
REPORT NO: 130 of 2019/2020
ISBN: 978-1-928507-90-1

"Alleged failure by Mahikeng Local Municipality to complete the construction of an access road from Kaalpan to Nooitgedacht villages"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE MAHIKENG LOCAL MUNICIPALITY TO COMPLETE THE CONSTRUCTION OF AN ACCESS ROAD FROM KAALPAN TO NOOITGEDACHT VILLAGES FROM GRAVEL TO TARRED ROAD
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>3</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>8</td>
</tr>
<tr>
<td>2. THE COMPLAINT</td>
<td>9</td>
</tr>
<tr>
<td>3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</td>
<td>10</td>
</tr>
<tr>
<td>4. THE INVESTIGATION</td>
<td>15</td>
</tr>
<tr>
<td>5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE</td>
<td>19</td>
</tr>
<tr>
<td>6. OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW</td>
<td></td>
</tr>
<tr>
<td>7. AND PRESCRIPTS</td>
<td></td>
</tr>
<tr>
<td>8. FINDINGS</td>
<td>31</td>
</tr>
<tr>
<td>7. REMEDIAL ACTION</td>
<td>34</td>
</tr>
<tr>
<td>8. MONITORING</td>
<td>34</td>
</tr>
</tbody>
</table>
Executive Summary

(i) This is my report issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of failure by the Mahikeng Local Municipality (the Municipality) to complete the construction of an access road from Kaalpan to Nooitgedacht villages, North West Province, from a gravel to a tarred road.

(iii) The complaint was lodged with my office on 01 October 2015 by Mr MW Tsatsimpe (the Complainant), acting on behalf of the community of Kaalpan Village, alleging failure by the Mahikeng Local Municipality to complete the construction of an access road from Kaalpan to Nooitgedacht villages, North West Province from gravel to tarred road.

(iv) On analysis of the complaint, the following issues were identified and investigated.

(a) Whether the Mahikeng Local Municipality improperly failed to complete the construction of the access road from Kaalpan to Nooitgedacht village since 16 August 2011;

(b) Whether the Mahikeng Local Municipality irregularly paid a contractor: Bonolo Supplier and Distribution for the construction of the access the road, resulting in irregular, or fruitless and wasteful expenditure; and

(c) Whether the Complainant and the community of Kaalpan village suffered prejudice as a result of the Mahikeng Local Municipality’s conduct, in the circumstances.
(viii) Key laws and policies taken into account to determine if there had been maladministration or improper conduct by the Municipality and prejudice to the Complainants, were principally those imposing administrative standards that should have been complied with by the Municipality and its officials when failing to complete the construction of an access road from Kaalpan to Nooitgedacht villages, North West Province, from gravel to tarred road. They include the following:


(b) Promotion of Administrative Justice Act, 3 of 2000

(c) The Municipal Finance Management Act 56 of 2003;

(d) The Public Protector Act, 23 of 1994

(e) Batho Pele Principles.

(ix) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory instruments, including constitutional provisions, legislation, regulations and relevant court decisions.

(xi) I issued notices in terms of section 7(9) of the Public Protector on 21 October 2019 to the Premier of the North West Provincial Government; the Member of Executive Council of Department of Cooperative Governance and Traditional Affairs, the Head of the Department of Cooperative Governance and Traditional Affairs, the Administrator Municipal Manager of the Mahikeng Local Municipality, the Municipal Manager of the Mahikeng Local Municipality, the Mayor of the Mahikeng
Local Municipality, and the Speaker of the Mahikeng Local Municipality in terms of section 7(9)(a) of the Public Protector Act, but no responses were received from any of the said officials.

(x) Having considered the evidence received during the investigation, the regulatory framework determining the standards that should have been complied with, I make the following findings:

(a) **Regarding whether the Mahikeng Local Municipality improperly failed to complete the construction of the access road from Kaalpan to Nooitgedacht village since 16 August 2011.**

(aa) The allegations that the Municipality failed to complete the construction of the access road from Kaalpan to Nooitgedacht since August 2011, is substantiated.

(bb) A period of eight (8) years has lapsed, however the Municipality has failed to complete the construction of the access road from Kaalpan to Nooitgedacht village.

(cc) The conduct of the Municipality in this regard is in violation of sections 33 read with section 3 of PAJA,152 and 195 of the Constitution, section 32 and 62 of MFMA and Batho Pele principle.

(dd) The conduct of the Municipality’s also constitutes improper conduct as envisaged in section 182(1) of the Constitution, and maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act.
(b) Regarding whether the Municipality irregularly paid the contractor: Bonolo Supplier and Distribution for the construction of an access road, resulting in irregular, or fruitless and wasteful expenditure.

(aa) The allegation that the Municipality paid the Contractor Bonolo Supplier and Distribution for the construction of an access road, resulting in irregular, fruitless and wasteful expenditure, is substantiated.

(bb) The contractor was paid an amount of R4 439 436.54 including 14% vat, certified by Mr AP Kembo, the then Head of the Department: Roads, that the account is correct; that the service and/or goods were actually rendered and that the charges are fair and reasonable according to the contract as per the payment certificates and invoices, despite the fact that construction of the access road was incomplete. The Municipality in this regard failed to provide my office with the names of the officials who inspected the road and who authorised payment to the contractor, as per enquiry made on 12 September 2018.

(cc) Had the Municipality followed the provisions of the Constitution, MFMA, the Systems Act, and Batho Pele Principles, the Municipality would have prevented irregular, or fruitless and wasteful expenditure, by not effecting payment to the Contractor for incomplete construction of the access road.

(dd) The conduct of the Municipality is in violation of section 33 read with section 3 of PAJA, sections 152 and 195 of the Constitution, sections 32, 62,and 112 of the MFMA and Batho Pele principles.

(ee) The conduct of the Municipality also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act.
(c) Regarding whether the Complainant and the Community of Kaalpan village suffered prejudice as a result of the Municipality’s

(aa) The allegation that the Complainant and the Community of Kaalpan village suffered prejudice as a result of the failure by the Municipality to complete the access road construction from Kaalpan to Nooitgedacht villages since 16 August 2011, is substantiated.

(bb) In terms of evidence obtained, the construction of the access road was expected to be completed on 31 January 2012 and for the past eight (8) years the Complainant and the community were adversely affected by the failure of the Municipality to provide their village with proper access road. The unfinished road is susceptible to flooding during rainy times, which poses a safety risk to the community and it has the potential to cause damage to vehicles making use of the road.

(xi) The appropriate remedial actions that I am taking as envisaged in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

(a) **The Acting Municipal Manager of the Mahikeng Local Municipality must:**

(aa) Within fifteen (15) working days from the date of this report ensure that this report is tabled before Council;

(bb) Within ninety (90) working days from the date of this report, conduct an analysis of the work still to be done to complete the construction of the access road, determine the cost thereof and the timelines within which the project can be completed;
(cc) Within one hundred and twenty (120) days of receipt of this report, appoint a service provider through the prescribed procurement processes, to undertake the completion of the access road.

(dd) Within one hundred and twenty (120) days from the date of this report, determine the amount overpaid to the contractor and initiate a legal process to recover such monies for incomplete construction of the access road;

(ee) Within sixty (60) working days from the date of this report, refer the matter to the Directorate of Priority Crimes, to investigate the corrupt activities of any official who inspected and authorised payment to the contractor whilst the construction of the road was incomplete;

(ff) Within sixty (60) working days from the date of this report, take internal disciplinary action against any official(s) who inspected, approved payment for stages as per payment certificates which were not completed and authorised payment to the contractor for incomplete road construction;

(gg) Within forty five (45) days from the date of this report, provide the Public Protector with an action plan to be implemented by the Municipality to complete the upgrading of the access road from Kaalpan to Nooitgedacht village, following the assessment of outstanding work which still needs to done to complete the access road, the cost of completing the access road and the appointment of the service provider to complete the access road;
(b) **The Administrator of Mahikeng Local Municipality must:**

(aa) Within ninety (90) working days from the date of this report, ensure that the Municipal Manager, complies with the remedial action taken in terms of section 182(1)(c) of the Constitution.

(c) **The MEC for the Department of Cooperative Governance and Traditional Affairs must**

(aa) Within ninety (90) working days from the date of this report, establish mechanisms, processes and procedures to monitor the Municipality in managing its own affairs, exercising its powers and performing its function; assess the support needed by the Municipality to strengthen its capacity to provide areas within its jurisdiction with adequate service delivery, to manage its own financial affairs and exercise its powers and perform its function in terms of the Constitution.

(c) **The Directorate for Priority Crime Investigations (DPCI) and the Asset Forfeiture Unit must:**

(aa) Investigate any alleged criminal conduct against implicated parties for financial mismanagement in violation of the MFMA, especially the payment of the service provider for services not rendered.

(bb) To recover, through civil litigation any amount incurred as irregular fruitless and wasteful expenditure from the responsible official(s) and service provider.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FALUIRE BY THE MAHIKENG LOCAL MUNICIPALITY TO COMPLETE THE CONSTRUCTION OF AN ACCESS ROAD FROM KAALPAN TO NOOITGEDACHT VILLAGES FROM GRAVEL TO TARRED ROAD

1. INTRODUCTION

1.1 This is my report issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8 of the Public Protector Act to the following people to inform them of the outcome of the investigation and implementation of the remedial actions:

1.2.1. The Premier of the North West Provincial Government, Professor JT Mokgoro;

1.2.2. The Member of the Executive Council for the Department of Cooperative Governance and Traditional Affairs (the MEC): Mr G Kegakilwe;

1.2.3. The Head of Department of Cooperative Governance and Traditional Affairs, Mr P E Motoko;

1.2.4. The Mayor: Mahikeng Local Municipality, Ms B Diakanyo;

1.2.5 The Speaker: Mahikeng Local Municipality, Mr T Mebe;

1.2.6 The Administrator: Mahikeng Local Municipality: Ms Letlotlo Letlapa
1.2.7 The Acting Municipal Manager: Mahikeng Local Municipality, Mr NM Mokgwamme;

1.2.8 The Complainant, Mr MW Tsatsimpe.

1.3. The report relates to an investigation into allegations of failure by the Mahikeng Local Municipality to complete the construction of an access road from Kaalpan to Nooitgedacht villages, from gravel to tarred road.

2. COMPLAINT

2.1. On 01 October 2015, Mr MW Tsatsimpe (the Complainant) acting on behalf of the community of Kaalpan Village, lodged a complaint with my office.

2.2 In the main, the Complainant alleged that:

2.2.1 The upgrading of the access road by the Municipality from Kaalpan to Nooitgedacht villages started in 2011;

2.2.2 Further, there is no one from the Municipality giving the community information about what is happening with the road and/or when the road construction will be completed;

2.2.3 As at 1 October 2015, the Municipality had not yet completed the upgrading of the access road from Kaalpan to Nooitgedacht village;

2.2.4 The Complainant requested my office to investigate the following:

   "
   2.2.2.1 Who is the Contractor appointed by the Municipality?

   2.2.4.1 What were the specifications of the contract?"
2.2.4.2 Was the contract advertised?
2.2.4.3 What are the costs of tarring the road?
2.2.4.4 What is the distance (km) of the road?
2.2.4.5 Whether the expenditure were incurred according to PFMA, prescripts?
2.2.4.6 How much was paid to the contractor?
2.2.4.7 Was the value for money approach observed when paying the contractor?
2.2.4.8 When and why the contract was stopped?
2.2.4.9 Who inspected the work done and authorised payment for incomplete work?
2.2.4.10 Does the Municipality intend to complete the road construction, if so, when?
2.2.4.11 What to expect going forward? "[sic]

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 legislation
3.4. In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016(3) SA 580 (CC) and (5) BCLR 618 the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect [at para 76]. 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.”

3.5 In the above-mentioned Constitutional matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*, the Chief Mogoeng stated the following, when confirming the powers of the Public Protector:

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

3.5.2 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);

3.5.3 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);
3.5.4 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);

3.5.5 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);

3.5.6 The Public Protector’s power to take appropriate 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);

3.5.7 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 these words suggests that she necessarily 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));

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d));

3.5.9 “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)).
3.5.10. In the matter of President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.5.10.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);

3.5.10.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question (paragraph 82 of the judgement);

3.5.10.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(10) afford the Public Protector with the following three separate powers (paragraphs 100 and 101 of the judgement):

a) Conduct an investigation;

b) Report on that conduct; and

c) To take remedial action.

3.5.10.4. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104 of the judgement);

3.5.10.5 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. (Paragraph 105 of the report). This a finding on EEF judgement as well;
3.5.10.6 The fact that there is no firm findings on the wrong doing, this 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 of the judgement); and

3.5.10.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgement).

3.6 Section 182 (2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation;

3.7 I am further mandated by the Public Protector Act to investigate and redress maladministration, improper conduct and abuse or unjustifiable exercise of power in the conduct of state affairs or an improper or dishonest act by any person in the employ of government at any level;

3.8 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably 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 I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.9 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred
more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. In this case, I submit that there is a huge public interest in the manner in which public administration or governing of public affairs are handled.

3.10 According to evidence in my possession, an amount of R 4 439 436.54 including 14% Vat of tax payers monies was paid out to the contractor who failed to complete the construction of access road from Kaalpan to Nooitgedacht villages which amounts to an irregular, fruitless and wasteful expenditure. The community suffered prejudice as a result of the failure by the contractor to complete the construction of the access road since 16 August 2016, to date. The Municipality will have to source additional funding to complete the construction of the access road. Therefore there is a need to recover the amount paid to the contractor and refer the matter to the relevant law enforcement agency for further investigation.

3.11 The Municipality is an organ of state and its conduct falls within the Public Protector’s mandate to investigate; and

3.12 The Public Protector’s powers and jurisdiction to investigate and take appropriate remedial action were not disputed by the Municipality.

4. THE INVESTIGATION

4.1 The investigation Process

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 me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3. The investigation process included an exchange of correspondence with the Municipality and other officials, analysis of relevant documentation, conducted research and the consideration and application of relevant laws, regulatory framework and jurisprudence.

4.1.4. During the investigation process, notices in terms of section 7(9) (a) of the Public Protector Act (section 7(9) notice) were served on the Premier, Professor Mokgoro, the Member of the Executive Council, Hon. MEC Kegakilwe, the Head of the Department, Mr Motoko, the Administrator: Ms Letlape, the Acting Municipal Manager: Mr Mokgwamme, the Speaker Mr Mebe and the Mayor Ms Diakanyo dated 21 October 2019, respectively, to afford them an opportunity to respond to my provisional findings. No responses were received from the affected parties as per my section 7(9) notices.

4.2 Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?
4.2.1.4 In the event of maladministration or improper conduct what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?
4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the Mahikeng Local Municipality improperly failed to complete the construction of the access road from Kaalpan to Nooitgedacht village since 16 August 2011, whether the Municipality irregularly paid the contractor for the incomplete construction of the access road, resulting in irregular, fruitless and wasteful expenditure and if so whether the Complainant and the community of Kaalpan village suffered prejudice as a result of the conduct of the Municipality.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality or organ of state to prevent maladministration and improper prejudice to the Complainant and the community of Kaalpan village.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered any prejudice, the idea is to place him or her as close as possible to where he/she would have been had the Municipality or organ of state complied with the regulatory framework setting the applicable standards for proper conduct and good administration.

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

4.3.1 Whether the Mahikeng local Municipality improperly failed to complete the construction of the access road from Kaalpan to Nooitgedacht villages since 16 August 2011;
4.3.2 Whether the Mahikeng local Municipality irregularly paid the contractor for incomplete construction of the access road, resulting in irregular, fruitless and wasteful expenditure; and

4.3.3 Whether the Complainant and the community of Kaalpan village were prejudiced as a result of the conduct of the Mahikeng Local Municipality in the circumstances.

4.4 The Key Sources of information

4.4.1 Documents received and considered

4.4.1.1 A copy of a newspaper advert dated 25 June 2010;
4.4.1.2 A copies of pictures of the alleged incomplete road;
4.4.1.3 A copy of names of the community members dated 15 September 2015;
4.4.1.4 A copy of a complaint dated 18 September 2015;
4.4.1.5 A copy of an inquiry letter from the Headman of Kaalpan village dated 23 May 2016;
4.4.1.6 A copy of a progress letter dated 13 January 2016 to the Complainant.

4.4.2 Correspondence sent and received

4.4.2.1 A copy of a progress report prepared by KKM Consulting Engineers from the Municipality dated May 2014, April 2015 and August 2015, respectively;
4.4.2.2 A Copy of a Complaint from the Complainant to PPSA office dated 18 September 2015;
4.4.2.3 A copy of a memorandum signed by Mr DP Goeiman;
4.4.2.4 A copy of an acknowledgment letter dated 06 October 2015 to the Complainant;
A copy of an enquiry letter dated 11 November 2015 to Mr G Magoma: former Director Legal Services, Department of Public Works and Roads;

A copy of an acknowledgement letter from Mr G Magoma dated 13 November 2015

A copy of a letter from Mr L Mafune: Acting Chief Director, Transport Infrastructure dated 01 December 2015;

A copy of a correspondence dated 04 December 2015 from Mr G Magoma to Mr S Keebine, the Provincial Representative;

A copy of an enquiry letter dated 13 January 2016 to the then Municipal Manager, Mr T Mokwena;

A copy of an email dated 03 March 2016 sent to Mr S Malongwa: Manager in the office of the Municipal Manager;

A copy of a response from the Municipality received by PPSA Office on 18 December 2016;

A copy of a correspondence dated 17 August 2017 from the then Municipal Manager: Mr T Mokwena;

Copies of payment certificates received by the Municipality from KKM Consulting Engineering;

A copy of a letter dated 22 July 2019 from the Municipality signed by the Acting Municipal Manager;

A copy of a section 7(4)(a) of the Public Protector Act 2019 to the then Municipal Manager, hearing was held on 08 December 2016;

**4.4.3 Notices issued and responses received**

Section 7(9) (a) notices to the Premier, the MEC, and the Head of the Department, the Administrator, the Municipal Manager, the Speaker and the Mayor dated 21 October 2019.
4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa Act, 108 of 1996
4.4.4.2 The Public Protector Act, 23 of 1994
4.4.4.3 Promotion of Administrative Justice Act, 3 of 2000
4.4.4.3 The Municipal Finance Management Act 56 of 2003;
4.4.4.4 Batho Pele Principles.

4.4.5 Case law

4.4.5.1 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016(3) SA 580 (CC) and (5) BCLR 618;

4.4.5.2 Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and others (12266/08) [2009] ZAKZPHC 30; 2010 (5) SA 574 (KZP)

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 Mahikeng local Municipality improperly failed to complete the construction of the access road from Kaalpan to Nooitgedacht villages since 16 August 2011:

Common cause issues

5.1.1 It is common cause that a tender for the upgrading of the access road from Kaalpan to Nooitgedacht villages from a gravel road to a tarred road was
advertised by the Municipality in “The Mail” local newspaper as per article dated 25 June 2010 under Tender Number MIG/NW 794/R,ST/07/09.

5.1.2 In terms of a report dated 17 June 2016 which was compiled by NN Matebesi, the acting Technician: Project Management Unit (PMU) employed by the Municipality, Bonolo Supplier and Distribution company (the contractor), was appointed on 16 August 2011 to upgrade the access road for an amount of R3 092 240.00 which was later revised and increased to R 4 864 240.00, due to price escalation.

5.1.3 It is also common cause that the construction of the access road was expected to be completed within a period of five (5) months as per a letter dated 29 July 2011 signed by the then Municipal Manager, Mr K Rabanye. The contractor accepted their appointment to upgrade the road as per a letter dated 2 August 2011.

5.1.4 Furthermore, as at 31 January 2012 six (6) months later the Municipality failed to complete the construction of the access road as scheduled.

5.1.5 The project was still incomplete as at 1 October 2015 when the Complainant approached my office for intervention. At the conclusion of the investigation, the road was still incomplete.

5.1.6 My office made an enquiry with the Municipality on 13 January 2016 and requested the Municipality to respond to questions raised in paragraph 3.4 above. The Municipality did not respond.

5.1.7 The Municipality, was as a result, subpoenaed in terms of section 7(4) (a) and (b) of the Public Protector Act. The subpoena hearing was held on 8 December 2016 in the North West Public Protector’s Chambers, Mahikeng, chaired by the
Provincial Representative, Mr SJ Keebine. The Municipality was represented by Mr Mooketsi Molamu, the Director Corporate Service: Legal Services.

5.1.8 During the ADR session, the Municipality furnished the investigation team with a copy of an undated report from the then Municipal Manager: Mr T Mkwena responding to our enquiry made to the Municipality on 13 January 2016 which provided as follows:

"Normal Supply Chain Management process were followed and Bonolo Supply was appointed to do the construction. The scope of work was 3.1 km of access road with 6.8 m wide double seal surface with mountable kerb. The project was funded by MIG. The cost of the project was R4 864 240.00 and the municipal officials inspected the work done and authorized payment to be effected for incomplete work done. Further that value for money was not observed when payment was effected to the contractor for incomplete work. The contract was stopped in August 2012 for inspection of work done, the Municipality intends to complete the road construction on proviso funds are available, the Municipality is expected to investigate the matter and map a way forward" [sic]

5.1.9 Mr. Molamu, further confirmed that the Municipality failed to complete the access road construction from Kaalpan to Nooitgedacht from gravel to tarred road.

5.1.10 The Municipality provided my office with the reports of the appointed Consultants dated May 2014, April 2015 and August 2015, respectively, which evidently confirm that the contractor failed to complete the construction of the access road, but was paid an amount of R4 439 436.54 including 14% Vat.

5.1.11 In addition to the reports provided, the Complainant submitted photographs to the investigation team, as supporting evidence which further confirmed the incomplete construction of the road.
5.1.12 Based on the evidence obtained during the investigation, it is clear that the access road construction by the Municipality was not completed, however the contractor was paid a sum of R4 439 436.54 including 14% Vat.

Application of relevant legal prescript

5.1.13 The Municipality's conduct needs to be tested against section 33 of the Constitution, which imposes a duty on all organs of state to provide administrative action that is lawful, reasonable and procedurally fair to everyone. It provides that:

"33. (1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons".

5.1.14 The question that remains to be resolved in this regard is whether the Municipality's action was lawful, reasonable or fair to the Complainant and the community.

5.1.15 The right to just administrative action forms part of the Bill of Rights in the Constitution, which is a set of moral norms, values and principles aimed at protecting everyone in the Republic of South Africa against unjust administrative action. These rights must be respected and protected and may not be violated by any individual, institution or spheres of government.

5.1.16 In terms of section 33(1) of the Constitution it was expected of the Municipality to provide administrative action that is lawful, reasonable and fair to the
Complainant and the Community in the manner in which services of the contractor were procured, rendered and paid for by the Municipality.

5.1.17 Furthermore, in terms section 33(2) of the Constitution it was expected of the Municipality to provide reasons for its decision or action for not completing the construction access road. The reasons must contain sufficient information so as to enable the recipient to understand both the administrative decision and the issues to be addressed and the aggrieved person must be able to consider whether an administrative act or decision is justifiable in relation to the reasons thereof, where his or her rights are affected or threatened by such act or decision.

5.1.18 Based on the above, the Municipality had a constitutional and statutory duty to provide the Complainant and the community with reasons regarding the failure to complete the construction of the access road.

5.1.19 The Promotion of Administration Justice Act 3 of 2000 (PAJA) gives effect to section 33 of the Constitution. Administrative action is defined in section 1 of the PAJA as follows:

"Any decision taken or failure to take a decision, by an organ of the State when…exercising a public function…. in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect."

5.1.20 The decision of the Municipality to make full payment for incomplete work can in the circumstances be classified as an administrative action which has in this case adversely affected the rights of the complainant and the community to service delivery by the Municipality.

5.1.21 The requirement for administrative action that is lawful, reasonable and procedurally fair is emphasised in section 3(2) (b) of the PAJA which provides
that administrative action which materially and adversely affects the rights on legitimate expectations of any person must be procedurally fair.

5.1.22 In Sokhela & Others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & others ([2009] JOL 23782 (KZP) at para. [52]), the court held per Wallis J that:

“As section 3(2) (b) of PAJA makes clear what will constitute a fair administrative procedure depends upon circumstances of each case. However, in general, in order to give effect to the right to procedurally fair administrative action the person affected must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations and a clear statement of the administrative action. Ordinarily the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. That is hardly surprising bearing in mind that one of the grounds upon which the decision of an administrator may be set aside is because irrelevant considerations were taken into account or relevant considerations were not considered.

5.1.23 The Municipality never provided the Complainant and the community with a formal written response regarding its failure to complete the construction of the access road. In the current case, the failure by the Municipality to provide the Complainant and the community with reasons regarding the failure to complete the access road construction, to provide the complainant and the community a reasonable opportunity to make representations regarding its decision for failing to complete the access road, may also be viewed as an administrative action;
Conclusion

5.1.24 The Municipality had a constitutional and statutory duty to observe the provisions of just administrative action, as encapsulated in section 33 of the Constitution and section 3 of the PAJA, to provide the Complainant and the community with written reasons once it had made a decision not to complete the road construction;

5.1.25 In terms of sections 152(1) and (2) of the Constitution, Municipalities are thus the most basic components spheres of government in the country and are tasked with providing basic services and fostering development in the areas they control. Local Government is attributed to service delivery and the Constitution assigns municipalities the role to organize economic resources towards the improvement of the lives of all citizens.

5.1.26 The Municipality's conduct needs to be tested against the objectives of local government outlined in section 152(1) of the Constitution, which state that the services to communities must be provided sustainably by the Municipality. It provides that:

"152(1) The objects of local government are –
(a) ..........;
(b) To ensure the provision of services to communities in a sustainable manner;
(c) ..........;
(d) To promote a safe and healthy environment"

5.1.27 Furthermore, section 50(2) of the Systems Act, supports the provisions of the Constitution regarding the objects of section 152 (1) of the Constitution. It provides that:
In administering its affairs, a municipality must strive to achieve the objects of local government set out in section 152(1) of the Constitution and comply with the duties set out in sections 4(6) and 6;

5.1.28 In terms of section 152(1) of the Constitution supported by section 50 (2) of the System Act, the Municipality was expected to ensure that the community of Kaalpan village is provided with basic service delivery in a sustainable manner by completing the construction of the access road from Kaalpan to Nooitgedacht village. However, in this regard, the Municipality failed to complete the construction of the access road as per reports submitted by the Municipality to my office.

5.1.29 The Municipality's conduct further needs to be tested within its financial and administrative capacity as outlined in section 152(2) of the Constitution, It provides that:

“A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

5.1.30 The Municipality was further expected to strive, within its financial and administrative capacity, to ensure that the construction of the access road from Kaalpan to Nooitgedacht village is completed in terms of section 152(2) of the Constitution.

5.1.31 Following from the above, I am of the view that the Municipality in the circumstances, failed within its financial and administrative capacity, to achieve the objects set out in section 152(1) of the Constitution and section 50(2) of the System Act. The Municipality in this regard advised my office that the price escalated from R3 092 240.00 to R 4 864 240.00 due to price escalation,

29
however the construction of the road is still not completed by the contractor even though the cost of the project escalated by an additional R1 772 000.00

5.1.32 From a financial perspective it was improper for the municipality to escalate the contract amount from R3 092 240.00 to R 4 864 240.00 and authorise payment to the contractor prior to the finalisation of work.

5.1.33 Batho Pele”, a Sesotho word, which means “People First,” is an initiative that was launched in 1997 to transform the Public Service at all levels. The initiative was launched because the democratic South African government inherited a Public Service that was not people-friendly and lacked the skills and attitudes to meet the developmental challenges facing the country. In the struggle to transform the Public Service, the old culture had to be changed to ensure that the people are served properly.

5.1.34 The relevant Batho Pele principle of redress provides that:

“If the promised standard is not delivered citizens should be offered an apology, a full explanation and speedy and effective remedy and when complaints are made, citizens should receive a sympathetic positive response”

5.1.35 It was expected of the Municipality to provide the complainant and the community with a positive response and regular feedback regarding the delay to complete the road construction.

Conclusion:

5.1.36 Basic services are the fundamental building blocks of improved quality of life, in that the Municipality must ensure that the people in their areas have at least the basic services they need. These services have direct and immediate effect on
the quality of the lives of the people in the areas the Municipality control, the most important basic services amongst others, include Municipal roads and storm water drainage.

5.1.37 Based on the evidence gathered, the Municipality unduly failed to complete the construction of the road and to provide the complainant and the community with reasons regarding the delay to complete the construction of the road.

5.1.38 The conduct of the Municipality was in violation of the provisions of sections 33, 152(1), 151(2) of the Constitution, section 3 of PAJA and section 50(2) of the System Act. The Municipality did not also acted in accordance with the principle 7 of the Batho Pele Principles relating to redress.

5.1.39 On 10 October 2019 my investigating team contacted Mr BG Senwedi: Community Chairperson from Kaalpan Village who confirmed that the construction of the road has still not been completed by the Municipality.

5.2 Regarding whether the Municipality irregularly paid the contractor for an incomplete construction of the access road, resulting in an irregular, fruitless and wasteful expenditure:

Common cause issues

5.2.1 It is common cause that the total contracted amount was R3 092 240.00 which was later revised and increased to R 4 864 240.00, due to price escalation.

5.2.2 The Municipality irregularly paid the contractor for an incomplete construction of an access road from Kaalpan to Nooitgedacht village and in this regard the community was not provided with basic service delivery as a result of the Municipality’s conduct.
5.2.3 The contractor was paid the contract amount of R4 369 004.56, including 14% Vat by the Municipality as per payment certificates prepared by KKM Consulting Engineering signed by Kitso Molawa: Professional Technical Engineering and received by Mr P Kembo the then Head of Department of Roads, despite failing to complete the upgrading of the road.

5.2.4 The copies of payment certificates received by the Municipality from KKM Consulting Engineering provides the following breakdown including VAT:

5.2.4.1 "Payment certificate No. 01 dated 29 July 2009 for Miscellaneous Costs, Professional fee, Plans, Prints and Contract: R 355, 124, 72;

5.2.4.2 Payment certificate No.1 02 dated 28 January 2011 for Professional fee and Transport Subsistence: R 156, 263, 91;

5.2.4.3 Payment certificate No.1 03 dated 17 October 2011 for Provision of Site Staff and Site Transport: R38, 918.66;

5.2.4.4 Payment certificate No.1 04 dated 25 November 2011 for Professional fee, Provision of Site Staff and Site Transport: R 39, 719, 50;

5.2.4.5 Fee claim No. 05 dated 25 January 2012 for Professional fee, Provision of Site Staff and Site Transport and Subsistence: R 200,953.27;

5.2.4.6 Payment certificate No. 03 dated 25 January 2012 for Retention of 10%, Material on site, Penalties and other debits/bonus, other credits/Security: R592, 910, 01;

5.2.4.7 Payment certificate No. 04 dated 14 March 2012 for total from Schedule of Quantities and Retention of 10%: R 704,046.33;
5.2.4.8 Fee claim No. 5 dated 26 March 2012 for Provision of Site Staff and Transport and Subsistence: R 23, 197, 22;

5.2.4.9 Payment certificate No. 05 dated 13 April 2012 for Retention of 10%, Material on site, Penalties and other debits/bonus, other credits/Security: R 427,005.81;

5.2.4.10 Payment certificate N.o 06 dated 25 June 2012 for Retention of 50% deducted from the contractor’s previous certificates, Material on site, Penalties and other debits/bonus, other credits/Security: R 1, 901, 273, 34;

5.2.11.1 Total contractual amount claimed and paid to the contractor: R 4 439 436.54”[sic]

5.2.5 The Municipality’s submission during the ADR session, was that the Municipality is aware of its wrongdoing, by irregularly effecting payment to the contractor without completing the road, as a result the money paid to the contractor in this regard constitutes an irregular, fruitless and wasteful expenditure.

Application of relevant legal prescript

5.2.6 The preamble to the Municipal Finance Management Act 56 of 2003 (MFMA) states that the Act seeks:

“To ensure sound and sustainable management of the financial affairs of Municipalities and other institutions in the local sphere of government, to establish treasury and standards for the local sphere of government, and to provide for matters connected therewith”.

5.2.7 The MFMA essentially sets standards for financial management, including financial controls, the MFMA’s provisions have enormous compliance
implications for and to some extent, spill over to the regulation of aspects of state procurement.

5.2.8 The MFMA defines an irregular expenditure as “an expenditure that is contrary to the Municipal Finance Management Act and the System Act”. Furthermore, fruitless and wasteful expenditure “is expenditure that was made in vain and would have been avoided had reasonable care been exercised”.

5.2.9 The MFMA imposes certain basic responsibilities on the accounting officer regarding financial and procurement management. The question that had to be answered with regard to the conduct of the Municipality is principally regulated by section 32(4)(a-b) and 62(1) (a) and (c) of MFMA;

5.2.10 Section 32(4)(a-b) of MFMA provides that:

“The accounting officer must inform the Mayor, the MEC for local government in the province and Auditor General in writing of-

a) Any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;

b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and

c) .....................

5.2.11 It was expected of the then acting Municipal Manager: Mr R Ruiters upon the discovery of an irregular, fruitless and wasteful expenditure, to investigate the alleged irregular, fruitless and wasteful expenditure, to report promptly in writing, the particulars of the expenditure to the Executive Mayor, the MEC for local government and the Auditor General. The results of the investigation would have determined the appropriate action to be taken regarding the irregular expenditure. However in this regard, the evidence gathered during the investigation indicates
that the Municipality failed to investigate the matter and to report promptly in writing, the particulars of the expenditure to the Executive Mayor, the MEC for local government and the Auditor General.

5.2.12 Furthermore section 62(1) of MFMA provides that: "the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure—

   a) That the resources of the Municipality are used effectively, efficiently and economically;
   b) ................
   c) ................
   d) That unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented
   e) ................"

5.2.13 In this regard the Municipality was expected to use its resources effectively, efficiently and economically as required by section 62 (1) (a) of MFMA in the completion of the construction of the access road from Kaalpan to Nooitgedacht village.

5.2.14 In terms of section 62 (1) (d) of MFMA the Municipality was expected, subsequent to the inspection of the road, to take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented before effecting the payment to the contractor;

5.2.15 The expenditure incurred in this regard could only be regarded as irregular, fruitless and wasteful in terms of section 62(1) (d) of MFMA, in that it was made in vain and would have been avoided had reasonable care been taken when effecting payment for an incomplete construction of the access road.
Conclusion

5.2.16 It is evident from the facts before me and evidence obtained that the Municipality failed to take all reasonable steps to ensure that the resources of the Municipality are used effectively, efficiently and economically in the completion of the access road. The Municipality further failed to take all reasonable steps to ensure that an irregular or fruitless and wasteful expenditure and other losses are prevented.

5.3 Regarding whether the Complainant and the Community of Kaalpan village were prejudiced as a result of the Municipality’s conduct in the circumstances:

5.3.1 The Complainant submitted that the fact that the Municipality has for a period of eight (8) years failed to complete the construction of the access road from Kaalpan to Nooitgedacht village from gravel to tar road has adversely affected the community in the area.

5.3.2 The Complainant further submitted as per photographs taken during rainy seasons that the aforementioned road is not accessible and the community is unable to use the road to reach their destinations, for instance, their place of work and schools for their children. Furthermore, the unpleasant road conditions cause damage to their motor vehicles.

5.3.3 The prejudice suffered relates to the failure by the Municipality to provide the community of Kaalpan village with service delivery and financial loss suffered by the Municipality as a result of payment effected to the contractor amounting to R4 439 436.54 including vat, for an incomplete construction of the road, resulting in an irregular, fruitless and wasteful expenditure;
5.3.4 Based on the evidence in my possession, the Municipality conceded to having improperly authorised payment to the contractor prior to the finalisation of work.

Application of relevant legal prescripts

5.3.5 The Municipality's conduct needs to be tested against the principles of good administration outlined in section 195(1) of the Constitution. It provides that:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles

(a) A high standard of professional ethics must be promoted and maintained;
(b) ..... 
(c) ....
(d) ....
(e) People's need must be responded to and the public must be encouraged to participate in policy making;
(f) Public administration must be accountable"

5.3.6 In terms of section 195(1)(a) the Municipality was expected to maintain a high standard of professional ethics by ensuring that the payment for incomplete construction of the access road is not effected to the contractor and further to ensure that that the construction of the access road is completed timeously. In this instance, the Municipality would have promoted and shown its efficient, economic and effective use of its resources.

5.3.7 Furthermore, the Municipal officials who inspected the access road were expected to strive to do quality work in the performance of their duties all the time in order to give effect to an accountable public administration in terms of section 195(1)(f). As a result, the Municipality would not have paid the contractor an
amount of R4 439 436.54 including 14% vat for an incomplete construction of the access road, which resulted in an irregular, fruitless and wasteful expenditure.

Conclusion

5.3.8 From evidence gathered and information provided by Mr Senwedi: Community Chairperson from Kaalpan Village, it can be concluded that the Municipality has failed to uphold the principles of a good public administration and deliver the services to the community of Kaalpan and Nooitgedacht Villages.

The Municipality's response to the section 7(9)(a) notice

5.3.9 At the conclusion of my investigation, the following persons were served with section 7(9)(a) notices namely: The Premier: Prof Mokgoro, the MEC: Mr Kegakilwe of Department of Cooperative Governance and Traditional Affairs, The Head of the Department: Mr Motoko of the Department of Cooperative Governance and Traditional Affairs, the Administrator of Mahikeng Local Municipality: Ms Letlape, the Acting Municipal Manager of Mahikeng Local Municipality, Mr Mokgwamme, the Speaker of the Mahikeng Local Municipality, Mr Mebe of the Mahikeng Local Municipality, and the Mayor: M Diakanyo of the Mahikeng Local Municipality. The notices were personally delivered to the aforementioned persons. These notices were served on the respective persons on 28 October 2019.

5.3.10 The purpose of the notices was to afford the parties an opportunity to comment on the possible findings arising from the investigation. The recipients were afforded ten (10) days to respond to the notices. However they all failed to respond by the expiry of the time allocated.
6. FINDINGS

Having considered the evidence received during the investigation, the regulatory framework determining the standard that should have been complied with, I make the following findings against the Municipality:

6.1 Regarding whether the Municipality improperly failed to complete the construction of the road from Kaalpan to Nooitgedacht villages:

6.1.1 The allegations that the Municipality failed to complete the construction of the access road from Kaalpan to Nooitgedacht since August 2011, is substantiated.

6.1.2 A period of eight (8) years has lapsed, however the Municipality has failed to complete the construction of the access road from Kaalpan to Nooitgedacht village.

6.1.3 The conduct of the Municipality in this regard is in violation of sections 33 read with section 3 of PAJA, sections 152 and 195 of the Constitution, sections 32 and 62 of MFMA and Batho Pele principle.

6.1.4 The conduct of the Municipality’s also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act;

6.2. Regarding whether the Municipality irregularly paid the contractor for an incomplete construction of an access road, resulting in an irregular, fruitless and wasteful expenditure:

6.2.1 The allegation that the Municipality paid the Contractor for an incomplete construction of an access road, resulting in an irregular, fruitless and wasteful expenditure, is substantiated.
6.2.2 The contractor was paid an amount of R4 439 436.54 including 14% vat, certified by Mr AP Kembo that the account is correct, the service and/or goods were actually rendered and the charges are fair and reasonable according to the contract as per the aforementioned payment certificates and invoices, despite an incomplete construction of the access road. The Municipality in this regard failed to provide my office with names of the officials who inspected the road and authorised payment to the contractor, as per an enquiry made by my investigation team on 12 September 2018;

6.2.3 Had the Municipality followed the provisions of the Constitution, MFMA, the Systems Act, and Batho Pele Principle, the Municipality would have prevented an irregular, fruitless and wasteful expenditure and other losses, by not effecting contractual payment to the Contractor for the incomplete construction of the access road.

6.2.4 The conduct of the Municipality is in violation of section 33 read with section 3 of PAJA,152, section195 of the Constitution, sections 32, 62,and 112 of the MFMA and Batho Pele principle;

6.2.5 The conduct of the Municipality also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act.

6.3 Regarding whether the Complainant and the Community of Kaalpan village were prejudiced as a result of the Municipality’s conduct in the circumstances:

6.3.1 The allegation that the Complainant and the Community of Kaalpan village suffered prejudice as a result of the failure by the Municipality to complete the access road construction from Kaalpan to Nooitgedacht villages since 16 August 2011, is substantiated.
6.3.2 In terms of evidence obtained, the construction of the access road was expected to be completed on 31 January 2012 and for the past eight (8) the complainant and the community have been severely affected by the failure of the Municipality to provide their village with basic service delivery. The unfinished road is also susceptible to flooding during inclement weather conditions, which poses a safety risk to the community and has the potential of causing damage to vehicles making use of the road.

7. REMEDIAL ACTION

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

7.1 The Acting Municipal Manager of the Mahikeng Local Municipality must:

7.1.1. Within fifteen (15) working days from the date of this report, ensure that this report is tabled before Council.

7.1.2 Within ninety (90) working days from the date of this report, conduct an analysis of the work still to done to complete the construction of the access road, determine the cost thereof and the timelines within which the project can be completed;

7.1.3 Within one hundred and twenty days (120) working days of receipt of the report, appoint a service provider in terms of the prescribed procedures to undertake the completion of the access road.
7.1.4 Within one hundred and twenty (120) days from the date of this report, determine the amount overpaid to the contractor and initiate a legal process to recover such monies for the incomplete construction of the access road;

7.1.5 Within sixty (60) working days from the date of this report, refer the matter to the Directorate of Priority Crimes, to investigate the corrupt activities of any official who inspected and authorised payment to the contractor whilst the construction of the road was incomplete;

7.1.6 Within sixty (60) working days from the date of this report, take internal disciplinary action against any official(s) who inspected, approved payment for stages as per payment certificates which were not completed and authorised payment to the contractor for incomplete road construction;

7.1.7 The Municipal Manager should within forty five (45) days from the date of this report, provide the Public Protector with an action plan to be implemented by the Municipality to complete the upgrading of the access road from Kaalpan to Nootgedacht village, following the assessment of outstanding work which still needs to done to complete the access road, the cost of completing the access road and the appointment of the service provider to complete the access road;

7.2 The Administrator of Mahikeng Local Municipality must:

7.2.1 Within ninety (90) working days from the date of this report, ensure that the Municipal Manager, complies with the remedial action taken in terms of section 182(1)(c) of the Constitution.

7.2.2 Within 30 working days of finalisation of the investigation, further ensure that the matter is referred to the Directorate for Priority Crime Investigations (DPCI) and
the Asset Forfeiture Unit in terms of Section 6(4) (c) (ii) of the Public Protector Act for further investigation and recovery of losses.

7.3 The MEC for the Department of Cooperative Governance and Traditional Affairs must:

7.3.1 Within ninety (90) working days from the date of this report, establish mechanism, processes and procedures to monitor the Municipality in managing its own affairs, exercising its powers and performing its function; assess the support needed by the Municipality to strengthen its capacity to provide areas within its jurisdiction with an adequate serve delivery, to manage its own financial affairs and exercise its powers and perform its function in terms of the Constitution.

7.4 The Directorate for Priority Crime Investigations (DPCI) and the Asset Forfeiture Unit must:

7.4.1 Investigate any alleged criminal conduct against implicated parties for financial mismanagement in violation of the MFMA, especially the payment of the service provider for services not rendered.

7.4.2 To recover, through civil litigation any amount incurred as irregular fruitless and wasteful expenditure from the responsible official(s) and/or the service provider.

8. MONITORING

8.1. The Municipal Manager must, within forty five (45) working days from the date of the issuing of this Report, and for my approval, submit the implementation Plan to me indicating when and how the remedial action prescribed in this Report will be implemented.
8.2. The Administrator, within forty-five (45) working days from the date of the issuing of this Report, and for my approval, submit the implementation Plan to me indicating when and how the remedial action prescribed in this Report will be implemented.

8.3. The MEC must, within forty-five (45) working days from the date of the issuing of this Report, and for my approval, submit the implementation Plan to me indicating when and how the remedial action prescribed in this Report will be implemented.

8.4. In line with the Constitutional Court judgment in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Administrator, the Municipal Manager and the MEC unless a Court order directing otherwise is obtained.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 03/02/2020

Assisted by: Mr Gift Matane, Investigator, and
Mr Sechele Keebine: Provincial Representative