

**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: 66 of 2022/2023

ISBN NUMBER: 978-1-991244-19-2

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE FREE
STATE DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT TO
ACQUIRE FARM TOT HIER TOE NO. 1127 SITUATED IN THE REGIONAL DIVISION
OF HEILBRON FOR THE RESIDENT TENURE FAMILIES**

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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS	DESCRIPTIONS
Complainant	Mr Sipho Mbongo
The Constitution	The Constitution of the Republic of South Africa, 1996
The Department	The Free State Department of Agriculture and Rural Development
The Farm	Farm <i>Tot Hier Toe</i> No. 1127 situated in the Regional Division of Heilbron
Public Protector Act	Public Protector Act 23 of 1994
Resident Tenure Families	The Complainant and 2 other families occupying 40 hectares of the Farm
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 Ms Luleka Nonyongo, Chief Director: Free State Department of Agriculture and Rural Development and Mr Siphon Mbongo (the Complainant).
- 1.6 The report relates to an investigation into the alleged failure by the Free State Department of Agriculture and Rural Development (the Department) to acquire a Farm *Tot Hier Toe* No. 1127 situated in the Regional Division of Heilbron (the Farm) for the resident tenure families.

2. THE COMPLAINT

- 2.1. The complaint was lodged with the Public Protector's office on 28 July 2021, by Mr Sipho Mbongo (the Complainant).
- 2.2. In essence, the Complainant alleged that:
 - 2.2.1. His family has been residing on a portion of the Farm for over twenty five (25) years, together with two (2) other families;
 - 2.2.2. Officials from the Department, namely Mr Fusi Sello and Mr Tseko Motete visited the farm and informed the three (3) families residing on the Farm that the Farm is for sale and that the Department is in the process of purchasing it for them;
 - 2.2.3. The problem ensued when the Department bought the Farm and to their shock, the Farm was leased to Mr Mosoeu who is unknown to them;
 - 2.2.4. The Department informed the Complainant in a letter dated 26 October 2018, that upon realisation that none of the resident tenure families had the capacity to utilise the Farm to its maximum potential, the Department issued a lease agreement to Mr Mosoeu, who had the capacity to utilize the Farm to its full potential;
 - 2.2.5. His family is the only one on the Farm that own livestock and that their livestock was left without water and sufficient grazing land, as Mr Mosoeu would not allow them to utilize the portion of the Farm that had access to water; and
 - 2.2.6. His father left his employment to focus solely on the Farm based on the promise made by the Department, however his father passed away without the promise

having been fulfilled by the Department, despite his father's repeated enquiries with the Department.

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 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”*.

3.7 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 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 such as the communication between himself and the Department during 2018 reflecting that since then he has made efforts to have the matter resolved;
- b) The Complainant provided a reasonable explanation for the delay in reporting the matter to the Public Protector in that he has been engaged in continuous efforts to resolve the matter since the date of occurrence;
- c) The alleged failure by the Department to acquire the Farm for the resident tenure families has not been finalised resulting in continued alleged prejudice to the resident tenure families; 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.

3.8 The Free State Department of Agriculture and Rural Development 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.

- 3.9 The Public Protector's powers and jurisdiction to investigate this matter was not disputed by the Free State Department of Agriculture and Rural Development.

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:

- 4.1.1 Whether the Free State Department of Agriculture and Rural Development failed to acquire Farm *Tot Hier Toe* No. 1127 situated in the Regional Division of Heilbron for the three resident tenure families, and if so, whether such conduct constitutes improper conduct in terms of section 182(1)(a) 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 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 register a formal legal entity in order for it to transfer forty (40) hectares of the Farm to the resident tenure families.

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 the Department failed to acquire the Farm for the resident tenure families.

- 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 Free State Department of Agriculture and Rural Development to prevent improper conduct and/or maladministration as well as prejudice.
- 5.2.5 The question regarding the remedy or remedial action seeks 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 he 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 On 14 April 2022, a meeting was held between Mr Aiseng, the Director Legal Services within the Department, Ms Mokhomo, the District Manager responsible the Fezile Dabi District within the Department, the Complainant and the Public Protector Investigation Team. The Department undertook to submit an Implementation Plan to the Public Protector indicating the process and timelines in which it will resolve the matter and transfer the Farm to a registered legal entity for the resident tenure families.

- 6.3 Subsequently, the Department submitted the Implementation Plan dated 19 August 2022 to the Public Protector. The Implementation Plan indicates that the legal entity, namely Mohlanapo Agricultural Primary Co-Operative was registered on 15 July 2022, and that all the other processes including the Farm subdivision, Farm disposal and Farm Development (water reticulation) will be completed by September 2023.
- 6.4 The outcome of the above-mentioned mediation and conciliation is recorded in the attached Settlement Agreement dated 23 March 2023, facilitated by the Public Protector and concluded between the Complainant, Mr S Mbongo and the Department, duly represented by Ms Luleka Nonyongo in her capacity as the Chief Director Rural Development.

7. SETTLEMENT AGREEMENT

- 7.1 It is common cause that the Department approached the Complainants to acquire the Farm for the resident tenure families. However, the Department subsequently acquired the Farm and issued a lease agreement to Mr Mosoeu, who never resided on the Farm.
- 7.2 The resident tenure families are still occupying a portion of about forty (40) hectares of the Farm. The resident families security of tenure rights were never affected, as they are still residing on the Farm.
- 7.3 The parties have agreed to rectify the omission to be completed by September 2023, as follows:
- 7.3.1 Register a legal entity in the name of the occupiers;
- 7.3.2 Conduct Farm subdivision;

- 7.3.3 Conduct Farm disposal;
- 7.3.4 Conduct Farm Development (water reticulation, Farm assessment/Business Plan and Business Plan Implementation); and
- 7.3.5 Conduct Project Close-out.

8. THE APPLICABLE LEGAL PRESCRIPTS

8.1 Key laws and policies taken into account to determine if there was 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 acquire the portion of Farm for the resident tenure families.

8.2 The following key legislation influenced the process followed in this report:

The Constitution of the Republic of South Africa, 1996

8.2.1 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..."*

8.2.2 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 about acquisition of the Farm. Transparency would have been fostered if the Department had responded promptly to the Complainant's enquiries. The Department was also expected to conduct itself in an accountable manner.

8.2.3 Section 25(5) of the Constitution provides that the State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

8.2.4 Section 25(6) of the Constitution further provides that a person or a community whose tenure of land is legally insecure as a result of the past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

8.2.5 The Department was therefore expected to ensure that the tenure of the three (3) families is legally secured, by providing the necessary resources.

The Extension of Security Tenure Act 62 of 1997

8.2.6 Section 4(1) of the Extension of Security Tenure Act provides that the Minister shall, from moneys appropriated by Parliament for that purpose and subject to the conditions the Minister may prescribe in general or determine in a particular case, grant subsidies:

- (a) to facilitate the planning and implementation of on-site and off-site developments; and
- (b) to enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land.

8.2.7 The Department had agreed to facilitate the on-site development for the three (3) families to enable them to have security of tenure to acquire land, however, it failed to secure the legal acquisition of the Farm for the resident tenure families.

9. CONCLUSION

9.1 The evidence gathered during the course of the investigation revealed that, despite undertakings made by the Department that the Farm would be acquired for the three (3) families, the Department instead acquired the farm and leased it to Mr Mosoeu. The three (3) families were allocated a portion of the farm, which is without sufficient water and grazing land for their livestock. The aforesaid was established through concessions by the Department and through the inspection *in loco* conducted by the Public Protector's Investigation Team, during the course of the investigation.

9.2 The three (3) families residing on the Farm are tenure occupiers of the Farm. The Department failed to facilitate the planning and implementation of on-site development, to enable occupiers who needed long-term security of tenure to acquire land.

9.3 The Department has since registered a legal entity in the name of the occupiers and has commenced with the subdivision of the Farm.

9.4 The Settlement Agreement concluded between the Complainant and the Department dated 23 March 2023, in accordance with section 6(4)(b)(i) of the Public Protector Act, constitutes a binding agreement.

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 23 March 2023, the Public Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution:

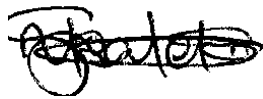
Chief Director: Rural Development

10.3.1 Within ninety (90) calendar days of this report, to conduct the Farm subdivision and transfer to the legal entity of the occupiers;

10.3.2 Within one hundred and eighty (180) calendar days of this report ensure that the complete terms of the Settlement Agreement have been implemented.

11. MONITORING

- 11.1 The Chief Director Rural Development must within thirty (30) calendar days of receipt of this report, submit to the Public Protector, an Implementation Plan of the remedial action contained in paragraph 10.3.1 and 10.3.2 above.
- 11.2 The Chief Director Rural Development must within two hundred and ten (210) calendar days of receipt of this report, submit a close out report, indicating the full implementation of the remedial action.



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

Assisted by: Adv De Waal
Acting Executive Manager: PII Inland