

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

*“Allegations of improper conduct and maladministration relating to undue delay
by the Sol Plaatje Local Municipality to finalise a claim for damages to a
property, situated at 53 Gladstone Street in Kimberley, in February 2015”*

REPORT NUMBER: 43 of 2021/22

ISBN NUMBER: 978-1-77634-737-7

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION RELATING TO UNDUE DELAY BY THE SOL PLAATJE
LOCAL MUNICIPALITY TO FINALISE A CLAIM FOR DAMAGES TO PROPERTY
SITUATED AT 53 GLADSTONE STREET IN KIMBERLEY IN FEBRUARY 2015**

INDEX

Executive Summary	3
1. INTRODUCTION	6
2. THE COMPLAINT	7
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	7
4. THE INVESTIGATION	13
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	17
6. FINDINGS	27
7. REMEDIAL ACTION	28
8. MONITORING	29

Executive Summary

- (i) This 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 23 of 1994 (the Public Protector Act).
- (ii) The complaint was lodged on 24 April 2017 by Mr Isghak Adams (the Complainant) at the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.
- (iii) The Complainant alleged that on 9 January 2015 there was a water pipe burst at Gladstone Street, causing his property to be flooded and resulting in extensive damage to his property and belongings to the estimated amount of R31 000.00. He lodged a claim for damages with the Municipality on 2 February 2015, but was never paid.
- (iv) In essence, the Complainant alleged that undue delay by the Municipality to finalise his claim for damages to his property, situated at 53 Gladstone Street in Kimberley in 2015 was improper, constitutes maladministration and prejudiced him.
- (v) Based on the analysis of the complaint, the following issues were identified for the investigation:
 - (a) Whether the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015 and if yes, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainant.**
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Municipality and Lion of Africa Insurance, an analysis of the relevant

documents and information obtained during the investigation and consideration and application of the relevant laws and prescripts.

(vii) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:

(a) Regarding whether the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015 and if yes, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainant.

(aa) The allegation that the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015, is substantiated.

(bb) The Municipality's failure to finalise the claim for damages to the Complainant's property, was not in accordance with the relevant provisions of the Local Government: Municipal Finance Management Act, 2003 (MFMA) relating to the managing of liabilities of the Municipality and Item 2 of the Code of Conduct for Municipal Staff Members as set out in Schedule 2 of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act).

(cc) The conduct of the Municipality was improper, constitutes maladministration and also prejudiced the Complainant.

(dd) The conduct of the Municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration and undue delay in terms of section 6(4)(a) of the Public Protector Act.

(viii) The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

(a) The Municipal Manager of the Municipality to:

- (aa) Take the appropriate steps to engage with the Complainant to offer a settlement relative to his claim for damages against the Municipality, within thirty (30) working days from the date of the report.
- (bb) Take the appropriate steps in respect of disciplinary action against any official(s) of the Municipality who contributed to the undue delay in the finalisation of the Complainant's claim for damages in terms of Consequence Management Policy of the Municipality, within 60 sixty working days from the date of the report.
- (cc) Ensure that all the officials of the Municipality that deal with claims of damages against the Municipality are trained on Loss Control and Insurance Policy and how it should be managed, within sixty (60) working days from the date of the report.
- (dd) Develop an Insurance Management Policy for the Municipality in line with Loss Control and Insurance Policy in conjunction with section 61, 62(c) and sec 78 of the MFMA to regulate insurance by the municipality against claims for damages and liabilities and submit it to the Council for consideration and adoption, within ninety (90) working days from the date of this report.
- (ee) Establish the internal complaint mechanism to ensure that complaints against the delivery of service are expeditiously resolved as per the resolution taken by the high level meeting between the PPSA and the NC Premier, within sixty (60) working days from the date of the report

- (ff) Ensure that Internal Audit, on an annual basis, review the adequacy and effectiveness of the municipality's system of internal control, risk management and supply chain management.

- (gg) Ensure that the Audit Committee of the municipality, in all its meetings, consider the internal audit and AGSA reports to ensure that the recommendations are implemented.

- (hh) Report to the Council on the progress made with the implementation of the remedial action taken in paragraphs (viii) (aa) to (gg) above, within 120 working days from the date of the report and to submit a copy thereof to the Public Protector.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO UNDUE DELAY BY THE SOL PLAATJE LOCAL MUNICIPALITY TO FINALISE A CLAIM FOR DAMAGES TO PROPERTY SITUATED AT 53 GLADSTONE STREET IN KIMBERLEY IN FEBRUARY 2015

1. INTRODUCTION

- 1.1 This is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) of the Public Protector Act to the following persons to inform them of the outcome of the investigation and the remedial action taken:
- 1.2.1 The Premier of the Northern Cape, Dr Z Saul.
- 1.2.2 Mr B Vass, the Northern Cape Member of the Executive Council (MEC) for Co-operative Governance, Human Settlements and Traditional Affairs (COGHSTA).
- 1.2.3 Mr B S Lenkoe, the Head of the Northern Cape Department of COGHSTA.
- 1.2.4 Ms Nomizizi Maputle, the Speaker of the Sol Plaatje Municipality (Municipality).
- 1.2.5 Mr Kagisho Sonyoni, the Executive Mayor Municipality of the Municipality.
- 1.2.6 Mr Goolam Akharwaray, the Municipal Manager of the Municipality.
- 1.2.7 A copy of the report is also provided to Mr Isghak Adams, who lodged the complaint.

- 1.3. The report relates to an investigation into an allegations of improper conduct and maladministration relating to undue delay by the Municipality to finalise a claim for damages to a property, situated at 53 Gladstone Street in Kimberley, in February 2015.

2. THE COMPLAINT

- 2.1. The complaint was lodged on 24 April 2017 by Mr Isghak Adams (the Complainant) at the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.
- 2.2. The Complainant alleged that on 9 January 2015 there was a water pipe burst at Gladstone Street, causing his property to be flooded and resulting in extensive damage to his property and belongings, to the estimated amount of R31 000.00. He lodged a claim for damages with the Municipality on 2 February 2015, but was never paid.
- 2.3. In essence, the Complainant alleged that undue delay by the Municipality to finalise his claim for damages to his property, situated at 53 Gladstone Street in Kimberley in 2015 was improper, constitutes maladministration and prejudiced him.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) 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 as regulated by national legislation –

- (a) *to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) *to report on that conduct; and*
- (c) *to take appropriate remedial action.”*

- 3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
- 3.4 Section 6(9) of the Public Protector Act grants the Public Protector discretionary powers to accept complaints which are lodged more than two (2) years after the occurrence of the incident.
- 3.5 In terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two (2) years before being reported to the office does not, in itself, bar the Public Protector from investigating the matter. Instead, it is mainly the interests of justice that dictate whether the Public Protector should investigate the matter or not. It is axiomatic that the Public Protector is to identify special circumstances in exercising her discretion should the Public Protector decide to entertain such a complaint.
- 3.6 Some of the special circumstances that the Public Protector took into account to exercise her discretion favorably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether she would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s) and whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

- 3.7 In the case between *South African Bureau of Standards v The Public Protector*¹, the North Gauteng High Court held that, as with most claims and complaints, there is for good reason, time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving.
- 3.8 In this specific case, the Public Protector concluded that the alleged undue delay by the Municipality to finalise the insurance claim of the Complainant for damages to his property situated at 53 Gladstone Street in Kimberley in 2015, is to date still continuing.
- 3.9 Therefore, the investigation required that the Public Protector explores the Complainant's insurance claim documents submitted to the Municipality, in order to determine the causes of undue delay to finalise the insurance claim submitted in 2015 and whether such delay was improper and constituted maladministration. The Public Protector accordingly decided to exercise her discretion in favour of this complaint. Conscious to all these reasons, the Public Protector concluded that it is in the interest of justice to investigate and determine the merits or demerits thereof.
- 3.10 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

¹ (34290/15A[2019] ZAGPPHC 101 (27 March 2019)

3.11 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.² The Constitutional Court further held that:

*“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*³

3.12 The constitutional court further held that:

3.12.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.12.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);

3.12.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints, as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

² [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

³ *Supra* at para [73].

- 3.12.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.12.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.12.6 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);
- 3.12.7 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));
- 3.12.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.12.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
- 3.13 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017)*, the Court held as follows when confirming the powers of the Public Protector:

- 3.13.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
- 3.13.2 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.13.3 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);
- 3.13.4 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Para 105);
- 3.13.5 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and
- 3.13.6 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).
- 3.14 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result, the matter falls within the jurisdiction of the Public Protector.

3.15 The Public Protector's powers and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong and what action should be taken?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015 and if yes, whether the conduct of the Municipality was improper, constitutes maladministration, and prejudiced him.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality to prevent improper conduct, and maladministration.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration where possible and appropriate.

4.3. On analysis of the complaint, the following issue was identified to inform and focus the investigation:

4.3.1 Whether the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015 and if yes, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainant.

4.4 The Key Sources of information

4.4.1 Documents and correspondence

4.4.1.1 Copy of a letter from the Complainant to Lion of Africa Insurance (Lion of Africa), dated 16 May 2016.

- 4.4.1.2 Copy of an internal e-mail from Mr Leeuw to Mr Eugene Baise, the Manager: Asset & Risk at the Municipality, dated 25 March 2015.
- 4.4.1.3 Copy of a Property Loss/Damage Claim Form addressed to AON (brokers) signed by Ms Barends, the then Acting Municipal Manager of the Municipality on 6 February 2015.
- 4.4.1.4 Copy of email dated 23 June 2015 from Ms S Petersen, Senior Associate at Patel & Associates attorneys representing Lion of Africa, addressed to Mr Mandla Shabalala, Intern: Liability Claims at Lion of Africa.
- 4.4.1.5 Response on the allegations to the PPSA investigation team by Mr Baise, Senior Manager: Asset & Risk Management of the Municipality, dated 20 March 2020.
- 4.4.1.6 Copy of email correspondence dated 15 September 2015 and 10 July 2019 between Ms Elize Gordon, Claims Service Advisor of Lion of Africa and Ms Ntombizodwa Zwane, Senior Claims Analyst at Lion Africa and Ms R Barends of the Municipality
- 4.4.1.7 Response to the allegations to the PPSA investigation team dated 13 July 2020 by Mr Baise, the Senior Manager: Asset & Risk Management of the Municipality
- 4.4.1.8 Response to the allegations by the former Acting Municipal Manager, Mr Boy Dhlwayo, dated 23 October 2020.

4.4.2 Meetings held

- 4.4.2.1 Meeting with the Mr Goolam Akharwaray, Municipal Manager of the Municipality, held on 2 December 2021.

4.4.3 Telephonic discussions

4.4.3.1 Telephonic discussion between the PPSA investigation team and Ms Elize Gordon, Claims Service Advisor of Lion of Africa on 22 June 2020.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996.

4.4.4.2 The Public Protector Act No 23 of 1994.

4.4.4.3 The Local Government: Municipal Systems Act no 32 of 2000. (Municipal Systems Act).

4.4.4.4 The Local Government: Municipal Finance Management Act, 2003 (MFMA).

4.4.4.5 The Municipality Consequence Management Policy.

4.4.4.6 The Promotion of Administrative Justice Act 3 of 2000.

4.4.5 Notice issued in terms of section 7(9) of the Public Protector Act

4.4.5.1 A Notice was issued on 15 November 2021 in terms of section 7(9) of the Public Protector Act to:

(a) Mr Goolam Akharwaray, the Municipal Manager of the Municipality.

(b) The Premier of the Northern Cape, Dr Z Saul.

(c) Mr B Vass, the MEC for Co-operative Governance, Human Settlements and Traditional Affairs.

(d) Mr BS Lenkoe, the HOD of COGHSTA.

- (e) The former Speaker of the Municipality.
- (f) The former Executive Mayor of the Municipality.
- (g) Mr Eugene Baise, Manager: Assets and Risk Management at the Municipality.
- (h) Ms Elize Gordon, the Claims Service Advisor II of Lion of Africa.
- (i) Ms Ntombizodwa Zwane, the Senior Claims Analyst of Lion of Africa.

4.4.5.2 The purpose of the Notice was to afford the addressees an opportunity to respond to the evidence obtained during the investigation. Except for the Municipal Manager, the other addressees did not respond.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015 and if yes, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced the Complainant.

Common cause or undisputed facts

5.1.1. It is common cause that on 9 January 2015 there was a pipe burst that resulted in flooding that caused extensive damage to Mr Adams' property, situated at 53 Gladstone Street, De Beers in Kimberley.

5.1.2. It is also common cause that the Complainant completed and submitted an External Insurance Claim Form at the Municipality on 2 February 2015.

5.1.3. On 6 February 2015 Mr Eugene Baise, the Manager: Assets & Risk at the Municipality, submitted to Mr D Leeuw, the Control Engineering Assistant of the Municipality, an incident report of possible litigation against the Municipality due to damages caused by a water pipe burst at 53 Gladstone Street, De Beers in Kimberley.

5.1.4. Neither the Municipality, nor its insurers disputed the claim for damages.

5.1.5. The claim for damages was not finalised and no payment was made to the Complainant.

Issues in dispute

5.1.6 The Complainant contended that there was undue delay on the part of the Municipality to finalise his claim for compensation for the damage caused to his property, as a result of the flooding incident in January 2015.

5.1.7 In a letter, dated 16 May 2016 addressed to Lion of Africa Insurance (Lion of Africa) the Complainant informed them that he did not understand why the claim he submitted took so long to be addressed and felt that it was unfair for him to wait for a long time since he had suffered the loss. He stated that

“According to the officials, the lawyers of Lion of Africa has closed the file because they never heard anything from us, the last we heard from the insurers was in the middle of February 2015 and no follow-up from the insurers or approach to us with regard to outstanding documentation or any request from the insurers. We are aware of previous claims that were exactly the same as our instance where the claimants were paid for the damages they incurred due to burst pipes in front of their premises much quicker than ours”

- 5.1.8 According to an Internal Memorandum from Mr Leeuw to Mr Eugene Baise, the Manager: Assets & Risk at the Municipality, dated 25 March 2015:
- 5.1.8.1 A main 110mm municipal water pipe burst at Gladstone Street and the Waterworks Section repaired the pipe.
- 5.1.8.2 It was necessary to do excavations to repair the pipe, which was underneath the paving bricks that had to be lifted.
- 5.1.8.3 Because of the soaked soil and erosion that caused instability of the ground, a car fell into the ditch.
- 5.1.8.4 An Investigation was conducted by the Water and Sanitation Section of the Municipality after receiving the complaint of the damage, and the owner (Complainant) was advised to contact the Assets Management office, which deals with claims.
- 5.1.9 Ms Barends, the then Acting Accounting Officer of the Municipality, completed and signed the Property Loss/Damage Claim Form addressed to AON on 6 February 2015.
- 5.1.10 In an email obtained during the investigation, dated 23 June 2015, from Ms Shamiema Petersen, the Senior Associate at *Patel & Associates* attorneys representing Lion of Africa, addressed to Mr Mandla Shabalala, Intern: Liability Claims at Lion of Africa, Ms Petersen stated that:
- 5.1.10.1 She checked the file and it appeared that the insured (Municipality) had still failed to submit a departmental report.
- 5.1.10.2 To date there had also been no further approaches from the Third Party (Complainant).

- 5.1.10.3 A telephone discussion was held with the Third Party on 17 February 2015, and since then there had been no further contact with him.
- 5.1.10.4 At this point, it may not be in Lion of Africa's best interest to awaken the Third Party's interest, after more than five (5) months had lapsed since the incident.
- 5.1.10.5 In the absence of the report from the insured there was nothing further that could be done in this matter.
- 5.1.10.6 Multiple emails have been sent requesting information from the insured and certain documentation still remained outstanding.
- 5.1.10.7 In the circumstances, the closure of the file would proceed pending receipt of any possible approaches from the Third Party.
- 5.1.10.8 The insured still needed to submit the outstanding documentation, so that same is on hand should this matter be revisited at a later stage.
- 5.1.11 In a written response to the allegations during the investigation, dated 20 March 2020, Mr Baise, the Senior Manager: Asset & Risk Management of the Municipality stated that:
- 5.1.11.1 On 9 January 2015 the Complainant approached the Municipality in connection with the damages that he suffered due to the flooding incident. He submitted a claim form to the Municipality's insurers, Lion of Africa, on 2 February 2015.
- 5.1.11.2 All the necessary documentation were received by the Municipality on 06 February 2015 and submitted to the external insurer, Lion of Africa.
- 5.1.11.3 The underwriters were dealing directly with third parties, hence the Municipality did not hear anything pertaining to this matter from the claimant (Complainant) nor from the brokers or the underwriter.

5.1.11.4 In February 2015, the attorney of the underwriter had a telephonic discussion with the Complainant to satisfy themselves of the validity of the claim, apparently not to their satisfaction. In this regard, it was stated that:

“While doing follow-ups on outstanding matters it came to my attention that the Underwriters were adamant not to open the file because there were no approaches from the 3rd party since February 2016 a year later”

5.1.11.5 After the Complainant was informed that the file was closed, he forwarded correspondence to the underwriters and the file was reopened and emails between the parties commenced. He stated that:

“With the intervention from my office the file was now reopened and a second Assessor appointed in the week of 22 July 2016”

5.1.11.6 On 12 August 2016, the underwriter requested additional information other than depicted in the report provided to them and this was forwarded to the insurer.

5.1.11.7 In the interim, the contract with the broker Aon came to an end in June 2018 and a new broker was appointed with effect from 1 July 2018 namely Marsh (Pty) Ltd.

5.1.11.8 The relationship, correspondence and contact with AON (broker) was very poor or non-existent.

5.1.12 In her response to the complaint during the investigation, Ms Elize Gordon, the Claims Service Advisor of Lion of Africa, stated during a telephonic discussion on 22 June 2020 that information relating to what caused the pipe to burst was still outstanding from the Municipality, to enable the insurer to finalise the claim.

She further stated that an email was sent to Ms Barends of the Municipality requesting information in relation to what caused the pipe to burst.

5.1.13 In an email dated, 15 September 2015 obtained during the investigation addressed to Ms Elize Gordon and Ms Ntombizodwa Zwane, the Senior Claims Analyst Lion of Africa, Ms Reene Barends stated that age (of the infrastructure) was the major contributing factor.

5.1.14 In another email dated 10 July 2019 from Ms Ntombizodwa Zwane, addressed to Ms Elize Gordon, Ms Zwane stated that:

5.1.14.1. The claim had prescribed as the date of loss was 12 February 2015;

5.1.14.2. The claim of prescription is 3 years; and

5.1.14.3. The file was closed.

5.1.15. Mr Baise, the Senior Manager: Asset & Risk Management of the Municipality in a letter dated 31 July 2020, stated that it is a requirement to provide the external insurers/brokers with reports of incidents of litigation against the insured. He further stated that:

“The due diligence was done from my office and the report received from the User Department in this case the Water and Sanitation Engineer was duly submitted to the External Insurers/Brokers. Subsequent and after the External Insurer looked at the report they required additional information and the report to be adjusted or further elaborated upon the incident to enable them to make a decision other than the original repudiation/closure of file. Notwithstanding all of above arguments and technicalities we as a Unit cannot be held responsible for this matter because the User Department has not complied or responded to the request of the External Insurer and this is what is still outstanding according to our reports...” (sic)

5.1.16. No evidence was found during the investigation that the outstanding information that was requested by Lion of Africa was submitted and the information that was provided to Lion of Africa was taken into account when a decision was taken to close the file on the basis of prescription.

5.1.17. In his response to the allegations during the investigation, dated 23 October 2020 the former Acting Municipal Manager, Mr Boy Dhlwayo stated that:

“The municipality has considered the information and facts contained in the correspondence as received from the office of the Public Protector.

In an effort to arrive at an amicable solution to the above problem, the municipality has decided on the following:

- (i) To engage with the complainant during the week of 9-13 November 2020.*
- (ii) The parties to discuss a settlement offer by the municipality with a possibility of reaching an agreement.*
- (iii) That such an agreement will be presented jointly by both parties by the people (sic) by the 20th November 2020.*

5.1.18. This undertaking by the former Acting Municipal Manager never materialised and the Complainant’s claim has not been paid.

5.1.19. In his response to a section 7(9) Notice in a letter dated 23 November 2021, Mr Goolam Akharwaray, the Municipal Manager of the Municipality stated:

“I refer to the above matter and confirm that I am not in possession of any further information that would contradict the report. It seems that the person tasked originally to evaluate the issues relating to the damage is no longer

in the organization's employ. Notwithstanding, I have instructed staff that the directives under 21.1 of the report be implemented”.

5.1.20. In a further response to the section 7(9) Notice in a meeting held 2 December 2021, Mr Goolam Akharwaray, the Municipal Manager of the Municipality conceded that the Municipality was at fault. However, he reiterated the Municipality's commitment to resolve the matter. The Municipal Manager further advised that he had already sent an apology letter to the Complainant and also requested his staff to comply with the Public Protector's proposed directives in the abovementioned notice. A copy of the apology letter addressed to Mr Adams, was however, not provided to the Public Protector during the investigation however the above meeting was recorded.

Application of the relevant law

5.1.21. Section 195(1)(a) of the Constitution provides among others, that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that the principle of a high standard of professional ethics must be promoted and maintained. According to section 195(2) of the Constitution these principles are applicable to the administration in every sphere of government.

5.1.22. Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

5.1.23. According to section 237 of the Constitution, all constitutional obligations must be performed diligently and without delay.

5.1.24. Section 55(1) of the Municipal Systems Act provides, that as the head of the administration of a municipality, the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, *inter*

alia, the management of the provision of services to the local community in a sustainable and equitable manner.

5.1.25. Section 63(1) of the MFMA provides that the accounting officer of a municipality is responsible for the management of, *inter alia*, the liabilities of the municipality. In this regard, the municipal manager must ensure that the municipality has and maintains a system of internal control; of assets and liabilities.

5.1.26. Accordingly, the Municipal Manager of the Municipality is responsible for the management of all liabilities of the Municipality, which includes claims for damages, against it.

5.1.27. The Municipality could not provide the investigation team with an Insurance Management Policy that regulates insurance by the Municipality.

5.1.28. A Code of Conduct for Municipal Staff Members is provided for in Schedule 2 to the Municipal Systems Act.

5.1.29. Item 2 of the Code provides that a staff member of a municipality must at all times-

(a) loyally execute the lawful policies of the municipal council;

(b) perform the functions of office in good faith, diligently, honestly and in a transparent manner;

(c) act in such a way that the spirit and objects of section 50 are promoted;

(d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and

(e) act impartially and treat all people, including other staff members, equally without favour or prejudice”.

5.1.30. Breaches of the Code must, by virtue of item 14, be dealt with in terms of the disciplinary procedures of the Municipality.

5.1.31. Section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 provides that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

Conclusion

5.1.32. The Complainant approached the Municipality on 2 February 2015, to claim damages for what he lost as a result of flooding due to a burst water pipe on 9 January 2015. His claim was not denied and constituted a liability against the Municipality.

5.1.33. The Complainant was referred to the insurers of the Municipality to deal with his claim. However, the Municipality failed to submit the relevant reports and documents to the insurers in time for the claim to be considered and processed. The Municipality's insurers also did not deny the merits of the claim for damages.

5.1.34. The Municipal Manager of the Municipality at the time and the officials dealing with the Complainant's claim for damages were responsible in terms of the section 63(1) of the MFMA to properly manage the liability caused by the claim for damages against the Municipality.

5.1.35. The Municipality failed to provide the documents required by its insurers in time to enable it to consider and process the claim. This resulted in the Complainant's claim not having been paid to date, six years later.

- 5.1.36. The former Acting Municipal Manager of the Municipality did not honour his written undertaking to the Public Protector to meet with the Complainant in November 2020 to discuss an offer to settle his claim for damages amicably.
- 5.1.37. The undue delay by the Municipality of six years to finalise the Complainant's claim for damages which was not disputed, was improper and constitutes maladministration. It also prejudiced the Complainant.
- 5.1.38. It appears from the evidence and information obtained during the investigation that there is undue delay on the part of the Municipality to finalise a claim of damage to property of the Complainant.
- 5.1.39. The conduct of the Municipality in this regard constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of 6(4)(a)(i) of the Public Protector Act.

6. FINDINGS

- 6.1. **Regarding whether the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015 and if yes, whether the conduct of the Municipality was improper and constitutes maladministration.**
- 6.1.1. The allegation that the Municipality unduly delayed to finalise a claim for damages to property situated at 53 Gladstone Street in Kimberley in February 2015, is substantiated.
- 6.1.2. The Municipality's failure to finalise the claim for damages to the Complainant's property, was not in accordance with the relevant provisions of the MFMA relating to the managing of liabilities of the Municipality and Item 2 of the Code of Conduct

for Municipal Staff Members as set out in Schedule 2 of the Municipal Systems Act.

6.1.3. The conduct of the Municipality was improper, constitutes maladministration and also prejudiced the Complainant.

6.1.4. The conduct of the Municipality accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration and undue delay in terms of section 6(4)(a) of the Public Protector Act.

7. REMEDIAL ACTION

7.1. The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

7.1.1. The Municipal Manager of the Municipality to:

7.1.1.1. Take the appropriate steps to engage with the Complainant to offer a settlement relative to his claim for damages against the Municipality, within thirty (30) working days from the date of the report.

7.1.1.2. Take the appropriate steps in respect of disciplinary action against any official(s) of the Municipality who contributed to the undue delay in the finalisation of the Complainant's claim for damages in terms of Consequence Management Policy of the Municipality, within sixty (60) working days from the date of the report.

7.1.1.3. Ensure that all the officials of the Municipality that deal with claims of damages against the Municipality are trained on Loss Control and Insurance Policy of the Municipality and how it should be managed, within sixty (60) working days from the date of the report.

- 7.1.1.4. Develop an Insurance Management Policy for the Municipality in line with Loss Control and Insurance Policy in conjunction with section 61, 62(c) and sec 78 of the MFMA to regulate insurance by the municipality against claims for damages and liabilities and submit it to the Council for consideration and adoption, within ninety (90) working days from the date of this report.
- 7.1.1.5. Establish the internal complaint mechanism to ensure that complaints against the delivery of service are expeditiously resolved as per the resolution taken by the high level meeting between the PPSA and the Premier of the Northern Cape Province, within sixty (60) working days from the date of the report.
- 7.1.1.6. Ensure that Internal Audit, on an annual basis, review the adequacy and effectiveness of the municipality's system of internal control, risk management and supply chain management.
- 7.1.1.7. Ensure that the Audit Committee of the municipality, in all its meetings, consider the internal audit and AGSA reports to ensure that the recommendations are implemented.
- 7.1.1.8. Report to the Council on the progress made with the implementation of the remedial action taken in paragraphs 7.1.1.1 to 7.1.1.7 above, within (120) working days from the date of the report and to submit a copy thereof to the Public Protector.

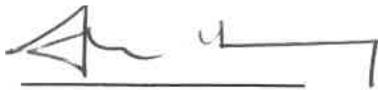
8. MONITORING

- 8.1 The Municipal Manager of the Municipality to submit an action plan to the Public Protector within thirty (30) days from the date of this report on the implementation of the remedial action referred to in paragraph 7.1 above.

8.2 The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 13 / 12 /2021



Assisted by: Mr M Khanya, Provincial Representative:
Northern Cape
Public Protector South Africa