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**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**



***Report No: 84 of 2021/22***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF  
MALADMINISTRATION AND THE ALLEGED UNDUE DELAY OR FAILURE BY  
THE CITY OF TSHWANE TO CONVENE A DISPUTE RESOLUTION COMMITTEE  
HEARING IN ORDER TO ADJUDICATE ON THE COMPLAINANT'S MATTER  
RELATING TO THE TRANSFER AND COMPENSATION FOR INCOMPLETE  
HOUSES AND SEMI DEVELOPED STANDS.**

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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 1996), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act 1994).
- (ii) The report communicates the findings and appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, 1996 following an investigation that relates to allegations of maladministration by the City of Tshwane in connection with an alleged undue delay or failure by the City of Tshwane to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands situated at an area known to as Lotus Gardens.
- (iii) The complaint was received on 7 October 2019, from Mr Moleshiwa (the Complainant) wherein it is alleged that he raised a complaint with the City of Tshwane in 2012, however the City of Tshwane failed to assist him to transfer incomplete houses and semi developed stands to his company or to compensate him for partial work completed on the said stands.
- (iv) Based on the analysis of the complaint and the allegations contained therein, the following issue was identified to inform and focus the investigation:
  - (a) Whether the City of Tshwane unduly delayed or failed to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands and if so, whether the conduct of the City of Tshwane constitutes improper conduct as envisaged

in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

- (v) The investigation was conducted in terms of section 182(1)(a) of the Constitution 1996 and sections 6 and 7 of the Public Protector Act 1994. The investigation process commenced with a preliminary investigation, followed by a formal investigation which included the consideration of the complaint lodged by the Complainant, the exchange of correspondence with the City of Tshwane.
- (vi) Thereafter an Alternative Dispute Resolution (ADR) was conducted on 17 October 2019 wherein a resolution was taken that the Complainant would provide the City of Tshwane with additional information regarding the disputed stands. The City of Tshwane would then escalate his complaint to the Dispute Resolution Committee within the City of Tshwane's internal processes.
- (vii) At the Dispute Resolution Committee, the Complainant would be provided with an opportunity to present evidence regarding his matter and consequently the Dispute Resolution Committee would adjudicate this matter. The Dispute Resolution Committee will then make a finding on the allegations raised by the Complainant and craft a way forward.
- (viii) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
  - (a) **Whether the City of Tshwane unduly delayed or failed to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens and if so, whether the conduct of the City of Tshwane constitutes improper**

**conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.**

- (aa) The allegation that the City of Tshwane unduly delayed or failed to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens is substantiated.
- (bb) The resolution taken at the ADR on 17 October 2019 to refer the matter of the Complainant to the dispute resolution committee was not implemented by the City of Tshwane.
- (cc) The conduct by City of Tshwane failed to promote the basic values and principles governing public administration as stipulated in section 195(f) of the Constitution, 1996. Section 195(f) of the Constitution, 1996 obliges organs of state to be accountable to their citizens. Furthermore, Section 237 of the Constitution<sup>1</sup>, provides that all constitutional obligations must be performed diligently and without delay, thus imposing a responsibility on the City of Tshwane to timeously table the Complainants matter before the appropriate committee as provided for in Section 79 of the Local Government, Municipal Structures Act 117 of 1998.
- (dd) The conduct of the City of Tshwane constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.
- (ix) The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, 1996 with a view to remedying the undue delay referred to in this report is as following:

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<sup>1</sup> Act 108 of 1996.

**(a) The Municipal Manager of the City of Tshwane must within ninety (90) days of receipt of this report:**

- (aa) Issue a written apology to the Complainant for the undue delay or failure by the City of Tshwane to meet out the ADR resolution undertaking and the legal obligation to refer this matter to the Dispute Resolution Committee.
- (bb) Take appropriate steps to ensure that a Dispute Resolution Committee hearing is convened or set up to hear and subsequently make a finding/determination on the grievance of the Complainant in this matter. This is in line with the City of Tshwane's confirmation as per the email dated 18 October 2019.

**(b) The Executive Mayor of the City of Tshwane must within sixty (60) days of receipt of this report:**

- (aa) Note this report and oversee that the City Manager refers the matter to the Dispute Resolution Committee as per the resolution taken at the ADR on 17 October 2019 and the confirmation dated 18 October 2019.

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND THE ALLEGED UNDUE DELAY OR FAILURE BY THE CITY OF TSHWANE TO CONVENE A DISPUTE RESOLUTION COMMITTEE HEARING IN ORDER TO ADJUDICATE ON THE COMPLAINANT'S MATTER RELATING TO THE TRANSFER AND COMPENSATION FOR INCOMPLETE HOUSES AND SEMI DEVELOPED STANDS.**

**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 1996), read with section 8(1) of the Public Protector Act, 1994 (the Public Protector Act 1994).

1.2 The report communicates the findings and appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution 1996, following an investigation into allegations of unduly delayed or failure by the City of Tshwane to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands.

1.3 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to:

1.3.1 Mr Randall Williams, The Executive Mayor, of the City of Tshwane for noting.

1.3.2 Ms Mmaseabata Mutlaneng, Acting City Manager, City of Tshwane;

1.3.3 Mr Samuel Lesiba Moleshiwa (the Complainant), who raised a complaint on behalf of his company NABCAT.

## 2. THE COMPLAINT

2.1 The Complaint was lodged with the Office of the Public Protector on 7 October 2019, by Mr Samuel Lesiba Moleshiwa (the Complainant) on behalf of his company NABCAT who *inter alia* alleged that;

2.1.1 He raised a complaint with the City of Tshwane in 2012 alleging that the City of Tshwane failed to assist him to transfer incomplete houses and semi developed stands to his company or to compensate him for partial work completed on the said stands at Lotus Gardens.

2.1.2 The Complainant alleged further that he entered into a Land Access Agreement with the Gauteng Housing Board during August 1996, to develop 76 houses on serviced stands at Lotus Gardens for the lower income group which would be sold to private individuals.

2.1.3 The Council for the City of Tshwane took a decision on 23 July 2008 to transfer the Land, known as 'Lotus Gardens' to the City of Tshwane. This transfer of land took place before the Complainant completed his part of the project. The Complainant indicated there was no consultation with him during this process of termination and transfer of land to the City of Tshwane. The Complainant was contracted to develop houses on stands and consequently to also obtain approved purchasers for the stands that were to be developed, with prior approval from the City of Tshwane.

2.1.4 The Council of the City of Tshwane took a decision on 23 July 2008 to change the terms of the Land Access Agreement, relating to the Lotus Gardens allegedly without consulting the Complainant. In essence, the Complainant had partially developed stands which he had expended



finances to improve, without obtaining purchasers thereof, and which land was subsequently alienated from him by the City of Tshwane.

- 2.1.5 The City of Tshwane is unreasonably withholding the transfer of 10 houses to qualifying beneficiaries. These 10 houses were incompletely built before the transfer took place from the Gauteng Housing Board to the City of Tshwane.
- 2.1.6 The Complainant stated that he was informed by the City of Tshwane that his matter will be referred to a Dispute Resolution Committee for mediation and arbitration. However, the City of Tshwane failed to establish such a Dispute Resolution Committee to assist him.
- 2.2 This matter was previously investigated by the Public Protector and was resolved by means of an Alternative Dispute Resolution (ADR) meeting which took place on 28 May 2013. The resolution of the ADR was that the Complainant would provide the Public Protector and the City of Tshwane with additional information regarding the disputed stands in order to enable the City of Tshwane to conduct its own investigation into the matter. The City of Tshwane would thereafter report back to the Public Protector and the Complainant on the outcome of the matter.
- 2.3 On 14 March 2014, Ms Nonto Memela the Executive Director Housing Administration, at the City of Tshwane sent correspondence to the Public Protector advising that the National Housing Board allocated 76 stands to NABCAT (Complainants business). Amongst these, 49 of the allocated stands were transferred to NABCAT. On 30 June 2012, being the date of termination of the development period of the Lotus Gardens Developers, NABCAT remained with 27 stands, 18 of which were in the process of being transferred. On the date of expiry of the development period, no deeds of sales were entered into with any clients of NABCAT for the remaining 9 stands. In terms of a City of Tshwane's Council resolution dated 30 June

2011, all unsold erven concerned were to be re-possessed by the City of Tshwane.

- 2.4 The Complainant alleged that all necessary documents regarding the 9 properties were submitted to the City of Tshwane, and that he was entitled to be compensated for work that was done on the properties, before it was transferred from the Gauteng Housing Board to the City of Tshwane.
- 2.5 In an attempt to expediently resolve this matter the Public Protector's investigation team conducted another ADR on 17 October 2019, wherein a resolution was taken that the Complainant would provide the City of Tshwane with additional information regarding the disputed stands. The City of Tshwane would then escalate his complaint to the Dispute Resolution Committee within the City of Tshwane's internal processes.
- 2.6 At the Dispute Resolution Committee, the Complainant would be provided with an opportunity to present evidence regarding his matter and consequently the Dispute Resolution Committee would adjudicate this matter. The Dispute Resolution Committee will then make a finding on the allegations raised by the Complainant and craft a way forward.
- 2.7 On 11 November 2019 the Complainant sent correspondence to the Public Protector investigation team, indicating that he is still awaiting a response from the City of Tshwane regarding the documents that he submitted after the ADR and furthermore still awaiting his matter to be tabled at the Dispute Resolution Committee.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1 The Public Protector is an independent state institution established under section 181(1)(a) of the Constitution 1996 to strengthen constitutional

democracy through amongst other investigating and redressing improper conduct in state affairs.<sup>2</sup>

3.2 Section 182(1) of the Constitution 1996 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) of the Constitution 1996 directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.4 Section 182(4) of the Constitution 1996 also requires that the Public Protector be accessible to all persons and communities. It is against this background that the services of the Public Protector are free and the Public Protector affords equal protection to complainants as well as the person or institution against whom a complaint was lodged<sup>3</sup>. It is to be further noted that the accessibility of the Public Protector is enabled by amongst others, the publication of the reports which are easily accessible and form a repository of public knowledge on the work of the institution to all persons, communities, the academia and public administration.

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<sup>2</sup> Thornhill C, *The Role of the Public Protector Case Studies in Public Accountability*, African Journal of Public Affairs Volume 4 (2) September 2011 pg 80.

<sup>3</sup> Brynard D J. *Supporting Constitutional Democracy in South Africa: An Assessment of the Public Protector (Ombudsman)* SAIPA 1999 34(1) pg 11.

- 3.5 It is also imperative to mention that the reports of the Public Protector constitute additional sources of information to different communities amongst others the media which at times write their stories on reports issued by the Public Protector<sup>4</sup>. Further thereto, the reports of the Public Protector can serve or can be used as a source of information to develop and enhance amongst others the standard operating procedures, training guides and manuals to guide public officials and the executive authorities to prevent similar maladministration and/or improper conduct from recurring in the future.
- 3.6 The Public Protector is further mandated by the Public Protector Act 1994 to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanisms.
- 3.7 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.<sup>5</sup> The Constitutional Court further held that:

*“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”<sup>6</sup>.*

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<sup>4</sup> Brynard D J. *Brynard Supporting Constitutional Democracy in South Africa* pg 9-10.

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

<sup>6</sup> *Supra* at para [73].

- 3.8 In the above-mentioned matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.8.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 3.8.2 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);
- 3.8.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints, as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
- 3.8.4 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);
- 3.8.5 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);
- 3.8.6 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be

informed by the subject-matter of investigation and the type of findings made (para 71);

3.8.7 Implicit in the words “*take action*” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “*action*” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (para 71(a));

3.8.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d)); and

3.8.9 “*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)).

3.9 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017)*, the Court held as follows when confirming the powers of the Public Protector:

3.9.1 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. (para 82);

3.9.2 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) of the Constitution, 1996 afford the Public Protector with the following three separate powers (para100-101):

- a) Conduct an investigation;
- b) Report on that conduct; and

c) To take remedial action.

3.9.3 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);

3.9.4 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (para 105);

3.9.5 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (para 107-108); and

3.9.6 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).

Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation, these addition functions include the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate Alternative Dispute Resolution (ADR) mechanism.

3.10 Section 6(9) of the Public Protector Act grants the Public Protector the power to accept complaints which are lodged more than two years after the occurrence of the incident in special circumstances, within her discretion. Some of the special circumstances which the Public Protector took into account in this matter to determine whether special circumstances exist, included:

- a) the nature of the complaint and the seriousness of the allegations;
- b) whether the outcome could rectify systemic problems in state administration;

- c) whether the Public Protector 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
  - d) whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.
- 3.11 The alleged failure by City of Tshwane in this particular case to address the concerns raised by the Complainant has been continuing since 2012, i.e. for 9 years, and the Complainant has to date, not yet been assisted by the City of Tshwane by convening a Dispute Resolution Committee hearing relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens. It was therefore in the interests of justice for the Public Protector to exercise her discretion in favour of investigating this matter.
- 3.12 Since 2012 the Complainant has been trying to address this matter with the City of Tshwane, and compel them to hold a dispute resolution hearing with the intention to hear the merits of his case and adjudication thereupon. The Complainant again approached the Public Protector for assistance 15 January 2019 indicating that the matter has still not been resolved, thus the office of the Public Protector perceived this as exceptional circumstances to again intervene in the matter to assist the Complainant.
- 3.13 The City of Tshwane 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 the matter under investigation.

## **4. THE INVESTIGATION**

### **4.1 The scope of the investigation**



4.1.1 The investigation was conducted in terms of section 182 of the Constitution, 1996 read with sections 6 and 7 of the Public Protector Act, 1994 which confers upon the Public Protector the power to investigate any alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action when necessary.

## 4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, 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 maladministration?
- (iv) In the event of 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?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry primarily focused on whether there was any maladministration by the City of Tshwane in connection with alleged undue delay or failure by the City of Tshwane to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands situated at Lotus Gardens.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials at the City of Tshwane.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of 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 City of Tshwane complied with the regulatory framework setting the applicable standards for good administration.

### **4.3 ISSUE CONSIDERED AND INVESTIGATED**

4.3.1 On analysis of the complaint, information and documents received during preliminary enquiries, the following issue was considered and investigated:

4.3.1.1 Whether the City of Tshwane unduly delayed or failed to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens and if so, whether the conduct of the City of Tshwane constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act..

### **4.4 The Key Sources of information**

#### **4.4.1 Documents and information received.**

4.4.1.1 Notice in terms of section 7(4) and (5) of the Public Protector Act, 1994, dated 7 May 2013.

- 4.4.1.2 Closing letter in terms of section 42(2) of the Public Protector Act 23 of 1994 and Rules relating to investigations by the Public Protector and matters incidental thereto, 1998, dated 17 March 2014;
- 4.4.1.3 Complaint in terms of section 6(1)(a) of the Public Protector Act, 1994 received on 7 October 2019;
- 4.4.1.4 Allegation letter and ADR notice sent to the City of Tshwane dated 7 October 2019;
- 4.4.1.5 Confirmatory e-mail from the City of Tshwane of referral to the DRC dated 18 October 2019;
- 4.4.1.6 Letter from the City of Tshwane for not conducting the ADR dated 13 March 2020;
- 4.4.1.7 Closing letter in terms of section 42(1) of the Public Protector Act 23 of 1994 and Rules relating to investigations by the Public Protector and matters incidental thereto, 1998 sent to the Complainant dated 25 May 2020;
- 4.4.1.8 Objections raised by Complainant to the intention to close letter dated 10 June 2020;
- 4.4.1.9 Briefing session held with the City of Tshwane on the establishment of the dispute resolution committee (DRC) in the City of Tshwane, 2008
- 4.4.1.10 Notice in terms of section 7(9)(a) of the Public Protector Act 23 of 1994 dated 5 December 2021;
- 4.5 Notice issued in terms of Section 7(9) of the Public Protector Act, 1994.**
- 4.5.1 A notice in terms of section 7(9)(a) of the Public Protector Act 23 of 1994 was sent to the City of Tshwane on 7 December 2021 on which an

acknowledged receipt thereto was received on 10 December 2021. However to date there has been no formal response to the section 7(9)(a) notice received from the City of Tshwane.

## **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 Whether the City of Tshwane unduly delayed or failed to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens and if so, whether the conduct of the City of Tshwane constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act..**

#### Common cause

5.1.1 The following facts are common cause and have not been disputed by the parties:

5.1.1.1 An Alternative Dispute Resolution meeting took place with the City of Tshwane, Public Protector's investigation team and the Complainant on 17 October 2019. The purpose of the ADR was to ascertain how the City of Tshwane could assist the Complainant with his complaint relating to the City of Tshwane's alleged failure to transfer incomplete houses and semi developed stands and furthermore to compensate the Complainant for partial work completed on the said stands.

- 5.1.1.2 The ADR was chaired by Advocate Johann Raubenheimer the Chief Investigator at the office of the Public Protector. In attendance was also, Ms Veronika Pillay, Senior investigator at the office of the Public Protector and the Complainant. Representing the City of Tshwane at the ADR were Mr Mankuroane Matseba, Mr Cornel Oliver, Mr Nonhlanhla Khumalo, Mr Katlego Pelo and Mr Thivhulawi Nyambeni.
- 5.1.1.3 A resolution as per the minutes of the ADR on 17 October 2019, was that *“the Complainant would provide the City of Tshwane with additional information regarding the disputed stands. In turn, the City of Tshwane would table his complaint at the Dispute Resolution Committee hearing of the City of Tshwane, wherein the Complainant would present evidence. The Dispute Resolution Committee would make findings on the issues that the Complainant raised.”*
- 5.1.1.4 It is common cause that the Public Protector’s investigation team received an e-mail correspondence from Mr Thivhulawi Nyambeni of the City of Tshwane on 18 October 2019 indicating that the City of Tshwane is in receipt of the Complainant’s documents as requested during the ADR meeting.

*Issues in dispute*

- 5.1.2 The issue for determination by the Public Protector is whether the City of Tshwane convened a Dispute Resolution Committee hearing in order to adjudicate on the Complainant’s matter relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens.
- 5.1.3 The Complainant alleged that NABCAT as a Developer entered into a Land Access Agreement dated 8 August 1996 with the National Housing Board, represented by the Provincial Housing Board for Gauteng. With regard to

the Developers' obligations and the Boards' obligations, the following was undertaken:

- “3.1       ...the Developer undertakes:
- 3.2.2     to enter into building contracts with beneficiaries whose names appear on the list supplied to it by the Board pursuant to part 4.1;
- 3.2.3     to assist such beneficiaries to obtain the necessary financial assistance required to fund the proposed transaction;
- 3.2.4     to submit the names of those beneficiaries with whom the building contracts have been concluded, and of whom the necessary financial arrangements have been made, to the Board for conclusion of deeds of sale in respect of the relevant erven;
- 4.1       ...Boards' obligations
- 4.1.1     provide a list of names of qualifying beneficiaries to the developer within 14 days from date of signature hereof, with whom the developer shall negotiate with the aim of disposing land to them.
- 4.1.2     enter into deeds of sale with those beneficiaries approved by them pursuant to part 3.2.4.”

5.1.4     The Complainant's version is that he submitted the documents to the City of Tshwane after the first ADR on 28 May 2013 and again on 18 October 2019 to the Secretary of the Acting Director Office of the City Manager, Mr Nyambeni.

5.1.5     The Acting Director Office of the City Manager Mr Nyambeni in his e-mail to the Public Protector Investigation team on 18 October 2019 confirmed that he is in receipt of documents and furthermore that he will forward the documents for a dispute resolution committee hearing.

5.1.6     After sending a follow up e-mail to the City of Tshwane on 19 November 2019, and monthly thereafter on 13 March 2020 the Public Protector's

investigation team received a correspondence from Mr Petal Thring Divisional Head of Human Settlements and Administration (Mr Thring) at the City of Tshwane, indicating that the agreement entered into between the then Housing Department, the City of Tshwane and the Complainant, has since expired, being the initial development agreement signed by NABCA with the then Housing Department. Therefore NABCAT has no legal grounds to claim for any compensation / whatsoever for the stands which they developed without first presenting prospective buyers to the City of Tshwane to process the agreements of sale.

- 5.1.7 Mr Thring also informed the Public Protector's investigation team that part of the agreement was that the Developer needed to bring the prospective buyers to the City of Tshwane to process agreements of sale for the land first to enable them to proceed to the stage of registration of building plans and service connection applications. Since the conclusion of the ADR, the Complainant has not brought forward any further documentation to substantiate his claim and allegations to enable the City of Tshwane to reconsider this matter.
- 5.1.8 Mr Thring further indicated that if indeed the Developer followed the correct procedure in making improvements on the disputed sites, the City of Tshwane requested that the Complainant should submit approved building plans, application for services installation, proof of payment for services installation applications and the approved buyer documents for the said property. Should the Complainant fail to present this information to the City of Tshwane, the Complainant would be in breach of the developmental rights agreement entered into as he would have made improvements without the approval of the City of Tshwane.
- 5.1.9 Regarding the issue of transfer of properties into NABCAT's name, Mr Thring submitted that no transfer took place from the City of Tshwane to NABCAT as the properties were allocated to NABCAT to make

improvements subject to the conditions of the development scheme. Mr Thring indicated that the City of Tshwane was within its power to alienate the sites in line with the Alienation Policy after terminating the developmental rights of the developer, in this case NABCAT.

- 5.1.10 Based on the evidence submitted by the Complainant, and the City of Tshwane the version of the Complainant that he submitted the documents is more probable as Mr Nyambeni sent an e-mail on 18 October 2019 confirming that he was in receipt of the Complainant's documents. Despite the submission of the documents the matter has not yet served before the Dispute Resolution Committee.

*Application of the applicable law*

- 5.1.11 Section 195(f) of the Constitution, 1996, obliges organs of state to be accountable to their citizens. The City of Tshwane had a responsibility to the Complainant to ensure that his complaint was considered and tabled before the dispute resolution committee.
- 5.1.12 Furthermore Section 237 of the Constitution, provides that all constitutional obligations must be performed diligently and without delay.
- 5.1.13 Section 73 of Municipal Systems Act , 2000 provides that:  
*"A municipality must give effect to the provisions of the Constitution..."*
- 5.1.14 Local Government, Municipal Structures Act, 1998.  
Section 79(1) states that a municipal council may:
- (a) establish one or more committees necessary for the effective and efficient performance of any of its functions or the exercise of any of its powers;



- (b) appoint the members of such a committee from amongst its members; and
- (c) dissolve a committee at any time.

5.1.15 Section 79 of the Municipal Structures Act, 2000 further provides the means for the City of Tshwane to establish the Dispute Resolution Committee which they failed to establish.

5.1.16 Section 5(1) of the Local Government Municipal Systems Act, 2000 (Systems Act) is titled ***Rights and Duties of Members of Local Community*** and states that:

- 5 (1) *“Members of the local community have the right—*
- (a) *through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to—*
    - (i) *contribute to the decision-making processes of the municipality; and*
    - (ii) *submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or the administration of the municipality;*
  - (b) *to prompt responses to their written or oral communications, including complaints, to the municipal council or to another political structure or a political office bearer or the administration of the municipality;*
  - (c) *to be informed of decisions of the municipal council, or another political structure or any political office bearer of the municipality, affecting their rights, property and reasonable expectations;*
  - (d) *to regular disclosure of the state of affairs of the municipality, including its finances;*
  - (e) *to demand that the proceedings of the municipal council and those of its committees must be—*

- (i) *open to the public, subject to section 20:*
- (ii) *conducted impartially and without prejudice; and*
- (iii) *untainted by personal self-interest...*”

5.1.17 In terms of section 5(1) of the Systems Act the City of Tshwane had a duty of care and subsequent responsibility to ensure that when the Complainant was raised with their offices that they promptly attended to it, and utilise the municipal structures in place to speedily address the Complainant and provide an outcome to the Complainant, which they erred in their duties as this matter relating to the compensation of partially developed stands to the Complainant remains unresolved. The Complainant had a right to submit his complaint to the Municipal Council in terms of section 5(1).

5.1.18 The Constitutional Court reiterated in the matter of *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* (CCT 10/13) 2013 ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013) that when, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues.

5.1.19 A regulatory document of the City of Tshwane in this regard would be the ***Briefing Session on the Establishment of the Dispute Resolution Committee (DRC) in the City of Tshwane***, guidelines regulating the functions and the mandate of the Dispute Resolution Committee in line with the rules of the Administrative Law and Common Law in general, which was sent to the Public Protector’s investigation on 21 July 2021, by Mr Thivhulawi Nyambeni Acting Director, Office of the City Manager. The relevant excerpts thereof are the following:-

*“There are numerous complaints and disputes on rights of occupancy and/or ownership from various clients from council-owned low cost residential houses in the City of Tshwane seeking finalisation to this contentious matter. The dispute resolution mechanism is one of the cost effective tools used to resolve disputes speedily. The low cost housing related disputes are dominated by the indigents who, in most cases, cannot afford the expensive court process.... A seven (7) days’ invite is given to the beneficiaries in order to attend the hearing, failure to attend this hearing without prior written notification to the committee will be recorded as an abandonment of the beneficiaries rights to the said property and the matter will be adjudicated and finalised by the committee in his/her absence. Letters will be issued to both parties after a decision has been made by the DRC, informing them of the outcome of the adjudication. A Committee of Councilors (Dispute Resolutions Appeals Committee), chaired by the Chairperson of the Section 79 Committee, then consider all appeals that arise from the Dispute Resolution Committee to oversee and decide on all such matters. Beneficiaries are then given twenty-one (21) days to submit such appeal. After the final decision has been taken by the committee on an appeal matter, parties who are not satisfied with the outcome they have to refer their matters in court at their own expenses, without the intervention or the interference of the municipality.” (own emphasis)*

- 5.1.20 It is submitted that the Complainant is a member of the local community and as such he is entitled to the relief envisaged in the above legal provisions.
- 5.1.21 According to the Briefing Session on the Establishment of the Dispute Resolution Committee in the City of Tshwane guidelines document, the Complainant had a reasonable expectation that the City of Tshwane would conduct a Dispute Resolution Committee hearing to deal with his matter.

The Local Government Municipal Structures Act<sup>7</sup> gives the Municipal Council the authority to establish committees such as a dispute resolution committee for the purposes of resolving the complaint.

- 5.1.22 From the evidence discussed above an undertaking to refer the matter of the Complainant and convene the Dispute Resolution Committee was made by the representatives of the City of Tshwane who were present at the ADR meeting on 17 October 2019.
- 5.1.23 The Municipal Systems Act provides that the member of a local community has a right to receive prompt responses to their oral or written communications. In this instance the Complainant submitted all necessary documents incidental to the Lotus Gardens Project to Mr Thivhulawi Nyambeni of the City of Tshwane in anticipation that his matter will be dealt with when the Dispute Resolution Committee is convened. However, the Dispute Resolution Committee was never convened to adjudicate the matter, to date.
- 5.1.24 The Public Protector takes cognisance of the initial agreement entered into between NABCAT and the then Department of housing that is in mentioned above. The contentions advanced by the City of Tshwane suggest that the Complainant was in breach of the said agreement, when NABCAT failed to comply with all the conditions of the agreement entered into with the National Housing Board.
- 5.1.25 However there was an undertaking made by the representatives of the City of Tshwane at the ADR meeting to assist the Complainant by referring his matter to the Dispute Resolution Committee to deal with his complaint which was not done.

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<sup>7</sup> Act 117 of 1998.

- 5.1.26 A settlement agreement was drafted and sent to the City of Tshwane on 5 November 2019, however the City of Tshwane did not sign the settlement agreement nor provide reasons for the non-signature thereof.

### Conclusion

- 5.1.27 Having considered the evidence, the conclusion is that the City of Tshwane has not assisted the Complainant and thus has failed to promote the basic values and principles governing public administration as envisaged in section 195(f) of the Constitution, 1996.
- 5.1.28 In not adhering to the resolution taken at the ADR meeting held on 19 October 2019 to convene a Dispute Resolution Committee meeting and referring the Complainants matter to such Committee the functionaries of the City of Tshwane disregarded adherence to all constitutional obligations that must be performed diligently and without delay.
- 5.1.29 The Policy of the City of Tshwane Briefing session on the establishment of a Dispute Resolution Committee makes provision for just administrative action to be taken in the circumstances of the Complainant and from the evidence above, the City of Tshwane's undue delay or failure to refer this matter to the Dispute Resolution Committee points towards a flagrant infringement and disregard of rights of the Complainant guaranteed by the regulatory framework.

## **6. FINDINGS**

- 6.1 Having regard to the evidence and the regulatory framework determining the standard that the City of Tshwane had to comply with by referring the Complainants matter to the Dispute Resolution Committee, the Public Protector is making the following adverse findings:

- 6.1.1 Regarding whether the City of Tshwane unduly delayed or failed to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens and if so, whether the conduct of the City of Tshwane constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.**
- 6.1.1.1 The allegation that the City of Tshwane unduly delayed or failed to convene a Dispute Resolution Committee hearing in order to adjudicate on the Complainant's matter relating to the transfer and compensation for incomplete houses and semi developed stands at Lotus Gardens is substantiated.
- 6.1.1.2 The resolution taken at the ADR on 17 October 2019 to refer the matter of the Complainant to the dispute resolution committee was not implemented by the City of Tshwane.
- 6.1.1.3 The conduct of the City of Tshwane failed to promote the basic values and principles governing public administration as stipulated in section 195(f) of the Constitution, 1996, which obliges organs of state to be accountable to their citizens. Furthermore Section 237 of the Constitution, provides that all constitutional obligations must be performed diligently and without delay, thus imposing a responsibility on the City of Tshwane to timeously table the Complainants matter before the appropriate committee as provided for in Section 79 of the Local Government, Municipal Structures Act 117 of 1998.
- 6.1.1.4 The conduct of the City of Tshwane constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

## **7. REMEDIAL ACTION**

7.1 The appropriate remedial action in terms of section 182 (1)(c) of the Constitution, with the view to placing the Complainant as close as possible to where they would have been had the improper conduct and maladministration no occurred, is the following:

### **7.1.1 The Municipal Manager City of Tshwane must within ninety (90) days of receipt of this report:**

7.1.1.1 Issue a written apology to the Complainant for the undue delay or failure by the City of Tshwane to meet out the ADR resolution undertaking and the legal obligation to refer this matter to the Dispute Resolution Committee.

7.1.1.2 Take appropriate steps to ensure that a Dispute Resolution Committee hearing is convened or set up to hear and subsequently make a finding/determination on the grievance of the Complainant in this matter. This is in line with the City of Tshwane's confirmation as per the email dated 18 October 2019.

### **7.1.2 The Executive Mayor City of Tshwane must within sixty (60) days of receipt of this report:**

7.1.2.1 Note this report and oversee that the City Manager refers the matter to the Dispute Resolution Committee as per the resolution taken at the ADR on 17 October 2019 and the confirmation dated 18 October 2019.

## **8. MONITORING**

8.1 The City Manager of the City Of Tshwane must within thirty days (30) days from the date of this report furnish the Public Protector with an implementation plan as to the above remedial action referred to in section 7.1.1.2 of this report.

8.2 In terms of the Constitutional Court Judgement in the matter of *Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others* [2016] ZACC 11, and in order to ensure the effectiveness of the Public Protector South Africa, the remedial action taken in this report are legally binding unless a court directs otherwise.



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

**DATE:** 31/01/2022

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