REPORT 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

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CLOSING REPORT OF THE PUBLIC PROTECTOR ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER USE OF THE PORTIONS OF THE LAND BELONGING TO HALKIRK FARM (PTY) LTD AND THE IMPROPER SECURING OF AN EXPROPRIATION ORDER BY THE ETHEKWINI MUNICIPALITY

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LIST OF ACRONYMS

PPSA	Public Protector South Africa
The Constitution	Constitution of the Republic of South Africa Act 108 of 1996
The Public Protector Act	Public Protector Act 23 of 1994
The Public Protector Rules	The Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 as amended

1. INTRODUCTION

1.1 This is a closing report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) , section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act) and Rule 41(2) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 as amended* (the Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act.

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act, 1994 to the following:

1.2.1 The Municipal Manager of eThekwini Municipality; and

1.2.2 Mr Evan Mowat on behalf of Halkirk farm (Complainant).

1.3 The report relates to an investigation into allegations of improper use of the portions of the land belonging to Halkirk Farm (Pty) Ltd and the improper securing of an expropriation order by the eThekwini Municipality.

2. THE COMPLAINT

2.1 On 28 July 2021, the KwaZulu-Natal (KZN) Provincial Office of the Public Protector South Africa (PPSA) was advised by the National Office that, following the decision made by the KZN office to close the file in this matter, the review application made by the Complainant, on behalf of Halkirk Farm, has been granted and the investigation must be conducted by a different Investigator at the KZN office.

2.2 In the main, the complaint originally lodged with Public Protector on 06 May 2016 was that:

2.2.1 The eThekwini Municipality has been and still is using specified land portions of the Halkirk Farm - Portions 485 and 486 of 337 - of the farm Albinia No 957

Hand Plan SJ 46 Halkirk Farm, a property that was not identified or mentioned in the Municipality's 1999 Expropriation Order to erect its overhead transmission line without any authorisation from the owners of Halkirk Farm and despite the objections from the farm owners; and

2.2.2 The eThekwini Municipality improperly obtained an Expropriation Order in 2017 for the expropriation of Portion 485 of 337 and Portion 486 of 337 of the Halkirk farm as mentioned above.

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 the 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. ISSUES IDENTIFIED FOR INVESTIGATION

4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.1.1 Whether the eThekwini Municipality has been and still is using the specified land Portions 485 and 486 of 337 of the farm Albinia No 957 Hand Plan SJ 46, Halkirk Farm, property that was not identified or mentioned in the Municipality's 1999 Expropriation Order to erect its overhead transmission line without any authorisation from the owners of Halkirk farm, and if so, whether such conduct was improper conduct as envisaged in section 182(1) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

4.1.2 Whether eThekwini Municipality improperly obtained an Expropriation Order in 2017 for the expropriation of Portions 485 and 486 of 337 of the Halkirk farm; and if so, whether the conduct constituted improper conduct as envisaged in section 182(1) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

5. THE INVESTIGATION

5.1 The Investigation Process

5.1.1 The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996, and sections 6 and 7 of the Public Protector Act, 1994. The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation.

5.1.2 The investigation process included correspondence with the Complainant and the eThekwini Municipality; and consideration and application of the relevant laws and prescripts.

5.2 The approach to the investigation

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

5.2.1.1 What happened?

5.2.1.2 What should have happened?

5.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to a breach of the applicable legal prescripts.

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 principally focused on whether the eThekwini Municipality has been and still is, using the above-mentioned specified land portions without authorisation from the landowner and further, whether the Expropriation Order obtained by the eThekwini Municipality was properly obtained.

5.2.3 On 04 August 2021, a letter containing the allegations by the Complainant was sent to the eThekwini Municipality. Having determined that the issues forming the subject of the complaint were almost similar to those raised by the Complainant with the eThekwini Municipality in a letter dated 19 March 2013, the same letter was used as the main reference to canvassing the issues relating to the use of the specified land portions by the eThekwini Municipality without authorization from the Halkirk farm owners.

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 eThekwini Municipality has been and still is, using the specified land Portions 485 an 486 of 337 of the farm Albinia No 957 Hand Plan SJ 46, Halkirk Farm, property that was not identified or mentioned in the Municipality's 1999 Expropriation Order to erect its overhead transmission line without any authorisation from the owners of Halkirk farm, and if so, whether such conduct was improper conduct as envisaged in section 182(1) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Common cause issues

6.1.1 The eThekwini Municipality has been using Portions 485 and 486 of 337 of the Halkirk farm, a private property registered as such under Deed of Transfer Number T 5222/1975, to access its overhead transmission line for maintenance purposes since 2001, as this is the only available supply to the Waterfall and parts of Hillcrest areas.

6.1.2 The use of the above-mentioned specified portions of the Halkirk farm occurs twice a year or when there is an emergency**.**

6.1.3 Accordingly, in relation to the use of the specified land portions as mentioned above up to the last day of September 2017, the specified land portions of the Halkirk farm were used by the eThekwini Municipality, without authorisation prior to securing a servitude on the property situated from 01 October 2017.

6.1.4 The available Deed of Cession of Servitude indicates that the servitude relating to the land portions as mentioned above was registered in favour of the Municipality on 09 September 2021 under Deed Number K 1650/20S.

Issues in dispute

6.1.5 The issue for the Public Protector's determination is whether the eThekwini Municipality still uses the specified portions of the Halkirk farm without the

necessary authorisation from Halkirk farm and whether this is improper and unlawful.

6.1.6 Whether the Municipality as of 01 October 2017 is lawfully using the specified portions of the Halkirk farm as it secured the servitude rights over the specified portions through the application and use of the Expropriation Act 63 of 1975.

Assessment of the issues and evidence

6.1.7 There is available evidence, in the form of letters exchanged between the Complainant and the eThekwini Municipality; letters exchanged between the Complainant and the KZN Department of Co-operative Governance & Traditional Affairs; letters exchanged between the eThekwini Municipality and the legal representatives of the Complainant; letters received by Public Protector Investigation Team and various annexures demonstrating beyond doubt that the eThekwini Municipality did use the specified land portions of the Halkirk farm without the necessary authorisation and further, that the Halkirk farm owners objected to the use of the said land portions of the farm.

6.1.8 In response to the allegations of the unauthorised use of Portions 485 and 486 of 337 of the Halkirk farm and improper securing of the 2017 Expropriation Order respectively, the eThekwini Municipality provided a response on 14 September 2021, which could essentially be summarised as follows:

6.1.8.1 The eThekwini Municipality has been using Portions 485 and 486 of 337 of the Halkirk farm as alleged to access an overhead transmission line supplying Waterfall and parts of the Hillcrest areas, and also for the maintenance service to towers;

6.1.8.2 Following the required and necessary Council approval dated 24 June 2015, the eThekwini Municipality proceeded with the expropriation of the temporary right of way servitude on 14 August 2015. There was an objection lodged by the Complainant on behalf of Hallkirk farm owners dated 23 August 2015 and a response thereto was provided dated 25 November 2015;

6.1.8.3 The eThekwini Municipality Council re-affirmed its earlier decision to proceed with the expropriation of the temporary right of way servitude on 8 December 2016 and the expropriation process was approved by the Department of Co-operative Governance and Traditional Affairs on 11 July 2017;

6.1.8.4 The matter was noted in the Deeds Registry entry ref EX 19/2018 and the servitude was registered in favour of the eThekwini Municipality on 09 September 2020 (Deed No K1650/20S);

6.1.8.5 On 28 September 2020, a registered letter was sent to the Complainant on behalf of the Halkirk farm owners inviting them to initiate any legal action within the period of eight months, if they have any reason to do so regarding this matter. The said period expired on 31 May 2021 and the Complainant, on behalf of the Halkirk farm owners, did not initiate any legal action regarding this matter;

6.1.8.6 Therefore, as of 10 October 2017, the eThekwini Municipality has been legally using the right of way servitude as it had been properly acquired and registered over the said properties in favour of the eThekwini Municipality.

6.1.9 In the bundle of documents submitted by the Complainant to the PPSA, there is a document signed by the Complainant, dated 14 August 2015 titled *RE: Proposed Temporary Right of Way Servitudes 3 Metre Wide Over Properties Described As Portions 485 (of 337) And 486 (of 337) Both of The Farm Albinia No 957: Hand Plan No SJ4628/1"* consisting of 14 pages.

6.1.10 According to the contents of the said document, it is demonstrated that as a result of the unauthorised use of Portions 486 and Portion 486 of the land of the Halkirk farm, the Complainant, through his attorneys of record, JH Nicolson Stiller and Geshen Attorneys commenced litigation under the Durban High Court Case No 647/2001 and the eThekwini Municipality defended the matter through its attorneys, Shepstone and Wylie. However, the matter was settled and a written settlement agreement, dated 11

February 2004, was concluded by the parties. At this point, a contractually binding agreement exists between the parties.

6.1.11 It was established that, with regard to the settlement agreement signed on 11 February 2004 after the Complainant's legal representatives, JH Nicolson Stiller & Geshen Attorneys had signed the Notice of Acceptance on the same date, the parties agreed on numerous issues, including the payment of the amount of R436 000,00 plus interest as well as the payment of the Complainant's taxed or agreed party and party costs.

6.1.12 Throughout the interaction with the Complainant, including the period when he was offered an extension period to provide his response, he did not proffer an explanation regarding any steps taken from 11 February 2004 to the later years, but based on the documents received from the Complainant, it is clear that on 28 October 2010, the Complainant's attorney of record wrote a letter to the eThekwini Municipality stating amongst other things that:

"11…Accordingly we are instructed to afford the Municipality a final period of 30 days from date hereof in which to commence formal negotiations with our client for the expropriation or purchase of the necessary roadways over our client's properties (which will have to be agreed) so as to enable the Municipality to access its 22m Power Line servitude, without having to drive its vehicle over our client's private property and without our client's consent"

6.1.13 On 08 November 2013, the Complainant received an email from the eThekwini Municipality through Adv Amy Padayachee, clearly indicating the intention of the eThekwini Municipality to expropriate the specified land portions, stating that:

"*It must be further noted that the expropriation of the right of way access will bring finality to the objections raised notwithstanding statutory rights conferred by the Local Authorities Ordinance of 1974 and the Municipal Systems Act 2000, to access the overhead transmission line."*

6.1.14 There is also evidence demonstrating that during the course of 2014, the Complainant was actively engaging with the KZN Department of Co-operative Governance and Traditional Affairs, as evidenced by his letter requesting a meeting with the MEC, KZN Co-operative Governance and Traditional Affairs, dated 20 August 2014. In the letter to Mr Kuhn, the Complainant stated amongst other things that:

"Dear Mr Kuhn

When I could not get hold of you over the three week period that I tried contacting you; and then receiving an email from Nomathemba Mazibuko of the Land Use Management Department on the 8/7/2014, requesting a meeting, which was followed by another e-mail from Mr Roos (of the same date) in reply to Nomathemba Mazibuko e-mail, I telephoned Mr Roos on Friday the 08 August 2014 and explained to him my reasons for persisting with the request for a meeting to see the MEC. As I explained to Mr Roos:

1)…;

2) My request to meet with the MEC is not to try and get the MEC to alter her decision regarding the EXPROPRIATION OF A 3 METRE RIGHT OF WAY SERVITUDE TO SERVICE AN OVERHEAD ELECTRICITY TRAMSMISSION LINE: PORTION 485(OF 337) AND 486 (OF 337) OF THE FARM ALBINIA NO.957. I quite understand that the MEC has made a decision regarding the above expropriation and is functus officio on that subject;

3) My request for a meeting with the MEC is to discuss the prejudice suffered by the Halkirk Farm since 1991 to date…"

6.1.15 The available evidence demonstrates that the letter of Notice of Intention to Expropriate signed by the Acting Head: Real Estate, dated 14 August 2015 was sent through registered post to the Complainant's address. In essence, the letter was informing and giving Notice to the Complainant about the reason for intending to expropriate the two land portions as identified above; inviting submissions within 30 days in case of an objection and further

advising that after service of the Notice no improvements, demolishing or alterations should be effected on the property.

6.1.16 Pursuant to this Notice, the Complainant responded by submitting a letter of Objection dated 23 September 2015 wherein he restated the history and the chronological sequence of events regarding this matter, pointing out what he believes should have been the correct manner of handling this matter relating to the two land portions dating back to 2001.

6.1.17 On 25 November 2015, the eThekwini Municipality through Mr Kenneth Reddy responded to the Complainant's objection and informed him of the Municipality's decision to continue with the expropriation process and also to include the Complainant's objections as the matter is being processed.

6.1.18 It is also not in dispute that the KZN Department of Co-operative Governance and Traditional Affairs sent a letter dated 11/7/17 to the eThekwini Municipality advising that the MEC responsible for the Department had granted approval for the expropriation of the specified land portions as the Complainant also confirms this in his request for the meeting with the KZN MEC for Co-operative Governance and Traditional Affairs as mentioned above.

6.1.19 In essence, the letter from the KZN Department of Co-operative Governance and Traditional Affairs informed the Complainant, amongst other things, that:

6.1.19.1 In terms of Section 190 (4) of the Local Authorities Ordinance No: 25 of 1974 the MEC of the KZN Department of Co-operative Governance and Traditional Affairs has approved the eThekwini Municipal Council's application for the proposed expropriation of Portions 485 and 486 respectively;

6.1.19.2 The eThekwini Municipal Council may therefore proceed with the procedures relating to the proposed expropriation;

6.1.19.3 The above-mentioned MEC's approval is subject to compliance with the provisions of the Expropriation Act; 1975; and

6.1.19.4 The expropriation process was concluded and the eThekwini Municipality appointed an independent valuer who assessed the compensation to the Complainant to be at R684 800,00.

6.1.20 A registered letter dated 17 June 2020 from K. Reddy, Head: Real Estate, was sent to the Complainant advising amongst other things that:

6.1.20.1 The compensation amount has been assessed at R648 800,00;

6.1.20.2 A copy of the compensation agreement and the required documents to be signed and submitted;

6.1.20.3 The total compensation amount will be credited to the Halkirk farm municipality rates account due to arrear rates on both properties as provided for by section 96 of the Municipal Systems Act 2000;

6.1.20.4 Further, inviting the Complainant to contact the Head: Real Estates for any inquiry regarding this letter.

6.1.21 Therefore, the evidence obtained during the course of the investigation demonstrates that:

6.1.21.1 The eThekwini Municipality used the specified land portions of the Halkirk farm without authorisation from the owners of the Halkirk farm since 2001;

6.1.21.2 As a result of the use of the specified land portions of the Halkirk farm, the owners of the Halkirk farm initiated a legal process through the Durban High Court Case No: 647/2001 that culminated in a binding contractual settlement agreement with the eThekwini Municipality dated 11 February 2004;

6.1.21.3 Whilst it is unclear whether any further action was taken by the parties since the conclusion of the binding contractual settlement agreement in 2004 as referred to above, the Complainant did not provide the required information and around the year 2010, the Complainant's attorneys invited the eThekwini Municipality to either expropriate or make a purchase offer regarding the specified land portions;

6.1.21.4 Around the year 2013, the Complainant was informed about the intention to institute a land expropriation process relating to the specified land portions;

6.1.21.5 Around the year 2014, the Complainant was actively involved with the KZN Department of Co-operative Governance & Traditional Affairs officials even to the extent of seeking a meeting with the responsible MEC to discuss the same matter. However, the request for the meeting was not granted as the MEC stated that she had already taken the decision on the matter as required by the Local Authorities Ordinance No 25 of 1974;

6.1.21.6 The Complainant was served, through registered post, with the Notice of Intention to expropriate the specified land portions on 14 August 2015, which signified the commencement of the expropriation process through the applicable Expropriation Act;

6.1.21.7 In terms of this process, the Expropriation Act 63 of 1975 essentially requires that once the local authority has exercised its power as required by the Act in terms of the applicable local authority ordinance (in this case giving notice in terms of section 190 of Ordinance 25 of 1974 of the eThekwini Municipality), it should:

"(a) Give notice that the Municipality is expropriating in terms of the applicable Ordinance of the local authority in terms of section 7 and a provide clear and full description;

(b) State the date of expropriation;

(c) Draw the attention of the owner of the expropriated property to sections 9(1) and 12(3) of the Expropriation Act."

6.1.21.8 Documentary evidence obtained demonstrates that the Municipality complied with this requirement, in that, the Complainant was sent a registered letter dated 27 July 2017, which constituted a Notice of Expropriation. Further to this, a registered letter dated 17 June 2020, was sent to the Complainant together with the Compensation Agreement;

6.1.21.9 The eThekwini Municipality further sent a registered letter dated 28 September 2020, to the Complainant informing him of the provisions of section 10(5) of the Expropriation Act, and particularly, the need to make an application to the court in terms of section 14(1) of the Expropriation Act and giving him the deadline by which a presumption of acceptance of the offer of compensation would be made. The available documents demonstrate that the eThekwini Municipality acted in full compliance with the requirements of the Expropriation Act, 1975.

6.1.21.10 The expropriation process was finalised by the eThekwini Municipality and resulted in the finalisation of the Expropriation Order which came into effect on October 2017. Subsequently, a letter dated 17 June 2020 was sent to the Complainant informing him about the compensation amount payable, an agreement to be signed, the documents to be submitted as well as the decision to pay the total compensation amount to the Halkirk farm Municipal rates account in compliance with the Municipal Systems Act 2000, due to outstanding rates payments;

6.1.21.11 The letter further invited the Complainant to contact the Head: Real Estates, if he wishes to make any inquiry about the contents of the letter.

6.1.21.12 According to the Municipality, the Complainant did not dispute the payment of compensation since 2020 but only raised an issue regarding the processes undertaken when the eThekwini Municipality was interacting with the KZN Department of Co-operative Governance and Traditional Affairs.

6.1.22 On numerous occasions, the Complainant, on behalf of Halkirk farm owners was afforded a reasonable period of time to provide information relating to the response received from the eThekwini Municipality and also to provide information in support of his allegations. Following the receipt of the response from the Municipality, the following correspondence was sent to the Complainant:

6.1.22.1 An email dated 15 September 2021, containing the complete set of responses and attachments received from the eThekwini Municipality as mentioned above requesting him to comment on the response received and make available basic and sufficient information and evidence to support the allegations made in his complaint;

6.1.22.2 A letter dated 12 October 2021, requesting the Complainant to provide sufficient information to contradict the information and evidence already provided by the eThekwini Municipality;

6.1.22.3 A letter dated 25 October 2021, requesting the Complainant to assist the investigation process by responding directly to the issues raised;

6.1.22.4 A letter dated 02 November 2021 was sent to the Complainant again requesting the Complainant to respond directly to the issues raised relating to the response received from the eThekwini Municipality as well as the allegations he has made regarding this matter;

6.1.22.5 An email dated 1 December 2021, sent by the Public Protector Investigation Team to the Complainant informing him that in view of all the correspondence already sent, he will be advised in due course of the decision taken as a way forward in this matter.

6.1.23 Subsequently, a Notice was issued to the Complainant on 03 December 2021 by the Public Protector, informing him of the intention to finalise the matter through a closing report and inviting him to make representations regarding the intention to close the file in terms of Rule 41(1) of the Public

Protector Rules. On each occasion that the correspondence was sent to the Complainant, he would acknowledge and respond to the correspondence by repeating the history of the matter since 2001 and 2016 respectively; but did not provide any further information.

6.1.24 A further letter dated 04 January 2022 was sent to the Complainant requesting him to respond directly to the issues raised in the Notice and to provide the necessary information to enable the Public Protector to finalise the investigation. This was followed by another reminder dated 19 January 2022.

6.1.25 In accordance with the provisions of Rule 41(2) of the Public Protector Rules, which provides that the Public Protector may, if the complainant has not responded within the prescribed timeframe of 14 days, proceed with the closing of the file. The Complainant did not respond to the issues raised by the Public Protector's Investigation Team based in KwaZulu-Natal regarding the correspondence above but rather opted to approach the then acting Chief Executive Officer of the Public Protector to raise his concern about this correspondence.

Conclusion

6.1.26 The available evidence in the form of documents received from both the eThekwini Municipality and the Complainant respectively, demonstrate that the eThekwini Municipality is not disputing that from 2001, the Municipality used the land portions of the Halkirk farm as specified above without authorisation. It is further evident from the various documents obtained that there were numerous engagements between the Complainant, the eThekwini Municipality and the KZN Department of Co-operative Governance and Traditional Affairs in an attempt to resolve the impasse between the parties.

6.1.27 It is also clear from the documents submitted by the Complainant dated 23 September 2015, that the owners of the Halkirk farm resorted to instituting

legal action against the eThekwini Municipality regarding the unauthorised use of the portions of the Halkirk farm as described in this matter, which culminated in the signing of the settlement agreement in 2004 by both the eThekwini Municipality and the Halkirk farm owners.

6.1.28 It was established from the documentary evidence obtained from the Complainant that on 28 October 2010, the Complainant's legal representatives presented the eThekwini Municipality with a written invitation to either expropriate or purchase the specified land portions. It also appears from the documents that the Municipality was not agreeable to this invitation as on 08 November 2013 it signalled its intention to initiate the expropriation process regarding the specified portions of the Halkirk farm.

6.1.29 In 2015, after the Complainant was served with the Notice to Expropriate, he opted to deal directly with the eThekwini Municipality and the KZN Department of Co-operative Governance and Traditional Affairs respectively regarding the received expropriation notice. The available exchanged emails amongst the parties clearly demonstrate that the KZN Department of Co-operative Governance and Traditional Affairs and the eThekwini Municipality did not agree to the approach presented by the Complainant as the expropriation process was already underway in this matter.

6.1.30 The sequence of events in this matter as outlined above and the ultimate lodging of the complaint with the Public Protector on 06 May 2016, clearly demonstrate that upon realising that the interactions he had initiated after the receipt of the Notice of the Intention to Expropriate in 2015 with both the eThekwini Municipality and the KZN Department of Co-operative Governance and Traditional Affairs respectively were not succeeding to provide the desired results, the Complainant opted to approach the Public Protector by submitting a complaint regarding this matter.

6.1.31 In due regard to the litigation process that was undertaken by the Complainant under the Durban High Court Case Number 647/2001, which resulted in the conclusion of a legally binding settlement agreement between

the parties in February 2004; and the resultant official notice of commencement of the expropriation process dated 14 August 2015, the Public Protector is barred from interfering with these legal processes as the institution is required by section 181(2) of the Constitution to operate subject only to the Constitution and the law. The requirement to operate subject only to the Constitution and the law entails that the Public Protector has to observe, apply and uphold the statutory and common law of the Republic of South Africa and this requires amongst other things that binding contractual agreements between parties and notices served to any party in fulfilment of statutory obligations should be respected and upheld.

6.2 Regarding whether the eThekwini Municipality improperly obtained an Expropriation Order in 2017 for the expropriation of certain portions of Halkirk farm and if so, whether the conduct constitutes improper conduct in terms of section 182(1) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Common cause

6.2.1 Following the necessary approval of the expropriation process granted by the KZN Department of Co-operative Governance and Traditional Affairs on 11 July 2017 to the eThekwini Municipality, the Municipality began lawfully accessing the servitude on 1 October 2017, whilst the expropriation process continued and culminated in the servitude being registered in favour of the eThekwini Municipality on 09 September 2020 under Deed No K 1650/20S.

Issue in dispute

6.2.2 The issue for the Public Protector's determination is whether the eThekwini Municipality improperly obtained an expropriation order in 2017 for the expropriation of certain portions of the Halkirk farm.

Assessment of the issues and evidence

6.2.3 The available evidence received in the form of emails and documents demonstrates that the process for the expropriation of the two portions of land belonging to the Halkirk farm was undertaken as follows:

6.2.3.1 The eThekwini Municipal Council provided its approval for the expropriation of the temporary right of way servitude on 24 June 2015;

6.2.3.2 The eThekwini Municipality proceeded with the appropriation process on 14 August 2015;

6.2.3.3 The Complainant, on behalf of the Halkirk farm, lodged an objection on 23 August 2015 and a response to his objection was provided to him on 25 November 2015;

6.2.3.4 The eThekwini Municipal Council re-affirmed the decision to proceed with the expropriation process on 8 December 2016 and the process was lodged with the KZN Department of Co-operate Governance and Traditional Affairs;

6.2.3.5 The KZN Department of Co-operative Governance and Traditional Affairs approved the request for expropriation on 11 July 2017;

6.2.3.6 Following the noting of the matter in the Deeds Registry, the servitude was registered in favour of the Municipality on 09 September 2020, with reference number Deed Number K 1650/20S;

6.2.3.7 A letter was sent by the Municipality on 28 September 2020 to the Complainant as a representative of the Halkirk farm, informing the Halkirk farm to commence legal action if it so wishes, by no later than 31 May 2021.

6.2.3.8 No response was received from the Complainant and/or the owners of the Halkirk farm regarding this matter.

Application of the relevant law

Local Authorities Ordinance No. 25 of 1974

6.2.4 Section 190 of the Local Authorities Ordinance requires that notice must be given to the affected person regarding the Municipality's future intention (subject to the approval of the Premier of KwaZulu-Natal) to expropriate the property in question and inviting the affected person to submit, within 30 days From the date of receipt of the Notice, a written statement detailing any objections to the proposed expropriation. The section further requires attention to be drawn that after the service of the Notice, it is an offence to effect improvements on the property, demolish, damage or alter anything on the property.

Expropriation Act 63 of 1975

6.2.5 Section 7 of the Expropriation Act requires the Municipality to give Notice to the affected person of its expropriation for public purposes, of the property in terms of Section 190 of Ordinance 25 of 1974 and Section 5 of the Expropriation Act.

6.2.6 Section 9 read with section 12 of the Act, requires the Municipality to inform the owner of the expropriated property about the duties to be fulfilled by him/herself relating to the written statements indicating the amount he/she claims as compensation, particulars of improvements affecting the value of the land, the leases which may be existing on the said property; if the land had been sold prior to the serving of the expropriation notice, the details of the buyer and the contract between the parties; if any builder's lien exists on the property, the details thereof and the applicable timeframes.

6.2.7 Section 12 deals with the manner of determining the compensation required and to be paid for the expropriation, including the amount of compensation and interest, where applicable. This section provides, inter alia, that:

l2. (1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed-

(a) in the case of any property other than a right, the aggregate of-

(i) the amount ·which the property would have realized if sold on the date of notice in the open market' by a willing seller to a willing buyer; and

(ii) an amount to make good any actual financial loss caused by the expropriation; and (b) in the case of a right, an amount to make good any actual financial loss or inconvenience caused by the expropriation or the taking of the right.

(2) Notwithstanding anything to the contrary contained in this Act there shall be added to the amount payable in accordance with subsection (1) (a) (i), in the case of immovable property, an amount equal to ten per cent thereof, but not exceeding ten thousand rand.

....”

Deeds Registration Act 47 of 1937

6.2.8 Section 32 of the Deed Registration Act provides that:

“32. (1) Whenever any right of servitude over any land has under the authority of any law been expropriated by, or has by statute been vested in the State, any public or local authority or any corporate body or any association of persons, the owner of the land shall on demand of the holder of such right sign or authorize the signature of a notarial deed evidencing such servitude and hand over to such holder the title deeds of the land.

(2) If the owner of the land fails to comply with the provisions of sub-section (1), the holder of the right of servitude may apply to the court for an order directing the owner to sign or authorize the signature of the

notarial deed and to hand over the title deeds, and authorizing some person on failure of the owner to comply with such order, to appear before a notary public and execute the said deed in the place of the owner, and authorizing the registrar to register the said deed without the production of the title deeds.

(3) On production of the prescribed number of copies of the said deed duly executed and of the title deeds or of the order of court authorizing registration of such deed without production of the title deeds, the registrar shall register the deed, and if the land is hypothecated, shall note the fact of such registration against the entry of the bond in the register in which such entry has been made: Provided that no such registration shall prejudice any claim to compensation which any owner or other person may have in respect of the expropriation or vesting of such servitude.

(4) The registrar shall not register the said deed unless he is satisfied that any notice prescribed by or under any law in connection with the expropriation of such servitude, has been duly served upon the person entitled to such notice, and may call for such diagrams as he may think necessary."

6.2.9 As indicated above, the eThekwini Municipality conceded to the irregular expropriation of the Complainant's two portions of the Halkirk farm in 2001, resulting in a settlement agreement between the parties on 11 February 2011.

6.2.10 Evidence further shows that in 2015, the eThekwini Municipality embarked on a process to lawfully expropriate the Complainant's land. The then Acting Head: Real Estate issued a Notice of Intention to Expropriate as per a letter dated 14 August 2015, further inviting submissions within 30 days in case of an objection.

6.2.11 According to the evidence obtained, in response to the Intention to Expropriate, the Complainant submitted a letter of Objection dated 23 September 2015 wherein he restated the history and the chronological

sequence of events regarding this matter, pointing out what he believes should have been the correct manner of handling this matter relating to the two land portions dating back to 2001.

6.2.12 It is evident from the letter dated 25 November 2015 from Mr Kenneth Reddy that the eThekwini Municipality, while noting the Complainant's objection to the impending expropriation, however, informed him of the Municipality's decision to continue with the expropriation process.

6.2.13 Subsequently, the KZN Department of Co-operative Governance and Traditional Affairs sent a letter dated 11 July 2017 to the eThekwini Municipality advising that the MEC responsible for the Department had granted approval for the expropriation of the specified portions of land in accordance with the provisions of section 190(4) of the Local Authorities Ordinance for the proposed expropriation of Portions 485 and 486, respectively.

6.2.14 Accordingly, the expropriation process was concluded and the eThekwini Municipality appointed an independent valuer who assessed the compensation to the Complainant to be R684 800,00. The eThekwini Municipality resolved that the total compensation amount will be credited to the Halkirk farm municipality rates account due to arrear rates on both properties as provided for by section 96 of the Municipal Systems Act 2000;

6.2.15 Therefore, the evidence obtained during the course of the investigation demonstrates that:

6.2.15.1 The necessary communication required in terms of the applicable statutory regulations was posted by registered mail to the Complainant as a representative of the Halkirk farm (Pty) Ltd and as the liaison person between the eThekwini Municipality and Halkirk farm.

6.2.15.2 Although the Complainant had lodged an objection against the expropriation of the two portions of land, such an objection was not

successful as the MEC for the KZN Department of Co-operative Governance and Traditional Affairs approved the expropriation and compensation was duly paid into the relevant account in line with the outcome of the valuation.

Conclusion

6.2.16 Based on the documents obtained and analysed during the investigation, it is clear that the eThekwini Municipality complied with all the relevant and applicable statutory regulations.

6.2.17 In addition, appropriate legal processes regulating the expropriation exercise at the local government level were complied with by both the KZN Department of Co-operative Governance and Traditional Affairs and eThekwini Municipality, respectively.

6.2.18 Consequently, the Public Protector, as an institution that is subject to the law, would not be competent to intervene in this matter since a court review process, as was decided by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)* is the only option available to the Complainant for appropriate legal recourse. In this case, the court held that, "*the person /institution affected by the decision made by the decision maker is not entitled to disregard the decision made and its consequences merely because of a belief that it is its invalid. Until the decision made is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked".*

7. FINDINGS

7.1 Having regard to the information and evidence obtained and analysed during the investigation, in relation to the complaint and the applicable legal and regulatory framework, the Public Protector is closing the investigation into this

matter in the form of a closing report as contemplated in Rule 41(2) of the Public Protector Rules, based on the following findings:

7.1.1 In respect of the allegation that the eThekwini Municipality used the land portions of the Halkirk farm from 2001 without authorisation, is partly substantiated, in that, the eThekwini Municipality conceded to the use of the portions of land of Halkirk farm without authorisation as alleged by the Complainant in 2001. However, the Complainant and the owners of the Halkirk farm instituted legal action against the eThekwini Municipality regarding the unauthorised use of the portions of the Halkirk farm under the Durban High Court Case Number 647/2001. The parties subsequently concluded a settlement agreement in 2004.

7.1.2 The eThekwini Municipality subsequently followed the prescribed legal process to lawfully expropriate the two portions of the Halkirk farm which was approved by the MEC responsible for the Department of Co-operative Governance and Traditional Affairs. Therefore, the pursuance of this matter and remedial action that may be imposed should adverse findings be made from a further investigation will serve no judicious purpose and the owners of the Halkirk farm were duly compensated for such expropriation.

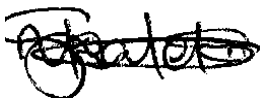
7.1.3 As indicated above, the Public Protector is prohibited from conducting any further investigation emanating from this matter as the settlement agreement is binding between the parties. The Complainant may approach a court of law for any further recourse.

8. CONCLUSION

8.1 It is important to note that the complainant can ask for a review to a court of law if there is a belief that the decision by PPSA to close the file was wrong because it was based on irrelevant evidence or information, inaccurate facts, errors of the law and if there is new evidence which has the potential to yield a different result.

8.2 A Notice in terms of Rule 41(1) of the Public Protector Investigation Rules published in Government Gazette No. 41903 dated 14 September 2018, was issued to the Complainant on 3 December 2021, affording him an opportunity to submit further representations on why the Public Protector should not proceed to close this matter. Despite being requested on numerous occasions to respond to the Notice of intention to close, the Complainant was unable to provide the required information which would contradict the evidence obtained during the course of the investigation.

8.3 This matter is thus deemed closed and at this stage the decision of the Public Protector can only be reviewed by a court of law.



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ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 30 SEPTEMBER 2022

Assisted by: Adv Mlandeli Nkosi
Provincial Representative: Kwazulu-Natal