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"Alleged failure by Ditsobotla Local Municipality to develop by-laws and comply with the provisions of the National Building Regulations and Building Standards Act relating to the erection of an illegal structure"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE DITSOBOTLA LOCAL MUNICIPALITY TO DEVELOP BY-LAWS AND COMPLY WITH THE PROVISIONS OF THE NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT, 1977 RELATING TO AN ILLEGAL STRUCTURE ERECTED ON ERF 3502, ZONE 2, ITSOSENG, NORTH WEST PROVINCE
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Executive Summary

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

(ii) The report relates to an investigation into allegations of failure by the Ditsobotla Local Municipality (the Municipality) to attend to a complaint relating to an illegal structure bordering the Complainant's property situated on ERF 3504, Zone 2, Itsoseng, North West Province.

(iii) The complaint was lodged with my office on 19 April 2016 by Mr Mokhele MS the Complainant) a 54 years old elderly alleging failure by the Ditsobotla Local Municipality to develop by-laws and comply with the provisions of the National Building Regulations and Building Standards Act, 1977 (the NBRBS Act) relating to an illegal structure erected on Erf 3502, zone 2, Itsoseng, North West Province.

(iv) In essence the allegation is that the Municipality failed to attend to a complaint relating to the erection of an illegal structure bordering the Complainant's property.

(v) On analysis of the complaint, the following issues were identified to inform and focus the investigation: -

(a) Whether the Ditsobotla Local Municipality improperly failed to develop by-laws and comply with the provisions of the National Building Regulations and Building Standards Act, 1977 relating to an illegal structure erected for business purpose next to the Complainant's property situated on Erf 3504, Zone 2, Itsoseng; and
(b) Whether the Complainant and any other persons suffered prejudice as a result of the conduct of the Ditsobotla Local Municipality in the circumstances.

(vi) 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 officials when failing to attend to a complaint lodged by the Complainant relating to an illegal structure bordering his property. They include the following:

(a) The Constitution and Promotion of Administrative Justice Act, 2000 impose a duty on all organs of the state to provide administrative action that is lawful, reasonable and fair to everyone;

(b) The National Building Regulations and Building Standards Act provides for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities and prescribed building standards; and

(c) Batho Pele Principles is an initiative that was launched in 1997 to transform the Public Service at all levels.

(vii) I issued notices to the Member of Executive Council, the Head of the Department, the Administrator, the Municipal Manager, and the Mayor in terms of section 7(9)(a) of the Public Protector Act, but no response was received from the said officials.
(viii) 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:

(a) Regarding whether the Ditsobotla Local Municipality improperly failed to develop its by-laws and comply with the provisions of the National Building Regulations and Building Standards Act, 1977 relating to an illegal structure erected for business purpose next to the Complainant’s property situated on Erf 3504, Zone 2, Itsoseng.

(aa) The allegations that the Municipality failed to develop its by-laws and comply with the provisions of the NBRBS Act relating to an illegal structure erected for business purpose next to the complainant’s property situated on Erf 3504, zone 2, Itsoseng is substantiated.

(bb) The Municipality has for the period of four (4) years since 2015 upon receipt of a petition about an illegal structure at Erf 3502 brought by the Complainant and Itsoseng community improperly failed to address it. The Municipality only took action by instructing its attorneys, Bosman and Bosman Attorneys, on 30 July 2018 to institute a civil action against the occupier of Erf 3502 for the erection of an illegal structure.

(cc) The Municipality conceded that it has not developed by-laws to ensure effective regulation of illegal structures in its area of jurisdiction.

(dd) The conduct of the Municipality is in violation of sections 33, 156, 195 of the Constitution and section 4 of the NBRBS Act, 1977.

(ee) The conduct of the Municipality, particularly the Municipal Manager, Mr Metswamere, constitutes improper conduct as envisaged in section 182(1) (a) of
the Constitution and maladministration as envisaged in section 6(4) (i) of the Public Protector Act.

(b) **Regarding whether the Complainant and any other persons suffered prejudice as a result of the conduct of the Ditsobotla Local Municipality in the circumstances:**

(aa) The allegation that the Complainant and any other persons suffered prejudice as a result of the conduct of the Ditsobotla Local Municipality is substantiated.

(bb) The failure by the Municipality to address the complaint of the erection of an illegal structure next to the Complainant and his neighbours has the likelihood to devalue their properties and contribute to the crime rate in the vicinity of the illegal structures.

(cc) The conduct of the Municipality is in violation of Batho Pele principle of redress.

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

(ix) The appropriate remedial actions I am taking as envisaged in section 182(1)(c) of the Constitution are the following:

(a) The Municipal Manager must:

(aa) Within thirty (30) working days from the date of this report, demolish the illegal structure erected for business purpose next to the Complainant’s property situated on Erf 3504, zone 2, Itsoseng;
(bb) Within thirty (30) working days from the date of this report, the Council shall decide on the impact and management of illegal structures in the area by the Municipality.

(cc) Within ninety (90) working days from the date of this report, develop by-laws.

(dd) Within thirty (30) working days from the date of this report, take appropriate action against any official who failed to attend to the Complainant’s matter on time;

(ee) Within fourteen (14) working days from the date of this report, write apology letters to the Complainant for the prejudice caused.

(b) The Mayor:

(aa) Within thirty (30) working days from the date of this report, ensure that the Municipal Manager, comply with the remedial action taken in terms of section 182(1)(c) of the Constitution.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS ON AN INVESTIGATION INTO ALLEGATIONS OF FAILIURE BY DITSOBOTLA LOCAL MUNICIPALITY TO DEVELOP BY-LAWS AND COMPLY WITH THE PROVISIONS OF THE NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT, 1977 RELATING TO AN ILLEGAL STRUCTURE ERECTED ON ERF 3502, ZONE 2, ITSOSENG, NORTH WEST PROVINCE

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)(a) of the Public Protector Act, 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 people to inform them of the outcome of the investigation and implementation of the remedial action:

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

1.2.2. The Member of the Executive Council for 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 Administrator for the Ditsobotla Local Municipality; Mr E Matlawe;

1.2.5. The Municipal Manager of Ditsobotla Local Municipality, Mr M A Metswamere;
1.2.6. The Mayor of Ditsobotla Local Municipality, Mr D Buthelezi; and

1.2.7. The Complainant, Mr MS Mokhele.

1.3. The report relates to an investigation into allegations of failure by the Ditsobotla Local Municipality to develop by-laws and comply with the provisions of NBRBS Act relating to an illegal structure erected on Erf 3502, Zone 2, Itsoseng, North West Province.

2. COMPLAINT

2.1. On 19 April 2016, Mr MS Mokhele (the Complainant), lodged a complaint with my office.

2.2 In the main, the Complainant alleged that:

2.2.1 He is currently occupying a property situated on Erf 3504, zone 2, Itsoseng, North West Province, registered in his name;

2.2.2 On 01 March 2015, he discovered that an illegal structure which was purported to be a tuck shop was erected next to his house at Erf 3502;

2.2.3 He approached the Municipality to enquire about the aforementioned structure and was informed that the Municipality was not aware of any illegal structure that was erected without its approval;

2.2.4 He and other community members were advised by Mr Morubane, the then Municipal Director: Housing, to petition the Municipality. The said petition was handed to Mr Morubane, the then Mayor, Councillor (Cllr) Lesego Holele and Ward
9 Cllr Dakie Ditlhareng on 28 April 2015. The Municipality, however did not respond to the said petition;

2.2.5 He made several enquires with the Municipality and Cllr Ditlhareng regarding the petition. However, for over a period of four (4) years the Municipality has failed to attend to his complaint. Despite an undertaking made to him by Cllr Ditlhareng that the Municipality would obtain a court order to demolish the structure because it was built illegally, to date the structure still exists;

2.2.6 In the course of four (4) years, he consulted with various officials within the Municipality, including Mr Mooketsi, the Municipal Legal Officer, however, the complaint remains unresolved; and

2.2.7 When he lodged a complaint with my office on 19 April 2016, the Municipality had not yet attended to his complaint.

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 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 Justice 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 judgement);

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 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration 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 The Municipality is an organ of state and its conduct falls within the Public Protector's mandate to investigate; and

3.10 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 Member of the Executive Council, MEC Kegakilwe, the Head of the Department, Mr Motoko, the Administrator: Mr Matlawe, the Municipal Manager: Mr Metswamere and the Mayor Mr Buthelezi dated 01 July 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 amounts 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. In this particular case, the factual enquiry principally focused on whether the Municipality improperly failed to develop by-laws and comply with the provisions of the NBRBS Act relating to an illegal structure erected on Erf 3502, zone 2, Itsoseng, North West Province and if so whether it 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.

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 issues were identified to inform and focus the investigation.

4.3.1 Whether the Ditsobotla Local Municipality improperly failed to develop by-laws and comply with the provisions of the National Building Regulations and Building Standards Act, 1977 relating to an illegal structure erected for business purpose next to the Complainant’s property situated on Erf 3504, Zone 2, Itsoseng; and

4.3.2 Whether the Complainant and any other persons suffered prejudice as a result of the conduct of the Ditsobotla 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 petition dated 28 April 2015;
4.4.1.2 Copies of pictures of the alleged tuck shop;
4.4.1.3 A copy of the PPSA complaint form dated 19 April 2016

4.4.1.4 A copy of a memorandum dated 30 July 2018;
4.4.1.5 A copy of an email sent to Bosman & Bosman Attorney dated 30 July 2018;

4.4.2 Correspondence sent and received

4.4.2.1 Copy of an email from the Complainant to PPSA office dated 19 April 2016;
4.4.2.2 A copy of an acknowledgment letter dated 20 April 2016 to the Complainant;
4.4.2.3 A copy of the letter dated 3 May 2016 to Mr Rasupang Mooketsi the Municipal former Legal Officer;
4.4.2.4 A copy of the letter dated 5 July 2016 to the then Municipal Manager, Mr M Juta;
4.4.2.5 A copy of an email dated 26 July 2016 from Mr Le-Roi van Niekerk;
4.4.2.6 A copy of the letter dated 24 July 2017 from the PPSA Office to the then Municipal Manager, Mr G Ramagaga;
4.4.2.7 A copy of the letter dated 31 October 2017 to the then Acting Municipal Manager, Mr L Dintwe;
4.4.2.8 A copy of the letter dated 21 November 2017 to the Director-General, Ms Lydia Sebego;
4.4.2.9 A copy of a memorandum dated 30 July 2018 from the Municipality;
4.4.2.10 A copy of a section 7(4)(a) of the Public Protector Act dated 27 July 2018 to the Mayor, Cllr D Buthelezi;

4.4.3 Notices issued and responses received

4.4.3.1 Section 7(9)(a) notices to the MEC, the Head of the Department, the Administrator, the Municipal Manager and the Mayor dated 1 July 2019.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution;
4.4.4.2 The Public Protector Act;
4.4.4.3 National Building Regulations and Building Standards Act;
4.4.4.4 Promotion of Administrative Justice Act; and
4.4.4.5 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 Sowkela 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 Ditsobotla Local Municipality improperly failed to develop by-laws and comply with the provisions of the National Building Regulations and Building Standards Act, 1977 relating to an illegal structure erected for business purpose next to the Complainant’s property situated on Erf 3504, zone 2, Itsoseng.

Common cause issues

5.1.1 The Complainant is the owner of a property situated at Erf 3504, Zone 2, Itsoseng.

5.1.2 It is common cause that there is a structure erected next to his house operating illegally as a tuck shop, called Rajah General Dealer on Erf 3502, Zone 2, Itsoseng (Erf 3502).
5.1.3 A petition was lodged with the Municipality by the Complainant and the community members on 28 April 2015 in relation to the above mentioned illegal structure.

**Issues in dispute**

5.1.4 The Complainant argued that the petition lodged with the Municipality in April 2015 has to date not been attended to. He provided my office with the following picture showing the alleged illegal structure at Erf 3502.

![Image of alleged illegal structure]

5.1.5. My investigation team raised the matter with the Municipality on 03 May 2016 regarding the cause of the delay in attending to the complaint, however, no response was received.

5.1.6 In order to resolve the matter promptly, I issued an Alternative Dispute Resolution (ADR) notice in terms of section 6(4)(b)(i) of the Public Protector Act. The session was held on 07 August 2018 and chaired by Senior Investigator, Adv. SI Motshegare. The Municipality was represented by Cllr Daniel Buthelezi, Mr MJ
Moipolai, the Chief Financial Officer and Mr W Moserwa, the Manager; Electricity.

5.1.7. It was reported that the Municipality had instructed its attorneys, Bosman and Bosman Attorneys on 30 July 2018 to take legal action against the occupier of the Erf 3502 in connection with the erection of an illegal structure or tuck shop. A memorandum signed by Mr. L van Niekerk, the Municipal Acting Unit Manager: Planning and Development, was submitted to my investigation team which, inter alia, provide as follows:

"Kindly be informed that this matter has been handed over to Bosman and Bosman Attorney’s to take further legal action against the occupier of the land and tuck shop”.

5.1.8. During a meeting with my investigation team on 31 January 2019, Mr Moserwa advised that the Municipality had no by-laws regulating the management of illegal structures within its area of jurisdiction.

5.1.9. No reasons were provided by the Municipality for its failure to address the Complainant’s matter on time.

*Application of the relevant law*

5.1.10. The Municipality’s conduct needs to be tested against the provision of section 33 of the Constitution, which imposes a duty on all organs of the state to provide administrative action that is lawful, reasonable and 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”.

5.1.11. The question that remains to be resolved in this regard is whether the Municipality’s action was lawful, reasonable or fair to the Complainant. The rights 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 government.

5.1.12. The Municipality’s conduct needs to be further tested against the principle of good administration outlined in section195(1) of the Constitution, which states amongst others, that the Public Administration must be governed by the democratic values and principle it provides that:

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

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

5.1.13. It was expected of the Municipality to maintain a high standard of professional ethics by developing by-laws and/or comply with the provisions of the National Building Regulations and Building Standards Act, 1977 (NBRBS Act) relating to an illegal structure built for business purpose bordering the Complainant’s property without delay.

5.1.14. The Municipality was also expected to develop by-laws and/or comply with the provisions of the NBRBS Act relating to an illegal structure built for business
purpose bordering the Complainant’s property on time, the Municipality would have given effect to accountable public administration in terms of section 195(1)(f) of the Constitution.

5.1.15 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.

5.1.16. In terms of section 33(2) of the Constitution it was expected of the Municipality to provide reasons for its decision or action. The reasons must contain sufficient information to enable the recipient to understand the municipality processes in addressing his complaint.

5.1.17. Failure by the Municipality to do any of the above would be in violation of the constitutional principles and obligations.

5.1.18 Based on the above, the Complainant visited the Municipality several times to enquire about its failure or undue delay to address his complaint relating to an illegal structure next to his property, however he was not assisted and/or provided with reasons. The Municipality had a constitutional and statutory duty to provide the Complainant with written reasons regarding its conduct in dealing with his complaint.

5.1.19 The Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) gives effect to section 33 of the Constitution. Administrative action is defined in section 2 of the PAJA, *inter alia*, as follows:

“Any decision taken or any failure to take a decision, by an organ of state when........exercising a public power......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 requirement for administrative action that is lawful, reasonable and procedurally fair is further emphasised in section 3(1) of the PAJA which provides that administrative action which adversely affects the rights or legitimate expectation of any person must be procedurally fair.

5.1.21 In Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and others [200] JOL 23782 (KZP) at para [52], the court held as per Wallis J that:

“As section 3(2) 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 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 property 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. In the current case the failure/delay by the Municipality to execute its by-laws and the provisions of the NBRBS Act relating to an illegal structure built for business purpose in a residential area without permission by the occupier of the land and following proper procedures may also be viewed by the Court as administrative action”.

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5.1.22 Section 156 (2) of the Constitution which provides that:

“A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer”.

5.1.23 The Municipality was expected to make and administer its by-laws for the effective administration in dealing with the erection of illegal structures within its area of jurisdiction, but information provided by the Municipality indicates that it has not made any such by-laws.

5.1.24 Section 4 of the NBRBS Act provides for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities and the prescribing of building standards and for matters connected therewith. Section 4 provides as follows:

“4 (1) No person shall without the 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;

(2) Any application for approval referred to in subsection1 shall be in writing on a form made available for that purpose by the local authority in question;

(3) Any application referred to in subsection (2) shall-

(a) Be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purpose of this Act;
(4) Any person erecting any building in contravention of the provisions of subsection 1 shall be guilty of an offence and liable on conviction to a fine not exceeding R100-00 for each day on which he was engaged in so erecting such building”.

5.1.25 In terms of the above provisions it is required of everybody to have building plans drawn up in a particular manner, and approved by the local authority in their area. It stands to reason that every house will have building plans. However, this is not always the case, and lack of approved building plans is clearly a major problem for many people who are buying and selling houses and other buildings in all parts of South Africa.

5.1.26 It was expected of the Municipality, to receive an application from the occupier of the land before the erection of the above mentioned illegal structure (tuck shop) and subsequently the Municipality would either approve or reject an application of the building in question in writing.

5.1.27 One Municipality with by –laws which administer the erection of illegal structures is the Greater Tubatse Municipality. Clause 22.1 of the Greater Tubatse Municipality by –law Land Use Management Scheme, 2006 provides that:

"any owner (hereinafter referred to as “the applicant”) intending to apply to the local municipality for consent to:

22.1.1 Erect and use of a building or for the use of land in any use zone, whether wholly or partially for any purpose which requires the written consent of the local municipality (see Column 5, Table “A”) shall do so in writing in the prescribed manner (where applicable) to the local municipality.
22.2 An application shall include a report to the Local Municipality containing full particulars on the criteria referred to in Clause 20.1 of the proposed uses, as well as:

(i) The name and address of the applicant;
(ii) The description, address and the locality of the subject Property;
(iii) Existing zoning of the property; and
(iv) A complete description of the proposed use of the land and/or building”.

22.3 No written consent shall be granted in terms of this clause until the applicant has to the satisfaction of the local municipality, obtained the written comments of the surrounding owners, as envisage in Clause 22.4.

Conclusion

5.1.28 Based on the evidence gathered, it can be concluded that the Municipality did not comply with the NBRBS Act in regulating the illegal structures in its area of jurisdiction.

5.2 Regarding whether the Complainant and any other persons suffered prejudice as a result of the conduct of the Ditsobotla Local Municipality in the circumstances.

Common cause issues

5.2.1. The Complainant indicated that failure by the Municipality to deal with the illegal structure erected for business purpose next to his property has caused prejudice to him and the community in the area.
5.2.2 The prejudice suffered relates to the likelihood of devaluation of his property and those of his neighbours in terms of market price and the rate of crime in his area has consequently increased as a result of the illegal structure at Erf 3502.

Conclusion

5.2.3 Based on the above evidence obtained, the Municipality conceded to having instructed its attorneys to institute a civil suit against the occupier of Erf 3502 to remove the illegal structure.

Application of the relevant legal framework

5.2.4 Batho Pele Principles, a Sesotho word, which means “People First”, is an initiative that was launched in 1997 to transform the Public Service at all levels. In the struggle to transform the Public Service, the old culture had to be changed to ensure that the people are served properly.

5.2.5 Batho Pele White Paper lists principles of good public administration, Redress being one of them. The redress principle provides that:

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

5.2.6 It was expected of the Municipality to provide the Complainant with a response and regular feedback regarding his complaint about its failure to develop by-laws and/or comply with the provisions of the NBRBS Act.
Conclusion

5.2.7 From the evidence gathered, it can be concluded that the Complainant suffered prejudice as a result of the Municipality's conduct in handling their complaint.

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

5.2.8 At the conclusion of my investigation, the following persons were served with section 7(9)(a) notice namely: - MEC Kegakilwe, Head of the Department: Mr Motoko, the Administrator: Mr Matlawe, The Municipal Manager, Mr Metswamere and the Mayor: Mr Buthelezi. The notices were served by way of emails and they were personally delivered to the aforementioned persons. These notices were served on the respective persons on 4 and 9 July 2019 respectively.

5.2.9 The purpose of the notice was to afford them an opportunity to comment on the possible findings arising from the investigation. The recipients were afforded ten (10) working days to respond to the notices. However they had 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 Ditsobotla Local Municipality improperly failed to develop by-laws and comply with the provisions of the National Building Regulations and Building Standards Act, 1977 relating to an illegal structure erected for business purpose next to the Complainant’s property situated on Erf 3504, Zone 2, Itsoseng.
6.1.1 The allegations that the Municipality failed to develop by-laws and comply with the provisions of the NBRBS Act, 1977 relating to an illegal structure erected for business purpose next to the Complainant’s property situated on Erf 3504, is substantiated.

6.1.2 The Municipality has for the period of four (4) years since 2015 upon receipt of a petition about an illegal structure at Erf 3502 brought by the Complainant and the community of Itsoseng improperly failed to address it. The Municipality only took action by instructing its attorneys, Bosman and Bosman Attorney, on 30 July 2018 to institute a civil action against the occupier of Erf 3502 for erection of an illegal structure;

6.1.3. The Municipality conceded that it has not developed by-laws to ensure effective regulations of illegal structures in its area of jurisdiction.

6.1.4. The conduct of the Municipality is in violation of section 33,156 and 195 of the Constitution and section 4 of the NBRBS Act.

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

6.2. **Regarding whether the Complainant and any other person suffered prejudice as a result of the conduct of the Ditsobotla Local Municipality in the circumstances:**

6.2.1. The allegation that the Complainant and any other person suffered prejudice as a result of the conduct of the Ditsobotla Local Municipality is substantiated.
6.2.2. The failure by the Municipality to address the complaint on the erection of an illegal structure next to the Complainant’s property which is likely to cause the devaluation of his property and contribute towards crime.

6.2.3. The conduct of the Municipality is in violation of Batho Pele principle of redress.

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

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 Municipal Manager must:

(aa) Within thirty (30) working days from the date of this report, demolish the illegal structure erected for business purpose next to the Complainant’s property situated on Erf 3504, zone 2, Itsoseng;

(bb) Within thirty (30) working table this report to the Council for a decision on the impact and management of illegal structures in the area by the Municipality

(cc) Within ninety (90) working days from the date of this report develop by-laws

(dd) Within thirty (30) working days from the date of this report, take appropriate action against any official who failed to attend to the Complainant’s matter on time;
(ee) Within fourteen (14) working days from the date of this report, write apology letters to the Complainant for the prejudice caused.

(b) The Mayor must:

(aa) Within thirty (30) working days from the date of this report, ensure that the Municipal Manager, comply with the remedial action taken in terms of section 182(1)(c) of the Constitution.

8. MONITORING

8.1. The Municipal Manager must, within fifteen (15) working days from the date of the issuing of this Report, and for my approval, submit the implementation Plan to me indicating how the remedial action will be implemented.

8.2. 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: North West, Department of Public Works and Roads unless the Administrator obtains a Court order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 05/09/2019