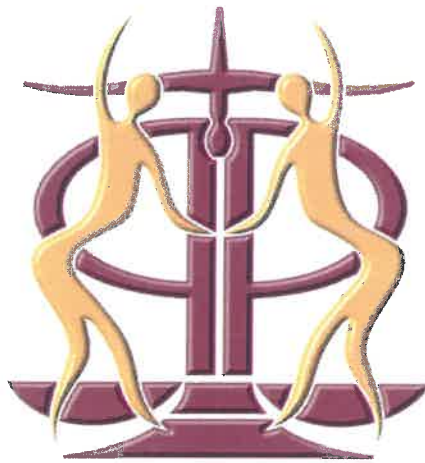


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH
AFRICA, 1996 AND SECTION 8(2A)(a) OF THE PUBLIC PROTECTOR
ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO. 9 OF 2019/20120

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***“Allegations of maladministration against the Polokwane Local
Municipality regarding the permanent appointment of Ms Suzan Malan”***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR
APPOINTMENT OF MS SUZAN MALAN TO A POSITION OF ASSISTANT MANAGER:
BILLING AND CUSTOMER CARE BY THE POLOKWANE LOCAL MUNICIPALITY**

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Executive Summary

- (i) 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(2A)(a) of the Public Protector Act 23 of 1994 (the 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 irregular appointment of Ms Suzan Malan (Ms Malan) to a position of Assistant Manager: Billing and Customer Care by the Polokwane Local Municipality (the Municipality).
- (iii) On 12 May 2017, I received a complaint from Mr TG Maponya (the Complainant) who was employed by the Municipality as the Manager: Finance-Expenditure.
- (iv) In the main, the Complainant alleged that:
 - (aa) The Municipality advertised the position of Assistant Manager: Billing and Customer Care in the *Sowetan* newspaper on 25 June 2013;
 - (bb) The Municipality shortlisted, interviewed and appointed Ms Malan despite the fact that she did not meet the minimum requirements of the post as advertised;
 - (cc) The Municipality ignored concerns raised internally by him and the Unit Manager, Mr Shokane, on the alleged irregular appointment of Ms Malan as an Assistant Manager: Billing and Customer Care.
- (v) On analysis of the complaint, the following issues were identified and investigated:
 - (aa) Whether the Municipality irregularly appointed Ms Suzan Malan to a position of Assistant Manager: Billing and Customer Care; and

- (bb) Whether the Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Suzan Malan?
- (vi) The investigation was conducted by way of correspondences, meetings and interviews with the Complainant, the Municipal officials as well as perusal of all relevant documents, analysis and application of all relevant laws, policies and related prescripts.
- (vii) Key laws and policies taken into account to determine if there had been improper conducted maladministration by the Municipality and prejudice caused to other candidates were principally those imposing administrative standards that should have been complied with by the Municipality during the recruitment process. Those are the following:
 - (aa) Section 195(1) (a) and (f) of the Constitution regulates good governance in public service.
 - (bb) The Polokwane Local Municipality Recruitment Policy of 2009 (Recruitment Policy) was established for the purpose of ensuring a fair, efficient, effective and transparent system of recruitment.
 - (cc) The Polokwane Municipality Personnel Code No. CR24/2/1998 (Personnel Code) was adopted in order to assist the Municipality to establish and make a determination on whether a candidate is suitable for a certain post.
- (viii) On 09 April 2019, I issued notices (Notice) in terms of section 7(9) (a) of the Public Protector Act to, amongst others, the Executive Mayor of Polokwane Local Municipality, the Speaker of the Municipal Council of Polokwane Local Municipality, and the Municipal Manager of the Polokwane Local Municipality, the former Municipal

Manager, the former Chairperson of the shortlisting and interviewing panel to enable them to respond within ten (10) working days of receipt thereof.

- (ix) In response to my Notice, both the former Acting Municipal Manager, Mrs TC Mamejja and the former Chairperson of the shortlisting and interviewing panel, Ms FJ Mudau indicated in a similar letter dated 24 April 2019 that the appointment of Ms Malan was conducted in terms of the legal prescripts.
- (x) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:
 - (a) **Regarding whether the Municipality irregularly appointed Ms Suzan Malan to a position of Assistant Manager: Billing and Customer Care:**
 - (aa) The allegation that the Municipality irregularly appointed Ms Susan Malan to a position of Assistant Manager: Billing and Customer Care is substantiated.
 - (bb) When the Municipality advertised the position of Assistant Manager: Billing and Customer Care in the *Sowetan* newspaper on 25 June 2013 and July 2013 (*errata*), it did not include the RPL as a requirement. The exclusion of this requirement denied any interested qualifying member of the public who had no degree or diploma, but had vast relevant years of experience an opportunity to apply for the post.
 - (cc) It was therefore unfair, unequitable and improper for the Municipality to then shortlist and subsequently appoint Ms Malan, who only had the RPL requirement, but did not meet the post requirements reflected in the advertisement. It was improper for the Municipality, particularly the shortlisting and interview panel, to have considered clause 2.18 of the Personnel Code to justify the shortlisting and appointment of Ms Malan.

- (dd) The conduct of the Municipality, particularly Ms Mametja and Ms Mudau, was in violation of clause 2.17 of the Personnel Code and clause 5.3.5 of the Recruitment Policy.
- (ee) Such conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) Regarding whether the Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Susan Malan:**
 - (aa) The allegation that the Municipality and other candidates suffered prejudice as a result of the irregular appointment of Ms Malan is substantiated.
 - (bb) The unfair, unequitable and therefore improper selection and subsequent appointment of Ms Malan by the Municipality caused the Municipality to incur an irregular expenditure. The salary of the Municipal Assistant Manager: Billing and Customer Care is being irregularly paid to a person who was irregularly appointed.
 - (cc) The shortlisting and subsequent appointment of Ms Malan as the only candidate with the RPL requirements prejudiced other applicants who had similar RPL requirements, but were unaware because they were not included in the advertisement.
 - (dd) The conduct of the Municipality, particularly Ms Mametja, was in violation of sections 60(a), 61(1)(d), 62(1) (d), 171(1) 173(1) of the MFMA and clauses 2.17 of the Personnel Code and 5.3.5 of the Recruitment Policy.
 - (xi) The appropriate remedial action that I am taking in pursuit of section 182(1) (c) of the Constitution and section 6(4) (c) (ii) of the Public Protector Act, is as follows:
 - (aa) The Speaker of the Municipal Council must ensure that, within 30 working days from the date of this report, the Municipal Council, in consultation with the Municipal

Manager, declares the appointment of Ms Malan to a position of Assistant Manager: Billing and Customer Care as irregular. The salary of Ms Malan should also reflect as an irregular expenditure in the Municipality's financial statement for the period 01 March 2014 to date

- (bb) The Municipal Manager must, within 30 working days from the date of this report, take disciplinary action against all officials who caused the irregular appointment of Ms Malan;
- (cc) The Municipal Mayor must, within 30 working days from the date of this report, take disciplinary action against the Municipal Manager, Mr DH Makobe, for failure to respond to my section 7(9)(a) notice; and
- (dd) The Municipal Manager must, within 30 working days from the date of this report, review the Municipal recruitment policy, particularly the provisions which address employment equity in the workplace. The employment equity requirements must be clearly articulated in the advertisement. Clause 2.18 of the Personnel Code must be removed from the Code and officials at supervisory level must be encouraged to acquire relevant educational qualifications. The shortlisting panel should also not shortlist anyone who does not meet the requirements of a post. The revised policy should also provide for the promotion of the qualifying internal staff to avoid financial implications of external advertisement.

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR
APPOINTMENT OF MS SUZAN MALAN TO A POSITION OF ASSISTANT MANAGER:
BILLING AND CUSTOMER CARE BY THE POLOKWANE LOCAL MUNICIPALITY**

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(2A)(a) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation and implement the remedial action:
 - 1.2.1 Member of the Executive Council (MEC) for Limpopo Cooperative Governance, Human Settlements and Traditional Affairs, Honourable J Ndou;
 - 1.2.2 The Speaker of the Municipal Council of the Polokwane Local Municipality, Councillor (Cllr) MJ Ralefatane;
 - 1.2.3 The Executive Mayor of the Polokwane Local Municipality, Cllr TP Nkadimeng;
 - 1.2.4 The Municipal Manager of the Polokwane Local Municipality, Mr DH Makobe;
 - 1.2.5 The former Municipal Manager of Polokwane Local Municipality; Ms TC Mametja;
and
 - 1.2.6 The former chairperson of the interview panel, Ms F Mudau.
- 1.3 A copy of the report is also provided to the Complainant, Mr TG Maponya, to inform him of the outcome of my investigation.

- 1.4 The report relates to an investigation into allegations of irregular appointment of Ms Suzan Malan to a position of Assistant Manager: Billing and Customer Care by the Polokwane Local Municipality (the Municipality).

2. THE COMPLAINT

- 2.1 On 12 May 2017, I received a complaint from Mr TG Maponya (the Complainant) who was employed by the Municipality as the Manager: Finance-Expenditure with a request that I must intervene and investigate what he perceived as maladministration relating to irregular appointment of Ms Suzan Malan (Ms Malan) to a position of Assistant Manager: Billing and Customer Care by the Municipality. He alleged that:

- 2.1.1 The Municipality advertised the position of Assistant Manager: Billing and Customer Care in the *Sowetan* newspaper on 25 June 2013;
- 2.1.2 The Municipality shortlisted, interviewed and appointed Ms Malan despite the fact that she did not meet the minimum requirements of the post as advertised;
- 2.1.3 The Municipality ignored concerns raised internally by him and the Unit Manager, Mr Shokane, on the alleged irregular appointment of Ms Malan as an Assistant Manager: Billing and Customer Care.

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 prescribed in 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 power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the 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 effect.¹ The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”²

3.1.6. 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].

- 3.1.7 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);
- 3.1.8 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);
- 3.1.9 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);
- 3.1.10 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);
- 3.1.11 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);
- 3.1.12 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));

- 3.1.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.1.14 “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)).
- 3.1.15 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:
- 3.1.15.1 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective. (paragraphs 85 and 152);
- 3.1.15.2 There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92);
- 3.1.15.3 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.
- 3.1.15.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (Paragraph 104);

- 3.1.15.5 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 To this end, I would like to emphasise that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature³. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its adjudicative and judicial nature. The office of the Public Protector is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and prejudice⁴. It is therefore trite that the decisions of the Public Protector are administrative actions⁵.
- 3.1.17 The fact that there is 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);
- 3.1.18 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action. (paragraph 112);
- 3.1.19 The Limpopo Provincial Department of Education 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 *Sedumo et al vs Rustenburg Platinum Mines Limited et al*, 2008(2) SA 24 (CC) at 235.

⁴ Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa 1996(4) SA744 (CC) at 16.

⁵ Minister of Home Affairs et al vs Public Protector et al 2017(2) SA 597 (GP).

3.1.20 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 of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives me the power 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; to report on that conduct; and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

4.1.3 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The investigation was conducted by way of correspondences, meetings and interviews with the Complainant and the relevant Department officials, 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 amount 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 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 Appeals⁶ (SCA) 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 a state organ complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the Municipality irregularly appointed Ms Suzan Malan to a position of Assistant Manager: Billing and Customer Care; and

⁶ *Public Protector versus Mail and Guardian*, 2011(4) SA 420 (SCA).

4.3.2 Whether the Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Suzan Malan.

4.4 The key sources of information

4.4.1 Documents

- 4.4.1.1 A copy of the Municipal Advertisement advertised on the *Sowetan* newspaper dated 25 June 2013.
- 4.4.1.2 A copy of the Municipal Advertisement advertised on the *Capricorn* newspaper dated 26 June 2013.
- 4.4.1.3 A copy of an *Errata* of the Municipal Advertisement advertised on both the *Sowetan* and the *Capricorn* newspapers.
- 4.4.1.4. A copy of the Memorandum Report for the shortlisting of candidates approved by the Municipal Manager dated 22 October 2013.
- 4.4.1.5 A copy of the shortlist Report.
- 4.4.1.6 A copy of the attendance register for the shortlisting and interview committee members present during the shortlisting session dated 15 November 2013.
- 4.4.1.7 A copy of the ranking of the candidates by the interview committee signed by panel committee members dated 15 November 2013.
- 4.4.1.8 A copy of the appointment Report by interview committee for the approval of the successful candidate.
- 4.4.1.9 A copy of the Approval Report for the appointment of Ms Malan signed by the Municipal Manager.
- 4.4.1.10 A copy of the complaint form by the Complainant 22 November 2017.
- 4.4.1.1 A copy of the letter from my office to the Municipality to raise the complaint with the Municipality dated 13 July 2017.
- 4.4.1.12 A copy of the response report from the Municipality dated 19 September 2017.

4.4.2 Correspondence sent and received

- 4.4.2.1 A letter of enquiry from my office to the Municipality dated 13 July 2017.
- 4.4.4.2 A letter from the Municipality to my office dated 19 September 2017.
- 4.4.4.3 A copy of correspondence from the Municipality to my office dated 20 April 2018.
- 4.4.4.4 An email to my office from Mr J Malau dated 16 April 2018.
- 4.4.4.5 A copy of the section 7(9) Notice signed by me on 09 April 2019 issued to the MEC, Executive Mayor, Speaker, the Municipal Manager, former Acting Municipal Manager and former Chairperson of the shortlisting panel.

4.4.3 Legislation and other prescripts

- 4.4.3.1 The Constitution.
- 4.4.3.2 The Public Protector Act.
- 4.4.3.3 The Polokwane Municipality Recruitment Policy of 2009 (Recruitment Policy).
- 4.4.3.4 The Polokwane Municipality Personnel Code No. CR24/2/1998 (Personnel Code).
- 4.4.3.5 The Municipal Finance Management Act, 2003 (MFMA)

4.4.4 Interviews

- 4.4.4.1 A meeting with Human Resource Manager, Mr Jimmy Mannya and the Senior Labour Relations Officer, Mr J Malau on 16 April 2018.

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 *Sedumo et al v Rustenburg Platinum Mines Limited et al* 2008(2) SA 24 (CC) at 235.

- 4.4.5.3 *Ex Parte Chairperson of the Constitutional Assembly; In re; Certificate of the Constitution of the Republic of South Africa 1996(4) SA744 (CC) at 161.*
- 4.4.5.4 *Minister of Home Affairs et al v Public Protector et al 2017(2) SA 597 (GP).*
- 4.4.5.5 *President of the Republic of South Africa v Office of the Public Protector and Others Case no. 91139/2016 [2017] ZAGPPHC 747.*
- 4.4.5.6 *Public Protector v Mail and Guardian 2011(4) SA 420 (SCA).*

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 Polokwane Local Municipality irregularly appointed Ms Suzan Malan to a position of Assistant Manager: Billing and Customer Care:

Common cause issues

- 5.1.1 The Municipality advertised the position of Assistant Manager: Billing and Customer Care in the *Sowetan* newspaper on 25 June 2013.
- 5.1.2 The requirements for the position of Assistant Manager: Billing and Customer Care were listed as follows:
 - (a) National Diploma or B.Com degree in Accounting or a Certificate Programme in Management Development (CPMD) /Municipal Finance Management Programme (MFMP);
 - (b) 5 years in the field of Finance;
 - (c) Relevant supervisory experience;
 - (d) Exposure to the Local Government environment will be an added advantage;
 - (e) Excellent analytical, communication, strategic planning, decision-making and report writing skills;
 - (f) Working knowledge of applicable legislation;

- (g) Knowledge of Municipal Financial System; and
- (h) A valid driver's licence.

5.1.3 In July 2013, the Municipality issued an *Errata* changing the previous requirements of the position of Assistant Manager: Billing and Customer Care.

5.1.4 The amended requirements for the position of Assistant Manager: Billing and Customer Care were:

*“A National Diploma or B. Com degree in Accounting **WITH** a Certificate Programme in Management Development for Municipal Finance (CPMD)/Municipal Finance Management Programme (MFMP) qualification.”*

5.1.5 Ms Malan applied for the position of Assistant Manager: Billing and Customer Care, was shortlisted; interviewed together with seven (7) other candidates and subsequently appointed to the position.

5.1.6 Ms Malan had the following qualifications when she was shortlisted:

- (a) Grade 12;
- (b) Certificate Programme in Management Development for Municipal Finance (CPMD);
- (c) Certificate in Municipal Finance Management (MFMP);
- (d) Code 08 drivers licence; and
- (e) 26 years' experience in the field of Finance.

5.1.7 The other seven (7) candidates had the following qualifications:

Name and Surname	Qualifications and Experience
1. Mathekga MD	Secondary Teachers Diploma (STD); Diploma in Business Management; Certificate in Foundations for Municipal Finance; Certificate

	<p>Programme in Management and Development on Municipal Finance (CPMDMF); Bachelor of Commence (Economics); Bachelor of Technology Business Admin); B.Com: Economics (Hons); Computer Literacy; 10 years teaching experience from 1995-2005; and Divisional Head: Revenue at Lepelle-Nkumpi Local Municipality from 2005 – 2010.</p>
2. Molefe SK	<p>National Diploma in Cost and Management Accounting; Certificate Programme in Government and Development Management; Certificate Programme in Management Development on Municipal Finance; Accountant Revenue at Lepelle-Nkumpi Municipality from January 2005 to 2013; Front Line Teller at Standard Bank from October 2003 to November 2004; Front Line teller at Standard Bank from May 2003 to September 2003; and Front Line Teller at Standard Bank from September 1999 to December 2000.</p>
3. Sithole MJ	<p>National Diploma in Cost and Management Accounting; CPMD (NQF 6); Clerk Grade 2 (Income) at Waterberg District Municipality in July 1999; Clerk Grade 1 (Expenditure) at Waterberg District Municipality from 1 November 2004 to 31 March 2004; and Accountant Tax at Polokwane Municipality from April 2004 to 2013.</p>
4. Malatji MP	<p>National Diploma in Cost & Management Accounting; Certificate in Banking & Business Administration; Certificate Programme in Management Development (CPMD); BCom degree in Management Accounting 3rd year level; Accountant: Insurance & Investments at Polokwane Municipality from June 2005 to 2013; Senior Clerical Assistant at Polokwane Municipality from June 2000 to May 2005; Clerical Assistant at Polokwane Municipality</p>

	from June 1999 to May 2000; and Enquiries Clerk at ABSA from 1998 to May 1999.
5. Machethe BM	Bachelor of Administration in Business Management (Honours) currently registered; Municipal Financial Management Programme currently registered; Practical Municipal Accounting; B-Tech in Credit Management; National Diploma in Credit Management; Senior Accounts Clerk (Billing Section) at Greater Tzaneen Municipality from 01 September 2005 to 2013; Clerk (Indigent Section) at Greater Tzaneen Municipality from April 2005 to August 2005; and Debt Recovery Agent (Call Centre) at Munnik Basson Dagama Attorneys from August 2004 to April 2005.
6. Morewane LM	B.Com degree in Accounting & Business Management; Certificate Programme in Management Development for Municipal Finance (CPMDMF); Masters of Development (MDEV); Clerk Grade 1 (Supervisor -Customer Care: Enquiries) at Polokwane Municipality from February 2009 to date; Senior Clerical Assistant (Customer Care) at Polokwane Municipality from 01 January 2007 to 31 January 2009); and Data Capturer at Polokwane Municipality from 17 October 2006 to 31 Dec 2006.
7. Nemadodzi ES	B.Com degree; Basic Computer Literacy; Call Centre Training; Investments from FNB Learning; Certificate in Local Government; Certificate Programme in Management Development for Municipal Finance Management Programme (MFMP) from University of Pretoria; Accountant Creditors at Makhado Municipality from September 2008 to date; Acting Assistant Manager Expenditure at Makhado Municipality from January 2008 to April 2008; Senior. Senior Costing Clerk at Makhado

	Municipality from 2006 to 2008. Teller at FNB from February 2004 to September 2004; Customer Service Representative at FNB from October 2004 to November 2005; and Accounting Officer at FNB from December 2005 to June 2006.
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Issues in dispute

- 5.1.8 The Complainant argued that the recruitment process and appointment of Ms Malan was irregular in that the Municipality shortlisted and appointed a candidate who did not meet the minimum requirements of the post and should therefore not have been shortlisted.
- 5.1.9 My investigation team raised the matter with the former Municipal Manager, Ms TC Mametja on 13 July 2017 and the Municipality responded as follows in a letter dated 19 September 2017:

“...The Polokwane Municipality Personnel Code (the code) at clause 2.18 provides as follows:

2.18 With the exception of levels 0-2 of the grading scheme, each full three years’ experience over and above the prescribed minimum experience for a position may be accepted as an alternative for one year academic, professional or scholastic training, which is prescribed for a post.

Mrs Malan possess a Certificate Programme in Management Development for Municipal Finance (CPMD) and also a Certificate in Municipal Finance Management (MFMP).

At the relevant time she had more than 26 years of exposure in the field of finance and more than 14 years as supervisor.

In light of clause 2.18 of the code the Municipality took into account her experience and the fact that she was executing and supervising the same functions and arrived at a decision to give her an opportunity to contest the position in the form of an interview.

Ms Malan was the best candidate out of the eight who were shortlisted and subsequently interviewed.

The appointment of Mrs Malan was in terms of the Polokwane Municipality policies and thus not irregular”.

5.1.10 The Municipal’s response that Clause 2.18 was invoked in order to afford a fair and equitable chance of opportunity for all candidates implies that the post advertisement should have included a provision for the Recognition of Prior Learning (RPL) in order to afford other candidates in a similar position as Ms Malan an opportunity to apply for the vacant post.

5.1.11 In terms of the provisions of clause 2.18, Ms Malan qualified to be shortlisted in that she had accumulated 26 years of experience, however, the advertisement requirements did not make provision for the RPL.

5.1.12 The Complainant further argued that during the shortlisting of the candidates on 15 October 2013, the South African Municipal Workers Union (SAMWU) representative and the Strategic Business Unit (SBU) Manager, Mr SM Shokane, raised an objection to the shortlisting of Ms Malan on the basis that she did not meet the minimum requirements as set out in the advertisement.

5.1.13 The objection was allegedly overruled by the Chairperson of the shortlisting panel, Ms F Mudau, on the basis that Ms Malan met the requirements in terms of clause

2.18 of the Personnel Code and therefore should be afforded an opportunity to contest for the post and all the panel members agreed.

5.1.14 In response to my section 7(9)(a) notice, both the former Municipal Manager and the former Chairperson of the shortlisting and interview panel rejected the Complainant's allegation that the appointment of Ms Malan was irregular.

5.1.15 They argued that no objection was raised on the shortlisting of Ms Malan on the allegation that she did not meet the minimum requirements as set out in the advertisement.

5.1.16 However, on 18 April 2018, my investigation team's telephone enquiry and a follow up email with Mr Shokane confirmed that an objection was indeed lodged during the shortlisting of Ms Malan. It was revealed that during the shortlisting of the candidates on 15 October 2013, a representative of SAMWU, Mr NC Rasehlo, raised an objection on the shortlisting of candidate number 8, Ms Malan, as she did not meet the minimum requirements as set out in the advertisement. Mr Shokane confirmed that he raised an objection and pointed out that the applicant did not meet the minimum requirements.

Application of the relevant law

5.1.17 Section 195(1) (a) and (f) of the Constitution provides that:

"Public Administration must be governed by the democratic values and principles enshrined in the Constitution including the following principles:

- (a) *A high standard of professional ethics must be promoted and maintained.*
- (b) ...
- (c) ...
- (d) ...
- (e) ...

(f) *Public administration must be accountable."*

5.1.18 These principles enjoin the Municipality and its officials to exercise a high level of professionalism and ethics, including accountability in the performance of their duties.

5.1.19 The Polokwane Municipality Recruitment Policy of 2009 (Recruitment Policy) was established for the purpose of ensuring a fair, efficient, effective and transparent system of recruitment. The Recruitment Policy serves as a guideline for shortlisting appointable candidates. It therefore follows that when advertising a vacant post, there are set requirements such as prescribed competencies or qualifications which must be met in line with the advertisement. The advertisement becomes the only legal document which the recruitment process should be based.

5.1.20 Clause 5.3.5 of the Recruitment Policy provides that:

"Candidates who meet the minimum appointment requirements may be considered for further assessment/evaluation; the others are eliminated from the process, except in cases of special merit in terms of any collective agreement".

5.1.21 The Polokwane Municipality Personnel Code No. CR24/2/1998 (Personnel Code) was adopted in order to assist the Municipality to establish and make a determination on whether a candidate is suitable for a certain post. Clause 2.17 of the Personnel Code provides that:

"When appointments are done, special attention must be given to the prescribed appointment requirements. The relevant prescribed requirements for each post is attached hereto as Annexure A."

5.1.22 The above clauses give guidance to the Municipality regarding the objective of the Recruitment Policy on the recruitment process which must be fair, equitable, and reasonable. Failure to adhere to the process would render the appointment irregular.

5.1.23 The Polokwane Municipality Personnel Code No. CR24/2/1998 (Personnel Code) was adopted in order to assist the Municipality to establish and make a determination on whether a candidate is suitable for a certain post. Clause 2.18 of the Personnel Code provides that:

“With the exception of levels 0-2 of the grading scheme, each full three years’ experience over and above the prescribed minimum experience for a position may be accepted as an alternative for one year academic, professional or scholastic training, which is prescribed for a post”.

5.1.24 It was expected of the Municipality to include in its advertisement the provision of the RPL, if it wanted to afford all candidates who had no academic qualification referred to in the advertisement, but had vast years of experience. Failure to include such provision in the advertisement would be unfair and unequitable, should a candidate with RPL requirements be shortlisted and appointed.

5.1.25 In the present matter, the Municipality shortlisted and appointed Ms Malan who, at the time of application for the position of Assistant Manager: Billing and Customer Care, did not possess any qualification referred to in the advertisement, but had more than 26 years exposure in the field of finance and more than 14 years as a supervisor.

Conclusion

5.1.26 Based on the evidence gathered, it can be concluded that the Municipality did not comply with the constitutional principles which govern public service and its internal recruitment and selection processes when it selected and appointed a candidate with RPL requirements when such requirements were not in the advertisement.

5.2 Regarding whether the Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Suzan Malan:

Issues in dispute

- 5.2.1 The Complainant argued that the unfair, unequitable and improper selection of Ms Malan in the position of Assistant Manager: Billing and Customer Care caused the Municipality to incur irregular expenditure. The salary of the Municipal Assistant Manager: Billing and Customer Care is being irregularly paid to a person who was improperly appointed.
- 5.2.2 He further argued that such selection also prejudiced other candidates who qualified based on the RPL requirement which was not included in the advertisement. Had the RPL requirement included in the advertisement such candidates would have been given an opportunity to apply for the post. It was therefore unfair and improper for the Municipality to have considered Ms Malan when the RPL requirement was not included in the advertisement.
- 5.2.3 In response to my section 7(9)(a) notice both the former Municipal Manager, Ms Mametja, and Chairperson of the shortlisting and interview panel, Ms Mudau, states in their letters dated 24 April 2019 that:

“2.8 AD Paragraph 8.2.2 (in whole)

It is still maintained that the shortlisting of Ms. Malan did not prejudice anyone, taking into account that a fair and just recruitment process has been followed as illustrated above. Therefore, the appointment of Ms Malan cannot be classified as unauthorized, irregular or fruitless and wasteful expenditure as per S 62(1)(d) of the MFMA.

2.8.1 The other candidates did not suffer any prejudice because there is no indication that they fared better than Ms. Malan in the overall assessment of a suitably qualified candidate.

2.8.2 None of the candidates contested the appointment of Ms. Malan and have all seemingly accepted the appointment.”

5.2.4 The Municipal Manager, Mr DH Makobe, was issued with a section 7(9)(a) notice dated 09 April 2019 and hand delivered to him on 10 April 2019, but failed to respond to it.

Application of the relevant legal framework

5.2.5 Section 61(1) of the MFMA provides that “*the accounting officer of a municipality must—*

(a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs”

5.2.6 Section 62(1)(d) of the MFMA provides as follows:

“The Accounting Officer is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented.”

5.2.7 The former Municipal Manager was expected to ensure that correct recruitment processes were followed in the appointment of Ms Malan. The appointment of any employee without following the prescribed recruitment processes would result in the Municipality incurring an irregular expenditure.

5.2.8 Section 171(1) MFMA provides that, *“the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently—*
(a) contravenes a provision of this Act;
(b) fails to comply with a duty imposed by a provision of this Act on the accounting officer of a municipality;”

5.2.9 The former Municipal Manager was expected to comply with sections 61 and 62 of the MFMA to avoid committing financial misconduct.

5.2.10 Section 173(1) of the MFMA provides that

“The Accounting Officer of a municipality is guilty of an offence if that accounting officer—

(a) deliberately or in a grossly negligent way—

(iii) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure.”

Conclusion

5.2.11 Based on the evidence gathered, it can be concluded that both the Municipality and potential candidates who had RPL requirements similar to Ms Malan suffered prejudice as a result of the unfairness and unequitable manner in which the Municipality selected and appointed Ms Malan.

6. FINDINGS

6.1 Regarding whether the Municipality irregularly appointed Ms Suzan Malan to a position of Assistant Manager: Billing and Customer Care:

6.1.1 The allegation that the Municipality irregularly appointed Ms Susan Malan to a position of Assistant Manager: Billing and Customer Care is substantiated.

- 6.1.2 When the Municipality advertised the position of Assistant Manager: Billing and Customer Care in the *Sowetan* newspaper on 25 June 2013 and July 2013 (*errata*), it did not include the RPL as a requirement. The exclusion of this requirement denied any interested qualifying member of the public who had no degree or diploma, but had vast relevant years of experience an opportunity to apply for the post.
- 6.1.3 It was therefore unfair, unequitable and improper for the Municipality to then shortlist and subsequently appoint Ms Malan, who only had the RPL requirement, but did not meet the post requirements reflected in the advertisement. It was improper for the Municipality, particularly the shortlisting and interview panel, to have considered clause 2.18 of the Personnel Code to justify the shortlisting and appointment of Ms Malan.
- 6.1.4 The conduct of the Municipality, particularly Ms Mametja and Ms Mudau, was in violation of clause 2.17 of the Personnel Code and clause 5.3.5 of the Recruitment Policy.
- 6.1.5 Such conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 6.2 Regarding whether the Municipality and other candidates suffered prejudice as a result of the alleged irregular appointment of Ms Susan Malan:**
- 6.2.1 The allegation that the Municipality and other candidates suffered prejudice as a result of the irregular appointment of Ms Malan is substantiated.
- 6.2.2 The unfair, unequitable and therefore improper selection and subsequent appointment of Ms Malan by the Municipality caused the Municipality to incur an irregular expenditure. The salary of the Municipal Assistant Manager: Billing and Customer Care is being irregularly paid to a person who was irregularly appointed.

- 6.2.3 The shortlisting and subsequent appointment of Ms Malan as the only candidate with the RPL requirements prejudiced other applicants who had similar RPL requirements, but were unaware because they were not included in the advertisement.
- 6.2.4 The conduct of the Municipality, particularly Ms Mametja, was in violation of sections and 60(a), 61(1)(d), 62(1) (d), 171(1) 173(1) of the MFMA and clauses 2.17 of the Personnel Code and 5.3.5 of the Recruitment Policy.

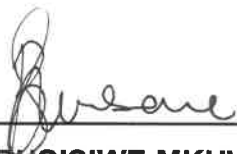
7. REMEDIAL ACTION

- 7.1 The appropriate remedial action that I am taking is in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:
- 7.1.1 The Speaker of the Municipal Council must ensure that, within 30 working days from the date of this report, the Municipal Council, in consultation with the Municipal Manager, declares the appointment of Ms Malan to a position of Assistant Manager: Billing and Customer Care as irregular. The salary of Ms Malan should also reflect as an irregular expenditure in the Municipality's financial statement for the period 01 March 2014 to date;
- 7.1.2 The Municipal Manager must, within 30 working days from the date of this report, take disciplinary action against all officials who caused the irregular appointment of Ms Malan;
- 7.1.3 The Municipal Mayor must, within 30 working days from the date of this report, take disciplinary action against the Municipal Manager, Mr DH Makobe, for failure to respond to my section 7(9)(a) notice ; and
- 7.1.4 The Municipal Manager must, within 30 working days from the date of this report, review the Municipal recruitment policy, particularly the provisions which address employment equity in the workplace. The employment equity requirements must be

clearly articulated in the advertisement. Clause 2.18 of the Personnel Code must be removed from the Code and officials at supervisory level must be encouraged to acquire relevant educational qualifications. The shortlisting panel should also not shortlist anyone who does not meet the requirements of a post. The revised policy should also provide for the promotion of the qualifying internal staff to avoid financial implications of external advertisement.

8. MONITORING

- 8.1 I will require the Municipal Manager to submit the implementation plans to my office within 15 working days from the date of this report indicating how the remedial actions referred to in paragraph 7 above will be implemented.
- 8.2 The submission of the Implementation Plan and the implementation of my remedial actions 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.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 30/04/2019