

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NUMBER: 63 of 2022/2023

ISBN NUMBER: 978-1-991244-16-1

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE
MPUMALANGA DEPARTMENT OF HUMAN SETTLEMENTS TO COMPLETE THE
CONSTRUCTION AND HANDING OVER OF A RECONSTRUCTION AND
DEVELOPMENT PROGRAMME (RDP) HOUSE TO MS NP MASEKO**

TABLE OF CONTENTS		
	LIST OF ACRONYMS	3
1.	INTRODUCTION	4
2.	THE COMPLAINT	5
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	5
4.	ISSUE IDENTIFIED FOR INVESTIGATION	8
5.	THE INVESTIGATION	8
6.	MEDIATION AND CONCILIATION	10
7.	SETTLEMENT AGREEMENT	11
8.	THE APPLICABLE LEGAL PRESCRIPTS	11
9.	CONCLUSION	13
10.	REMEDIAL ACTION	14
11.	MONITORING	15

LIST OF ACRONYMS

ACRONYMS	DESCRIPTIONS
Adv	Advocate
AHoD	The Acting Head of the Department of Human Settlements
The Constitution	The Constitution of the Republic of South Africa, 1996
HSS	Housing Subsidy System
PA	Personal Assistant
Public Prtoector	Public Protector South Africa
Public Protector Act	Public Protector Act 23 of 1994
RDP	Reconstruction and Development Programme
IHP	Incomplete Housing Programme
Public Protector	Public Protector of South Africa

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 section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings and remedial action, to affected parties (including the Complainant) for such persons to note the outcome of the investigation and to implement the remedial action, where applicable.
- 1.3 The complaint was resolved through mediation and conciliation, in terms of section 6(4)(b)(i) of the Public Protector Act.
- 1.4 The findings and remedial action of the Public Protector are as a result of the outcome of the mediation and conciliation process.
- 1.5 A copy of the report is provided to the following persons:
- 1.5.1 Mr SK Mashilo, MEC for Human Settlements;
- 1.5.2 Ms HN Zitha, Acting Head of the Mpumalanga Department of Human Settlements; and
- 1.5.3 Ms NP Maseko, the Complainant.
- 1.6 The report relates to an investigation into the alleged failure by the Mpumalanga Department of Human Settlements to complete the construction and the handing over of a Reconstruction and Development Programme (RDP) House to Ms NP Maseko, that was supposed to be built on Stand Number 427 in Emngwenya, Waterval Boven in Mpumalanga.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector by Ms Nondumiso Pretty Maseko (the Complainant) on 03 June 2021. The Complainant in essence alleged that:

2.1.1 In or around the year 2000, she applied for an RDP house with the Mpumalanga Provincial Department of Housing and Land Administration, which is now called the Department of Human Settlements, and her application was approved for Stand No: 427 in Emgwenya, Waterval Boven, Mpumalanga.

2.1.2 As time went by, she saw houses being built for other people, but hers was not. When she enquired from the Department, she was told that the house was completed and the contractor had long been paid. She then informed the Department that the stand is still vacant, only a slab was constructed and nothing further was done.

2.1.3 The Department allegedly sent people to verify whether the house was built and they all confirmed that the house was not built, but could not say what steps would be taken to resolve the matter.

2.1.4 The matter has been going on for more than twenty (20) years and each year the Department would conduct inspections, but she received no feedback as to whether the house was going to be built or not.

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 of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through amongst others, 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) take appropriate remedial action”.*

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

3.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.5 Section 6(4)(b)(i) of the Public Protector Act provides that *“the Public Protector shall, be competent to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation”.*

3.6 In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹

3.7 The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial*

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

action taken against those under investigation cannot be ignored without any legal consequences.”²

3.8 Section 6(9) of the Public Protector Act, 1994 provides that, *“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned”*.

3.9 Since the incident or matter concerned occurred more than two years prior to the reporting of the matter to the Public Protector, the Public Protector has exercised her discretion in terms of section 6(9) of the Public Protector Act to entertain the complaint based on the following special circumstances as envisaged in Rule 10(1) of the Public Protector Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended (the Rules):

- a) The Complainant provided sufficient and compelling information of alleged or suspected improper or prejudicial conduct;
- b) The Complainant provided a reasonable explanation for the delay in reporting the matter to the Public Protector in that she has been engaged in continuous efforts to resolve the matter since the date of occurrence;
- c) The alleged failure to complete and hand over the house by the Department in this particular case is still continuous, so is the alleged prejudice and the RDP house has not yet been completed and handed over to the Complainant; and
- d) It was therefore in the interest of justice and good governance for the Public Protector to exercise her discretion by accepting this matter.

² *Supra* at para [73].

- 3.10 The Mpumalanga Department of Human Settlements is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls within her competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and sections 6(4) of the Public Protector Act.
- 3.11 The Public Protector's powers and jurisdiction to investigate this matter was not disputed by the Mpumalanga Department of Human Settlements.

4 ISSUE IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
- 4.4.1 Whether the Mpumalanga Department of Human Settlements failed to complete the construction and hand over the RDP house to the Complainant, and if so, whether such conduct constitutes improper conduct in terms of section 182 (1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.

5 THE INVESTIGATION

5.1 Methodology

- 5.1.1 The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.
- 5.1.2 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. Section 6 of the Public Protector Act authorises the Public Protector to resolve a matter or remedy an act or omission through Alternative

Dispute Resolution (ADR), measures such as conciliation, mediation and negotiation.

5.1.3 The complaint was classified as a Service Delivery and identified for resolution by way of a conciliation or mediation process in line with section 6(4)(b)(i) of the Public Protector Act in order to help the parties reach a settlement.

5.1.4 The outcome of the mediation was for the Complainant to consider the offer made by the Department to complete the construction and the handing over of the RDP house to her within the 2022/2023 financial year.

5.2 Approach to the investigation

5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 The investigation was approached using an enquiry process that seeks to determine:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, abuse of power or other improper conduct?
- (d) 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 they would have been, but for the maladministration or improper conduct?

- 5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Department failed to complete the construction and handing over of the RDP house to the Complainant, after her application was approved in 2002.
- 5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department of Human Settlements to prevent improper conduct and/or maladministration as well as prejudice.
- 5.2.5 The question regarding the remedy or remedial action seek to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where she would have been had the Department complied with the regulatory framework setting the applicable standards for good administration.

6. MEDIATION AND CONCILIATION

- 6.1 Having considered the evidence at hand against the above regulatory framework, the Public Protector decided to resolve the matter through a mediation and conciliation process in accordance with section 6(4)(b)(i) of the Public Protector Act.
- 6.2 The outcome of the above-mentioned mediation and conciliation is recorded in the attached Settlement Agreement dated 26 October 2022, facilitated by the Public Protector and concluded between the Complainant, Ms NP Maseko and the Department, duly represented by Ms N.H Zitha in her capacity as the Acting Head of the Department of Human Settlements.

7. SETTLEMENT AGREEMENT

7.1 It is common cause that the Complainant's subsidy application was approved in 2002 and that a slab was built and paid for in 2008, where-after no further construction took place.

7.2 The parties have agreed to rectify the omission as follows:

7.2.1 The Department shall appoint a service provider to complete the house for the Complainant in the 2022/23 financial year.

8. THE APPLICABLE LEGAL PRESCRIPTS

8.1 Key laws and policies taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant, were principally those imposing administrative standards that should have been complied with, by the Department or its officials when it failed to complete and hand over the RDP house to the Complainant. The following key legislation influenced the process followed in this report:

The Constitution of the Republic of South Africa, 1996

8.1.1 Section 195(1) of the Constitution makes provision for the principles of good administration in all spheres of government. The Department's conduct thus needs to be tested against these administrative principles. The following are, amongst others, provisions of section 195(1):

“

(1) *Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

- (a) *A high standard of professional ethics must be promoted and maintained,*
- (b) *...;*
- (c) *...;*
- (d) *...;*
- (e) *People's needs must be responded to...;*
- (f) *Public administration must be accountable;*
- (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information...*

8.1.2 The Department was expected to maintain a high standard of professional ethics when it dealt with the Complainant's matter. It was further expected of the Department to ensure that it responded to the Complainant's enquiries when she enquired about when her house would be completed. Transparency would be fostered if the Department responded promptly to the Complainant's enquiries. The Department was also expected to conduct itself in an accountable manner. However, this has not been the case considering the manner in which it dealt with the Complainant's matter.

8.1.3 Therefore, the Department's failure to complete the construction and handing over of the RDP house to the Complainant, is inconsistent with the principles espoused in section 195(1) of the Constitution.

8.1.4 Section 26(1) of the Constitution provides that *"everyone has the right to have access to adequate housing"*. Subsection (2) further provides that *"the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."*

8.1.5 In this particular matter, the Department failed to ensure that this right materialised, despite the approval of her application for a housing subsidy in 2002, which caused her prejudice.

The Housing Act, 107 of 1997

- 8.1.6 Section 7(1) of the Housing Act provides that every provincial government must do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of the National Housing Policy.
- 8.1.7 According to this section, the Department is required to provide the Complainant with adequate housing. The Department was therefore expected to take all reasonable steps to ensure that the Complainant's constitutional right to adequate housing was complied with by ensuring that the construction of her RDP house was completed and handed over to her.
- 8.1.8 This section also created a legal and moral obligation on the Department to do everything in its power to promote and facilitate the provision of adequate housing, especially to the approved beneficiaries such as the Complainant.
- 8.1.9 By allowing the service provider to abandon the Complainant's site without completing the house, the Department abdicated its responsibilities under section 26(1) of the Constitution and section 7(1) of the Housing Act.

9. CONCLUSION

- 9.1 The Mpumalanga Department of Human Settlements failed to complete the construction and hand over the RDP house to the Complainant
- 9.2 The Complainant's subsidy application was approved in 2002 and a slab was built and paid for in 2008, where-after no further construction took place. The investigation could not establish the exact amount paid by the Department for the slab, and the Department could not elaborate on what became of the allocated budget for this particular house.

- 9.3 The Department confirmed that the subsidy was approved and that it would ensure that the Complainant is given lawful occupation of her approved RDP house immediately upon completion.
- 9.4 The Settlement Agreement concluded between the Complainant and the Department, in accordance with section 6(4)(b)(i) of the Public Protector Act, constitutes findings of the Public Protector.

10. REMEDIAL ACTION

- 10.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report.
- 10.2 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* ([2016] ZACC 1 at para 76 and 105) the Constitutional Court held that the remedial action taken by the Public Protector has a binding effect.
- 10.3 Having regard to the evidence, the regulatory framework determining the standard that the Department should have complied with, and the Settlement Agreement concluded between the parties dated 26 October 2022, the Public Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution:

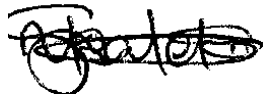
Acting Head of Department

- 10.3.1 Within ninety (90) calendar days of this report, ensure that the construction of the Complainant's RDP house is completed and handed over to the Complainant.

10.3.2 Within thirty (30) calendar days after the handover of the house, provide the Public Protector with proof of occupation of the house by the Complainant.

11. MONITORING

11.1 The Acting Head of Department must within thirty (30) calendar days of this report, submit to the Public Protector, an Implementation Plan of the remedial action contained in paragraph 10.3.1 above.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 31 MARCH 2023

Assisted by Adv De Waal
Executive Manager: PII Inland