AN EGG-SKULL SITUATION

Report on an investigation into allegations of negligence by the City of Ekurhuleni which allegedly resulted in prejudice to Mr. Malahlela

Report No: 17 of 2012/13
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Executive Summary

(i) The investigation relates to a complaint received by the Public Protector on 1 August 2012 from Mr MV Malahiela (the Complainant). He alleges that the Ekurhuleni Metropolitan Municipality (Municipality) damaged his house through negligence during the repair of a damaged 20mm water pipe outside his yard. Further, that the negligence resulted in the damage of a 300mm bulk water pipe which released water that caused damage to his house and the sinking of portions thereof. The Municipality has directed him to vacate his house without offering him alternative accommodation. He harbours a real apprehension that his house may collapse at any time with the Complainant and his family still inside.

(ii) In response to the Public Protector’s investigation, the Municipality denied any legal liability for the damages to Complainant or that the bursting of the 300mm water pipe outside Complainant’s house was a causa sine qua non for the damage to his house. It nonetheless, in full and final settlement of Complainant’s claim, as well as reserving its rights, offered to rehabilitate the hazard in Complainant’s land and repair his house. Work in that regard began on 15 October 2012. In addition, it offered him an amount equal to eight weeks’ rental in lieu of alternative accommodation whilst it undertakes the work.

(iii) On or about 1 October 2012, the Complainant vacated his home and concluded a 12 (twelve) months lease agreement for temporary accommodation with a certain Mr Visagie (Landlord).

(iv) The Public Protector’s finding is that:
The bursting of or damage to the 300mm water pipe was occasioned by the negligence of the Municipality. The damage caused by the Municipality to the 300mm water pipe is a *causa sine qua non* (a fact without which) the house of the Complainant would not have been damaged. Complainant has, on a balance of probabilities, succeeded in proving his case. In any event the Municipality had a duty to ensure that no construction takes place on dolomitic land – which obligation it did not fulfill.

(iv) The following remedial actions is to be taken:

(a) The Complainant will submit to the Municipality, the bill of his monthly rent seven days before the end of each month.

(b) The Municipality must, until the matter is resolved on or before the first day of each subsequent month, settle the Complainant's rental bill directly with the Landlord or refund to Complainant his paid monthly rent upon proof thereof. In addition thereto and within seven days of this report, the Municipality shall refund to the Complainant all monies he has expended to acquire his temporary accommodation (including the R9, 400.00 he paid to the Landlord for that purpose on or about 1 October 2012).

(c) The Municipality shall be liable to pay all cancellation fees or penalties relating to the early cancellation of the lease agreement between the Complainant and the Landlord.

(d) The Matter shall be considered resolved once both Complainant's house and the land upon which it is built have been (whichever is applicable) repaired, rehabilitated or rebuilt; or the Municipality has provided the Complainant, at no cost to him, a house of substantially
similar size or value. At the end of either or all the processes the house and land must, at the cost to the Municipality, have been certified safe and habitable by experts seconded, appointed or nominated by the Engineering Council of South Africa (ECSA) who shall issue a certificate therefor.

(e) The Municipality must ensure that the rehabilitation and repair processes it has undertaken relative to the house and the land in question, at its own expense, are completed without undue delay.

(f) The Municipality can only issue a municipal Occupational Certificate once the land and house in question have been certified safe and habitable by experts seconded, appointed or nominated by ECSA and a certificate therefor has been issued. The refusal to certify the land and the house safe habitable by ECSA experts shall be conclusive on the subject.

(g) In the event that the experts seconded, appointed or nominated by ECSA refuse to certify the land and house in question as safe and habitable, the Municipality shall be obliged to remedy the defects on the land or in the house, as the case may be, until the experts issue the said certificate; or the Municipality provides Complainant, at no cost to him, a house of substantially similar size or value.

(h) The Municipality is advised to tender its written apology to the Complainant for the inconvenience he suffered as a result of its actions within fourteen days of this report.

(i) The Municipality must take proactive measures and adopt policies designed to cater for occurrences of the nature that has befallen the Complainant.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF NEGLIGENCE BY THE CITY OF EKURHULENI WHICH ALLEGEDLY RESULTED IN PREJUDICE TO MR MALAHLELA

INTRODUCTION

1.1 "An Egg-Skull Situation" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 This report is submitted to:

1.2.1 The Mayor of the Ekurhuleni Metropolitan Municipality (the Municipality);
1.2.2 The City Manager of the Municipality; and
1.2.3 Mr MV Malahlela (the Complainant).

1.3 The report relates to an investigation into the allegations of negligence by the Municipality which allegedly resulted in damage to and sinking of a portion of house number 16463 Mabuya Street, Vosloorus.

2. THE COMPLAINT

2.1 The Complainant approached the Public Protector on 1 August 2012 with the following allegations:

2.1.1 At the time which the Municipality were repairing the damaged 20mm water pipe, they were negligent in that they failed to exercise the requisite degree of care;
2.1.2 The Municipality's negligence resulted in damage to his house and the sinking of portions thereof;

2.1.3 Despite the fact that Complainant holds the Municipality liable for the damages he suffered, the Municipality has directed him to vacate his house without offering him alternative accommodation; and

2.1.4 There is a real apprehension that the house may collapse at any time with Complainant and his family inside.

3. BACKGROUND

3.1 The Complainant, the owner of the house situated on stand number 16463 Mabuya Street, Vosloorus, alleges that on one Friday morning in the month of September (possibly the 16th September 2011), he woke up to a house without water. Later that day in the afternoon, he reported same to the Municipality only to be told that employees of the Municipality do not work on a weekend unless that weekend falls on a month end. He only successfully logged his complaint with the Municipality on the subsequent Monday morning.

3.2 The Complainant further alleges that when the Municipality came to investigate what the problem could be, it was only then that it was discovered that there was approximately a 3m diameter by 5m depth sinkhole below the land surface that had damaged the 20mm water pipe that supplied water to his house. It was at the time thought that the water leak caused the subsequent erosion of dolomite residuum and the formation of a 3m diameter sinkhole.

3.3 The Municipality took a decision to repair the leaking pipe. During their repair of the 20mm pipe, a 300mm bulk water pipe was inadvertently
damaged by the (TLB) machinery that was used, resulting in high pressure water in large volume gushing out right in front of his house. A larger sewerage pipe was allegedly also accidentally damaged and it was spitting its contents into the sinkhole.

3.4 The damaged pipes were subsequently repaired but, the sinkhole was left uncovered for a period of nine weeks. It was only once the Complainant reported the matter and got same to be published by the Daily Sun, a daily tabloid, that the Municipality covered the sinkhole with some topsoil.

3.5 In the period towards the end of 2011 he began to notice the development of large cracks to and the sudden sinking of portions of his house. In due course the house progressively started to disintegrate with portions of it starting to fall off – making the house particularly unsafe.

3.6 The Complainant reported his observations to the Municipality. The Municipality denied liability and left the Complainant to his own devices.

3.7 On 25 July 2012 the Municipality served the Complainant with a notice\(^1\) to vacate the house on the basis that same was not safe to occupy. The Municipality offered no alternative accommodation to the Complainant and his family of four (Complainant; his wife and daughter; and his younger brother).

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\(^1\) In terms of section 12 of the National Building Regulations and Building Standards Act, 1977
4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

4.1 The Public Protector South Africa – the object of which is to strengthen constitutional democracy in the Republic - is an institution established in terms of section 181 of the Constitution, 1996 and regulated in terms of the Public Protector Act, 1994.

4.2 In terms of section 182 of the Constitution, 1996,

(1) 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 an impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action”

4.3 Any conduct by the Municipality that is alleged or suspected to be improper or result in any impropriety or prejudice is within the jurisdiction of the Public Protector to investigate.

5. THE INVESTIGATION

5.1 The investigation was conducted in terms of Section 7 of the Public Protector Act, 1994. The investigation is comprised of:

5.1.1 Correspondence and telephonic communication between the Public Protector South Africa and the Municipality; and
5.1.2 Correspondence and telephonic communication between the Public Protector South Africa and Complainant.

5.1.3 Consideration of the following legislation and legal prescripts:

5.1.3.1 The Constitution of the Republic of South Africa Act, 1996;
5.1.3.2 The Public Protector Act, 1994; and
5.1.3.3 The National Building Regulations and Building Standards Act, 1977.

5.1.4 Research conducted on the legal concept of 'egg-skull cases'.

5.2 **Issues to be considered by the Public Protector**

The following legal issues were matters for the Public Protector's consideration:

5.2.1 Whether or not the conduct of the Municipality caused the damage to the Complainant’s house and if so, whether this constitutes maladministration as envisaged in the Public Protector Act, 1994;

5.2.2 Does the fact that the Complainant's house was built on dolomitic land (and would in any way due to some or other future event have sunk) absolve the Municipality of its legal liability towards the Complainant;

5.2.3 Whether or not the Municipality's subsequent conduct further amounted to maladministration as envisaged in the Public Protector Act, 1994. If the conduct of the Municipality constitutes maladministration, whether or not the Complainant suffered prejudice as envisaged in the Public Protector Act, 1994; and
5.2.4 What it would take to place the Complainant as close as possible to a position he would have been but for the Municipality's conduct.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Information received from Complainant

6.1.1 Sometime in September 2011 (possibly on the 16th September 2011), the Complainant reported to the Municipality that water supply to his house had inexplicably came to an abrupt halt. He wanted the Municipality to restore his water supply. The Municipality visited his home to investigate.

6.1.2 Upon investigation on 20 September 2012, the Municipality discovered that underground, right on the boundary of his yard, a 20mm water pipe had been disconnected.

6.1.3 It was discovered during the investigation of the area by the Municipality, that there was a 3m by 5m sinkhole below the land surface.

6.1.4 A TLB was brought to the scene to excavate the area around which the 20mm pipe dislocation was located with the object of repairing the disconnected pipe.

6.1.5 During the excavation process, the TLB accidentally struck the 300mm bulk water pipe and damaged it. That resulted in the bulk water pipe releasing huge volumes which caused sub-surface erosion and
possibly the formation of cavity at depth\textsuperscript{2}. It took some considerable time to stop the water and fix that pipe.

6.1.6 After some time, the Complainant - whose house is built on dolomitic land, started to notice cracks, to his house. Then a portion of his house started to sink culminating with the condition of his house progressively deteriorating to a point where he started to harbour a real apprehension that his house may collapse with his family inside.

6.1.7 The Complainant reported the observed damages to his house and held the Municipality liable. The Municipality denied all liability for the damage to the Complainant’s his house.

6.1.8 In July 2012 the Municipality, citing safety reasons, served the Complainant with a notice to vacate his house. It refused to provide Complainant with alternative housing.

6.1.9 When the Public Protector investigated, the Municipality denied any legal liability to the Complainant but, nonetheless offered to:

6.1.9.1 Rehabilitate the hazard in the area of the Complainant’ stand, in order to prevent the current hazard causing more damage to the Municipality and private property;

6.1.9.2 Accept its obligation to provide alternative accommodation whilst it rehabilitate the dolomitic hazard and the Complainant’s house; and

6.1.9.3 A 24 square metre shack to be erected close to the Complainant’s house as the only temporary accommodation available at short notice

\textsuperscript{2} VGIconslt report to the City of Ekurhuleni dated 22 September 2012 at p 1 par 3
allegedly being the standard alternative accommodation that the Municipality provides to all residents;

6.1.9.4 Fearing for his safety and that of his family, on or about 1 October 2012, the Complainant vacated his home and concluded a 12 (twelve) months lease agreement for temporary accommodation with a certain Mr Visagie (Landlord). He paid an upfront amount of R9, 400.00 (nine thousand and four hundred Rand) made up as R5, 000.00 (five thousand Rand) deposit and a R4, 400.00 (four thousand and four hundred Rand) monthly rent for October, respectively.

6.2 Information Received From the Municipality:

Upon receipt of the complaint above, the Public Protector approached the Municipality for a response to the Complainant’s allegations. The Municipality responded\(^3\) to the Public Protector as follows:

6.2.1 It denied any legal liability for the prejudice (damages) suffered by Complaint whatsoever but, it nonetheless offered the following:

6.2.1.1 “... rehabilitate the hazard in the area of stand 16463, Marimaba, Vosloorus’ ... ‘in order to prevent the current hazard causing more damage to Council and private property’;

6.2.1.2 “Council accepts the obligation to provide alternative accommodation whilst we rehabilitate the dolomitic hazard and the house on the premises of the owner.’ ‘... reconfirmed with the Human Settlement Department that the only temporary accommodation available at this short notice is the standard alternative accommodation that we provide

\(^3\) Report dated 22 August 2012 and email of 23 August 2012
to all resident in emergencies (a 24 square meter shack) to be erected close to the house in a safe area"; and

6.2.1.3 "In addition an undertaking was given to repair the house of the Malahlelas".

6.3 An Analysis of Documentation Received:

The assessment of the correspondence from Complainant and that from the Municipality revealed the following:

6.3.1 Complainant’s house was built on dolomitic land;

6.3.2 An approximately 3m diameter by 5m sinkhole in depth below the ground surface occurred outside the boundary of stands number 16463 and 16464 Mabuya Street, Vosloorus, sometime during the month of September 2011;

6.3.3 Due to the development of the sinkhole, a 20mm water pipe supplying water to Complaint’s house was disconnected;

6.3.4 When the Municipality was excavating the area around the disconnected water pipe with the TLB in an attempt to reconnect same and thus restore water supply to Complainant’s house, the machine accidentally hit and damaged the 300mm water pipe. Astonishingly what appears to be the moment of impact was captured on camera4;

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4 Photographs contained in a report by VGiconsult dated 22 September 2011
6.3.5 It is also common cause that the damaged 300mm water pipe released large amounts of water into the ground for a considerable amount of time.

6.3.6 What appears to be in dispute is what caused the damage to the pipe in question. The Municipality contends that same was caused by the development of a sinkhole relative to dolomitic land in the area. Assuming that to be correct, the Municipality argues, the seismic activity is an act of God for which it cannot be held responsible.

6.3.7 Complainant attributes the cracking, sinking of the portion and progressive deterioration of his house directly to the large volume of water that was released into the ground right on the boundary of his yard when the 300mm water pipe burst. His version that large volumes of water had accumulated where a sinkhole developed is corroborated by VGIconsult's report. The 300mm bulk water pipe burst when the Municipality was repairing the disconnected 20mm water pipe. In his view, the water that was sucked up into the dolomitic land caused his house to develop some cracks and ultimately portions thereof sank.

6.4 Consulting Engineering, Geologists and Engineers Report:

6.4.1 The Municipality commissioned a geologist\(^5\) report from a consulting, engineering, geologists and engineers concern named and styled VGIconsult, on the formation of a sinkhole that took place outside Complainant's house.

6.4.2 VGIconsult, consequent to a site inspection conducted on 20 September 2011, noted and observed the following:

\(^5\) VGIconsult report to the City of Ekurhuleni dated 22 September 2012
"According to the available geological information, the area is underlain by dolomite and chert of the Malmani sub-group, Chuniespoort group of the Transvaal super-group.

A 3m diameter size sinkhole extending to a depth of approximately 5m below ground surface on the South-Eastern boundary to stand 16463 and stand 16464;

A cracked and leaking 300mm diameter uPVC EMM water line located at a depth of approximately 1,5m within the area of the sinkhole;
A 110mm diameter uPVC sewer line at a depth of approximately 2m below ground surface within the area of the sinkhole;

A 20mm diameter PVC internal waterline running perpendicular to the water and sewer line at a depth of less than 1m;
Water originating from the 300mm diameter broken water line disappearing in a Northerly direction at base of sinkhole".

6.4.3 VGIconsult went on to say:

“A leak on the 20mm diameter PVC internal water line originally caused sub-surface erosion of dolomite residuum material at depth and consequent displacement and failure of 300mm uPVCEMM waterline and the formation of a 3m diameter size sinkhole at ground surface’ and that ‘Large volumes of water from the displaced 300mm diameter EMM waterline entered the sub-surface via a 1m diameter soil erosion tunnel towards North, causing further sub-surface erosion and possibly the cavity at depth. The 110mm diameter sewer line located at depth of 2m is also at risk to fail if the area is not stabilized immediately. All leaks on waterlines were repaired immediately by the Water Department of Vosloorus and the area barricaded".
6.4.4 It concludes its report with the following statement:

'Ekurhuleni Metropolitan Municipality will be responsible for any damages caused by the sinkhole\(^6\).''

7. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED

The following observations were made from the investigation:

7.1 It is common cause that Complainant's house is built on dolomitic land. All parties (VGIconsult, Complainant and Municipality) readily admitted that fact;

7.2 It is also common cause that on or about 20 September 2012 some ground incident occurred – which incident- resulted in the development of subsurface 3m by 5m deep sinkhole on the boundary of stands number 16463 and 16464 Mabuya Street, Vosloorus.

7.3 According to VGIconsult, large volumes of water from the displaced 300mm diameter water line entered the sub-surface via a 1m diameter soil erosion tunnel towards the North, causing further sub-surface erosion and possibly the formation of a cavity at depth\(^7\). Thus it has not been disputed that due to a burst or damaged 300mm water pipe, some large volume of water was released and accumulated into the ground.

7.4 There is no indication from the Municipality that any attempt was made to extract the large volumes of water that had accumulated into the

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\(^6\) VGIconsult report to the City of Ekurhuleni dated 22 September 2012 at p 2 par 4

\(^7\) VGIconsult report to the City of Ekurhuleni dated 22 September 2012 at p 1 par 3
sub-surface. In the absence of such indication by the Municipality, it must be accepted that all of it was simply allowed to disappear into the ground.

8. LEGAL AND REGULATORY FRAMEWORK

8.1 The Constitution, 1996

8.1.1 Section 26 provides:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

8.1.2 Decoding the meaning of the word ‘adequate’ in the context of this constitutional provision will help determine the content of the right in question. Adequate is an adjective denoting ‘satisfactory or acceptable in quality and quantity’\(^8\). Accordingly the right to housing can only truly be realised when the housing provided is adequate if same is acceptable in quality and quantity. In this instance quantity refers to the size of the housing provided.

\(^8\) Compact Oxford Online English Dictionary
8.2 The National Building Regulations and Building Standards Act, 1977

Section 12 of this Act provides:

(1) If the local authority in question is of the opinion that-
(a) any building is dilapidated or in a state of disrepair or shows signs thereof;

(b) any building or the land on which a building was or is being or is to be erected or any earthwork is dangerous or is showing signs of becoming dangerous to life or property, it may by notice in writing, served by post or delivered, order the owner of such building, land or earthwork, within the period specified in such notice to demolish such building or to alter or secure it in such manner that it will no longer be dilapidated or in a state of disrepair or show signs thereof or be dangerous or show signs of becoming dangerous to life or property or to alter or secure such land or earthwork in such manner that it will no longer be dangerous or show signs of becoming dangerous to life or property. Provided that if such local authority is of the opinion that the condition of any building, land or earthwork is such that steps should forthwith be taken to protect life or property, it may take such steps without serving or delivering such notice on or to the owner of such building, land or earthwork and may recover the costs of such steps from such owner.

8.2.1 The provision above does not detract from the fact that no person shall without the prior written approval of the Municipality, erect any building\(^9\). Thus it was the duty of the Municipality to ensure that

\(^9\) Section 4(1) of the National Buildings Regulations and Building Standards Act, 1977
Complainant builds his house on solid and safe ground. Furthermore, the Municipality had in any event approved the erection of the house in question. It should not have done so if it considered that the building in question would probably or in fact be dangerous to life or property\(^\text{10}\).

8.3 **EGG-SKULL RULE (TALEM QUAM RULE)**

8.3.1 The so-called *egg-skull* doctrine\(^\text{11}\) is a legal construct that explains a case where the complainant, due to some or other condition suffers more harm or damage as a result of the wrongdoer's conduct than would have been the case if the complainant did not suffer from such condition. This rule is expressed thus: "You *must take your victim as you find him*. His precarious condition prior to the wrongdoer's conduct has no bearing on the determination legal liability of the wrongdoer or the determination of quantum of damages.

8.3.2 Applying the *talem quam rule* to the facts of this case, the state of the Complainant's house prior to the bursting of the 300mm water pipe can be likened to an egg-skull in that it was built on dolomitic land. Dolomitic land is notorious for its unpredictability, sometimes with deadly and destructive results. However, fragile an egg-skull it may have been, and despite the constant threat that it could have been sunken by some sudden future event, the truth of the matter is that prior to the bursting of the 300mm water pipe, Complainant's house was stable and-solidly intact.

8.3.3 The fact that a house built on rock solid ground would not have been damaged had the same quantity of water been released in its vicinity or around its perimeter wall is of no consequence. Nor can the

\(^{10}\) Section 7(1)(b)(i)(bb) of the National Buildings Regulations and Building Standards Act, 1977

\(^{11}\) Neethling *et al* Law of Delict, 5th edition Lexisnexis 2006 191
Municipality insist on the apportionment of damages between the parties as there has been no contributory negligence by Complainant. Thus true to the talem quam rule, the Municipality must take its victim (Complainant) as it found him.

9. RESPONSE TO THE PUBLIC PROTECTOR'S PROVISIONAL REPORT

9.1 Section 7(9) of the Public Protector Act, 1994, provides:

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances”.

9.2 The Public Protector therefore resolved to issue a provisional report on the investigation to the Mayor of Ekurhuleni Metropolitan Municipality; the City Manager of the Ekurhuleni Metropolitan Municipality; and the Complainant. The Provisional Report was distributed as a confidential document in order to provide the recipients thereof an opportunity to respond to its contents.

9.3 The Ekurhuleni Metropolitan Municipality responded, in a letter dated 31 October 2012 which letter was received on 15 November 2012, under the hand of Adv Motsapi Moeketsi (Head of Department: Corporate Legal Services). The material aspects of the response are the following:
9.3.1 There is no scientific proof or evidence that the damage to Complainant’s house was caused by the Municipality due to the bursting of the 300mm water pipe or that the bursting of the 300mm water pipe is the *causa sine qua non* to the damage to Complainant’s house. Furthermore, the existence of a ‘sinkhole cavity’ as mentioned in par 7.4 of the Provisional Report; and the occurrence of a ‘seismic activity’ as reported at par 5.2.2 thereof; have both not been proven. Such allegations will need to be scientifically proven by a competent person. In addition, the failure to extract water from the affected area should be understood in the context that such an action is not recommended in dolomitic areas.

9.3.2 The Complainant’s house is privately owned and bonded by Standard Bank. Standard Bank provides insurance on buildings for damage. The legal process to be followed relative to Complainant’s matter would be for the bank to appoint an engineer to investigate the cause and extent of the damage. Based on the engineer’s finding, the insurer will make a decision to or not to repair the house. If the engineer’s report determines that the damage was caused by a third party, a claim will, in that event, be made against such third party. That process would, at the Complainant’s cost, typically involve expert scientific (dolomite) investigation methods prescribed for dolomitic areas.

9.3.3 The Municipality is willing to undertake rehabilitation works on the property as an aid towards the Complainant and an obligation to ensure that that the property is suitable for human habitation. To that effect, the grouting programme commenced on 15 October 2012 and work will take approximately eight weeks to complete. The improvement of sub-surface conditions on the property by means of grouting is only one element of a detailed risk management process.
Some detail is provided into the nature of the improvement process, viz: "... Risk Management Plan will include the replacement of all internal wet services in accordance with PW344 standards, strict management and precautionary measures of wet services by the home owner and monitoring of the structure over a period of time.'

9.3.4 Regarding repairs to be undertaken on the house, depending on the outcome of the grouting programme, the Municipality will make provision for the placing of micro-piles if required even though same may not be required. All existing internal and external wall and floor cracks will be cleaned out, prepared and refilled. The walls will be painted internally and externally. All internal water and sewer lines will be replaced with HDPE pipes and connected to the municipal system, among other things.

9.3.5 The Municipality is only obliged to provide 'available alternative accommodation'. Same is dependent on the availability of Municipal Resources. The Municipality will pay Complainant a lump sum equal to two months' rent to a structure similar to his house the estimated period of eight weeks rehabilitation work undertaken on the property.

9.3.6 The Municipality's gesture is by no means to be interpreted as an implied acceptance of liability by it but, same is an undertaking the Municipality intends as a full and final settlement of the matter. The Municipality further reserves its rights in terms of possible future actions.
10. CONCLUSION

10.1 On 20 September 2011 the Municipality established that a 20mm diameter water pipe outside the Complainant’s house has been disconnected and as a result thereof his water supply had been disrupted.

10.2 Before the Municipality could set about repairing the disconnected 20mm diameter water pipe – the object of which was to restore water supply to the Complainant’s house – it discovered that there was a sinkhole along the perimeter of the Complainant’s yard. The Municipality had to make use of such heavy machinery as a TLB, to repair the disconnected pipe.

10.3 Whilst still in the process of digging in the vicinity of the dislocated 20mm water pipe in order to repair same, the Municipality inadvertently damaged a 300mm diameter bulk water pipe right on the perimeter of the Complainant’s yard. The Municipality’s conduct was negligent.

10.4 The damage to the 300mm diameter bulk water pipe resulted in large volumes of water entering the subsurface and dissipating into the ground. It took some considerable time before the leaking water from the 300mm diameter water pipe could be stopped and the pipe was repaired.

10.5 According to the available geological information, the land on which the Complainant’s house is built is dolomitic.
10.6 Not long after the incident, the condition of the Complainant’s house started to deteriorate in that it started to develop cracks on an ongoing basis until portions thereof started to sink.

10.7 The causal nexus between what began as a sudden and the ongoing deterioration of the condition of Complainant’s house and the Municipality’s negligence.

10.8 The Municipality was in all probability correct and acted within its powers when it issued the Complainant with a notice to vacate his house on safety considerations but, it erred in not providing him with alternative accommodation. The Municipality further erred when it offered as alternative accommodation a 24 square metre shack to the Complainant when the Public Protector started to investigate the matter.

10.9 Taking the position in which Complainant was prior to the damage that was visited upon his house (the fact that his was a privately owned bonded three bedroom house) and the nature of his right to adequate housing, the Municipality’s offer to Complainant of a 24 square meter shack is not satisfactory in terms of either quality size thereof. Same is therefore inadequate under the circumstances.

11. FINDINGS

The Public Protector’s findings are that:

11.1 The conduct of the Municipality caused the damage to the Complainant’s house. The Municipality’s conduct constitutes maladministration and improper conduct as envisaged in section 182 of the Constitution;
11.2 The fact that the Complainant's house was built on dolomitic land (and would in any way due to some or other future event have sunk) absolve the Municipality of its legal liability towards the Complainant;

11.3 The Municipality's subsequent conduct by refusing to offer the Complainant alternative accommodation and only later offering same in the form of a 24 square meter shack was both improper and inadequate. This conduct too constitutes maladministration and improper conduct as envisaged in section 182 of the Constitution. Due to the maladministration and improper conduct by the Municipality, the Complainant suffered prejudice as envisaged in section 182 of the Constitution.

11.4 What it would take to place the Complainant as close as possible to a position he would have been but for the Municipality's conduct is for the Municipality to immediately provide the Complainant with adequate alternative accommodation while the issue of what is to happen to Complainant's house is investigated.

12. REMEDIAL ACTION:

Remedial action that is to be taken as envisaged by section 182(1)(c) of the Constitution is the following:

12.1 Since he has already arranged his own temporary accommodation, the Complainant will submit to the Municipality, the bill of his monthly rent seven days before the end of each month.

12.2 The Municipality must, until the matter is resolved on or before the first day of each subsequent month, settle the Complainant's rental bill
directly with the Landlord or refund to Complaint his paid monthly rent upon proof thereof. In addition thereto and within seven days of this report, the Municipality shall refund to the Complainant all monies he has expended to acquire his temporary accommodation (including the R9, 400.00 he paid to the Landlord for that purpose on or about 1 October 2012).

12.2.1 The Municipality shall be liable to pay all cancellation fees or penalties relating to the early cancellation of the lease agreement between the Complainant and the Landlord.

12.2.2 The Matter shall be considered resolved once both the Complainant’s house and the land upon which it is built have been (whichever is applicable) repaired, rehabilitated or rebuilt; or the Municipality has provided the Complainant, at no cost to him, a house of substantially similar size or value. At the end of either or all the processes the house and land must, at the cost to the Municipality, have been certified safe and habitable by experts seconded, appointed or nominated by the Engineering Council of South Africa (ECSA) who shall issue a certificate therefor.

12.3 The Municipality must ensure that the rehabilitation and repair processes it has undertaken relative to the house and the land in question, at its own expense, are completed without undue delay.

12.4 The Municipality can only issue a municipal Occupational Certificate once the land and house in question have been certified safe and habitable by experts seconded, appointed or nominated by ECSA and a certificate therefor has been issued. The refusal to certify the land and the house safe habitable by ECSA experts shall be conclusive on the subject.
12.5 In the event that the experts seconded, appointed or nominated by ECSA refuse to certify the land and house in question as safe and habitable, the Municipality shall be obliged to remedy the defects on the land or in the house, as the case may be, until the experts issue the said certificate; or the Municipality provides Complainant, at no cost to him, a house of substantially similar size or value.

12.6 The Municipality is advised to tender a written apology to the Complainant for the inconvenience he suffered as a result of its actions, within fourteen days of this report.

12.7 Vosloorus is reputed to be a dolomitic area, the Municipality must take proactive measures and adopt policies designed to cater for occurrences of the nature that has befallen the Complainant.

13 MONITORING

13.2 The Municipal Manager must within 30 days henceforth, submit to the Public Protector:

13.1.1 An action plan in respect of the remedial action referred to in paragraph 12 above; and

13.1.2 Expert reports and advice upon which the Municipality based its current rehabilitation and repair efforts to the land and the house, respectively.

13.3 Thereafter, a progress report must be submitted to the Public Protector with 60 days from of this report indicating the progress made with the implementation of the remedial action referred to in paragraph 12 above.
13.4 The Public Protector will monitor the progress made in this regard on a quarterly basis.

ADV-TN MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 14/12/2012
Assisted by: Mr JSK Keebine and M Mabaso