"Allegations of unlawful removal of telephone containers belonging to Mr Patrick Nkopelang by the Rustenburg Local Municipality"
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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, and section 8(1) of the Public Protector Act, 1994 (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 unlawful removal of telephone containers belonging to Mr Patrick Nkopelang from the Rustenburg main taxi rank, by officials of the Rustenburg Local Municipality (the Municipality).

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

(iv) In the main, the Complainant alleged that during February 2010 he and his wife were owners of four containers which housed Vodacom prepaid telephones which they used to run a telephone business at the Rustenburg main taxi rank. However, they did not have a permit to run the said business.

(v) The Complainant further alleged that he bought the said containers from Site Space Transport and Carriers in Rustenburg in 2008 and 2009, respectively, however, he no longer has the receipts for the said containers.

(vi) On 2 May 2010, in the middle of the night, a large number of Law Enforcement officials from the Rustenburg Municipality’s Public Safety and Law Enforcement Unit raided the taxi rank and removed the four containers belonging to him.

(vii) During the process of removing the said containers, they were all damaged beyond repair. There were also several items that were locked inside the containers, which the Municipal officials confiscated during the raid.
(viii) The Complainant did not recover any of those items. The items that were locked inside the containers included the following:

i. Thirteen (13) community telephones which were distributed as follows: Two containers had 4 (four) telephones each, while the third and fourth containers had 2 (two) and 3 (three) telephones respectively.

ii. Four (4) gas lights, one in each container.

iii. Four (4) batteries, one in each container.

iv. Thirty six (36) Remote controllers.

v. Thirty six (36) Cable wires for the telephones.

vi. Cash in the amount of R200-00 which was locked in one of the containers.

(ix) As a result of the damage caused to the containers as well as the disappearance of the items that were locked inside the containers, the Complainant suffered damages amounting to R263 849-00. (Two hundred and sixty three thousand, Eight hundred and forty-nine rand), being the total costs for the containers as well as the value of the items that were stored inside them.

(x) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Municipality unlawfully removed the telephone containers belonging to the Complainant from the taxi rank.

(b) Whether the Complainant suffered prejudiced as a result of the conduct of the Municipality.

(xi) Key laws and policies taken into account to determine if there had been maladministration by the Municipality and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Municipality or its officials when dealing with this complaint.
These are the following:

(a) The Constitution, 1996

(b) Rustenburg Local Municipality Bylaws on Street Trading.

(xii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) Whether the Municipality unlawfully removed telephone containers belonging to the Complainant from the taxi rank:

(aa) The allegation that the Municipality unlawfully removed the Complainant’s containers from the taxi rank, is substantiated.

(bb) The Municipality violated its own by-laws in failing to give the Complainant prior notice before confiscating the containers. Section 16(1) of the Municipal by-laws on street trading provides that the Municipality can only remove someone’s property after it has given that person prior notice to correct the situation.

(cc) The Municipality further failed to provide the Complainant with a receipt of the goods it confiscated as required by Section 16(2) of the Municipal by-laws which provides that the Municipality must issue a receipt in respect of all the goods confiscated as well as the amount of a fine that should be paid by the Complainant in order to have them released.

(ee) The conduct of the Municipality constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
(b) Whether the Complainant suffered prejudice as a result of the conduct of the Municipality:

(aa) The allegation that the Complainant was prejudiced as a result of the conduct of the Municipality, is substantiated.

(bb) During the unlawful process of removing the containers, three (3) of them were damaged beyond repair. The fourth container could not be found even after a diligent search. The Municipality did not dispute that it removed four containers belonging to the Complainant from the taxi rank.

(cc) I am unable to make any finding regarding the items that were allegedly stored inside the containers due a dispute that was raised by the Municipality concerning the actual contents of the containers that could not be proven during the investigation. The Complainant should consider instituting a civil claim against the Municipality.

(xiii) In light of the above findings, I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution:

The Municipal Manager must:

(aa) Within thirty (30) working days from the date of this report, write a letter of apology to the Complainant for the unlawful removal of the containers from the taxi rank.

(bb) Ensure that this report is submitted to the Council for consideration within Thirty (30) days from the date of issue for consideration.

(cc) The Municipal Manager must, within thirty (30) days of this report, return the four (4) containers to the Complainant, in the same condition they were in, before they were removed.
Alternatively,

(dd) The Municipal Manager, must within thirty (30) days of this report, obtain three (3) quotations in respect of the damaged containers and compensate Complainant according to the lowest quotation.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNLAWFUL REMOVAL OF TELEPHONE CONTAINERS BELONGING TO MR PATRICK NKOPELANG FROM THE RUSTENBURG MAIN TAXI RANK

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, 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following officials:

1.2.1 The Executive Mayor of Rustenburg Local Municipality, Councillor Mpho Khunou.

1.2.2 The Speaker of the Rustenburg Local Municipality, Councillor Shila Mabale-Huma.

1.2.3 The Municipal Manager of the Rustenburg Local Municipality, Mr Victor Makona.

1.3 Copies of the report are also submitted to the Complainant, Mr Patrick Nkopelang to inform him about the outcome of the investigation.

1.4 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 unlawful removal of telephone containers belonging to Mr Patrick Nkopelang from the Rustenburg main taxi rank, by officials of the Rustenburg Local Municipality (the Municipality).
2. THE COMPLAINT

2.1 The Complainant alleged that during February 2010 he and his wife were the owners of four containers which housed Vodacom prepaid telephones which they used to run a telephone business at the Rustenburg main taxi rank. However, they did not have a permit to run the said business;

2.2 On 2 May 2010, in the middle of the night, a large number of Law Enforcement officials from the Rustenburg Municipality’s Public Safety and Law Enforcement Unit raided the taxi rank and removed the four containers belonging to the Complainant;

2.3 During the process of removing the said containers, they were all damaged beyond repair. The following items were locked inside the containers and were never recovered:

i. Thirteen (13) community telephones which were distributed as follows: Two containers had 4 (four) telephones each, while the third and fourth containers had 2 (two) and 3 (three) telephones respectively.

ii. Four (4) gas lights, one in each container.

iii. Four (4) batteries, one in each container.

iv. Thirty six (36) Remote controllers.

v. Thirty six (36) Cable wires for the telephones.

vi. Cash in the amount of R200-00 which was locked in one of the containers;

2.4. As a result of the damage caused to the containers as well as the disappearance of the items that were locked inside, Complainant suffered damages amounting to R263 849-00 (Two hundred and sixty three thousand, Eight hundred and forty-nine rand).
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1. The Public Protector is an independent constitutional body 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 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) of the Constitution states that the Public Protector has additional powers and functions prescribed by national legislation.

3.4. 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. The Public Protector is also given the powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5. *In re Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*¹ 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

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¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
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".\(^2\) The Court further confirmed the Public Protector’s powers as follows:

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);

\(^2\) at para [73].
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 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 the 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 him under the
constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);

3.5.10.3. 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 of the judgment):

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 judgment);

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 judgment). [This was a finding on EEF judgment 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 (paragraph 107 and 108 of the Judgment); 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 judgment).

3.6 The Public Protector is admitted by section 8(1)(a) of the PDA to accept a Protector disclosure complaint.
3.7 The Municipality is an organ of state and its conduct and the conduct of its officials constitutes conduct in state affairs, as a result, this matter falls within the mandate of the Public Protector.

3.8 The powers and jurisdiction of the Public Protector to investigate and take appropriate remedial action were 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, 1994.

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.

4.1.3. The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory instruments, including constitutional provisions, legislation, regulations and relevant court decisions.

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?
4.2.1.4. In the event of maladministration 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.

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

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the state institution complied with the regulatory framework setting the applicable standards for good administration.

4.2.5. Section 6(9) of the Public Protector Act gives me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident.

4.2.6. In this specific case, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint include the following:

(i). The seriousness of the allegations, especially with regard to the possible abuse of power by the Municipality.

(ii) There were sufficient documents and records that were availed to my office which would assist me to successfully investigate the complaint.
(iii) There were also various alternative best remedies in the circumstances which could be offer the Complainant.

(iv) The successful investigation of this matter could assist to address some of the systemic failures within the Municipality were the Municipality simply ignores its own bylaws and other laws in order to achieve certain objectives.

(vi) The overall impact of this investigations especially with regard to issues of good governance within the Municipality.

4.2.7. The powers and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of the parties

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

4.3.1. Whether the Municipality unlawfully removed telephone containers belonging to the Complainant from the taxi rank.

4.3.2. Whether the Complainant suffered prejudice as a result of the conduct of the Municipality.

4.4. Key sources of information

4.4.1. Documents:

4.4.1.1. A statement giving full particulars of the complaint and chronology of events received by my office per complaint form dated 11 August 2014;
4.4.1.2. Letter dated 15 August 2014 from my office addressed to Municipal Manager, Mr Victor Makona.
4.4.1.3. Letter dated 21 January 2015 from my office to the Municipal Manager.
4.4.1.4. Letter dated 10 July 2015 from my office to the Municipal Manager.
4.4.1.5. Letter dated 09 November 2015 from my office to the Municipal Manager.
4.4.1.6. Letter dated 11 February 2016 from the Municipality Manager, Mr Victor Makona to my office.
4.4.1.7. Letter dated 24 February 2016 from my office to the Municipal Manager.
4.4.1.8. Letter dated 26 September 2016 from my office to the Municipal Manager.
4.4.1.9. My preliminary report in terms of section 7(9) of the Public Protector Act dated 03 January 2020 from my office addressed to the Acting Municipality.
4.4.1.11. Copy of the quotation by Complainant from Site Space Transport and Carrier Services brought to my office in 2017.

4.4.2. Meetings and Interviews

4.4.2.1. Meeting held with on 05 November 2014 between my office and the Municipality.
4.4.2.2. Meeting held on 21 April 2016 between my office and the Municipality.
4.4.2.3. Meeting held on 23 August 2016 between my office and the Municipality.

4.4.1 Legal and Regulatory Framework

4.4.3.1 The Constitution of the Republic of South Africa, 1996;
4.4.3.2 Public Protector Act no 23 of 1994;
4.4.3.3 Rustenburg Local Municipality By-laws on Street Trading.

4.4.4 Case Law

4.4.4.1 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 2016 (5) BCLR 618 (CC);

4.4.4.2 The President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017).
5 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH THE APPLICABLE LAW AND PRESCRIPTS

5.1. Whether the Municipality unlawfully removed the telephone containers belonging to the Complainant from the taxi rank

Common cause issues

5.1.1. It is common cause that the complainant and his wife conducted a telephone business at the Rustenburg taxi rank.

5.1.2. It is further common cause that they had four (4) containers kept at the taxi rank, from which they conducted a telephone service business.

5.1.3. The Complainants did not have a valid permit to conduct the said business.

5.1.4. On 02 February 2014 in the middle of the night, Municipal officials raided the taxi rank and removed the containers.

Issues in dispute

5.1.5. The Complainant alleged that during the process of removing the containers, they were all damaged beyond repair, while the Municipality denied that the containers were damaged.

5.1.6. The Complainant further alleged that there were certain items which were locked inside the containers. During the raid, he asked for permission to remove the items inside the containers but was not allowed to do so. The following morning, when he arrived at the Municipal premises, the containers were opened, the locks and handles were broken and they were empty.
5.1.7. The Municipality denied any knowledge of any items that were purportedly inside the containers.

5.1.8. The Complainant further alleged that the Municipality did not issue him with a notice, warning him to remove the containers before they were forcefully removed. On the other hand, the Municipality alleged that a notice was issued to the Complainant and was placed on one of the containers.

5.1.9. The Complainant further alleged that he was not issued with a receipt for the goods that were confiscated, either during or after the raid, while the Municipality maintained that a receipt was issued.

5.1.10. In the process of investigating this matter, my investigation team held a meeting with the Municipality. The meeting was held on 05 November 2014 and the Municipality was represented by Mr D Khumalo, the Unit Manager: Law Enforcement and Senior Superintendent Sekone from the Traffic Department. The officials indicated to my investigation team that the containers were not damaged and further that there were no items that were found inside.

5.1.11. On 25 November 2015 an inspection *in loco* was carried out by my investigation team, the Complainant as well as Mr Khumalo from the Municipality. One container was found at the Municipality's compound near Thabane. The said container was not locked and was severely damaged.

5.1.12. The inspection team then proceeded to the Municipality's electrical industrial site where two more containers were found. The two containers had been converted into storage rooms and some equipment was kept inside by people unknown to the Complainant. The fourth container could not be found, even after a diligent search, and the Municipality could also not account for its whereabouts.
5.1.13. None of the items mentioned in paragraph 3.6 above could be found in any of the three containers which were traced. In an attempt to resolve the matter amicably, my office convened an ADR (Alternative Dispute Resolution mechanism) session that was held at the Rustenburg offices on 16 April 2016.

5.1.14. During the ADR session, Mr Khumalo from the Municipality indicated that even if the containers were damaged, the Municipality should not be held liable since it was carrying out a lawful operation to remove illegal traders from the taxi rank.

5.1.15. The Municipality was asked if it had issued Complainant with a notice in terms of section 16 of its by-laws which requires the offender to remove his or her goods within 48 hours failing which the Municipality would forcefully remove them. The Municipality indicated that they had been trying on several occasions to give notices to the illegal traders, but it was in vain because every time the illegal traders saw the Municipal officials coming, they ran away leaving the officials stranded. Mr Khumalo indicated that in the case of the Complainant, the said notice was put on the container.

5.1.16. However, the Municipality could not indicate the date when the said notice was placed on the container, nor could it furnish my office with a copy of the said notice. The information regarding the notice and a copy thereof was specifically requested by my office through a letter dated 24 February 2016 addressed to the Municipal Manager, Mr Victor Makona long before the date of the ADR but same was never given to my investigating team.

5.1.17. The Complainant himself denied that he was ever issued with a notice, nor did he see any notice that had been placed on the container. He also denied ever running away from the officials of the Municipality.

5.1.19. During the Alternative Dispute Resolution (ADR) that was held on 16 April 2016, the Municipality stated that, the following morning after the raid, a receipt was issued to the Complainant regarding the goods that were
confiscated the previous night. However, the Municipality could not produce a copy of the said receipt. Instead, a blank receipt was shown to my team as a sample of the receipt that was usually issued when goods were confiscated.

5.1.20 On 13 January 2020, I provided the Municipality with a copy of my preliminary report indicating the probable adverse findings I might make based on the available evidence. In its response dated 12 February 2020, the Municipality disputed several issues including the following:

5.1.20.1 Regarding the issuing of a notice to the Complainant.

(a) The Municipality insists that its official gave the Complainant a notice by affixing a copy on the container since the Complainant was not there to receive the notice personally.

(b) While I accept that a notice can be served by way of affixing a copy on the door of a house or such similar structure, failure by the Municipality to provide me with proof of service of the notice to the Complainant, such as the date or the time of service and a copy of the said notice, presents me with a conundrum to determine whether there was compliance with the law and/or Municipal by laws.

(c) It was not in dispute that Complainant was running a business at the taxi rank. The Municipality states that the officials could not find the Complainant when they went to serve the notice. One would certainly assume that since this was a business place, it is expected that there will always be someone in the shop to help the customers.

(d) In the absence of further details in the form of dates, time and the official substantiating this submission by the Municipality, I am inclined not to accept it. As a result, the version of the Municipality cannot be accepted without being properly substantiated.
(e) The Municipality further stated in its response to my preliminary report, that the Complainant was informed in writing, that he had illegally erected structures without the approval of the Municipality. However, the Municipality could not provide me with any such communication which was supposedly sent to the Complainant.

5.1.20.2 Regarding whether there were items belonging to the Complainant inside the container

(a) The Municipality submitted that there was insufficient evidence to substantiate the allegations that Complainant had left certain items in the containers. However, it is common cause that Complainant operated a telephone business at the taxi rank. It is also common cause that Complainant stored the telephones and other related equipment he used to conduct his business inside the containers. The Municipality therefore bears the burden of proving that there were no items inside the containers during the raid. I take note of the submission by the Municipality that the raid was carried out at night and it would have been difficult to issue a receipt at that time, but one would have expected the Municipality to record everything that was confiscated and keep such record. However, in this case the Municipality failed to do so, hence it could not even furnish Complainant with a receipt. The Municipality also failed to provide me with a copy of such a receipt.

(b) The Complainant further alleged that during the removal of the containers, he pleaded with the Municipal officials, that he be afforded an opportunity to remove the items in the containers, but his plea fell on deaf ears. He alleged that he was advised to come the next day where these items will be handed over to him. However the Municipality has always maintained that no items were found inside the containers. It was therefore difficult for me to make a conclusive finding in this regard in the absence of more evidence from either of the parties.
5.1.20.3 Regarding the alleged damage caused to the containers by the Municipality

(a) The Municipality contended that the operation was carried out together with members of the South African Police Service (SAPS) and as such it cannot be correct that Complainant should hold the Municipality solely responsible for the damage caused to the containers.

(b) It cannot be disputed that the raid was a joint operation carried out together with SAPS members. However, the Municipality stated in its response to my preliminary report that it brought the forklift and hired some trucks specifically to carry the said containers. Further, it did not dispute the fact that the said containers were stored at the premises of the Municipality as such they were under the custody of the Municipality.

(c) It is evident from the evidence that the raid was the brainchild of the Municipality. The Municipality alleged to have issued the notice and the operation was carried out as part of enforcement of municipal by-laws. The SAPS was there to keep peace and cannot be held liable for the Municipality’s and/or its officials’ failure to comply with its administrative processes. Therefore the submission by the Municipality cannot be accepted.

(d) The Municipality further submitted that the fact that other two containers were being used meant that they were not damaged. The Complainant stated that the two containers have since been converted into storage rooms and that some equipment and machinery were kept inside them. The usage of the containers does not mean that they were not damaged. The Municipality did not dispute the observations made during the Inspection in loco that that containers were damaged.

(e) The Municipality further submitted that Complainant was only interested in claiming money from the Municipality rather than paying a fine and then
collect his containers. The problem with this submission is that, firstly, it
does not take into account that I was not given any proof to show that
Complainant was given any document in the form of a receipt or invoice
advising him to come and collect his goods upon payment of a fine.

(f) The second problem is that Complainant could not be expected to collect
the containers when they were damaged. Complainant stated that when
he went to the Municipality the following morning, he found the containers
open and damaged.

(g) The Municipality further contended that the four containers were of
different sizes, therefore the replacement value cannot be the same. I
agree with the Municipality's submission. The Municipality only raised the
issue of the different sizes of the containers in response to the s7(9)
notice. However, in order to arrive at a fair amount of damages suffered
by the Complainant, the submission by the Municipality is a reasonable
one and cannot be overlooked.

Applicable legislation

5.1.21. Section 195 (1) of the Constitution provides, amongst others, that "public
Administration must be governed by democratic values and principles enshrined
in the Constitution, including the following principles

(b) A high standard of professional ethics must be promoted and maintained.
............
(f) Public administration must be accountable

5.1.22. It was expected of the Municipal officials to exercise a high standard of
professional ethical conduct during the raid and be able to account for its
conduct when called upon to do so.

24
5.1.23. Section 156(2) of the Constitution which provides that:

"A municipality may make and administer bylaws for the effective administration of the matters which it has the right to administer".

5.1.24. In this case the Municipality has made its own bylaws for the effective administration in dealing with people who conduct business within the streets of Rustenburg including the taxi rank, however the Municipality failed to observe its own by-laws.

5.1.25. Regulation 16(1) of the Municipal by-laws on informal trading provides that the municipality may forcefully remove any trader who may be found trading illegally without any permit, after giving such person notice to stop such illegal trading:

5.1.26. Regulation 16 (1 ) reads as follows: "an officer may, after written notice has been given to an offender to rectify his transgression within 48 hours, remove and impound any goods which he reasonably suspects is being used in connection with street trading."

5.1.27. This regulation clearly empowers the officials to confiscate the goods but only after the required notice has been given to the offender directing him or her to remove the said illegal goods. In this case, the Municipality should have given Complainant a notice advising him to remove the containers within 48 hours, prior to the confiscation.

5.1.28. Regulation 16(c) provides that "the Council shall not be liable for compensation to any person for damages arising out of or loss of any object removed in terms of subsection (1) and the owner of such object shall have no claim against or right of redress against the Council."

5.1.29. According to this regulation, Complainant would under normal circumstances, have no claim against the Municipality for the loss of the items which were
allegedly kept inside the containers or for the damage caused to the containers.

5.1.30. In terms of section 16(2) of the Rustenburg Local Municipality by-laws on Informal Trading, the "Municipal Council shall publish a notice in a newspaper circulating in the area of Rustenburg, containing a description of the objects which were confiscated and where the said objects are stored and that such objects may be claimed by the owner upon production of a receipt showing that he had paid the fine that was imposed on him".

5.1.31 According to this section, the Municipality should issue a receipt of goods confiscated and give it to the owner of the goods. The receipt must also indicate the amount of the fine payable by the owner of the goods before he can take possession. A notice must then be published in a newspaper calling upon affected parties, in particular, the Complainant, to come and collect his goods upon paying a fine. The Municipality could not provide any evidence that this section of the by-laws was ever complied with.

5.1.32 The Municipality averred that the legislation I relied upon in this case was incorrect. The Municipality submitted that the matter under investigation should have been judged against the National Building Regulations and Building Standards Act no 103 of 1977, as it was the most relevant legislation.

5.1.33 The National Building Regulations and Building Standards Act (hereinafter referred to as the Act) provides for the promotion of uniformity relating to the erection of buildings in the area of jurisdiction of local authorities.

5.1.34 Section 1(iii) of the Act describes a building as any other structure, whether of a permanent or temporary nature irrespective of the material used, which is erected or used for in connection with rendering of any service or goods.
5.1.35 Section 4 (1) of the Act provides that no person shall, without prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.

5.1.36 According to this section, no person shall without prior approval, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act. The operative words here are "building in respect of which plans are to be drawn and submitted". In this case the Complainant had put containers which were already constructed and built somewhere else. These containers were movable structures.

5.1.37 The question is whether plans were supposed to have been drawn and submitted in respect of a containers which were already built. Even if a plan could be required, the Act provides that the person must first obtain prior approval from the local authority before erecting that structure.

5.1.38 I believe that the submission by the Municipality is irrelevant in this case. It has already been stated that the Complainant did not have any permit to operate his business at the taxi rank. It therefore means that he did not obtain any prior approval from the Municipality before putting his containers at the taxi rank.

5.1.39 The issue here is not whether the containers were placed at the taxi rank legally or not. The issue is however, the process that was followed by the Municipality in removing the containers that were illegally placed at the taxi rank and whether the Municipality followed its own by-laws when they were removed.

5.1.40 In all my engagements with the Municipality during the investigation of this matter, the Municipality had always been referring to its by-laws in dealing with this matter. It cannot be correct that I should not rely on their by-laws at this stage when all along, they (Municipality) has been referring to the said by-laws as its primary source of reference. More so, it is only in the by-laws where we find the procedure that needs to be followed by the Municipality before confiscating any goods of illegal traders within the jurisdiction of the
Municipality. I therefore conclude that the Municipal by-laws are the most applicable legislation to use in this matter.

5.1.41 Further, even if I were to concede to the Municipality’s argument that Complainant’s matter should be dealt with under the National Building Regulations and Building Standards Act, the Act also prescribes a process which must be followed, including the requirement that a building control officer should issue a notice in writing, served by post or delivered and order the owner of such a building, within a specified period in such a notice to remove the structure or remedy the transgression.

5.1.42 It follows therefore that the Municipality also cannot rely on the National Building Regulations and Building Standards Act, because the procedure prescribed therein to deal with non-compliant structures or building was also not adhered to.

5.1.43 In its response to my preliminary report, the Municipality stated that the following: “during 2010 before the hosting of the Soccer World Cup, the Rustenburg Municipality Council approved the promulgation of by-laws. These by-laws inter alia regulates the trading at the taxi rank, keeping of the city and the taxi rank clean, including safety and security bylaws”.

5.1.44 The Municipality further stated that Complainant as well as other hawkers participated in the drafting of these by-laws. It is evident that the purpose of these bylaws were, amongst others to regulate trade within the taxi rank. Complainant was one of the traders at the taxi rank and therefore he was directly governed by these by-laws.

Conclusion

5.1.43. The Municipality was obliged to issue the Complainant with a notice in terms of section 16 of its by-laws on Street Trading, calling upon the Complainant to remove the illegal goods (containers) within 48 hours. If the transgression was not corrected within the stated timeframe, the Municipality would have been
acting within its rights to remove the goods. Having failed to issue a notice before the removal, all the actions of the Municipality thereafter were unlawful.

5.1.44. The containers were severely damaged during the removal process. The Complainant stated that each container costs about R39 500-00. The Municipality has, however argued that the containers were of different sizes and therefore cannot all of them cost the same amount.

5.1.45. The said damaged containers are still kept at the premises of the Municipality. Some of them have since been converted into storage rooms by the Municipality. The Municipality however cannot account for the whereabouts of one container. It seems that the items confiscated from the Complainant have been forfeited to the Municipality, even though no notice was placed in the local newspaper and no receipt was given to the Complainant to enable him to claim his property back from the Municipality.

5.1.46. Based on the evidence gathered, it can therefore be concluded that the averasions of the Complainant are more probable under the circumstances.

5.2. Regarding whether the Complainant suffered prejudice as a result of the conduct of the Municipality:

**Common cause issues.**

5.2.1. It is common cause that the Complainant was the owner of four containers that were kept at the Rustenburg Taxi rank.

5.2.2. It is further common cause that he was running a telephone service business at the Rustenburg Taxi Rank using Vodacom prepaid telephones which were housed inside four containers. The Complainant did not have a licence to operate such a business.
5.2.3. It is not disputed that on 02 May 2010 the Municipality removed those containers from the taxi rank in the middle of the night.

5.2.4. Three of those containers were damaged, while the fourth one could not be located despite a diligent search.

*Issues in dispute*

5.2.5. The Municipality disputed that it was responsible for the damages caused to the Complainant’s containers.

5.2.6. The Complainant further alleged that he had left some items inside the containers on the night they were confiscated. In particular, the following items were allegedly left inside the containers:

(a) Thirteen (13) community telephones valued at R5200-00 each.
(b) Four (4) gas light valued at R339-26 each.
(c) Four (4) batteries valued at R1 670 -00 each.
(d) Thirty six (36) Remote controllers (screen pads for telephones) valued at R550-00 each.
(e) Thirty six (36) cable wires for the telephones valued at R267-00 each (each telephone had three wires).
(f) Cash in the amount of R 200-00.

5.2.7. The Municipality denied that it found any items inside the containers.

5.2.8. According to the quotations submitted to my office by the Complainant, each container costs R39 500-00 and there were four of them. Therefore, the total costs for the containers alone is **R158 000- 00**. The costs of the other items are as follows:
<table>
<thead>
<tr>
<th>NO.</th>
<th>DESCRIPTION OF ITEM</th>
<th>COST PER UNIT</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>13 community telephones</td>
<td>R5200-00</td>
<td>R67 600-00</td>
</tr>
<tr>
<td>2.</td>
<td>4 gas lights</td>
<td>R339-00</td>
<td>R1 356-00</td>
</tr>
<tr>
<td>3.</td>
<td>4 batteries</td>
<td>R1670-00</td>
<td>R6 680-00</td>
</tr>
<tr>
<td>4.</td>
<td>36 Telephone remotes</td>
<td>R550-00</td>
<td>R19 800-00</td>
</tr>
<tr>
<td>5.</td>
<td>36 Telephone wires.</td>
<td>R267-00</td>
<td>R10 413-00</td>
</tr>
<tr>
<td>6.</td>
<td>4 containers</td>
<td>R39 500.00</td>
<td>R158 000.00</td>
</tr>
<tr>
<td></td>
<td><strong>TOTAL</strong></td>
<td><strong>R263 849-00</strong></td>
<td></td>
</tr>
</tbody>
</table>

**Conclusion**

5.2.9. Based on the evidence in my possession, it is clear that three of the containers that were removed by the Municipality were all damaged. The fourth container could not be traced. The Complainant suffered financial prejudice as a result of the conduct of the municipal officials and will have to replace all containers that were damaged and the one that could not even be found.

5.2.10. There is a dispute regarding the items that were allegedly stored in the containers. The Municipality denies that there were items inside the containers, whilst the Complainant does not have evidence to prove that there were items stored inside the containers.

5.2.11. If the Municipality had issued the Complainant with a receipt of the goods confiscated, there would be no dispute regarding which items were stored in the containers. The receipt would indicate what was inside the containers and would have been signed by both parties. The failure by both the municipality to issue the receipt and the Complainant to provide proof of the items that were in the containers when they were confiscated by the municipality make any finding regarding the lost items an arduous task.
6. FINDINGS

6.1. Regarding whether the Municipality unlawfully removed the containers belonging to the Complainant from the taxi rank:

6.1.1. The allegation that the Municipality unlawfully removed the containers from the taxi rank which belonged to the Complainant is substantiated.

6.1.2. The Municipality violated its own by-laws in failing to give the Complainant prior notice before confiscating the containers. Section 16(1) of the Municipal by-laws on street trading provides that the Municipality can only remove someone’s property after it has given that person notice to correct the situation.

6.1.3. The Municipality further failed to provide the Complainant with a receipt of the goods confiscated as required by Section 16(2) of the Municipal by-laws which requires the Municipality to give the Complainant a receipt of all the goods confiscated as well as the amount of fine that should be paid by the Complainant in order to release them from confiscation.

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

6.2. Regarding whether Complainant suffered prejudice as a result of the conduct of the Municipality:

6.2.1. The allegation that the Complainant was prejudiced as a result of the Municipality’s conduct is substantiated, only in so far as the issue of damage to the containers in concerned.

6.2.2. During the unlawful process of removing the containers, the Municipality damaged three containers beyond repair. The fourth container could also not
be found even after a diligent search. The Municipality did not dispute that it removed four containers from the taxi rank.

6.2.3. I am unable to make any finding regarding the items that were allegedly stored inside the containers due a dispute that was raised by the Municipality concerning the actual contents of the containers that could not be proven during the investigation. The Complainant should consider instituting a civil claim against the Municipality Due to lack of sufficient evidence with regards to the items that were allegedly stored inside the containers, I am unable to make any finding in that regard.

7. REMEDIAL ACTION

7.1. In light of the above findings I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution:

Municipal Manager must:

7.1.1 Within thirty (30) working days from the date of this report, write a letter of apology to the Complainant for the unlawful removal of the containers from the taxi rank.

7.1.2 Ensure that this report is submitted to the Council for consideration within thirty (30) days from the date of issue for consideration.

7.1.3 The Municipal Manager must, within thirty (30) days of this report, return the four (4) containers to the Complainant, in the same condition they were in, before they were removed.
Alternatively,

7.1.4 The Municipal Manager, must within thirty (30) days of this report, obtain three (3) quotations in respect of the damaged containers and compensate Complainant according to the lowest quotation.

8 MONITORING

8.1. The Municipal Manager must, within 15 working days of this report, submit an Action Plan to my office indicating how the remedial action will be implemented.

8.2 The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

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

Assisted by:
Mr Sechele Keebine (NW: Provincial Representative) and Kleinbooi Matsetela (NW: Snr. Investigator - GGI Unit)