

**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 ON A SYSTEMIC INVESTIGATION ON STRENGTHENING RELATIONS
BETWEEN TRADITIONAL LEADERSHIP AND LOCAL GOVERNMENT FOR QUALITY
SERVICE DELIVERY AT GRASSROOTS LEVEL**

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Executive Summary

- (i) This is my report 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).
- (ii) The report relates to a systemic investigation on strengthening relations between traditional leadership and local government for quality service delivery at grassroots level.
- (iii) In the main, this is an own initiative systemic investigation by my office emanating from the public hearings I conducted throughout South Africa during the National Stakeholder Dialogue Roadshow in 2017. It was observed during the public hearings that the common issue raised throughout the discussions was the dissatisfaction with service delivery to the people of South Africa by the government.
- (iv) It was gathered that one of the contributing factors which hampered service delivery was the apparent **strained relationship between traditional authorities and local government**. In order to address the root causes of these complaints, I decided to embark on an own initiative systemic investigation in response to complaints relating to issues of common interest between the traditional leadership institutions and local government in respect of service delivery and good governance at the local government level.
- (v) Subsequently, I held public hearings of stakeholders across the country on 24 and 25 October 2017. They were afforded an opportunity to interact with me, with a view of providing a platform to voice matters which are of concern.
- (vi) The main issues raised during the hearings were the following:

(a) NATIONAL HOUSE OF TRADITIONAL LEADERS

(aa) There are no guidelines on the implementation of section 81 of the Municipal Structures Act 117 of 1998 (MSA) in relation to the role of traditional leaders in municipal councils. Section 81 provides for the participation of traditional leaders and states the following:

- *Subsection 1 states that: Traditional authorities that traditionally observe a system of customary law in the area of a municipality, may participate through their leaders, identified in terms of subsection (2), in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council.*
- *Subsection 2 states that: (a) The MEC for local government in a province, in accordance with Schedule 6 and by notice in the Provincial Gazette, must identify the traditional leaders who in terms of subsection (1) may participate in the proceedings of a municipal council; (b) The number of traditional leaders that may participate in the proceedings of a municipal council may not exceed 20 per cent of the total number of councillors in that council, but if the council has fewer than 10 councillors, only one traditional leader may so participate; (c) If the number of traditional leaders identified in a municipality's area of jurisdiction, exceeds 20 per cent of the total number of councillors the MEC for local government in the province may determine a system for the rotation of those traditional leaders.*
- *Subsection 3 states that: Before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter.*
- *Subsection 4 states that: The MEC for local government in a province, after consulting the provincial House of Traditional Leaders, may by notice in the Provincial Gazette- (a) regulate the participation of traditional leaders in the proceedings of a municipal council; and (b) prescribe a role for traditional leaders in the affairs of a municipality.*
- *Subsection 5 states that: (a) When participating in the proceedings of a municipal council a traditional leader is subject to the appropriate provisions of the Code of Conduct set out in Schedule 1 of the Local Government: Municipal Systems Act, 2000; (b) (i) A traditional leader who participates in the proceedings of a municipal council is entitled to the payment of out of pocket expenses in respect of such*

participation. (ii) A municipal council must determine the criteria for, and calculation of, the out of pocket expenses referred to in subparagraph (i). (iii) Out of pocket expenses referred to in subparagraph (i) must be paid from the budget of the municipality in question.

- (bb) There is no allocation of land to the community and there is implementation of service delivery by the municipalities without consulting traditional leaders; and
- (cc) There is non-recognition of traditional leaders by the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

(b) BAROLONG BOO SELEKA TRADITIONAL COUNCIL FROM THE FREE STATE PROVINCE

- (aa) There is failure to comply with the Integrated Development Plan (IDP), which led to lack of engagement between the Free State Traditional Leaders and Maluti a Phofung Local Municipality, Phumelela Local Municipality and Mangaung Metropolitan Municipality;
- (bb) There is allocation of land by the Mangaung Metropolitan Municipality without consulting the Traditional Council;
- (cc) There is failure by the Mangaung Metropolitan Municipality to provide progress relating to the implementation of section 81 of the MSA;
- (dd) There is failure by the Mangaung Metropolitan Municipality to implement the informal land tenure of communities that falls within the area of jurisdiction of the Barolong Boo Seleka Traditional Council; and
- (ee) There is an undue delay to finalise and issue an outcome relating to Toolo Commission.

(c) EASTERN CAPE HOUSE OF TRADITIONAL LEADERS

- (aa) There is failure by the Eastern Cape Provincial Government (ECPG) to implement section 81 of the MSA and Chapter 12 of the Constitution, Act 106 of 1996 (Constitution);
- (bb) There is failure by the ECPG to provide benefits such as monthly allowance, car allowance and other benefits issued to the Eastern Cape traditional leaders to enable them to perform their duties, whereas Municipal Councillors and Mayors are entitled to such;
- (cc) There is failure by the ECPG to allocate chambers for the Eastern Cape traditional leaders to enable them to fulfil their mandate effectively; and
- (dd) There is no clarity in the MSA in relation to the role of the Eastern Cape traditional leaders in municipal structures.

(d) KWAZULU NATAL TRADITIONAL LEADERS

- (aa) There is failure by the KwaZulu Natal Department of Cooperative Governance and Traditional Affairs to provide traditional leaders with tools of trade;
- (bb) There is failure by the KwaZulu Natal Provincial Government (KZNPG) to provide funds for the tribal court to refurbish its premises;
- (cc) The land was taken from the traditional leaders and placed under the authority of the Communal Property Association (CPA);
- (dd) Traditional leaders are not recognised in municipal structures; and

(ee) There is failure by the KZNPG to remunerate traditional leaders for attending municipal activities.

(e) MPUMALANGA PROVINCE

(aa) There is an undue delay by the Mpumalanga Provincial Government (MPG) to address issues relating to the challenges of section 81 of the MSA;

(bb) There are no voting rights for traditional leaders at the Nkangala District Municipality (NDM); and

(cc) There is lack of consultation by the NDM with the traditional leaders in relation to implementation of service delivery issues.

(f) NORTHERN CAPE PROVINCE

(aa) There are no guidelines on the implementation of section 81 of the MSA in relation to the role of traditional leaders in municipal councils.

(g) NORTH WEST PROVINCE

(aa) There is no clarity in the Traditional Leadership and Governance Framework Act 41 of 2003 (the TLGFA) and the Constitution relating to the mandate and roles of traditional leaders, including lack of cooperation between the traditional leaders and municipalities;

(bb) There is an undue delay by the municipalities and the North West Provincial Government (NWPG) to resolve issues relating to spatial planning since 1996;

(cc) Traditional leaders are not recognised within municipal structures; and

(dd) There is failure by the CPA to recognise traditional leaders.

(h) CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA

(aa) There is no provision of voting rights for traditional leaders in terms of the MSA;

(bb) Traditional leaders are not empowered with the authority to implement basic services to communities; and

(cc) There is no proper communication channels between the traditional leaders and municipalities.

(vii) **Based on an analysis of the allegation, I identified the following issues to inform and focus the investigation and to determine the merits of the above issues raised in paragraph vi:**

(a) Whether the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA;

(b) Whether the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA;

(c) Whether the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA;

(d) Whether the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in

- proceedings of a municipal council and prescribes their role in the affairs of a municipality;
- (e) Whether the Department failed to provide traditional leaders and councils with information on their funding, resourcing and remuneration; and
 - (f) The main complaints raised during the public hearings conducted by the Public Protector on 24 and 25 October 2017.
- (viii) A formal investigation was conducted through public hearings with the traditional leaders and the information received from various provinces as per the response to the enquiry made through the National Department of Traditional Affairs (the Department), as well as the analysis and application of all relevant laws, policies and related prescripts.
- (ix) I issued a notice dated 16 September 2020 in terms of section 7(9)(a) of the Public Protector Act to the Members of the Executive Council of all nine (9) Provinces, the Director General (DG) of the National Department of Traditional Affairs (the Department) and all the Heads of the nine (9) Provincial Departments of Cooperative Governance and Traditional Affairs advising them of my intended findings and affording them an opportunity to provide me with further evidence. A response was only received from the DG of the Department and all the Heads of the Provincial Departments of Cooperative Governance and Traditional Affairs failed to respond within the prescribed timeframe. In his response, the DG stated that in terms of the National Department's mandate and functions, the responsibilities for the gaps raised in my notice do not rest with it, but with the relevant Provincial Departments.
- (x) Key laws and policies taken into account to determine if there had been strained relationship between traditional authorities and local government which hampered service delivery and good governance at the local government level. Those are the following:

- (a) The Constitution;
 - (b) Intergovernmental Relations Framework Act 13 of 2005 (IRFA);
 - (c) Traditional Leadership Governance Framework Act 41 of 2003 ; and
 - (d) The Public Service Act; 1994.
- (xi) Having considered the information uncovered during the investigation against the relevant regulatory framework, the systemic investigations as against the concomitant responses from the Department, I make the following findings:
- (a) **Regarding whether the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA:**
 - (aa) The issue that the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA is not substantiated. My investigation revealed that it is in fact the Provincial Departments which failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA.
 - (bb) My investigation revealed that other than the Free State and Mpumalanga Departments which demonstrated establishment of partnerships, all other Provinces did not establish such partnerships.
 - (cc) Failure by the Provincial Departments to promote partnerships between municipalities and councils is in violation section 5 of the TLGFA and section 4 of IRFA. Section 5 of the TLGFA provides for the partnerships between municipalities and traditional councils. It states the following:

“

 - *Subsection 1 states that: The national government and all provincial governments must promote partnerships between municipalities and traditional councils through legislative or other measures;*

”

- *Subsection 2 states that: Any partnership between a municipality and a traditional council must- (a) be based on the principles of mutual respect and recognition of the status and roles of the respective parties; and (b) be guided by and based on the principles of co-operative governance; and*
 - *Subsection 3 states that: A traditional council may enter into a service delivery agreement with a municipality in accordance with the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and any other applicable legislation.”*
- (dd) The conduct of the Provincial Departments in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- (b) Regarding whether the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA:**
- (aa) The issue that the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA is not substantiated. My investigation revealed that it is in fact the Provincial Departments which failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA.
- (bb) My investigation revealed that there is lack of service delivery agreements between municipalities and traditional councils. Failure to conclude such agreements could have contributed to complaints of poor service delivery or lack thereof raised during my public hearings. A traditional council fully capacitated by the Department in terms of section 6 would be able to fulfil its functions, including a section 5(4) TLGFA function.

- (cc) The conduct of the Provincial Departments in this regard was in violation of section 6 of the TLGFA.
- (dd) The conduct of the Provincial Departments also amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- (c) Regarding whether the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA:**
 - (aa) The issue that the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA is not substantiated. My findings are that it is the Provincial Departments who failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA.
 - (bb) My investigation revealed that only KwaZulu Natal, Eastern Cape and Mpumalanga Provincial Departments provided information to the traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA. The North West, Free State, Northern Cape and Limpopo Provincial Departments failed to comply with section 20 of the TLGFA.
 - (cc) The conduct of the Provincial Departments is partially in violation of section 20 of the TLGFA.
 - (dd) The conduct of some Provincial Departments in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

- (d) Regarding whether the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in proceedings of a municipal council and prescribes their role in the affairs of a municipality:**
- (aa) The issue that the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in proceedings of a municipal council and prescribes their role in the affairs of a municipality is not substantiated.
- (bb) The Department managed to provide documents indicating that all the Provinces, except the Northern Cape Province, issued Provincial Gazettes regulating participation of traditional leaders and councils in proceedings of a municipal council and their role in the affairs of a municipality.
- (cc) The Department's conduct in this regard does not amount to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- (e) Regarding whether the Department failed to provide information on funding, resourcing and remuneration of various Traditional Leaders and Traditional Councils:**
- (aa) The issue that the Department failed to provide traditional leaders and councils with information on their funding, resourcing and remuneration is not substantiated.
- (bb) The Department provided traditional leaders and councils with information related to their funding, resourcing and remuneration, except for the Northern Cape and the North West Provinces.

- (cc) The Department's conduct in this regard does not amount to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution. However the Department should ensure and monitor full compliance by all the Provincial Departments.
- (f) Regarding the main complaints raised during the public hearings conducted by the Public Protector on 24 and 25 October 2017:**
- (aa) The allegations made by the Provincial Traditional Leaders during the hearings conducted by the Public Protector on 24 and 25 October 2017 are substantiated in certain provinces.
- (bb) All the Provinces, except for the Mpumalanga Province, responded to and addressed all the allegations made by their Provincial Traditional Leaders as stated in paragraph 2 above. The Mpumalanga Province did not respond to the complaints raised by Traditional Leaders during the public hearings.
- (cc) The Eastern Cape Provincial Department stated that it did not fail to implement section 81 of the MSA as 259 Traditional Leaders participate in 26 Municipal Councils as determined in the Act in question. It further stated that all members of the LHOTL are paid sitting allowances, Chairpersons have been given cars, laptops and reimbursed for all work related travelling.
- (dd) The Free State Provincial Department stated that it is only in two Municipal Councils of Maluti a Phofung and the Mangaung Metropolitan Municipality respectively where Traditional Councils are participating in line with the provisions of section 81 of the MSA. It also stated that as far as their records indicate, the Mangaung Metropolitan Municipality is consistently involving Barolong boo Seleka Traditional Council in their Council affairs and meetings,

except for the outstanding land dispute that is currently receiving attention of the DRDLR.

- (ee) The KwaZulu Natal Provincial Department stated that it does provide tools of trade, namely, cell phones to all members of the Executive Committees of Provincial houses, Chairpersons and deputies of local houses of traditional leaders; motor vehicles, plus petrol cards, to the Chairperson and Deputy of the Provincial House of Traditional Leaders. In respect of traditional leaders participating in municipal councils, some municipalities provide them with laptops, data cards, tablets, allowances for data bundles and iPads; and the Department provides traditional leaders with fully-furnished offices.
- (ff) The Northern Cape Provincial Department confirmed that the draft section 81 regulations are in place in the JTG District Municipality and that it had circulated the same draft regulations to Ga-Segonyana and Joe Morolong Local Municipalities. It also stated that Workshops on participation of traditional leaders in municipalities on their roles in terms of section 8, including “Guidelines on the Participation of Traditional Leaders in Municipal Integrated Development Plans” were conducted to both traditional leaders, Mayors and IDP managers.
- (gg) The North West Provincial Department stated that section 81 of the MSA, 1998, as amended, read with Schedule 6, is complied with. Subsequent to local government elections, the MEC, together with the North West House of Traditional Leaders, identified senior traditional leaders who were to participate in the activities of their respective municipalities. Generally, the relations between municipalities and Dikgosi in the province are cordial and they are playing their part in the activities of municipalities.
- (hh) The conduct of the Provincial Departments does not amount to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution. However the

Department should ensure and monitor full compliance by all the Provincial Departments.

- (xii) **My overall concern is that failure to manage and improve the working relationship between the Traditional leadership and local government would have a huge impact on the quality of services such as provision of water, housing, education and health provided to the most vulnerable communities at grassroots level.**
- (xiii) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, with a view to remedying the improper prejudice and maladministration referred to in this report, is the following:
- (aa) The MECs of Cooperative Governance and Traditional Affairs of the Eastern Cape, Free State, KwaZulu Natal, Limpopo, Mpumalanga, Northern Cape and North West Provincial Governments, supported by the DG of the Department, must within ninety (90) days from the date of receipt of this Report, table it at their respective Provincial Executive Council meetings to discuss, amongst others, its findings and implementation of the remedial action;
- (bb) The Heads of Departments of Cooperative Governance and Traditional Affairs in the Eastern Cape, Free State, KwaZulu Natal, Limpopo, Mpumalanga, Northern Cape and North West Provinces must:
- (i) Within ninety (90) days of receipt of this Report, put in measures in place to promote partnerships between municipalities and traditional councils in terms of the TLGFA and IRFA;
- (ii) Within ninety (90) days of receipt of this Report, put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into

service delivery agreements with municipalities in accordance with the TLGFA;
and

- (iii) Supported by the DG of the Department, within ninety (90) days of receipt of this Report, provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA.

REPORT ON A SYSTEMIC INVESTIGATION ON STRENGTHENING RELATIONS BETWEEN TRADITIONAL LEADERSHIP AND LOCAL GOVERNMENT FOR QUALITY SERVICE DELIVERY AT GRASSROOTS LEVEL

1. INTRODUCTION

- 1.1 This is my report, as 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 of the Public Protector Act to the following people to note the outcome of my investigation and implement the remedial action:
 - 1.2.1 The Minister of Cooperative Governance and Traditional Affairs, Dr Nkosazana Dlamini-Zuma;
 - 1.2.2 The Deputy Minister of Traditional Affairs, Mr Obed Bapela;
 - 1.2.3 The Director General (DG) of the Department of Cooperative Governance and Traditional Affairs, Ms Avril Williamson;
 - 1.2.4 The Members of the Executive Councils (MECs) of all the nine (9) Provincial Departments of Cooperative Governance and Traditional Affairs;
 - 1.2.5 The Heads of all nine (9) Provincial Departments of Cooperative Governance and Traditional Affairs;
 - 1.2.6 The Chairperson of the National House of Traditional Leaders; and
 - 1.2.7 The Chairpersons of all Provincial Houses of Traditional Leaders.

1.3 This report relates to a systemic investigation on strengthening relations between traditional leadership and local government for quality service delivery at grassroots level.

2. THE COMPLAINT

2.1 This is an own initiative systemic investigation by my office emanating from the following:

2.1.1 I conducted public hearings throughout South Africa during the National Stakeholder Dialogue Roadshow in 2017. It was observed during the public hearings that the common issue raised throughout the discussions was the dissatisfaction with service delivery to the people of South Africa by the government;

2.1.2 It was gathered that one of the contributing factors which hampered service delivery was the apparent strained relationship between traditional leadership and local government. In order to address the root causes of these complaints, I decided to embark on an own initiative systemic investigation in response to complaints relating to issues of common interest between the traditional leadership institutions and local government in respect of service delivery and good governance at the local government level; and

2.1.3 Subsequently, I held public hearings of stakeholders across the country on 24 and 25 October 2017. They were afforded an opportunity to interact with me, with a view of providing a platform to voice matters which are of concern.

2.2 The main issues raised during the hearings were the following:

2.2.1 NATIONAL HOUSE OF TRADITIONAL LEADERS

- 2.2.1.1 There are no guidelines on the implementation of section 81 of the Municipal Structures Act 117 of 1998 (MSA) in relation to the role of traditional leaders in municipal councils;
- 2.2.1.2 There is no allocation of land to the community and there is implementation of service delivery by the municipalities without consulting traditional leaders; and
- 2.2.1.3 There is non-recognition of traditional leaders by the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

2.2.2 BAROLONG BOO SELEKA TRADITIONAL COUNCIL FROM THE FREE STATE PROVINCE

- 2.2.2.1 There is failure to comply with the Integrated Development Plan (IDP), which led to lack of engagement between the Free State Traditional Leaders and Maluti a Phofung Local Municipality, Phumelela Local Municipality and Mangaung Metropolitan Municipality;
- 2.2.2.2 There is allocation of land by the Mangaung Metropolitan Municipality without consulting the Traditional Council;
- 2.2.2.3 There is failure by the Mangaung Metropolitan Municipality to provide progress relating to the implementation of section 81 of the MSA;
- 2.2.2.4 There is failure by the Mangaung Metropolitan Municipality to implement the informal land tenure of communities that falls within the area of jurisdiction of the Barolong Boo Seleka Traditional Council; and

2.2.2.5 There is an undue delay to finalise and issue an outcome relating to Toolo Commission.

2.2.3 EASTERN CAPE HOUSE OF TRADITIONAL LEADERS

2.2.3.1 There is failure by the Eastern Cape Provincial Government (ECPG) to implement section 81 of the MSA and Chapter 12 of the Constitution;

2.2.3.2 There is failure by the ECPG to provide benefits such as monthly allowance, car allowance and other benefits issued to the Eastern Cape traditional leaders to enable them to perform their duties, whereas municipal councillors and Mayors are entitled to such;

2.2.3.3 There is failure by the ECPG to allocate chambers for the Eastern Cape traditional leaders to enable them to fulfil their mandate effectively; and

2.2.3.4 There is no clarity in the MSA in relation to the role of the Eastern Cape traditional leaders in municipal structures.

2.2.4 KWAZULU NATAL TRADITIONAL LEADERS

2.2.4.1 There is failure by the KwaZulu Natal Department of Cooperative Governance and Traditional Affairs to provide traditional leaders with tools of trade;

2.2.4.2 There is failure by the KwaZulu Natal Provincial Government (KZNPG) to provide funds for the tribal court to refurbish its premises;

2.2.4.3 The land was taken from the traditional leaders and placed under the authority of the Communal Property Association (CPA);

2.2.4.4 Traditional leaders are not recognised in municipal structures; and

2.2.4.5 There is failure by the KZNPG to remunerate traditional leaders for attending municipal activities.

2.2.5 MPUMALANGA PROVINCE

2.2.5.1 There is an undue delay by the Mpumalanga Provincial Government (MPG) to address issues relating to the challenges of section 81 of the MSA;

2.2.5.2 There are no voting rights for traditional leaders at the Nkangala District Municipality (NDM); and

2.2.5.3 There is lack of consultation by the NDM with the traditional leaders in relation to implementation of service delivery issues.

2.2.6 NORTHERN CAPE PROVINCE

2.2.6.1 There are no guidelines on the implementation of section 81 of the MSA in relation to the role of traditional leaders in municipal councils.

2.2.7 NORTH WEST PROVINCE

2.2.7.1 There is no clarity in the Traditional Leadership and Governance Framework Act 41 of 2003 (the TLGFA) and the Constitution relating to the mandate and roles of traditional leaders, including lack of cooperation between the traditional leaders and municipalities;

2.2.7.2 There is an undue delay by the municipalities and the North West Provincial Government (NWPG) to resolve issues relating to spatial planning since 1996;

2.2.7.3 Traditional leaders are not recognised within municipal structures; and

2.2.7.4 There is failure by the CPA to recognise traditional leaders.

2.2.8 CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA

2.2.8.1 There is no provision of voting rights for traditional leaders in terms of the MSA;

2.2.8.2 Traditional leaders are not empowered with the authority to implement basic services to communities; and

2.2.8.3 There is no proper communication channels between the traditional leaders and municipalities.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

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 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) directs 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 In the Constitutional Court, 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* (CCT143/15; CCT/15) [2016] ZACC11; 2016 (5) BCLR 618 (CC); 2016 (3) SA580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the Public Protector:
- 3.5.1 The remedial action taken by the Public Protector has a binding effect. *“When remedial action is binding, compliance is not optional, whatever the 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.”* (para 73)
- 3.6 Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.6.1 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);
- 3.6.2 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 the effect, if it is the best attempt at curing the root cause of the complaint** (para 68);

- 3.6.3 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 of their **nature, context and language**, to determine what course to follow (para 69);
- 3.6.4 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 effects it has on the person, body or institution it addressed to (para 70);
- 3.6.5 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);
- 3.6.6 Implicit in the words “*take action*” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measures. And “*action*” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that **she necessarily 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(c));
- 3.6.7 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (para 71(d)); and
- 3.6.8 “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 (paragraph 71(e)).
- 3.7 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:

- 3.7.1 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);
- 3.7.2 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);
- 3.7.3 There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);
- 3.7.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):
- (a) Conduct and investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 3.8 The Public Protector is constitutionally empowered to take remedial action on the basis of preliminary findings or prima facie findings (para 104);
- 3.9 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);
- 3.10 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector's observations

constitute prima facie findings that point to serious misconduct (paras 107 and 108);

- 3.11 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).
- 3.12 The Department is an organ of state and their 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 and take appropriate remedial action in the matter under investigation.
- 3.13 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.
- 4.1.3 This is an own initiative systemic investigation by my office emanating from the public hearings I conducted throughout South Africa during the National Stakeholder Dialogue Roadshow in 2017. It is in response to complaints relating to issues of common interest between the traditional leadership institutions and

local government in respect of service delivery and good governance at the local government level in line with section 6(5) of the Public Protector Act.

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:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

4.2.1.4 In the event of improper conduct or maladministration what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?

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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on how and to what extent the Department contributed to the apparent strained relationship between traditional authorities and local government which resulted in the hampering of service delivery.

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 Department or an organ of state to prevent maladministration and prejudice. In this case, key reliance was placed on legislation, prescripts and policies that regulate the standard that should have been met by Department to ensure that it acted fairly and responsibly to ensure that the traditional leaders are not improperly prejudiced.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the affected traditional leaders had suffered prejudice, the objective is to place them as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3 **Based on an analysis of the allegations, I identified the following issues to inform and focus this investigation:**

4.3.1 Whether the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA;

4.3.2 Whether the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA;

4.3.3 Whether the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA;

4.3.4 Whether the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in proceedings of a municipal council and prescribes their role in the affairs of a municipality;

4.3.5 Whether the Department failed to provide traditional leaders and councils with information on their funding, resourcing and remuneration; and

4.3.6 The main complaints raised during the public hearings conducted by the Public Protector on 24 and 25 October 2017.

4.4 The Key Sources of Information

4.4.1 Documents

- 4.4.1.1 A copy of a submission of a record proceedings: Public Protector National Good Governance week 2017.
- 4.4.1.2 Copies of the enquiry letters to the Department and supporting documentation dated 12 April and 16 August 2019;
- 4.4.1.3 A copy of the response letter from the Department dated dated 28 November 2019;
- 4.4.1.4 A copy of the response letter and supporting documents dated 01 June 2020, with responses from the Northern Cape, KwaZulu Natal and Free State Provinces;
- 4.4.1.5 A copy of the email from the Department dated 25 June 2020, with responses from the Eastern Cape and North West Provinces; and
- 4.4.1.6 A copy of the email from the Department dated 24 July 2020, with responses from the Limpopo Province.

4.4.2 Interviews and meetings conducted

- 4.4.2.1 Stakeholder engagement with the traditional leaders on 24 and 25 October 2017.

4.4.3 Correspondence sent and received

- 4.4.3.1 Copies of email correspondence between my investigation team and officials of the Department, dated 18 and 19 November 2019, 12 February 2020, 09 and 25 June 2020, and 24 July 2020;
- 4.4.3.2 A copy of section 7(9) notice dated 16 September 2020 and the copies of the emails forwarding the same to the Minister, Deputy Minister, DG, MECs of all nine (9) Provincial Departments of Cooperative Governance and Traditional Affairs and all Heads of the Provincial Departments of Cooperative Governance and Traditional Affairs; and
- 4.4.3.3 A copy of the email and a response letter from the DG dated 02 October 2020 in response to my section 7(9) notice.

4.4.4 Legislation and other prescripts

- 4.4.4.1 The Constitution;
- 4.4.4.2 Intergovernmental Relations Framework Act 13 of 2005 (IRFA);
- 4.4.4.3 Traditional Leadership Governance Framework Act 41 of 2003 (TLGFA); and
- 4.4.4.4 The Public Service Act 103 of 1994 (PSA).

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 Regarding whether the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA:

5.1.1 The issue for my determination is whether the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA.

5.1.2 This issue was raised with the Department through a letter dated 16 August 2019. The Department responded, per the letter dated 28 November 2019, and stated that upon receipt of the enquiry on 20 November 2019, it solicited responses from the relevant Provincial Heads of Departments and that all Provinces, except Mpumalanga, had not responded by end of 2019. The Department further requested an extension until 31 January 2020 for further responses in order to integrate these Provincial responses, but no response was received.

5.1.3 When the Department responded on 28 November 2019, through the letter signed by the DG, it also provided my office, with documents on the intervention it undertook to strengthen the relationship between traditional leadership and local government, consisting of the following:

- a) Approved Partnership Framework and Guidelines;
- b) Approved Guidelines on the Participation of Traditional Leadership in Municipal IDP;
- c) Draft Cooperative Governance Framework for Traditional Leadership in Local Governance;

- d) Approved Quarter Two Report: Three (3) Provinces work-shopped on the Draft Cooperative Governance Framework for Traditional Leadership in Local Governance;
- e) Approved Analysis Report on the Implementation of section 81 of the MSA;
- f) Provincial Gazettes and Notices on the identification and recognition of traditional leaders who may participate in municipal councils' proceedings;
- g) Approved Submission, Implications of the Resolutions of Technical Minmec on the Project – Monitoring the Participation of Traditional Leadership in Municipal IDP Process – An Annual Performance Plan Project;
- h) Approved letters to Provincial Heads of Departments on the Implementation of section 81 of the MSA – Participation of Traditional Leaders in Municipal Councils;
- i) Draft Regulations relating to the Participation of Traditional Leaders in Municipal Councils as contemplated in section 81 of the MSA;
- j) Framework for the Participation of Traditional Leaders in Municipal Councils; and
- k) Letters to the Director-Generals of selected national sector departments on the implementation of and/or compliance with section 20 of the Traditional Leadership and Governance Framework Act 41 of 2003.

5.1.4 On 02 June 2020, a response letter signed by the DG was received from the Department with supporting documents. In the letter, the Department stated that not all the Provinces submitted their inputs, but only supporting documents from the Northern Cape, KwaZulu Natal and Free State Provinces were provided to my investigation team.

5.1.5 However, on 25 June 2020, a response email from Mr Jacob Mashishi of the Department was received with responses from the Eastern Cape, North West and Limpopo Provinces. The responses from the Provinces regarding this issue were the following:

Inputs from the Eastern Cape Province

5.1.5.1 The Eastern Cape Provincial Department stated, through a letter signed by the Acting Head of the Department, Ms P N Roboji, that there are no formal partnerships entered into between District Municipalities and Kingship/Queenship Councils.

Inputs from the Free State Province

5.1.5.2 The Free State Provincial Department is currently implementing the TLGFA and Free State Traditional Leadership and Governance Act of 2009 as repealed in 2016. It has the following partnerships in place:

- i) National Youth Development Agency. The partnership was still in the process of being finalized and signed as at the date of this notice;
- ii) LOTTO–National Partnership which is also to be cascaded to the Province;
- iii) Motsepe Foundation, which is funding Traditional Council programmes annually;
- iv) the South African Social Security Agency (SASSA), which has already concluded a partnership wherein the SASSA uses Traditional Council buildings and halls for payment of social grants; and
- v) Free State Department of Agriculture and Rural Development around commonages, land acquisition, livestock donation and plant production for agriculture inputs.

Inputs from the KwaZulu Natal Province

5.1.5.3 The KwaZulu Natal Provincial Department stated that it had no information to provide in respect of this issue (as stated in paragraph 5.1).

Inputs from the Limpopo Province

5.1.5.4 The Limpopo Provincial Department indicated that the Kingship/ Queenship Council has not been constituted in the Province and therefore no partnership was entered into.

Inputs from the Mpumalanga Province

5.1.5.5 The Mpumalanga Provincial Department reported that there is no partnership entered into between district municipalities and Kingship/Queenship Councils. Nonetheless, it further clarified that it has entered into a Memorandum of Understanding (MoU) with all Traditional Councils regarding Land Administration.

Inputs from the Northern Cape Province

5.1.5.6 The Northern Cape Provincial Department did not provide any information of existence of partnerships established between traditional leadership and municipalities.

Inputs from the North West

5.1.5.7 The North West Provincial Department also did not provide any information of existence of partnerships established between traditional leadership and municipalities.

Response to my section 7(9) notice

5.1.6 On 16 September 2020, I issued a section 7(9) notice to the DG and all the Heads of Departments in affected Provinces, with a view to affording them an opportunity to respond to my provisional findings.

- 5.1.7 The DG responded to my notice as per the letter dated 02 October 2020. The Heads of Departments in all the affected Provinces failed to respond.
- 5.1.8 In his response, the DG indicated that my notice assessed what provinces have or have not been able to do and then concluded that his Department's "*conduct in this regard amounts to maladministration*". He said that he reported on what the Department had done within the parameters of its competence as a national department. He further emphasised that the Provincial Departments referred to in my notice are not accountable to the Department, and neither does the Department have any authority over them. The Provincial Departments have their own Accounting Officers and Executive Authorities as provided for in the PSA and the Public Finance Management Act, 1999. Unfortunately, the Heads of the Departments in the affected Provinces failed to respond.

Application of the relevant law

- 5.1.9 Section 211(1) of the Constitution states that the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. Section 212(1) states that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. Subsection (2) further states that to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law – (a) national and provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council for traditional leaders.
- 5.1.10 It is expected of the Department to recognise the institution, status and role of traditional leadership, according to customary law, and also to establish national legislation that will provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

- 5.1.11 Section 4 of the IRFA states that the object of this Act is to provide, within the principle of co-operative government set out in Chapter 3 of the Constitution, a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including - coherent government; effective provision of services; monitoring implementation of policy and legislation; and realisation of national priorities.
- 5.1.12 It is expected of the Department to comply with the object of the IRFA as stated in section 4 to facilitate co-ordination in the implementation of policy and legislation, including- coherent government; effective provision of services; monitoring implementation of policy and legislation; and realisation of national priorities, between itself and the traditional leadership or councils.
- 5.1.13 The TLGFA provides for the establishment and recognition of traditional councils and provides a statutory framework for leadership positions within the institution of traditional leadership. Section 5(1) provides that national government and all provincial governments must promote partnership between district municipalities and Kingship or Queenship Councils and principal traditional councils through legislative or other measures. Section 5(2) further provides that the national government and all provincial governments must promote partnerships between local municipalities and traditional councils through legislative or other measures.
- 5.1.14 It was expected of the Department to facilitate the establishment and recognition of traditional councils and the leadership positions within the institution of traditional leadership. Furthermore, the Department is obligated, through the Provincial Department, to promote partnership between district municipalities and Kingship or Queenship Councils and principal traditional councils through legislative or other measures, and that it must also promote

partnerships between local municipalities and traditional councils through legislative or other measures.

- 5.1.15 The PSA, as amended by Act 30 2007, regulates the establishment of government departments (national and provincial), the appointment of the heads of the departments, and the functions and roles of the provincial heads of the departments. Section 3A (a) (ii) states that the Premier of a province may, in the province concerned, subject to section 7 (5) to (7) after consultation with the Minister and the Minister of Finance establish or abolish any provincial government component or establish an existing body as a provincial government component, designate such component and the head thereof and designate the Office of the Premier or a provincial department as its principal provincial department or amend any such designation.
- 5.1.16 Section 3A (b) further states that the Premier of a province may, in the province concerned, make determinations regarding the allocation of any function to, or the abolition of any function of, any department or government component in the province concerned or the transfer of any function from such department or component to another department or component in the province or from such office, department or component to anybody established by or under any law of the provincial legislature or from any such body to such office, department or component.
- 5.1.17 Section 7(1) state that the public service established by section 197(1) of the Constitution shall be structured and organised as provided for in this Act. Subsection 3(b) states that, subject to the provisions of paragraphs (c) and (d), a head of department shall be responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of State property, and he or she shall perform the functions that may be prescribed.

- 5.1.18 Further, subsection 3(c) (ii) provides that, in addition to any power or duty entrusted or assigned by or under this Act or any other law to the head of the Office of a Premier, the said head shall, subject to sections 85 (2) (c) and 125 (2) (e) of the Constitution, be responsible for intergovernmental relations on an administrative level between the relevant province and other provinces as well as national departments and national government components and for the intra-governmental co-operation between the relevant Office of the Premier and the various provincial departments and provincial government components, including the co-ordination of their actions and legislation. Subsection 3 (d) also state that the head of the Office of a Premier shall in respect of a provincial department of the relevant province exercise no power or perform no duty which is entrusted or assigned by or under this Act or any other law to the head of the provincial department.
- 5.1.19 The Department of Planning, Monitoring and Evaluation (DPME) Guideline No. 3.1.7 of 31 March 2014 provides a framework on the generic roles and organisational design considerations for the monitoring and evaluation components in provincial government departments. It provides that provincial departments are primarily accountable to their Heads of Departments (HoDs), as their accounting officers, and the Members of the Executive Council (MECs), as the Executing Authorities, for their mandates and performance. The Provincial Legislatures and Executive Councils (EXCOs/Cabinets) provide legislative and executive oversight, respectively. The Offices of Premiers play a critical executive oversight, accountability and coordination role in relation to the implementation of provincial programmes and other service delivery initiatives of government.
- 5.1.20 It is expected of the Provincial Departments of Traditional Affairs to ensure the establishment and recognition of traditional councils and the leadership positions within the institution of traditional leadership. Furthermore, the Provincial Department is obligated to promote partnership between district

municipalities and Kingship or Queenship Councils and principal traditional councils through legislative or other measures, and that it must also promote partnerships between local municipalities and traditional councils through legislative or other measures.

Conclusion

5.1.21 Based on the evidence gathered, it can be concluded that the Department, together with the Provincial Departments, did not promote partnerships between local municipalities and traditional councils. Evidence presented indicated that only the Free State Provincial Department demonstrated the partnerships it has established with several institutions.

5.2 Regarding whether the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA:

5.2.1 The issue for my determination is whether the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA to promote the ideas of sustainable development and service delivery.

5.2.2 The responses from the Provinces regarding this issue were as follows:

Inputs from the Eastern Cape Province

5.2.2.1 The Eastern Cape Provincial Department did not respond to this issue relating to service delivery agreements between traditional councils and municipalities.

Inputs from the Free State Province

5.2.2.2 The Free State Provincial Department stated that other sector departments are involved in traditional councils even though there are no formal service delivery agreements which are regulated by inter-Governmental Relations Framework Act.

Inputs from the KwaZulu Natal Province

5.2.2.3 The KwaZulu Natal Department indicated that it has no information to provide in this respect.

Inputs from the Limpopo Province

5.2.2.4 The Limpopo Provincial Department stated that there are no service delivery agreements between the various traditional councils and the municipalities in accordance with the TLGFA.

Inputs from the Mpumalanga

5.2.2.5 The Mpumalanga Provincial Department reported that there are no service delivery agreements between various traditional councils and municipalities in the Province.

Inputs from the Northern Cape

5.2.2.6 The Northern Cape Provincial Department did not indicate existence of any service delivery agreements between traditional councils and municipalities.

Inputs from the North West

5.2.2.7 The North West Provincial Department also failed to indicate any existing service delivery agreements established between the two institutions.

Response to my section 7(9) notice

5.2.3 As indicated above, I issued a section 7(9) notice to the DG and all the Heads of Departments in Provinces, but the latter failed to respond.

5.2.4 The DG, in response to this issue, indicated in a letter dated 02 October 2020, that his Department has done work in this area, including the provision of enabling guidelines and the workshopping of Provinces as part of supporting and strengthening them. He argued that beyond his Department's role of providing such support, work has to be done at a provincial level where Traditional Councils are located and where their resourcing and staffing are also provided for. Traditional Councils are established and resourced by Provinces, and there is a limit as to how far the National Department can intervene to provide support while still staying within its legislative mandate and resource envelope.

Application of the relevant law

5.2.5 Section 5(4) of the TLGFA provides that a traditional council may enter into a service delivery agreement with a municipality in accordance with the MSA and any other applicable legislation.

5.2.6 Section 6 of the TLGFA further states that the national government and a provincial government may adopt such legislative or any other measures to support and strengthen the capacity of traditional councils to fulfil their functions,

such as entering into service delivery agreements with municipalities to promote “the ideas of sustainable development and service delivery.”¹

5.2.7 Information provided to my office by the Department indicates lack of service delivery agreements between municipalities and traditional councils. Failure to conclude such agreements led to complaints of poor service delivery or lack thereof raised during my public hearings. A traditional council fully capacitated by the Department in terms of section 6 would be able to fulfil its functions, including a section 5(4) function. The Department and Provincial Departments did not provide evidence of putting measures in place to support and strengthen traditional councils to fulfil their functions. It was expected of the Provincial Departments of Traditional Affairs to put measures in place to support and strengthen traditional councils to fulfil their functions and to provide evidence thereof.

Conclusion

5.2.8 Based on the evidence gathered, it can be concluded that the Department, together with the Provincial Departments, did not support and strengthen traditional councils to fulfil their functions in compliance with TLGFA.

5.3 Regarding whether the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA:

5.3.1 The issue for my determination is whether the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA.

¹ Section 4(1)(h) of TLGFA which provides the functions of the Traditional Councils

5.3.2 Section 20 of the TLGFA sets out the guiding principles for allocation of roles and functions of traditional leaders and councils. Subsection 1 provides that national or a provincial government may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of the following:

- a) arts and culture;*
- b) land administration;*
- c) agriculture;*
- d) health;*
- e) welfare;*
- f) the administration of justice;*
- g) safety and security;*
- h) the registration of births, deaths and customary marriages;*
- i) economic development;*
- j) environment;*
- k) tourism;*
- l) disaster management;*
- m) the management of natural resources;*
- n) the dissemination of information relating to government policies and programmes; and*
- o) education.”*

5.3.3 The responses from the Provinces regarding this issue were as follows:

Inputs from the Eastern Cape Province

5.3.3.1 The Eastern Cape Provincial Department stated that it is conducting induction and orientation programme quarterly throughout the Province on the newly appointed Traditional Leaders on the TLGFA as well as other pieces of legislation applicable to Traditional Leaders. Further, stated that, through the Provincial Committee on Traditional Leaders Capacity Building and development in which LHOTL and Provincial House of Traditional Leaders (PHOTL) participate, a comprehensive manual has been developed and is piloted on all newly recognised Traditional Leaders. As at the date of this notice, twenty (20) Traditional Leaders had been trained on Governance and leaders, sixty (60) on Traditional Court Management and the programmes were continuing. PHOTL is

playing an oversight role over LHOTL and Traditional Councils. Local Houses also play an oversight responsibility over Traditional Councils within their jurisdiction.

Inputs from the Free State Province

5.3.3.2 The Free State Provincial Department did not respond to this issue.

Inputs from the KwaZulu Natal Province

5.3.3.3 The KwaZulu Natal Provincial Department indicated that although there is no assignment of roles and functions to traditional leaders in a specific form or with reference to a specific activity, as done in terms of section 20 of the TLGFA, as amended, the MEC elected to promulgate broad roles and functions, which would allow traditional leaders a wide and extensive involvement in the activities of municipalities.

Inputs from the Limpopo

5.3.3.4 The Limpopo Provincial Department stated that no specific roles have been assigned to various traditional leaders and traditional councils in terms of the TLGFA.

Inputs from the Mpumalanga Province

5.3.3.5 The Mpumalanga Provincial Department stated that there exists no formal assigned roles to Traditional Leaders in respect of section 20 of the TLGFA. However, the Traditional Leaders informally participate in the listed roles when requested, for example, when a health crisis arises, they would address the community accordingly.

Inputs from the Northern Cape Province

5.3.3.6 The Northern Cape Provincial Department did not provide any supporting information relating to its role in educating the traditional leaders and councils of their roles in line with section 20 of TLGFA.

Inputs from the North West Province

5.3.3.7 The North West Provincial Department also did not provide any supporting information relating to its role in educating the traditional leaders and councils of their roles in line with section 20 of TLGFA.

Response to my section 7(9) notice

5.3.4 In response to my notice, the DG indicated his Department could not be held liable when Provincial Departments fail to execute their functions because they are not accountable to him.

Application of the relevant law

5.3.5 Section 4 of the IRFA states that the object of this Act is to provide within the principle of co-operative government set out in Chapter 3 of the Constitution a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including- coherent government; effective provision of services; monitoring implementation of policy and legislation; and realisation of national priorities.

5.3.6 It was expected of the Department to realise the object of the IRFA as stated in section 4 to facilitate co-ordination in the implementation of policy and legislation, including- coherent government; effective provision of services; monitoring

implementation of policy and legislation; and realisation of national priorities, between itself and the traditional leadership or councils.

5.3.7 As indicated above, section 20 of the TLGFA enjoins the Provincial Departments to provide different roles for traditional councils or leaders. It was expected of the Provincial Departments of Traditional Affairs to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA.

Conclusion

5.3.8 Based on information provided, it can be concluded that all the Provinces, except the KwaZulu Natal Province, could not provide evidence about their roles in providing information to traditional leaders and councils on their assigned roles in terms of section 20 of the TLFGA.

5.4 Regarding whether the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in proceedings of a municipal council and prescribes their role in the affairs of a municipality:

5.4.1 The issue for my determination is whether the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in proceedings of a municipal council and prescribes their role in the affairs of a municipality.

5.4.2 The responses from the Provinces regarding this issue were as follows:

Inputs from the Eastern Cape Province

5.4.2.1 The Eastern Cape Department provided a copy of Eastern Cape Guidelines for the Participation of Traditional Leaders in Municipal Councils. The Department presented these guidelines to all new members of Municipal Councils including Traditional Leaders serving in these Councils during the induction period which was held in August 2016.

Inputs from the Free State Province

5.4.2.2 The Free State Provincial Department indicated that as at the date of this report, it was in the process of amending the Free State Traditional Leadership and Governance Act of 2009 as repeated in 2016 to accommodate the Khoi and the SAN communities and its leadership. The draft bill was consulted with various traditional communities and it was awaiting final tabling at the National Council of Provinces (NCOP) and the Free State Legislature for adoption and signing.

Inputs from the KwaZulu Natal Province

5.4.2.3 The KwaZulu Natal Provincial Department provided a copy of the Provincial Gazette which regulates the participation of traditional leaders in municipal council proceedings.

Inputs from the Limpopo Province

5.4.2.4 The Limpopo Provincial Department responded by referring to the Gazette (No. 2752 of 26 September 2016) although with no specific roles for traditional leaders. The gazette published the names of Traditional Leaders who must serve in the proceedings of the districts and local municipal councils for a period of five (5) years (2016 – 2021).

Inputs from the Mpumalanga Province

5.4.2.5 The Mpumalanga Provincial Department stated that on 11 November 2016, the Province published the names of the respective Traditional Leaders who may participate in Council meetings in the Provincial Gazette (no. 2748 of 2016). The Province gave inputs and comments on the draft Regulations regarding the participation of Traditional Leaders in terms of section 81 of the MSA.

Inputs from the Northern Cape Province

5.4.2.6 The Northern Cape Provincial Department still did not specifically respond to this issue. However, they only generally responded to the implementation of section 81 of the MSA as an issue that was raised by the Northern Cape Traditional Leaders, as stated in paragraph 5.6.1.18 below and also provided the Draft Regulations on section 81 of the MSA.

Inputs from the North West Province

5.4.2.7 The North West Provincial Department stated that on 26 October 2016, it published a notice with the names of the respective Traditional Leaders who may participate in Council meetings. The responses are as stated in paragraph 5.6.1.19 to paragraph 5.6.1.22 below.

Response to my section 7(9) notice

5. 4.3 In response to my notice, the DG indicated his Department could not be held liable when Provincial Departments fail to execute their functions because they are not accountable to him.

Application of the relevant law

- 5.4.4 Section 4 of the IRFA states that the object of this Act is to provide within the principle of co-operative government set out in Chapter 3 of the Constitution a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including- coherent government; effective provision of services; monitoring implementation of policy and legislation; and realisation of national priorities.
- 5.4.5 It was expected of the Department to realise the object of the IRFA as stated in section 4 to facilitate co-ordination in the implementation of policy and legislation, including- coherent government; effective provision of services; monitoring implementation of policy and legislation; and realisation of national priorities, between itself and the traditional leadership or councils.
- 5.4.6 The TLGFA provides for the establishment and recognition of traditional councils and provides a statutory framework for leadership positions within the institution of traditional leadership. Section 5 provides that national government and all provincial governments must promote partnership between district municipalities and Kingship or Queenship Councils and principal traditional councils through legislative or other measures. Furthermore the national government and all provincial governments must promote partnerships between local municipalities and traditional councils through legislative or other measures.

Conclusion

- 5.4.7 It can be concluded that all the Provinces, except for the Northern Cape Province, provided evidence of publication of Provincial Gazettes which regulate the participation of traditional leaders in the proceedings of a municipal council and prescribe their role in the affairs of a municipality.

5.5 Regarding whether the Department failed to provide traditional leaders and councils with information on their funding, resourcing and remuneration:

5.5.1 The issue for my determination is whether the Department failed to provide traditional leaders and councils with information on their funding, resourcing and remuneration.

5.5.2 The responses from the Provinces regarding this issue are as follows:

Inputs from the Eastern Cape Province

5.5.2.1 The Eastern Cape Provincial Department did not provide any information on this matter, except to indicate that that the determination of salaries and benefits of Traditional Leaders, members of the Provincial House of Traditional Leaders is issued by President annually.

Inputs from the Free State Province

5.5.2.2 The Free State Provincial Department stated that it provided this information to its traditional leadership. All its Traditional Councils are fully funded from the Department's budget in relation to salaries of support staff of Traditional Councils; Security, Principal and Senior Traditional Leaders, their tool of trade and various traditional events as well as the opening of different Houses.

Inputs from the KwaZulu Natal Province

5.5.2.3 The Province indicated that remuneration of traditional leaders for attending Municipal Council proceedings is regulated by section 81(5)(b) of the MSA which provides: (i) that a traditional leader who participates in the proceedings of a municipal council is entitled to the payment of out of pocket expenses in respect of such participation, (ii) a municipal council must determine the criteria for, and calculation of, the out of pocket expenses referred to in subparagraph (i), and (iii)

out of pocket expenses referred to in subparagraph (i) must be paid from the budget of the municipality in question (emphasis).

5.5.2.4 Consistent with the above provisions, all municipalities pay traditional leaders for their out of pocket expenses, from their own budgets. It stated further that given the vast number of traditional leaders in their respective ranks and levels, coupled with and compounded by limited financial resources available to the Provincial Department, it is not feasible to provide tools of trade to each and every traditional leader in the Province. The Provincial Department stated that it does, in fact, budget for the refurbishments of tribal courts.

Inputs from the Limpopo Province

5.5.2.5 The Limpopo Provincial Department stated that it is responsible to provide resources to traditional leaders, including office infrastructure, office furniture, motor vehicles, cell phone gadgets and airtime. It also provides financial assistance towards funerals and inauguration ceremonies for senior traditional leaders. It is also responsible to pay royal allowances for all traditional leaders and also subsidizes salaries to officers appointed by the traditional councils.

Inputs from the Mpumalanga Province

5.5.2.6 The Mpumalanga Provincial Department stated that in accordance with section 10 of the Mpumalanga Traditional Leadership and Governance Act 3 of 2005, it provides the following support to Traditional Councils: Administrative Grant of R150 000.00 annually to cover the various operating costs, such as administrative costs, salaries of staff, office accommodation, stationary and telephone costs; R200 000.00 for holding of annual heritage commemoration day (Ummemo); Paying salary of Senior Traditional Leaders and Headmen/women; procuring vehicles and tractors for Traditional Councils; and Reimbursement of

travelling expenses of Traditional Leaders regarding their attendance of mandatory tasks and functions.

Inputs from the Northern Cape Province

5.5.2.7 The Northern Cape Provincial Department did not specifically respond to this issue.

Inputs from the North West Province

5.5.2.8 The North West Provincial Department also did not specifically respond to this issue.

Response to my section 7(9) notice

5.5.3 In response to my notice, the DG indicated his Department could not be held liable when Provincial Departments fail to execute their functions because they are not accountable to him.

Application of the relevant law

5.5.4 As indicated above, the TLGFA provides for the establishment and recognition of traditional councils and provides a statutory framework for leadership positions within the institution of traditional leadership. Section 6 of the TLGFA provides that national government and a provincial governments may adopt such legislative or other measures as may be necessary to support and strengthen the capacity of traditional councils, principal traditional councils and Kingship or Queenship councils within the province to fulfil their functions.

5.5.5 It was expected of the Department to monitor the compliance by the Provincial Departments that they do adopt such legislative or other measures as may be

necessary to support and strengthen the capacity of traditional councils, principal traditional councils and Kingship or Queenship councils within the province to fulfil their functions.

- 5.5.6 In this instance, the Department was, therefore, expected to monitor the compliance by the Provincial Departments that they do adopt such legislative or other measures as may be necessary to support and strengthen the capacity of traditional councils, principal traditional councils and Kingship or Queenship councils within the province to fulfil their functions in accordance with the TLGFA.

Conclusion

- 5.5.7 Based on the information gathered, it can be concluded that all the Department provided traditional leadership with information related to their funding, resourcing and remuneration, except for the Northern Cape and the North West Provinces.

5.6 Regarding the main complaints raised during the public hearings conducted by the Public Protector on 24 and 25 October 2017:

- 5.6.1 The Provincial Departments responded as follows:

Inputs from the Eastern Cape Province

- 5.6.1.1 With regard to failure by the Eastern Cape Provincial Department to implement section 81 of the MSA and Chapter 12 of the Constitution, it stated that it has not failed to implement section 81 of the MSA as 259 Traditional Leaders participate in 26 Municipal Councils as determined in the Act in question. Further that during the election process of the new municipal term that started during August 2016, the Department issued a Gazette to all Municipalities with names of all Traditional Leaders to participate in the Municipal Councils as per Circular

no. 1 of 2016 dated 28/07/2016. Further also that it is implementing Chapter 12 of the Constitution accordingly in line with Eastern Cape Traditional Leadership and Governance Framework Act 1 of 2017 as well as Guidelines for the Participation of Traditional Leaders in Municipal Councils.

- 5.6.1.2 With regard to its alleged failure to provide benefits such as monthly allowance, car allowance and other benefits issued to Eastern Cape traditional leaders to enable them to perform their duties, whereas Councillors and Mayors are entitled to such, the Eastern Cape Provincial Department stated that on 30 March 2015, it developed Guidelines for the Participation of Traditional Leaders in Municipal Council as per guidelines dated 25 March 2015. Section 16 of the Guidelines determines allocation of tools of trade, benefits and allowances to Traditional Leaders serving in Municipal Councils.
- 5.6.1.3 The guidelines are not limiting municipalities in paying Traditional Leaders specific amounts in line with their legislation/policy guidelines. It presented these guidelines to all new members of the Municipal Councils, including Traditional Leaders serving in these Councils during the induction period held in August 2016. All members of the LHOTL are paid sitting allowances, Chairpersons have been given cars, laptops and reimbursed for all work related travelling.
- 5.6.1.4 With regard to its alleged failure to allocate chambers for the Eastern Cape traditional leaders to enable them to fulfil the mandate effectively, it stated that there are Chambers in the Provincial House of Traditional Leaders where Traditional Leaders are participating as provided for under sub-section (2) of section 81 of the MSA. It is planning to construct two (2) Traditional Councils per financial year and thus far it constructed 24 traditional councils, three (3) under construction and one (1) earmarked for renovations. All six (6) Chairpersons of LHOTL had been allocated offices for performing their duties. For full sitting and committee work, it sources venues externally.

5.6.1.5 With regard to the issue of no clarity in the MSA in relation to the role of the Eastern Cape traditional leaders in municipal structures, the Provincial Department stated that section 8 of the Eastern Cape CoGTA Guidelines for the participation of Traditional Leaders in Municipal Councils clearly states the roles and responsibilities of Traditional Leaders participating in Municipal Councils. These was discussed at length in the induction session held in August 2016.

Inputs from the Free State Province

5.6.1.6 With regard to its alleged failure to comply with the IDP, which led to lack of engagement between the Free State Traditional Leaders and the Maluti a Phofung Local Municipality, Phumelela Local Municipality and Mangaung Metropolitan Municipality, the Provincial Department stated that all Traditional Councils are participating in the two Municipal Councils of Maluti a Phofung and the Mangaung Metropolitan Municipality respectively in line with the provisions of section 81 of the MSA.

5.6.1.7 With regard to allocation of land by the Mangaung Metropolitan Municipality without consulting the Traditional Council, it stated that the Barolong boo Seleka Traditional Council land dispute of Motlatla Village with Mangaung Metro matter was referred to the Department of Rural Development and Land Reform (DRDLR) to mediate after the Court processes to assist with correct classification of boundaries, since they are the ones who issued approval to Mangaung for township establishment.

5.6.1.8 With regard to alleged failure by the Mangaung Metropolitan Municipality to provide progress relating to the implementation of section 81 of the MSA, the Provincial Department stated that as far as their records indicate, Mangaung Metropolitan Municipality is consistently involving Barolong boo Seleka Traditional Council in their Council affairs and meetings, except for the outstanding land dispute that is currently receiving attention of the DRDLR.

- 5.6.1.9 With regard to the alleged failure by the Mangaung Metropolitan Municipality to implement the informal land tenure of communities that fall within the area of jurisdiction of the Barolong Boo Seleka Traditional Council, it stated that this issue is covered paragraph 5.6.1.6 above.
- 5.6.1.10 With regard to the alleged undue delay to finalise and issue an outcome relating to Toolo Commission, it stated that the outcome of the Toolo Commission was officially communicated with all the affected parties by the Provincial Director General on 10 November 2017 and that is when the family of Princess Moipone Moroka rejected the report and vouched to challenge the outcome of the report and stop the possible inauguration of Khosi Kingsley Moroka which was intended to be held in February 2018.

Inputs from the KwaZulu Natal Province

- 5.6.1.11 With regard to its alleged failure to provide traditional leaders with tools of trade, the Provincial Department stated that given the vast number of traditional leaders in their respective ranks and levels, coupled with and compounded by limited financial resources available to the Department, it is not feasible to provide tools of trade to each and every traditional leader in the Province. Since this was raised in the public hearings, it might have been raised by a traditional leader who, factually does not have such tools of trade. However, the fact that he/she/they may not be in possession of such tools does not necessarily mean that the Department does not provide tools of trade to traditional leaders at all.
- 5.6.1.12 The Department does provide tools of trade, namely, cell phones to all members of the Executive Committees of Provincial houses, Chairpersons and deputies of local houses of traditional leaders; motor vehicles, plus petrol cards, to the Chairperson and Deputy of the Provincial House of Traditional Leaders; In respect of traditional leaders participating in municipal councils, some municipalities provide them with laptops, data cards, tablets, allowances for data

bundles and iPads; and the Department provides traditional leaders with fully-furnished offices.

5.6.1.13 With regard to its alleged failure to provide funds for the tribal court to refurbish its premises, it stated that it does, in fact, budget for the refurbishments of “tribal courts”, which it refers to as Traditional Administrative Centres (TACs). It reported that during the 2006/2007 financial year, it constructed twenty (20) new TACs, at a combined cost of R73.1 million; during the 2010/2011 financial year, it funded the refurbishment or rehabilitation of 106 TACs at a total cost of R77.2 million; during the 2019/2020 financial year, it provided a Traditional Council with a Park Home resourced with ablution facilities and furniture, at a combined cost of R1.022 million; In respect of the current financial year, 2020/2021, it has 14 rehabilitation and 70 maintenance projects, which form part of its Infrastructure Plan, which are currently being implemented through various phases, at a budget of only R17.45 million due to reduced budget allocations. For the financial year 2021/2022 and 2022/2023, it has budgeted an amount of about R19 million (for each financial year) for the refurbishment and/or rehabilitation of TAC’s; and in addition, the Provincial Department purchased furniture for 102 traditional councils.

5.6.1.14 With regard to the land taken from the traditional leaders and placed under the authority of the CPA, it stated that it had no information in relation to this issue, however, it would be looked into going forward.

5.6.1.15 With regard to the allegation that traditional leaders are not recognised in municipal structures, it stated that the factual position is that traditional leaders participate in all municipalities within the KZN Province, with the exception of two (2) municipalities (Endumeni and Kokstad Municipalities), where there are currently no appointed traditional leaders to represent their traditional authorities.

5.6.1.16 With regard to its alleged failure to remunerate traditional leaders for attending municipal activities, it stated that the allegation is not factual. The remuneration of traditional leaders for attending municipal council proceedings is regulated by section 81(5)(b) of the MSA which provides: (i) that a traditional leader who participates in the proceedings of a municipal council is entitled to the payment of out of pocket expenses in respect of such participation, (ii) a municipal council must determine the criteria for, and calculation of, the out of pocket expenses referred to in subparagraph (i), and (iii) out of pocket expenses referred to in subparagraph (i) must be paid from the budget of the municipality in question (own emphasis). Consistent with the above provisions, all municipalities pay traditional leaders for their out of pocket expenses, from their own budgets.

Inputs from the Limpopo Province

5.6.1.17 The Limpopo Traditional Leaders did not raise any specific issue or concern during the Public Hearings conducted by the Public Protector on 24 and 25 October 2017.

Inputs from the Mpumalanga Province

5.6.1.18 The Mpumalanga Provincial Department did not respond or address specific issues raised by the Mpumalanga Traditional Leaders.

Inputs from the Northern Cape Province

5.6.1.19 With regard to allegations that there are no guidelines on the implementation of section 81 of the MSA in relation to the role of traditional leaders in municipal councils, the Provincial Department confirmed the following development, specifically in the JTG District Municipality:

- That the draft section 81 regulations are in place;

- The Department circulated the same draft regulations to Ga-Segonyana and Joe Morolong Local Municipalities including JTG District Municipality;
- Same will be gazetted as soon as the Department receives comments/inputs from municipalities;
- Workshops on participation of traditional leaders in municipalities on their roles in terms of section 8, including “*Guidelines on the Participation of Traditional Leaders in Municipal Integrated Development Plans*” were conducted to both traditional leaders, Mayors and IDP managers. It provided the Northern Cape Draft Regulations on section 81 of the MSA.

Inputs from the North West Province

5.6.1.20 With regard to allegations that there is no clarity in the Traditional Leadership Act 41 of 2003 and the Constitution relating to the mandate and roles of traditional leaders, as such there is no cooperation between the traditional leaders and the municipality, the Provincial Department stated that the TLGFA as amended, owes its existence to the provisions of section 212 of the Constitution, which enjoins the government to develop legislation dealing with powers and functions of traditional leaders. TLGFA clearly spells out the roles, duties and functions of traditional leaders and their councils. On the other hand, section 151 of the Constitution provides for the establishment of wall to wall municipalities. Further, section 156 provides for the powers and functions of municipalities. Clearly, there is no ground for contestation of authority between municipalities and traditional leaders.

5.6.1.21 With regard to the alleged undue delay by the municipalities and the Provincial Department to resolve issues relating to spatial planning since 1996, the Provincial Department stated that it is common knowledge that on the eve of the commencement of SPLUMA, a delegation of traditional leaders led by the National House of Traditional Leaders met with the then Minister of the Department of Rural Development and Land Reform to reject the

implementation of SPLUMA in their areas. On 12-13 December 2019, the Provincial Department conducted a workshop on the Traditional and Khoisan Leadership Act, 2019 and other policies impacting on the roles and functions of traditional leaders. In the course of the workshop, the Head of the Department (HoD) presented the North West Spatial Planning and Land Use Management Bill, which was before the Provincial Legislature. After the deliberations, Dikgosi pledged their support for the Bill and requested the Department to avail them spatial planning services.

5.6.1.22 With regard to allegations that the Traditional Leaders are not recognised within municipal structures, it stated that in the North West Province, section 81 of the MSA, 1998, as amended, read with Schedule 6, is complied with. Subsequent to local government elections, the MEC, together with the North West House of Traditional Leaders, identified senior traditional leaders who were to participate in the activities of their respective municipalities. Generally, the relations between municipalities and Dikgosi in the province are cordial and they are playing their part in the activities of municipalities.

5.6.1.23 The North West House of Traditional Leaders and South African Local Government Association (SALGA) - North West signed a Memorandum of Understanding on 11 November 2008. The Memorandum of Understanding in the main seeks to foster the spirit of cooperative governance as enshrined in the Constitution. In terms of the Memorandum, the Chairperson of the North West House of Traditional Leaders participates in the Executive meetings of SALGA-North West and that has created a platform for the parties to discuss issues affecting service delivery and their members.

5.6.1.24 With regard to the alleged failure by the CPA to recognise traditional leaders, it stated that the CPA is a juristic person established in terms of the Communal Property Act 28 of 1996. The CPA has its own Constitution and it is registered as an “association” of verified beneficiaries who are of equal standing. The main

purpose of the CPA is to hold and manage property in common and to protect members thereof against abuse of powers by other members and/or by its Executive Committee members. The Communal Property Act is silent on the recognition of traditional leaders even if they are beneficiaries. Traditional leaders who are verified beneficiaries of the CPA are within their rights to contest for any position in the CPA.

Conclusion

- 5.6.2 Based on the evidence gathered, it can be concluded that all the Provinces, except for the Mpumalanga Province, addressed all the main issues raised during the hearings conducted by the Public Protector on 24 and 25 October 2017, as stated in paragraph 2.2 above.

6. FINDINGS

Having considered the evidence obtained during the investigation as against the relevant regulatory framework, I make the following findings:

6.1 Regarding whether the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA:

- 6.1.1 The issue that the Department failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA is not substantiated. My investigation revealed that it is in fact the Provincial Departments which failed to promote partnerships between district municipalities and Kingships or Queenship Councils in terms of the TLGFA.

- 6.1.2 My investigation revealed that other than the Free State and Mpumalanga Departments which demonstrated establishment of partnerships, all other Provinces did not establish such partnerships.
- 6.1.3 Failure by the Provincial Departments to promote partnerships between municipalities and councils is in violation section 5 of the TLGFA and section 4 of IRFA.
- 6.1.4 The conduct of the Provincial Departments in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- 6.2 Regarding whether the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA:**
- 6.2.1 The issue that the Department failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA is not substantiated. My investigation revealed that it is in fact the Provincial Departments which failed to put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA.
- 6.2.2 My investigation revealed that there is lack of service delivery agreements between municipalities and traditional councils. Failure to conclude such agreements could have contributed to complaints of poor service delivery or lack thereof raised during my public hearings. A traditional council fully capacitated by the Department in terms of section 6 would be able to fulfil its functions, including a section 5(4) TLGFA function.

6.2.3 The conduct of the Provincial Departments in this regard was in violation of section 6 of the TLGFA.

6.2.4 The conduct of the Provincial Departments also amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.3 Regarding whether the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA:

6.3.1 The issue that the Department failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA is not substantiated. My findings are that it is the Provincial Departments who failed to provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA.

6.3.2 My investigation revealed that only KwaZulu Natal, Eastern Cape and Mpumalanga Provincial Departments provided information to the traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA. The North West, Free State, Northern Cape and Limpopo Provincial Departments failed to comply with section 20 of the TLGFA.

6.3.3 The conduct of the Provincial Departments is partially in violation of section 20 of the TLGFA.

6.3.4 The conduct of the Provincial Departments in this regard amounts partially to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.4 Regarding whether the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in proceedings of a municipal council and prescribes their role in the affairs of a municipality:

6.4.1 The issue that the Department failed to provide information to traditional leaders and councils on Provincial Gazette which regulates their participation in proceedings of a municipal council and prescribes their role in the affairs of a municipality is not substantiated.

6.4.2 The Department managed to provide documents indicating that all the Provinces, except the Northern Cape Province, issued Provincial Gazettes regulating participation of traditional leaders and councils in proceedings of a municipal council and their role in the affairs of a municipality.

6.4.3 The Department's conduct in this regard **does not** amount to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.5 Regarding whether the Department failed to provide information on funding, resourcing and remuneration of various Traditional Leaders and Traditional Councils:

6.5.1 The issue that the Department failed to provide traditional leaders and councils with information on their funding, resourcing and remuneration is not substantiated.

6.5.2 The Department provided traditional leaders and councils with information related to their funding, resourcing and remuneration, except for the Northern Cape and the North West Provinces.

6.5.3 The Department's conduct in this regard **does not** amount to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution. However the Department should ensure and monitor full compliance by all the Provincial Departments.

6.6 Regarding the main complaints raised during the public hearings conducted by the Public Protector on 24 and 25 October 2017, as stated in paragraph 2.2 above:

6.6.1 The allegations made by the Provincial Traditional Leaders during the hearings conducted by the Public Protector on 24 and 25 October 2017 are partially not substantiated.

6.6.2 All the Provinces, except for the Mpumalanga Province, responded to and addressed all the allegations made by their Provincial Traditional Leaders as stated in paragraph 2 above. The Mpumalanga Province did not respond to the complaints raised by Traditional Leaders during the public hearings.

6.6.3 The Eastern Cape Provincial Department stated that it did not fail to implement section 81 of the MSA as 259 Traditional Leaders participate in 26 Municipal Councils as determined in the Act in question. It further stated that all members of the LHOTL are paid sitting allowances, Chairpersons have been given cars, laptops and reimbursed for all work related travelling.

6.6.4 The Free State Provincial Department stated that all Traditional Councils are participating in the two Municipal Councils of Maluti a Phofung and the Mangaung Metropolitan Municipality respectively in line with the provisions of section 81 of the MSA. It also stated that as far as their records indicate, the Mangaung Metropolitan Municipality is consistently involving Barolong boo Seleka Traditional Council in their Council affairs and meetings, except for the outstanding land dispute that is currently receiving attention of the DRDLR.

- 6.6.5 The KwaZulu Natal Provincial Department stated that it does provide tools of trade, namely, cell phones to all members of the Executive Committees of Provincial houses, Chairpersons and deputies of local houses of traditional leaders; motor vehicles, plus petrol cards, to the Chairperson and Deputy of the Provincial House of Traditional Leaders. In respect of traditional leaders participating in municipal councils, some municipalities provide them with laptops, data cards, tablets, allowances for data bundles and iPads; and the Department provides traditional leaders with fully-furnished offices.
- 6.6.6 The Northern Cape Provincial Department confirmed that the draft section 81 regulations are in place only in the JTG District Municipality and that it had circulated the same draft regulations to Ga-Segonyana and Joe Morolong Local Municipalities. It also stated that Workshops on participation of traditional leaders in municipalities on their roles in terms of section 8, including “*Guidelines on the Participation of Traditional Leaders in Municipal Integrated Development Plans*” were conducted to both traditional leaders, Mayors and IDP managers.
- 6.6.7 The North West Provincial Department stated that section 81 of the MSA, 1998, as amended, read with Schedule 6, is complied with. Subsequent to local government elections, the MEC, together with the North West House of Traditional Leaders, identified senior traditional leaders who were to participate in the activities of their respective municipalities. Generally, the relations between municipalities and Dikgosi in the province are cordial and they are playing their part in the activities of municipalities.
- 6.6.8 The conduct of the Provincial Departments **does not** amount to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution. However the Department should ensure and monitor full compliance by all the Provincial Departments.

6.7 My overall concern is that failure to manage and improve the working relationship between the Traditional leadership and local government would have a huge impact on the quality of services such as provision of water, housing, education and health provided to the most vulnerable communities at grassroots level.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking in terms of section 182(1) (c) of the Constitution, with a view to remedying the improper prejudice and maladministration referred to in this report, is the following:

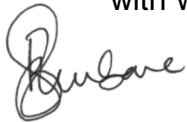
- 7.1 The MECs of Cooperative Governance and Traditional Affairs of the Eastern Cape, Free State, KwaZulu Natal, Limpopo, Mpumalanga, Northern Cape and North West Provincial Governments, supported by the DG of the Department, must within ninety (90) days from the date of receipt of this Report, table it at their respective Provincial Executive Council meetings to discuss, amongst others, its findings and implementation of the remedial action;
- 7.2 The Heads of Departments of Cooperative Governance and Traditional Affairs in the Eastern Cape, Free State, KwaZulu Natal, Limpopo, Mpumalanga, Northern Cape and North West Provinces must:
- 7.2.1 Within ninety (90) days of receipt of this Report, put in measures in place to promote partnerships between municipalities and traditional councils in terms of the TLGFA and IRFA;
- 7.2.2 Within ninety (90) days of receipt of this Report, put measures in place to support and strengthen traditional councils to fulfil their functions such as entering into service delivery agreements with municipalities in accordance with the TLGFA; and

7.2.3 Supported by the DG of the Department, within ninety (90) days of receipt of this Report, provide information to traditional leaders and councils on their assigned roles and functions in terms of section 20 of the TLGFA.

8. MONITORING

8.1 The MECs and Heads of the Departments of Cooperative Governance and Traditional Affairs referred to in paragraph 7 above must, within thirty (30) days of receipt of this Report, provide my office with an action plan indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied with within the stated period.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 11/12/2020

Assisted by: Mr M A Mnguni, Senior Investigator