

**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. 154 of 2019/2020

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**Closing Report on an investigation into allegations of failure by Thembisile Hani
Local Municipality to seek approval or consent from the Manala Mbhongo
Traditional Council for the construction of Phola Mall**

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THEMBISILE HANI LOCAL MUNICIPALITY TO OBTAIN APPROVAL FROM THE MANALA MBHONGO TRADITIONAL COUNCIL FOR THE CONSTRUCTION OF PHOLA MALL

1. INTRODUCTION

- 1.1 This is my closing report of an investigation conducted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, (the Constitution) and section 8(1) of the Public Protector Act, 1994.
- 1.2 The report relates to an investigation into allegations of failure by Thembisile Hani Local Municipality to seek approval from the Manala Mbhongo Traditional Council for the construction of Phola Mall.
- 1.3 The complaint was lodged with my office by HRH Prince M.J Mabhena on behalf of His Majesty King Makhosoke II on 02 February 2018.
- 1.4 The office of His Majesty King Makhosoke II requested my intervention on the matter of the construction of Phola Mall which was allegedly built without any approval or consent from the relevant Traditional Council.
- 1.5 The Complainant made the following allegations that:
 - 1.5.1 Phola Mall was built at the fourway stop of Vezubuhle, Themba lethu and Phola Park – Enkeldoornoog JR219, an area which resorts under the Manala Mbhongo Traditional Council's jurisdiction and was never approved, recommended and consented to by the Council through tribal or community resolution as they understand it to be the requirement of the law of the country.

- 1.5.3 The matter was reported to both Thembisile Hani Local Municipality and the Nkangala District Municipality but to date no acknowledgment of receipt and or response of the said complaint was received from these authorities.
- 1.5.4 In addition, the Ndebele Kingdom further requested that I make a finding that the Developers of the Mall be found guilty and be compelled to compensate the relevant Traditional Council.
- 1.5.5 Lastly, the Developers of the Mall re-enter into a Memorandum of Understanding (MOU) with the relevant Traditional Council for social responsibility purpose.

2. THE ISSUES CONSIDERED AND INVESTIGATED

- 2.1 On analysis of the complaint and the information and documentation received during preliminary enquiries, the following issues were considered and investigated:
 - 2.1.1 Whether the Municipality failed to seek the approval or consent of the Manala Mbhongo Traditional Council in respect of the construction of Phola Mall?
 - 2.1.2 Whether the Manala Mbhongo Traditional Council is entitled to any form of compensation from the Developers of the Mall?

3. THE INVESTIGATION

3.1 Scope of the Investigation

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

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

3.2 The investigation approach

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

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

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

3.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not Thembisile Hani Local Municipality failed to seek the consent and/or approval of the relevant Traditional Council for the construction Phola Mall.

3.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Thembisile Hani Local Municipality in processing the land use application for Phola Mall.

4. KEY SOURCES OF INFORMATION

4.1 Applicable Legislation.

- 4.1.1 The Constitution of the Republic of South Africa, 108 of 1996.
- 4.1.2 The Public Protector Act, 23 of 1994.
- 4.1.3 Traditional Leadership and Governance Framework Act, 2003.

4.2 Documents and information sent and received.

- 4.2.1 The relevant information and documents obtained and analysed, were primarily:
 - 4.2.1.1 Traditional Leadership and Governance Framework Act, 2003 on 22 February 2018.
 - 4.2.1.2 A deeds search regarding the ownership of the land on which Phola Mall was built.
 - 4.2.1.3 Letter sent to the Complainant on 12 February 2018 verifying the issues raised with the office of the Public Protector South Africa.
 - 4.2.1.4 Email dated 22 February 2018 to Thembisile Hani Local Municipality enquiring about the matter.
 - 4.2.1.5 A response received from Thembisile Hani Local Municipality on 22 February 2018.
 - 4.2.1.6 A letter sent to the Complainant on 13 April 2018 giving the Ndebele Kingdom an opportunity to make comments on the outcome of the investigation. Furthermore, it should be noted that no response was received from the Complainant.
 - 4.2.1.7 A second letter was sent to the Complainant on 13 June 2018 requesting comments on the likely outcome of the investigation, again, no response was received from the Complainant.

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

5.1 Whether the Municipality unduly failed to seek the approval, recommendation and/or consent of the Traditional Council in respect of the construction of Phola Mall?

Common cause

5.1.1 It is common cause that Phola Mall is built at the four way stop of Vezubuhle, Thembaletu and in Phola Park, in an area which falls under the jurisdiction of both the Manala Mbhongo Traditional Council and the Municipality.

Issues in dispute

5.1.2 The Complainant indicated that the Municipality failed to seek their recommendation and approval for the construction of Phola Mall. On the other hand, the Municipality contended in an email dated 22 February 2018, that the relevant Traditional Council, being the Manala Mbhongo Traditional Council, provided a letter of recommendation for the construction of the Phola Park Shopping Centre and also that they fully support the initiative.

5.1.3 The Municipality further indicated in an email sent to my investigating team on 22 February 2018 that the registered owner of the land in dispute is the Department of Rural Development and Land Reform and the afore-mentioned was confirmed by a deed search which was conducted on 29 May 2018.

Application of relevant law

5.1.4 Section 20(1)(b) of the Traditional Leadership and Governance Framework Act, 2003 states: "National government or a provincial government, as the

case may be, may through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of land administration.”

- 5.1.5 This directly implies that Traditional Councils do not have ownership of land, however, they are bestowed certain administrative duties in terms of land administration which, amongst others, would include tradition, custom and community affairs.
- 5.1.6 My office was provided with the business recommendation letter dated 10 October 2012 by the Manala Traditional Council on behalf of Manala Mbhongo Traditional Council, which in fact recommended the construction of Phola Mall and indicated in the said letter that they fully support the initiative and hope that the company/person (the Developers) receives the necessary attention they requested. Furthermore, it was established that public participation processes were thus followed.
- 5.1.7 The above-mentioned evidence rebuts the allegation posed by the office of His Majesty King Makhosoke II that their recommendation or that of the relevant Tribal Authority or Traditional Council was not obtained prior to the construction of Phola Mall.

5.2 Whether the Traditional Council is entitled to any form of compensation from the Developers of the Mall?

- 5.2.1 In terms of the deeds search conducted, it was established that the Traditional Council is not the owner of the land in question and therefore if there is any compensation that is due in terms of the usage of the mentioned property, the Department of Rural Development and Land Reform in Mpumalanga would be entitled to such compensation.
- 5.2.2 Furthermore, as mentioned above, the Municipality submitted evidence in the form of a letter dated 10 October 2012 from the Manala Mbhongo Traditional

Council giving consent for the construction of Phola Mall. Therefore, the claim for compensation from the Complainant is unsubstantiated.

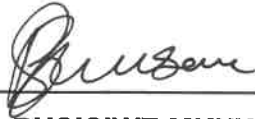
- 5.2.3 In relation to the Developers of Phola Mall entering into an MOU with the relevant Traditional Council, I consider this issue to be a private matter which my office does not have jurisdiction to determine and/or to enforce compliance thereto.
- 5.2.4 I therefore advise the Manala Mbhongo Traditional Council to engage the Thembisile Hani Local Municipality to facilitate this process with the Developers.

6. REASON FOR CLOSURE

- 6.1. The complaint that the Municipality failed to seek the approval of the Manala Mbhongo Traditional Council prior the construction of Phola Mall is not substantiated by the evidence and information obtained during the investigation. Evidence at my disposal in the form of a letter dated 10 October 2012 from the Council, confirmed that the Manala Traditional Authority issued a letter of recommendation supporting construction of Phola Mall.
- 6.2 Furthermore, the Complainant's claim for compensation from the Developers of the Mall cannot be entertained by the Public Protector as the relevant Traditional Council authorised and supported the construction of the Phola Park Shopping Mall and there was no loss or damages suffered in order for civil restitution to be applied.
- 6.3 Kindly take note that in terms of section 7(2) of the Public Protector Act, 1994, the contents of this closing report are confidential and no person may disclose them without the authorisation of the Pubic Protector.
- 6.4 Contravention of section 7(2) is in terms of section 11(1) of the Public Protector Act, 1994, an offence and upon conviction, punishable in terms of subsection

(4) with a fine not exceeding R40 000 or with imprisonment not exceeding 12 months or with both such fine and such imprisonment.

- 6.5 Should there be any enquiries or responses to this report, kindly contact Mr BG Sithole, the Provincial Representative of the Public Protector, Mpumalanga Office at botromias@pprotect.org within ten (10) working days of receipt of this report.



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

DATE: 31/03/2020