

**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(2A)
OF THE PUBLIC PROTECTOR ACT, 1994**



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*Allegations of improper conduct, undue delay and maladministration against the
Knysna Local Municipality*

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT,
UNDUE DELAY AND MALADMINISTRATION BY THE KNYSNA MUNICIPALITY IN
FAILING TO PROVIDE MS LYDIA BOSMAN WITH A LOW COST HOUSE AT ERF
9890A, WHITE LOCATION**

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EXECUTIVE SUMMARY

- (i) 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, 1994 (the Public Protector Act).
- (ii) The report relates to an investigation into allegations of improper conduct, undue delay and maladministration by the Knysna Local Municipality (Municipality) in the Western Cape Province relating to its failure in providing Ms Lydia Bosman with a low cost house at ERF 9890A, White Location.
- (iii) The complaint was lodged by Mr Themba Bosman on behalf of his mother Ms Lydia Bosman on 15 May 2019, who is a pensioner.
- (iv) Based on an analysis of the complaint, the following issue was considered and investigated:
 - (a) Whether the Municipality failed to provide the Complainant with a low cost house after having approved it as such in terms of the relevant legal prescripts and if yes, whether such amounts to undue delay, improper conduct, constitutes maladministration and prejudice to the Complainant.
- (v) 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 documents and information obtained during the investigation and application of the relevant laws and prescripts.

(vi) Having considered the evidence and information obtained during the investigation against the relevant regulatory framework setting the standard that should have been upheld by the Municipality, the Public Protector makes the following findings:

(a) **Regarding whether the Municipality failed to provide the Complainant with a low cost house after having approved it as such in terms of the relevant legal prescripts and if yes, whether such amounts to undue delay, improper conduct, constitutes maladministration and prejudice to the Complainant.**

(aa) The allegation that the Municipality failed to provide a low cost house after having approved it in terms of the relevant legal prescripts, is substantiated.

(bb) The Complainant had on several occasions engaged with the Municipality requesting for assistance for her house to be constructed, to no avail.

(cc) It was conceded by the Municipality that the Complainant had applied for a low cost house and a subsidy was approved in respect of ERF 9890A on 26 March 2009.

(dd) To date the Complainant has been prejudiced as no house has been constructed in respect of the approved low cost house.

(ee) The conduct of the Municipality accordingly is improper as envisaged by section 182(1)(a) of the Constitution and constitutes

maladministration and undue delay as envisaged in section 6(4)(a) of the Public Protector Act. It also prejudices the Complainant.

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

(a) The Acting Municipal Manager to:

(aa) Apologise in writing to the Complainant for the undue delay in providing her with a low cost house in terms of her approved application, within thirty (30) working days from the date of the report;

(bb) Take urgent and appropriate steps to ensure that the Complainant is provided with a low cost house, as required in terms of section 26(1) and section 152 of the Constitution, section 2 and section 9 of the Housing Act and the National Housing Code, within one hundred and twenty (120) working days from the date of the report.

(cc) Take appropriate steps in respect of disciplinary action against the municipal officials who were implicated in non-compliance with the Municipality's policies and procedures that resulted in the undue delay to provide Ms Lydia Bosman with a low cost house at ERF 9890A, White Location as envisaged in section 67(1)(h) of the Municipal Systems Act, within sixty (60) working days of the report.

(dd) Ensure that the Internal Audit Function of the Municipality conducts regular audits, and reviews the adequacy and effectiveness of controls, processes and procedures on the delivery of low cost houses, of the Municipality and report accordingly, as contemplated by section 165 of the Local Government: Municipal Finance Management Act, 2003 ; and

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(ee) Report to the Council of the Municipality on the steps taken to implement the remedial action referred to in paragraphs (vii)(a)(aa) to (vii)(a)(cc)

above within one hundred and twenty (120) working days from the date of this report and submit a copy of the report to the Public Protector.

(b) The report is also referred to the Western Cape MEC for Human Settlements for noting.

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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, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to the following persons to note the outcome of the investigation and to implement the remedial action, where applicable:
 - 1.2.1 The Member of the Executive Council for Human Settlements of the Western Cape Provincial Government, Mr Tertuis Simmers;
 - 1.2.2 The Acting Head of the Western Cape Department of Human Settlements (Department), Ms P Phila Mayisela;
 - 1.2.3 The Speaker of the Council of the Knysna Municipality (Municipality), Cllr Julie Lopes;
 - 1.2.4 The Executive Mayor of the Municipality, Cllr Levael Davis;
 - 1.2.5 The Acting Municipal Manager of the Municipality, Mr Dawid Adonis; and

1.2.6 The Acting Director: Integrated Human Settlements of the Municipality, Ms Lindile Petuna.

1.3 A copy of the report is also provided to Mr Themba Bosman, who lodged the complaint on behalf of his mother, Ms Lydia Bosman (Complainant).

1.4 The report relates to an investigation into allegations of improper conduct, undue delay and maladministration by the Municipality in failing to provide Ms Lydia Bosman with a low cost house at Erf 9890A, White Location in Knysna.

2. THE COMPLAINT

2.1 The complaint was lodged by Mr Themba Bosman on behalf of his mother, Ms Lydia Bosman on 15 May 2019, who is a pensioner.

2.2 The gist of the complaint is that the Complainant applied for low-cost housing on 1 February 1996 and even though a subsidy to build a house was approved on 26 March 2009, no house has been built to date.

2.3 In addition, other housing applicants who applied after the Complainant's application in 1999, have received their houses for the same project (White Location), in about 2005.

2.4 In essence, the Complainant is alleging that the conduct of the Municipality in not providing the approved house is improper, constitutes maladministration and the undue delay has prejudiced her.

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 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 power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

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* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect¹. The Constitutional Court further held that:

*“When the 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. In the above-mentioned matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others*, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 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 (para 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints. It is 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 (para 68);

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 (para 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 (para 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 (para 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(para 71(a));
- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 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 (para 71(e)).

- 3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:
- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);
- 3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);
- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);
- 3.7.5 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);
- 3.7.6 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; and

- 3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).
- 3.8 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.
- 3.9 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 PPSA 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.
- 3.10 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.
- 3.11 In the case between *South African Bureau of Standards v The Public Protector*³, 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.

³ [2019]ZAGPPHC 101 (27 March 2019)

- 3.12 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.
- 3.13 Similarly in the case between *Gordhan v Public Protector and Others*⁴ the North Gauteng High Court held that, in view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint.
- 3.14 The Complainant in this matter applied for a low cost house and her application was approved in 2009 (13 years ago). Her complaint on the failure on the part of the Municipality to build and deliver her low cost house to date has been ongoing over the years. It was concluded that it is in the interest of justice and also in the public interest that this matter is investigated and the Complainant attains her constitutional right to housing
- 3.15 The jurisdiction of the Public Protector to investigate this matter was not disputed by 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 [2020]ZAGPPHC 777 (17 December 2020)

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 maladministration?

4.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong or, where appropriate, to place the complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration?

4.2.1.5 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 failed to provide the Complainant with a low cost house, since her application was approved in 2009.

4.2.1.6 The enquiry regarding what should have happened, focuses on the standard that should have been met by the Municipality in providing the Complainant with a low cost house.

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

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

4.3.1 Whether the Municipality failed to provide the Complainant with a low cost house after having approved it as such in terms of the relevant legal prescripts and if yes, whether such amounts to undue delay, improper conduct, constitutes maladministration and prejudice to the Complainant.

4.4 Key sources of information

4.4.1 Documents, letters and emails exchanged

4.4.1.1 Housing Subsidy Portal verification print out for the Complainant, dated 05 March 2009;

4.4.1.2 The original complaint, dated 15 May 2019;

4.4.1.3 An email enquiry from the Public Protector to the Municipality dated 21 May 2019;

4.4.1.4 An email response from the Municipality to the Public Protector dated 10 June 2019;

4.4.1.5 A letter response from the Municipality to the Public Protector dated 24 October 2019;

- 4.4.1.6 A letter response from the Municipality to the Public Protector dated 12 March 2020;
- 4.4.1.7 An email response from the Municipality to the Public Protector dated 19 March 2019;
- 4.4.1.8 An email enquiry to the Municipality from the Public Protector dated 08 April 2020;
- 4.4.1.9 An email enquiry to the Municipality from the Public Protector dated 11 May 2020;
- 4.4.1.10 An email response from the Municipality to the Public Protector dated 02 June 2020;
- 4.4.1.11 An email response from the Municipality to the Public Protector dated 17 June 2020;
- 4.4.1.12 An email enquiry to the Municipality from the Public Protector dated 02 July 2020;
- 4.4.1.13 An email response from the Municipality to the Public Protector dated 24 August 2020;
- 4.4.1.14 An email response from the Municipality to the Public Protector dated 21 March 2021; and
- 4.4.1.15 A letter response from the Municipality to the Public Protector dated 25 March 2021.

4.4.2 Legislation and other prescripts

- 4.4.2.1 The Constitution of the Republic of South Africa, 1996.
- 4.4.2.2 The Public Protector Act No 23 of 1994.
- 4.4.2.3 The National Housing Act, 107 of 1997. (National Housing Act)
- 4.4.2.4 Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act)
- 4.4.2.5 The National Housing Code, 2009. (National Housing Code)

4.4.3 Jurisprudence considered

4.4.3.1 *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).

4.4.3.2 *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).

4.4.3.3 *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

4.4.3.4 *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45.

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

4.4.4.1 A notice was issued in terms of section 7(9) of the Public Protector Act, to the Acting Municipal Manager of the Municipality, Mr Dawid Adonis, the former Director: Integrated Human Settlement, Mr Mr J Mkunqwana the Acting Director: Integrated Human Settlements of the Municipality, Mr Lindile Petuna, the Member of the Executive Council for Human Settlements of the Western Cape Provincial Government, Mr T Simmers, on 29 November 2021. Except for acknowledgements of receipt. No substantive written response was received.

4.4.4.2 The Acting Municipal Manager of the Municipality, Mr D Adonis was engaged telephonically on 18 January 2022 by the Regional Manager of the George

Regional Office of the Public Protector South Africa (PPSA) in connection with the response by the Municipality to the section 7(9) Notice.

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 failed to provide the Complainant with a low cost house after having approved it as such in terms of the relevant legal prescripts and if yes, whether such amounts to undue delay, improper conduct, constitutes maladministration and prejudice to the Complainant.

Common cause or Undisputed Facts

5.1.1 It is not disputed that the Complainant applied for a low cost house (previously under the RDP Programme) and was since 1996 placed on the waiting list.

5.1.2 It is also not disputed that on 26 March 2009, a housing subsidy for the application of the Complainant was approved, as indicated on the Housing Subsidy System Portal (HSS) report under the application reference number "WA09030133", for site number 9890A, under the Knysna City Township.

Issues in dispute

5.1.3 The Complainant contended that after her housing subsidy was approved on 26 March 2009, the Municipality built low cost houses for other applicants and did not consider her house as priority, even though she had initially applied in 1996, coupled with the fact that she was a pensioner.

5.1.4 The Complainant further submitted that several attempts were made by her to seek assistance from the Municipality on receiving a house, prior to the lodgement of a complaint with the Public Protector on 15 May 2019, however her concerns were never dealt with.

5.1.5 On 10 June 2019, Mr Joel Mkunqwana, the former Director: Integrated Human Settlement of the Municipality indicated to the investigation team of the Public Protector South Africa (PPSA) that:

“The Municipality has been seeking alternative relocation to some of the beneficiaries which included the Complainant, in the form of Temporary Relocation Areas (TRAs) which allows for the necessary space and access ways in which such BNG (Breaking New Ground) type units would be realised;

A former tender has been confirmed in this financial year of 2018/19 which has been struggling to set its operations on the identified development areas;

We attach related records about her previous application and current waiting list status; and

We can confirm that her name is part of the beneficiary list targeted for the financial year”.

5.1.6 On 24 October 2019, Doctor S Vatala, the former Municipal Manager of the Municipality, responded to the PPSA’s enquiry that the Municipality was attending to the matter and that a unit will be constructed after they have addressed some technical impediments and negotiated with a contractor.

5.1.7 On 12 March 2020, Mr Joel Mkunqwana: Director: Integrated Human Settlement reported that the Municipality had requested a local contractor to erect a 40m² BNG (Breaking New Ground)⁵ house for the Complainant with a site inspection already having been completed.

5.1.8 Ms Lindile Petuna: Manager: Integrated Human Settlement of the Municipality, advised the PPSA on 19 March 2020 that:

“It must be confirmed that we had a meeting with the contractor who will erect the said house for the beneficiary. As previously reported to you, the date of the construction of such unit has not been communicated yet since the contractor is busy with construction of units in the same ward as the complainant. Again we confirm that there is commitment from the contractor that this unit will be constructed before the project is finished before the end of year 2020”.

5.1.9 On 02 June 2020, Mr Mkunqwana of the Municipality provided a further response to the PPSA, indicating that the Municipality had been compelled to pursue an alternative plan and use another contractor who has volunteered to build the house immediately, which will be dependent on appropriate access for the plant and material to be delivered; arrangements made for a new access way; and the influence and eventuality of the house construction and related completion schedules.

5.1.10 On 17 June 2020, Ms Lindile Petuna, Manager: Integrated Human Settlement at the Municipality stated in an email to the PPSA that:

⁵ <https://www.gov.za/about-government/sustainable-human-settlements-breaking-new-ground>

"We are now busy with enrolment of the house on NHBRC for construction to take place immediately.

Access issue has been addressed with the relevant directorate."

- 5.1.11 Mr Joel Mkunqwana responded to further enquiries by the PPSA investigation team on 24 August 2020, highlighting the project (Mandela Voluntary Unit) challenges, which included that the topography of the site and soil conditions in specific portions of the land parcels that were partially developed; uncontrolled history of land invasions that saw increased densification resulting in site access blockages to enable service of some of the sites (including the Complainant's portion) and entire BNG top structure development at the time not being completed; electrical overhead lines in some portions of the site which do not allow for BNG development; and the above together with the access issue nullified the planned completion of the Complainant's unit.
- 5.1.12 It was further reported on 24 August 2020, that the, Mandela Voluntary Unit which was a voluntary initiative broadly comprising of the business community, civil sector, Non-Governmental Organisations, individuals and the Municipality among others, were in the process of building a house for the Complainant and should this fail to materialize, then the Municipality would have to revert to the original planned development in appointing a contractor.
- 5.1.13 The PPSA investigation team followed up on progress made with the building of a house for the Complainant on 22 March 2021.
- 5.1.14 In his response, dated 25 March 2021, the Acting Municipal Manager of the Municipality, Mr Dawie Adonis, indicated that the Contractor who initially agreed to the construction of the house for the Complainant has since negated on the agreement. He further stated that:

“We need to submit an application for funding to provincial government; or the Municipal Council can fund the construction of the dwelling through own funding.

The construction of the dwelling would be a capital project and we will need to make budget submission, of which said submissions already closed for the 2021/2022 financial year.

As mentioned, the Municipal Council will need to consider funding of an unfunded mandate, for the provision of housing, making use of own funding. The administration is not in favour of making use of this option as it creates an added financial burden and will set an unsustainable precedent that the Municipality can build houses with own funds, which we generate through the levying of rates and services of which same must be utilised to deliver services to the community.

The administration is thus considering the best option on how to proceed with this matter.”

- 5.1.15 Mr Adonis’ response to the section 7(9) Notice was that the Municipality is aware of the complaint. He indicated that the Municipality is the implementing agent of the Department. Further, that as soon as the Public Protector’s report on this matter is issued, the Municipality will engage the relevant stakeholders to determine the best way forward.

Application of the relevant law and prescripts

5.1.16 Section 2 of the Constitution, states that “*the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*”.

5.1.17 Section 8(1) of the Constitution, further states that “*the Bill of Rights, applies to all law, and binds the legislature, the executive the judiciary and all organs of state*”.

5.1.18 In terms of section 26 (1) and (2) of the Constitution:

“(1) *Everyone has the right to have access to adequate housing.*”

“(2) *The state must take reasonable legislative and other measures within it’s available resources, to achieve the progressive realization of this right.*”

5.1.19 In the *Government of the Republic of South Africa v Grootboom* matter, the Court described the state’s constitutional obligations in relation to the right to adequate housing as a constitutional issue of fundamental importance to the development of South Africa’s new constitutional order⁶.

5.1.20 In *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others*⁷ the court further stated that:

⁶ Government of the Republic of South Africa v Grootboom [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

⁷ Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others [2021] ZACC 45.

“The commitment to transform our society into one which respects and observes the values of human dignity, freedom and equality lies at the heart of our constitutional order.

As former Chief Justice Chaskalson wrote in Soobramoney, “this commitment is reflected in various provisions of the Bill of Rights and in particular in sections 26 and 27 which deal with access to housing, health care, food, water and social security”.

5.1.21 The Court further held that after more than a decade of futile engagements by the applicants with the Ekurhuleni Municipality and others, all of the provided explanations regarding the [Municipality] about the budgetary constraints, the various processes that have to be finalised, before the houses could be built, etc, were delaying tactics to continue to deprive the applicants access to adequate housing which the court rejected⁸.

5.1.22 Section 152 (1) (a) and (c) of the Constitution further states that *“The objects of local government are to provide democratic and accountable government for local communities; and to promote social and economic development”*.

5.1.23 In terms of section 152(2) of the Constitution *“A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)”*.

5.1.24 Section 195 (1) of the Constitution which is the required standard of public administration, provides amongst other things that:

⁸ Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others [2021] ZACC 45 at para 18 and 19.

“Public Administration must be governed by the democratic values and principles enshrined on the Constitution, including the following principles:

- (a)
- (b)
- (c)
- (d) *People’s needs must be responded to, and the public must be encouraged to participate in policy-making; and*
- (e) *Public administration must be accountable.”*

5.1.25 The right to have access to housing accrued to the Complainant and there is a corresponding constitutional duty on the Municipality as an arm of the state to take reasonable legislative and other measures, within available resources, to achieve the progressive realization of this in respect of this matter. Officials of the Municipality are compelled in terms of sections 152 and 195 of the Constitution to have responded to the need of the Complainant and to have been held accountable for the delay.

5.1.26 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

5.1.27 In response to this constitutional imperative, the Government has in terms of the Housing Act, No 107 of 1997 (Housing Act) introduced a variety of programmes which provide the poor access to adequate housing.

5.1.28 Section 2 (1)(a) and (b) of the Housing Act, provides inter alia:

“(1) National, Provincial and Local sphere of government must-

- (a) Give priority to the needs of the poor in respect of housing development;*
- and*

(b) *Consult meaningfully with individuals and communities affected by housing development.*"

5.1.29 Section 9 (1) (a) (i) The Housing Act provides as follows:

"Every municipality must as part of the municipality's process of integrated development planning take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis."

5.1.30 It is therefore a requirement of the Municipality to ensure that steps are taken in providing access to adequate housing on those individuals who meet the applicable requirements.

5.1.31 The National Housing Code 2009⁹ (National Housing Code) further sets out the underlying policy principles, guidelines, norms and standards, which apply to various governments housing assistance programmes introduced since 1994.

5.1.32 The above provisions are applicable to the Municipality in the local sphere of government in as far as it expressly prescribes the obligation to prioritize the needs of the poor in respect of housing development and consultation with affected individuals.

5.1.33 In this instance, the Complainant applied for a low cost house and her application was approved on 26 March 2009. However, the Complainant has since March 2009 (for 12 years), been unable to benefit from a low cost house, despite the Municipality being aware of her complaint and having committed in writing on

⁹ A Simplified Guide to the National Housing Code 2009 {Part 1 of the National Housing Code} 2009, Volume 1 issued in terms of section 4 of the Housing Act 107 of 1997

several occasions that a house would be constructed for her, which never materialised.

5.1.34 In this matter, the Complainant is an approved beneficiary of Erf 9890A according to the Housing Subsidy System Report, dated 10 June 2019.

5.1.35 In terms of section 62(1) (a) of the MFMA, the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that the resources of the municipality are used effectively; efficiently and economically; and that the municipality has and maintains effective, efficient and transparent systems of financial and risk management and internal control; and of internal audit operating in accordance with any prescribed norms and standards.

5.1.36 Section 63 (1) of the MFMA, further states that *“The accounting officer of a municipality is responsible for the management of the assets of the municipality, including the safeguarding and the maintenance of those assets; and the liabilities of the municipality”*.

5.1.37 In terms of section 63 (2) (a), *“The accounting officer must for the purposes of subsection take all reasonable that the municipality has and maintains management and information system that accounts for the assets and liabilities of the municipality”*.

5.1.38 Section 65 (2) (a) of the MFMA, further states that the accounting officers for the purposes of subsection (1) take all reasonable steps to ensure that the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds.

5.1.39 The accounting officer of the municipality as the custodian of the Municipality's assets and liabilities is therefore obliged to take steps in ensuring that any implemented processes within the municipal structure are audited to ensure that a transparent system of accountability exists.

Conclusion

5.1.40 The Municipality conceded during the investigation that the Complainant's application for a subsidy for a low cost house was approved on 26 March 2009 in respect of ERF 9890A, White Location in Knysna.

5.1.41 The Municipality does not dispute that other housing applicants who applied after the Complainant's application have received houses in the same project (White Location).

5.1.42 The Complainant is a pensioner and applied for a low cost house as long ago as 1996, (25 years ago) which was approved 12 years ago, based on the fact that she fell within the low income assessment category.

5.1.43 One of the constitutional and statutory obligations of the Municipality is that it must give priority to the needs of the poor in respect of housing development within the community. Since the Complainant's subsidy was approved on 26 March 2009, to date she has never benefited from a low cost house.

5.1.44 The Municipality's conduct in unduly delaying and failing to prioritise and provide a low cost house to the Complainant is in direct contravention with the sections 26, 195 and 237 of the Constitution and the Housing Act.

6. FINDINGS

6.1 Regarding whether the Municipality failed to provide the Complainant with a low cost house after having approved it as such in terms of the relevant legal prescripts and if yes, whether such amounts to undue delay, improper conduct, constitutes maladministration and prejudice to the Complainant.

6.1.1 The allegation that the Municipality failed to provide the Complainant with a low cost house after having approved it in terms of the relevant legal prescripts, is substantiated.

6.1.2 The Complainant had on several occasions engaged with the Municipality requesting for assistance for her house to be constructed, to no avail.

6.1.3 It was conceded by the Municipality that the Complainant had applied for a low cost house and a subsidy was approved in respect of ERF 9890A on 26 March 2009.

6.1.4 To date the Complainant has been prejudiced as no house has been constructed in respect of the approved low cost house.

6.1.5 The conduct of the Municipality accordingly is improper as envisaged by section 182 (1) (a) of the Constitution and constitutes maladministration and undue delay as envisaged in section 6(4)(a) of the Public Protector Act. It also prejudices the Complainant.

7. REMEDIAL ACTION

7.1 The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, is the following:

7.1.1 The Acting Municipal Manager to:

7.1.1.1 Apologise in writing to the Complainant for the undue delay in providing her with a low cost house in terms of her approved application, within thirty (30) working days from the date of the report;

7.1.1.2 Take urgent and appropriate steps to ensure that the Complainant is provided with a low cost house, as required in terms of section 26 (1) and section 152 of the Constitution, section 2 and section 9 of the Housing Act and the National Housing Code, within one hundred and twenty (120) working days from the date of the report.

7.1.1.3 Take appropriate steps in respect of disciplinary action against the municipal officials who were implicated in non-compliance with the Municipality's policies and procedures that resulted in the undue delay to provide Ms Lydia Bosman with a low cost house at ERF 9890A, White Location as envisaged in section 67(1)(h) of the Municipal Systems Act, within sixty (60) working days of the report.

7.1.1.4 Ensure that the Internal Audit Function of the Municipality conducts regular audits, and reviews the adequacy and effectiveness of controls, processes and procedures on the delivery of low cost houses, of the Municipality and report accordingly, as contemplated by section 165 of the Local Government: Municipal Finance Management Act, 2003; and

7.1.1.5 Report to the Council of the Municipality on the steps taken to implement the remedial action referred to in paragraphs 7.1.1.1 to 7.1.1.3 above within one hundred and twenty (120) working days from the date of this report and submit a copy of the report to the Public Protector.

7.1.2 The report is also referred to the Western Cape MEC for Human Settlements for noting.

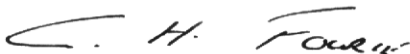
8. MONITORING

8.1 The Acting Municipal Manager to submit an implementation plan indicating how the remedial action referred to in paragraph 7.1.1 is implemented, within thirty (30) working days from the date of this report.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 31/01/2022

Assisted by:



ADV CH FOURIE
EXECUTIVE MANAGER
PII: COASTAL