2011 to 2016.

Issues in Dispute

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<sup>2</sup> SALA Fund Rules-Revised Rules Effective Date 1 October 2008: Issued under Pension Fund Act 24 of 1956.

- 5.1.9 According to the Complainants, they received salary advices from the former Municipality that indicated contributions paid to the SALA Pension Fund every month. As a result, they had no reason to suspect that their employer might not have transmitted all their contributions to the SALA Pension Fund.
- 5.1.10 In the Municipality's response to the complaint dated 12 December 2018, the Municipal Manager, Ms F Ntlemeza, indicated that as at 31 October 2018 the Municipality was in arrears in respect of pension funds contributions to the SALA Pension Fund in the amount of R22 454 936.00 (twenty two million four hundred and fifty four thousand nine hundred and thirty six Rand). This was as a result of a debt incurred by the former Gariiep Local Municipality in respect of transmitting pension fund contributions of employees to the SALA Pension Fund.
- 5.1.11 The Municipal Manager further stated that the Municipality inherited substantial debt from the erstwhile local municipalities, due to their failure to meet financial obligations. As a result, the Municipality was placed under administration in terms of section 139 of the Constitution, in February 2018.
- 5.1.12 It was confirmed by the Municipal Manager, in a letter dated 30 January 2020 that the Municipality inherited debts that arose from statutory deductions in respect of pension fund contributions that were not paid over to the pension funds.
- 5.1.13 In this letter and a further response dated 6 May 2020, it was stated that while the Municipality was under Administration it solicited financial assistance in the amount of R15 000 000.00 (fifteen million Rand) from the Eastern Cape Department of Cooperative Governance and Traditional Affairs (CoGTA) in order to pay the outstanding pension fund contributions. However, due to the Municipality's financial challenges, it was decided to re-direct this amount to address its debt to Eskom, which was regarded as more urgent. In essence, the amount was paid by CoGTA directly to Eskom.

- 5.1.14 It is further stated in the letter dated 6 May 2020 that “*an indication as to what happened to money that was deducted from the staff members as pension contribution, is that, there was no money to pay such contribution*”.
- 5.1.15 Mr P Ziegler, the Head of Department: SALA, responded to the complaint on 5 November 2019. He confirmed that the erstwhile Gariep Local Municipality was in arrears with its normal contributions.
- 5.1.16 According to Mr Ziegler, the capital value owed amounted to R8 936 753.31 (eight million, nine hundred and thirty six thousand, seven hundred and fifty three rand, thirty one cent). Further, that the interest exceeds the *in duplum* rule and was pegged. Therefore, the total including interest amounts to R17 873 506.62 (seventeen million, eight hundred and seventy three thousand, five hundred and six rand, sixty two cent).
- 5.1.17 Mr S Sidu, the Principal Officer of the SALA Pension Fund, confirmed in a letter, dated 7 May 2020 that the Municipality is a participating employer of the SALA Pension Fund with effect from 1 August 2017.
- 5.1.18 Mr Sidu further indicated that prior to the amalgamation, the Gariep Local Municipality was in arrears with the payment of pension contributions since July 2011, However, periodic payments were made. In addition, late payment interest was due as the monthly contributions by the erstwhile Gariep Local Municipality were not paid on time.
- 5.1.19 According to Mr Sidu, the capital debt owed to SALA Pension Fund by the Municipality is R8 936 753.31 (eight million, nine hundred and thirty six thousand, seven hundred and fifty three rand, thirty one cent) and the projected interest up to 30 April 2020 amounts to R12 630 064.49 (twelve million, six hundred and thirty thousand and sixty four rand, forty nine cent). Furthermore, the Municipality is also liable for an amount of R164 217.72 (one hundred and sixty four thousand, two hundred and seventeen rand, seventy two cent) in respect of late payment interest.

- 5.1.20 Mr Sidu further indicated that the SALA Pension Fund has been engaging the Municipality with a view of resolving the matter, but with no success. The SALA Pension Fund reminded the Municipality in writing of the outstanding amounts on 24 February 2020, 23 March 2020 and 17 April 2020.
- 5.1.21 He confirmed that the Complainants' are members of the SALA Pension Fund. They are part of the defined benefit structure of the Fund in terms of which benefits are guaranteed in the event of the termination of their employment. According to Mr Sidu, the fact that the Municipality is non-compliant with section 13A of the PFA does not affect the value of their pension benefits. However, the Complainants can be adversely affected in respect of risk benefits, as the insurer is likely to repudiate claims due to non-payment of premiums.
- 5.1.22 In a nutshell, the Complainants submitted that contributions to pension funds are benefits that employees of the Municipality are contractually entitled to as part of their salary package and/or employment contract.
- 5.1.23 On 16 July 2020, I issued a Notice to the Municipal Manager of the Municipality in terms of section 7(9)(a) of the Public Protector Act, to afford her an opportunity to respond to the evidence implicating the Municipality. She responded on 24 July 2020.
- 5.1.24 In her response, the Municipal Manager in essence conceded that the former Gariep Local Municipality deducted pension fund contributions from the Complainants' salaries. Further, that the former Gariep Local Municipality failed to transmit the contributions to the SALA Pension Fund. She further conceded that as a legal consequence of the amalgamation, the Municipality became the successor in law in respect of the legal and financial obligations of its predecessor municipalities.
- 5.1.25 The Municipal Manager stated that without suggesting that the Municipality has no role to play in the conundrum, "*the blameworthiness of the personnel of the former Gariep Local Municipality in their ineptitude to transmit the pension contributions is not susceptible to being inherited by the Municipality*". However,

it was admitted that the debt was inherited by the Municipality and that it had to be settled as such.

- 5.1.26 Further that the Municipality could not cope with the financial commitments and liabilities of the former Gariep Local Municipality, which resulted in the Municipality being placed under administration seventeen (17) months after its establishment.
- 5.1.27 The Municipal Manager submitted that the former Administrator of the Municipality, Mr Khayo Mpungose, was helpless in dealing with the issues of the Municipality due to an absence of financial support from both the Eastern Cape Provincial Treasury and the Eastern Cape Department of CoGTA.
- 5.1.28 She further confirmed previous submissions made in letters dated 20 January 2020 and 6 May 2020 that the that the Eastern Cape Department of CoGTA had allocated a grant funding for the defrayment debts to Eskom on behalf of the Municipality to an amount of R15 million. The amount was directly credited by the Department to Eskom.
- 5.1.29 The Municipal Manager submitted an email dated 23 October 2018 from the former Administrator to the Head of the Eastern Cape Department of CoGTA requesting assistance in the form of a grant funding of R24 million to obviate the debt brought about by the former Gariep Local Municipality. According to her, the request was not acceded to.
- 5.1.30 The Municipal Manager stated that the Municipality does not have the funds to pay the debt to the SALA Pension Fund incurred as a result of the failure to transmit pension fund benefits deducted from the salaries of employees and proposed that the Eastern Cape Provincial Treasury and Department of GOGTA should assist the Municipality in this regard.

Application of the relevant law

5.1.31 Section 12 (1) of the Municipal Structures Act provides that:

*“The MEC for local government in a province, by notice in the Provincial Gazette, must establish a municipality in each municipal area which the Demarcation Board demarcates in the province in terms of the Demarcation Act”.*

5.1.32 Section 14 (1) of the Municipal Structures Act provides that:

- (a) “A municipality established in terms of section 12 in a particular area, supersedes the existing municipality or municipalities to the extent that the existing municipality or municipalities fall within that area.*
- (b) The superseding municipality becomes the successor in law of the existing municipality subject to paragraph (c)”.*

5.1.33 A notice in terms of section 12 of the Municipal Structures Act was published in the Provincial Gazette by the Member of the Executive Council (MEC) responsible for Local Government in the Eastern Cape, Mr F Xasa on 27 June 2016, establishing the Municipality.

5.1.34 In terms of paragraph 5 (1) of the notice, the assets, rights, liabilities and obligations of the disestablished municipalities (including the Gariiep Local Municipality) were transferred to the Municipality.

5.1.35 Paragraph 8 (1) of the notice deals with the transfer of staff. It states *inter alia* that:

*“A person who on the effective date is an employee of the disestablished municipality becomes an employee of the new municipality in accordance with the following rules:*

- (a) The employment of employees by a new municipality is subject to any collective agreement and the Labour Relations Act, 1995 (Act 66 of 1995);*

- (b) *An employee referred to is transferred to the new municipality on terms and conditions no less favourable than those under which such employee served immediately before the effective date;*
- (c) *Service by a person so transferred is deemed to be in the service as an employee of the new municipality to which the person is transferred and any leave, pension and other benefits that may have accrued to that person by virtue of service with the disestablished municipalities shall be deemed to have accrued in favour of such a person by virtue of service with the new municipality to which she or he is transferred;*
- (d) *Where an employee was a member of a medical aid scheme, pension or provident fund immediately before the effective date-*
  - (i) *that employee continues as such a member unless continued membership is contrary to the rules of the scheme or fund in question or unless the new municipality to which the employee is,*
  - (ii) *the new municipality must deduct the necessary employee's contribution to the scheme or fund from the remuneration of the employee and pay over to the scheme or fund in question together with the employer's contribution.*

5.1.36 Section 13A of the PFA regulates the payment of contributions and certain benefits to pension funds. It provides *inter alia* that:

- “(1)Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-*
- (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and*
  - (b) any contribution for which the employer is liable in terms of those rules”.*

5.1.37 It is apparent from the above provisions that employers are obliged by section 13A of the PFA to pay contributions over to the pension funds in which they are participating, when the rules of such funds make provision for such payment.



## Conclusion

- 5.1.38 The former Gariiep Local Municipality was a registered employer as defined both in the SALA Fund Rules<sup>3</sup> and in terms of the PFA<sup>4</sup>. The former Municipality participated as an employer on the SALA Fund. Therefore, the former Municipality as a participating employer to the Fund was obliged to pay pension fund contributions deducted from the salaries of employees and transmit the contributions to the SALA Pension Fund together with the employer's contribution.
- 5.1.39 As shown in the evidence above, pension fund contributions of the Complainants were deducted by the former Gariiep Local Municipality during the period July 2011 to July 2016. Not all the contributions were paid over to the SALA Pension Fund. Subsequently, the Municipality took over a debt to the SALA Pension Fund from the former Municipality when it was established in terms of the Municipal Structures Act. This was conceded by the Municipality.
- 5.1.40 The capital debt owed by the Municipality to SALA Pension Fund is R8 936 753.31 (Eight million, nine hundred and thirty six thousand, seven hundred and fifty three rand, thirty one cent). The projected interest as at 30 April 2020 amounts to R12 630 064.49 (Twelve million, six hundred and thirty thousand and sixty four rand, forty nine cent). The Municipality is also liable for an amount of R164 217.72 (One hundred and sixty four thousand, two hundred and seventeen rand, seventy two cent) in respect of late payment interest for contributions that were paid late. This was also not disputed by the Municipality during the investigation.
- 5.1.41 Based on the legal obligations emanating from the amalgamation notice in terms of section 12 and 14 of the Municipal Structures Act, in terms of which the Municipality became the successor in law and incurred the debt of the

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<sup>3</sup> SALA Fund Rules-Revised Rules Effective Date 1 October 2008: Issued under Pension Fund Act 24 of 1956.

<sup>4</sup> In relation to a fund, Employer means an employer participating in the fund, section 1 of PFA.

former Gariep Local Municipality, it became responsible for settling the debt owed to SALA Pension Fund, which did not happen.

5.1.42 The Municipality failed to transmit the outstanding amount representing the Complainants' contributions to the SALA Pension Fund, as it was obliged to do in terms of the PFA and the Municipal Structures Act.

5.2 **Regarding whether the conduct of the former Municipality was improper, constitutes maladministration and prejudiced the Complainants'.**

Common cause or undisputed facts

5.2.1 It is common cause that the Municipality was established by the amalgamation of the Gariep and Maletswai Local Municipalities on 3 August 2016 in terms of section 12 and section 14 of the Municipal Structures Act. The amalgamation involved the transfer of the assets, rights, liabilities and obligations of the disestablished Municipalities to the Municipality, in terms of section 14 of the Municipal Structures Act.

5.2.2 It is further common cause that the Complainants were employees of the erstwhile Municipality. Pension fund contributions were deducted from their salaries during the period from July 2011 to July 2016. All the deducted contributions were not paid over to the SALA Pension Fund.

5.2.3 The Municipal Manager of the Municipality conceded during the investigation that the Municipality is in arrears in respect of the historic debt owed by the erstwhile Municipality to the SALA Pension Fund.

5.2.4 It is not in dispute, as indicated in paragraph 5.1 above, that the Municipality failed to transmit all the Complainants' contributions to the SALA Pension Fund, as it was obliged to do as the successor of the Gariep Local Municipality. The Municipal Manager indicated during the investigation that the Municipality does not have the funds to pay the debt and interest to the SALA Pension Fund.

### Application of the relevant legal prescripts

- 5.2.5 The relevant laws and prescripts referred to in paragraphs 5.1.31 to 5.1.37 above also apply to the consideration of this issue.

### Conclusion

- 5.2.6 Based on the exposition of evidence and the application of the relevant law discussed above, it can be concluded that the failure by Municipality to pay to the SALA Pension Fund the outstanding contributions deducted from the Complainants' salary by the Gariiep Local Municipality during the period July 2011 to July 2016, was not in accordance with the provisions of the Municipal Structures Act and the PFA. The conduct of the Municipality was therefore improper, constitutes maladministration and prejudiced the Complainants.
- 5.2.7 The failure due to a lack of funds by the Municipality in its capacity as a liable successor in law to settle the debt owed by its predecessor to SALA Pension Fund is further perpetuating the prejudice to the Complainants.

## **6. FINDINGS**

Having regard to the evidence, and the regulatory framework setting the standard that should have been upheld by the Municipality and the impact on the Complainants, I make the following findings against the Municipality:

- 6.1 **Regarding whether the Municipality failed to transmit pension fund contributions deducted from Complainants' salaries during the period from July 2011 to July 2016 to the SALA Pension Fund.**
- 6.1.1 The allegation that the Municipality as the successor of the Gariiep Local Municipality failed to transmit pension fund contributions deducted from

Complainants' salaries during the period July 2011 to July 2016 to the SALA Pension Fund, is substantiated.

6.1.2 The SALA Pension Fund indicated during the investigation that the amount due to it by the former Municipality as a result of its failure to pay outstanding contributions during the period July 2011 to July 2016 is in excess of R20 million.

6.1.3 The Municipal Manager of the Municipality conceded during the investigation that the Municipality is by law indebted to the SALA Pension Fund in respect of the historic debt of the former Gariep Local Municipality.

6.2 **Regarding whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainants.**

6.2.1 The allegation that the failure by the Municipality to transmit the pension funds contributions deducted from the Complainants' salaries by pension fund contributions to the SALA Pension Fund was improper constitutes maladministration and prejudiced the Complainants, is substantiated.

6.2.2 The failure by the Municipality to transmit the pension fund contributions of the Complainants to SALA Pension Fund as it was obliged to do in terms of the Municipal Structures Act and the PFA, unfairly exposed the Complainants to improper prejudice since their contributions to the fund has a shortfall and could have an impact on their benefits.

6.2.3 Accordingly, the conduct of the Municipality in the circumstances constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.

## 7. REMEDIAL ACTION

7.1 It appears from the evidence and information obtained during the investigation that the Municipality inherited substantial debt from the former Gariep Local Municipality when the amalgamation took place, including the more than R20 million owed to the SALA Pension Fund. The Municipality evidently might have a serious financial problem to address its legal obligation to the SALA Pension Fund, in terms of the PFA and the Municipal structures Act.

7.2 Section 136 of the Local Government: Municipal Finance Management Act, 2003 (MFMA) provides for types of provincial interventions in a municipality that has a serious financial problem as *inter alia* as follows:

*“(1) If the MEC for local government in a province becomes aware that there is a serious financial problem in a municipality, the MEC must promptly-*

*(a) consult the mayor of the municipality to determine the facts;*

*(b) assess the seriousness of the situation and the municipality’s response to the situation; and*

*(c) determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.*

*(2) If the financial problem has been caused by or resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for an intervention in terms of section 139(1) of the Constitution are met, the provincial executive must promptly decide whether or not to intervene in the municipality. If the provincial executive decides to intervene, section 137 applies.*

7.3 Section 137 of the MFMA provides that if the conditions for a provincial intervention in a municipality in terms of section 139(1) of the Constitution are met and the provincial executive decides in terms of section 136(2) of the MFMA to intervene in the municipality, the provincial executive may take any

appropriate steps referred to in section 139(1) of the Constitution, including, *inter alia*:

- 7.3.1 Assessing the seriousness of the financial problem in the municipality; and
- 7.3.2 Seeking solutions to resolve the financial problem in the municipality in a way that would be sustainable and would build the municipality's capacity to manage its own financial affairs.
- 7.4 The criteria for determining the seriousness of a financial problem are provided for in section 138 of the MFMA include that the Municipality has failed to make payments as and when due of the Municipality has defaulted on financial obligations for financial reasons.
- 7.5 **The appropriate remedial actions that I am taking in terms of section 182(1)(c) of the Constitution is the following:**
  - 7.5.1 **The Municipal Manager of Municipality to:**
    - 7.5.1.1 Determine the exact total amount due and payable by the Municipality to the SALA Pension Fund, representing the debt of the former Gariep Local Municipality in respect of the pension fund deductions made from the salaries of employees and interest thereon, within 60 business days from the date of this report; and
    - 7.5.1.2 Take the appropriate steps to pay the outstanding debt and interest to the SALA Pension Fund within 60 business days from the date of this report.
  - 7.5.2 **In the event that the Municipality is unable to pay the outstanding debt and interest to the SALA Pension Fund:**
    - 7.5.2.1 **The Municipal Manager to:**
      - 7.5.2.1.1 Inform the Eastern Cape MEC for Co-operative Governance and Traditional Affairs of the total amount as determined in paragraph 7.4.1.1 above and that it constitutes a serious financial problem for the

Municipality as contemplated by section 136 of the MFMA, within 30 business days from the date of this report ;

7.5.2.1.2 Submit a report to the Council of the Municipality on the actions taken as referred to in paragraphs 7.5.1.1 and 7.5.2.1.1 above within 30 business days from the date of this report; and

7.4.2.1.3 Inform the Complainants in writing of the actions taken referred to in paragraphs 7.5.2.1 above and of the progress made with resolving the matter, within 30 business days from the date of this report and every 90 days thereafter until the debt and interest is paid to the SALA Pension Fund.

**7.4.2.2 The Eastern Cape MEC for Cooperative Governance and Traditional Affairs to:**

7.4.2.1 Take the appropriate action in terms of section 136 of the MFMA to determine whether the situation justifies or requires the intervention of the Provincial Executive and take necessary steps accordingly, within 90 business date of this report to ensure that payment of the outstanding debt and interest to the SALA Pension Fund is made.

**8. MONITORING**

8.1 The Municipal Manager of the Municipality to submit an action plan to me within 60 business days from the date of this report, indicating how the remedial action referred to in paragraph 7.5.1 above will be implement, if applicable.

8.2 In the event that the Municipality is unable to implement the remedial action taken in paragraph 7.5.1 above, the Municipal Manager to submit an action plan to me within 60 business days from the date of this report on how the remedial action referred to in paragraph 7.5.2.1 above will be implemented.

- 8.3 In the event that the Municipality is unable to implement the remedial action taken in paragraph 7.5.1 above, the Eastern Cape MEC for Co-operative Governance and Traditional Affairs to submit an action plan to me within 60 business days from the date of this report indicating how the remedial action referred to in paragraph 7.5.2.2 above will be implemented.
- 8.4 The submission of the implementation plan and the implementation of my remedial action shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



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**ADV BUSISIWE MKHWEBANE**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**  
DATE: 9/12/2020

**Assisted by: Louise Winkwart**