

**REPORT OF THE PUBLIC PROTECTOR ISSUED IN TERMS SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 READ WITH SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994.**



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY FUNCTIONARIES OF THE NATIONAL HOME BUILDERS REGISTRATION COUNCIL**

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## LIST OF ACRONYMS

<b>Constitution</b>	The Constitution of the Republic of South Africa of 1996
<b>Discovery Planet</b>	Discovery Planet Business Enterprises CC
<b>ECSA</b>	Engineering Council of South Africa
<b>Housing Consumers Act</b>	Housing Consumers Protection Measures Act 95 of 1998
<b>PFMA</b>	Public Finance Management Act 1 of 1999
<b>Public Protector Act</b>	Public Protector Act 23 of 1994
<b>Singo Investment</b>	Singo Investment Holdings (Pty) Limited
<b>The Council</b>	National Home Builders Registration Council
<b>The Public Protector</b>	Public Protector of the Republic of South Africa

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## EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and in terms section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of improper conduct and maladministration by functionaries of the National Home Builders Registration Council (the Council), for failure to inform the housing consumers of the defective foundations of their housing units and take appropriate action to rectify the defects.
- (iii) The investigation originates from a complaint lodged by an anonymous Complainant (the Complainant), on 15 February 2019, alleging amongst others that, a construction site inspection conducted during November 2016 by Mr Byron Paimaan (Mr Paimaan), the inland engineer of the Council found that the foundations of four (4) housing units in Protea Glen Extension 10, Soweto, were not constructed in compliance with the drawings and designs submitted to the Council for enrolment.
- (iv) The housing units were constructed by Singo Investment Holdings (Pty) Ltd (Singo Investment) and were incorrectly certified as having been constructed in compliance with the drawings and designs submitted to the Council for enrolment. The incorrect certification was done during October 2016 by Mr CF Joubert (Mr Joubert), who was an engineer in the service of Singo Investment. The Complainant further submitted that functionaries of the Council were aware of the inadequate strength of the foundation designs of the housing units, but failed to inform the housing consumers about the conditions of the housing units or take appropriate action in terms of the Housing Consumers Protection Measures Act

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- 95 of 1998 (the Housing Consumers Protection Measures Act), to address the matter.
- (v) Based on the analysis of the complaint and the allegations contained therein, the following issue was identified to inform and focus the investigation:
    - (a) Whether functionaries of the Council failed to take appropriate steps within a reasonable time to inform the housing consumers of the defective foundations of the housing units, and if so, whether their conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.
  - (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
  - (vii) On 23 November 2022, a notice in terms of section 7(9) of the Public Protector Act was issued to the Chairperson of the Council, Ms Nomusa Mufamadi (Ms Mufamadi), the Chief Executive Officer of the Council, Mr Songezo Booii (Mr Booii) and the Director of Singo Investment, Mr Michael Singo Muthundinne (Mr Muthundinne), to provide an opportunity for a response on the likely adverse findings and proposed remedial action. Section 7(9)(a) and (b) of the Public Protector Act provide that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same.
  - (viii) A response was received dated 15 December 2022, from Mr Booii and no response was received from either Ms Mufamadi or Mr Muthundinne. The response and information/ evidence submitted in response to the notice in terms of section 7(9)(a) of the Public Protector Act, were duly considered by the Public Protector in relation to the substance of any allegations against the person(s) concerned on the grounds for adverse comments or findings against or remedial action involving them.

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- (ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant legislative and regulatory framework, the findings are that:
- a) Whether functionaries of the Council failed to take appropriate steps within a reasonable time to inform the housing consumers of the defective foundations of the housing units, and if so, whether their conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.
- (aa) The allegation that the functionaries of the Council failed to take appropriate steps within a reasonable time to inform the housing consumers of the defective foundations of the housing units is substantiated.
- (bb) Functionaries of the Council failed to inform the housing consumers about the defective foundations of the housing units, following the inspection conducted by Mr Paaiman during November 2016. The Council's functionaries therefore failed to promote the values and principles governing public administration as stipulated in section 195(1) of the Constitution, as well as failed to discharge their obligations in terms of sections 3(f) of the Housing Consumers Protection Measures Act.
- (cc) At the time of the Public Protector's receipt of the complaint, as well as the responses from Mr Booij, the housing consumers had still not been informed or made aware of the defective foundations of the housing units as functionaries of the Council had not shared the information with them as required by section 5(4)(f) of the Housing Consumers Protection Measures Act.
- (dd) The Council took disciplinary action against Singo Investment for contravening section 14(1), of the Housing Consumers Protection Measures Act, however, the foundations of the housing units remain defective as no evidence could be found reflecting that the defects were addressed.

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- (ee) In response to the notice in terms of section 7(9)(a) of the Public Protector Act, Mr Booï stated that given the serious nature of the defects identified and the impact the defective foundations may have, the Council considered possible remedial action, which may include demolition and rebuilding or settlement of the homes in respect of the properties situated in Protea Glen, Extension 10, Soweto, in line with section 17 of the Housing Consumers Protection Measures Act.
- (ff) He committed that the Council would undertake independent forensic engineering and civil infrastructure assessments, to investigate and obtain an independent opinion regarding the geotechnical conditions of homes in the area, its impact on the constructed homes and the structural integrity of the homes in January 2023.
- (gg) He further committed that the Council would engage with the housing consumers of the respective units during January 2023, to enable compliance with the Housing Consumers Protection Measures Act and its Regulations in respect of procedural requisites and that the Public Protector would be informed on progress.
- (hh) Accordingly, the conduct by functionaries of the Council constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.
- (x) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:
- (a) **The Chairperson of the Council**
- (i) Take note of the findings and put in place measures to strengthen the Council's oversight role in preventing the recurrence of similar incidences that pose a risk to the lives of consumers and ensure that the principles and values stipulated in section 195(1) of the Constitution and the obligations of the Council stipulated in

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section 3 and 5 of the Housing Consumers Protection Measures Act are promoted and realised by functionaries of the Council.

(b) **The Chief Executive Officer of the Council**

- (i) Within one hundred and twenty (120) calendar days of receipt of the final report and within the provisions of the Housing Consumers Protection Measures Act consider possible remedial measures which may include demolition and/or rebuild and/or settlement of the homes in respect of the properties situated at Ptn's 4,5,9 and 11 of Erf 12944 Protea Glen, Soweto, and to engage with the housing consumers of the respective units in line with sections 3(f), 5(4)(f) and 17 of the Housing Consumers Protection Measures Act; and
- (ii) Within one hundred and twenty (120) calendar days of receipt of the final report, in line with Mr Boo's commitment in the letter dated 15 December 2022 to conduct an independent forensic engineering and civil infrastructure assessments in other areas of Protea Glen, Soweto.



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## 1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), read with section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The report communicates the findings and appropriate remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct and maladministration by functionaries of the National Home Builders Registration Council (the Council), for failure to inform the housing consumers of the defective foundations of their housing units and take appropriate action to rectify the defects.
- 1.3 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to the following persons:
- 1.3.1 The Chairperson of the National Home Builders Registration Council, Ms Mufamadi;
- 1.3.2 The Chief Executive Officer of the Council, Mr Booii;
- 1.3.3 The Director of Singo Investment Holdings (Pty) Ltd, Mr Muthundinne; and
- 1.3.4 The Complainant.

## 2. THE COMPLAINT

- 2.1 The investigation originates from a complaint lodged by an anonymous Complainant (the Complainant), on 15 February 2019, alleging amongst others that:

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- 2.1.1 A construction site inspection conducted during November 2016 by Mr Byron Paimaan (Mr Paimaan) the inland engineer of the Council found that the foundations of the housing units listed below, were not constructed in compliance with drawings and designs (house plans), submitted to the Council for enrolment. The affected housing units in Soweto are:
- (a) Erf 12944 Ptn 4 Protea Glen Extension 10;
  - (b) Erf 12944 Ptn 5 Protea Glen Extension 10;
  - (c) Erf 12944 Ptn 9 Protea Glen Extension 10; and
  - (d) Erf 12944 Ptn 11 Protea Glen Extension 10.
- 2.1.2 When Mr Paaiman conducted the site inspection of the housing units listed above, Mr CF Joubert (Mr Joubert), an engineer in the service of the home builder, known as Singo Investment Holdings (Pty) Ltd (Singo Investment), had already incorrectly certified in October 2016 that the housing units were constructed in compliance with drawings and designs submitted to the Council for enrolment.
- 2.1.3 The Engineering Council of South Africa (ECSA) and investigators appointed by the Council confirmed that the foundation design strength of the housing units is inadequate for soil classified as D3 and therefore there is a possibility that they may collapse in case of a sinkhole occurring, which may result in loss of life and assets.
- 2.1.4 Despite the Council being aware of the inadequate strength of the foundation design of the housing units, no action was taken by functionaries of the Council to:
- 2.1.4.1 Inform the housing consumers that the housing units are unsafe and pose a risk to their lives and assets so that they can exercise their rights in terms of the Housing Consumer Protection Measures Act or take action against the home builder for contravening the applicable laws relevant to the construction of the housing units.

2.1.5 As a corollary to the above, the Complainant requested that an investigation be instituted into the conduct of functionaries of the Council and hold those responsible to account and take appropriate remedial action.

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

3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through amongst others, investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

*“The Public Protector has the power, as regulated by national legislation –*

*(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*

*(b) to report on that conduct; and*

*(c) to take appropriate remedial action”.*

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states amongst others that, the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.4 The incident or matter concerned occurred more than two years prior to its reporting. While it was not recorded at the time of assessment of the complaint, the Public Protector has nevertheless exercised her discretion in terms of section 6(9) of the Public Protector Act to entertain the complaint based on the following special circumstances as envisaged in Rule 10(1) of the Public Protector Rules, as amended, in relation to this matter as follows:

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### 3.4.1 Nature of the complaint and seriousness of the allegations

3.4.1.1 The allegations of failure by functionaries of the Council to inform housing consumers of the defective foundations of the housing units after an inspection conducted by Mr Paimaan are very serious as they impact on the housing consumers' fundamental right of access to property rights and adequate housing rights in terms of sections 25 and 26 of the Constitution. The right of access to adequate housing is not limited to brick and mortar alone. The Public Protector took into consideration that in giving effect to these rights, the housing consumer protection framework encompasses the requirement that the housing structure should be built in conformity with the applicable built regulatory framework and standards applicable to the home building industry;

3.4.1.2 The housing structure must not be built in a manner or with material that may cause danger, loss of life and property in a situation where an uncontrolled event occurs, such as a sinkhole or earthquake. The foundations of the housing units are alleged to be defective and were occupied by the housing consumers with their defects, without them having been informed of the status of the foundation, which was known to functionaries of the Council. The Council is required in terms of section 195(1)(g) of the Constitution, sections 3(f) and 5(4)(f) of the Housing Consumers Protection Measures Act to provide and share with the housing consumers, timely accurate information;

3.4.1.3 The nature of the complaint affects housing consumers, who may not have the resources and technical knowledge to understand the technical specifications that should have been complied with by the home builder. They may not be in a position to rectify the defects at their own costs in case the defects in the foundations render the habitation of the housing units unsafe and dangerous;

3.4.1.4 The affected housing consumers may not have the financial resources to take the matter to court to enforce their rights to adequate housing, which appear to have been compromised by building housing units on defective foundations. The

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Public Protector, whose services are available for free is in a position to assist the housing consumers to realise and enforce their property rights.

3.4.1.5 Whilst the foundations remain defective, the prejudice suffered by the affected housing consumers will continue. The housing consumers are placed in a position where they may not realise any return on investment from their homes due to the fact that they were not informed of the defects in their housing units to enable them to exercise any available remedies in terms of the Housing Consumers Protection Measures Act. There are epidemiological findings to suggest strong associations between housing conditions and health effects and home safety, including water supply, facilities and sanitation.<sup>1</sup> Furthermore, the housing consumers are exposed to risk to life, safety and health on a daily basis without their knowledge, as functionaries of the Council have not shared information relating to the condition of the foundations of the housing units with them.

**3.4.2 Due consideration of available evidence and other information relating to the incident/event that would enable the Public Protector to successfully investigate the complaint**

3.4.2.1 At the time the complaint was reported to the Public Protector on 15 February 2019, it was approximately thirty six (36) months from the time when the event occurred therefore the Public Protector did not expect the delay to affect the likelihood of being able to investigate the matter, having regard to the availability of information, records, witnesses and evidence. At the time of reporting the complaint, the Complainant alleged that the housing consumers had not yet been informed about the defective foundations of their housing units.

3.5. Having reflected on the above special circumstances, it will therefore be improper for the Public Protector to exercise her discretion in a manner that ignores the plight of the housing consumers who may not have the resources to resolve the

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<sup>1</sup> Bonnefoy X, 2007 "Inadequate Housing and Health: An Overview", *International Journal of Environment and Pollution*, 30(3) page 411 – 429.

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matter. On 23 November 2022, the special circumstances were raised with the Council and not disputed in their response dated 15 December 2022.

- 3.6 The Council is listed as a public entity under Part A of Schedule 3 of the Public Finance Management Act, (Act No.1 of 1999).
- 3.7 The Council is a regulatory body for the home building industry. It was established in terms of the Housing Consumers Protection Measures Act. Its mandate is amongst others, *“to protect the interests of housing consumers and to ensure that home builders comply with the prescribed building industry standards as contained in the Home Building Manual”*<sup>2</sup>. The Minister of Human Settlements exercises oversight over the Council<sup>3</sup>.
- 3.8 The Council is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls within her competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and section 6(5)(a) of the Public Protector Act.

#### 4 ISSUE IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
- 4.1.1 Whether functionaries of the Council failed to take appropriate steps within a reasonable time to inform the housing consumers of the defective foundations of the housing units, and if so, whether their conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.

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<sup>2</sup> NHBRC Annual Report 2019/20 pg 3.

<sup>3</sup> NHBRC Annual Report 2019/20 pg 8.

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## 5 THE INVESTIGATION

### 5.1 Methodology

5.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

### 5.2 Approach to the investigation

5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation, consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 The investigation was approached using an enquiry process that seeks to determine:

(a) What happened?

(b) What should have happened?

(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, abuse of power or other improper conduct?

(d) In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during

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the investigation. In this particular case, the factual enquiry principally focused on whether the alleged conduct was inconsistent with the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by functionaries of the Council in discharging their obligations and duties.

### 5.3 **Key sources of information and documentation received**

5.3.1 Complaint, dated 15 February 2019;

5.3.2 Letter from the Public Protector to Mr Booi, dated 18 September 2019;

5.3.3 Subpoena served on Mr Booi, dated 19 March 2021;

5.3.4 Response to the subpoena received from Mr Booi, dated 20 April 2021;

5.3.5 Letter received from Mr Booi, dated 12 April 2021;

5.3.6 Copy of letter from CFJ Consulting Engineers to Mr Paimaan of the Council, dated 20 May 2016;

5.3.7 Copy of Completion Certificate: Open trench foundation inspection from CFJ Consulting Engineers, dated 30 October 2016;

5.3.8 Copy of Health and Safety Risk To Residents of Units at Protea Glen Extension 10 from Mr Paimaan to City of Johannesburg, dated 28 February 2017;

5.3.9 Copy of Disciplinary Hearing Report for Singo Investment, dated 23 August 2018;

5.3.10 Copy of Disciplinary Report by the Engineering Council of South Africa, dated 18 January 2021;



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5.3.11 Notice issued in terms of section 7(9)(a) of the Public Protector Act, dated 23 November 2022;

5.3.12 Response by Mr Booi to the notice issued in terms of section 7(9)(a) of the Public Protector Act, dated 15 December 2022;

5.3.13 Copy letter from the Public Protector to the Chief Executive Officer of the Council dated 14 March 2023; and

5.3.14 Copy of response letter from the Chief Executive Officer of the Council, dated 30 March 2023.

#### 5.4 **Legislation and other prescripts**

5.4.1 The Constitution of the Republic of South Africa, 1996;

5.4.2 The Public Protector Act 23 of 1994;

5.4.3 The Housing Consumers Protection Measures Act 95 of 1998;

5.4.4 The Public Finance Management Act 1 of 1999;

5.4.5 The Code of Conduct, Board Notice 42 of 2017 of the ECSA; and

5.4.6 The General Regulations Regarding Housing Consumers Protection Measures No. 1406.

#### 5.5 **Case Law**

5.5.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT143/15; CCT171/15) [2016]

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**6 THE DETERMINATION OF THE ISSUE IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND POLICY PRESCRIPTS**

**6.1 Whether functionaries of the Council failed to take appropriate steps within a reasonable time to inform the housing consumers of the defective foundations of the housing units, and if so, whether their conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act**

*Common cause*

6.1.1 The housing units mentioned in the complaint were constructed during the course of 2016 by Singo Investment. The housing consumers took occupation of the completed housing units pursuant to the issuance of *Completion Certificate: Open trench foundation Inspection* by Mr Joubert, dated 30 October 2016.

6.1.2 The housing units were already occupied at the time when Mr Paimaan conducted the site inspection as reflected in a letter dated 28 February 2017 to the City of Johannesburg, titled *Health and safety risk to residents of units at Protea Glen Ext 10*.

*Issues in dispute*

6.1.3 The issue for the Public Protector's determination is whether functionaries of the Council failed to inform the housing consumers timeously of the defective condition of the foundation of the housing units, after the inspection by Mr Paimaan and take appropriate action to rectify the defects.

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*Complainant's version*

- 6.1.4 It is the Complainant's submission that functionaries of the Council were made aware on several occasions about issues relating to houses built without complying with the requirements of the home building industry standards particularly in dolomitic soils. Functionaries of the Council failed to decisively deal with the home builders and any other persons involved in breaching the Housing Consumers Protection Measures Act. The Council did not make efforts to correct the identified defective foundations of the housing units in question or to at least inform the housing consumers of the affected housing units about the defective foundations.
- 6.1.5 The Complainant further contended that the Council failed to send inspectors during the construction phase and only sent Mr Paimaan to conduct an inspection after the construction of the housing units were already completed and the housing consumers had taken occupation.

*The Council's response to the allegations*

- 6.1.6 The Council was informed about the investigation of the complaint through a letter dated 18 September 2020. A subpoena was also issued to Mr Booi on 19 March 2021.
- 6.1.7 Mr Booi responded to both the allegations letter as well as the subpoena through a sworn affidavit signed on 12 April 2021, stating amongst others that:
- 6.1.7.1 The available records of the Council relating to the issues raised, reflect that the home builder who constructed the housing units operated under the name of Singo Investment, which utilised the services of Mr Joubert as its engineer, during the construction of the housing units at Protea Glen Ext 10 in Soweto. The owner of Singo Investment is Mr Muthundinne, who also operates another company by the name of Discovery Planet Business Enterprises CC (Discovery Planet);

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- 6.1.7.2 Singo Investment was successfully prosecuted by the Disciplinary Committee of the Council on 20 August 2018 and 04 March 2019 in respect of two matters relating to undeclared or unenrolled construction on Erf 12944. The sanction imposed by the Disciplinary Committee of the Council was a fine of five thousand rand (R5000.00) on each of the two counts amounting to a total fine of ten thousand rand (R10 000);
- 6.1.7.3 Mr Joubert requested intervention from the Council on 20 May 2016 to ensure that Singo Investment complies with the prescribed standards and rectifies the defects identified. The request from Mr Joubert was addressed to Mr Paimaan. The Council dispatched Mr Paimaan during November 2016, to conduct an inspection at the construction site of the housing units in question. During the inspection, Mr Paimaan found that the housing units were already occupied as reflected in the *Completion Certificate: Open trench foundation Inspection*, dated 30 October 2016, issued by Mr Joubert. The completion certificates were issued by Mr Joubert despite him having written to the Council on 20 May 2016, requesting its intervention to ensure that Singo Investment complies with the requirements that he found not to have been complied with during the construction of the housing units;
- 6.1.7.4 Mr Paimaan's inspection found that the construction of the housing units was not done in accordance with the drawings previously submitted to the Council for enrolment;
- 6.1.7.5 The Council's Acting Manager of the BMS Division Mr Makapela has been tasked to pursue an independent geotechnical investigation into the soil and foundations at the homes concerned at Protea Glen Ext 10, Soweto. Once the investigation is completed, the Council will be in a position to advise on the assistance that can be provided to the affected housing consumers; and
- 6.1.7.6 The Council could not ascertain the availability of records that housing consumers of the affected housing units were informed about the public health, safety or

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danger as a result of their housing units having been built and certified for occupation without being compliant to the set standards. The Council admits that the matter was not settled with the housing consumers in terms of the Housing Consumers Protection Measures Act, either in the form of financial relief to the affected housing consumer or any other relief available under the circumstances. However, it is noted that the Council's warranty protection is provided to housing consumers whose properties are enrolled with the Council, in accordance with section 14 of Housing Consumers Protection Measures Act, subject to a valid claim within the relevant time periods.

*Evidence tendered by Mr Booï*

6.1.8 The following copies of documentation were tendered to substantiate the response by Mr Booï:

6.1.8.1 Copy of a letter titled *Health and Safety Risk to Residents of Units at Protea Glen Ext 10*, dated 28 February 2017, signed by Mr Paimaan, addressed to the City of Johannesburg, reflects amongst others that:

- (a) During a site inspection in November 2016 at Protea Glen Ext 10, the Council noted that the housing units in question were not constructed as per the drawings submitted for enrolment. The Council believed that the *as-built* foundations were not constructed in compliance with the industry acceptable norms and standards for the construction of sites underlain by dolomite and further deviation from SANS 1936-3, in terms of construction, were also noted. The Council approached the home builder and the competent person for clarity and it was informed that the housing units in question were already issued with *Occupation Certificates* by the City of Johannesburg and copies of the *Occupation Certificates* were also provided to the Council.

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(b) The letter further stated that:

- (i) The as-built foundations and as-built wet service were not suitable to dolomitic conditions and as such, residents of the housing units may be faced with an inherent and potentially life threatening risk;
- (ii) The as-built foundations could fail should a probable sinkhole of 5 metre diameter occur; and
- (iii) The Council intended to escalate the matter to the ECSA for an investigation to be conducted against the engineer, Mr Joubert.

6.1.8.2 It is noted that in spite of the above response, there is no conclusive evidence indicating that the City of Johannesburg responded to the letter from the Council.

6.1.8.3 Copy of *Completion Certificate: Open trench foundation Inspection* issued by Mr Joubert on 30 October 2017 in respect of units 12944 /4,10 and 11, reflects amongst others that:

- (a) *“This is to certify that the excavation sizing and rebat fixing (as specified where necessary) of the foundations (which were inspected by this practice) of the project on the above property have been constructed to my detail and satisfaction. If the concrete of the required strength is placed to the dimensions as stipulated in my foundation report these foundations will be able to carry the prescribed SABS load safely”.*

6.1.8.4 Copy of *Disciplinary Proceedings Outcome*, dated 23 August 2018, addressed to Singo Investments reflects amongst others that:

- (a) Singo Investment was notified by the Council about the outcome of the disciplinary proceedings that were held on 18 July 2018, in relation to a contravention of section 14(1) of the Housing Consumers Protection

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Measures Act<sup>4</sup>, with regard to homes situated at Erf 12044/28 and 12944/54 at Protea Glen Ext 10 in Soweto. Singo Investment was found guilty of having contravened the Housing Consumers Protection Measures Act and a fine of R10 000, 00 was imposed by the Disciplinary Committee of the Council.

6.1.8.5 Copy of *Disciplinary Proceedings Outcome*, dated 26 April 2019, addressed to Singo Investment reflects amongst others that:

- (a) Singo Investment was found guilty of contravening section 14(1) of the Housing Consumers Protection Measures Act in relation to a house situated at Erf 12944, Unit 9 Protea Glen Ext 10, Soweto. A fine of twenty thousand rand (R20 000, 00) was imposed by the Disciplinary Committee of the Council.

6.1.8.6 A copy of a disciplinary report titled: *Ruling of Disciplinary Tribunal Duly Appointed to Hear Evidence Adduced by the Duly Appointed Pro-Forma Complainant in Support of Charges Laid Against Mr FC Joubert-formerly being a Professional Registered Engineer-With Registration Number: 800192-Relating to the Certification of certain foundations laid in Protea Glen, Extension 10-initially Convened for Hearing on 11 March 2020 and continued on 2 December 2020*, dated 18 January 2021, reflects amongst others that:

- (a) Mr Joubert was subjected to a disciplinary process by the ECSA in relation to the certification of foundations laid in Protea Glen Ext 10, Soweto, for amongst others, the housing units in question. He was found guilty of contravening Rule 3 of the Code of Conduct, Board Notice 42 of 2017 of

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<sup>4</sup> Section 14 of the Act reads that:

- (1) A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless-
  - (a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
  - (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council; and
  - (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.

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the ECSA and a fine of eighty thousand Rand (R80 000, 00), was imposed. It is further stated that Mr Joubert's registration as a Professional Engineer was already cancelled at the time when the disciplinary process was concluded.

- (b) The disciplinary report makes reference to the inspection report of Mr Paimaan in which he stated amongst others that his inspection found that “*...the as-built foundations had not been constructed in compliance with the industry accepted norms and standards for construction on sites underlain by dolomite*”.

*Notice issued in terms of section 7(9) of the Public Protector Act*

6.1.9 A notice, dated 23 November 2022, issued in terms of section 7(9)(a) of the Public Protector Act was served on Ms Mufamadi, Mr Booï and Mr Muthundinne on 25 November 2022, affording the persons the opportunity to respond to the intended findings of the Public Protector. On 25 November 2022 Ms Natasha Fouche, the Legal Service Manager of the Council confirmed receipt of the notice on behalf of Ms Mufamadi, however, no further response to the notice was received. On 25 November 2022, Mr Muthundinne acknowledged receipt of the notice but did not provide a substantive response thereto. On 15 December 2022, Mr Booï responded to the notice and stated amongst others that:

6.1.9.1 Subject to the provisions of subsections (3), (4) and (5) (of section 17), the NHBRC may in terms of section 17(2)(b), in exceptional circumstances prescribed by the Council, instead of having a defect rectified, make payment to the housing consumer in full and final settlement of any claim;

6.1.9.2 In addition, where the requirements of section 17(1) of the Act have been met, the liability of the NHBRC is subject to further limitations. In this regard, Regulation 13(1) of the General Regulations Regarding Housing Consumers Protection Measures No. 1406 (“Regulations 1406”) provides that the maximum amount that may be expended by the Council under section 17(1) in respect of



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- homes enrolled in terms of section 14(1) of the Act, pursuant to a failure of a home builder to meet its obligations in terms of section 13(2)(b)(i) of the Act, is the selling price of the home as declared by the homebuilder at the time of the enrolment of the home, up to a maximum amount of five hundred thousand rand (R500 000.00);
- 6.1.9.3 Given the serious nature of the defects identified and the impact the defective foundations may have, the NHBRC has considered possible remedial action, which may include demolition and rebuilt or settlement of the homes in respect of the properties situated at Ptn's 4, 5, 9 and 11 of Erf 12944 Protea Glen, Extension 10, Soweto, in line with the provisions of section 17 of the Act;
- 6.1.9.4 The NHBRC will engage with the housing consumers of the respective units during January 2023, to enable fulfilment with the Act and the Regulations in respect of procedural requisites;
- 6.1.9.5 The NHBRC in fulfilling its mandate has undertaken independent forensic engineering and civil infrastructure assessments in other areas of Protea Glen, Soweto. The purpose of the investigation is to obtain an independent opinion regarding the geotechnical conditions of homes in the area, its impact on the constructed homes and the structural integrity of the homes. The latter investigations will further be extended to homes constructed in Protea Glen, extension 10, Soweto; and
- 6.1.9.6 Further that once the investigations are completed, the NHBRC will communicate with the community on the way forward regarding their homes.
- 6.1.10 On 14 March 2023 the Public Protector sent a letter to Booi affording him an opportunity to respond or comment on the amended remedial action following his response to the section 7(9) notice. Mr Booi responded on 30 March 2023 stating amongst others that:

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6.1.10.1.1 The Council remains committed to assist the affected housing consumers as possible within mandate, powers of the Council in terms the Housing Consumers Protection Measures Act, its Regulations and Rules;

6.1.10.1.2 The Council has taken corrective measures following receipt of the Public Protector notice and conducted a site visit on 20 and 21 December 2022 at the affected houses at Extension 10 Protea Glen, Soweto. The purpose of the visit was to assist the housing consumers to lodge complaints regarding the rectification of the defects and left by the home builder;

6.1.10.1.3 The Council will undertake forensic investigation into the foundation at the homes concerns at Protea Glen, which is expected to be completed within 120 days and will advise the affected housing consumers of the findings on completion of the investigation; and

6.1.10.1.4 The Council is committed to initiate remedial measures which may include remedial work, demolition and/or rebuild and/or settlement with the housing consumers within the prescripts of the Housing Consumers Protection Measures Act.

*Applicable law and legal prescripts*

### **The Constitution of the Republic of South Africa**

6.1.11 Section 195(1) of the Constitution stipulates the democratic values and principles governing public administration by providing that, *“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles, which includes amongst others that: (a) A high standard of professional ethics must be promoted and maintained; (g) transparency must be fostered by providing the public with timely, accessible and accurate information.”*

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## Housing Consumers Protection Measures Act

6.1.12 The objectives of the Council in terms of section 3 of Housing Consumers Protection Measures Act are to:

- (a) “to represent the interests of housing consumers by providing warranty protection against defects in new homes;
- (b) *to regulate the home building industry;*
- (c) to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of this Act;
- (d) *to establish and to promote ethical and technical standards in the home building industry;*
- (e) *to improve structural quality in the interests of housing consumers and the home building industry;*
- (f) to promote housing consumer rights and to provide housing consumer information;
- (g) *to communicate with and to assist home builders to register in terms of this Act;*
- (h) *to assist home builders, through training and inspection, to achieve and to maintain satisfactory technical standards of home building;*
- (i) *to regulate insurers contemplated in section 23(9)(a);and*
- (j) *in particular, to achieve the stated objects of this section in the subsidy housing sector.”*

6.1.13 Section 5(4)(f) of the Act provides that the Council shall engage in communications to inform housing consumers of their rights under this Act.

6.1.14 Section 13(2)(b)(i) provides that the agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that the home builder shall subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home

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- builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as from the occupation date, and notified to the home builder by the housing consumer within that period.
- 6.1.15 Section 14(1) states that A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner:
- (b) the Council has accepted the submission contemplated in paragraph (u) and has entered it in the records of the Council; and
  - (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.
- 6.1.16 Section 17(1)(a) of the Act provides that subject to subsection 2, the Council shall pay out of the fund established for that purpose, in terms of section 15(4), an amount for rectification, where a major structural defect has manifested itself in respect of a home within 5 years of the date of occupation and has been notified to the home builder, within that period and as a result of non-compliance with the NHBRC technical requirements.
- 6.1.17 Section 19(2) of the Act provides that an inspector may, for the purpose of inspecting a home during its construction, enter and inspect the premises constituting the site of the construction at any reasonable time. The provisions of the Act uses the word may implying that conducting of an inspection by functionaries of the Council is not compulsory rather discretionary.
- 6.1.18 Regulation 13(1) of the Regulations 1406 provides for the minimum and maximum amounts payable from the Fund and states that the maximum amount

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that may be expended by the Council under section 17(1) in respect of homes enrolled in terms of section 14(1) of the Act pursuant to a failure of a home builder to meet its obligations in terms of section 13(2)(b)(i) of the Act, is the selling price of the home as declared by the home builder at the time of the enrolment of the home, up to a maximum amount of R500 000. The maximum amount that may be expended may include:

- (a) any professional fee incurred by the Council in investigating and determining a cost effective method of rectification;
- (b) the necessary cost for rectification of any major structural defect and for making good any finishes necessarily damaged by the rectification process; and
- (c) reasonable accommodation costs where, in the opinion of the Council, it would be unreasonable for a housing consumer to remain in occupation of the property due to the extensive nature of the remedial works, prescribed at maximum daily rates by the Council up to a maximum of five percent of the selling price, or R25 000, whichever is the lesser.

#### *Analysis of the evidence*

6.1.19 In this case, upon being informed in May 2016, by Mr Joubert that Singo Investment's construction of the housing units in question was not in compliance with the requirements stipulated in home building standards, the Council dispatched Mr Paimaan in November 2016, to conduct an inspection. The inspection found that the housing units were occupied despite being built on defective foundations.

6.1.20 The evidence before the Public Protector reflects that during the inspection, Mr Paimaan found that Singo Investment failed to construct the housing units in conformity with the Council's Technical Requirements.

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- 6.1.21 Upon finding that the housing units were defective and already occupied, functionaries of the Council operating within the requirements of public administrations would ordinarily be expected to inform the housing consumers of conditions of the housing units' foundations. In terms of the values and principles in section 195(1)(a) and (g) of the Constitution, a high standard of professional ethics is promoted by amongst others, sharing relevant information with the affected parties, especially if it affects their property rights.
- 6.1.22 Transparency is promoted by amongst others sharing information relating to the outcome of the inspection conducted by Mr Paimaan with the affected parties so that they are in a position to exercise and protect their rights. In this case, the Public Protector was not provided with evidence to confirm that communication or information was provided to the housing consumers by functionaries of the Council, regarding the condition of the foundations of their housing units.
- 6.1.23 The Council could neither provide evidence in its response to the notice in terms of section 7(9) of the Public Protector Act, disputing that the housing consumers were not informed about the conditions of the foundations of the housing units nor could the Council provide evidence disputing that the foundations of the housing units were not defective or had been rectified.
- 6.1.24 Furthermore, the Public Protector was not provided with evidence reflecting that functionaries of the Council informed the housing consumers of the defects found during an inspection conducted by Mr Paimaan. This despite the Council having an obligation in terms section 3(c) and 3(f), read with section 5(4)(f) of the Housing Consumers Protection Measures Act to provide protection and information to housing consumers and to promote the values and principles governing public administration as contemplated in section 195(1) of the Constitution.
- 6.1.25 The Council has committed itself to undertake the process of conducting an independent forensic engineering and civil infrastructure assessment to determinate the extent of defects and develop the appropriate strategy to address

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the defects identified in terms of the Housing Consumers Protection Measures Act. The Council also tasked Mr Makapela to pursue an independent geotechnical investigation into the soil and foundations of the homes concerned at Protea Glen Ext 10, Soweto.

### *Conclusion*

- 6.1.26 The Council did not dispute that the foundations of the housing units in question are defective as a result of not being compliant with the required standards commensurate with dolomitic soils as found in the report by Mr Paaiman. The Council furthermore did not dispute that the housing units were enrolled with the Council in terms of section 14 of the Housing Consumers Protection Measures Act.
- 6.1.27 The Council conceded in its response that the housing consumers were not informed about the extent of the structural defects in the foundations of the housing units. This despite the Council being required in terms of section 3(f) read with section 5(4)(f) of the Housing Consumers Protection Measures Act to amongst others engage housing consumers about their rights.
- 6.1.28 In his response to the section 7(9) notice of the Public Protector Act, Mr Booï submitted that given the serious nature of the defects identified and the impact the defective foundations may have, the Council has considered possible remedial action which may include demolition and rebuilt or settlement of the homes in respect of the properties situated at Ptn's 4,5,9 and 11 of Erf 12944 Protea Glen, Soweto, in line with section 17 of the Housing Consumers Protection Measures Act. Furthermore, the Council has undertaken to engage with the housing consumers of the respective units to enable fulfilment with the Act and the Regulations in respect of procedural requisites.
- 6.1.29 Furthermore, the Council has undertaken to conduct an independent forensic engineering and civil infrastructure assessments in other areas of Protea Glen. The purpose of the investigation is to obtain an independent opinion regarding

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the geotechnical conditions of homes in the area, its impact on the constructed homes and the structural integrity of the homes.

## 7 FINDINGS

7.1 Having regard to the evidence and the regulatory framework determining the standard that the Council functionaries should have complied with, the Public Protector is making the following findings:

**7.1.1. Whether functionaries of the Council failed to take appropriate steps within a reasonable time to inform the housing consumers of the defective foundations of the housing units, and if so, whether their conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act**

7.1.1.1 The allegation that the functionaries of the Council failed to take appropriate steps within a reasonable time to inform the housing consumers of the defective foundations of the housing units, is substantiated.

7.1.1.2 Functionaries of the Council failed to inform the housing consumers about the defective foundations of the housing units following the inspection conducted by Mr Paimaan during November 2016. The Council's functionaries therefore failed to promote the values and principles governing public administration as stipulated in section 195(1) of the Constitution as well as failed to discharge their obligations in terms of sections 3(c) and (f) read with section 5(4)(f) of the Housing Consumers Protection Measures Act.

7.1.1.3 At the time of receipt of the complaint by the Public Protector as well as the responses from Mr Booï, the housing consumers were still not informed or made aware of the defective foundations, of the housing units.



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7.1.1.4 Accordingly, such conduct by functionaries of the Council constitutes improper conduct as envisaged in section 182(1) of the Constitution, 1996 and maladministration as envisaged in section 6 (4)(a)(i) of the Public Protector Act.

## 8 REMEDIAL ACTION

8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this notice upon the conclusion of an investigation where adverse findings are made.

8.2 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng, CJ held that the remedial action taken by the Public Protector has a binding effect.

8.3 Having regard to the evidence, the regulatory framework determining the standard the Municipality should have complied with and the impact on the Complainant, the Public Protector is taking the following remedial action, in terms of section 182(1)(c) of the Constitution:

### **The Chairperson of the Council**

8.3.1 Take note of the findings and put in place measures to strengthen the Council's oversight role in preventing the recurrence of similar incidences that pose a risk to the lives of consumers and ensure that the principles and values stipulated in section 195(1) of the Constitution and the obligations of the Council stipulated in sections 3 and 5 of the Housing Consumers Protection Measures Act are promoted and realised by functionaries of the Council.

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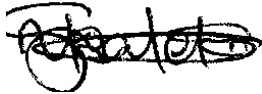
### **The Chief Executive Officer of the Council**

- 8.3.2 Within one hundred and twenty (120) calendar days of receipt of the final report and within the provisions of the Housing Consumers Protection Measures Act consider possible remedial measures which may include demolition and/or rebuild and/or settlement of the homes in respect of the properties situated at Ptn's 4,5,9 and 11 of Erf 12944 Protea Glen, Soweto, and to engage with the housing consumers of the respective units in line with sections 3(f), 5(4)(f) and 17 of the Housing Consumers Protection Measures Act; and
- 8.3.3 Within one hundred and twenty (120) calendar days of receipt of the final report, in line with Mr Booï's commitment in the letter dated 15 December 2022 to conduct an independent forensic engineering and civil infrastructure assessments in other areas of Protea Glen, Soweto.

## **9 MONITORING**

- 9.1 The Chief Executive Officer of the Council, within thirty (30) calendar days of receipt of the report, submit to the Public Protector an implementation plan reflecting how the above remedial action will be implemented.
- 9.2 Within one hundred and fifty (150) calendar days of receipt of the final report, submit to the Public Protector a close out report indicating the full implementation of the remedial action, with proof thereof.

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- 10 The Public Protector considers this matter finalised. Should any party wish to challenge this decision they are at liberty to approach a court of law and lodge an application for a judicial review of the matter.



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

*Assisted by: Ms Ponatshego Mogaladi*  
*Executive Manager: Investigations Branch*