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"Allegations of failure by the North West Department of Local Government and Human Settlements to process an application for land development"

REPORT ON AN INVESTIGATION INTO THE ALLEGED FAILURE BY THE NORTH WEST PROVINCIAL DEPARTMENT OF LOCAL GOVERNMENT AND HUMAN SETTLEMENTS TO PROCESS AN APPLICATION FOR THE DEVELOPMENT OF A PROPERTY
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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 (Constitution), published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of failure by the North West Provincial Department of Local Government and Human Settlements (Department), through its North West Development Tribunal (Tribunal), to process an application for the establishment of a development area brought by Mr Chester Staples.

(iii) The complaint was brought by Mr Chester Staples (Complainant), who is a property developer.

(iv) In essence, the Complainant alleged that during March 2009 he brought an application for the establishment of a development area at Nauwpoort farm near Rustenburg. The application was submitted to the Tribunal.

(v) A preliminary hearing to process the application took place in February 2010 and the matter was postponed to March 2010. However, the hearing was not held due to the alleged failure by the Department to finalise the process of nominating and recommending to the Premier the appointment of a new Tribunal, after the first Tribunal’s term of office had lapsed.

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

(a) Whether the Department failed to process the Complainant’s application for the development of a property; and
(b) Whether the Complainant suffered prejudice as a result of the conduct of the Department.

(vii) Key laws and prescripts taken into account to determine if there had been improper conduct on the part of the Department and prejudice to the Complainant, were mainly those imposing administrative standards that should have been complied with by the Department in order to process the application, and include the following:

(a) The Constitution which requires that public administration must be governed according to certain democratic values and principles;

(b) The Development Facilitation Act No. 67 of 1995 (DFA) which imposes an obligation on the Premier to appoint a Tribunal. It further provides that some of the functions of the Tribunal include consideration of applications for establishment of development areas;

(c) The Town Planning and Township Ordinance 15 of 1986 (TPO) which deals with the process of land development; and

(d) The Batho Pele Principles were adopted by the government as a yard stick against which it will measure itself when providing service to the people.

(viii) I issued a notice in terms of section 7(9)(a) of the Public Protector Act to the Head of the Department who acknowledged receipt of the Complainant’s application and indicated that due to the delay to appoint the new Tribunal to process his application, the Complainant was advised to use an alternative option to submit his application, but failed to do so. The Head of the Department further indicated that the Department could therefore not be held liable for any prejudice suffered by the Complainant.
Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) **Regarding whether the Department failed to process the Complainant’s application for development of a property:**

(aa) The allegations that the Department, through its Tribunal, failed to process the Complainant’s application for the development of a property is substantiated.

(bb) The Department improperly failed to nominate and recommend to the Premier new Tribunal members who would have processed the Complainant’s application in terms of the DFA.

(cc) The Department’s argument that the Complainant failed to use the TPO as an alternative to DFA to submit his re-application is found to be unacceptable because rights under the DFA do not constitute rights under the TPO.

(dd) The Department’s conduct was in contravention section 195(1)(a) and (f) of the Constitution, section 15(1) of the DFA and the Batho Pele Principles on service standard, information, courtesy and redress.

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

(b) **Regarding whether the Complainant suffered prejudice as a result of the conduct of the Department:**

(aa) The allegation that the Complainant was prejudiced by the conduct of the Department, through its Tribunal, is substantiated.
(bb) The Complainant incurred costs of R1 383 344.00 when he submitted his application for the establishment of a development area at Nauwpoort farm near Rustenburg in the North West Province. These were the necessary expenses which he had to pay in pursuit of his application.

(x) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, is the following:

(aa) The Head of the Department must, within 30 working days from the date of publication of this report, send a letter of apology to the Complainant for the prejudice caused to him;

(bb) The Head of the Department must, within 60 working days from the date of publication of this report, pay the Complainant an amount of R1 383 344.00, plus interest calculated from the date on which the application was lodged, **16 March 2009**, to the date on which all DFA applications should have been finalised, **17 June 2012**; and

(cc) The Head of the Department must, within 90 working days from the date of publication of this report, institute civil proceedings against any person(s) liable in law, for the recovery of the amount referred to in paragraph (x)(bb) above.
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 (Constitution) and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

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

1.2.1. The Premier of the North West Province, Honourable Professor J Mokgoro;

1.2.2. The North West Province Administrator, Mr S Mpanza;

1.2.3. The Member of Executive Council for Local Government and Human Settlements, Honourable GF Gaolaolwe;

1.2.4. The Head of Department of Local Government and Human Settlements, Mr E Motoko; and

1.2.5. The former Registrar of the North West Development Tribunal, Ms M van Heerden.

1.3. A copy of the report is also provided to Mr Chester Staples (Complainant) to inform him about the outcome of the investigation.

1.4. The report relates to an investigation into the alleged failure by the North West Provincial Department of Local Government and Human Settlements
(Department), through its North West Development Tribunal (Tribunal) to process an application of the Complainant for the establishment of a development area at Nauuwoort farm near Rustenburg in the North West Province.

2. **THE COMPLAINT**

2.1. The complaint was lodged with my office by the Complainant on 21 February 2013.

2.2. He, in essence, alleged that:

2.2.1. He is a property developer residing in Johannesburg in the Gauteng Province;

2.2.2. In March 2009, he approached a town planner, Mr Conrad Henry Wieham, practicing under the name and style, "The Practice Group (Pty) Ltd", to submit an application on his behalf to the Department, seeking permission to establish a development area on portion 31 and Remaining Extent of portion 3 of the farm Nauuwoort 355 near Rustenburg. The project was to be known as "Chesterton Equestrian Estate";

2.2.3. The application was submitted on 16 March 2009 in terms of the Development Facilitation Act, No. 67 of 1995 (DFA). It was submitted to the Registrar of the Tribunal;

2.2.4. The Tribunal’s preliminary hearing conference to process the application was convened on 09 February 2010 and the matter was postponed to 03 March 2010 for a formal hearing;

2.2.5. However, on 03 March 2010 the matter was postponed to 08 August 2011. The hearing did not materialise. This was due to failure by the Department to finalise the process to nominate and recommend to the Premier the appointment of new
Tribunal members, after the first Tribunal's term of office had lapsed on 31 August 2010;

2.2.6. The consequence thereof was that the Complainant's application was not processed; and

2.2.7. It resulted in the Complainant having to pay costs amounting to R1 383 344.00, which included fees paid to the town planners who submitted the application on his behalf as well as the purchase of all materials and services related thereto.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1. The Public Protector is an independent constitutional body established under section 182(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) of the Constitution directs that the Public Protector has additional powers and functions prescribed by 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 power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5. In the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.[1] 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".[2]

3.6. The Court further confirmed the powers of the Public Protector as follows:

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

3.6.2 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);

3.6.3 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);

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[1] [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
[2] Supra at para [73].
3.6.4 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);

3.6.5 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);

3.6.6 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);

3.6.7 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));

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

3.6.9 "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)).
3.7 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 Public Protector's powers:-

3.7.1 The Public Protector has 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);

3.7.2 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective. (paragraphs 85 and 152)

3.7.3 There is nothing in the Public Protector act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92);

3.7.4 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);

3.7.4.1 Conduct an investigation;
3.7.4.2 Report on that conduct; and
3.7.4.3 To take remedial action.
3.7.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104);

3.7.6 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.

3.7.7 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector form taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108);

3.7.8 Prima facie evidence which points to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).

3.8 The Department is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector’s mandate.

3.9 My jurisdiction in this matter was not disputed by any of the parties.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.
4.1.2. The process commenced with a preliminary investigation which included interviews and meetings with the Complainant, correspondence with the Department; analysis of relevant documentation; research and the consideration and application of the relevant laws, regulatory framework and jurisprudence.

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:

a) What happened?

b) What should have happened?

c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

d) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where he or she 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 or not the Department acted improperly in its failure to nominate and recommend to the Premier the appointment of the new Tribunal members who would have processed pending applications, including the Complainant’s.

4.2.3 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 improper prejudice, the idea is to place him or her as close as possible to where he or she would have been had the Department complied with the regulatory framework setting the applicable standards for 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 Department failed to process the Complainant’s application for the development of a property; and

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

4.4. **Key sources of information**

4.4.1 **Meetings and consultation with the Complainant and Department**

(a) A meeting between my investigation team, the Complainant and Department on 18 December 2013; and

(b) A meeting between my investigation team and the Department’s Chief Town and Regional Planner and former Registrar of the Tribunal, Ms M van Heerden, on 02 February 2015.

4.4.2 **Correspondence**

(a) A copy of the letter from my office to the Head of the Department, Mr E Motoko, dated 13 September 2013;
(b) A copy of the letter from Mr Motoko to the Complainant dated 03 February 2014;

(c) A copy of the letter from my office to Mr Motoko dated 09 June 2014;

(d) A copy of the letter from Ms van Heerden to my office dated 29 January 2015;

(e) A copy of the letter from my office to Mr Motoko dated 06 March 2015;

(f) A copy of the letter from Mr Motoko to my office dated 10 March 2015;

(g) A copy of the letter from my office to Mr Motoko dated 02 October 2017; and

(h) A copy of the letter from Mr Motoko to my office dated 13 November 2017.

4.4.3 Legislation and other prescripts

(a) The Constitution;

(b) The Public Protector Act;

(c) The Development Facilitation Act, 1995 (DFA);

(d) The Town-Planning and Township Ordinance 15 of 1986 (TPO);

(e) The Batho-Pele Principles-Government Gazette No 18340; and
(f) A Policy statement dated 22 March 2012 by the National Department of Rural Development and Land Reform on Spatial Planning and Land Use Management Bill and the Constitutional Court judgement on the DFA case.

4.4.4 Case law

(a) City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010);

(b) 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)

(c) 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

(d) Nabuvax (Pty) Ltd and others v City of Tshwane Metropolitan Municipality and Others (31875/13) [2013] ZAGPPHC 181; [2013] 3 All SA 528 (GNP) (2 July 2013)
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 Department failed to process the Complainant’s application for the development of a property:

*Common cause issues*

5.1.1 The Complainant submitted an application with the Department, through its Tribunal, for the establishment of a development area on portion 31 and the remaining extent of portion 3 of the farm Naauwoort 355 near Rustenburg during March 2009.

5.1.2 The Tribunal conducted a preliminary hearing to process the application in February 2010 and the matter was postponed to March 2010. However, the hearing did not materialise as there was a failure by the Department to finalise the process of nominating and recommending to the Premier the appointment of new Tribunal members, after the first Tribunal’s term of office had lapsed on 31 August 2010.

*Issues in dispute*

5.1.3 The Complainant argued that he submitted his application at the Registrar of the Tribunal in terms of the DFA, but the Department improperly failed to process it, because it failed to finalise the process of nominating and recommending to the Premier the appointment of the new Tribunal members.

5.1.4 My office raised the complaint with the Department through a letter dated 13 September 2013.
5.1.5 The Department, through Ms van Heerden, only provided a formal response through a letter on 29 January 2015. In her response, she stated the following:

"The application was submitted to the Registrar of the Development Tribunal on 16 March 2009;"

(i) Preliminary processes which included advertisement of the application in the Government gazette and newspapers were carried out on 17 and 24 November 2009 respectively;

(ii) A pre-hearing conference was held on 09 February 2010 and at the hearing facts and issues that were in dispute were listed and it was agreed that they would also form part of the main hearing. The matter was then postponed to 03 March 2010 for a hearing;

(iii) On 03 March 2010, the hearing was postponed due to some outstanding documents which had to be furnished by the Complainant. The matter was then postponed to the 18 August 2011; and

(iv) The hearing on 18 August 2011 could not take place due to the fact that there was no Tribunal in existence at that time and as such the hearing was then postponed indefinitely."

5.1.6 According to Ms van Heerden, the following events took place during the time when the Tribunal was supposed to have been appointed:

"(i) The Premier had appointed a Development Tribunal to serve from 01 September 2009 until 31 August 2010;"
(ii) The Tribunal managed to eradicate the backlogs and performed very well until the members did not get paid their salaries. The Department did not budget for the Tribunal even though it was standard requests annually;

(iii) Eventually when the members received their payments in October 2010, their term of office had already expired;

(iv) The Premier was requested in a memorandum dated 22 July 2011 to re-appoint the Tribunal in order to finalise all the pending DFA applications before 17 June 2012. During June 2010, the Constitutional Court had declared chapters V and VI of the DFA to be unconstitutional, but it had suspended that declaratory order until 17 June 2012;

(v) The Member of the Executive Council for Local Government and Human Settlements (the MEC) did not want the previous Tribunal to be re-appointed and proposed that a new process be commenced with to obtain new nominations and the Premier agreed to the proposal;

(vi) Advertisements were done and nominations were forwarded to the MEC in a memorandum dated 07 November 2011. During January 2012, the Registrar was requested to re-submit the memo as the original one was lost;

(vii) In March 2012 the MEC nominated 14 people and on 02 April 2012 a memorandum was prepared for the Premier to confirm the nominations;

(viii) In May 2012, a new MEC was appointed. The new MEC requested that the memorandum to the Premier be recalled because he did not want to appoint a Tribunal before he knew what would be the outcome of a request to extend the DFA period for another two years. (A request had been made to the
Constitutional Court to extend the period of the DFA with a further two year period; however, the Constitutional Court declined the request);

(ix) During March 2012, the National Department of Rural Development and Land Reform issued a statement to all provincial departments directing that all pending DFA applications that were received before 17 June 2012 should be heard and finalised by the Development Tribunals; and

(x) On 26 July 2012 the Registrar submitted another memorandum to the MEC for nomination of members for the Tribunal. The MEC obtained a legal opinion and on that basis decided not to appoint a new Tribunal even if it was only meant to finalise pending applications.”

5.1.7 Ms van Heerden provided my office with a copy of the statement issued by the national Department of Rural Development and Land Reform dated 22 March 2012 to all provincial departments regarding the implications of the Constitutional Court’s judgement with regard to the constitutionality of the DFA. The said statement indicated that during June 2010, the Constitutional Court in the case of City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others, case no CCT89/09 2010, had declared chapters V and VI of the DFA unconstitutional, but had suspended the order for a period of two years until June 2012. Paragraph 3 of the statement read as follows:

“The department acknowledges that there is genuine apprehension on the following issues:

(a) ...

(b) Clarity on applications pending before the Development Tribunal as at 17 June 2012.”
5.1.8 Paragraph 4 of the statement reads as follows:

"The explanations to these issues are as follows:

(a) The Constitutional Court did not repeal the whole of the DFA but found only chapters v and vi of the Act as constitutionally invalid.

(b) Applications received by the Development Tribunal before 17 June 2012 will continue to be heard and determined by the Tribunals even after 17 June 2012 as if the Constitutional Court had not declared invalid chapters v and vi.

(c) Since the appointment of Development Tribunal members were done in terms of chapter iii of the DFA (which remains unaffected by the Constitutional court order) tribunal members may continue to hold office beyond 17 June 2012 until the DFA is repealed."

5.1.9 In its defence, the Department indicated that after realising that a Tribunal had not been appointed, it advised the Complainant to re-apply using the TPO, but he failed to heed the advice and as such the Department holds the view that it cannot be held liable for the expenses the Complainant incurred.

5.1.10 On 02 October 2017, I issued a notice to the Department in terms of section 7(9)(a) of the Public Protector Act in which I found its conduct to be improper and constituting maladministration in the manner in which it dealt with the Complainant's application.

5.1.11 In its response, through a letter dated 13 November 2017, signed by Mr Motoko, the Department indicated the following:
(i) "It was correct that indeed Complainant submitted an application for land Development in the area of Rustenburg.

(ii) That there were pre-hearings that were held and some objections were raised. However there were some postponements during the process until the term of the Tribunal expired.

(iii) That Complainant was then advised to bring the application in terms of Ordinance 15 as an alternative, but he did not respond to the advice.

(iv) That indeed a Tribunal was not appointed but there was always willingness to assist complainant.

(v) That Complainant was not the only applicant and other applicants withdrew their applications after realising that there was no Tribunal, however Complainant did not withdraw his.

(vi) That Complainant had an option which he failed to consider and as such the Department does not accept liability for his alleged costs."

Application of the relevant law

5.1.12 Section 195(1) of the Constitution provides that "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) ...

(c) ...

(d) ...

(e) ...
(f) *Public administration must be accountable.*

5.1.13 It was expected of the Department to maintain a high standard of professional ethics by timeously assisting the Complainant to process his application in line with the applicable legal prescripts and the directives from the national department. In its explanation, the Department indicated that one of the reasons for not processing the application was because a memorandum addressed to the Premier recommending the appointment of the Tribunal members was lost. This is a clear indication of lack of professionalism on the part of the officials of the Department.

5.1.14 On 22 March 2012, the National Department of Rural Development and Land Reform issued a statement to all provincial departments advising them to continue to finalise all pending applications. The Department did not adhere to the instructions as it failed to submit a memorandum to the Premier on the recommended appointable Tribunal members. Failure to do so would be in conflict with the constitutional principle of accountability.

5.1.15 Section 15(1) under Chapter III of DFA provides that:

*A tribunal is hereby established for each province in each case to be known as the Development Tribunal of the province concerned*.

5.1.16 Section 15(2) of the DFA provides as follows, *A Tribunal consists of a chairperson, a deputy chairperson and the other member or members appointed from time to time by the Premier with the approval of the provincial legislature.*

5.1.17 Section 1(l) of the DFA defines MEC as a *Member of the Executive Council of a province to whom the Premier has assigned the performance of the functions entrusted to a MEC by or under such a provision in relation to land development in terms of Chapter V.*
5.1.18 Whilst the appointment of members of the Tribunal is done by the Premier, however, the functions to advertise, nominate and recommend appointable Tribunal members have been delegated to the Member of the Executive Council for Local Government and Human Settlements (MEC).

5.1.19 In terms of section 16(a) of the DFA, a Tribunal has the power to deal with any matter brought before it in terms of section 31 of the DFA. Section 31(2) of the DFA provides “that a land development applicant shall lodge a land development application accompanied by the prescribed documents and information with a designated officer in the prescribed manner.”

5.1.20 In the current matter, the Complainant submitted his application and lodged it with the Registrar of the Tribunal as prescribed by the DFA. It is not in dispute that the application by Complainant was properly lodged in terms of the DFA.

5.1.21 The TPO also deals with the process of land development. In its introduction the TPO provides that its aim is “to consolidate and amend the laws relating to town planning and establishment of townships and to provide for matters incident thereto”. Matters that are incidental thereto relate to the usage and development of land.

5.1.22 In certain aspects, especially on the structure, the TPO can be said to be similar to the DFA. Chapter 1 of the TPO, under section 3(1) provides as follows:

“A Township Board is hereby established for each province”. This is similar to section 15(1) of the DFA which provides that “a Development Tribunal is established for each province” and both the Board and the Tribunal are headed by a chairperson. Therefore, the TPO operates parallel to and as an alternative to the existing land development procedures set out therein.
5.1.23 In the case of Nabuvax (Pty) Ltd and others v City of Tshwane Metropolitan Municipality and others (31875/13)[2014] the Court held that:

"...the scheme of the DFA created ...a parallel and in substantial respects overlapping regime of property development law along with the TPO. The procedure created by the DFA worked faster than that available under the TPO. In a case like this one, an applicant could choose whether to apply to the Development Tribunal under the DFA or to the local authority under the TPO."

5.1.24 The difference between the DFA and TPO is that the DFA was designed to apply throughout the country to speed up land development, whilst the TPO and other Ordinances only applied to the territories within the provinces that were governed by the pre-1994 administration.

5.1.25 The TPO can be used in the application for land development. Even the courts have recognised that the TPO and other ordinances were the only option for township development in view of the declaration of the invalidity of certain provisions of the DFA, and the fact that the SPLUMA was assented to in August 2013, but had not come into operation when certain provisions of the DFA were declared invalid. The SPLUMA only came into operation in November 2015.

5.1.26 In the present case, it was therefore possible that the Complainant might have had the option to use the TPO for the development of the land. However, this would not have exonerated the Department from liability for the maladministration regarding the undue delay in the processing of the appointment of the Tribunal members for the following reasons:

5.1.26.1 In the Nabuvax matter referred to above, the Municipality wanted to convert an application that had stalled under the DFA, to the TPO process, but the Court found that at the time when the applicant’s DFA application had stalled, he had
vested rights which would in context “always relate to steps in the DFA process towards township establishment”;

5.1.26.2 The Court confirmed that the applicant enjoyed “a right under the DFA which would have entitled such an applicant to proceed to the next stage of the DFA process of township development. They did not constitute rights under Ordinance 15. That is because, quite simply, no functionary acting under the Ordinance 15 had applied his mind to the relevant question”;

5.1.26.3 If the Complainant had vested rights in the DFA process to proceed to the next stage of the process, then the Department, conversely, had an obligation to ensure that the DFA process could continue accordingly. The TPO process would have meant that the Complainant, as confirmed in the Nabuvax matter, had to start afresh as a new application before any rights could accrue to the Complainant and could therefore never constitute the realisation of the Complainant’s vested rights in the DFA process.

5.1.26.4 Chapter VIII of the DFA under section 67(2) provides as follows: “After a land development application has been lodged in terms of this Act, the same or substantial similar land development application may not also be brought in terms of any other law”;

5.1.26.5 Therefore in terms of the above section, once an application for land development is lodged in terms of the DFA, a similar or same application may not be lodged in terms of any other law, not even the TPO. In brief, the Complainant would have to withdraw his application in terms of the DFA and submit a new application in terms of a different piece of legislation; and

5.1.26.6 The Constitutional Court, in the matter of City of Johannesburg Metropolitan Municipality and others v Gauteng Development Tribunal and Others
(CC89/09) [2010] held that "the order of constitutional invalidity made by the Supreme Court of Appeal in respect of Chapters V and VI of the Development Facilitation Act 67 of 1995 is confirmed". The Constitutional Court further held that the Tribunals in the rest of the country, with the exception of areas falling within the Johannesburg and Durban Metros, were not barred from accepting new applications or processing existing applications during the period of suspension from 18 June 2010 to 17 June 2012. Therefore the state had a duty to ensure that the Tribunal remained operational during the period of suspension of parts of the DFA.

5.1.27 The Batho Pele Principles were adopted by the government as a yardstick against which it will measure itself when providing service to the public. These principles are aligned to the Constitution and require public servants to provide service to the citizens accordingly.

5.1.28 The following principles are key in this specific case:

(a) **Service standard:** According to this principle citizens should be told what level and quality of public service they will receive so that they know what to expect. In this specific case the quality of service and the level of service that was rendered by the department did not meet the standard expected. The Department lost the memorandum which was to be sent to the Premier for approval.

(b) **Courtesy:** In terms of this principle citizens should be treated with courtesy and consideration. The Complainant was not treated with courtesy in this case. The Department was expected to be sensitive to the fact that the Complainants and other applicants spent money in bringing these applications and should have endeavoured to ensure that their applications were processed through the establishment of the Tribunal and ensuring that it functions effectively by finalising these applications timeously.
(c) **Information:** The principle requires that citizens should be given full and accurate information about the public service they are entitled to. The Department was expected to provide the Complainant with full information relating to the processing of his application. He was, however, not told that one of the reasons for the delay in the appointment of the Tribunal was because the memorandum that was prepared for the Premier was lost or that another memorandum that had been sent to the Premier was recalled by the MEC.

(d) **Redress:** According to this principle if the promised standard of service is compromised, citizens should be offered an apology and a full explanation and a speedy effective remedy be given to them.

**Conclusion**

5.1.29 Based on the evidence gathered, it can be concluded that the Department contravened the DFA by failing to conclude the process of nominating and recommending to the Premier the appointment of the new Tribunal members. It can also be concluded from the case law quoted above that the rights under the DFA do not constitute rights under the TPO. The standard of service which was expected from the Department in terms of the Batho-Pele principles was also compromised.

5.2 **Regarding whether the Complainant suffered prejudice as a result of the conduct of the Department:**

**Issues in dispute**

5.2.1 The Complainant appointed professional town planners to prepare and submit the application on his behalf and as a result incurred expenses. He paid R1 383 344.00 for their services. According to him, these were the necessary expenses which he
had to pay in pursuit of his application. Copies of all invoices and receipts were made available to my office by the Complainant.

5.2.2 It is no longer possible for the Complainant to develop the area as the land is no longer available, and even if it was available, to request him to submit another application would cause him to incur even more costs.

5.2.3 As indicated above, the Department indicated that after realising that a Tribunal had not been appointed, it advised the Complainant to re-apply using the TPO, but he failed to heed the advice and as such the Department holds the view that it cannot be held liable for the expenses he incurred.

Conclusion

5.2.4 From the evidence gathered, it can be concluded that the Complainant incurred costs when he submitted his application which the Department failed to process.

6 FINDINGS

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

6.1 Regarding whether the Department failed to process the Complainant’s application for the development of a property:

6.1.1. The allegations that the Department, through its Tribunal, failed to process the Complainant’s application for the development of a property is substantiated.
6.1.2. The Department improperly failed to nominate and recommend to the Premier new Tribunal members who would have processed the Complainant's application in terms of the DFA.

6.1.3 The Department's argument that the Complainant failed to use the TPO as an alternative to DFA to submit his re-application is found to be unacceptable because rights under the DFA do not constitute rights under the TPO.

6.1.4 The Department's conduct was in contravention section 195(1)(a) and (f) of the Constitution, section 15(1) of the DFA and the Batho Pele Principles on service standard, information, courtesy and redress.

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

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

6.2.1 The allegation that the Complainant was prejudiced by the conduct of the Department, through its Tribunal, is substantiated.

6.2.2 The Complainant incurred costs of R1 383 344.00 when he submitted his application for the establishment of a development area at Nauwpoort farm near Rustenburg in the North West Province. These were the necessary expenses which he had to pay in pursuit of his application.
7 REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with a view of placing the Complainant as close as possible to where he would have been had the maladministration not occurred, is as follows:

7.1 The Head of the Department must, within 30 working days from the date of publication of this report, send a letter of apology to the Complainant for the prejudice caused to him;

7.2 The Head of the Department must, within 60 working days from the date of publication of this report, pay the Complainant an amount of R1 383 344.00, plus interest calculated from the date on which the application was lodged, 16 March 2009, to the date on which all DFA applications should have been finalised, 17 June 2012, and

7.3 The Head of the Department must, within 90 working days from the date of publication of this report, institute civil proceedings against any person(s) liable in law, for the recovery of the amount referred to in paragraph 7.2 above.

8 MONITORING

8.1 The Head of the Department must submit an Implementation Plan to my office within 15 working days from the date of publication of this report indicating the manner in which the remedial action referred to in paragraph 7 above will be implemented.
8.2 Each remedial action listed in paragraph 7 above is legally binding on the person directed to implement, unless it has been reviewed and set aside by a Court or an appropriate interim Court Order to stay the implementation of the remedial action is obtained within the compliant period stated therein.

ADV'BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 17/10/2018