

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

*“Allegations of improper conduct and maladministration relating to wrongful burial
of Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, by the Sol
Plaatje Municipality in 2013”*

**REPORT NUMBER 47 of 2021/22
ISBN NUMBER: 978-1-77634-714-8**

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT
AND MALADMINISTRATION RELATING TO THE WRONGFUL BURIAL OF THE
LATE MR BESHU JOSEPH KHUMALO IN THE GRAVE OF THE LATE MR STEPHEN
MOILOA, BY THE SOL PLAATJE MUNICIPALITY IN 2013**

INDEX

Executive Summary	3
1. INTRODUCTION	8
2. THE COMPLAINT	9
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	9
4. THE INVESTIGATION	14
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	18
6. FINDINGS	27
7. REMEDIAL ACTION	28
8. MONITORING	29

Executive Summary

- (i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- (ii) The report communicates the Public Protector's findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct and maladministration relating to wrongful burial of the late Mr Beshu Joseph Khumalo in the grave of the late Mr Stephen Moilola, the father of Ms Kehilwe Seepamore (Complainant), by the Sol Plaatje Municipality (Municipality) in 2013.
- (iii) The complaint was lodged on 25 September 2019, at the Northern Cape Provincial Office of the Public Protector South Africa in Kimberley.
- (iv) The Complainant alleged that in 2013 the Municipality buried Mr Beshu Joseph Khumalo in the grave of her father, Mr Stephen Moilola, who was buried at ABC Cemetery in September 1977.
- (v) In essence, the Complainant alleged that the wrongful burial by the Municipality was improper, constitutes maladministration and prejudiced her family.
- (vi) Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
 - (a) Whether the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moilola, the father of the Complainant in 2013; and if so, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced her family.

(vii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Municipality, an analysis of the relevant documents and information obtained during the investigation and consideration and application of the relevant laws and prescripts.

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

(a) Regarding whether the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moilola, the father of the Complainant in 2013; and if so, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced her family:

(aa) The allegation that the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moilola, the father of the Complainant in 2013, is substantiated.

(bb) The Municipality failed to ensure that the graves were properly marked and that the numbers were affixed to the graves as required in terms of the provisions of the the Sol Plaatje Municipality Cemeteries By-law No.2 of 2006.

(cc) The Municipality's failure to rectify the wrongful burial of Mr Beshu Joseph Khumalo in the grave of the late father of the Complainant since 2013, was in violation of sections 4, 5(1) and (2) of the Sol Plaatje Municipality Cemeteries By-law, 2006, and Item 2 of the Code of Conduct for Municipal Staff Members as set out in Schedule 2 to the Local Government: Municipal Systems Act, 2000. It also prejudiced the Complainant and her family as they had to bear the

trauma caused by the wrongful burial and will also have to go through the ordeal of exhumation and reburial.

- (dd) The Municipality's conduct accordingly constitutes improper conduct as envisaged by section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(ii) of the Public Protector Act.
- (ix) The Municipal Manager conceded in his response to the section 7(9) Notice that the Municipality was at fault and indicated that the Municipality was in the process of improving the registry system of the cemeteries. He further indicated that the Municipality is committed to resolve the matter. Officials of the Municipality will be meeting with the families involved to endeavour to find an amicable solution, failing which the Municipality will obtain a court order for the exhumation and reburial of Mr Khumalo and will make a financial contribution in regard thereto.
- (x) The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

(a) The Municipal Manager of the Municipality to:

- (aa) After consultation with the families involved, approach the relevant sphere of government or approach the Magistrate's Court in terms of section 26(1)(a) and (b) of the National Health Act Regulations relating to the management of human remains, 2013 and section 16(8) of the Sol Plaatje Municipality Cemeteries By-law, 2006 in order to obtain an exhumation order that will enable the Municipality to exhume the body of Mr Beshu Joseph Khumalo that was wrongfully buried in the grave of the late father of the Complainant, within sixty (60) days from the date of this report and for it to be reburied.

- (bb) Ensure that once the Court order is granted, make a financial contribution to the family concerned for the costs of the exhumation and reburial, within sixty (60) working days from the date of this report.
- (cc) Take the appropriate steps in respect of disciplinary action against the officials of the Municipality who contributed to undue delay in the rectification of the wrongful burial of Mr Beshu Joseph Khumalo in the grave of the late father of the Complainant in terms of the Consequence Management Policy, within sixty (60) working days from the date of this report.
- (dd) Embark on auditing all existing graves to ensure correct marking before loading the information on a newly developed digitized GPRS system in pre-empting wrongful burials in wrong graves, within sixty (60) working days from the date of this report.
- (ee) Take the appropriate steps to expedite the finalisation of the Sol Plaatje Municipal Cemeteries Policy to regulate the management of cemeteries and the threshold capped costs paid by the Municipality for the performance of rituals during exhumation of remains of people, and to provide training to the relevant officials that will have to implement the Policy, within sixty (60) working days from the date of this report.
- (ff) Ensure that the Audit Committee of the Municipality report regularly to the Municipal Council on the audit outcomes relating to internal audit plan which includes the digitized GPRS system, within sixty (60) working days from the date of this report.
- (gg) Internal Audit must on an annual basis, review the adequacy and effectiveness of the municipality's system of internal control, risk management and supply chain management. It is further recommended that the Audit Committee must consider in all its meetings, the internal

audit and AGSA reports to ensure that recommendations are implemented.

- (hh) Establish internal complaint mechanism which will address service delivery complaints raised by the community served by the Municipality, within sixty (60) working days from the date of this report.
- (ii) Report to the Council on the implementation of the remedial action taken in paragraphs (x) (aa) to (hh) above within ninety (90) working days from the date of this report, and provide the Public Protector with a copy thereof.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION RELATING TO THE WRONGFUL BURIAL OF THE LATE MR BESHU JOSEPH KHUMALO IN THE GRAVE OF THE LATE MR STEPHEN MOILOA, BY THE SOL PLAATJE MUNICIPALITY IN 2013

1. INTRODUCTION

1.1 This is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of sections 8(1) of the Public Protector Act to the following persons, to inform them of the outcome of the investigation and the remedial action taken:

1.2.1 Dr Zamani Saul, the Premier of the Northern Cape.

1.2.2 Mr B Vaas, the Northern Cape Member of the Executive Council (MEC) for Co-operative Governance, Human Settlements and Traditional Affairs (COGHSTA).

1.2.3 Mr B S Lenkoe, the Head of the Northern Cape Department of COGHSTA.

1.2.4 Ms Nomizizi Maputle, the Speaker of the Sol Plaatje Municipality (Municipality).

- 1.2.5 Mr Kagisho Sonyoni, the Executive Mayor of the Municipality.
- 1.2.6 Mr Goolam Akharwaray, the Municipal Manager of the Municipality.
- 1.3 A copy of the report is also provided to Ms Kehilwe Seepamore, who lodged the complaint.
- 1.4 The report relates to an investigation into allegations of improper conduct and maladministration relating to the wrongful burial of Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moilola, the late father of the Complainant by the Municipality, in 2013.

2. THE COMPLAINT

- 2.1. The complaint was lodged on 25 September 2019 at the Northern Cape Provincial Office of the Public Protector South Africa (PPSA) in Kimberley.
- 2.2. The Complainant alleged that in 2013 the Municipality buried the late Mr Beshu Joseph Khumalo in the grave of her father, Mr Stephen Moilola, who was buried at ABC Cemetery in Kimberley in September 1977.
- 2.3. In essence, the Complainant alleged that the wrongful burial by the Municipality was improper, constitutes maladministration and prejudiced her family.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that:

“The Public Protector has the power as regulated by national legislation –

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

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

competent alternative remedies available to the Complainant and the overall impact of the investigation.

- 3.7 In the case between *South African Bureau of Standards v The Public Protector*¹, the North Gauteng High Court held that, as with most claims and complaints, there is for good reason, time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving.
- 3.8 In this specific case, the Public Protector concluded that the failure by the Municipality to rectify wrongful burial of Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, the father of the Complainant, is to date still continuing.
- 3.9 Therefore, the investigation required that the Public Protector explores the original burial records of the Municipality, in order to determine whether the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, and if so whether such conduct was improper and constitutes maladministration. The Public Protector accordingly decided to exercise her discretion in favour of this complaint. Conscious to all these reasons, the Public Protector concluded that it is in the interest of justice to investigate and determine the merits or demerits thereof.
- 3.10 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

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

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

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

3.12 The Constitutional Court further held that:

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

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

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

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

³ *Supra* at para [73].

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

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

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

4. THE INVESTIGATION

4.1 Methodology

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

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

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

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

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on

whether the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, the father of the Complainant in 2013; and if so, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced her family.

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

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

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

4.3.1. Whether the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, the father of the Complainant in 2013; and if so, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced her family.

4.4 The Key Sources of information

4.4.1 Documents and correspondence

4.4.1.1. A copy of a Memorandum from Ms T Maropong, the Manager: Sport, Art, Culture and Recreation of the Municipality to the Legal Department of the Municipality, dated 17 December 2019.

4.4.1.2. A copy of letter from Mr Molefi, Mr Khumalo's son, to Mr Letebejane, the Cemetery Manager of the Municipality, dated 7 May 2018.

4.4.1.3. A copy of an undated Report compiled by Ms T Maropong, the Manager: Sport, Art, Culture and Recreation.

4.4.1.4. Copy of a letter from Ms Maropong to Mr Letebejane, the Cemetery Manager of the Municipality dated 4 November 2019.

4.4.2 Meetings held

4.4.2.1 Meeting held with Mr Doctor Letebejane, the Cemetery Manager of the Municipality on 8 June 2021.

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

4.4.3 Legislation and other prescripts

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

4.4.3.2 The Public Protector Act No 23 of 1994.

4.4.3.3 The Local Government: Municipal Systems Act No 32 of 2000. (Municipal Systems Act).

4.4.3.4 The Sol Plaatje Municipality Cemeteries By-law No.2 of 2006.

4.4.3.5 The National Health Act Regulations relating to the management of human remains, 2013.

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

4.4.4.1 A Notice was issued on 23 November 2021 in terms of section 7(9) of the Public Protector Act to Mr Goolam Akharwaray, the Municipal Manager the Municipality, affording him an opportunity to respond to the evidence obtained during the investigation.

4.4.4.2 The Notice was also sent to:

- (a) Dr Z Saul, the Premier of the Northern Cape.
- (b) Mr B Vass, the MEC for Co-operative Governance, Human Settlements and Traditional Affairs
- (c) Mr B S Lenkoe, the HOD of COGHSTA.
- (d) The former Speaker of the Municipality.
- (e) The former Executive Mayor of the Municipality.
- (f) Ms T Moropong, the Manager: Sports, Arts, Culture & Recreation of the Municipality.
- (g) Mr D Letebejane, the Cemetery Manager of the Municipality
- (h) Mr Pitso, the Manager: Legal Unit of the Municipality, respectively.

4.4.4.3 Only the Municipal Manager Mr Akharwaray responded to the Notice, on 23 November 2021.

4.4.4.4 Copy of the letter from the Municipal Manager dated 23 November 2021.

4.4.4.5 Copy of the letter from the Municipal Manager dated 6 December 2021.

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

5.1 Regarding whether the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, the father of the Complainant in 2013; and if so, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced her family

Common cause or undisputed facts

5.1.1 It is common cause that on 13 July 2013, Mr Beshu Joseph Khumalo was wrongfully buried at the Cemetery in the grave of Mr Stephen Moiloa i.e. Grave 14, Row G instead of Grave 14, Row F, the grave of Mr Simon Khumalo, without the permission of the Moiloa family.

Issues in dispute

5.1.2 In a response to the allegations during the investigation in a meeting held on 8 June 2021, Mr Doctor Letebejane, the Cemetery Manager of the Municipality conceded that there was a wrongful burial of Mr Beshu Joseph Khumalo in Grave 14, Row G, the grave of Mr Stephen Moiloa.

5.1.3 Mr Letebejane further stated the following:

5.1.3.1 That Mr Stephen Moiloa, the father of the Complainant, was buried in Grave 14, Row G, which is situated at the Catholic Block of the ABC Cemetery, in Kimberley, on 03 September 1977.

- 5.1.3.2 That on 05 November 1977, Mr Simon Khumalo, the father of Mr Beshu Joseph Khumalo, was buried in Grave 14, Row F at the Catholic Block of the ABC Cemetery in Kimberley.
- 5.1.3.3 On 13 July 2013, Mr Beshu Joseph Khumalo was wrongfully buried in the grave of Mr Stephen Moilwa i.e. Grave 14, Row G instead of Grave 14, Row F, the grave of his late father, Mr Simon Khumalo.
- 5.1.4 In a Memorandum obtained during the investigation, dated 17 December 2019 addressed to the Municipality's Legal Unit, Ms TB Moropong, the Manager: Sports, Arts, Culture & Recreation of the Municipality, conceded that wrong burials are one of the challenges that the Cemeteries Section is faced with and the problem originates from the burial registers which have been updated incorrectly.
- 5.1.5 In the said Memorandum, Ms Maropong sought legal intervention from the Municipality's Legal Unit to get permission to exhume the remains of people who were wrongfully buried in graves that belong to other members of the community. Ms Maropong further indicated that:
- 5.1.5.1 Most of the wrongful burials take place at the ABC Cemetery;
- 5.1.5.2 She was approached by the Mothelesi and Moilwa families complaining about the Morebodi and Khumalo families who were wrongfully buried in their graves at the ABC Cemetery. The problem is that the Morebodi and Khumalo families do not want to give permission for their loved ones' remains to be exhumed from the wrong graves;
- 5.1.5.3 These complaints have been ongoing and are affecting the wellbeing of the affected families, others have threatened to take legal action against the Municipality and to expose the Municipality via newspapers; and

- 5.1.5.4 The Cemeteries Section did its best to resolve these wrongful burials, and a stumbling block originates from the demands presented by the families that are expected to sign the Exhumation Forms for the municipality to correct its mistakes by burying their loved ones accordingly.
- 5.1.6 In a letter from Mr Khumalo's son, Mr Molefi, to Mr Letebejane dated 7 May 2018, obtained during the investigation, Mr Molefi referred to a meeting with Mr Pitso, the Legal Advisor of the Municipality held on 7 May 2018. In the said letter, Mr Molefi stated that the family discussed the matter of the body of Mr Khumalo being exhumed and came to the conclusion that this was a serious and traumatising matter and further that the Municipality had made a huge mistake of which they had admitted their wrong. He exclaimed that:

“As family we expect the Municipality to rectify all their wrongs and with due respect when it comes to the families’ demands, namely (i) A forensic to be done on the grave which Mr Khumalo will be moved to. (ii) Payment for all ritual and reburial expenses and (iii) Compensation for emotionally and psychologically traumatising the family”.

- 5.1.7 In an undated report compiled by Ms Tumelo Maropong, the Manager: Sport, Art, Culture and Recreation of the Municipality, it is stated that:
- 5.1.7.1 She was approached by the Moilwa family on 26 September 2019 reporting that their father Mr Stephen Moilwa was buried in Grave R/G/14 in 1977 and later they discovered that Mr Joseph Khumalo was buried together with their father in the same grave in 2013.
- 5.1.7.2 The family and the ABC Cemetery Supervisor who verified using copies of the burial register, noted that the Moilwa and Khumalo grave numbers were tampered with using a *tippex* to erase one of the letters.

5.1.7.3 The Manager had previously visited the Khumalo family to inform them about the situation when Mr Khumalo's son, Mr Molefi came up with demands for his father to be exhumed from Mr Moilwa's grave and reburied on top of his grandfather, Mr Simon Khumalo.

5.1.7.4 She was contacted telephonically by the Moilwa family that informing her that they were visited by Mr Molefi who made it clear to them that he does not have a problem signing the Exhumation Form for his father's remains to be exhumed from Moilwa's grave. The Manager also confirmed on 29 October 2019 that he had a discussion with Mr Molefi who did not have a problem signing the forms, and he was advised to speedily provide the applicant (Mr Molefi) with the Exhumation Forms for his signature. An instruction in writing was immediately given to the Manager for the form to be taken to Mr Molefi for him to sign, for this matter to be put to rest.

5.1.7.5 The original burial records that are safely kept at the Africana Library were perused on 19 November 2019 to investigate what was the initial grave number before the *tippex* was used, where it was discovered that the letters were swapped by the previous Supervisor. This proved that indeed the numbers were changed and that Mr Khumalo was buried on top of Mr Moilwa. The Manager further stated that:

"We had many engagements with both families but the status quo still remains, hence we seek legal intervention to have Mr Khumalo's remains to be exhumed accordingly and reburied in the correct grave"

5.1.8 According to a letter obtained during the investigation, dated 4 November 2019 addressed to Mr Letebejane, the Cemetery Manager of the Municipality, Ms Maropong informed him that Ms Moilwa had telephonically informed her that Mr Khumalo had paid her family a visit to inform them that he did not have a problem with his deceased family member being exhumed from the Moilwa family grave. Ms Maropong further exclaimed that:

“You also confirmed that you had spoken to Mr Khumalo who agreed with the exhumation being carried out. I advised you and you agreed to speedily provide Mr Khumalo with the exhumation form for his signature. A written instruction is given to you to ensure that Mr Joseph Khumalo who was wrongfully buried in Mr Moilola’s grave in 2013 be exhumed before Tuesday- 12 November 2019.”

- 5.1.9 Despite the approved Memorandum dated 17 December 2019 addressed to the Municipality’s Legal Unit requesting for legal support to resolve wrongful burial at the ABC Cemetery in Kimberley, there is no evidence that anything was done by the Legal Unit of the Municipality to rectify the wrongful burial of Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moilola.
- 5.5.10 In his response to the section 7(9) Notice in a letter dated 23 November 2021, Mr Goolam Akharwaray, the Municipal Manager of the Municipality stated the following:
- 5.5.10.1. The burial into a wrong grave was mainly occasioned by “*tampering*” with the records by unknown persons. It seems that the evidence shows the use of tippex to change records.
 - 5.5.10.2. The incorrect burial was not due to dereliction of duty.
 - 5.5.10.3. To mitigate such matters the Municipality has developed a digitized record platform which will detail the GPRS coordinates of each grave with details of the deceased. The matter of recording the information is underway as a pilot project with the aim of resolving this matter permanently.
 - 5.5.10.4. Staff advised that the delay in finalizing this matter had been occasioned by the lack of policy and non-cooperation by the family.

- 5.5.10.5. A policy was developed and processed via the Council Committee and has not yet been approved by Council, creating a vacuum for staff to function within.
- 5.5.10.6. The family of the deceased seem to have verbally abused and threatened staff and demanded extensive reburial arrangements, the cost of which are disproportionately high.
- 5.5.11. In the said response, Mr Akharwaray also indicated that he had directed the relevant staff to:
- 5.5.11.1. Meet with the families again to attempt to resolve this matter amicably;
 - 5.5.11.2. Failing a resolution, to advise the families that the Municipality will obtain a court order for exhumation and reburial; and
 - 5.5.11.3. The Municipality will contribute the sum of R10 000.00 to cover the cost of reburial and related rituals.
- 5.5.12. In another response to a section 7(9) Notice in a meeting held 2 December 2021, Mr Goolam Akharwaray, the Municipal Manager of the Municipality conceded that the Municipality was at fault. However, he reiterated the Municipality's commitment to resolve this matter. The Municipal Manager further indicated that he had already advised his staff to meet with the families involved in order to resolve this matter amicably.
- 5.5.13. According to a letter received from the Municipal Manager addressed to the Public Protector dated 6 December 2021, Mr Mayisela from the Legal Section of the Municipality was tasked to meet and resolve the matter amicably. He further stated that was achieved and a settlement agreement would be signed soon with the aim of ensuring reburial to be finalized by mid-January 2022.

Application of the relevant law

- 5.5.13. Section 55(1) of the Municipal Systems Act provides that as the head of the administration of a municipality, the municipal manager is, subject to the policy considerations of the municipal council, responsible and accountable for, *inter alia*, the management of the provision of services to the local community in a sustainable and equitable manner.
- 5.5.14. According to section 4 of the Sol Plaatje Municipality Cemeteries By-law , 2006 (By-law) a register of graves and burials shall be kept by the caretaker of a municipal cemetery and such register shall be completed as far as possible immediately after a burial has taken place, with reference to the prescribed particulars contained in the burial order concerned.
- 5.5.15 In terms of sections 5(1) and 2 of the By-law, all graves in a municipal cemetery that are occupied or for which a burial has been authorized in terms of the provisions of section 9, shall be numbered by the Municipality and the number shall be affixed to the grave and indicated on a plan to be kept available in the caretaker's office.
- 5.5.16 Section 9(6) of the By-law provides that the allocation of a specific grave is the responsibility and the sole discretion of the caretaker and a burial shall be executed only in a grave allocated by him or her.
- 5.5.17 Section 16(8) of the By-law provides that if at any time and for whatever reason the exhumation and transfer of a corpse to another grave in a municipal cemetery shall become necessary, the Municipality may, after the relatives of the deceased person have been notified accordingly, exhume such body and transfer it to another grave.
- 5.5.18 A Code of Conduct for Municipal Staff Members is provided for in Schedule 2 to the Municipal Systems Act.
- 5.5.19 Item 2 of the Code provides that a staff member of a municipality must at all times-

- (a) loyally execute the lawful policies of the municipal council;*
- (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner;*
- (c) act in such a way that the spirit and objects of section 50 are promoted;*
- (d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and*
- (e) act impartially and treat all people, including other staff members, equally without favour or prejudice”.*

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

5.5.21 Section 15(3) of the of the National Health Act Regulations relating to the management of human remains, 2013 provides that all burials must be registered with the relevant local government, and the local government concerned shall enter all burials in the register of burials of such local government.

5.5.22 Section 26(1)(a) and (b) of the National Health Act Regulations relating to the management of human remains, 2013, provide that no exhumations and reburials of human remains shall be done unless, authorized by the relevant sphere of government and permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place or a court order is issued by a magistrate and shall be permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place.

Conclusion

5.5.23 The evidence and information obtained during the investigation confirmed that the Municipality wrongfully buried Mr Beshu Joseph Khumalo in the grave of the late father of the Complainant and that the Municipality had failed to rectify the wrongful burial since the matter was reported by the Moiloa family to the Municipality in 2016.

6. FINDINGS

6.1 Regarding whether the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, the father of the Complainant in 2013; and if so, whether the conduct of the Municipality was improper, constitutes maladministration and prejudiced her family:

6.1.1. The allegation that the Municipality buried Mr Beshu Joseph Khumalo in the grave of Mr Stephen Moiloa, the father of the Complainant in 2013, is substantiated.

6.1.2. The Municipality failed to ensure that the graves were properly marked and that the numbers were affixed to the graves as required in terms of the clauses/provisions of the Municipal By-law.

6.1.3. The Municipality's failure to rectify the wrongful burial of Mr Beshu Joseph Khumalo in the grave of the late father of the Complainant since 2013, was in violation of sections 4, 5(1) and (2) of the Sol Plaatje Municipality Cemeteries By-law, 2006, and Item 2 of the Code of Conduct for Municipal Staff Members as set out in Schedule 2 to the Municipal Systems Act. It also prejudiced the Complainant and her family as they had to bear the trauma caused by the

wrongful burial and will also have to go through the ordeal of exhumation and reburial.

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

7. REMEDIAL ACTION

- 7.1 The Municipal Manager conceded in his response to the section 7(9) Notice that the Municipality was at fault and indicated that the Municipality was in the process of improving the registry system of the cemeteries. He further indicated that the Municipality is committed to resolving the matter. Officials of the Municipality will be meeting with the families involved to endeavour to find an amicable solution, failing which the Municipality will obtain a court order for the exhumation and reburial of Mr Khumalo and will make a financial contribution in regard thereto.

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

7.2.1 The Municipal Manager of the Municipality to:

- 7.2.1.1. After consultation with the families involved, approach the relevant sphere of government or approach the Magistrate's Court in terms of section 26(1)(a) and (b) of the National Health Act Regulations relating to the management of human remains, 2013 and section 16(8) of the Sol Plaatje Municipality Cemeteries By-law, 2006 in order to obtain an exhumation order that will enable the Municipality to exhume the body of Mr Beshu Joseph Khumalo that was

- wrongfully buried in the grave of the late father of the Complainant, within sixty (60) days from the date of this report and for it to be reburied.
- 7.2.1.2. Ensure that once the Court order is granted, make a financial contribution to the family concerned for the costs of the exhumation and reburial, within sixty (60) working days from the date of this report.
 - 7.2.1.3. Take the appropriate steps in respect of disciplinary action against the officials of the Municipality who contributed to undue delay in the rectification of the wrongful burial of Mr Beshu Joseph Khumalo in the grave of the late father of the Complainant in terms of the Consequence Management Policy, within sixty (60) working days from the date of this report.
 - 7.2.1.4. Embark on auditing all existing graves to ensure correct marking before loading the information on a newly developed digitized GPRS system in pre-empting wrongful burials in wrong graves, within sixty (60) working days from the date of this report.
 - 7.2.1.5. Take the appropriate steps to expedite the finalisation of the Sol Plaatje Municipal Cemeteries Policy to regulate the management of cemeteries and the threshold capped costs paid by the Municipality for the performance of rituals during exhumation of remains of people, and to provide training to the relevant officials that will have to implement the Policy, within sixty (60) working days from the date of this report.
 - 7.2.1.6. Ensure that the Audit Committee of the Municipality reports regularly to the Municipal Council on the audit outcomes relating to internal audit plan which includes the digitized GPRS system, within sixty (60) working days from the date of this report.
 - 7.2.1.7. Internal Audit must on an annual basis, review the adequacy and effectiveness of the municipality's system of internal control, risk management and supply chain management. It is further recommended that the Audit Committee must

consider in all its meetings, the internal audit and AGSA reports to ensure that recommendations are implemented.

7.2.1.8. Establish internal complaint mechanism which will address service delivery complaints raised by the community served by the Municipality, within sixty (60) working days from the date of this report.

7.2.1.9. Report to the Council on the implementation of the remedial action taken in paragraphs 7.2.1.1 to 7.2.1.8 above within ninety (90) working days from the date of this report, and provide the Public Protector with a copy thereof.

8 MONITORING

8.1.1 The Municipal Manager of the Municipality to submit an action plan to the Public Protector within thirty (30) days from the date of this report, indicating how the remedial action referred to in paragraph 7.2.1 above will be implemented.

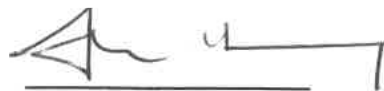
8.1.2 The submission of the implementation plan and the implementation of the remedial action shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE

THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA

DATE: 13 / 12 /2021



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