

**CLOSING 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, 23 OF 1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**Report No. 126 of 2019/20**

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS THAT THERE WAS NO PROPER PROCESS FOLLOWED IN RESPECT OF AN APPLICATION FOR AN ENVIRONMENTAL AUTHORISATION CERTIFICATE ISSUED IN RESPECT OF THE PROPOSED CONSTRUCTION OF THE JOHANNESBURG EAST ELECTRICITY SUPPLY STRENGTHENING PROJECT, IN THE MPUMALANGA AND GAUTENG PROVINCES**



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**1. INTRODUCTION**

- 1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).
- 1.2. This report is submitted in terms of section 8(3) of the Public Protector Act, to the Complainant, Mr PR de Lange.
- 1.3. This report relates to my investigation into allegations that there were no proper processes followed in respect of an application for an Environmental Authorisation Certificate issued in respect of the proposed construction of the Johannesburg East Electricity Supply Strengthening Project, in the Mpumalanga and Gauteng Provinces.
- 1.4. A notice in terms of rule 42(1) of the Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, dated 4 December 2019, was issued to the Complainant affording him an opportunity to make representations on the intended closure of the complaint. The Complainant did not respond to the discretionary report sent to him and I am thus closing this matter.



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## **2. THE COMPLAINT**

- 2.1 The Complainant alleged that the Matla-Jupiter transmission line forms part of the Johannesburg East Electricity Supply Strengthening Project being implemented by the Ekurhuleni Municipality (the Municipality) and Eskom.
- 2.2 The line traverses over 64 council owned land parcels including properties in the Alberton Central Business District (CBD).
- 2.3 The Complainant seeks intervention from the Public Protector as he believes that Eskom or its agents did not consult the community in respect of the Environmental Authorisation (EA). He also mentions that there is no record in local newspapers advertising such consultations to be held and further believes that there were no notices which made any mention of alignment cuts through the Alberton CBD. He also believes that the Alberton community was thus not adequately informed nor aware of the proposed alignment.
- 2.4 The Complainant also avers that the EA was obtained prematurely as there was non-compliance with the conditions of the EA as effected and interested parties to the proposed structures were not notified in writing.
- 2.5 According to the Complainant, the Minister must consider objections/inputs by Interested and Affected Parties (IAP's) and he/she must take into consideration all relevant information to review or amend the EA. He further adds that not following the abovementioned process undermines the purpose of the EA.
- 2.6 The Complainant would like the Public Protector to investigate the process, studies done and alternatives considered to determine if the approved EA for Alberton

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CBD meets the requirements in terms of Environment Management Act, 107 of 1998 (NEMA).

- 2.7 The Complainant also requests that the Public Protector investigate the grounds on which the Minister allegedly granted extension to Eskom to proceed with the project without taking IAPs into consideration.
- 2.8 The Complainant is convinced that a public participation meeting that had been agreed on (date not provided) was reneged by both Eskom and the Ekurhuleni Metropolitan Council and that a public participation process was not followed, as he alleged that information was deliberately withheld from the public and their representatives.
- 2.9 That the proposed construction of pylons and lines will be unsightly and detrimental to the Alberton CBD's property values.
- 2.10 That the proposed construction of pylons and lines pose a health hazard as there would be electromagnetic radiation close to schools.
- 2.11 That the above mentioned proposals would interfere with electronic communication in the Alberton vicinity and that there should be underground cables instead. He further mentioned that the entire process was "steamrolled" through the council despite there being better options and less invasive routes.
- 2.12 According to the complaint all avenues were exhausted by engaging with the Metro and Eskom as well as with their project managers and there is evidence in the form

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of petitions that lend support for their contention that the public objects to the project.

2.13 The complainant requested that the Public Protector investigate the process, studies done and alternatives considered to determine if the approved EA, as applicable for the Alberton CBD, meets the requirements.

3. During the course of our investigation, we contacted the Complainant with a view to clarifying the complaint and engaging on the issues for investigation. Despite these requests, the Complainant failed to respond to the Public Protector requests and the evidence initially received from the Complainant as well as the information received from the responding entities had to be used to finalise the investigation.

#### 4. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

4.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

4.2 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*

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

4.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

4.4 The Public Protector is further mandated by the Public Protector Act, 1994 to investigate and redress maladministration and related improprieties in the conduct of state affairs.

4.5 The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

4.6 The Ekhureleni Municipality as well as the Department of Environmental Affairs (DEA) are organs of state. The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by the entities.

## **5. THE INVESTIGATION**

### **4.1 Methodology**

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

5.6.2 The complaint was classified as a Service Delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act.

5.6.3 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

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## **4.2 Approach to the investigation**

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

- (i) What happened?**
- (ii) What should have happened?**
- (iii) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?**
- (iv) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?**

**4.2.2 The investigation process included exchanges of documentation between the Public Protector and officials from the Municipality as well as the DEA.**

**4.2.3 All relevant documents and correspondence were obtained and analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.**

**4.2.4 A discretionary notice was issued and sent to the Complainant on 4 December 2019. I did not receive a response to my discretionary notice from the Complainant.**



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**4.3 Based on the analysis of the complaints including the allegations contained therein, the following issues were identified to inform and focus the investigation.**

5.5.1 **Issue 1:** Whether due processes were followed in the granting of the EA?

5.5.2 **Issue 2:** Whether the Minister of Environmental Affairs failed to consider the interested and affected persons (IAPs) when he granted an extension to the validity of the EA?

**5.1 The Key Sources of information**

**5.6.1 Documents**

5.6.1.1 The written complaint lodged by the Complainant with attachments emailed to the Public Protector on 31 August 2017.

**5.6.2 Correspondence sent and received**

5.6.2.1 Letter to the Municipality raising the matter dated 6 September 2018;

5.6.2.2 Reply letter from the Municipality dated 24 October 2018 with supporting documents;

5.6.2.3 Letter to the Department dated 5 September 2019;

5.6.2.4 Reply letter from the Department dated 27 September 2019 with supporting documents;

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5.6.2.5 A discretionary notice issued in terms of the Public Protector Act to the Complainant dated 4 December 2019.

**5.6.3 Legislation and other prescripts**

5.6.3.1 The Constitution of the Republic of South Africa, 1996 (The Constitution);

5.6.3.2 The Public Protector Act, 23 of 1994 (Public Protector Act) and

5.6.3.3 The National Environmental Management Act, 1998 (the NEMA).

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

**6.1 Whether due processes were followed in the granting of the EA?**

*Common cause issues*

6.1.1 It is not disputed that there is currently an EA in force which was issued by the DEA in respect of the construction of the Johannesburg East Electricity Supply Strengthening Project, in the Mpumalanga and Gauteng provinces.

6.1.2 The EA was issued on the 6 April 2011.

6.1.3 The process applicable in obtaining an EA is set out in section 24 of the National Environmental management Act, 1998 (the Act). During this process, stakeholder meetings were held with the affected parties.

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- 6.1.4 It is further noted that the Act provides for a process of appeal in instances where there is allegations of non-compliance.

*Issues in dispute*

- 6.1.5 The Complainant is disputing the fact that the process in terms of the Act was complied with by Eskom and by extension, the Municipality when it applied for the EA.
- 6.1.6 Although the Complainant lists a number of activities which were not complied with by Eskom, it is sufficient to note that all these aspects relates to the processes required in terms of the Act.
- 6.1.7 The submission by the DEA is that the EA was issued in terms of the requirements of the Act.
- 6.1.8 We have further received evidence showing that there was an appeal in the matter to the Minister and this was also the basis of the appeal to the Minister.
- 6.1.9 It is thus necessary to evaluate whether the decision by the Minister not to allow the appeal is in line with the Act.

*Application of the Relevant Legal Framework*

- 6.1.10 In terms of section 43 of the Act, an appeal may be lodged to the Minister in terms of the prescribed processes.

- 6.1.11 In deciding whether the Minister acted within the scope of the applicable laws, the Regulations applicable to granting the EA at the time should be considered. The applicable Regulations being, the Environmental Impact Assessment Regulations, 2010.
- 6.1.12 Chapter 7 of the said Regulations governed the appeal process at the time.
- 6.1.13 Section 60 of the regulations states that an affected person, who wishes to lodge an appeal in the instance, should submit a notice of intention to appeal to the Minister (as is applicable here) within 20 days after the date of decision to grant the EA.
- 6.1.14 Section 62 provides that the appeal should be lodged within 30 days of the lapsing of the 20 days referred to in section 60 above.
- 6.1.15 In the present instance, four appeals were lodged with the Minister following a request for the amendment of the EA on 6 April 2017.
- 6.1.16 The Minister, considered these appeals and its basis and found that the appeals relate to the merits of the original EA, and not the request for an amendment of the EA.
- 6.1.17 The amendment related to the extension of the timeframe of the EA only, no other changes were made to the EA which was issued in 2011.
- 6.1.18 The Regulations, as enunciated above, were accordingly applicable to the issues raised at this stage for consideration and thus the timelines above were applicable and not complied with.

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*Conclusion*

- 6.1.19 The evidence above shows that the issues you brought before me have been considered by the Minister in the appeals lodged with him.
- 6.1.20 The Minister acted in terms of the applicable Regulations in dismissing the appeals, and I find no reason why his decision should not be upheld.
- 6.1.21 For this reason, I will not be reviewing the processes undertaken at the time when the EA was applied for.
- 6.2 Whether the Minister of Environmental Affairs failed to consider the interested and affected persons (IAPs) when he granted an extension to the validity of the environmental authorisation (EA)?**

*Common Cause*

- 6.2.1 It is common cause that an application was made on 30 September 2016 to the DEA for an amendment to the EA which was issued to Eskom in 2011.
- 6.2.2 It is common cause that the amendment was only in respect of an extension to the time of validity of the EA. There were no changes in respect of the content of the EA.

*Issue in dispute*

- 6.2.3 It submitted by the Complainant the IAPs were not taken into account when the amendment was granted.

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***Application of the Relevant Legal Framework***

- 6.2.4 The application for the amendment was made in terms of the Environmental Impact Assessments Regulations, 2014.
- 6.2.5 Section 28 of the Regulations requires that the request for the amendment should be made prior to the date of expiration of the EA.
- 6.2.6 Part 1: Amendments where no change in the scope or a change in the ownership occur, is applicable to the current application for an amendment.
- 6.2.7 This is the case as the content of the EA was not changed, and only the time period of validity as stated above.
- 6.2.8 Section 30, states in this regard, that the competent authority must decide on the application within 30 days of receipt of the application and or any further information requested.
- 6.2.9 The section does not prescribe any specific factors which must be taken into account by the competent authority (being the Minister) in this instance. This includes, any IAPs.
- Conclusion***
- 6.2.10 I thus find that the Minister acted within the prescripts of the applicable legislation and make no finding in this regard.

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## 7. FINDINGS

Having regard to the evidence and the regulatory framework determining the standard the Municipality and the Department should have complied with and the fact that the Complainant made no comments on the discretionary notice issued to him dated 4 December 2019, I make the following findings:

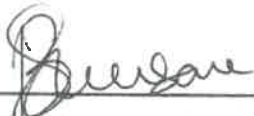
**7.1 Whether the EA was issued in terms of the applicable legislation, and if not what process should have been followed to review the EA?**

7.1.1 I find that the evidence shows that the matter was dealt with in terms of the applicable legislation.

**7.2 Whether the Minister of Environmental Affairs failed to consider the interested and affected persons (IAPs) when he granted an extension to the validity of the environmental authorisation (EA)?**

7.2.1 I find that the Minister acted within the prescripts of the applicable legislation when he granted the extension to the validity of the environmental authorization (EA).

8. I am thus satisfied that the issues brought before me have been considered and the matter is therefore finalised.



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

DATE: 31/03/2020