
REPORT NO. 21 OF 2009/10

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY THAT RELATE TO THE MOOIFONTEIN ANIMAL POUND IN THE NORTH WEST PROVINCE
# INDEX

**Executive summary**  

1. **INTRODUCTION**  
2. **BACKGROUND**  

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3. **THE COMPLAINT**  
4. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT**  
5. **THE INVESTIGATION**  

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6. **LEGISLATION AND OTHER REFERENCES CONSIDERED**  
7. **REMARKS ABOUT THE PROVISIONS OF THE LEGISLATION AND OTHER REFERENCES CONSIDERED**  

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8. **EVALUATION OF EVIDENCE**  
9. **OBSERVATIONS AND KEY FINDINGS**  
10. **RECOMMENDATIONS**  
11. **CONCLUSION**
Executive summary

(i) The Office of the Public Protector (OPP) investigated a complaint received from the stockowners (the Complainants) in the Kopano Tribal Authority of allegations of improper administration of the Mooifontein Animal Pound (Pound) situated within the Mafikeng Local Municipality’s area of jurisdiction. It was alleged that:

(a) The Complainants approached the office of the Premier in the North West Provincial Government in May 2006 with a memorandum about alleged discrepancies at the Pound but ever since, no relief was forthcoming; and

(b) The Pound is currently operated and administered by one Mr M Phele in his private capacity. He is enriching himself by charging exorbitant fees/retainers for animals impounded.

(ii) From the investigation it was found that:

(a) Albeit the recent published Pound Bill for the North West Province, there is no enabling legislation in the North West Province that regulates, enables, establishes and/or recognises pounds to be operated by private individuals within the Province;

(b) Since the establishment of the new dispensation in 1994 the North West Provincial Legislature has not enacted new, nor amended any existing legislation and this caused a lacuna with regards to the operation of pounds in the North West Province, ultimately resulting in pounds being operated by private individuals;

(c) The acquisition and transfer by Kopano Tribal Authority of the Pound to the current operator raises some concern. The
infrastructure of the pound was established with public funds by the then Department of Agriculture of the former Republic of Bophuthatswana. There is no indication that the present occupier leases nor has bought the property from any government department or institution; and

(d) Although the North West Provincial Department of Agriculture and the Mafikeng Local Municipality have knowledge of the existence of the Pound, there is no indication that it was ever transferred to or taken under control by the Mafikeng Local Municipality.

(iii) Following the above findings it is recommended that:

(a) The North West Provincial Legislature must as a matter of urgency finalise the enactment of a Pounds Act; and

(b) The Municipal Manager of the Mafikeng Local Municipality in conjunction with the Heads of the Departments of Agriculture, Conservation, Environment and Rural Development and the Department of Local Government and Traditional Affairs should in the interim, pending the enactment of the Pounds Act, take urgent steps to address the current administration of the Pound.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY THAT RELATE TO THE MOOIFONTEIN ANIMAL POUND IN THE NORTH WEST PROVINCE

1. INTRODUCTION

1.1 This report is submitted to the Provincial Legislature of the North West Province, the Members of the Executive Council responsible for Agriculture, Conservation, Environment and Rural Development, Local Government and Traditional Affairs and the Municipal Manager of the Mafikeng Local Municipality 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 It relates to an investigation by the Office of the Public Protector (OPP) into allegations of improper administration of the Mooifontein Animal Pound (Pound) situated within the Mafikeng Local Municipality’s area of jurisdiction.

2. BACKGROUND

2.1 Mr Thomas Mhlopheki Balene and Others (the Complainants) are residents and stockowners in the Kopano Tribal Trust Area that falls within the municipal boundary of the Local Municipality of Mafikeng in the North West Province.

2.2 The Pound is situated within the Trust Area, totalling about 15 hectares in size. It was allegedly established and previously administrated by the then Republic of Bophuthatswana’s Department of Agriculture in terms of the (Bophuthatswana) Pounds Act, 1974.
2.3 The Pound allegedly became non-operational after the new dispensation in 1994 and was then unilaterally taken over and administered by the Kopano Tribal Authority. However, due to alleged infrastructural problems faced by the Tribal Authority the Pound was taken over by Mr Phele (the Poundmaster) who is now operating it in his private capacity.

3. THE COMPLAINT

The Complainants approached the OPP on 18 May 2006 and alleged that:

3.1 In May 2006, they approached the office of the Premier of the North West Provincial Government with a memorandum about alleged discrepancies at the Pound but ever since, no relief was forthcoming;

3.2 The Pound is currently operated and administered by the Poundmaster in his private capacity;

3.3 The Poundmaster is apparently enriching himself by charging exorbitant retainers for animals impounded upon their release to legitimate owners, and

3.4 He charges exorbitant fees for alleged damage to property caused by animals impounded without allowing the owners of the livestock to inspect the so-called damage before releasing the animals back to the lawful owners. When queried about the damage or retainer fees payable, his response is always that he is not the one who determines the fines payable, but the people who have brought the livestock to the Pound are the ones who determine compensation fees for damages caused.
4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

4.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution as one of a number of bodies that support constitutional democracy. The operational requirements of the Office of the Public Protector are provided for by the Public Protector Act.

4.2 Section 181(1) of the Constitution provides that the Public Protector has the power

“(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.”

4.3 The matter complained against therefore falls within the jurisdiction of the Public Protector to investigate.

5. THE INVESTIGATION

The investigation was conducted in terms of section 6 and 7 of the Public Protector Act and comprised:

5.1 Telephone and written enquiries to the North West Premier’s Office, North West Provincial Department of Agriculture, Conservation, Environment and Rural Development, and the Poundmaster;
5.2 Formal and informal discussions with officials from the Department of Agriculture's Legal Services, members of the Kopano Tribal Authority, and the Complainants; and

5.3 Consideration of the following legislation:

5.3.1 The Constitution;

5.3.2 Proclamation 110 of 1994;

5.3.3 Pounds Ordinance, 1972;

5.3.4 Pounds Ordinance, 1932; and

5.3.5 (Bophuthatswana) Pounds Act, 1974.

6. LEGISLATION AND OTHER REFERENCES CONSIDERED

6.1 The Constitution

6.1.1 Schedule 5, provides for those “Functional Areas of Exclusive Provincial Competence” and in “Part B” thereof, pounds fall within the competency of the “Local Sphere of Government.”

6.2 Proclamation 110 of 1994 (Gazette no. 15813)

6.2.1 The Proclamation provides for the assignment of laws under section 235(8) of the Constitution of the Republic of South Africa, 1993, to the North West Province and the following laws\(^1\) were duly assigned\(^2\) to the province.

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\(^1\) Pounds Ordinance 13 of 1972 from the former Province of Transvaal, Pounds Ordinance 18 of 1938 from the former province of the Cape of Good Hope and the (Bophuthatswana) Pounds Act, Act 7 of 1974.

\(^2\) With effect from 17 June 1994.
6.3 Legislation from the former provinces of the Transvaal and Cape of Good Hope

6.3.1 Pounds Ordinance, 1972, of the former province of Transvaal.

6.3.1.1 The ordinance does not apply to any pound situated in or on land in the area of a municipality.

6.3.1.2 The establishment, appointment and duties of a poundmaster and disestablishment of a pound established by the Administrator are regulated in Chapter I by Sections 3 -17 of the Ordinance.

6.3.2 Pounds Ordinance, 1938, of the former province of the Cape of Good Hope

6.3.2.1 The ordinance set out the duties, responsibilities and procedures to be followed by a poundmaster under the auspice of a Local Authority.

6.4 (Bophuthatswana) Pounds Act, 1974

The (Bophuthatswana) Pounds Act provides for the following:

6.4.1 Section 2: Establishment of a pound

“(1) the Minister may, subject to the provisions of subsection (2) and (3)

(a) at the request of a tribal authority, establish for such authority one or more pounds to be known as tribal authority pounds;
(b) in any area in which he deems it necessary, with due regard to the needs of the public, establish one or more pounds to be known as government pounds;

(c) at a request of any tribal authority transfer to such authority any government pound situated in the area for which such tribal authority was established;

(d) if he is satisfied that a tribal authority pound is not properly controlled or maintained—

(i) issue such instructions to the tribal authority as he may deemed necessary in relation to the control or maintenance of such pound; or

(ii) by notice in writing direct that such pound be transferred to the Government to become a government pound on a date specified in such notice which shall be at least ninety days after the date of such notice;

(e) at the request of any tribal authority, take over from such tribal authority a tribal authority pound, whereupon such pound shall become a government pound, or abolish such pound;

(f) the establishment or abolition of any pound under subsection (1) shall be by notice in the Official Gazette, with effect from a date specified in such notice which shall be at least ninety days after the date of such notice.”

6.4.2 Section 4: **Appointment of the poundmaster**

“(1) For every pound a poundmaster shall be appointed.
(2) The pound master of the tribal authority pound shall be appointed by the tribal authority concerned and shall be the employee of such tribal authority: Provided that any officer or employee in the government service who performs his official duties in the office of such tribal authority may, with the approval of the Minister of the department in which he is employed, be appointed as poundmaster by such tribal authority.

(3) The Minister shall for every pound, appoint an officer or employee in the government services as poundmaster.

(4) .......

(5) An acting poundmaster and an assistant poundmaster shall exercise all the power and perform all the duties and functions conferred on or assigned to a poundmaster by this Act.”

6.5 Budget Votes delivered by the MEC for Agriculture, Conservation and Environment, in the North West Provincial Legislature

6.5.1 Extract of Budget policy speech on Agriculture, Conservation and Environment presented by MEC, Mandlenkosi Mayisela on 24 May 2007.

“Multi-purpose Livestock Handling Facilities

As an outcome of the Provincial Anti-Stock Theft Forum launched in 2003, the regulation of animal pounds and auctions emerged as an important factor in the security of livestock. In response we commissioned the drafting of a Pounds Bill in order to provide a legislative framework for the establishment of pounds. (own emphasis). This year we intend to proceed with the construction of at least one multipurpose livestock handling facility in each district”.
6.5.2 Extract of Budget vote by Mr Jan Serfontein MEC for Agriculture, Conservation and Environment delivered on 28 May 2008 to the North West Provincial Legislature.

"Anti Stock Theft Programme

This programme was conceptualised after rising levels of livestock theft were recorded in the province. Since its inception, stock theft levels have gradually decreased. **Linked to this programme is the Animal Pounds Bill, which we expect will become law shortly.** (own emphasis)

The Animal Pounds Bill provides in the handling of stray animals, will ensure that not only public safety improves, but that the care and management of animals is seen as a serious responsibility by those who own livestock.

**The bill will provide for the creation of municipal and state pounds, as well as the safe confiscation and subsequent disposal of impounded animals throughout the province.** (own emphasis). The multipurpose livestock handling facilities is one of the sub-programmes of the anti stock theft programme.

Thus far, four sites have been selected in each district. The procurement process for the construction of these facilities is in motion. Given the time delays in selecting the sites as well as the finalisation of the pounds bill, the project was deferred for implementation during 2008/09.

An amount of R4 million has been budgeted for this project this financial year. The facilities will assist to bring markets closer to the farmers and increase their returns"
7. REMARKS ABOUT THE PROVISIONS OF THE LEGISLATION

7.1 Schedule 5 of the Constitution provides that the administration of pounds fall within the competency and jurisdiction of local government. This implies that pounds should be established and administered by local municipalities for each area of their jurisdiction.

7.2 The (Bophuthatswana) Pounds Act, 1974 which was assigned in whole to the North West Province does not provide for the establishment of pounds operated by private individuals.

7.2.1 In terms of the (Bophuthatswana) Pounds Act, 1974 only two categories of pounds can be established which are either a tribal authority pound or a government pound. Both these pounds can only be established or abolished by the Minister by giving a notice in the official gazette.

7.3 Both the Pounds Ordinances of the former provinces of Transvaal and the Cape of Good Hope are silent as to the establishment of privately owned pounds.

8. EVALUATION OF EVIDENCE

8.1 Department of Agriculture

8.1.1 The Head of the Department of Agriculture, Conservation and Tourism Mr M P Mogothe informed the OPP in a letter dated 5 June 2007, *inter alia* that:

"It is general knowledge that, since the advent of the new order, no pounds act or ordinance have been implemented thereby creating a vacuum, which has been exploited by those who still operate pounds in their private capacity."
To this end, this Department does not have any record of a person or persons who have been licensed or authorised to operate a pound, and any document purported to be proof of same, has not been issued by the Department, therefore rendering it invalid at least on the part as Department.

The many complaints raised against Lichtenburg and Mooifontein pounds are noted, but such operations are not recognised by the department and are therefore illegal. This is an exception in cases where members of the S.A.P.S have seized and impounded same, to be used as exhibits in subsequent trials. Any arrangement between the police and a pound operator are private, see section 30(c) of the Criminal Procedure Act 51 of 1977 as amended. In terms of section 25 of the Bophuthatswana Pounds Act No. 7 of 1974 (Chapter 5) ‘No person shall impound or detain for impoundment, the stock of another person except in accordance with the provisions of this Act’.

It therefore follows that any impoundment done not in terms of law, constitutes a criminal offence, and any aggrieved party may lodge such a matter with the police for investigation and prosecution. It further follows that any person who operates an unlawful pound cannot sell any livestock on auction. Such sale will be null and void (possible even stock theft) as he/she did not lawfully posses such livestock. Owners of livestock may therefore sue such person for any damages suffered as a result of such sale.

Hopefully this response will remove any uncertainty that prevailed, and will in future assist concerned parties in soliciting a solution to this impasse.”

8.1.2 During an informal meeting held on 8 August 2007 with officials from the Department of Agriculture, Conservation and Environment the OPP was furthermore informed that:
8.1.2.1 The Pound was established during 1983 by the then Bophuthatswana Government and it remained a government pound until the Department were informed through a “Power of Attorney” during 1994 that pounds are no longer falling within their administration but became the competency of the Department of Local Government and Housing;

8.1.2.2 During the investigation no confirmation about the above allegation could be obtained that the Department of Local Government and Housing is forthwith responsible for the administration of pounds within the province;

8.1.2.3 Mr M Z Makoti, Director: Legislation in the office of the Premier confirmed that he was not aware of any transfer of the administration and responsibilities of pounds from the Department of Agriculture, Conservation and Tourism to the Department of Local Government. He has also indicated that the drafting of a Pounds Bill is nearly completed and that it would be tabled in the Provincial Legislature in due course; and

8.1.2.4 When the Department stopped administrating pounds at the time, a number of pounds collapsed and private individuals took the advantage to operate such pounds without proper provincial or municipal authorisation. In this regard reference was made to the Pound and Lichtenburg pound.

8.2 The Tribal Authority

8.2.1 Members\(^3\) of the Kopano Tribal Authority informed the OPP that after realising that no business was taking place at the Pound and their

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\(^3\) Mr Pine, Chairperson of the Kopano Tribal Authority, Ms Emanuel, Secretary of the Kopano Tribal Authority,
efforts of operating it failed due to capacity problems, they entered into an agreement with the Poundmaster to operate it.

8.2.2 No supporting documents could be supplied to substantiate the above allegation. The Tribal Authority furthermore admitted that it never requested any authority to operate or transfer the pound as a Tribal Pound from any Department.

8.3 The Poundmaster

8.3.1 The Poundmaster informed the OPP that he got permission to operate the Pound from the Kopano Tribal Authority. He furthermore alleged that there was an agreement entered into between him and the Tribal Authority, however, no supporting documents could be provided to substantiate the allegation.

8.3.2 He further averred that he registered a Close Corporation with the Companies and Intellectual Property Registration Office\(^4\) and approached the Central Transitional District Council\(^5\) at the time to register the Pound as a business entity under his name. He also admitted that he presently operates the Pound as a private entity.

8.3.3 During the investigation no registers could be found where entries of any animals impounded were made. In scrutinising some receipts allegedly issued by the Poundmaster it was noticed that the following fees (noticeably there is no indication on any of the receipts of the period the animals were impounded or to whom the receipt is issued to) are recorded, e.g. for 7 head of cattle an amount of R1 700.00, for 5 head of cattle R1 500.00, and for 1 cow R 700.00 were charged respectively.

\(^4\) Companies and Intellectual Property Registration Office’s letter under reference 15358462 dated 3/06/2005 where a Close Corporation with the name “Moofontein Pound” with reference number 2005/061026/23, was registered.

\(^5\) Certificate with number 1253671372 indicating registration and payment of Regional Council Levies by the Moofontein Pound.
9. OBSERVATIONS AND KEY FINDINGS

9.1 It is of concern that, except for the recently published Pounds Bill\(^6\), there is no enabling legislation in the North West Province that regulates, establishes and/or recognises pounds to be operated by private individuals within the Province. Since the establishment of the new dispensation in 1994 the Provincial Legislature has neither enacted new, nor amended any existing legislation and this caused a lacuna with regards to the operation of pounds in the North West, Province ultimately resulting in pounds being operated by private individuals.

9.2 The acquisition of the Pound by the Poundmaster raises some concern. The infrastructure of the Pound was established with public funds by the then Department of Agriculture of the former Republic of Bophuthatswana. There is a clear indication that the Poundmaster has neither leased nor has bought the property from any Government Department or Institution;

9.3 The Tribal Authority had no authority to either operate or transfer the Pound to a private individual.

9.4 Although the North West Provincial Department of Agriculture and the Mafikeng Local Municipality have knowledge of the existence of the Pound, there is no indication that it was ever transferred to, or taken under control by any Provincial Department or the Mafikeng Local Municipality.

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\(^6\) North West Extraordinary Provincial Gazette, No 6536 dated 23 September 2008.
10. RECOMMENDATIONS

10.1 In terms of Section 182(1)(b) of the Constitution, 1996, and section 6(4)(c)(ii) of the Public Protector Act, 1994, it is recommended that:

10.1.1 The North West Provincial Legislature should, as a matter of urgency, finalise the enactment of a Pounds Act; and

10.1.2 The Municipal Manager of the Mafikeng Local Municipality in conjunction with the Heads of the Departments of Agriculture, Conservation, Environment and Rural Development and the Department of Local Government and Traditional Affairs should in the interim, pending the enactment of the Pounds Act, take urgent steps to address the current administration of the Pound.

11. CONCLUSION

11.1 The Public Protector will monitor the implementation of the recommendations made on a monthly basis.

ADV. M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 21/08/09

Assisted by: D.T Mothoagae Investigator, Mafikeng Provincial Office