

**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**



REPORT NO: 110 OF 2021/22

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“Allegations of maladministration relating to failure and/or undue delay by the Department of Water and Sanitation to register a servitude at Pylkop farm 26 JQ in respect of a water project that was constructed at the said farm.”

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION RELATING TO THE FAILURE AND/OR DELAY BY THE
DEPARTMENT OF WATER AND SANITATION TO REGISTER A SERVITUDE ON
PYLKOP 26 JQ FARM WITHIN THE MOSES KOTANE LOCAL MUNICIPALITY.**



TABLE OF CONTENTS

	EXECUTIVE SUMMARY	3
1.	INTRODUCTION	8
2.	THE COMPLAINT	9
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	10
4.	THE INVESTIGATION	15
5.	THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	19
6.	FINDINGS	33
7.	REMEDIAL ACTION	34
8.	MONITORING	35



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 [Act No 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No 23 of 1994] (the Public Protector Act).
- (ii) The report communicates the findings and appropriate remedial action taken in terms of section 182(1) of the Constitution, following an investigation into allegations of maladministration and failure by the National Department of Water and Sanitation to register a servitude on Pylkop farm 26 JQ regarding a water project that was constructed at the said farm.
- (iii) The complaint was lodged by Mr Thabiso Mphela, acting on behalf of the Mphela family (the Complainant) on 14 November 2018 with the National Office of the Public Protector in Pretoria, and it was subsequently transferred to the Rustenburg Regional Office for further investigation.
- (iv) In the main, the Complainant alleged *inter alia* that:
 - (a) The Mphela family are the owners of a farm called Pylkop 26 JQ situated within the municipal area of the Moses Kotane Local Municipality (Municipality). The farm is commonly known as Ga-Phadi Village;
 - (b) During 2017, the Complainant discovered that the Department had established a water project known as the Baphalane Water Project at the farm;
 - (c) The Mphela family was never consulted by the Department before commencing with the project. Furthermore, the Department did not

register a servitude on the property in respect of the project resulting in the family not being compensated for the usage of their land; and

- (d) The Complainant wants the Department to register a servitude in respect of the property and to compensate the family for the usage of their land.

(v) **ISSUES IDENTIFIED AND INVESTIGATED:**

- (a) Whether the failure and/or undue delay by the Department to register a servitude on the farm was in violation of the relevant laws and prescripts regulating the provision of water and its infrastructure; and if so, whether the conduct of the Department constitutes maladministration and improper conduct; and
- (b) Whether the failure and/or undue delay by the Department to compensate the Mphela family for the usage of their land was in violation of the relevant laws and prescripts regulating the installation of water infrastructure on private land; and if so, whether the conduct of the Department was improper and constitutes maladministration.

- (vi) The issue regarding whether the Department was obliged to compensate the Complainant was dealt with in a separate Closing Report, Report No 41 of 2021/22 which was issued by the Public Protector on 26 October 2021. The current investigation is therefore only focused on the issue whether or not the Department failed to register a servitude.

- (vii) A Notice in terms of Section 7(9)(a) of the Public Protector Act, was served on to the Acting Director-General of the Department, Mr Leonardo Manus, on 06 January 2022. A copy of the section 7(9) Notice was also sent to the Municipal Manager of the Municipality.

- (viii) A response to the Notice was expected on or before 21 January 2022, however same was not received. On 25 January 2022, a reminder was sent to the Department requesting it to respond. On 07 February 2022, the Department sent an email to the Public Protector advising that Mr Leonardo Manus had been assigned other responsibilities and that the new Director-General, Dr Sean Phillips, would respond to the section 7(9) notice.
- (ix) A final reminder was sent to the Department on 10 February 2022 requesting the Department to respond on 11 February 2022. The Acting Director General, Mr F Moatshe, only responded on 09 March 2022.
- (x) All relevant documents and correspondence were obtained and analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the preliminary investigation.
- (xi) Key laws and prescripts taken into account to determine if there had been maladministration or improper conduct by the Department due to their failure and/or undue delay to register a servitude on the farm are the following: -
 - (a) **The Constitution** 1996 [Act 106 of 1996] which is the supreme law of the Republic;
 - (b) **The Public Protector Act 1994** [Act No 23 of 1994] which the key legislation giving effect to the provisions of section 182(1)(a) to (c) of the Constitution, 1996
 - (c) **The National Water Act No 36 of 1998**; and
 - (d) **The Public Finance Management Act, No 1 of 1999.**
- (xii) Having considered the evidence received during the investigation, the regulatory framework, the Public Protector makes the following findings:



- (a) **Regarding whether the failure and/or undue delay by the Department to register a servitude on the farm was in violation of the relevant laws and prescripts regulating the provision of water and its infrastructure; and if so, whether the conduct of the Department constitutes maladministration and improper conduct.**
- (aa) The allegation that the Department failed and/or delayed to register a servitude on the farm, is **substantiated**. The Department had always intended to register a servitude on the farm, but failed to do so.
- (bb) Section 38(1)(d) of the Public Finance Management Act places an obligation on an Accounting Officer to protect public resources. It is not in dispute that the project was established by the Department. Public funds were used to construct the water project and the only way to safeguard the project was by registering a servitude. Therefore, failure to register a servitude exposed the state to financial risks in that the land owner may, e.g. build on top of the pipe line, thus making the pipeline inaccessible to the state. Accordingly, the Department has violated the provisions of Section 38(1)(d) of the Public Finance Management Act.
- (cc) The conduct of the Department in failing to register a servitude, constitute improper conduct as envisaged in section 182(1) (a) of the Constitution and maladministration as envisaged in section 6(4) (i) of the Public Protector Act.
- (dd) It should be noted that subsequent to the issuing of the Section 7(9) Notice, the Department has proposed the following with regard to the remedial action: *“The remedial action requires the Department to avail sufficient funds to the Municipality for the purpose of registering the servitude at Pylkop 26 JQ farm in respect of the water project. The Department is engaging National Treasury on Municipality transfer payment approval.”* (sic).



- (xvi). **The appropriate remedial action taken as envisaged in terms of section 182(1)(c) of the Constitution, is the following:**
- (aa) The Director General of the Department must ensure that a servitude is registered in respect of the water project on the farm in compliance with Section 127(3) of the National Water Act 36 of 1998 **within one hundred and eighty (180) working days** of the issuing of this report.
- (bb) The Director General of the Department in compliance with section 38(1) of the PFMA, must submit to the Public Protector proof of the transfer of the project and the conditions under which it was transferred to the Municipality, **within sixty (60) working days** of the issuing of this report.
- (cc) The Moses Kotane Local Municipality must, **within ninety (90) working days** after receipt of the funds from the Department, ensure that a servitude is registered at Pylkop Farm in respect of the water project.



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE DEPARTMENT OF WATER AND SANITATION TO REGISTER A SERVITUDE ON PYLKOP 26 JQ FARM UNDER THE MOSES KOTANE LOCAL MUNICIPALITY

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and hereby published in terms of section 8 of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report communicates the Public Protector's findings and the appropriate remedial action to be taken in terms of the remedial power given by section 182(1)(c) of the Constitution, following an investigation of a complaint, received on 14 November 2018 relating to allegations of maladministration in connection with the failure and/or delay by the Department of Water and Sanitation (Department) to register a servitude on Pylkop farm 26 JQ.
- 1.3 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to inform them of the outcome of the investigation and the implementation of the remedial action:
- 1.3.1. The Minister of Water and Sanitation, Mr Senzo Mchunu MP;
 - 1.3.2. The Director-General of the Department, Dr Sean Phillips;
 - 1.3.3. The Municipal Manager of the Moses Kotane Municipality (Municipality), Mr Mokopane Letsoalo;
 - 1.3.4. The Executive Mayor of the Municipality, Councillor Nketu Nkotswe; and
 - 1.3.5. The Speaker of the Municipality, Councillor Gugulethu Mtshali.

- 1.4 A copy of the report is also sent to the Complainant, Mr Thabiso Mphela.
- 1.5 The report relates to an investigation into allegations of maladministration and failure by the Department to register a servitude on the farm in respect of a water project that was established on the said farm.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector's National Office in Pretoria by Mr Thabiso Mphela acting on behalf of the Mphela family. It was then transferred to the Rustenburg Regional office of the Public Protector South Africa (PPSA) in the North West Province, for investigation.

2.2 In the main, the Complainant alleged that:

2.2.1 The Mphela family are the owners of a farm called Pylkop 26 JQ situated within the Municipality. The farm is commonly known as Ga-Phadi Village.

2.2.2 During 2017, the Complainant discovered that the Department had established a water project known as the Baphalane Water Project at the farm.

2.2.3 The Mphela family were never consulted by the Department before commencing with the project. Furthermore, the Department did not register a servitude in respect of the project, resulting in the family not being compensated for the usage of their land.

2.2.4 The Complainant wants the Department to register a servitude on the property in respect of the said water project, and to compensate the family for the usage of their land.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides 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 to be suspected to be improper or to result in any impropriety or prejudice.*
- b) *Report on that conduct; and*
- c) *To take 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, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 Section 6(9) of the Public Protector Act grants the Public Protector the discretion to accept complaints which are lodged more than two years after the occurrence of the incident in special circumstances. Some of the special circumstances that the Public Protector took into account to exercise her discretion favourably to accept this complaint, includes the nature of the

complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in the state administration; whether the Public Protector would be able to successfully investigate the matter with due consideration to the availability of evidence and/ or records relating to the incident; and whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

- 3.6 In the case between *South African Bureau of Standards v The Public Protector*¹ the North Gauteng High Court held that, as with most claims and complaints, there is for good reason time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving.
- 3.7 Similarly in the case between *Gordhan v Public Protector and Others*² the North Gauteng High Court held that, in view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint.
- 3.8 Regarding the exercise of the discretion by the Public Protector in terms of section 6(9) of the Public Protector Act to entertain matters where the incident or the matter complained of occurred two years or longer prior to the complaint being reported to her office, only in special circumstances, the Public Protector concluded that the alleged failure on the part of the Department to register a servitude in respect of this matter was still

¹ [2019] ZAGPPHC 101 (27 March 2019).

² [2020] ZAGPPHC 777 (17 December 2020).

continuing at the time the complaint was lodged and is still continuing to date.

- 3.9 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11;2016(3) SA 580 (CC) and (5) BCLR 618 the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect [at para 76]. The Constitutional Court further held that:

“When remedial action is binding, compliance is not optional, whatever 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.”

- 3.10 In the above-mentioned constitutional matter Mogoeng CJ stated amongst other things the following, when confirming the powers of the Public Protector:

- 3.10.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

- 3.10.2 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** (paragraph 67);

- 3.10.3 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 that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

- 3.10.4 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 to their **nature, context and language**, to determine what course to follow (paragraph 69);
- 3.10.5 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 effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.10.6 The Public Protector's power to take appropriate 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** (paragraph 71);
- 3.10.7 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these 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** (paragraph 71(a));
- 3.10.8 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (paragraph 71(d)); and

- 3.10.9 “*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)).
- 3.11 In the matter of *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)*, the court held as follows, when confirming the powers of the Public Protector:
- 3.11.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71);
- 3.11.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the Constitution if that is required to remedy the harm in question (paragraph 82);
- 3.11.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(10) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.11.4. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (paragraph 104); and
- 3.11.5 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. (paragraph 105);



- 3.11.6 The fact that there is no firm findings in respect of 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 (paragraphs 107 and 108); and
- 3.11.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).
- 3.12 The Department is an organ of state and its conduct falls within the Public Protector`s mandate to investigate.
- 3.13 The Public Protector`s powers and jurisdiction to investigate and take appropriate remedial, action were not disputed by the Department.

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 upon the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

- 4.2.1. 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 maladministration?
- 4.2.1.4 In the event of improper conduct or maladministration what would it take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where they would have been had the maladministration or improper conduct not taken place?
- 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.
- 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 for the relevant processes. In this particular case, the main focus was on whether or not the Department was obliged to register a servitude at the time of the construction of the water project.
- 4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration, where appropriate.
- 4.2.5. Where a complainant has suffered any prejudice, in appropriate cases the idea is to place him or her as close as possible to where he/she would have been had the Department followed proper processes.
- 4.3 On analysis of the complaint, the following issues were identified to inform and focus the investigation:**
- 4.3.1. Whether the failure and/or undue delay by the Department to register a servitude on the farm was in violation of the relevant laws and prescripts

regulating the provision of water and its infrastructure; and if so, whether the conduct of the Department constitutes maladministration and improper conduct;

4.3.2. Whether the failure and / or undue delay by the Department to compensate the Mphela family for the usage of their land was in violation of the relevant laws and prescripts regulating the installation of water infrastructure on private land; and if so, whether the conduct of the Department constitutes maladministration and improper conduct.

4.3.3 The issue regarding whether the Department was obliged to compensate the Complainant was dealt with in a separate Closing Report, Report No 41 of 2021/22 which was issued by the Public Protector on 26 October 2021. The current investigation is therefor only focussed on the issue whether or not the Department was obliged to register a servitude.

4.4 KEY SOURCES OF INFORMATION

4.4.1 Applicable legislation and other legal prescripts:

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

4.4.1.2 The Public Protector Act, Act No 23 of 1994;

4.4.1.3 The National Water Act, No 36 of 1998; and

4.4.1.4 The Public Finance Management Act, No 1 of 1999.

4.4.2 Documents and correspondence sent and received:

4.4.2.1 Report of the Inspection in loco, dated 09 December 2020;

4.4.2.2 Deed search report provided by the Registrar of Deeds, dated 16 January 2020;

4.4.2.3 Copy of a Settlement Agreement, dated 03 September 2019;

4.4.2.4 Letter from Department, dated 02 November 2020;

4.4.2.5 Letter from Department, dated 11 May 2021;

4.4.2.6 Report by the Land Restitution Commission, dated 31/07/2020

- 4.4.2.7 Research Report by the Land Claims Commission, dated 08 April 2005;
- 4.4.2.8 Email dated 03 November 2016 from Tumelo Rasebitse of Tshwaranang Community Consultants; and
- 4.4.2.9 Email dated 05 December 2016 from Tumelo Rasebitse of Tshwaranang Community Consultants.

4.4.3. Jurisprudence considered

- 4.4.3.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016(3) SA 580(CC)
- 4.4.3.2 *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).
- 4.4.3.3 *South African Bureau of Standards v The Public Protector* [2019] ZAGPPHC 101 (27 March 2019).
- 4.4.3.4 *Gordhan v Public Protector and Others* [2020] ZAGPPHC 777 (17 December 2020).

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

- 4.4.4.1 A Notice was issued to the Acting Director General, Mr Leonard Manus on 06 January 2022 and he did not respond.
- 4.4.4.2 A copy of the Notice was also sent to the Municipal Manager of the Municipality. He did not respond.
- 4.4.4.3 On 09 March 2022 after several reminders were sent to the Department, the Acting Director General, Mr F Moatshe, submitted a response.



5.1 DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.

5.1.1. Whether the failure and/or undue delay by the Department to register a servitude on the farm was in violation of the relevant laws and prescripts regulating the provision of water and its infrastructure; and if so, whether the conduct of the Department constitutes maladministration and improper conduct.

Common cause issues

- 5.1.1.1. The Mphela family owns a farm called Pylkop 26 JQ, commonly known as Ga-Phadi Village.
- 5.1.1.2. According to the records of the Registrar of Deeds, the farm was registered in the estate of the late Daniel Rakgokong Mphela on 24 July 1962 under Title Deed No 15179/1962.
- 5.1.1.3. Around 1998, the Department established a water project known as the Baphalane Water Project at Pylkop farm, through Magalies Water as the implementing agent.
- 5.1.1.4. The Baphalane Water Project included water projects that were implemented not only at Pylkop farm, but also at other villages such as Bojating, Mmorogong, as well as the Vaalkop dam project.
- 5.1.1.5. The Department did not register a servitude on the farm with regard to the said water project.

- 5.1.1.6. On 01 August 2019, the Complainant and the Department signed a Settlement Agreement in which the Department undertook to register a servitude in respect of the said project.
- 5.1.1.7. During March 2021, the Department withdrew from the Settlement agreement, citing error on the part of its officials before signing the Settlement Agreement.

Issues in dispute

- 5.1.1.8. The only issue for determination by the Public Protector is whether or not the Department failed and/or delayed to register a servitude on the farm in respect of the water project.

Brief historical background

- 5.1.1.9. During the process of investigation, the Public Protector South Africa (PPSA) Investigation Team conducted interviews with the Complainant as well as with other witnesses, including Kgosana George Mphela, who is the current Kgosana³ of Ga-Phadi Village. Kgosana George Mphela was appointed as such by the former Premier of the North West Province, Dr Popo Molefe, in September 1999.
- 5.1.1.10. Kgosana George Mphela submitted to the Investigation Team that prior to 1998, the residents of the farm got their water from a borehole. Around 1994, the borehole went dry and the community experienced water challenges.

³ In Tswana society, the head of a kgotla or ward.

<https://www.wordsense.eu/kgosana/#:~:text=kgosana%20%28English%29%20Origin%20%26%20history%20From%20Tswana%20kgosana%E2%80%8E.,head%20of%20a%20kgotlaor%20ward.%20Entries%20with%20%22kgosana%22> (Accessed on 16 March 2022)



5.1.1.11. During 1995, the then Kgosana, Mr Amos Lesiba Mphela together with Kgosi Ramokoka of the Baphalane–Ba-Ramokoka, approached the Department and requested it to assist the people of Pylkop and surrounding villages with the provision of water. According to Kgosana George Mphela, the Department started with the process of constructing the water project at Ga-Phadi Village around 1998. The project was called the Baphalane Water Project.

Inspection in Loco and Investigation

5.1.1.12. On 09 December 2020, the PPSA Investigation Team conducted an inspection *in loco* in respect of the water project at Pylkop farm. Although the Department was invited to be part of the inspection, none of its officials showed up.

5.1.1.13. The inspection *in loco* found that the Pylkop water project consisted of a steel reservoir built on top of a hill, approximately 600 to 700 meters away from the village. A large underground steel pipeline pipes water from the reservoir into the village.

5.1.1.14. It was further observed by the Investigation Team that there was an inscription on the floor at the project with the engraving 19/08/98 inferring that the project had been completed on this date.

5.1.1.15. The Complainant informed the Investigation Team that the reservoir gets its water from the Vaalkop dam which is about 30 kilometres south of Pylkop farm. Other large pipes which supply the reservoir with water could also be seen. There was another pipe which was connected to the main pipeline which, according to the Complainant, was piping water from Ga-Phadi Village to another neighbouring village.



- 5.1.1.16. The PPSA Investigation Team is also in possession of the minutes of a meeting that was held on 24 October 1997 wherein preparations were done for the construction of the Baphalane Water Project. From the minutes of the said meeting, it appears that a Steering Committee was established for the purposes of overseeing the construction of the Baphalane Water Project.
- 5.1.1.17. It also appears from the minutes that the Baphalane Water Project did not only include the water project at Pylkop farm, but extended to surrounding villages of the Baphalane area such as Bojating, Morogong and Vaalkop water projects. Further, the said meeting which discussed the Baphalane Water Project was not held at Pylkop farm, but at Baphalane Tribal Hall at Ramokokastad village, which is an indication that the project was not only about Pylkop, but also included other villages.
- 5.1.1.18. According to the attendance register of the said meeting, it was attended by officials from Magalies Water⁴, official from the then Department of Water and Forestry, officials from an engineering company called Messrs. Van Renssen and Fortuin Consulting Engineers (Pty) Ltd, as well as community representatives, including those from Pylkop farm.
- 5.1.1.19. During the said meeting, the project at Pylkop was also discussed. The meeting noted that there were issues regarding the ownership of Pylkop farm. The meeting further resolved that Magalies Water will follow up on the issue of ownership of Pylkop farm. Paragraph 5 of the Minutes stated the following:

⁴ Magalies Water is a Water Board established in terms of section 28 of the National Water Services Act of 1997.

“... the issue on land ownership in Pylkop is still not resolved. Magalies Water will follow up on this issue. A servitude will most probably have to be registered”.

- 5.1.1.20. From the wording of this paragraph, it appears that the registration of a servitude was definitely a consideration for the farm, once the dispute regarding ownership of the farm was resolved.
- 5.1.1.21. The PPSA team is also in possession of a copy of an email, dated 03 November 2016 written by Mr Tumelo Rasebitse of Tshwaranang and Associates Community Consultants. The email was addressed to Mr Fortuin of Messrs Van Renssen and Fortuin Engineers (Pty) Ltd, who were the engineers who constructed the Water Project.
- 5.1.1.22. Amongst other issues, the said email stated the following: *“... We would appreciate your assistance with regard to this project that was implemented by Van Renssen & Fortuin Engineers in 1997. The Department of Water and Sanitation through Land Matters Unit have tasked us to assist in the process of servitude registration and possible extension of the project based on current needs”.*
- 5.1.1.23. The PPSA Investigation Team is also in possession of another email dated 05 December 2016 from Mr Tumelo Rasebitse of Tshwaranang Community Consultants which was addressed to Ms Joey Van Rooyen of the Department. According to the contents of that email, there were challenges regarding the ownership of the farm.
- 5.1.1.24. The said email stated as follows amongst other issues: *“ It was after his call (Mr Moruakgomo) that I realised what a groot (huge) challenge is before us regarding the problems highlighted with regards to the history of both families.(Mphela and Biloanes). Mr Moruakgomo has done a lot already in*

terms of soliciting information to whom the rightful land owner is. There is to date no confirmation of who the rightful land owner is so as to work with and engage with the rightful owners.” (sic)

- 5.1.1.25. From the above email, it appears that the Department and Tshwaranang Consultants were experiencing challenges in terms of moving forward with regard to the issue of servitude registration. The challenge was caused by the dispute regarding ownership of the farm, as there was no confirmation who the rightful owners were at that stage.
- 5.1.1.26. During the investigation, the PPSA Investigation Team also obtained a copy of a report issued by the Commission on Restitution of Land Rights (the Commission) dated 31 July 2020. According to the report, Kgosi Ramokoka instituted a claim with the Commission around 1998 for the restitution of various farms, including Pylkop 26 JQ.
- 5.1.1.27. The Commission conducted research regarding the claim of the Baphalane family and found that their claim was valid in so far as Pylkop 26 JQ and other farms were concerned. According to the research report of the Commission dated 08 April 2005, the Baphalane family were the rightful owners of Pylkop farm. Paragraph 7.3 of the report states as follows:
- “The chief lost ownership of his tribes land and his dignity was ignored as government departments, without his consultation distributed their forefathers land to other tribes. Phadi known as Pylkop was given to the Mphela family and Driefontein was given to the Bakgatla Ba Kgafela”.*
- 5.1.1.28. During 2007, Kgosi Ramokoka acting on behalf of the Baphalane family, instituted a civil claim in the Land Claims Court, against the Mphela family, the Commission as well as other defendants, regarding ownership of the farm under case no LCC 09/2007. The court referred the dispute to the Land Claims Commission.



- 5.1.1.29. The PPSA Investigation team also consulted with Mr Tonakgolo Setlhabi, who is the Deputy Director at the Land Claims Commission. Mr Setlhabi submitted that in trying to resolve the Baphalane dispute, the Commission decided that it was not advisable to evict the Mphela family from Pylkop and replace them with the Baphalane community as they too, were also dispossessed.
- 5.1.1.30. The Commission resolved the dispute by purchasing alternative land called Gansvley farm 240 KP, as compensation to the Baphalane family for the land taken by the Mphela family. As a result, the Mphela family remained at the farm as the rightful owners. Gansvley 240 KP farm was formally transferred to the Baphalane Community and registered at the Deeds Office on 18 March 2021. Therefore one can safely say that the dispute was formally resolved during March 2021 when the Baphalane Community was officially given alternative land.
- 5.1.1.31. On 03 September 2019, through the facilitation of the PPSA, the Department and the Complainant signed a Settlement Agreement wherein the Department undertook to register the servitude at Pylkop 26 JQ.
- 5.1.1.32. In a meeting held on 04 March 2021, which was attended by the PPSA Investigation Team, officials from the Department as well as officials from the Municipality, the Department through its Acting Director-General (ADG), Mr Leonardo Manus, indicated that the Settlement Agreement was signed in error as no diligent investigation was done by the officials before the signing thereof.
- 5.1.1.33. The ADG further indicated that at the time when the agreement was signed, the Department did not have the 1998 project in mind as it was unaware of its existence. The officials were under the impression that the Complainant was referring to other water projects that were also carried out in the Baphalane area.

- 5.1.1.34. The Department only became aware of the project at Pylkop when it was informed by the PPSA, following the inspection *in loco* that was carried out. The Department further indicated that it was struggling to find records of the project as it was established a long time ago.
- 5.1.1.35. Note was taken of the explanation proffered by the Department. Amongst other reasons given by the Department, was the fact that the project was established a long time ago and that the officials who were involved in the project are no longer available, due to the passage of time.
- 5.1.1.36. The Department further indicated that had their officials done proper research before signing the Settlement Agreement, they would have also discovered that no records were available regarding the project and would have therefore not committed the Department to the agreement. It was also noted that the signing of the Settlement Agreement by the Department, created an expectation on the part of the Mphela family who had hoped that a servitude would be registered in respect of the property.
- 5.1.1.37. During the same meeting held on 04 March 2021, Mr Manus indicated that the Department made funds available for the said project and further that after the completion of the project, it was transferred to the Municipality. However, even though the PPSA Investigation Team requested him to indicate how much money was allegedly transferred to the Municipality, he could not provide any details or furnish any records regarding the said transfer of the Project to the Municipality.
- 5.1.1.38. In a letter from the PPSA, dated 09 March 2021, the Department was again requested for details around the alleged funds that were transferred to the Municipality as well as documents transferring the project to the Municipality. However, the Department failed to respond.

- 5.1.1.39. The Mayor of the Municipality, Mr Abram Diale, on the other hand indicated that the Municipality did not receive any funds from the Department. The Municipality submitted that the project was started by the National Department before the Municipality even came into existence. The Municipality was only established in 2000 while the project was completed in August 1998. He submitted that the Department should have registered the servitude from the inception of the project.
- 5.1.1.40. On 05 May 2021, during an interview by the PPSA Investigation Team of Mr Stephan Piek, who is the Director of Legal Services at the Municipality, he indicated that since the project is within the jurisdiction of the Municipality, they will have to register the servitude if they are provided with funds to do so.
- 5.1.1.41. While it appears that the Department may have had the intention of registering the servitude based on the initial evidence that was available at that time, hence the signing of the Settlement Agreement, the evidence that subsequently emerged and which affected the implementation of the Settlement Agreement cannot be ignored.
- 5.1.1.42. From the new evidence which subsequently emerged, at the time of the signing of the Settlement Agreement (which was in August 2019), the dispute regarding ownership of the farm had not yet been formally resolved.
- 5.1.1.43. Even if the Department had intended to register a servitude at the time of construction of the project, it would have not been possible as there was a dispute regarding the ownership of the farm. Kgosi Ramokoka had at that time instituted a claim for ownership of the farm with the Land Claims Commission. The claim of Kgosi Ramokoka was later upheld by the Commission which found that the farm belonged to the Baphalane Community and not the Mphela family.

- 5.1.1.44. The available evidence indicates that the Department always had the intention of registering a servitude, particularly on Pylkop farm. The said intention had been there since the inception of the project, and even before the Settlement Agreement was signed as could be seen from the emails of Mr Tumelo Rasibetse. However, a servitude could not be registered on Pylkop at that time due to challenges regarding ownership of the farm. The dispute was only resolved in March 2021 when alternative land was formally transferred to the Baphalane community.
- 5.1.1.45. During the investigation process, the Public Protector issued a Notice in terms of section 7(9)(a) of the Public Protector Act to the Acting Director-General of the Department, Mr Leonardo Manus, on 06 January 2022. A copy of the section 7(9) Notice was also sent to the Municipal Manager of the Municipality.
- 5.1.1.46. A response to the Notice was expected on or before 21 January 2022, however same was not received. On 25 January 2022, a reminder was sent to the Department requesting it to respond. On 07 February 2022, the Department sent an email to the Public Protector advising that Mr Leonardo Manus had been assigned other responsibilities and that the new Director-General, Dr Sean Phillips, would respond to the section 7(9) notice.
- 5.1.1.47. A final reminder was sent to the Department on 10 February 2022 requesting the Department to respond on 11 February 2022. The Acting Director General, Mr F Moatshe, only responded on 09 March 2022, stating the following: *“The remedial action requires the Department to avail sufficient funds to the Municipality for the purpose of registering the servitude at Pylkop 26 JQ farm in respect of the water project. The Department is engaging National Treasury on Municipality transfer payment approval.”* (sic).
- 5.1.1.48. On 25 March 2022, the Investigation team sought clarity from the Department to their response to the Section 7(9) Notice and engaged Ms



Joey Van Rooyen, Manager in the Land Matters Unit. Ms Van Rooyen indicated that funds were available within the Department and they were only seeking approval for transfer such funds to Moses Kotane Local Municipality.

Application of relevant legal framework

- 5.1.1.49. Section 27(1)(b) of the Constitution provides that “*everyone has the right to have access to sufficient food and water and the state must take reasonable legislative and other measures within its available resources to achieve it.*” In this specific case, the people of the farm have a right of access to water and the state, through the Department was fulfilling its constitutional obligation by providing them with water.
- 5.1.1.50. Part 2 of the National Water Act 36 of 1998, defines a servitude as “*a right that a person has over property belonging to another person.*” It further says that “*only a person who is authorised to carry out water works under the Act, can claim a servitude*”. In other words the holder of a servitude has the right to enter the property belonging to another person in order to carry out water works.
- 5.1.1.51. Section 127(3) of the National Water Act 36 of 1998 provides as follows: “*a servitude under this chapter may also be claimed in respect of an existing water works.*” After realising that a servitude has not been registered, the Department could have relied on this section in order to register the servitude.
- 5.1.1.52. In this specific case, the Baphalane Water Project is already in existence although there is no servitude registered in respect of it. Therefore the Department can rely on this section and claim a servitude on that land in respect of the project.

- 5.1.1.53. Section 127(3) provides further that a person who wants to claim a servitude in terms of this section must follow the procedure set out in Schedule 2 to the Act.
- 5.1.1.54. Schedule 2 to the Act provides that the person claiming servitude must give notice to the land owner. Section 1(f) of the Schedule provides that the impact of the servitude on the land or its use must be disclosed. In this case the Department must inform the Mphela family of the impact that the servitude would have on their land or its usage.
- 5.1.1.55. Section 128 of the National Water Act refers to the Rights and Duties of a servitude holder. Section 128(1) states that “*the holder of a servitude has a reasonable right of access to the land which is subject to servitude for purposes of constructing, altering, replacing, inspecting, maintenance and repair of the relevant water works.*”
- 5.1.1.56. According to the above section, the holder of a servitude has a right to access the land belonging to another person in order to maintain or repair water works, amongst other duties. In this specific case a Water Authority such as the Department will have to regularly maintain or repair the water project. A servitude will give the Department such a right of access to the land on which the project is built.
- 5.1.1.57. The PFMA is also a key instrument regulating financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management; and to provide for matters connected therewith.
- 5.1.1.58. Section 38 of the PFMA places an obligation on accounting officers to protect and preserve public resources. Section 38(1)(d) of the PFMA provides as follows: “*the accounting officer for a department is responsible*



for the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities of the Department.”

5.1.1.59. According to this section, the Department, through its accounting officer has an obligation to ensure that the assets of the Department are protected. In this specific case the water project is an asset of the State. The best way to protect this asset which was established on private land, would have been through the registration of a servitude. If a servitude is not registered, there is nothing that stops the land owner from doing whatever he or she pleases with his/her land and possibly damage the property of the state.

Conclusion

5.1.1.60. Having regard to the investigation conducted in the matter, the evidence and information obtained therewith, it is concluded that the Department's failure and/or delay to register the servitude on the farm was not in line with legislation and all other prescripts regulating such processes.

5.1.1.61. Prior to 1998, residents of the farm received their water from a borehole and after experiencing a severe water shortage, the Department was approached to assist and provide the affected areas with sufficient water which resulted in the construction of a dam through the water project.

5.1.1.62. In an engagement amongst the Department, Magalies Water and the Steering Committee, consensus was reached that the registration of a servitude was probable.

5.1.1.63. From the evidence obtained, the Department could not undertake the process of registration of the servitude during the construction of the project in 1998 as the Baphalane Community had lodged a Land claim for ownership of Pylkop with the Land Claims Commission.

- 5.1.1.64. It is further clear from the evidence obtained that during 2016, the Department made an attempt to register the servitude. However at that time the dispute regarding ownership of the farm had not yet been resolved. The dispute was resolved around July 2020 when the Land Commission decided that the Mphela family should remain at Pylkop.
- 5.1.1.65. The Commission resolved that an alternative land will be purchased for the Baphalane community. Indeed, an alternative land called Gransvley was purchased for the Baphalane Community and was formally registered in the names of the Baphalane community in March 2021.
- 5.1.1.66. It is clear from the evidence obtained, that the Commission resolved during July 2020 that the Mphela family should remain at Pylkop farm, therefore the Department had sufficient time to register the servitude, but it failed to do so.
- 5.1.1.67. The Department had an obligation through its accounting officer to ensure that as the asset owner, the water project was to be maintained and protected.
- 5.1.1.68. With the project being constructed on a privately owned land, a registered servitude would have offered protection and the ensued legal consequences had it been necessary.
- 5.1.1.69. In the absence of a registered servitude, the Department therefore exposed the water project and the Department to a potential financial risk, loss and/or damages to the project.
- 5.1.1.70. The registration of a servitude would have ensured that the rights of the land owner was limited in favour of the holder of the servitude and mitigated potential risks to a certain extent.



- 5.1.1.71. Even though the Department indicated that funding was made available for the registration of a servitude, no evidence was provided to support that submission. However, in their response to the Notice in terms of section 7(9) issued by the Public Protector, the Department indicated that they were approaching the National Treasury to seek approval for the transfer of funds to the Municipality to register the servitude.
- 5.1.1.72. Based on all the evidence uncovered during the investigation, it is therefore required that a servitude should be registered on the said farm as a matter of urgency.
- 5.1.1.73. The Department has since the PPSA's investigation transferred the project over to the Municipality as the current owner. During the meeting of 04 March 2021, the Municipality indicated that they would, if funds are made available, register the servitude.

6 FINDINGS

After examination of the evidence obtained during the investigation, and the regulatory framework setting the standards that should have been upheld by the Department, the Public Protector makes the following findings:

6.1 **Regarding whether the failure and/or undue delay by the Department to register a servitude on the farm was in violation of the relevant laws and prescripts regulating the provision of water and its infrastructure; and if so, whether the conduct of the Department constitutes maladministration and improper conduct.**

- 6.1.1 The allegation that the Department failed and/or delayed to register a servitude on the farm is **substantiated**. The Department had always intended to register a servitude at the said farm, but failed to do so.

- 6.1.2 Section 38(1)(d) of the PFMA places an obligation on Accounting Officers to protect public resources. Public funds were used to establish the project and the only way to safeguard the project was by registering a servitude. Therefore failure to register the servitude exposed the state to financial risks in that the land owner may for example, build on top of the pipe line, thus making the pipeline inaccessible to the state. Accordingly the Department has violated the provisions of section 38(1)(d) of the PFMA.
- 6.1.3 The Department indicated that it had since transferred the project to Municipality.
- 6.1.4 The conduct of the Department in failing to register a servitude, constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

- 7.1. **The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, is the following:**
- 7.1.1 The Director General of the Department to ensure that a servitude is registered in respect of the water project on the farm in compliance with Section 127(3) of the National Water Act 36 of 1998 **within One hundred and eighty (180) working days** of the issuing of this report.
- 7.1.2 The Director General of the Department in compliance with section 38(1) of the PFMA, must submit to the Public Protector proof of the transfer of the project and the conditions under which it was transferred to the Municipality, **within sixty (60) working days** of the issuing of this report.

- 7.1.3. The Moses Kotane Local Municipality must, **within ninety (90) working days** after receipt of the funds from the Department, ensure that a servitude is registered at Pylkop Farm in respect of the water project.

8. MONITORING

- 8.1. The Director General of the Department must, **within sixty (60) working days** from the date of this report, submit an Implementation Plan to the Public Protector indicating how the remedial action will be implemented.
- 8.2. The Director General of the Department must submit a report, **within ninety (90) working days** as of the date of this report, to the Public Protector regarding the progress made in respect of the implementation of the remedial action.
- 8.3 In line with the Constitutional Court judgment in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11*, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the the Director General of the Department.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30/03/2022

Assisted by: Mr Kleinbooi Matsetela, Senior Investigator
North West Provincial Office