

# SAVED BY THE NOTICE

Report on an investigation into the alleged irregular appointment and the extension of the Chief Financial Officer's employment contract by the Senqu Municipality in the Eastern Cape and his alleged undue influence in the appointment of his wife by a service provider contracted to the municipality

*Report No: 8 of 2014/ 2015*



PUBLIC PROTECTOR  
SOUTH AFRICA

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*"To reduce nepotism and encourage the appointment of suitably qualified people, posts will in future have to be advertised nationally, not just locally. If a suitable person is not found to fill a post, a municipality may request an MEC or Minister to second a person to the post until a suitable candidate has been appointed. Within 14 days of the appointment of a senior manager, the MEC has to be informed of the appointment process and outcome. In turn, the MEC must within 14 days inform the Minister. If a person is appointed as a senior manager without meeting the requirements of the legislation, the MEC or Minister has to take appropriate action. Of course, a municipality may, in special cases, apply for exemption from provisions of the legislation, if it is clearly unable to attract suitable candidates."*

Yunus Carrim  
Deputy Minister of Cooperative Governance and Traditional Affairs  
June 2011

## Executive Summary

- (i) "Saved by the Notice" 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, and section 8(1) of the Public Protector Act, 1994.
- (ii) The report communicates my findings and the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged irregular appointment and extension of the employment contract of the Chief Financial Officer (CFO) in the Senqu Municipality and his alleged undue influence in the appointment of his wife by SEBATA (Pty) Ltd, a service provider engaged by the Municipality for their Financial Management System and Support.
- (iii) The Complainants are the Sterkspruit Ratepayers Association and the Sterkspruit Civic Association who represented the community of Sterkspruit.
- (iv) In the main the Complainants alleged that :
  - 1) The appointment of the CFO, Mr Christopher Rudolph Venter, was irregular as he did not possess the necessary qualifications and skills to fulfil the requirements of the position;
  - 2) The appointment of Mrs Venter, the CFO's wife, was unduly influenced by the CFO and that she was performing the duties of the CFO;

- (v) While the Municipality did not dispute that the Chief Financial Officer did not have the requisite qualifications, it maintained that it was justified in appointing him for the fact that the Municipality had clean audits under him. The Municipality further contended that it was within its right to renew the CFO's employment contract in terms of section 57 of the Municipal Systems Act 32 of 2000, without advertising the post in 2007 and 2012.
- (vi) On analysis of the complaint, the following issues were identified and investigated by the Public Protector:
- (a) Did the Senqu Municipality improperly appoint Mr Venter to the position of CFO without the required qualifications?
  - (b) Did the Senqu Municipality irregularly appoint Mr Venter as the CFO in contravention of the relevant laws?
  - (c) Did the CFO unduly influence the appointment of his wife to SEBATA, a service provider to the Municipality?
- (vii) The investigation process commenced with a letter to the Municipality on 15 August 2012 requesting its response to the allegations. The Municipal Manager responded on 24 August 2012 that their appointment of the CFO was justified although he did not have the requisite qualifications.
- (viii) A formal investigation, conducted through meetings and interviews with Complainants and relevant officials of the Municipality as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts, followed. Upon completion of the investigation, a section 7(9) notice was issued on 18 August 2014 to the Municipal Manager of the Senqu Municipality regarding my provisional findings and envisaged remedial action. The Municipal Manager responded to the section 7(9) notice with a written letter dated 29 August 2014.

- (ix) Key laws, policies and prescripts taken into account to help me determine if there had been maladministration by the Municipality were the following:
- (a) The Municipality's advertisement for the position of Financial Manager which specifically stated that the incumbent should possess an appropriate tertiary qualification and that tertiary qualification is an NQF Level 6 qualification prescribed in the Municipal Regulations on Minimum Competency Levels issued on 1 July 2007;
  - (b) The Municipal Systems Act 32 of 2000 and the Municipal Systems Amendment Act 7 of 2011, which provides for the manner in which managers who are directly accountable to the municipal managers should be appointed, what qualifications they should possess and how their performance output should be determined and assessed;
  - (c) The Government Notice No. 179 issued by the Minister of Finance on 14 March 2014 regarding the exemption of municipalities and municipal entities from complying with regulations 15 and 18 of the Municipal Regulations on Minimum Competency Levels issued on 1 July 2007, relating to the minimum competency levels of the managers directly accountable to the municipal managers; and
  - (d) The Code of Conduct for Councillors which stipulates how municipal councillors should conduct themselves in pursuit of the business of the municipality.
- (x) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:
- (a) **Whether the Senqu Municipality improperly appointed Mr Venter to the position of CFO without the required qualifications:**



- (i) The allegation that Mr Venter did not have the required qualifications to be appointed to the position of CFO at the time when he was appointed has been substantiated;
  - (ii) Mr Venter only passed Standard 10 in 1981 and did not possess the appropriate tertiary qualification as required by the advertisement for the position of Financial Manager when he was appointed in 2002;
  - (iii) Mr Venter had not acquired the appropriate tertiary qualification for the position of CFO when his contract of employment was renewed by the Senqu Municipality in 2007;
  - (iv) Mr Venter had also not acquired the appropriate NQF level 6 tertiary qualification prescribed by the Guideline for Municipal Competency Levels for the position of CFO when his contract of employment was renewed by the Senqu Municipality in 2012;
  - (v) The appointment of Mr Venter to the position of Financial Manager by the Senqu Municipality in 2002 without the required qualifications and the renewal of his employment contract in 2007 and 2012 without the required qualifications constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act; and
  - (vi) However, Mr Venter has since obtained the required higher education qualification of a Certificate in Municipal Financial Management on 5 June 2014.
- (b) Whether the Senqu Municipality irregularly appointed Mr Venter as the CFO in contravention of the relevant laws:**

- (i) The allegation that the Senqu Municipality irregularly appointed Mr Venter as CFO was substantiated;
- (ii) The Senqu Municipality failed to comply with the requirements of its own advertisement for the position of Financial Manager when it appointed Mr Venter in 2002 and such failure constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act;
- (iii) The Senqu Municipality failed to conclude separate performance agreements with Mr Venter when he was appointed Financial Manager in 2002 and when his contract of employment as CFO was renewed in 2007 and 2012;
  - 1. Such failure was in violation of section 57(1)(b) of the Municipal System Act 32 of 2000 and constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act;
- (iv) The Senqu Municipality failed to advertise the position of CFO when it became vacant in 2007, when it renewed the employment contract of Mr Venter as CFO;
  - 1. Although the Senqu Municipality did not have a statutory obligation to advertise the position of CFO at that time, best practice dictates that the position should have been advertised more so because the incumbent did not possess the required qualifications when the contract was renewed;

- (v) The Senqu Municipality failed to advertise the position of CFO when it became vacant in 2012, when it renewed the employment contract of Mr Venter as CFO;
    - 1. Such failure was in violation of section 56(3) of the Municipal Systems Act 32 of 2000 (as amended) and constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act;
  - (vi) The conduct of the Senqu Municipal Council in failing to adhere to the legal prescripts as indicated above was unlawful and in violation of section 11(d) of the Code of Conduct of Councillors, which provides that a councillor may not except as provided by law encourage or participate in any conduct which would cause or contribute to maladministration in the council; and
  - (vii) The appointment of Mr Venter by the Senqu Municipal Council firstly as a Financial Manager and later as a CFO without the required higher education qualification although initially improper and unlawful, has since been legitimised by his attainment of a Certificate in Municipal Financial Management on 5 June 2014 in accordance with the exemptions issued by the Minister of Finance in terms of Government Notice No. 179.
- (c) **Whether there was undue influence by the CFO in the appointment of his wife by SEBATA, a service provider to the Municipality:**
- (i) The allegation that the CFO unduly influenced the appointment of his wife by SEBATA, a service provider to the Municipality, could not be substantiated.



- (xi) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution is the following:
- (i) The Municipal Manager of the Senqu Municipality must ensure that he concludes a separate performance agreement with the CFO in terms of section 57(1)(b) of the Municipal Systems Act 32 of 2000 within 30 days from the date of this report;
  - (ii) The Senqu Municipal Council must ensure that the position of CFO is advertised in terms of section 56(3) of the Municipal Systems Act 32 of 2000 (as amended) when the current employment contract of Mr Venter terminates; and
  - (iii) The Member of the Executive Council (MEC) for Local Government and Traditional Affairs in the Eastern Cape must investigate the circumstances of the violation of the Municipal Systems Act 32 of 2000 by the Senqu Municipality and the conduct of the officials responsible and take action to ensure that the situation is not repeated.

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**REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR APPOINTMENT AND THE EXTENSION OF THE CHIEF FINANCIAL OFFICER'S EMPLOYMENT CONTRACT BY THE SENQU MUNICIPALITY IN THE EASTERN CAPE AND HIS ALLEGED UNDUE INFLUENCE IN THE APPOINTMENT OF HIS WIFE BY A SERVICE PROVIDER CONTRACTED TO THE MUNICIPALITY**

**1. INTRODUCTION**

- 1.1 "Saved by the Notice" 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 section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to:
- 1.2.1 The Member of the Executive Council (MEC) for Local Government and Traditional Affairs in the Eastern Cape, Mr F Xasa.
- 1.3 The copies of the report are also provided to the following:
- 1.3.1 The Mayor of the Senqu Municipality, Mrs N Mtyali;
- 1.3.2 The Municipal Manager of Senqu Municipality (Municipal Manager), Mr M M Yawa;
- 1.3.3 The Chief Financial Officer (CFO) of the Senqu Municipality, Mr Venter;
- 1.3.4 The Sterkspruit Ratepayers Association, (the Complainants); and
- 1.3.5 The Sterkspruit Civic Association, (the Complainants).
- 1.4 The report relates to an investigation into the alleged irregular appointment of the CFO of Senqu Municipality and his alleged undue influence in the

appointment of his wife by a service provider, SEBATA, engaged by the Municipality.

## **2. THE COMPLAINT**

2.1 The Public Protector was approached by Mr Gungqa of the Sterkspruit Ratepayers Association on 12 June 2012. During Heritage Day Celebrations in Sterkspruit on 27 September 2012, further allegations were brought by the Sterkspruit Civic Association. The Complainants alleged that:

- 2.1.1 The appointment of the CFO, Mr Christopher Rudolph Venter, was irregular as he did not possess the necessary qualifications and skills to fulfil the requirements of the position; and
- 2.1.2 The appointment of Mrs Venter, the CFO's wife was unduly influenced by the CFO and that she was performing the duties of the CFO;

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

- 3.1 The Public Protector is an independent constitutional body established under section 181(1)(b) 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 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 take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

- 3.3 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 and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.4 The Senqu Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.
- 3.5 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

## **4. THE INVESTIGATION**

### **4.1 Methodology**

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to, on his or her own initiative; or on receipt of a complaint or an allegation; or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of the Act, conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.

### **4.2 Approach to the investigation**

- 4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
- 4.2.1.1 What happened?
  - 4.2.1.2 What should have happened?
  - 4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
  - 4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?
- 4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the CFO had the required skills and qualifications, secondly whether or not he was appointed in an irregular manner and whether the CFO had unduly influenced the appointment of his wife to SEBATA, a service provider to the Municipality.
- 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 Department or organ of state to prevent maladministration and prejudice.
- 4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for correcting maladministration and redressing its consequences. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

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

- 4.3.1 Did the Senqu Municipality improperly appoint Mr Venter to the position of CFO without the required qualifications?
- 4.3.2 Did the Senqu Municipality irregularly appoint Mr Venter as the CFO in contravention of the relevant laws?
- 4.3.3 Did the CFO unduly influence the appointment of his wife to SEBATA, a service provider to the Municipality?

**4.4 The Key Sources of information**

**4.4.1 Documents**

- 4.4.1.1 Advertisement for the position of Financial Manager, Senqu Municipality Notice No. 14/2001 posted on the Daily Dispatch Newspaper on 20 October 2001;
- 4.4.1.2 The list of applicants for the position of CFO;
- 4.4.1.3 The shortlist for interviews;
- 4.4.1.4 Minutes of Council meeting on 30 November 2001;
- 4.4.1.5 Employment Contract between the Municipal Manager and the CFO signed on 11 February 2002;
- 4.4.1.6 Employment Contract between the Municipal Manager and the CFO signed on 11 December 2006/7/8;



- 4.4.1.7 Letter from the Municipal Manager to the CFO dated 26 August 2011;
- 4.4.1.8 Letter from the Municipal Manager to the CFO dated 22 November 2011;
- 4.4.1.9 Minutes of Special Council meeting held on 09 January 2012; and
- 4.4.1.10 The agreement between the Senqu Municipality and Sebata dated 28 October 2008.

#### **4.4.2 Interviews conducted**

- 4.4.2.1 Interviews conducted with the complainants on 28 September 2012; and
- 4.4.2.2 Interviews with Ms Charmaine van Schalkwyk on 03 September 2014 following responses received from the Municipal Manager.

#### **4.4.3 Correspondence sent and received**

- 4.4.3.1 Letter to the Mayor of the Senqu Municipality on 15 August 2012;
- 4.4.3.2 Letter received from the Municipal Manager on 28 September 2012, dated 24 August 2012;
- 4.4.3.3 E-mail sent to Dylan Strydom, Managing Director of Sebata (Pty) Ltd on 19 June 2013 requesting information;
- 4.4.3.4 Response from Dylan Strydom received on 21 June 2013; and

4.4.3.5 Response to letter in terms of Section 7(9) of the Public Protector Act by the Municipal Manager of Senqu Municipality, Mr Yawa.

#### **4.4.4 Legislation and other prescripts**

4.4.4.1 Municipal Systems Act 32 of 2000;

4.4.4.2 Municipal Systems Amendment Act 7 of 2011;

4.4.4.3 Guideline for Municipal Competency Levels: Chief Financial Officers dated 1 July 2007 - Municipal Regulations on Minimum Competency Levels issued in terms of the Local Government: Municipal Finance Management Act 56 of 2003;

4.4.4.4 Government Notice No. 179 issued by the Minister of Finance on 14 March 2014;  
and

4.4.4.5 The Public Protector Act 23 of 1994.

### **5. STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH**

**5.1 Whether the Senqu Municipality improperly appointed Mr Venter to the position of CFO without the required qualifications:**

5.1.1 Whether the CFO met the minimum requirements for appointment in 2002 and 2007

5.1.1.1 The requirements for the appointment of managers who are directly accountable to the municipal manager during the 2002 and 2007 appointment of Mr Venter were regulated by the Municipal Systems Act 32 of 2000 before it was amended in 2011.

5.1.1.2 Section 56(b) of the Municipal Systems Act 32 of 2000 provided that:

*"A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the post in question....."*

5.1.1.3 The advertisement for the position of Financial Manager in 2001 as per Senqu Municipality Notice No. 14/2001 specifically stated the following key criteria to be met for appointment:

- (i) *"Appropriate tertiary qualification (M+3);*
- (ii) *Registration as a municipal Accountant and at least 5 years Managerial experience in financial management or unless the candidate can show competencies obtained through extensive experience;*
- (iii) *Preferably a member of IMFO;*
- (iv) *Working knowledge of computerised Financial Management System;*
- (v) *Sound knowledge of current legislation affecting municipalities;*
- (vi) *Code B Driver's licence;*
- (vii) *Ability to formulate and introduce initiatives aimed at improving the financial affairs of the Town;*
- (viii) *Ability to formulate and introduce initiatives related to budgetary control; and*
- (ix) *Some knowledge of traffic, law enforcement and related practices and legislation."*

5.1.2 Whether the CFO met the minimum requirements for appointment in 2012.

5.1.2.1 The requirements for the appointment of Managers who are directly accountable to the Municipal Manager when the CFO was appointed in 2012 is regulated by the Municipal Systems Act 32 of 2000 as amended by the Municipal Systems Amendment Act 7 of 2011 which came into operation on 5 July 2011, and the Municipal Regulations on Minimum Competency Levels, 2007 issued in terms of section 168 of the Municipal Finance Management Act 56 of 2003.

5.1.2.2 Section 56(1)(b) of the Municipal System Act 32 of 2000 (as amended) provides that :

*"A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as prescribed."* (Own emphasis)

5.1.2.3 Regulation 5 of the Municipal Regulations on Minimum Competency Levels issued in terms of section 168 of the Municipal Finance Management Act 56 of 2003 provides that:

*"The chief financial officer of a municipality or municipal entity must comply with the minimum competency levels required for higher education qualification, working related experience, core managerial and occupational competencies and be competent in the unit standards prescribed for financial and supply chain management competency areas....."*

5.1.2.4 The required higher education qualification in terms of regulation 5 referred to above is at least NQF Level 6 in fields of Accounting, Finance or Economics or Certificate in Municipal Financial Management (SAQA Qualification ID No. 48965). Regulation 5 further provides that the incumbent must have a minimum of 5 years work-related experience at middle management level.

- 5.1.2.5 The above required higher education qualifications are also reiterated in the Guideline for Municipal Competency Levels: Chief Financial Officers dated 1 July 2007 contained in the Municipal Regulations on Minimum Competency Levels referred to above. The Guideline further provides that a chief financial officer must have or attain by 1 January 2013 a higher education qualification referred to above.
- 5.1.2.6 In terms of the above Guideline, "NQF" refers to the National Qualification Framework prescribed by regulations issued in terms of the South African Qualifications Authority Act 58 of 1995. The equivalent of NQF level 6 in terms of the South African Qualifications Authority is first (under-graduate) three-year degrees and higher diplomas.
- 5.1.2.7 Regulation 15 provides among others that regulation 5 does not affect the continued employment and conditions of employment of a financial official or supply chain management official appointed by a municipality or municipal entity before 1 July 2007, provided that such official attains the required higher education qualification and the required minimum competency level in the required unit standards for each competency area within a maximum period of five years from 1 January 2008. The maximum period of five years from 1 January 2008 lapsed on 1 January 2013.
- 5.1.2.8 It then follows that a CFO who does not meet the minimum requirements as set out in the Regulations referred to above and who was appointed before 1 July 2007, is obliged to have attained the required higher education qualification by 1 January 2013.
- 5.1.2.9 Regulation 18(1) provides that no municipality or municipal entity may, with effect from 1 January 2013, employ a person as a financial official or supply chain management official if that person does not meet the competency levels prescribed for the relevant position in terms of these Regulations.

- 5.1.2.10 However, regulation 18(2) provides that a municipality or municipal entity may before 1 January 2013 employ a person that does not meet the competency levels prescribed for the relevant position, provided that such official's continued employment is subject to a condition that the official attains the required higher education qualification and the required minimum competency level in the required unit standards for each competency area on or before 1 January 2013.
- 5.1.2.11 It also follows that a CFO who does not meet the minimum requirements as set out in the Regulations referred to above and who was appointed before 1 January 2013, is obliged to have attained the required higher education qualification by 1 January 2013.
- 5.1.2.12 However, it is noted that the Minister of Finance issued a Government Notice No. 179 on 14 March 2014 in terms of the Municipal Finance Management Act 56 of 2003 which provides for exemption from regulations 15 and regulation 18 of the Municipal Regulations on Minimum Competency Levels, 2007.
- 5.1.2.13 The effect of Government Notice No. 179 is that it exempt municipalities and municipal entities from strict compliance with regulations 15 and 18 by suspending compliance therewith for the period 1 April 2014 to 30 September 2015.
- 5.1.2.14 In the case of a financial official or supply chain management official as indicated in regulation 15, the required qualification and competency levels should be attained by 30 September 2015. This condition must be included in the personal development plan, which forms part of the performance agreement of the official, if such agreement and plan is required.
- 5.1.2.15 In the case of a financial official or supply chain management official as indicated in regulation 18(1) the required qualification and competency levels must be



attained within 12 months from the date of appointment. This condition must be included in the employment contract by stipulating that if the required qualification and competency levels are not attained within 12 months after appointment, the official's employment will terminate automatically within one month after the end of the 12 month period. The condition must also be included in the personal development plan, which forms part of the performance agreement of the official, if such agreement and plan are required.

**5.2 Whether the Senqu Municipality irregularly appointed Mr Venter as the CFO in contravention of the relevant laws:**

**5.2.1 Whether the appointment of the CFO in 2002 and 2007 was irregular**

5.2.1.1 The issue regarding the manner in which managers who are directly accountable to the Municipal Manager were appointed was regulated by the Municipal Systems Act 32 of 2000 during the 2002 and 2007 appointments.

5.2.1.2 Section 56(a) of the Municipal Systems Act 32 of 2000 provides that:

*"a municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager."*

5.2.1.3 Section 57(1) Municipal Systems Act 32 of 2000 further provides that:

*"a person appointed as a manager directly accountable to the manager, may be appointed to that position only –*

*(a) in terms of a written employment contract with the municipality complying with the provisions of this section.*

*(b) Subject to a separate performance agreement concluded annually as provided for in subsection (2)."*

- 5.2.1.4 The period within which the performance agreement of the manager directly accountable to the municipal manager should be concluded is regulated by section 57(2) of the Municipal Systems Act 32 of 2000, which provides that the performance agreement must be concluded within a reasonable time after a person has been appointed as a manager directly accountable to the municipal manager and thereafter within one month after the beginning of the financial year of the municipality.
- 5.2.1.5 Section 57(4) of the Municipal Systems Act 32 of 2000 provides that the performance agreement of a manager directly accountable to the municipal manager must include the following:
- “(a) performance objectives and targets that must be met, and the time frames within which those performance objectives and targets must be met;*
  - (b) standards and procedures for evaluating performance and intervals for evaluation; and*
  - (c) the consequences of substandard performance.”*
- 5.2.1.6 Section 57(5) of the Municipal Systems Act 32 of 2000 further provides that the performance objectives and targets referred to in subsection (4) must be practical, measurable and based on the key performance indicators set out from time to time in the municipality's integrated development plan.
- 5.2.2 Whether the appointment of the CFO in 2012 was irregular
- 5.2.2.1 The issue regarding the manner in which Managers who are directly accountable to the Municipal Manager were appointed was regulated by the Municipal Systems Act 32 of 2000 as amended by the Municipal Systems Act 7 of 2011 during the 2012 appointment.

5.2.2.2 Section 56(1)(a) of the Municipal Systems Act 32 of 2000 (as amended) provides that :

*"A municipal council, after consultation with the municipal manager, must appoint-*

- (i) a manager directly accountable to the municipal manager; or*
- (ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed."*

5.2.2.3 Section 56(3) of the Municipal Systems Act 32 of 2000 (as amended) provides that if a post referred to in subsection (1)(a)(i) becomes vacant, the municipal council must –

- "(a) advertise the post nationally to attract a pool of candidates nationwide; and*
- (b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post..."*

5.2.2.4 Section 56(6) of the Municipal Systems Act 32 of 2000 (as amended) provides that a municipality may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (1)(b) if it is unable to attract suitable candidates.

5.2.3 Whether the Municipality acted improperly by renewing the contract of employment of the CFO in 2007 and 2012

5.2.3.1 The issue whether the Municipality acted within the ambit of the law by renewing Mr Venter's contract of employment in 2007 is regulated by section 57(6)(c) of the Municipal Systems Act 32 of 2000, which provides that the employment

contract for a municipal manager must stipulate the terms of the renewal of the employment contract, but only by agreement between the parties.

- 5.2.3.2 Section 57(7) of the Municipal Systems Act 32 of 2000 (before deletion or repeal) further provided that a municipality may extend the application of subsection (6) to any manager directly accountable to the municipal manager. The implication of section 57(7) is that the employment contract of Mr Venter was capable of being renewed in terms of section 57(6)(c) in 2007.
- 5.2.3.3 However, in 2011 section 57(7) of the Municipal Systems Act 32 of 2000 was deleted or repealed by section 6(1)(f) of the Municipal Systems Amendment Act 7 of 2011 which came into effect on 5 July 2011. Therefore section 57(6) read with subsection (7) did not apply to the renewal of Mr Venter's employment contract in 2012. By implication the Municipal Systems Amendment Act 7 of 2011 did not make provision for the renewal of Mr Venter's employment contract in 2012 or any manager directly accountable to the municipal manager.
- 5.2.4 Regarding the conduct of the Senqu Council in renewing the employment contract of the CFO in 2007 and 2012
- 5.2.4.1 The conduct of the Senqu Councillors in relation to this issue is regulated by section 11(d) of the Code of Conduct of Councillors, which provides that a councillor may not except as provided by law encourage or participate in any conduct which would cause or contribute to maladministration in the council.
- 5.3 Whether there was undue influence by the CFO in the appointment of his wife by SEBATA, service provider to the Municipality:**
- 5.3.1 The issue regarding the appointment of the CFO's wife by SEBATA is regulated by Schedule 2 of the Municipal Systems Act 32 of 2000.

5.3.2 Article 4(1) states that a staff member of a Municipality may not:

*"take a decision on behalf of the municipality concerning a matter in which that staff member, or that staff member's spouse, partner or business associate, has a direct or indirect personal or private business interest."*

## **6 EVIDENCE AND INFORMATION OBTAINED**

### **6.1 Whether the Senqu Municipality improperly appointed Mr Venter to the position of CFO without the required qualifications:**

6.1.1 It is common cause that the CFO did not have the required tertiary qualifications when he was appointed in 2002. The Municipality further conceded in its letter of response to the Public Protector dated 24 August 2012 that Mr Venter did not have a tertiary qualification. However, the Municipality contended that Mr Venter had *"a wealth of experience in the field of municipal finance and under him the municipality had obtained clean audit reports"*.

6.1.2 An inspection of the records and a copy of the advertisement for the position of Financial Manager received from the Municipality's Human Resources division, indicated that the following key criteria had to be met by the applicants to be appointed to the position:

6.1.2.1 Appropriate tertiary qualification (M+3);

6.1.2.3 Registered as a Municipal Accountant and at least 5 years managerial experience in financial management or unless the candidate could show competencies obtained through extensive experience.

6.1.2.4 Preferably a member of IMFO.

- 6.1.2.5 Working knowledge of computerised Financial Management System.
- 6.1.2.6 Sound knowledge of current legislation affecting municipalities.
- 6.1.2.7 Code B Driver's licence.
- 6.1.2.8 Ability to formulate and introduce initiatives aimed at improving the financial affairs of the Town.
- 6.1.2.9 Ability to formulate and introduce initiatives related to budgetary control.
- 6.1.2.10 Some knowledge of traffic, law enforcement and related practices and legislation.
- 6.1.3 It is noted that in the same advertisement of the Financial Manager, there is a preceding advertisement of Corporate Support Services Manager/Admin/Human Resources Manager. In its key criteria it listed a requirement of a relevant tertiary qualification or diploma (M+3) or unless the candidate can show competencies obtained through experience.
- 6.1.4 A perusal of the section 3 relating to qualifications in Mr Venter's application for employment indicated that he had passed standard 10 in 1981 and the sub-section relating to additional qualifications was crossed out as an indication that he did not have any additional qualifications.
- 6.1.5 In an effort to verify whether Mr Venter was a member of the Institute of Municipal Finance Officers (IMFO) in accordance with the key criteria for the position, my office established during an interview with the official(s) from the IMFO that Mr Venter was registered as a member in April 2004 and was given membership number V2368. It is noted that the registration took place two years after his appointment to the position.



- 6.1.5.1 It then follows that at the time of his appointment in 2002, Mr Venter was not a member of the IMFO.
- 6.1.6 A perusal of the section 3 relating to qualifications in Mr Venter's application for employment further revealed that he had indicated that he was registered with the Board for Municipal Accountants – EO 535. However, in an effort to verify whether Mr Venter was registered with the Board for Municipal Accountants as indicated, my office established that the Board for Municipal Accountants had been dissolved and therefore no record of his membership could be found.
- 6.1.6.1 I have no reason to doubt the *bona fides* of Mr Venter's alleged membership of the Board of Municipal Accountants at the time of his appointment in 2002 as indicated by him in his application for employment with the Senqu Municipality in the absence of any records to the contrary.
- 6.1.7 A perusal of the Municipality's shortlisting matrix and the records of the shortlisting committee indicated that Mr Venter had 12 years experience in the financial field. However, it is not indicated whether that experience constituted managerial experience in financial management. Nonetheless 12 years experience indicated that Mr Venter could show competencies obtained through extensive experience.
- 6.1.8 A further perusal of Mr Venter's application for employment with the Senqu Municipality revealed that he indicated that he has a driver's licence.
- 6.1.8.1 Again I have no reason to doubt the *bona fides* of Mr Venter's alleged possession of a driver's licence in the absence of any evidence to the contrary.
- 6.1.9 The records received from the Municipality's Human Resources division further indicated that Mr Venter was shortlisted with Mr Hopa, a candidate with B Com and 6 years experience in financial management who withdrew prior to the interviews.

- 6.1.10 It is noted that Item 38 of the copy of minutes of the Municipal Executive Meeting of 30 November 2001, relating to the appointment of Financial Manager, indicates that Mr Venter and Mr Hopa were interviewed by a selection panel established by the Executive Committee for the position of Financial Manager.
- 6.1.11 In his response to my section 7(9) notice in terms of the Public Protector Act, the Municipal Manager, Mr MM Yawa indicated that Mr Venter and Mr Hopa were requested to attend interviews with the selection committee on 29 November 2001. However, Mr Hopa withdrew his application prior to the interview. Mr Yawa further indicated that *"Mr Venter was the only remaining suitable candidate and the selection committee unanimously agreed to nominate him for the position as financial manager."* However, the Municipality could not provide score sheets regarding Mr Venter's interview.
- 6.1.12 In the absence of score sheets in that regard I am unable to determine whether Mr Venter met the other remaining requirements which would have been tested by way of questions and scoring during an interview. The impression created by Mr Yawa's response in this regard is that no actual interview took place except that *"the selection committee unanimously agreed to nominate him for the position as financial manager."*
- 6.1.13 The evidence obtained by my office indicated that at the time of his appointment to the position of Financial Manager in 2002, Mr Venter did not meet all the key criteria set down in the advertisement for the position except for registration as a Municipal Accountant and a driver's licence, despite Mr Yawa's contention in his response to my section 7(9) notice that save for the lack of a tertiary qualification Mr Venter met other requirements.
- 6.1.14 In his response to my section 7(9) notice, the Municipal Manager further stated that the criteria for the appointment of the Financial Manager were prepared by the

Human Resources Consultant, Ms Charmaine van Schalkwyk and that Council did not determine the criteria.

- 6.1.15 In further pursuit of the matter, my office interviewed Ms van Schalkwyk on 03 October 2014, who confirmed that she had prepared the advert on behalf of the Municipality and had been involved in the shortlisting and interviews for the position of the Financial Manager in 2001.
- 6.1.15.1 She further advised that there was a challenge in getting applicants for positions in small towns as most qualified people were not willing to work in these areas.
- 6.1.15.2 She also indicated that they had elected not to re-advertise as the only candidate interviewed had met most of the required skills and competencies; he had been working in the Municipality for a long period of time and, based on the applicants that had applied, most of whom did not meet the requirements, they were not willing to incur further costs.
- 6.1.15.3 Ms van Schalkwyk further advised that at the time of the advertisement there were no regulations pertaining to the requirements for the position of Financial Manager, as currently exist, for the position of Chief Financial Officer.
- 6.1.15.4 She also indicated that the Municipality did not at the time have a policy regarding appointments.
- 6.1.15.5 She further explained that the use of the words or "*unless the candidate could show competencies obtained through extensive experience*" mitigated the lack of tertiary qualification.
- 6.1.15.6 She also advised that she had prepared the submission to the Municipal Council on behalf of the Municipal Manager.

- 6.1.15.7 Ms van Schalkwyk further contended that the discretion on whether to appoint, based on the submission she had prepared on behalf of the Municipal Manager, rested with the Municipal Council.
- 6.1.15.8 The submissions made by Ms van Schalkwyk as indicated above did not detract from the evidence traversed that Mr Venter did not meet all the key criteria when he was appointed Financial Manager in 2002.
- 6.1.15.9 In response to my section 7(9) notice the Municipal Manager submitted a copy of a Statement of Result from the Local Government Sector Education and Training Authority (LGSETA), which indicated that Mr Venter obtained a Certificate in Municipal Financial Management on 5 June 2014.

**6.2 Whether the Senqu Municipality irregularly appointed Mr Venter as the CFO in contravention of the relevant laws:**

**6.2.1 The appointment of Mr Venter as Financial Manager in 2002**

- 6.2.1.1 It has now been established that Mr Venter was appointed without meeting all the key criteria in terms of the advertisement for the position in 2002. It is also common cause that despite Mr Venter not meeting all the key criteria of the position and the withdrawal of Mr Hopa from the interviews, the post was not re-advertised.
- 6.2.1.2 A perusal of the minutes of the Executive Committee Meeting on 30 November 2001 revealed that the selection panel recommended to the Executive Committee that Mr Venter be appointed as CFO.
- 6.2.1.3 The minutes of the Council Meeting on 30 November 2001 stated as follows:

**"1. INTRODUCTION:**

On the 29<sup>th</sup> November 2001 the following candidates were interviewed by a selection panel established by the Executive Committee for the position of Financial Manager.

Mr C Venter

Mr L S Hopa

The selection panel decided that Mr C Venter, who is currently the Acting Financial Manager of Senqu Municipality and has **over 12 years' experience in the financial field** [sic]. He has further held position as Treasurer for Jamestown Municipality and Barkly East Municipality. Mr Venter is registered with the Board for Municipal Accountants and has **further completed short courses in financial accounting.**

The remunerations, terms and conditions of the appointment to be further negotiated by the Human Resources Representative, with the assistance of the Municipal Manager. The post further be attached to a five year performance based fixed term contract.

## **2. RECOMMENDATION:**

Mr Venter be appointed as Financial Manager with effect from 1 January 2002, and the the Human Resources Representative, draw up the necessary contract, job description and performance agreement.

## **3. RESOLVED**

That the recommendation from the selection panel **BE APPROVED.**"

6.2.1.4 Although the minutes referred to above indicated that two candidates were interviewed by the selection panel, in his response to my section 7(9) notice, the

Municipal Manager indicated that it was incorrectly stated that Mr Hopa was interviewed. He further attributed the alleged mistake to Ms van Schalkwyk and contended that there was no intention to mislead the Executive Committee in any way whatsoever. He further contended that the majority of the members of the Executive Committee were also members of the selection panel that conducted the interview and as such they were aware of the actual facts.

- 6.2.1.5 However, if indeed it was a mistake by Ms van Schalkwyk, it is not clear why the majority of the members of the selection panel did not correct the mistake as they were aware of the facts as alleged.
- 6.2.1.6 It is also common cause that a contract was signed between Mr MM Yawa, the Municipal Manager and Mr Venter on 11 February 2002 effective from 1 February 2002 to 31 January 2008. However, no performance agreement was signed between the Municipal Manager and Mr Venter.
- 6.2.1.7 In his response to my section 7(9) notice, the Municipal Manager indicated that the duration of the contract signed between him and Mr Venter was for 5 years instead of 6 years as indicated in the contract. It is noted that according to the copy of the contract was indicated that it was effective from 1 February 2002 to 31 January 2008. The Municipal Manager contended that there was a typographical error as the duration should have been captured as 1 February 2002 to 31 January 2007.
- 6.2.1.8 The Municipal Manager further contended that the Executive Committee of the Municipality accepted the recommendation for the appointment of Mr Venter as Financial Manager and that it was furthermore approved by the Council. It is noted that except for a copy of the minutes of the Executive Committee of 30 November 2001 regarding the appointment of the Financial Manager, no minutes of the full Council approving the resolution of the Executive Committee was provided as proof that the full Council approved the appointment.



- 6.2.1.9 In relation to the failure to conclude a performance agreement with Mr Venter, the Municipal Manager contended that the employment contract concluded with Mr Venter on 11 February 2002 expressly provided in clause 8 thereof for the performance appraisal of Mr Venter substantively in compliance with the requirements of section 57(1)(b) of the Municipal Systems Act 32 of 2000.
- 6.2.1.10 A perusal of clause 8 of the contract concluded between the Municipality and Mr Venter revealed that paragraph 8.1 thereof provided that from commencement of his appointment, Mr Venter would be evaluated in terms of his Performance Agreement and Key Performance Indicators. The rest of clause 8 indicated the timeframes within which he would be evaluated, when the performance agreement would be reviewed and what procedures would be undertaken in the case where his performance was not satisfactory.
- 6.2.1.11 It is noted that clause 8 itself did not provide for any Key Performance Indicators referred to in paragraph 8.1. Clause 8 did not even indicate what deliverables were expected from Mr Venter as it would be the case in a standard performance agreement.
- 6.2.1.12 It then follows that clause 8 could not be regarded as a Performance Agreement as contended by the Municipal Manager. Accordingly, clause 8 did not constitute a performance agreement. However, whether clause 8 complied with the requirements of section 57(1)(b) of the Municipal Systems Act 32 of 2000 as contended by the Municipal Manager is a question of law and will be resolved later when measuring conduct against the rules or the applicable legal framework.
- 6.2.2 The first renewal of Mr Venter's contract in 2007

- 6.2.2.1 It is common cause that the position of Financial Manager was not advertised when Mr Venter's contract terminated in 2007. It is also common cause that a fixed term contract of employment for the period commencing 1 February 2007 to 31 January 2012, was entered into between Mr Venter and Mr Yawa on or about 14 December 2006.
- 6.2.2.2 No Council resolution authorising the renewal of the contract could be found during the investigation. However, in his response to my section 7(9) notice the Municipal Manager contended that the Council decided to renew Mr Venter's contract of employment, as it was entitled to do prior to its expiry and further that there was no statutory obligation on the Municipality to advertise the position at the time. The issue whether there was no statutory obligation on the Municipality to advertise the position is a question of law and will be later resolved when measuring conduct against the rules.
- 6.2.2.3 It is also common cause that a contract containing the Conditions of Service was also signed between Mr Yawa and Mr Venter. However, the evidence obtained indicated that there was no separate performance agreement signed between Mr Venter and the Municipality.
- 6.2.2.4 In his response to my section 7(9) notice, the Municipal Manager contended that the contract referred to above contained performance appraisal provision in clause 10 thereof substantively in compliance with the requirements of section 57(1)(b) of the Municipal Systems Act 32 of 2000. Whether such clause was in compliance with section 57(1)(b) of the Municipal Systems Act 32 of 2000, is a question of law and will also be resolved later when measuring conduct against the rules.
- 6.2.2.5 The Municipality responded in a letter dated 24 August 2012 that a request had been sent to the MEC for Local Government and Traditional Affairs motivating for the continuation of the contract with Mr Venter.

6.2.2.6 The Municipality allegedly had not received a response from the MEC and had not specified when such request had been made.

6.2.3 The second renewal of Mr Venter's contract

6.2.3.1 It is common cause that on 26 August 2011 the Municipal Manager advised Mr Venter in writing that his contract of employment would terminate on 31 January 2012 and reminded him of the terms of his contract pertaining to the extension thereof.

6.2.3.2 It is also common cause that on 22 November 2011 the Municipal Manager again wrote to Mr Venter and advised him of the clauses of his employment agreement. He also stated that:

*"The ex gratia ("the ex gratia clauses") were included into contracts and intended to operate on the basis that the municipality had the legal right to (by way of proper Council resolution) extend the fixed term contracts of senior managers as part of its managerial prerogative.*

*However, after contracts were concluded with the ex gratia clauses, the Local Government: Municipal Systems Amendment Act, 2001 became effective on 5 July 2011.*

*As a consequence of the Systems Amendment Act, Council no longer has the prerogative to simply agree to renew fixed term contracts of senior managers. The effect of the Systems Amendment Act is that upon the expiry of a fixed term contract of a senior manage [sic], the post can only be refilled after advertising of the position, with the regulated competency levels and such advertising must be done nationally.*

*I therefore wish to inform you that by operation of law, your contract will expire on 31 January 2012. In terms of section 56(3)(a) your post will then become vacant and you are encouraged to apply when the post is duly advertised."*

- 6.2.3.3 It should be noted that at that stage the Municipal Manager was aware of what was required in terms of section 56 of the Municipal Systems Act 32 of 2000 (as amended) with regard to the appointment of the CFO.
- 6.2.3.4 However, in his response to my section 7(9) notice the Municipal Manager contended that the 2007 contract provided a mechanism in clause 2 thereof for the renewal of the contract through negotiation as contemplated by section 57(6)(c) of the Municipal Systems Act, 2000. He further contended that at that time he held the view that the contract was capable of renewal through direct negotiation without advertising the position.
- 6.2.3.5 In further response to my section 7(9) notice the Municipal Manager indicated that the Municipality obtained a legal opinion from its attorneys during October 2011 wherein a contrary view to his was expressed. He indicated that it was on that basis that he wrote the letter dated 22 November 2011 to inform Mr Venter that his position would have to be advertised.
- 6.2.3.6 The Municipal Manager further indicated that the renewal of contracts of section 57 managers was further debated within the municipalities in the district and that the Maletswai Local Municipality obtained a legal opinion which advised that the renewal of a contract of a municipal manager (and by implication the section 57 managers) by council is lawful. However, since the contention whether the provisions in section 57 relating to the renewal of the municipal manager's contract can be extended to the CFO is a question of law, such will be resolved when measuring conduct against the rules.
- 6.2.3.7 The Municipal Manager indicated in his response to my section 7(9) notice that he advised Council per Item 6.2 of 09 January 2012 to advertise the vacant CFO

position. However, the Municipal Manager contended that as there were different opinions on the matter the Council exercised its discretion and approved the renewal of Mr Venter's contract without advertising the position. The Municipal Manager further contended that the decision taken by the Councillors in this regard was not in conflict with the provisions of the Code of Conduct for Councillors as alleged.

- 6.2.3.8 The Municipal Manager further contended that subsequent to the Council having renewed the contract of Mr Venter, the South African Local Government Association (SALGA) issued a Circular 14/2012 dated 28 May 2012 wherein it advised municipalities that where a contract provides for a renewal by agreement the position would not become vacant upon expiry of the contract and need not be advertised. However, any reliance on the said SALGA Circular is misconstrued as it could never have been intended to apply retrospectively. Furthermore a Circular could never have been intended to supersede legislation in that regard. In any event the argument postulated by the Municipal Manager in this regard was specifically intended to apply to the renewal of the employment contracts of municipal managers and not contracts of managers directly accountable to the municipal manager. Therefore the Municipal Manager's contention in his response to my section 7(9) notice that the position adopted by the Council on 09 January 2012 was accordingly in line with the position of SALGA is untenable.
- 6.2.3.9 It is common cause that a special Council Meeting was held on 09 January 2012 the purpose of which was to discuss the implications of the Municipal Systems Amendment Act 7 of 2011 on the renewal of the employment contract of the Chief Financial Officer, "which would be ending on 31 January 2012[sic]."
- 6.2.3.10 It is also common cause that during the meeting the Municipal Manager recommended to Council that the contract of the CFO be renewed for three months and the position be advertised in the national and local newspapers. He

further advised that the incumbent CFO would be free to apply when the post was advertised.

6.2.3.11 The Council, however, resolved against the Municipal Manager's advice and elected to renew the contract of the CFO for 5 years operational from 1 February 2012 to 31 January 2018. It is not clear why the Senqu Municipality would rely on a legal opinion obtained by another municipality on the same issue and ignore the one it obtained.

6.2.3.12 It is noted that when the request for documents was made to the Municipality in February 2013, there was no record of an agreement or performance agreement in the possession of the Municipality.

**6.3 Whether there was undue influence by the CFO in the appointment of his wife by SEBATA, service provider to the Municipality:**

6.3.1 The evidence discovered during the investigation revealed that the contract between SEBATA and the Municipality was entered into on 28 October 2008 for the installation and maintenance of a financial management system.

6.3.2 The correspondence received from Mr Dylan Strydom, Managing Director of SEBATA stated that Mrs Venter was a consultant and not an employee of SEBATA.

6.3.3 The evidence further revealed that when SEBATA acquired the business Mrs Venter had already been with the company for over ten years.

6.3.4 It was also discovered that Mrs Venter spent a small portion of her time at the Senqu Municipality but mostly worked with other municipalities.



6.3.5 Therefore my office could not find any other evidence which could substantiate the allegation that there was undue influence by the CFO in the appointment of his wife by SEBATA.

## 7. MEASURING CONDUCT AGAINST THE RULES

### 7.1 Whether the Senqu Municipality improperly appointed Mr Venter to the position of CFO without the required qualifications:

#### 7.1.1 Whether Mr Venter met the minimum requirements to be appointed as the Financial Manager in 2002 and 2007

7.1.1.1 It has been established in the evidence that Mr Venter did not possess an appropriate tertiary qualification as required by the advertisement for the position.

7.1.1.2 In terms section 56(b) of the Municipal Systems Act 32 of 2000 which was applicable at the time, a person appointed as a manager directly accountable to the municipal manager must have the relevant skills and expertise to perform the duties associated with the post in question. The advertisement for the position further provided that the incumbent must have specific skills including an appropriate tertiary qualification.

7.1.1.3 It then follows that Mr Venter did not qualify to be appointed to the position of Financial Manager as he did not have an appropriate tertiary qualification as prescribed in the advertisement for the position.

7.1.1.4 The argument by Ms van Schalkwyk that the use of the expression "*or unless the candidate can show competencies obtained through extensive experience*" in the advertisement for the position justified the appointment is misconstrued as this expression is linked to the requirement that the candidate should be registered as a Municipal Accountant and at least 5 years managerial experience in financial



management. In terms of the advertisement for the position the requirement of registration as a Municipal Accountant and at least 5 years managerial experience in financial management or "*unless the candidate could show competencies obtained through extensive experience*", did not seek to replace the requirement of an appropriate tertiary qualification as it was not presented as an alternative to that requirement. In essence it was an alternative to the requirement of at least 5 years managerial experience in financial management.

- 7.1.1.5 The argument postulated by Ms van Schalkwyk would have been applicable in the position of Corporate Support Services Manager/Admin/Human Resources Manager, which was advertised in the same notice as the position of Financial Manager where it was expressly stated under the key criteria that the requirement was a relevant tertiary qualification or diploma (M+3) or unless the candidate can show competencies obtained through experience. In that case it was clear that a diploma or competencies obtained through experience would have been considered as an alternative to a tertiary qualification. However, in the case of a Financial Manager, competencies obtained through experience were not prescribed as an alternative to a tertiary qualification. Similarly the reasons advanced by Ms van Schalkwyk for failing to re-advertise the position stands to be rejected since the Municipal Systems Act 32 of 2000 did not make provision for exceptions prior to amendment.
- 7.1.1.6 If the expression "*or unless the candidate can show competencies obtained through extensive experience*" was presented as an alternative to the requirement of three year tertiary qualification, more people who could show competencies obtained through extensive experience but who were without the appropriate tertiary qualifications would have applied for the position.
- 7.1.1.7 The argument by the Municipal Manager that Mr Venter met the other requirements by virtue of his experience in the Municipality and that under him the Municipality had obtained clean audit reports did not detract from the fact that he

did not possess an appropriate tertiary qualification which was a key requirement to be appointed to the position.

7.1.1.8 The argument by the Municipal Manager that there was no policy in place stating the minimum criteria for the position cannot be sustained since that criteria was specified in the advertisement for the position.

7.1.1.9 It is beyond doubt that Mr Venter was appointed without meeting all the requirements set out in the advertisement for the position and as such the appointment was in contravention of section of section 56(b) of the Municipal Systems Act 32 of 2000 and the requirements set in the advertisement for the position.

7.1.2 Whether Mr Venter met the minimum requirements to be appointed to the position of CFO in 2012

7.1.2.1 Section 56(1)(b) of the Municipal Systems Act 32 of 2000 (as amended), which was applicable when Mr Venter was appointed as CFO in 2012 provides that a person appointed a manager directly accountable to the municipal manager must at least have the skills, expertise, competencies and qualifications prescribed.

7.1.2.2 The qualifications for appointment of Chief Financial Officers are prescribed in the Guidelines for Municipal Competency Levels dated 1 July 2007 contained in the Municipal Regulations on Minimum Competency Levels issued in terms of the Municipal Finance Management Act 56 of 2003. In terms of the aforesaid Guidelines read with regulation 5 of the aforesaid Regulations, the incumbent must at least have an NQF level 6 or Certificate in Municipal Financial Management (SAQA qualification ID No. 48965). The equivalent of NQF level 6 in terms of the South African Qualifications Authority is first (under-graduate) three-year degrees and higher diplomas.

- 7.1.2.3 The evidence traversed revealed that Mr Venter did not have a tertiary qualification equivalent to an NQF level 6 or a Certificate in Municipal Financial Management as required by the Guidelines for Municipal Competency Levels referred to above.
- 7.1.2.4 It then follows that Mr Venter did not have the minimum requirements to be appointed CFO when his contract of employment was renewed in 2012.
- 7.1.2.5 It is noted that regulation 15 of the Municipal Regulations on Minimum Competency Levels stipulates that regulation 5 does not affect the continued employment and conditions of employment of a CFO appointed by a municipality before 1 July 2007, provided that the CFO attains the required higher education and the required minimum competency level in the required unit standards for each competency area by 1 January 2013.
- 7.1.2.6 The evidence of a copy of a Statement of Result issued by LGSETA indicated that Mr Venter attained a Certificate in Municipal Financial Management, which is the equivalent of NQF Level 6, on 5 June 2014 which was outside the cut-off date of 1 January 2013 in terms of the Municipal Regulations on Minimum Competency Levels.
- 7.1.2.7 It then follows that as at 1 January 2013, Mr Venter's continued employment as CFO was unlawful.
- 7.1.2.8 However, the continued employment of Mr Venter as a CFO without the required higher education qualification was legitimised from 1 April 2014 by the exemption from regulations 15 and 18 of the Municipal Regulations on Minimum Competency Levels, 2007 issued by the Minister of Finance in terms of Government Notice No. 179 dated 14 March 2014.
- 7.1.2.9 It is noted that Mr Venter has now complied with regulation 5 by having attained the required higher education qualification on 5 June 2014 before the cut-off date of 30 September 2015 set down in Government Notice No. 179.

7.1.2.10 Therefore his appointment as CFO has been legitimised retrospectively.

## **7.2 Whether the Senqu Municipality irregularly appointed Mr Venter as the CFO in contravention of the relevant laws:**

### **7.2.1 Whether the appointment of Mr Venter as the Financial Manager in 2002 and 2007 was irregular**

- 7.2.1.1 Section 56(a) of the Municipal Systems Act 32 of 2000 requires that a municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.
- 7.2.1.2 The minutes of the Executive Committee meeting on 30 November 2001 shows that the Executive Committee resolved "*that the recommendation from the selection panel be approved*". The recommendation of the selection panel was that Mr Venter be appointed as Financial Manager with effect from 1 January 2002.
- 7.2.1.3 The appointment of Mr Venter as Financial Manager by the Municipal Manager in 2001 was duly authorised by the Council of the Senqu Municipality in terms of Item 38 of the Executive Committee meeting of 30 November 2001.
- 7.2.1.4 Notwithstanding that the appointment by the Council was done in consultation with or with the knowledge of the Municipal Manager as required by section 56(a) of the Municipal Systems Act 32 of 2000, the appointment was irregular in that Mr Venter did not meet the minimum requirements prescribed in the advertisement for the position to be appointed as Financial Manager in 2001.
- 7.2.1.5 Section 57(7) of the Municipal Systems Act 32 of 2000 provides that a municipality may extend the application of subsection (6) relating to the renewal of the employment contracts by agreement between the parties to any manager directly

accountable to the municipal manager. The Municipal Manager contended in his response to my section 7(9) notice that the Council decided to renew Mr Venter's contract of employment as it was entitled to do prior to its expiry and further that there was no statutory obligation on the Municipality to advertise the position at the time.

7.2.1.6 Although the Municipal Manager was correct in asserting that the Council was entitled to renew Mr Venter's contract of employment within the provisions of section 57(7), such renewal was improper considering that the initial appointment of Mr Venter was irregular by virtue of the fact that he did not meet the minimum requirements prescribed in the advertisement for the position to be appointed as Financial Manager in 2001. Had Mr Venter been appointed properly in 2002, then the renewal of his contract within the ambit of section 57 in 2007 would have been perfectly legitimate.

7.2.1.7 It then follows that the subsequent renewal of Mr Venter's employment contract although done within the ambit of section 57(7) could not have cured the initial irregular appointment for want of proper qualifications.

## 7.2.2 Whether the appointment of Mr Venter as the CFO in 2012 was irregular

7.2.2.1 Section 56(1)(a)(i) of the Municipal Systems Act 32 of 2000 (as amended) which was applicable when the appointment was made in 2012 provides that a municipal council, after consultation with the municipal manager, must appoint a manager directly accountable to the municipal manager.

7.2.2.2 It has been established in the evidence obtained that the Municipal Manager advised Mr Venter on 26 August 2011 and 22 November 2011 in writing that his contract of employment would terminate on 31 January 2012. It has also been established that the Municipal Manager advised the Council on 09 January 2012 to advertise the vacant position of CFO.

- 7.2.2.3 It has also been established in the evidence obtained that despite the Municipal Manager's advice to the Council to advertise the position of the CFO and the legal opinion obtained in that regard, the Council approved the renewal of Mr Venter's employment contract without advertising the position.
- 7.2.2.4 The conduct of the Council in this regard was in violation of section 56(3) of the Municipal Systems Act 32 of 2000 (as amended), which provides that if a post of a manager directly accountable to the municipal manager becomes vacant, the municipal council must advertise the post nationally to attract a pool of candidates nationwide and select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.
- 7.2.2.5 The language used in section 56(3) referred to above is peremptory and therefore the Municipal Manager's contention in his response to my section 7(9) notice that the Council exercised its discretion and approved the renewal of Mr Venter's employment contract without advertising the position is misconstrued.
- 7.2.2.6 Similarly the Municipal Manager's contention that Mr Venter's 2007 employment contract provided a mechanism in clause 2 thereof for renewal through negotiation as contemplated by section 57(6)(c) of the Municipal Systems Act 32 of 2000 is also misconstrued in that at the time when Mr Venter's contract of employment was renewed in 2012, section 57(6)(c) of the Municipal Systems Act 32 of 2000 only applied to municipal managers. Section 57(7) of the Municipal Systems Act 32 of 2000 which extended the application of section 57(6)(c) to any manager directly accountable to the municipal manager was deleted or repealed by section 6(1)(f) of the Municipal Systems Amendment Act 7 of 2011 which came to effect on 5 July 2011.



- 7.2.2.7 It then follows that reliance on clause 2 referred to by the Municipal Manager in renewing Mr Venter's employment contract was in contravention of the Municipal Systems Act 32 of 2000 (as amended) and accordingly null and void.
- 7.2.2.8 It is noted that section 6(2) of the Municipal Systems Amendment Act 7 of 2011 provides that the deletion of section 57(7) of the principal Act does not affect the continuation or validity of a fixed-term employment contract of a manager directly accountable to the municipal manager which is in force when the Amendment Act takes effect. However, such guarantee cannot be extended to an employment contract of a manager directly accountable to the municipal manager which was renewed in 2012, since such a contract is regarded as a new contract from the date when it was renewed.
- 7.2.2.9 It then follows that at the expiry of Mr Venter's contract of employment of 2007 in 2011, the provisions of the Municipal Systems Amendment Act 7 of 2011 became applicable to any subsequent appointment of the incumbent to the post of CFO. Therefore, the provisions of section 56(1)(b) of the Municipal Systems Act 32 of 2000 (as amended), which required that a person appointed as a manager directly accountable to the municipal manager must at least have the skills, expertise, competencies and qualifications prescribed also became applicable.
- 7.2.2.10 The conduct of the Council in renewing the employment contract of Mr Venter as CFO in 2012 was also in contravention of section 11(d) of the Code of Conduct of Councillors which provides that a councillor may not except as provided by law encourage or participate in any conduct which would cause or contribute to maladministration in the council.
- 7.2.3 Regarding the alleged failure by the Senqu Municipality to conclude performance agreements with Mr Venter at the time of his appointment in 2002 and at the subsequent renewal of his employment contract in 2007 and 2012



- 7.2.3.1 Section 57(1)(b) of the Municipal Systems Act 32 of 2000 was applicable at the time of Mr Venter's initial appointment in 2002 and the subsequent renewal of his employment contract in 2007. Section 57(1)(b) provides that a person to be appointed as the municipal manager of a municipality, and a person to be appointed as manager directly accountable to the municipal manager, may be appointed to that position only subject to a separate performance agreement concluded annually as provided for in subsection (2).
- 7.2.3.2 Subsection (2)(a) provided that the performance agreement referred to in subsection (1)(b) must be concluded within a reasonable time after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager, and thereafter, within one month after the beginning of the financial year of the municipality. (Subsection (2)(a) was subsequently amended by section 6(1)(a) of the Municipal Systems Amendment Act 7 of 2011)
- 7.2.3.3 Subsection (4) provides that the performance agreement referred to in subsection (1)(b) must include the following:
- “(a) performance objectives and targets that must be met, and the time frames within which those performance objectives and targets must be met;*
  - (a) standards and procedures for evaluating performance and intervals for evaluation; and*
  - (b) the consequences of substandard performance.”*
- 7.2.3.4 Subsection (5) further provides that the performance objectives and targets referred to in subsection (4)(a) must be practical, measurable and based on the key performance indicators set out from time to time in the municipality's integrated development plan.
- 7.2.3.5 It has been established in the evidence obtained that when the Municipal Manager signed a contract of employment with Mr Venter in 2002, no separate

performance agreement was concluded as required by section 57(1)(b) of the Municipal Systems Act 32 of 2000.

- 7.2.3.6 The Municipal Manager's contention that the employment contract concluded with Mr Venter on 11 February 2002 expressly provided in clause 8 thereof for the performance appraisal of Mr Venter substantively in compliance with the requirements of section 57(1)(b) of the Municipal Systems Act 32 of 2000 is misconstrued. Section 57(1)(b) specifically provides for a separate performance agreement not a clause in the employment contract.
- 7.2.3.7 Clause 8 referred to by the Municipal Manager did not make provisions for the requirements of performance objectives and targets listed in section 57(4) as indicated above. The fact that there was no separate performance agreement concluded with Mr Venter as required by section 57(1)(b) is sufficient to conclude that the municipality acted improperly.
- 7.2.3.8 Similarly no separate performance agreement was concluded when Mr Venter's employment contract was renewed in 2007. The Municipal Manager's contention that the 2007 contract contained performance appraisal provision in clause 10 thereof fell short of the standard required by section 57(1)(b). The Municipal Manager did not contend that any performance agreement was concluded in 2012 when Mr Venter's employment contract was renewed for the second time. It is safe to conclude that no such performance agreement in compliance with section 57(1)(b) was concluded.
- 7.2.3.9 It then follows that the failure by the Municipality to conclude performance agreements with Mr Venter for the periods stipulated was improper.
- 7.3 Whether there was any undue influence by the CFO in the appointment of his wife to SEBATA:**

- 7.3.1 The investigation revealed that contract between SEBATA and the Municipality was entered into on 28 October 2008 for the provision of a Financial Management System as well as maintenance thereof.
- 7.3.2 The investigation further revealed that Mrs Venter was a consultant of SEBATA not an employee and had been engaged as such for a period exceeding ten (10) years prior to the contract being entered into.
- 7.3.3 As a consultant, Mrs Venter was responsible for the maintenance of the system provided by SEBATA.
- 7.3.4 According to the response from SEBATA, Mrs Venter spent a small portion of her time in the Senqu Municipality but mostly consulted in other municipalities.
- 7.3.5 Therefore, my office could not find any evidence to substantiate the allegation that there was undue influence by the CFO in the appointment of his wife by SEBATA.

## 8. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

- 8.1 Whether the Senqu Municipality improperly appointed Mr Venter to the position of CFO without the required qualifications:**
- 8.1.1 The allegation that Mr Venter did not have the required qualifications to be appointed to the position of CFO at the time when he was appointed has been substantiated;
- 8.1.2 Mr Venter only passed Standard 10 in 1981 and did not possess the appropriate tertiary qualification as required by the advertisement for the position of Financial Manager when he was appointed in 2002;

- 8.1.3 Mr Venter had not acquired the appropriate tertiary qualification for the position of CFO when his contract of employment was renewed by the Senqu Municipality in 2007;
- 8.1.4 Mr Venter had also not acquired the appropriate NQF level 6 tertiary qualification prescribed by the Guideline for Municipal Competency Levels for the position of CFO when his contract of employment was renewed by the Senqu Municipality in 2012
- 8.1.5 The appointment of Mr Venter to the position of Financial Manager by the Senqu Municipality in 2002 without the required qualifications and the renewal of his employment contract in 2007 and 2012 without the required qualifications constituted improper conduct as envisaged in section 182(1) of the Constitution, and maladministration as envisaged in section 6 of the Public Protector Act; and
- 8.1.6 However, Mr Venter has since obtained the required higher education qualification of a Certificate in Municipal Financial Management on 5 June 2014.
- 8.2 Whether the Senqu Municipality irregularly appointed Mr Venter as the CFO in contravention of the relevant laws:**
- 8.2.1 The allegation that the Senqu Municipality irregularly appointed Mr Venter as CFO was substantiated;
- 8.2.2 The Senqu Municipality failed to comply with the requirements of its own advertisement for the position of Financial Manager when it appointed Mr Venter in 2002 and such failure constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act;

- 8.2.3 The Senqu Municipality failed to conclude separate performance agreements with Mr Venter when he was appointed Financial Manager in 2002 and when his contract of employment as CFO was renewed in 2007 and 2012;
- 8.2.3.1 Such failure was in violation of section 57(1)(b) of the Municipal System Act 32 of 2000 and constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act;
- 8.2.4 The Senqu Municipality failed to advertise the position of CFO when it became vacant in 2007, when it renewed the employment contract of Mr Venter as CFO;
- 8.2.4.1 Although the Senqu Municipality did not have a statutory obligation to advertise the position of CFO at that time, best practice dictates that the position should have been advertised more so because the incumbent did not possess the required qualifications when the contract was renewed;
- 8.2.5 The Senqu Municipality failed to advertise the position of CFO when it became vacant in 2012, when it renewed the employment contract of Mr Venter as CFO;
- 8.2.5.1 Such failure was in violation of section 56(3) of the Municipal Systems Act 32 of 2000 (as amended) and constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act;
- 8.2.6 The conduct of the Senqu Municipal Council in failing to adhere to the legal prescripts as indicated above was unlawful and in violation of section 11(d) of the Code of Conduct of Councillors, which provides that a councillor may not except as provided by law encourage or participate in any conduct which would cause or contribute to maladministration in the council.

8.2.7 The appointment of Mr Venter by the Senqu Municipal Council firstly as a Financial Manager and later as a CFO without the required higher education qualification although initially improper and unlawful, has since been legitimised by his attainment of a Certificate in Municipal Financial Management on 5 June 2014 in accordance with the exemptions issued by the Minister of Finance in terms of Government Notice No. 179.

**8.3 Whether there was undue influence by the CFO in the appointment of his wife by SEBATA, a service provider to the Municipality:**

8.3.1 The allegation that the CFO unduly influenced the appointment of his wife by SEBATA, a service provider to the Municipality, could not be substantiated.

**9. REMEDIAL ACTION**

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

- 9.1 The Municipal Manager of the Senqu Municipality must ensure that he concludes a separate performance agreement with the CFO in terms of section 57(1)(b) of the Municipal Systems Act 32 of 2000 within 30 days from the date of this report;
- 9.2 The Senqu Municipal Council must ensure that the position of CFO is advertised in terms of section 56(3) of the Municipal Systems Act 32 of 2000 (as amended) when the current employment contract of Mr Venter terminates;
- 9.3 The Member of the Executive Council (MEC) for Local Government and Traditional Affairs in the Eastern Cape must investigate the circumstances of the violation of the Municipal Systems Act 32 of 2000 by the Senqu Municipality and the conduct of the officials responsible and take action to ensure that the situation is not repeated.

## 10. MONITORING

- 10.1 The Public Protector requires an implementation report from the MEC for Local Government and Traditional Affairs indicating the steps taken and procedures that have been put in place in line with the remedial action at paragraph 9.3 above within 60 days from the date of this report.
- 10.2 The Municipal Manager of the Senqu Municipality must submit an implementation report regarding the remedial action taken at paragraph 9.1 within 14 days from the date of the lapse of the 30 days specified therein.



**ADV T N MADONSELA**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**

DATE: 05 / 12 / 2014

*Assisted by: Ms Siphokazi Jika – Investigator*  
*Eastern Cape Provincial Office of the PPSA*