Please quote this reference in your reply: 7/2-37247/11/WC
Enquiries: Adv R van Rensburg, Provincial Representative: Western Cape, Tel: 021-423 8644

Mr Achmat Ebrahim
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CAPE TOWN
8000

E-mail: city.manager@capetown.gov.za; achmat.ebrahim@capetown.gov.za

Dear Mr Ebrahim

“POWER TO THE PEOPLE”: REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT AND UNFAIR TREATMENT BY THE CITY OF CAPE TOWN RELATING TO DAMAGE CAUSED AS A RESULT OF AN ELECTRICAL POWER SURGE

Please find attached a copy of my final report entitled “Power to the People” on the investigation into the above matter.

Your attention is specifically directed to the remedial action to be taken and the monitoring requirements in paragraphs 10 and 11 of the report.

Best wishes

[Signature]

Adv YK Madonsela
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 25/01/2013
Please quote this reference in your reply: 7/2–37247/11/WC

Enquiries: Adv R van Rensburg, Provincial
Representative: Western Cape, Tel: 021-423 8644

Alderman Patricia De Lille
The Executive Mayor
City of Cape Town
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Dear Ms De Lille

“POWER TO THE PEOPLE”: REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT AND UNFAIR TREATMENT BY THE CITY OF CAPE TOWN RELATING TO DAMAGE CAUSED AS A RESULT OF AN ELECTRICAL POWER SURGE

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Best wishes

[Signature]

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 25/01/2013
Please quote this reference in your reply: 7/2-37247/11/WC

Enquiries: Adv R van Rensburg
Provincial Representative: Western Cape
Tel: 021 423-8644

Ms M Taliep
C/o 20 Third Avenue
SCHAAPKRAAL
7941

Dear Ms Taliep

"POWER TO THE PEOPLE": REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT AND UNFAIR TREATMENT BY THE CITY OF CAPE TOWN RELATING TO DAMAGE CAUSED AS A RESULT OF AN ELECTRICAL POWER SURGE

Please find attached my final report entitled "Power to the People" on the investigation into the above matter.

Best wishes

[Signature]

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

DATE: 25/01/2013
POWER TO THE PEOPLE

Report on an investigation into an allegation of improper conduct and unfair treatment by the City of Cape Town relating to damage caused as a result of an electrical power surge

Report No: 19 of 2012/13
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Executive Summary

(i) The Public Protector South Africa (the Public Protector) conducted an investigation regarding allegations of unfair treatment by the City of Cape Town (the City). The complainant alleged that on 20 February 2011, her household electrical appliances were damaged as a result of a power failure in Lansdowne, the area where she resides. The complainant reported the matter to the City on the same day.

(ii) A municipal official conducted an inspection *in loco* and informed the complainant that the power failure was caused by vandalism. During February 2011 the complainant submitted a claim to the City’s Insurance Department for compensation in respect of her damaged appliances. The City eventually informed her by letter, dated 23 March 2011, that they will not compensate her because the power failure was not caused by their negligence.

(iii) The investigation involved the perusal of the relevant documentation received from the complainant, the City and the National Energy Regulator of South Africa (NERSA) and the analyses of relevant legislation, policies and NERSA prescripts and standards.

(iv) A Provisional Report on the investigation was issued on 29 August 2012 and the Executive Mayor and Municipal Manager of the City of Cape Town and the complainant were afforded an opportunity to respond thereto. The complainant furnished her comments on 9 October 2012. A response was received from the City on 30 November 2012.

(v) The Public Protector makes the following findings:

(a) The City failed to take appropriate measures to safeguard and maintain its Kanarieway substation and failed to discharge the evidentiary burden placed
on it in terms of section 25 of the Electricity Regulations Act and was therefore negligent as contemplated in this section. This negligent conduct amounts to maladministration.

(b) The negligent conduct of the City has resulted in prejudice to the Complainant due to the damage caused to her electrical appliances.

(c) The Complainant’s claim for damages is found to be substantiated. She is being further prejudiced by the City’s unjustified rejection of her claim for compensation for the damage caused to her electrical appliances.

(d) The provisions of section 22 of the By-Law are inconsistent with and contradicts the provisions of section 25 of the Electricity Regulation Act, 2006.

(vi) The appropriate remedial action to be taken in terms of section 182(1) (c) of the Constitution is the following:

(a) The City Manager of the City must take urgent steps to verify and assess the amount of R18 407.98 claimed by the Complainant and ensure that an agreement is reached and the claim is settled within 30 days from the date of this report.

(b) The City Manager of the City must extend a written apology to the Complainant for the inconvenience caused by the delay to finalise this matter.

(c) The City Manager should ensure that the security measures at the Kanarieway substation complies with NERSA standards, and furnish the Public Protector with a report confirming the steps the City has taken to ensure that it complies with such standards.
(d) The City Manager, after having had regard to the roles and responsibilities of officials, must consider taking disciplinary action should any official be found to have neglected his / her duty.

(e) The Council of the City must take urgent steps to amend section 22 of its Standard Electricity Supply By-Law in order to ensure consistency with the provisions of section 25 of the Electricity Regulation Act.
REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT AND UNFAIR TREATMENT BY THE CITY OF CAPE TOWN RELATING TO DAMAGE CAUSED AS A RESULT OF AN ELECTRICAL POWER SURGE

1. INTRODUCTION

1.1 "Power to the People" 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 It is submitted to the Executive Mayor and the Municipal Manager of the City of Cape Town (the City).

1.3 A copy of the report is also submitted to Ms M Taliep (the Complainant).

1.4 The report relates to an investigation by the Public Protector into an allegation of improper conduct and unfair treatment by the City relating to damage caused to the Complainant's household electrical appliances as a result of an electrical power surge

2. THE COMPLAINT

2.1 The Complainant, a resident of Lansdowne, located within the area of jurisdiction of the City, approached the Public Protector on 6 April 2011 with the following allegations:

2.1.1 On 20 February 2011 at 7h30 there was a power failure in her area, which resulted in her electrical appliances being damaged and/or destroyed.

2.1.2 Amongst the goods damaged and/or destroyed were the following:
(a) An LG computer
(b) BENQ Computer box
(c) An Acer Laptop
(d) A Samsung home telephone charger
(e) A Defy microwave oven
(f) A Samsung Digital Washing machine (13kg)
(g) An energy saving light bulb
(h) An Ultronic DVD Player
(i) An Enzer sound system
(j) An Ellies T.V. Aerial
(k) An LG Refrigerator

2.1.3 She reported the damage to the City on the same day.

2.1.4 The City sent a municipal official to conduct an inspection in loco who informed her that the power failure was caused by vandalism.

2.1.5 During February 2011 the Complainant submitted a claim for compensation with regard to her damaged appliances to the City’s Insurance Department.

2.1.6 On or about 29 March 2011 the City’s Insurance Department repudiated her claim and, amongst other things, informed her in writing as follows:

2.1.6.1 The City “is precluded from effecting compensation in instances other than where it has been found to be legally liable, such as when negligence has been found to have been obtained (sic) on the part of the Council or any of its employees”.

2.1.6.2 The report received from the Electricity Department revealed that “there was an interruption in the electricity supply. Malfunction of the Flamingo Crescent Substation was due to theft/vandalism of the neutral copper
bars by person/s unknown, causing instability in voltage to the Complainant's premises.

2.1.6.3 Theft and vandalism are criminal activities over which the City has no control, and there was, therefore, no negligence on the part of either the City or any of its officials.

2.1.7 The Complainant was of the view that she was being treated unfairly and as a result requested the Public Protector to investigate the alleged unfair treatment and improper conduct of the City.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector was established in terms of Chapter 9 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. It further directs that the Public Protector has additional powers prescribed in legislation.

3.3 The Public Protector's operations are regulated by the Public Protector Act which mandates the Public Protector to investigate and redress maladministration and related improprieties in the conduct of state affairs and further mandates the Public Protector to resolve the disputes through conciliation.
3.4 The City is an organ of state and its conduct amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector's mandate.

4. THE INVESTIGATION

The investigation was conducted in terms of section 7 of the Public Protector Act, 1994.

4.1 Key sources of information

4.1.1 Various written and telephonic communications that were exchanged between the Complainant, the Public Protector and the City;

4.1.2 Two sworn affidavits from the Complainant, listing all the electrical appliances damaged by the power surge, were examined;

4.1.3 The repudiation letter from the City, dated 29 March 2011, was analysed;

4.1.4 The relevant provisions of the Constitution were assessed and applied;

4.1.5 The relevant provisions of the Electricity Regulation Act, 2006 were examined;

4.1.6 The City of Cape Town: Electricity Supply By-Law C 17/05/09, as amended on 31 March 2010 (C 60/03/10) and promulgated on 16 April 2010 in Provincial Gazette 6727; LA 21678 was examined;

4.1.7 The Licence for the operation of an electricity distribution facility, license number: NER/D/CAPE TOWN, issued by the Nersa to the City on 27 May 2010, was examined;
4.1.8 The Rationalized User Specification, NRS 059:2002, recommendations to minimize problems associated with the theft of transformer neutral and neutral earthing copper conductors, Edition 1.1 issued by the NRS Project in May 2002 was examined;

4.1.9 NERSA Independent Technical Audit Report: Cape Town Electricity, conducted by Merz and McLellan South Africa, from 27 February to 3 March 2006 was also considered; and

4.1.10 Consideration of applicable jurisprudence

4.2 Summary of the investigation process and evidence obtained during the investigation

4.2.1 The information gathered during the communication and consultation with the Complainant and the City revealed the following:

4.2.1.1 The City would only accept legal liability if negligence could be attributed to them;

4.2.1.2 The power surge which caused the Flamingo Crescent Substation to malfunction was caused by the theft/vandalism of the neutral copper bars by unknown persons. In addition, the loss of neutral bus-bars caused voltage surges which in turn resulted in damage to electrical appliances serviced from the vandalized electricity infrastructure.

4.2.1.3 The City maintained that in light of the aforementioned criminal activity, neither the City nor any of its officials were negligent.

4.2.2 The Public Protector requested that the City reconsider its repudiation of the claim citing the provisions of the Electricity Regulation Act, Act 4 of 2006 in
support of its request, as the said piece of legislation replaced the common law.

4.2.3 The City refused to reconsider the repudiation and maintained that the power failure was caused by vandalism of its street furniture and that it has so far cost them approximately R500 000.00 to repair such infrastructure. The City also informed the Public Protector that it has taken the following steps to combat this practice, namely:

4.2.3.1 Restricting access and securing bus-bars;
4.2.3.2 Raising community awareness to the problem;
4.2.3.3 Partnership with the municipal law enforcement units;
4.2.3.4 Micro-dot technology;
4.2.3.5 Surveillance cameras

4.2.4 It was, thereafter, pointed out to the City that the supply and distribution of electricity in the Republic of South Africa are regulated by the provisions of the aforesaid Act which placed the burden of rebuttal of the presumption of negligence on the part of the City in the event of a civil dispute arising out of damages caused by the supply of electricity. The City, however, adamantly refused to change its stance towards the claim.

4.2.5 The Public Protector further advised the City that it had _prima facie_ failed to rebut the presumption of negligence placed on it and that in light of the provisions of section 25 of the Electricity Regulation Act it was by law liable and reasonably expected to compensate the Complainant for the losses sustained by her.

4.2.6 The City was invited to comment on the aforesaid adverse findings of the Public Protector, the correctness or otherwise of the facts and the remedial action proposed.
4.2.7 The City responded to the proposed findings and remedial action by restating its repudiation of liability.

4.3 On or about 30 May 2011 the complainant furnished the Public Protector with photographs depicting the condition of the Flamingo Crescent Substation in Lansdowne. For instance, the complainant described the fencing as 'extremely poor' and indicated that 'this condition has been stagnant for as long as [she] ha[s] been staying in Flamingo Crescent, Lansdowne', i.e. since 1 February 2008. On 29 September 2011 the complainant furnished the Public Protector with a photograph which indicated that the fencing around the substation has been repaired.

5. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

5.1 It is common cause that the City is a licensee as defined by the Electricity Regulation Act and that the damage to the complainant's electrical appliances was caused by means of electricity transmitted or distributed by the City and hence the latter is subject to the provisions of the Electricity Regulation Act.

5.2 The City argued that the power surge was caused by theft/vandalism and that it had no control over such criminal acts, hence it was not negligent. This argument failed to take into account the provisions of section 25.

5.3 The disruption of the electricity is said to have been caused by an act(s) of vandalism which resulted in a voltage surge(s) that destroyed the Complainant's electricity appliances. The Complainant lodged a claim for compensation for the damages which the City rejected on the basis that the
damage was caused by vandalism and that there was therefore no negligence by the City or any of its officials.

5.4 However, the City failed to indicate the specific measures taken by it to curb incidence of vandalism at the particular sub-station and the consequent effects thereof on consumers.

5.5 Vandalism and theft of the City’s street infrastructure are common occurrences, which have required the City to implement various measures in order to combat them. The following breakdown of claims received as a result of vandalism at some of the City’s substations over the May-August 2010 period was furnished by the City, and indicates that Lansdowne, the area in which this incident occurred, had the second highest incidence of vandalism.

<table>
<thead>
<tr>
<th>Location</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wetton</td>
<td>43</td>
</tr>
<tr>
<td>Kenwyn</td>
<td>37</td>
</tr>
<tr>
<td>Ottery</td>
<td>77</td>
</tr>
<tr>
<td>Zeekoeivlei</td>
<td>19</td>
</tr>
<tr>
<td>Lansdowne</td>
<td>47</td>
</tr>
<tr>
<td>Fairways</td>
<td>29</td>
</tr>
<tr>
<td>TOTAL</td>
<td>252</td>
</tr>
</tbody>
</table>

5.6 In light of the aforesaid, the power surge caused by these criminal acts is deemed not to be a remote or far-fetched occurrence.

5.7 As stated in the City’s response to the Public Protector’s enquiries, vandalism is a challenge which has necessitated the Council to devise various methods to combat it. This shows that vandalism is not an uncommon or remote occurrence. In this case the City has, therefore, foreseen the reasonable possibility of the substation being vandalized,
resulting in either injury to someone or the damage of municipal property or that of its customers.

5.8 The photographs furnished by the Complainant, indicates that the substation is enclosed by a wire mesh fence on top of which four rows of barbed wire are supposed to be strung around the top of the enclosure. The anti-climbing device (the barbed wire) had been breached (before the relevant incident of theft) because it was in a complete state of disrepair as the strands of barbed wire were no longer strung tautly between the four poles of the enclosure, but were either missing or severed and were hanging down the wire mesh fence.

5.9 Hence, due to the state of disrepair of the fence for instance, it appears that the existing security measures it would have posed very little difficulty to anyone who was determined to gain access to the substation. Furthermore, in the photographs there are also no surveillance cameras in sight.

5.10 The City has indicated that it has implemented certain general measures to overcome “challenges encountered as a result of vandalism”, such as restricting access and securing the bus-bars, it has not indicated which specific measures were implemented at the Flamingo Crescent substation to restrict or prevent acts of vandalism at this particular substation.

5.11 The documentary evidence shows that at least from 2002 there was an awareness of the need to prevent over voltages that damage electrical appliances of consumers as a result of the theft of copper conductors.

5.12 In 2006 in its Technical Audit Report NERSA raised its concerns that “maintenance was not a high priority in the City Management” and that certain substations were not maintained or managed to acceptable standards as benchmarked by the prime sites. It also revealed that copper
theft remained a problem. In response the City indicated that the 2006/2007 budget does make provision for rectifying the shortcomings in capital expenditure as well as maintenance and refurbishment in order to improve the state of the networks on all voltage levels.

5.13 Despite the aforesaid, the Complainant, however, informed the Public Protector that the substation was in an “extremely poor” state of repair and that ‘this condition has been stagnant for as long as [she] ha[s] been staying in Flamingo Crescent, Lansdowne’, i.e. since 1 February 2008.

6. LEGAL AND REGULATORY FRAMEWORK

6.1 Electricity Regulation Act, Act 4 of 2006

6.1.1 The supply and distribution of electricity in the Republic of South Africa is regulated by the Electricity Regulation Act, 2006 (the Act). According to its preamble, the purpose of the Act is among other things:

“To establish a national regulatory framework for the electricity supply industry, to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework, to provide for licenses and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity be regulated, to regulate the reticulation of electricity by Municipalities...”

6.1.2 A licensee in the Act is defined as meaning the holder of a license granted or deemed to have been granted by the Regulator under the Act and distributor means a person who distributes electricity. In this regard the City is both a licensee and a distributor of electricity. Public liability of a licensee (e.g. City) is regulated by section 25 of the Act which provides as follows:
"In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee unless there is credible evidence to the contrary". (Emphasis added)

6.1.3 Section 27 of the Act, in respect of the "Duties of municipalities", amongst others provides that:

"Each City must exercise its executive authority and perform its duty by-
"(f) Ensuring sustainable reticulation services through effective and efficient management and adherence to the national norms and standards contemplated in section 35"

6.2 The City's Standard Electricity Supply By-Law

6.2.1 This By-Law was promulgated on 16 April 2010.

6.2.2 Its objective is to regulate the supply of electricity and related matters within the City’s area of jurisdiction.

6.2.3 Of relevance here is the following provision:

"22. Non-liability of the Service Authority or Service Provider
Neither the Service Authority nor the Service Provider shall be liable for any loss or damage, direct or consequential, suffered or sustained by a consumer as a result of or arising from the cessation, interruption or any other abnormality of the supply of electricity, unless caused by negligence on the part of the Service Authority or the Service Provider."

1 S 35 provides that "[T]he Regulator may, after consultation with (a) licensees; (b) municipalities that reticulate electricity; and (c) such other interested persons as may be necessary, make such guidelines and publish codes of conduct and practice, or make rules by notice in the Gazette."
6.2.4 The City has a General Insurance Fund Policy in which "Public Liability" is defined as follows:

"Damages which the Council shall become LEGALLY LIABLE to pay consequent upon injury to any person or damage to property".

6.3 Applicable jurisprudence

6.3.1 In the matter of Pietermaritzburg City Council v PMB Armature Winders 1983 All SA 117(A), a similar matter was decided in favour of the respondent (confirmed on appeal) and awarded compensation in respect of damages done to its equipment by electricity transmitted by the electrical plant and machinery of the appellant. The Court upheld the homeowners claim based on its interpretation of section 50 of the Electricity Act which is an identical predecessor of section 25 of the current Act.

6.3.2 The same approach was followed in the case of Eskom Holdings Ltd v H obo H 2005 (3) SA 503 (SCA) which was decided in favour of the respondent who was awarded compensation in respect of damages, whilst Eskom’s appeal was dismissed. In this case, section 26 of the Electricity Act 41 of 1987\(^2\), created a presumption of negligence in civil actions against the appellant arising out of the injury caused by electricity transmitted from the plant or machinery of the appellant. According to the court, "the appellant bore the onus of proving on a balance of probabilities that it was not negligent or, if it was, that there was no causal link between the negligence and the injuries sustained by the minor".

\(^2\) Section 26 of the Electricity Act 41 of 1987 provides:

In any civil proceedings against an undertaker arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated or transmitted by or leaking from the plant or machinery of any undertaker, such damage or injury shall be presumed to have been caused by the negligence of the undertaker, unless the contrary is proved."
The court maintained further that the appellant had "foreseen the reasonable possibility of someone climbing the pylon and being injured or electrocuted, which accounted for its installation of the anti-climbing device. The next enquiry therefore was whether a reasonable person would have taken steps to guard against the danger and, if so, whether the steps taken by the appellant were reasonable in the circumstances." In regard to the question as to whether the pylon was adequately protected the court held that "the anti-climbing device posed very little obstacle" and that the respondent's son "was able to remove the barring wires without any tools, and with very little effort." The court held that the appellant was unable to rebut the presumption of negligence.

6.4  Regulatory framework

6.4.1 Furthermore, in the Licence for the Operation of an Electricity Distribution Facility, issued by NERSA to the City, the following conditions are laid down:

6.4.1.1 In Chapter two under "Specific Conditions" it is stated that:

"4.8 The Licensee shall operate the distribution facility in line with quality standards that NERSA may provide as and when required from time to time.

6.4.1.2 In Chapter three under "General Conditions" it is, amongst others, provided that:

"5.2 The licensee shall comply with codes, rules, laws and any other regulation applicable (sic) the operation of (sic) distribution facility.

...
5.5 The Licensee shall take all reasonable practical steps to protect the environment and safety in the course of operations associated with his license, including but not only, those specified in health and safety and environmental legislation currently in force and not specifically related to the operation of (sic) distribution facility."

6.4.2 NRS 059:2002 (May 2002) is a “Rationalized User Specification” (the specification) which allows user organizations to define the performance and quality requirements of relevant equipment, and may after a certain application period be introduced as national standards. The specification was prepared by a Working Group appointed by the Electricity Suppliers Liaison Committee from 13 municipalities (which included the City of Cape Town). The specification comprises recommendations to electricity utilities to prevent over voltages that damage consumers’ electrical appliances/equipment as a result of the theft of transformer neutral earthing copper conductors. The drafters of the NRS 059:2002 has indicated that “[I]n the event of an investigation of damages or other problems resulting from over voltages caused by unauthorized removal of earthing and neutral earthing conductors, [NERSA] will use the recommendations in this specification to determine whether reasonable measures were taken by the electricity utility to prevent such removal of conductors”. Recommendations made illustrate a resolve to address the challenge of safeguarding substations. Some of the recommendations to prevent unauthorized access to brick substations and mini-substations include the following:

6.4.2.1 Brick Substations

(a) Use steel doors instead of wood and replace existing wooden doors and wooden door frames with steel doors and steel door frames,
and where wooden doors cannot be replaced install a security gate in from of the door.

(b) The use of locks such as padlocks, night latch (security locks commonly used in homes), and other proven locks/locking systems.

(c) Concealing exposed locks by, for instance, attaching a rectangular metal cover box over the lock and across the doors.

(d) Where substations are adjacent to the premises of key customers, install alarms to alert the customer’s security personnel when they are triggered, with the consent of said customer.

(e) Concealing (horizontal) copper conductors in the floor or foundation and vertical copper conductors by enclosing them in steel pipes that are welded in the reinforcing steelwork and embedded in thick concrete.

6.4.2.2 Mini-substations

(a) Using a three-point locking system on the enclosure doors;

(b) A proven locking system as stated above.

6.4.3 Mr D Seemela from NERSA made their Independent Technical Audit Report: Cape Town Electricity, dated 30 May 2006, on an audit conducted from 27 February to 3 March 2006 available. This Audit report reflects the following:

6.4.3.1 The objectives of the audit were, *inter alia*:

(a) To assess, at a high level, the condition of substations and the network.

(b) To determine the effectiveness of the maintenance plan development and execution.

6.4.3.2 The Audit revealed that:
(a) The central issues in the case of Cape Town Electricity are the question of refurbishment funding, maintenance funding, lack of suitable staff and a procurement policy that results in delays and overspending.

(b) Generally the Cape Town network was in good shape and that refurbishment and expansion had been managed well, but it was also stated that "maintenance was not a high priority in the City Management" and the limited attention given to maintenance were becoming very visible.

(c) In regard to the status of "MV/LV distribution sites" a Field Report of the Audit stated that there was "some concern that these sites are not maintained or managed to acceptable standards as benchmarked by the prime sites". For example, it was indicated that substation inspections are carried out monthly on prime stations and 4-6 monthly in secondary stations.

(d) The backlog on maintenance of substations was estimated to be one year and growing.

(e) A Field Report of the Audit mentioned that copper theft and illegal connections was managed by a loss management system but remained a problem. It also mentioned that maintenance scheduling was via a SAP software system which was not yet fully utilized.

6.4.4 In response to the aforesaid findings the City, amongst others, responded by way of a letter, dated 3 May 2006, that:

6.4.4.1 In the next budget cycle steps will be taken from 1 July 2006 and that tenders for maintaining the City's various electricity distribution infrastructure will be adjudicated in terms of the RED1 (Regional Electricity Distributor) procurement policy.
6.4.4.2 The issue of increased allocations for repairs and maintenance and refurbishment were considered in the compilation of the 2006/09 multi-year budget and it is believed that the 2006/2007 budget does make provision for rectifying the shortcomings in capital expenditure as well as maintenance and refurbishment in order to improve the state of the networks on all voltage levels.

6.4.5 Finally, on 27 October 2011 in response to an enquiry to the City as to whether it has a policy and procedure regarding the maintenance of its electrical infrastructure, the City stated that it "is in the process of implementing a SAP Plant Maintenance Module which will have prescribed formal maintenance procedures" (emphasis added). In regard to the aforesaid the City furnished the Public Protector with a document entitled "Progress of Enterprise Systems Project and Recommendation (sic) on the Awarding of Tender CMC 402/2001 “The Supply and Delivery of Enterprise System(s) software” which consisted of a report to Council, dated 15 June 2001 as approved on 16 August 2001, to implement SAP, and that one of the areas covered in this report is Asset Management. It is therefore noted that this matter has been outstanding for some years.

7. RESPONSE TO THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

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

"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 person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstance."
7.2 The Public Protector therefore resolved to issue a provisional report on the investigation, on 29 August 2012, to the Complainant, the Executive Mayor and City Manager of the City of Cape Town.

7.3 The Complainant responded and expressed her agreement and satisfaction with the Provisional Report. The City of Cape Town also responded and their comments are discussed in more detail hereunder.

7.4 Response of City of Cape Town

7.4.1 The City was of the view that the Public Protector lacked the powers and jurisdiction to investigate claims of this nature and advised that they have instructed counsel to provide an opinion on the matter, which is still awaited.

7.4.2 The powers and jurisdiction of the Public Protector are set out in para 3 supra. In addition to the powers granted to the Public Protector by section 182(1) (a) of the Constitution, section 6(4) of the Public Protector specifically authorises the Public Protector to investigate:

"(a) maladministration in connection with the affairs of government at any level;
(b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function,
(c) ...
(d) ...
(e) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person".
This complaint relates to the improper prejudice suffered by the Complainant as a result of the City's failure to take the necessary steps to prevent the vandalism of the relevant mini substation. The failure by the City to ensure that the mini substation was adequately secure does not only constitute maladministration, but also constitutes an omission by the City to take the necessary steps to prevent such vandalism and improper prejudice to the Complainant. In view of the aforesaid it is therefore maintained that this matter is within the jurisdiction of the Public Protector to investigate.

7.4.3 The City asserted further that the power surge that occurred on 20 February 2011, which is attributed to the theft of neutral and earth bars, occurred at the Kanarieway substation and not the Flamingo Crescent substation. The City further advised that the Kanarieway substation falls under the Vanguard district which is divided into four zones and that the Kanarieway substation, together with Wetton, Lansdowne and Crawford are situated in Zone 3 according to their records Zone 3 has the lowest prevalence of vandalism in the Vanguard district, and the Kanarieway substation is and has always been regarded as a "low risk" substation insofar as vandalism and theft of parts are concerned. For these reasons, they maintain that they were not negligent.

According to the City the following protection measures were in place at the Kanarieway substation on 20 February 2011, in order to protect it from vandalism and theft:

- The substation was enclosed by a wire fence and on top of the fence was a barbed wire which acted as an anti-climbing device;
- The pedestrian gate giving access to the substation was locked with a padlock;
Inside the substation, the low voltage compartment of the local transformer where the neutral and earth bars were situated, was also locked with a padlock;

The 11kv Ring Main Unit was also locked with a padlock;

7.4.4 As stated in paragraph 5.8 above the barbed wire strung on top of the wire fence had been breached before this particular incident and was in a complete state of disrepair because the strands of barbed wire were no longer tautly strung between the four poles of the enclosure, but were either missing or hanging down the wire fence. Furthermore, as stated in paragraph 6.4.2 in 2002 NERSA introduced NRS 059:2002, which specification consists of recommendations to electricity utilities to prevent over voltages that damage consumers' electrical appliances/equipment as a result of the theft of transformer neutral earthing copper conductors. Some of the recommendations to prevent unauthorized access to mini-substations include using a three-point locking system on the enclosure doors. In addition, to prevent the unauthorized removal of the padlock and other exposed locks, it is recommended that the method in paragraph 5.1.2.2a of the specification should be used. Paragraphs 5.1.2.2 and 5.1.2.2a of the specification accordingly stipulate the following:

"5.1.2.2 Conceal padlocks and other exposed locks using one of the following methods to prevent the unauthorized removal of the lock:

a) attach a rectangular metal cover box over the padlock and across both doors. Weld the box to the opening door leaving access to the padlock from the bottom of the box. Leave sufficient room for unlocking and removing the padlock..."

In addition, paragraph 5.2.4 of the specification stipulates "where protective covers (see 5.1.2.2a) are difficult to fit or impractical, an alternative padlock-
free, three point locking device that is flush on the door panel is recommended."

Furthermore, as stated in paragraph 6.4.2 the drafters of the NRS 059:2002 has indicated that "[I]n the event of an investigation of damages or other problems resulting from over voltages caused by the unauthorised removal of earthing and neutral earthing conductors, [NERSA] will use the recommendations in this specification to determine whether reasonable measures were taken by the electricity utility to prevent such removal of conductors".

In light of the aforesaid, applying the recommendations set out in NRS 059:2002, and in the absence of any indication from the City that it had implemented the aforesaid additional security measures, it is clear that the use, as an additional protection measure, of only padlocks at the Kanarieway substation, did not comply with the recommendations of Nersa and that the City had accordingly not taken reasonable measures to prevent the removal of the conductors. The City was therefore negligent by failing to properly secure the Kanarieway substation.

7.4.5 The City contends further that, their records show that there was not a single incident of theft of neutral and earth bars or vandalism during the period 20 February 2010 and 19 February 2011 at the Kanarieway substation. The City also mentions that the Metal Theft Unit, an elite task team of specially trained officers was constituted in 2007 by them to combat the theft of non-ferrous metals. The unit was given a budget of R14 928 000.00 for 2010/2011 to achieve its objective to eradicate any and all instances of metal theft within the City of Cape Town. The City therefore maintains that it has taken all reasonable steps to prevent or to mitigate power surges and damages caused by vandalism and/or theft. In regard to the specific incident giving rise to the complaint, the City states that officials from the First Line
Response, who inspected the Kanarieway substation on 20 February 2011 at 9h23 made the following observations on their arrival:

- The pedestrian gate was open and the padlock of the pedestrian gate was lying on the ground next to the gate. The padlocked has evidently been forced open.
- The door of the low voltage compartment of the transformer was open and the lock of the door was also lying on the ground next to the transformer. An inspection of the lock revealed that it had been forced open.

The City contends therefore that the only reasonable inference which can be drawn is that the person(s) gained access to the substation by first forcing the padlock of the pedestrian gate open and thereafter the padlock of the door of the low voltage compartment. They maintain that it is highly unlikely that the person(s) would have climbed over the fence, as access to the substation through the pedestrian gate after the lock had been forced open would have been much quicker and with less effort. The City states that it does however give consideration to the suggestion that section 22 of the Standard Electricity By-Law should be amended.

7.4.6 It is noted that the City does not indicate in which suburb the Kanarieway substation is situated, so one is unable to consider the prevalence of incidents of vandalism of sub stations in the particular suburb in which the Kanarieway substation is located. However, according to statistics that were provided previously, as mentioned in paragraph 5.5 above, it is noted that Wetton and Lansdowne are the two areas, within Zone 3, with the highest incidence of vandalism over only three (3) months (the period May-August 2010). It is therefore evident that Zone 3 is a high risk zone and the City cannot be said to have adequately secured the Kanarieway substation. The fact that “there was not a single incident of theft of neutral and earth bars or
vandalism during the period 20 February 2010 and 19 February 2011 at the Kanarieweg substation” is deemed not have occurred because of the security measures implemented by the City at the particular substation, which were clearly inadequate. Furthermore, the failure of the City to implement specifications such as NRS 059:2002 is actually adding to the workload of the Metal Theft Unit, as they cannot combat theft of non-ferrous metals, if the City is not implementing the reasonable measures proposed by NERSA. The City attributes the cause of the vandalism and theft at the Kanarieweg substation to the forcing of the padlock on the gate and the door of the low voltage compartment of the transformer. As stated above the use of padlocks, alone, on mini substations is inadequate and does not comply with NRS 059:2002. Furthermore, regarding the City’s assertions “that the only reasonable inference which can be drawn is that the person(s) gained access to the substation by first forcing the padlock of the pedestrian gate open and thereafter the padlock of the door of the low voltage compartment and that “it is highly unlikely that the person(s) would have climbed over the fence, as access to the substation through the pedestrian gate after the lock had been forced open would have been much quicker and with less effort”, makes it clear that the padlocks by themselves were hardly a deterrent for the vandals.

It should also be noted that as early as June 2011, during the investigation process, photos of the vandalized substation, which clearly indicated the state of disrepair of the barbed wire, were forwarded to the City, together with a request that they confirm whether the power failure was caused by the vandalism of the substation itself and who was responsible for the repairs of the substation and fencing around it. It was clear that the assumption was that access to the substation had been gained by means of the fence. At no time previously did the City advise the Public Protector that access to the substation had been gained by the forcing of the padlocks that secured the substation. This information was extremely relevant to the investigation and
should have been disclosed to the Public Protector. The City was required to comply with section 181(3) of the Constitution which stipulates that organs of state must assist and protect institutions such as the Public Protector to ensure their independence, impartiality, dignity and effectiveness.

7.4.7 Lastly, the City stated that it did however give consideration to the suggestion that section 22 of the Standard Electricity By-Law should be amended. It is deemed necessary that the City does not only consider the amendment of section 22, but that it should actually amend the provision as soon as possible.

8. CONCLUSION

8.1 It is common cause that the Complainant's electrical appliances were destroyed or damaged following an electrical power surge.

8.2 The cause of the power surge is also not in dispute.

8.3 The Complainant has consistently held that the City is liable for compensating her for the repair and/or replacement value of her goods.

8.4 The City has consistently denied liability.

8.5 In terms of the provisions of section 25 of the Electricity Regulation Act, the City, as a licensee and distributor of electricity, is deemed to have been negligent where damages have been caused to the property of a third party ‘by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee’ unless the City can produce credible evidence to the contrary.

8.6 The effect of section 25 of the Electricity Regulation Act is that the City bears the onus of alleging and proving on a balance of probabilities that it was not
negligent. As stated in the City's response to the Public Protector's enquiries, vandalism is a challenge which has necessitated the Council to devise various methods to combat it. This shows that vandalism is not an uncommon or remote occurrence. Therefore, the City ought to have reasonably foreseen the possibility of the substation being vandalized, resulting in either injury to someone or the damage of municipal property or that of consumers.

8.7 As the Complainant was unable to produce evidence to prove that the City was negligent, the law has placed an evidentiary burden on the City to show what steps were taken by it to comply with the expected standards. Therefore, it must be established whether the City had taken the necessary steps to guard against the danger were reasonable in the circumstances. In regard to the question as to whether the substation was adequately protected or secured.

8.8 The assertions, by the City, that it could not have foreseen and prevented the occurrence of the incident are not considered sufficient. In order to rebut the presumption which operated against it, it must show by means of credible evidence, that it could not have foreseen and prevented the power surge and the subsequent damage that was caused. It must also show that the occurrence is quite remote and far-fetched and could not be reasonably expected to occur in the circumstances of the case.

8.9 It is submitted that any reasonable electricity licensee or distributor in South Africa would expect that from time to time electrical power surges would occur, particularly as a result of vandalism, causing damage or destruction to third party electrical appliances and would have taken reasonably appropriate measures to prevent or mitigate such occurrence and effects. In view of the aforesaid it is clear that the City has not adequately, if at all, maintained the substation for years.
8.10 It is also evident that the preventative measures put in place by the City, in light of the high incidence of vandalism of its electrical street furniture, as mentioned in paragraph 5.5 above, were inadequate and poorly maintained.

8.11 The City has been unable to produce credible evidence to prove that the damage that was caused to the appliances of the Complainant was not caused by their negligence and was therefore unable to discharge the evidentiary burden placed on it by section 25 of the Electricity Regulation Act.

8.12 The City cannot be said to have acted as a reasonable electricity licensee or distributor in South Africa, as it did not take appropriate reasonable measures to prevent or mitigate the occurrence of power surges caused by vandalism and its effects. The City was aware of the prevalence of vandalism and theft as well as its resultant damage to electricity users, but it had failed to maintain or secure the relevant substation.

8.13 The documentary evidence show that at least from 2002 there was awareness for the need to prevent over voltages that could damage the electrical appliances of customers as a result of the theft of copper conductors.

8.14 In 2006 in its Technical Audit Report NERSA raised its concerns that "maintenance was not a high priority in the City Management" and that certain substations were not maintained or managed to acceptable standards as benchmarked by the prime sites. It also revealed that copper theft remained a problem. In response the City indicated that the 2006/2007 budget does make provision for rectifying the shortcomings in capital expenditure as well as maintenance and refurbishment in order to improve the state of the networks on all voltage levels.

8.15 In so far as the provisions of section 22 of the aforesaid By-Law are inconsistent and contradict the provisions of section 25 of the Electricity
Regulation Act, 2006, they must be regarded as *pro non scripto* and null and void and the provisions of the Act must supersede the provisions of the by-law.

9. FINDINGS

The Public Protector makes the following findings:

9.1 The City failed to take appropriate measures to safeguard and maintain its Kanarieweg substation and failed to discharge the evidentiary burden placed on it in terms of section 25 of the Electricity Regulations Act and was therefore negligent as contemplated in this section. This negligent conduct amounts to maladministration.

9.2 The negligent conduct of the City has resulted in prejudice to the Complainant as a result of the damage caused to her electrical appliances.

9.3 The Complainant's claim for damages is found to be substantiated. She is being further prejudiced by the City's unjustified rejection of her claim for compensation for the damage caused to her electrical appliances.

9.4 The provisions of section 22 of the By-Law are inconsistent with and contradicts the provisions of section 25 of the Electricity Regulation Act, 2006.

10. REMEDIAL ACTION

The appropriate remedial action to be taken in terms of section 182(1) (c) of the Constitution is the following:
10.1 The City Manager must take urgent steps to verify and assess the amount of R18 407.98 claimed by the Complainant and ensure that an agreement is reached and the claim is settled within 30 days from the date of this report.

10.2 The City Manager must extend a written apology to the Complainant for the inconvenience caused by the delay to finalise this matter.

10.3 The City Manager should ensure that the security measures at the Kanarieway substation complies with NERSA standards, and furnish the Public Protector with a report confirming the steps the City has taken to ensure that it complies with such standards.

10.4 The City Manager, after having had regard to the roles and responsibilities of officials, must consider taking disciplinary action should any official be found to have neglected his / her duty.

10.5 The Council of the City must take urgent steps to amend section 22 of its Standard Electricity Supply By-Law in order to ensure consistency with the provisions of section 25 of the Electricity Regulation Act.

11. MONITORING

The Public Protector will:

11.1 Require an implementation plan from the City Manager indicating the manner in which he intends to implement the remedial action to be taken in paragraphs 10.1, 10.2, 10.3 and 10.4 above within 30 days from the date of this report; and

11.2 Require an implementation plan from the Council of the City indicating the manner in which it intends to implement the remedial action to be taken in
paragraphs 10.5 above within 30 days from the date of this report and which implementation should be effected within six months of the issue and receipt of this Report; and

11.3 Require a progress report within 30 days after receipt of the implementation plan referred to above.

11.4 Monitor the progress made in this regard over regular intervals.

ADY T MADONSELA
PUBLIC PROCTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 31/01/13

Assisted by: Mrs S Lengeveldt, Senior Investigator: Western Cape