

**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**

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**REPORT IN TERMS OF SECTION 8(1) OF THE PUBLIC PROTECTOR ACT 1994 ON
AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE FREE STATE
DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT TO ACQUIRE
ALTERNATIVE ACCOMMODATION FOR MS MPHATSOE SUBSEQUENT TO ITS
UNDERTAKING TO IDENTIFY AND PURCHASE AN ALTERNATIVE FARM FOR HER**

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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS / ABBREVIATIONS	DESCRIPTIONS
Complainant	Ms Polo Mphatseo
The Constitution	The Constitution of the Republic of South Africa, 1996
The Department	The Free State Department of Agriculture and Rural Development
The Farm	Annmekaar Farm in the District of Dewetsdorp
Public Protector Act	Public Protector Act 23 of 1994
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 Ms Polo Mphatseo (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 alternative accommodation for Ms Mphatsoe, subsequent to its undertaking to identify and purchase an alternative farm for her.

2. THE COMPLAINT

- 2.1. The complaint was lodged with the Public Protector's office on 20 July 2021, by Mr TS Mphatseo on behalf of Ms P Mphatseo (the Complainant).
- 2.2. In essence, the Complainant alleged that:
 - 2.2.1. She was residing at Annmekaar Farm in the District of Dewetsdorp, Free State Province (the Farm);
 - 2.2.2. On 13 August 2016, she was evicted from the Farm;
 - 2.2.3. In May 2018, she applied for a court order for the restoration of her fundamental rights in terms of section 5 of the Extension of Security of Tenure Act 62 of 1997;
 - 2.2.4. On 30 January 2019, the court ordered that her rights to occupy the Farm be restored;
 - 2.2.5. However, when she attempted to occupy the Farm, she was denied access to the Farm by the owner;
 - 2.2.6. The Complainant then approached the Department on 15 September 2020 for assistance, and the Department raised concerns relating to her safety on the Farm, as the relationship between the Complainant and owner of the Farm had irretrievably broken down;
 - 2.2.7. She agreed with the Department that the relationship between the owner of the Farm and herself had irretrievably broken down and that she is no longer able to occupy the Farm; and
 - 2.2.8. The Department undertook to identify and purchase an alternative farm for her, but has to date failed to do so.

- 2.3. The Public Protector has noted that a court order was issued against the farm owner in relation to the matter, however at the outset, it must be stated that the focus of the Public Protector’s investigation was the alleged failure by the Department to honour its undertaking to the Complainant to identify and purchase an alternative farm for her.

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 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 section 6(4) of the Public Protector Act.
- 3.7 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 an alternative farm for Ms Mphatsoe subsequent to its undertaking, 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 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 assist the parties to reach a settlement.
- 5.1.4 The outcome of the mediation was for the Complainant to consider the offer made by the Department to identify and purchase a suitable alternative farm for her occupation by December 2023.

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 an alternative farm for Ms Mphatsoe, subsequent to its undertaking to identify and purchase an alternative farm for her.

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 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 On 09 February 2023, a meeting was held between Mr Tumo Kgoboko, Director Tenure Reform Implementation in the Department, Ms Mpho Lechwano, the

Project Officer for the Xhariep District in the Department, Ms Nomonde Mokoena, Projector Coordinator for the Mangaung and Xhariep District in the Department, the Complainant and the Public Protector Investigation Team.

- 6.3 The Department undertook to submit an Implementation Plan to the Public Protector, indicating the process and timelines in which it will resolve the matter to identify and purchase a suitable alternative farm for the Complainant's occupation.
- 6.4 The Department submitted the Implementation Plan, dated 27 February 2023 to the Public Protector. The Implementation Plan indicates that the Department will commence with the identification of the farm for the Complainant from March 2023 and that all the other processes, including the evaluation of the identified farm, approval of price, signing the offer to purchase, appointment of a conveyancer and handing over of the title deed to the Complainant, will be completed by December 2023.
- 6.5 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, Ms Mphatseo and the Department, duly represented by Ms Nonyongo in her capacity as the Chief Director Rural Development.

7. SETTLEMENT AGREEMENT

- 7.1 It is common cause that the Complainant approached the Department for assistance, subsequent to her being denied access to the Farm by the owner of the Farm. The Department undertook to identify and purchase an alternative farm for the Complainant, but has to date failed to do so.
- 7.2 The parties have agreed to rectify the omission by December 2023, as per the following milestones:

From March 2023 to June 2023 (Milestone 1)

- 7.2.1 Identify a farm for the Complainant;
- 7.2.2 Site Visit with Complainant and Department; and
- 7.2.3 Registration on Basic Accounting System.

From June 2023 to July 2023 (Milestone 2)

- 7.2.4 Evaluation of the identified Farm.

From July 2023 to August 2023 (Milestone 3)

- 7.2.5 Assessment of Valuation Report; and
- 7.2.6 Approval of Price.

From August 2023 to September 2023 (Milestone 4)

- 7.2.7 Sign offer to Purchase; and
- 7.2.8 Finalise sale agreement.

From September 2023 to November 2023 (Milestone 5)

- 7.2.9 Appointment of Conveyancer; and
- 7.2.10 Conveyancing and Transfer of Farm.

From November 2023 to December 2023 (Milestone 6)

- 7.2.11 Handing over of title deed to Complainant.

7.3 In view of the Department's mandate and functions in respect of land tenure reform in the Free State, the Department commits to monitor and ensure implementation of the agreement, subject to availability of funding as appropriated by the Provincial Treasury and the Department.

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 acquire the alternative Farm for 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):

“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 on the progress regarding the alternative farm. Transparency would have been fostered if the Department responded promptly to the Complainant's enquiries by providing information regarding the progress on the matter.

- 8.1.3 The Department was also expected to conduct itself in an accountable manner.
- 8.1.4 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.
- 8.1.5 Section 25(6) of the Constitution 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.
- 8.1.6 The Complainant's eviction and the subsequent breakdown of the relationship with the owner of the Farm resulted in a violation of her fundamental rights, making her tenure in the land she had occupied legally insecure.
- 8.1.7 The Department, as per its undertaking to the Complainant, was expected to ensure that it takes reasonable measures within available resources to provide the Complainant with comparable redress to enable her to gain access to land.

9. CONCLUSION

- 9.1 The Complainant's eviction and the subsequent breakdown of the relationship with the owner resulted in the violation of her fundamental rights. This has resulted in the Complainant's tenure in the land she had occupied being compromised and threatened by the non-resolution of the matter.

- 9.2 Although the Department made undertakings to the Complainant to identify and allocate an alternative farm to her, this has not been the case considering the manner in which it dealt with the Complainant's matter, as the process to identify and purchase the farm only commenced subsequent to the Public Protector bringing the matter to the Department's attention.
- 9.3 The Settlement Agreement dated on 23 March 2023, concluded between the Complainant and the Department, in accordance with section 6(4)(b)(i) of the Public Protector Act, constitutes a binding agreement.

10. REMEDIAL ACTION

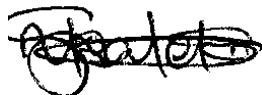
- 10.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report.
- 10.2 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic 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 thirty (30) calendar days upon completion of each milestone as set out in paragraph 7 above, provide the Public Protector with a progress report and supporting evidence of the achievement of each milestone. In the event that the Department is unable to accomplish any particular milestone, the Department must inform the Public Protector accordingly and provide reasons.
- 10.3.2 Within thirty (30) calendar days after the finalisation of the registration of the farm to the Complainant provide the Public Protector with a copy of the title deed or proof of registration.

11. MONITORING

- 11.1 The Chief Director Rural Development 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 and 10.3.2 above.



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