



PUBLIC PROTECTOR
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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE DEPARTMENT OF WATER AND SANITATION TO REGISTER A SERVITUDE AND COMPENSATE THE BILOANE FAMILY REGARDING A WATER PROJECT THAT WAS CONSTRUCTED ON BOSCHFONTEIN FARM 458 JQ, SITUATED WITHIN THE MADIBENG LOCAL MUNICIPALITY, NORTH WEST PROVINCE.

- 1.1. This is a closing report on an investigation conducted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, (the Constitution) and section 8(1) of the Public Protector Act, 1994.
- 1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of the investigation:
 - 1.2.1. The Acting Director-General of the Department of Water and Sanitation, Mr Leonardo Manus; and
 - 1.2.2. The Administrator of Madibeng Local Municipality, Mr Paul Maseko.
 - 1.2.3. A copy of the report is also submitted to the Complainant, Mr Johannes Nkaneng Davids, who represents the Biloane family.
- 1.3. The report relates to an investigation into allegations of failure by the Department of Water and Sanitation (the Department) to register a servitude and to compensate the Biloane family in respect of a water project that was allegedly constructed by the Department at portion 4 of a farm called Boschfontein 458 JQ, commonly known as Majakaneng Village.

2. THE COMPLAINT

- 2.1. The Complaint was lodged with the Public Protector, Rustenburg Regional office on 14 November 2018, by Mr Johannes Davids acting on behalf of the Biloane family. (The Complainant).
- 2.2. In essence, the Complainant made the following allegations against the Department:
 - 2.2.1. The Biloane family are the owners of portion 4 of a farm called Boschfontein 458 JQ situated at the Madibeng Local Municipality. There is a village called Majakaneng which has been established on the farm.

- 2.2.2. During 2015, the Complainant discovered that the Department had constructed a water project at Majakaneng village. The Biloane family, as owners of the land was never consulted by the Department when the project was constructed.
- 2.2.3. Further, the Department did not register a servitude on the property and the Biloane family was not compensated for the usage of their land. The Complainant wants the Department to register a servitude on the property and to compensate the family.
- 2.3. The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector powers to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, 1994 (the Public Protector Act) which regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR.

- 3.1. The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2. Section 182(1) of the Constitution provides as follow:

“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) provides that the Public Protector has additional powers and functions prescribed by legislation.
- 3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5. The Department is an organ of state within the meaning of section 239 of the Constitution and its conduct amounts to conduct in state affairs, and as a result, the matter falls within the ambit of the Public Protector’s mandate.
- 3.6. The Public Protector’s power and jurisdiction to investigate this matter and take appropriate remedial action was not disputed by the Department.

4. THE INVESTIGATION

4.1. Scope of the Investigation

4.1.1. The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 and sections 6 and 7 of the Protector Act of 1994.

4.1.2. 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 gives

the Public Protector the authority to investigate and report her findings regarding any complaint lodged.

4.2. The investigation approach

4.2.1. The approach to the investigation commenced by analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

4.2.2. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct on the part of the said Department.

4.2.3. 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 constructed a water project at Majakaneng village and then failed to register a servitude and compensate the Biloane family.

4.2.4. 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 before constructing the water project.

4.3. On analysis of the complaint and the information and documentation received during preliminary enquiries, the following issues were considered and investigated:

4.3.1. Whether the Department was obliged to register a servitude at Portion 4 of the farm Boschfontein 458 JQ; and

4.3.2. Whether the Department was obliged to compensate the Biloane family in respect of the water project that was constructed at Boschfontein 458 JQ.

4.4. KEY SOURCES OF INFORMATION

4.4.1. Applicable legislation and other legal prescripts

4.4.1.1. The Constitution of the Republic of South Africa, Act 106 of 1996.

4.4.1.2. The Public Protector Act, Act no 23 of 1994.

4.4.1.3. The National Water Act no 36 of 1998.

Case Law

4.4.1.4. Rand Water Board v Big Cedar Trading 22 (pty) Ltd- Case no: SCA 1038/15

Other sources

4.4.1.5. Eghard Rubert Schutte v Five Lakes Farm (Pty) Ltd, case no 18104/2014 (Eastern Circuit Court-George).

4.5. Documents and information sent and received

4.5.1. Report of the Inspection in loco dated 09 December 2020.

4.5.2. Deed search report provided by the Registrar of Deeds dated 16 January 2020.

4.5.3. Copy of the Settlement Agreement dated 03 September 2019.

4.5.4. Letter from Department dated 02 November 2020

4.5.5. Letter from Department dated 11 May 2021.

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 Department was obliged to register a servitude at Portion 4 of the farm Boschfontein 458 JQ

Common cause issues

- 5.1.1 Majakaneng is the name of a village situated on portion 4 of Boschfontein farm 458 JQ. During 2014 the Department through its agent, Magalies Water,¹ refurbished a water project that was known as Majakaneng Water Project.
- 5.1.2 It is further common cause that no servitude was registered on the property in respect of the said project.
- 5.1.3 It is further common cause that on 03 September 2019, the Complainant and the Department signed a Settlement Agreement in which the Department undertook to register a servitude and compensate the Biloane family.
- 5.1.4 It is further common cause that on 04 March 2021, in a meeting that was held between the Public Protector, the Department and the Madibeng Local Municipality, the Department withdrew from the Settlement Agreement citing error on the part of its officials.

Issues in dispute

- 5.1.5 During a meeting held in Pretoria on 22 January 2020 between the Public Protector, the Department, the Complainant, Magalies Water as well as

¹ Magalies Water is a national Water Board established in terms of section 28 of the National Water Services Act 108 of 1997

the Registrar of Deeds, there were two important submissions that were made to the Public Protector.

- 5.1.6. The first submission was made by the Registrar of Deeds, through Mr Emmanuel Molekwa, who indicated that he was a Senior Examiner at Deeds Office. He submitted that the Biloane family was not the sole owners of Portion 4 of Boschfontein 458 JQ farm. He indicated that the farm was co-owned by 112 (One Hundred and Twelve) people in a single undivided share - including the Biloane family.
- 5.1.7 Mr Molekwa further furnished the Public Protector with a Deed Search Report dated 16 January 2020. According to the report, the farm was co-owned by one hundred and twelve (112) people in a single undivided share. The report further showed all the names of the co-owners as well as their identity numbers. There was no evidence which showed that the Biloane family was the only owner of the land.
- 5.1.8 The second submission that was made to the Public Protector was made by Mr. Ronaldo du Toit. Mr Du Toit submitted that he was working as an Engineer at an Engineering company called Africa Remedial Technologies (Pty) Ltd. Prior to 2014, his company did various projects around Madibeng Local Municipality where they were contracted by various companies including the Madibeng Local Municipality.
- 5.1.9. Mr du Toit submitted that around 2014, Africa Remedial Technologies was contracted by Magalies Water to work on a water project at Majakaneng village. He submitted that, when his company arrived at Majakaneng village to work on the project, they found that there was an existing water project that had been constructed at Majakaneng Village. From their research as well as from the documentation that was provided to their company, it appeared that the initial water project was constructed by Bigen Africa Services (Pty) Ltd on behalf of the Lonmin Platinum Mine.

- 5.1.10. Mr du Toit further submitted that they found an underground pipeline as well as a reservoir that had already been built, which brought water into the village. He further submitted that water into the village was transported through an underground pipeline which brought water from the Vaalkop dam. Mr du Toit further indicated that the 2014 Majakaneng Water Project which was to be constructed by the Department, entailed only the refurbishment of the old water pipes, drilling of five additional boreholes and the installation of yard connections to the residents of the village. He submitted that they did not start a new water project from scratch.
- 5.1.11. During the said meeting of 20 January 2020, the Department through Mr Joey Van Rooyen, who is the Manager of the Land Matters Unit within the Department, indicated that the process of transporting bulk water from the Vaalkop dam into the village was regarded as bulk water supply as defined in terms of the Preamble of the National Water Services Act, 108 of 1997. The submissions made by both Mr du Toit and the Department were not disputed by the Complainants.
- 5.1.12. In another meeting that was held on 04 March 2021 between the Public Protector, the Department as well as the Madibeng Local Municipality, the Department through its Acting Director General, Mr Leonardo Manus, submitted that it only became involved in Majakaneng village during 2014 after it was requested by the North West Provincial Government to do so, following community protests in that area due to water shortages.
- 5.1.13. During the said meeting, the Department confirmed the submission by Mr du Toit of Africa Remedial Technologies company by stating that the Department did not build a new project, it only refurbished an existing project by replacing the old pipes and the drilling of an additional 5 boreholes in order to augment the water supply. It also installed water taps inside the yards of the residents. The Department further submitted

that this process did not require the registration of a servitude as the work constituted a reticulation² project.

- 5.1.14. In a letter dated 27 July 2020, in explaining the non-registration of a servitude, the Department indicated as follows: *“However, this (referring to the servitude) is not required in the case of the Majakaneng emergency intervention project as it is a reticulation project and in terms of the Water Services Act 1997, (Act no 108 of 1997) the local authority had the right to install infrastructure over land without the acquisition of a servitude.”*
- 5.1.15. In another letter dated 11 May 2021 addressed to the Public Protector and signed by the Acting Director-General of the Department, it was indicated that around 2010, the Department had established a programme called the *“Accelerated Community Infrastructure Programme (ACIP) which was used to implement short term refurbishment interventions and eradication of water backlogs within local government”*. It was through the ACIP that the Department got involved in Majakaneng village.
- 5.1.16. The Department further submitted that by the year 2014, Majakaneng village had grown in size. This led to the shortage of water in the area which resulted in service delivery protests. Following these protests, the Department was then requested by the North West Provincial Government to assist with the alleviation of water shortages at Majakaneng village. The Department undertook the project through Magalies Water, which was the implementing Agency. The project was carried out in four phases.
- 5.1.17. The first phase of the project included the replacement of some of the old pipes that were installed by the mine, as they were leaking. The second phase involved the drilling of five boreholes within the village in order to augment the existing water supply. During the third phase, the said

² Water reticulation is a water distribution network (usually owned by a local authority,) which has to be collected and then treated before being distributed to the consumer.

boreholes were equipped with pipes so as to add more water into the reservoir. The fourth phase involved the installation of water taps at each household in the village.

- 5.1.18. The Department further indicated that after the project was completed, it was then handed over to the Madibeng Local Municipality as the Municipality was a Water Authority in terms of the Water Act. The said project is now owned by the Madibeng Local Municipality.
- 5.1.19. On 09 December 2020, the Public Protector's Investigation team as well as the Complainants carried out an inspection *in loco* at Majakaneng village. The investigation team observed that Majakaneng was indeed a huge village. There were other infrastructure visible in the village such as high mass lights, telecommunication and tarred roads.
- 5.1.20. During May 2021, the Investigation Team conducted interviews with one Mrs Tlapu who was one of the Ward Councilors at Majakaneng village. She indicated that because of its size, Majakaneng has two Ward Councilors. She estimated the number of households at Majakaneng to be around 3000 (Three thousand).
- 5.1.21. Beside the size of the village, the Investigating Team further observed that there were water taps that had been installed at each and every household. At the time of the inspection, these taps did not have water and most of the residents that were interviewed during the inspection confirmed that it had been a long time ago since the taps had water. These taps were connected to the main underground pipes laid under the streets.
- 5.1.22. Furthermore, the Investigation Team observed that there was a huge reservoir that had been built at the edge of the village. There were also huge underground steel pipes which supplied the reservoir with water. According to Councilor Tlapu, the reservoir was built around 1995. There were also communal taps on the streets of Majakaneng. Councilor Tlapu

also indicated to the Investigation Team that the people who are responsible for allocating stands at Majakaneng village were the Modisakeng family.

- 5.1.23. The evidence obtained during the inspection *in loco*, was consistent with the submission made by the Department. Each household had a water tap. At one of the streets where a manhole cover was removed, the Investigation Team observed that some of the underground blue pipes looked relatively new. This was also consistent with the submission made by the Department that they had replaced some of the old pipes.
- 5.1.24. During 03 September 2019, the Department and the Complainant signed a Settlement Agreement wherein the Department undertook to register the servitude and compensate the Biloane family.
- 5.1.25. However, during a meeting which was held on 04 March 2021 between the Department, the Public Protector as well as the Madibeng Local Municipality, the Department (represented by its Acting Director–General Mr Leonardo Manus), indicated that the Settlement Agreement was signed in error since no diligent investigation was done by the officials before the signing thereof. The Acting Director General indicated that the Department could therefore no longer adhere to the terms of the Settlement Agreement.
- 5.1.26. Mr Manus stated that had the officials undertaken proper internal investigations before signing the Settlement Agreement, they would have uncovered some of the facts stated above, which would have prevented the Department from signing the agreement. Mr Manus cited as an example, the issue around ownership of the property on which the project was situated as well as the fact that the Department found an existing water project at Majakaneng village when it became involved.
- 5.1.27. The Public Protector cannot easily discharge an institution from its obligations especially where that institution has committed itself in writing

that it will carry out certain undertakings made per a settlement agreement. However, where subsequent facts and evidence emerge that indicate that the agreement cannot be justifiably enforced, the Public Protector must ensure that the true facts and evidence are taken into consideration.

5.1.28. The Public Protector has to take into account all relevant factors before releasing an institution from its obligations. Such factors would amongst others, include the following:

- (i) Evidence uncovered during the investigation.
- (ii) The impact on the organ of state.
- (iii) The prejudice that is likely to be suffered by the Complainants.

5.1.29. In this case some of the compelling evidence include the following:-

- (a) According to the report issued by the Registrar of Deeds, the Biloane family are not the sole owners of portion 4 of Boschfontein farm where the project had been constructed. It would therefore prejudice other co-owners if the Department was to negotiate or even compensate the Biloane family to the exclusion of other co-owners.
- (b) It was not disputed by any party that the entire water project was actually started by Lonmin Platinum Mine in or around 1995 and that the Department only became involved in 2014 in order to refurbish the old infrastructure following a request by the North West Provincial Government. It would therefore not be fair if the Public Protector was to enforce the Settlement Agreement and thereby ignoring the evidence which emerged later.
- (c) The work undertaken by the Department was a reticulation project which did not require a servitude to be registered as it was only confined within (and underneath) the streets of Majakaneng village.

Discretionary Notice:

- 5.1.30. On 09 September 2021, the Public Protector issued a Discretionary Notice outlining her preliminary findings in this matter. The Discretionary Notice was served on the Complainant on the same day. In his response to the notice, the Complainant raised a number of issues. One of the issues he raised was around the Settlement Agreement signed with the Department. He submitted that the Settlement Agreement should be enforced against the Department by the Public Protector.
- 5.1.31. While it is correct that the Settlement Agreement is a valid document which should not be taken lightly, the Public Protector has already dealt with this issue under paragraphs 5.1.24 to 5.1.28 above. Most importantly the decision by the Public Protector not to enforce the agreement against the Department is based on the evidence which was subsequently uncovered after the agreement was signed. Enforcement of an agreement even where the evidence does not support that would render such enforcement to be legally unjustified.
- 5.1.32. The other issue raised by the Complainant was around his insistence that the Biloane family was the sole owners of the land. The Complainant attached copies of the title deed signed in 1927 reflecting the names of the 16 family members who were apparently related to one Mr Benjamin Biloane.
- 5.1.33. The Public Protector has previously advised the Complainant that the Office of the Public Protector was not the appropriate forum to deal with disputes regarding land ownership. While the Complainant has a Title Deed issued by the Registrar of Deeds, the Public Protector must take note of the subsequent report issued by the Deeds Office which indicate that after the land was initially registered in the name of Mr Benjamin Biloane, it was subsequently in the following years registered under the names of 111 other co-owners - in one undivided share.

- 5.1.34. The Complainant was advised through a letter dated 22 October 2020 to approach the Land Claims Commission if he wished to challenge the ownership of the other co-owners. The Office of the Public Protector was not the appropriate forum to deal with such issues. In this case the Public Protector cannot ignore the records provided by the Deeds office which clearly indicate that the land is co-owned by 112 people.
- 5.1.35. Another submission that was made by the Complainant was that one of the Biloane family members once approached a certain family called the Modisakeng family and told them to stop allocating stands to people. This submission by the Complainant confirmed what Councilor Tlapu has said, which was that the Modisakeng family were responsible for allocating stands at Majakaneng. However the Biloane family did not take any legal action to stop the Modisakeng family in allocating stands. As such a huge village was ultimately formed.
- 5.1.39. The other issue raised by the Complainant was that before approaching the Public Protector to lodge a complaint against the Department, the family had approached the Special Investigating Unit (SIU) which advised that the Madibeng Local Municipality must compensate the family. The Public Protector has seen the said letter by the SIU dated 19 October 2018. It was clear from the letter that the SIU did not investigate the matter. Instead it advised the Complainant to approach the office of the Public Protector so that the matter can fully investigated. The Public Protector has investigated the matter and this report is the outcome of such investigation.

Application of relevant legal framework

- 5.1.40. Section 27(1)(b) of the Constitution provides that “*everyone has the right to have access to sufficient food and water and the state must take reasonable legislative and other measures within its available resources to achieve it.*” According to this section, the people of Majakaneng have a right of access to water and the Department has an obligation to fulfil that right.

5.1.41. Section 126(b) of the National Water Act 36 of 1998 describes a *servitude as a right to occupy land belonging to another by means of a water work for abstracting or leading water*. According to this Section, a servitude gives its holder the right to enter private property for the sake of water works. In this specific case the work of the Department was only confined within the streets of the Majakaneng Village.

5.1.42. Section 129(2) of the National Water Act provides that a person claiming a servitude or an amendment of a servitude under this Chapter may, on reasonable notice to the land owner:

(a) *enter*

(b) *make any investigation or*

© *undertake any operation*

.....on a land which will be subject to the servitude where this is reasonable in the circumstances. According to Schedule 2 of the Act, a servitude is based on agreement between the land owner and the Water Authority.

5.1.43. In the case of *Rand Water Board v Big Cedar Trading 22 (Pty) Ltd, case no 1038/2015* held in the Supreme Court of Appeal (SCA), a similar situation was discussed. In the above case, Rand Water installed pipelines in 1971 and 1979 on a private property without registering any servitude. The property was later sold to Big Cedar Trading Company without a servitude having been registered.

5.1.44. As soon as Big Cedar Trading became aware of the pipeline, it launched an action in the High Court demanding that Rand Water must register a servitude and pay compensation. The High Court in Pretoria agreed with Big Cedar Trading and ordered Rand Water to register a servitude and pay compensation to Big Cedar Trading. However, Rand Water took the matter on appeal to the SCA.

- 5.1.45. At paragraph 10 of the judgement, the SCA found: “...*the key issue is whether Rand Water acted lawfully in laying the two pipelines in the first place. As Counsel for the Rand Water expressed in the matter, once the pipelines were lawfully laid upon the property, the owner at the time and all the other subsequent owners were obliged to tolerate their presence on the property*”.
- 5.1.46. In this specific case of Majakaneng, the pipelines were laid by Lonmin Platinum Mine around 1995, however no servitude was registered at that time. The Complainant and other residents of the village knew about this but did not take any action against the Mine back in 1995 in order to get a servitude registered. It follows therefore that they have tolerated the presence of the pipelines for over 26 years and did not require that the mine should register a servitude. The claim for a servitude should not be enforceable against the Department whose role was the refurbishment of the already existing infrastructure that had been established by Lonmin Platinum Mine many years ago.
- 5.1.47. The Biloane family as co-owners of the land, allowed people to occupy that land until a huge settlement in the form of Majakaneng village was formed. In terms of Section 27 of the Constitution, the state has an obligation to provide the residents of Majakaneng Village with water and other basic services. By allowing people to occupy their land without evicting them, it means the land owners allowed themselves to be deprived the use of that portion of the farm which is now occupied by the village residents.
- 5.1.48. At paragraph 24 of the Rand Water Board v Big Cedar Trading judgement, the court stated the following: “*coercive powers to enter land, and even to deprive owners of the use of land, for public purposes is a typical governmental power that is provided for in democracies such as ours precisely in order to further public interest*”.

- 5.1.49. It is therefore concluded from this court judgment that democratic governments such as ours, have the power to enter private land in order to carry out water projects in the public interest. In the specific complaint, the Department did not deprive the Complainant of the usage of the land. The Department carried out its work within the streets of the Village and inside the specific individual yards. The area where the project was actually carried out, was no longer available to the Complainant as it was now occupied by the residents.
- 5.1.50. In this case, evidence shows that the project at Majakaneng Village was not started by the Department but by Lonmin Platinum Mine using Bigen Africa Services as the construction company several years ago.

Conclusion

- 5.1.51. The available evidence indicates that the farm on which this water project was carried out is not solely owned by the Biloane-family. According to records from the Deeds office, portion 4 of the farm Boschfontein 458 JQ is co-owned by 112 people including the Biloane family in an undivided share. Therefore the Biloane family does not have the exclusive right or sole ownership of the property.
- 5.1.52. Further, the Biloane family allowed people to settle on the land until a huge village was formed. By allowing people to occupy that piece of land, the Biloane family and others allowed themselves to be deprived of the sole usage of that portion of land which is occupied by the community as it now belongs to the Community. The land can no longer be regarded as private land as it is now occupied by the village which is governed by the Municipality through Ward Councilors. Furthermore, the project itself was confined to the streets of the village and did not require the registration of a servitude as the pipes did not pass through any private land.

- 5.1.53. It is not disputed that Lonmin Platinum Mine constructed the Bulk Water Project in or around 1995. This was also confirmed by Mr Ngozo of Bigen Africa - which is the company that was contracted by the mine to construct the project. If a servitude was to be registered, it should have been done by the mine back then. The Department simply worked on an already existing project.
- 5.1.54. Based on the strength of the evidence discussed above, the Public Protector is persuaded to conclude that the Department had no obligation to register a servitude at Majakaneng Village.

5.2 Whether the Department was obliged to compensate the Biloane family regarding the water project constructed at Majakaneng Village.

Common cause issues

- 5.2.1. It is common cause that during 1995, Lonmin Platinum mine brought bulk water supply to Majakaneng village through the construction of an underground pipeline, the installation of communal taps as well as the building of a reservoir.
- 5.2.2. It is not disputed that the mine did not register any servitude in respect of the said project and further that the Biloane family never claimed any compensation from the mine.
- 5.2.3. It is further common cause that during 2014, the Department of Water and Sanitation at the request of the North West Provincial Government, undertook a refurbishment water project at Majakaneng village.

5.2.4. It is further common cause that the Department also did not register any servitude in respect the property and furthermore that no compensation was paid to the Biloane family.

Issues in dispute

5.2.5. The issue in dispute is whether the Department was obliged to compensate the Biloane family for the water project that was constructed at Majakaneng village.

5.2.6. From the submission that was made to the Public Protector by Mr Ronaldo du Toit during a meeting held in January 2020 as already discussed above, the Department found an existing water project which was started by Lonmin Platinum Mine around 1995. The mine laid the pipeline and also built the reservoir at Majakaneng village.

5.2.7. The Department only came into play during 2014 and replaced the old pipes that were installed by the mine, drilled five boreholes and installed the water taps inside the yards. The Department did not start a new project at Majakaneng. It worked on a project which already existed.

5.2.8. The Complainant did not present any evidence to the Public Protector which indicates that prior to the involvement by the Department, they were in control of the land where they reside. As such it cannot be asserted that they have been prejudiced by the conduct of the Department, to the contrary, the provision of water is only to the benefit of all residents including the Complainant.

- 5.2.9. The Complainant, and other co-owners of the farm, have allowed people to settle on the land. The Biloane family, by allowing a residential settlement to be established on their land have de facto lost control of the land. Evidence obtained during the Investigation, with particular reference from the Ward Councillors, indicate that the Biloane family does not have the authority to allocate stands to new residents or to evict anyone from the land. The control and management of the area is under the authority of the Municipality through ward councillors in consultation with the Modisakeng family, who are the co-owners as they appear on the list by the Deeds office.
- 5.2.10. Further, the evidence presented before the Public Protector indicates that the Biloane family are not the sole owners of the farm on which Majakaneng village was built. The farm is co-owned by 112 different people including the Biloanes in a single undivided share. Therefore the Biloane family does not have an of exclusive right to ownership of the farm on which Majakaneng village was built.
- 5.2.11. The water project by the Department was carried out in order to further the interests of the public by ensuring that the community of Majakaneng receives water as per their Constitutional rights.

Legislative requirements

- 5.2.12. Section 27 of the Constitution provides that everyone has the right of access to water and that the state must take all reasonable steps to ensure that this right is achieved. This means that the State through the Department has a constitutional obligation to ensure the right as contained in Section 27 is fulfilled.

5.2.13. Section 195 of the Constitution provides that public administration in every sphere of government must be underpinned by amongst others that, the following the democratic values and principles-

(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) Efficient, economic and effective use of resources must be promoted.*
 - (c) Public administration must be development-oriented.*
 - (d) Services must be provided impartially, fairly, equitably and without bias.*
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
 - (f) Public administration must be accountable.*
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*
- (2) The above principles apply to —*
- (a) administration in every sphere of government;*
 - (b) organs of state; and*
 - (c) public enterprises.*

5.2.14. The Public Finance Management Act, 1999 [Act No. 1 of 1999] (the PFMA, 1999), is the key instrument regulating financial management in the national government and provincial governments; to ensure that all

revenue, expenditure, assets and liabilities are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management; and to provide for matters connected therewith.

- 5.2.15. Irregular expenditure is defined in section 1 of the PFMA, 1999 “*as expenditure, other than unauthorized expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation*”.
- 5.2.16. Section 129(3) of the National Water Act provides as follows: *a person acting under subsection (2) must pay compensation in an agreed amount or an amount determined by the court*. The meaning of section 126 and 129 (1) of the National Water Act is to the effect that private land may be entered if it is in the public interest and that compensation should be paid to the land owner.
- 5.2.17. Payment of compensation is not automatic. It depends on the circumstances of each and every case. In terms of Section 130 of the National Water Act, which deals with the Powers of the High Court regarding servitudes, it provides that the High Court may award compensation or refuse compensation.
- 5.2.18. In the case of *Eghard Rubert Schutte v Five Lakes Farm (pty) ltd*, case no 18104/2014 held in the High Court of South Africa (Eastern Circuit Court-George), the applicant Mr Schutte applied to the court for the registration of a servitude over the property of Five Lakes Farm in terms of section 127 of the National Water Act so as to direct the flow of water from Duiwe river passing through the properties of Five Lakes. Five Lakes Farm opposed the application and demanded that compensation should be paid.
- 5.2.19. Mr Schutte in his application alleged that when he bought the property at an auction in 2002, there was already an existing pipeline which took water from the Duiwe River to his property passing through the property

of Five Lakes. The court ordered that the servitude be registered but no compensation should be paid to the Respondent.

5.2.20. In this specific case, the evidence shows that in 1995 that Lonmin Mine undertook a water supply project in Majakeng village. There is however no indication that the Complainant for over 20 years (or any of other owners of the farm) ever claimed any servitude or compensation from Lonmin Platinum Mine for the said water project as well as for the infrastructure, in particular the reservoir and the underground pipeline.

5.2.21. In the case of *Rand Water Board v Big Cedar Trading 22 (Pty) Ltd, Case no 1035/15 SCA*, Big Cedar had brought a property upon which there was an already existing pipeline, even though a servitude had not been registered in respect of the pipeline. The Supreme Court of Appeal ruled that since the pipeline had been there for over 40 years, it means the respondents have tolerated its existence and were not entitled to any compensation.

6. **Conclusion**

6.1. Evidence before the Public Protector clearly shows that the water project at Majakaneng village was started by the Lonmin Platinum mine in 1995. The Biloane family have not placed any evidence before the Public Protector to show that the continued existence of the project, prejudices them and thus outweighs public interest.

6.2. The evidence before the Public Protector indicates that the Biloane family and other co-owners have allowed a huge village to be established on their land without taking any legal action to remove them. The Biloane family have lost control of the day-to-day administration of the village. The administration of the village is conducted by the Madibeng Local Municipality through the ward councillors.

6.3. Evidence placed before the Public Protector further shows that the Biolane family had, for over 20 years tolerated the existence of the water

infrastructure after it was established by Lonmin Platinum Mine. Furthermore, during that period, they never approached the mine to seek either registration of a servitude or compensation.

7. Reasons for closure

- 7.1 Evidence before the Public Protector shows that the Biloane family are not the sole owners of the land on which the water project was constructed. Portion 4 of Boschfontein 458 JQ is co-owned by 112 people in an undivided share.
- 7.2 The Water Project at Majakaneng was constructed by Lonmin Mine around 1995. The Department only became involved in 2014 when it refurbished the old existing infrastructure. Furthermore the project by the Department was a reticulation project which did not require the registration of a servitude.
- 7.3 The project was carried out within the confined streets of the village. The Complainants and other co-owners allowed people to settle on their land. Accordingly they lost ownership of that piece of land which is now occupied by the village residents. The Complainants have no control of the day to day administration of the village.
- 7.4 The project was constructed in the interest of the Public at large. The Complainants did not place any evidence before the Public Protector which shows that the continued existence of the project prejudiced them in any way.



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

DATE: 26/10/2021

*Assisted by Mr Sechele Keebine: Provincial Representative: North West
Provincial Office, Mr Kleinboo Matsetela: Senior Investigator, Rustenburg*