
**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**



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF REFUSAL BY THE
LAND BANK TO CONDUCT BUSINESS WITH MR MOLOELE BASED ON
ALLEGED FALSE INFORMATION THAT APPEARED IN THE MEDIA**

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1. INTRODUCTION

1.1 This is a report 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:

1.2.1 Mr Stephen Sebueng; The Executive Manager, Legal Services, of the Land Bank; and to

1.2.2 The Complainant, Mr M. Moloele, to inform him of the outcome of the Public Protector's investigation.

1.3 This report relates to an investigation into allegations of the refusal by the Land Bank to conduct business with Mr Moloele based on alleged false information that appeared in the media.

2. THE COMPLAINT

2.1 The complaint was lodged by Mr Moloele (hereinafter referred to as the Complainant) at the Public Protector Head office during April 2019 alleging that the Land Bank refused to conduct business with him without just cause.

2.2 An acknowledgement of receipt letter was sent to the Complainant on 12 April 2019.

2.3 The Complainant further alleged that this decision by the Land Bank was based on unverified media reports which related to illegal and fraudulent transactions, involving him and his alleged associates.

3. Based on the analysis of the complaint and the allegations contained therein, the following issues were identified and investigated:

3.1 Whether the Land Bank improperly and unjustifiably refused to conduct business with the complainant, and if so, whether the conduct constituted maladministration and improper conduct.

4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

4.1 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.

4.2 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”.*

4.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

4.4 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.

4.5 The Land Bank is an organ of state and its conduct amounts to conduct in state affairs, as a result the complaint falls within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

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

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The investigation process included the exchange of correspondence and documentation between the Public Protector, the Land Bank and the Complainant.

5.1.2 All relevant documents and correspondence were obtained and analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.

5.1.3 The action followed by the office of the Public Protector falls within the scope and ambit of a preliminary investigation provided for in section 7 of the Public Protector Act, wherein the Public Protector has the discretion to decide whether a full scale investigation is required or should be declined.

5.2 Approach to the investigation

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

- (i) What happened?
- (ii) What should have happened?
- (iii) Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?
- (iv) In the event of improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where he would have been but for the maladministration or improper conduct?

5.2.2 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 primarily focussed on whether the Land Bank improperly and unjustifiably refused to conduct business with the Complainant, and if not so, whether the conduct constituted maladministration and improper conduct.

5.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the Land Bank.

5.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration. Where the Complainant has suffered prejudice, the idea is to place him as close as possible to where he would have been had the

Land Bank concerned complied with the regulatory framework setting the applicable standards for good administration.

5.3 The Key Sources of information

5.3.1 Documents and information sent and received.

- 5.3.1.1 An acknowledgement of receipt letter from the Office of the Public Protector sent to the Complainant on 12 April 2019;
- 5.3.1.2 Complainants notice of motion filed on 19 February 2019 at the Gauteng High Court, with case number 11666/19;
- 5.3.1.3 Letter sent on 14 April 2019 from the office of the Public Protector to the Complainant informing him that he must first exhaust his internal remedies available to him by escalating the matter to the Chief Executive Officer of the Land Bank;
- 5.3.1.4 Email from the Public Protector investigation team to the Land Bank on 17 July 2019 raising the allegations of the Complainant;
- 5.3.1.5 E-mail received on 8 August 2019 from the Legal Advisor of the Land Bank informing us that the Complainant instituted a review application in the High Court of South Africa under case number 11666/2019;
- 5.3.1.6 Complaint form received from Complainant on 11 November 2019, alleging that the land bank refused to do business with him based on false information in the media;
- 5.3.1.7 Letter dated 17 February 2020 from the Public Protector investigation team to the Land Bank requesting a response to the allegations of the Complainant;

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- 5.3.1.8 Correspondence dated 2 March 2020 from the Executive Manager, Legal Services at the Land Bank;
- 5.3.1.9 Intention to close letter, dated 2 July 2020 sent from the Public Protector investigation team to the Complainant;
- 5.3.1.10 Correspondence dated 3 July 2020, received from Complainant raising objections to the intention to close letter sent to him.
- 5.3.1.11 Email dated 7 July 2020, from the Public Protector investigation team to the Land Bank requesting further information regarding the objections raised by the Complainant;
- 5.3.1.12 Email dated 22 July 2020, from the Complainant's firm of attorneys containing the Complainant's application in terms of Rule 28(7) filed on 16 March 2020 which is pending in the High Court of South Africa, Gauteng Division, Pretoria under case number 11666/2019; and
- 5.3.1.13 Correspondence dated 24 July 2020 received from the Land Bank informing us of the status of the matter in court.

5.4 Legislation and other prescripts

- 5.4.1 Section 182 of the Constitution of the Republic of South Africa, 1996;
- 5.4.2 Section 7 of the Public Protector Act 23 of 1994;
- 5.4.3 Section 6(3)(b) of the Public Protector Act 23 of 1994;
- 5.4.4 Section 6(6) of the Public Protector Act 23 1994; and
- 5.4.5 Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector (11311/2018; 13394/2018) [2019] ZAGPPHC.

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

6.1 Regarding whether the Land Bank improperly and unjustifiably refused to conduct business with the complainant, and if so, whether the conduct constituted maladministration and improper conduct.

Common cause

6.1.1 It is not disputed that during April 2018 the Complainant engaged the Land Bank regarding proposed transactions including possible joint venture transactions.

6.1.2 It is also common cause that on 28 May 2019 the Complainant received a correspondence from the General Manager of the Land Bank who resolved to decline to engage and / or establish a relationship with him as he was considered to be a “high risk” potential client, and that further engagements with the Complainant would result in “reputational harm”, to the Land Bank.

Issues in dispute

6.1.3 The issue for determination is whether the Land Bank improperly and unjustifiably refused to conduct business with the complainant, and if so, whether the conduct constituted maladministration and improper conduct.

6.1.4 The investigation commenced with our investigation team raising the Complainant’s allegations on 17 July 2019 with the Land Bank and a follow up e-mails being sent to the Land Bank on 17 February 2020 and 7 July 2020.

6.1.5 Mr Sebueng who is the Executive Manager Legal Services at the Land Bank in a letter dated 2 March 2020 to the Public Protector, indicated that “*Mr Moloele had instituted review application proceedings against the Land*

Bank in the High Court of South Africa, Gauteng Division Pretoria under case number 11666/2019 during February 2019. The Land Bank assumes the complaint that is lodged at the Office of the Public Protector is based on the same claims as contemplated in the Review Application. In light of the pending Review Application and our understanding of the Public Protector Act, we are of the view that it may not be necessary for your office to investigate a matter of this nature, as Mr Moloele has not yet exhausted the legal remedies available to him.”(sic)

- 6.1.6 Upon adjudication of this matter an intention to close letter was sent to the Complainant on 2 July 2020, informing him that since this matter is still before the court, the matter is *sub judice* therefore we cannot at this stage intervene and make a determination whereas this matter is still pending finalisation by the High Court, Pretoria Division.
- 6.1.7 On 3 July 2020 the Complainant responded to the intention to close letter that was sent to him. Stating that “...*the allegations of the Land bank to me, are baseless and without any evidence. I have decided to take the matter to the courts, purely because your office could not render service to me...*”
- 6.1.8 The Complainant however did not raise objections on any particular material aspect of the intention to close letter, and furthermore from the evidence provided to us by the Complainant, it appeared from the court stamp on the documents that he provided to our office when he lodged his complaint, that his application was made to the High Court well before he approached the Public Protector for assistance.
- 6.1.9 Pursuant to Mr Moloele’s objections we requested and obtained copies of further documents that were filed in respect of case number 11666/19, being the Complainants amended notice of motion filed on 17 March 2020. It was evident from the Complainants notice of motion filed earlier on 19 February 2019 and received by the Office of the Public Protector in April 2019, and the amended notice of motion filed on 17 March 2020 that there

was a legal process before court, which started before the Complainant approached the Public Protector for assistance.

Application of the relevant law

- 6.1.10 Following from The Constitution of the Republic of South Africa, 1996: Section 182 (3) which deals with the functions of Public Protector, the Public Protector may not investigate court decisions. This provides a caution to the Public Protector to be wary not to overstep the powers as provided for in national legislation.
- 6.1.11 Section 6(3) of the Public Protector Act 23 of 1994 states that “ *The Public Protector may refuse to investigate a matter reported to him or her if the person ostensibly prejudiced in the matter is:- (b) ... has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.*” It is clear that in this case Complainant lodged a review application in the High Court of South Africa, Gauteng Division, Pretoria, under case number 11666/19, which following from the evidence received, the notice of motion was filed on 19 February 2019 and received by the Office of the Public Protector in April 2019, which is an indication that there was a legal process pending before court, and such legal process had started before the Complainant approached the Public Protector for assistance.
- 6.1.12 In the case of *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) [2019] ZAGPPHC 132, the court commented that “*The Public Protector may refuse to investigate a matter reported to him or her,....has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.*” This further entrenches the importance of ensuring that all legal remedies are exhausted before the matter can be investigated by the Public Protector.

6.1.13 Following from section 6(6) of the Public Protector Act, the Public Protector is not empowered to investigate the performance of judicial functions by any court of law, so in this instance the Complainants matter still falls within the ambit of the court, as the judicial process has not yet been concluded.

Conclusion

6.1.14 Following from the evidence received namely the founding affidavit, the issues raised by the Complainant in the High Court application, are the same issues that were submitted to the Public Protector's office to adjudicate on, namely the High Court application was for *“reviewing and setting aside the decision taken by the third respondent... to not transact and / or engage with the applicant in respect of financial or any other matters, either presently or in future, and in finding him to be a high risk potential client.”*

6.1.15 It is also clear from the evidence that the Complainant has not abandoned the court process as this matter is still proceeding before the High Court of South Africa, Gauteng Provincial Division, Pretoria, Under case number 11666/19.

6.1.16 The investigation team is therefore of the opinion that the issues that form the basis of the Complainant's complaint are in essence the same issues that are being adjudicated upon in the High Court under case number 11666/19.

7. REASONS FOR CLOSURE

7.1 Consequently, the pursuance of the matter and remedial action that may be imposed should adverse findings be made from a further investigation will serve no judicious purpose, on the basis that the matter is still pending before the High Court.

- 7.2 In terms of Sec 6(3) of the Public Protector Act ,1994, and due to the fact that the matter is still pending before the High Court of South Africa, Gauteng Provincial Division, Pretoria, under case number 11666/19, the Public Protector will not conduct any further investigation into this matter.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 9/9/2021

*Assisted by Ms Veronika Pillay, Senior Investigator: Investigations
Branch*