

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT No: 14 of 2021/22

ISBN No: 978-77630-039-6

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT,
UNDUE DELAY AND MALADMINISTRATION BY THE NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY TO PROVIDE THE COMPLAINANT WITH HIS
RECONSTRUCTION AND DEVELOPMENT PROGRAMME (RDP) HOUSE NUMBER
29459, MISSIONVALE, PORT ELIZABETH**

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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), and published in terms of section 8(1) of the Public Protector Act, 1994, (Public Protector Act).
- (ii) The report communicates the findings of the Public Protector and the appropriate remedial action which the Public Protector is taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct, undue delay and maladministration by the Nelson Mandela Bay Metropolitan Municipality (NMBM), in connection with the allocation of an RDP house number 29459, in Missionvale, Port Elizabeth, in the province of Eastern Cape.
- (iii) The complaint was lodged with the Eastern Cape Provincial Office of the Public Protector South Africa in Bhisho (the Public Protector) by Mr Mkhanyiseli Maggelstone Mbeki (Complainant), on 05 April 2019.
- (v) Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
 - (a) Whether NMBM failed to give the Complainant access to his RDP house after it has been approved, in terms of the relevant legal prescripts regulating the allocation, occupation and transfer of ownership of RDP houses; and if yes, whether such amounts to improper conduct, maladministration and prejudice.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the former and current MECs for Finance, Economic Development, an analysis of the

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relevant documents and information obtained during the investigation and consideration and application of the relevant laws and prescripts.

(vii) Having considered the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by the NMBM, the Public Protector makes the following findings:

(a) Regarding whether the NMBM failed to give the Complainant access to his RDP house after it has been approved, in terms of the relevant legal prescripts regulating the allocation, occupation and transfer of RDP houses, and if yes, whether such amounts to improper conduct, maladministration and prejudice.

(aa) The allegation that NMBM unduly failed to give the Complainant access to his RDP house after it has been approved in terms of the relevant legal prescripts regulating the allocation, occupation and transfer of RDP house, is substantiated.

(bb) The Complainant had on several occasions as discussed in evidence visited the NMBM, requesting to be assisted to take occupation of his approved RDP house number 29459, in Missionvale and the eviction of the unlawful occupier in vain.

(cc) It was conceded by the NMBM that the house in question belongs to the Complainant in terms of the municipal RDP housing subsidy records.

(dd) The Complainant has since April 2019, been receiving municipal statements for account Erf number 600 217 808 000, in his name, in respect of his approved house number 29459, Missionvale, however the

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said house remains occupied by somebody else and NMBM has failed to take any steps to rectify the situation.

(ee) As a result, the Complainant is extremely prejudiced and cannot enjoy occupation, title deed and/or ownership in respect of his approved RDP house.

(ff) This conduct by NMBM and in particular its failure to enable access, and occupation of the said RDP house to the Complainant and to evict the unlawful occupier, is at variance with the provisions of section 26(1)and(2), section 33 (1) and section 195 (1) (e) and (f) of the Constitution; Section 2(1) (a)(b) of the Housing Act, 1997; Section 3(1) and section 5(1) of the Promotion of Administrative Justice Act, 2003; Section 3(1), section 4(1)(2), section 6(1)(a) and section 7(1) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 1998 and 16 of the Deeds Registries Act, 1937.

(gg) The conduct of the NMBM accordingly constitutes improper conduct as envisaged by section 182(1) (a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act. It also prejudices the Complainant.

(viii) The appropriate remedial action which the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

(a) The Acting City Manager of NMBM to:

(aa) Take the appropriate steps to ensure that the Complainant is given lawful occupation in respect of his approved RDP house and further ensure that the Complainant receives his title deed document

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working in conjunction with the relevant Department of Human Settlements, within ninety (90) business days from the date of this report.

- (bb) Report to the Council of the NMBM on the steps to be taken as referred to in paragraphs (viii) (a)(aa) above within ninety (90) business days from the date of issue of this report.
- (cc) Apologise in writing to the Complainant for the delay in enabling him occupation of his approved RDP house and further inform him of the steps to be taken as referred to in paragraph (viii)(a)(aa) above, within thirty (30) business days from the date of issue of this report.

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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) and section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).
- 1.2 The report is submitted in terms of section 8(1) and 8(3) of the Public Protector Act to the following persons to inform them of the outcome of the investigation:
 - 1.2.1 The Premier of the Eastern Cape Province: Mr Lubabalo Oscar Mabuyane;
 - 1.2.2 The Member of the Executive Council of the Eastern Cape Provincial Government, responsible for Cooperative Governance and Traditional Affairs (MEC): Mr X Nqatha;
 - 1.2.3 The Acting Head of the Eastern Cape Department of Cooperative Governance and Traditional Affairs, Ms PN Roboji;
 - 1.2.4 The Head of the Eastern Cape Department of Human Settlements, Ms T Poswa;
 - 1.2.5 The Speaker of the Nelson Mandela Bay Metropolitan Municipality (NMBM), Mr Jonathan Lawack;
 - 1.2.6 The Executive Mayor of the NMBM, Mr Nqaba Banga and

1.2.7 The Acting City Manager of the NMBM, Mr MB George.

1.3 A copy of the report is also provided to Mr Mkhanyiseli Maggelstone Mbeki, who lodged the complaint, to inform him about the outcome of the investigation.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector on 05 April 2019, by Mr Mkhanyiseli Maggelstone Mbeki (Complainant).

2.2 In the main, the Complainant alleged that:

2.2.1 On 08 October 2013, he applied to the NMBM for an RDP housing subsidy and his application was approved on 17 October 2013 and the allocated site number is 29459 in Missionvale, Port Elizabeth, and the project number is 120800 10/9.

2.2.2 That his RDP housing subsidy was subsequently subverted and his house was given to someone else, without his consent and knowledge.

2.2.3 Since 2014/2015 he visited his Ward Councillor in Missionvale and NMBM offices in Port Elizabeth on numerous occasions, requesting his RDP house and the eviction of the unlawful occupier, but without any success. This resulted in him seeking accommodation somewhere else.

2.2.4 He has since April 2019 been receiving municipal rate statements for an account number 600 217 808 000 in his name, in respect of house number 29459, Missionvale, which he is not occupying.

2.2.5 In essence, the Complainant argued that the conduct failure by the NMBM to provide him with his RDP house and to evict the unlawful occupier is improper, constitutes maladministration and resulted in him suffering prejudice.

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 support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that: "*The Public Protector has the power as regulated by national legislation:*

- (a) *To investigate any conduct in state affairs, or in the Public Administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) *To report on that conduct; and*
- (c) *To take appropriate remedial action".*

3.3 Section 182(2) of the Constitution 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 the powers to

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resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 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. 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.”

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

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

3.6.2 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);

3.6.3 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

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empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.6.4 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);

3.6.5 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);

3.6.6 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);

3.6.7 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 the words suggests that she 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));

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d); and

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3.6.9 “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)).

3.7 In the matter of the *President of the Republic of South Africa vs. Office of the Public Protector and Others (91139/2016) {2017} ZAGPPHC 747; 2018 (2) SA 100 (GP); 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:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the constitution (para 71);

3.7.2 The Public Protector has power to take remedial action, which includes instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);

3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182 (1) afford the Public Protector with the following three separate powers (para 100 and 101);

- a) Conduct an investigation;
- b) Report on that conduct and
- c) To take remedial action;

3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

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- 3.7.5 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 (para 105);
- 3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108); and
- 3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112).
- 3.8 The NMBM is an organ of state and its conduct amounts to conduct in state affairs. As a result, this matter falls within the jurisdiction of the Public Protector.
- 3.9 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action in this matter, was not disputed by any of the parties.
- 3.10 Regarding the exercise of the discretion in terms of section 6(9) of the Public Protector Act to entertain matters where the incident or the matter complained of occurred two (2) years or longer prior to the complaint only in special circumstances, the Public Protector concluded that the alleged failure on the part of NMBM to provide the Complainant with his RDP house and the title deed was still continuing at the time the complaint was lodged and is still continuing to date. The "*incident or matter complained of*" is therefore a continuous occurrence that causes perpetual prejudice to the complainant until the RDP house is provided by NMBM.

3.11 Moreover, the alleged failure on the part of the NMBM has a serious impact on the right and ability of the Complainant to access and occupy his RDP house, which in any event constitutes special circumstances and adequate grounds that warrant an investigation by the Public Protector.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 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.

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 or improper conduct?

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4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong and what action should be taken?

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. In this particular case, the factual enquiry principally focused on whether the NMBM failed to provide the Complainant with his RDP house.

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 NMBM to prevent improper conduct and/or maladministration, as well as prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/ or maladministration, where possible and appropriate. Where the Complainant has suffered prejudice, the idea is to place him as close as possible to where he would have been had the NMBM complied with the regulatory framework setting the applicable standards for good administration.

4.3 **On analysis of the complaint, the following issue was considered and investigated:**

4.3.1 Whether the NMBM failed to give the Complainant access to his RDP house after having approved it as such in terms of the relevant legal prescripts regulating the allocation, occupation and transfer of ownership of RDP houses; and if yes, whether such amounts to improper conduct, maladministration and prejudice to the Complainant.

4.4 The Key Sources of Information

4.4.1 Documents, letters and emails exchanged

- 4.4.1.1 The original complainant dated 05 April 2019;
- 4.4.1.2 E-mail from the Public Protector to the Complainant dated 09 May 2019;
- 4.4.1.3 E-mail from the Public Protector to Mr Peter Neilson, the City Manager of the NMBM, dated 09 May 2019;
- 4.4.1.4 E-mail received from the City Manager of the NMBM, confirming receipt dated 09 May 2019;
- 4.4.1.5 E-mail received by Public Protector from Mr David Toyise, Senior Anti-Land Invasion Officer: Human Settlement Directorate;
- 4.4.1.6 E-mail received by Public Protector from Ms N Gqiba: Executive Director: Human Settlement Directorate, dated 29 May 2019;
- 4.4.1.7 E-mail sent by Public Protector to Ms Gqiba dated 21 June 2019;
- 4.4.1.8 E-mail received by Public Protector from Ms N Gqiba dated 21 June 2019;
- 4.4.1.9 E-mail sent by Public Protector to Ms N Gqiba dated 27 June 2019, proposing a meeting;
- 4.4.1.10 E-mail received by Public Protector from Ms N Gqiba dated 27 June 2019;
- 4.4.1.11 E-mail received by Public Protector from Mr David Toyise dated 10 July 2019;
- 4.4.1.12 E-mail sent by Public Protector to Ms N Nqwazi, the Acting City Manager, dated 16 July 2019;
- 4.4.1.13 An acknowledgement email received from Ms N Nqwazi dated 16 July 2019;
- 4.4.1.14 E-mail received by Public Protector from Mr Toyise dated 17 July 2019;
- 4.4.1.15 E-mail sent by Public Protector to Ms N Nqwazi dated 28 August 2019;
- 4.4.1.16 E-mail received by Public Protector from Mr M Clay, the Acting City Manager, dated 28 August 2019;
- 4.4.1.17 E-mail sent by Public Protector to Mr Clay dated 20 September 2019;

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- 4.4.1.18 E-mail received by Public Protector from Mr A Gqaba, the Acting City Manager, dated 20 September 2019;
- 4.4.1.19 E-mail received by Public Protector from Ms Karin Koekemoer: Personal Assistant (PA) to Mr Mapu, the Acting Executive Director: Human Settlement / NMBM, dated 25 September 2019;
- 4.4.1.20 E-mail received by Public Protector from Mr McDonald Hlonyane, Senior Anti-Land Invasion Officer: Human Settlement Directorate, dated 01 October 2019;
- 4.4.1.21 E-mail sent by Public Protector to Mr Hlonyane dated 01 October 2019;
- 4.4.1.22 E-mail received by Public Protector from Mr Hlonyane, dated 04 October 2019;
- 4.4.1.23 E-mail sent by Public Protector to Colonel E Kitching (Directorate of Priority Crime Investigations (DPCI): Commercial Crime Unit), dated 09 October 2019;
- 4.4.1.24 E-mail received by Public Protector from Detective Nico Gideon Koen (DPCI: Commercial Crime Unit), dated 20 October 2019;
- 4.4.1.25 E-mail sent to Ms N Mpongwana, the Acting City Manager of NMBM , dated 23 October 2019;
- 4.4.1.26 E-mail received by Public Protector from Ms Karin Koekemoer: PA to the Acting City Manager, dated 23 October 2019;
- 4.4.1.27 E-mail received by Public Protector from N Mpongwana dated 23 October 2019;
- 4.4.1.28 E-mail by sent Public Protector to Ms Mpongwana dated 15 November 2019;
- 4.4.1.29 E-mail received by Public Protector from Ms Koekemoer on behalf of Mr M. Mapu, (Acting Executive Director: Human Settlement/ NMBM), dated 18 November 2019;
- 4.4.1.30 E-mail sent by Public Protector to Ms Amanda Pika, the Information Officer in the Deeds Office, dated 10 June 2019;

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- 4.4.1.31 E-mail received by Public Protector from Ms Nadine Kirsten, Deeds Office, dated 01 July 2020;
- 4.4.1.32 E-mail sent by Public Protector to Mr M Mapu dated 30 September 2020;
- 4.4.1.33 E-mail received by Public Protector from Mr M George, the Acting City Manager dated 30 September 2020 and
- 4.4.1.34 E-mail sent by Public Protector to Mr Mbeki (the Complainant) dated 19 February 2021.

4.5 Legislation and other legal prescripts

- 4.5.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
- 4.5.2 The Public Protector Act 23 of 1994;
- 4.5.3 National Housing Act 107 of 1997;
- 4.5.4 The National Housing Code, 2009;
- 4.5.5 Deeds Registries Act 47 of 1937;
- 4.5.6 The Promotion of Administrative Justice Act (PAJA),2003;
- 4.5.7 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIA), Act No. 19 of 1998.

4.6 Case Law

4.6.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) and*

4.6.2 *President of the Republic of South Africa vs. Office of the Public Protector and Others (91139/2016) {2017} ZAGPPHC 747; 2018 (2) SA 100 (GP); 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017).*

4.7 Notices issued in terms of section 7(9) of the Public Protector Act, 23 of 1994.

4.7.1 A notice was issued in terms of section 7(9) of the Public Protector Act, to the Acting City Manager of the NMBM, Mr L Magalela, on 31 March 2021. No response was received.

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

5.1 **Regarding whether the NMBM failed to give the Complainant access to his RDP house after having approved it as such in terms of the relevant legal prescripts regulating the allocation, occupation and transfer of RDP houses, and if yes whether such amounts to improper conduct, maladministration and prejudice:**

Common cause issues or undisputed facts

5.1.1 The Complainant applied to the NMBM for an RDP subsidy on 08 October 2013. His application was approved on 17 October 2013, as indicated in the Housing Subsidy Portal (HSS) report, dated 28 May 2019 as follows:

(a) *ERF number 29459,*

(a) *Application number 100401209,*

(c) *HSS reference number EC 13100742,*

(d) *For PE Missionvale Garden Lots, 2498 units, Port Elizabeth.*

Issues in Dispute

5.1.2 The Complainant contended that in 2014/2015 the RDP project that included his house, was finalized. He subsequently visited the office of Ms Sandren Felix, who is a former Ward Councillor (Ms Felix) of the NMBM, in Missionvale to enquire about his application.

5.1.3 Complainant submitted further that he was verbally informed by Ms Felix that his application had been approved and that he was one of the approved beneficiaries of ERF No 29459. The Complainant thereafter visited his RDP house in Missionvale and discovered that the house was unlawfully occupied by other people without his consent.

5.1.4 In 2016, the Complainant approached the NMBM and discussed his complaint with Mr Xolani Majeke who is the Housing Official (Mr Majeke). Mr Majeke informed the Complainant that he is the approved beneficiary; however his RDP house was illegally allocated and occupied by someone else.

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- 5.1.5 Mr Majeke then arranged a meeting for the Complainant with Mr Luyolo Nombola, the new Ward Councillor responsible for the area, around 2016. At this meeting, he was advised to further consult with the unlawful occupier and to invite the occupier to the Councillor's office in Missionvale, to discuss the ownership of the RDP house. The Complainant refused to approach the unlawful occupier fearing he might be putting his life in danger.
- 5.1.6 In April 2019, the Complainant allegedly approached the NMBM and requested a statement of the municipal rates account in respect of ERF number 29459. He was provided with the municipal rates account of 02 April 2019 with in his name in account number - 600 217 808 000. This further proved to him that the house in question was registered and allocated to him.
- 5.1.7 On 01 October 2019, the Public Protector's investigation team received an e-mail from Mr McDonald Hlonyane (Mr Hlonyane), the Senior Anti-Land Invasion Officer at the Human Settlement Directorate, urgently requesting the contact details of the Complainant.
- 5.1.8 On 04 October 2019, the Public Protector's investigation team received another e-mail from Mr M Hlonyane indicating that the Directorate for Priority Crime Investigation (DPCI): Commercial Crime Unit in Port Elizabeth are also investigating this matter, although he could not remember the name(s) and surnames of the officials investigating this matter from DPCI, he could only confirm that their offices are in Grahamstown Road in Port Elizabeth.
- 5.1.9 On 09 October 2019, the Public Protector's team sent an e-mail to Colonel E Kitching, DPCI: Commercial Crime Unit, enquiring about their investigation relating to RDP project in Missionvale.
- 5.1.10 On 10 October 2019, Detective Nico Gideon Koen, DPCI, Commercial Crime Unit, responded and indicated that his office is conducting an investigation of the tender process and not the allocation of RDP houses in Missionvale.

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- 5.1.11 On 23 October 2019, the Public Protector's investigation team sent an e-mail to the Acting City Manager, Ms Mpongwana, enquiring as to whether or not the NMBM has resolved the complaint and managed to evict the unlawful occupier.
- 5.1.12 The Complainant has since 2014/2015, visited his Ward Councillor in Missionvale and NMBM offices in Port Elizabeth on numerous occasions, requesting his RDP house and the eviction of the unlawful occupier, but without any success.
- 5.1.13 The NMBM has not provided the Complainant with his approved RDP house and/or alternative accommodation, nor has the Public Protector's investigation team been provided with proper reasons as to why the Complainant cannot be given to access his approved house.
- 5.1.14 The Acting City Manager, Mr Mandla George, in his e-mail response to the Complaint dated 29 May 2019, conceded that the Complainant is the approved beneficiary of ERF 29459.
- 5.1.15 On 10 July 2019, the Public Protector's investigation team received an e-mail from Mr D Toyise, the Housing Official of the NMBM (Mr Toyise), in which he conceded that he investigated the complaint and discovered that the Complainant is the rightful approved beneficiary of ERF 29459, in Missionvale.
- 5.1.16 Mr Toyise further indicated that the house is currently being illegally occupied by someone else who is not approved and the Complainant is staying in another house belonging to someone else, on an understanding that the Complainant will temporarily stay in the house until the complaint is resolved.

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5.1.17 Mr Toyise recommended that the unlawful occupier be evicted in line with the legal prescripts and that the Complainant's occupation of his RDP house be restored.

5.1.18 On 16 July 2019, the Public Protector's investigation team wrote to Ms N Nqwazi, the then Acting City Manager at NMBM (Ms Nqwazi) requesting her to respond as to when the NMBM intends evicting the unlawful occupier as per the recommendations of Mr Toyise.

5.1.19 In an e-mail dated 17 July 2019, Mr Toyise responded and indicated that the Municipality is unable to set a time frame as eviction is being done by another sub-directorate within Human Settlements.

5.1.20 The Public Protector's investigation team wrote to the Deeds Office as per e-mail dated 10 June 2020, requesting copies of records from its database indicating that the NMBM registered the Erf in the name of the Complainant.

5.1.21 The Deeds Office responded as per e-mail dated 01 July 2020, indicating that after searching the Deeds records and database it was found that Mr Mkhanyiseli Maggelstone Mbeki (the Complainant), Identity Number 7611025980084, does not exist in their records.

Application of the relevant law and prescripts

5.1.22 Section 195(1) of the Constitution, 1996 provides amongst other things that:

“Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a)

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(b)

(c)

(d)

(e) *People's needs must be responded to....;*

(f) *Public Administration must be accountable.*

5.1.23 It is axiomatic that the NMBM's employees are public servants who are constitutionally enjoined to respond to people's needs and to be accountable when dealing with the Complainant as provided for above.

5.1.24 Section 26(1) (2) of the Constitution¹, 1996, provides that:

"(1) everyone has the right to have access to adequate housing".

"(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."

5.1.25 It is submitted that the above right to have access to housing accrues to the Complainant and there is a corresponding constitutional duty on the NMBM, as an arm of the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right in respect of this matter.

5.1.26 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

5.1.27 Section 33(1) of the Constitution, 1996, provides that:

¹ Act No.108 of 1996

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“(1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

(2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”*

5.1.28 Section 3(1) of the Promotion of Administrative Justice Act (PAJA), 2000², provides:

“(1) Administrative action which materially and adversely affects the rights or “legitimate expectations of any person must be procedurally fair.

5.1.29 In terms of section 5(1) of PAJA, further provides:

“(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.”

5.1.30 If due regard is given to the nature and subject matter of the powers to be exercised by the NMBM’s officials in the circumstances, it amounts to the exercise of administrative action within the meaning of section 33 of the Constitution as well as section 3 and 5 of PAJA, as contemplated above.

5.1.31 It is an exercise of public power which had to be carried out lawfully, reasonably and in a procedurally fair manner within the provisions of the Constitution and PAJA, by way of giving the complainant written reasons why he could not enjoy access to his approved RDP house, as may be the case in this matter.

² Act No 3 of 2000.

5.1.32 Section 2(1)(a)(b) of the Housing Act³, provides *inter alia*:

“(1) National, Provincial and local sphere of government must-

- (a) Give priority to the needs of the poor in respect of housing development; and*
- (b) Consult meaningfully with individuals and communities affected by housing development”.*

5.1.33 The above provisions are applicable to the NMBM in the local sphere of government in as far as it expressly prescribes the need to prioritize the needs of the poor in respect of housing development and consultation with affected individuals.

5.1.34 Section 3(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)⁴, provides that:

“No person may directly or indirectly receive or solicit payment of any money or other consideration as a fee or charge for arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of that land”.

5.1.35 It is common cause and a widespread trend that the administration or allocation of RDP housing is often associated with allegations of corruption involving government officials, unlawful collection of rentals by municipal councillors, leasing of RDP houses to foreign nationals or illegal immigrants for cash and unlawful occupation of RDP houses by vigilante groups.

5.1.36 Section 5(1) of the PIE Act provides that the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the

³ Act 107 of 1997

⁴ Act No. 19 of 1998.

court may grant such an order if it is satisfied that the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted.

5.1.37 Section 6(1) (a) of the PIE Act further provides that:

“An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if-

(a) The consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained”.

5.1.38 In terms of section 6(4), *“An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier”.*

5.1.39 Section 7(1) of the PIE Act, further provides:

“If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by

agreement, appoint another person to facilitate meetings or mediate a dispute on the conditions that the municipality may determine”.

5.1.40 The above legislative provisions empower the NMBM to institute proceedings for the *eviction of an unlawful occupier* from land which falls within its area of jurisdiction or, if it is not the owner of the land, to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act.

5.1.41 The National Housing Code 2009⁵ (National Housing Code) sets out the underlying policy principles, guidelines, norms and standards, which apply to various governments housing assistance programmes introduced since 1994.

5.1.42 Security of Tenure remains is a fundamental principle of the National Housing Programmes. *All beneficiaries of a housing assistance programme must acquire secure tenure either in the form of ownership, leasehold, deed of grant or formal, rental arrangements and related non-ownership forms of tenure.*

5.1.43 Part A of the Technical Guidelines of the National Housing Code further underscores Security Tenure in the following terms:

“Generally subsidies will be made available only to beneficiaries who acquire registered title to a property either in the form of ownership, leasehold, 99-year leasehold, or deed of grant”.

5.1.44 The RDP is a South African government programme with the objective of enabling qualifying beneficiaries such as the Complainant access to adequate housing, occupation and ownership thereof.

⁵ A Simplified Guide to the National Housing Code 2009 {Part 1 of the National Housing Code} 2009, Volume 1 issued in terms of section 4 of the Housing Act 107 of 1997.

5.1.45 Acquiring of a secure tenure of house occupation in the case of the Complainant was to be effected by way of providing a structure or house and issuing title deed documents which would effectively ensure that ownership of the property vest with the Complainant.

5.1.46 In this instance, the Complainant applied for his RDP house and his application was approved on 17 October 2013. However the Complainant has since October 2013, been unable to enjoy and occupy his house, despite the NMBM being aware that he is the lawful owner of the house.

5.1.47 In this matter, the Complainant is an approved beneficiary of ERF number 29459 according to the Housing Subsidy Portal (HSS) report, dated 28 May 2019, however somebody else (unknown to the complainant) is occupying the house and the NMBM could not account how this came about and neither took adequate steps to remedy the situation.

Response to the Notice issued in terms of the provisions of section 7(9) (a) of the Public Protector Act

5.1.48 Section 7(9)(a) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances”.

5.1.49 A Notice was issued in terms of section 7(9) of the Public Protector Act (the Notice) to the Acting City Manager of the NMBM, Mr M George, on 31 March 2021.

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- 5.1.50 On 07 April 2021, the then Acting City Manager, Mr Magalela acknowledged receipt of the Notice. On 04 May 2021, a reminder was sent by the Public Protector to Mr Magalela to reply to the Notice.
- 5.1.51 On 06 May 2021, Mr Magalela extended his apology as on behalf of the NMBM for not responding to the initial correspondence and further appealed to the Public Protector to afford it an opportunity to collate the required information and provide a comprehensive response to the Public Protector within five (5) working days from Thursday 06 May 2021.
- 5.1.52 On 07 May 2021, the request for an extension was granted to Mr Magalela, however no response was provided to the Public Protector by Friday 21 May 2021.

Conclusion

- 5.1.53 The NMBM conceded during the investigation that the Complainant is an approved beneficiary of a RDP house in respect of ERF Number 29459.
- 5.1.54 It was also not disputed that the Complainant is entitled to occupation of his approved RDP house. However, the Complainant has never been provided by the RDP house and it was occupied by someone else. Despite raising this several times with the NMBM, it improperly failed to assist the Complainant to exercise his rights as the owner of the house by providing him with access at occupy it. He was also not provided with proper reasons why the NMBM was not assisting him.
- 5.1.55 This conduct failure by the NMBM is direct contravention with the Constitution, Housing Act, PAJA, PIE the Deeds Registries Act and the Housing Code 2009.

6. FINDINGS

Having regard to the evidence, the regulatory framework setting the standard that should have been upheld by the NMBM and the impact on the Complainant(s), the following findings are made:

6.1 Regarding whether the NMBM failed to give the Complainant access to his RDP house after having approved it as such, in terms of the relevant legal prescripts regulating the allocation, occupation and transfer of RDP house and if yes, whether such amounts to improper conduct, maladministration and prejudice.

6.1.1 The allegation that NMBM failed to give the Complainant access to his RDP house after having approved it as such in terms of the relevant legal prescripts regulating the allocation, occupation and transfer of RDP house, is substantiated.

6.1.2 The Complainant had on several occasions as discussed in evidence visited the NMBM requesting to be assisted to take occupation of his approved RDP house number 29459, in Missionvale and the eviction of the unlawful occupier in vain.

6.1.3 It was conceded by the NMBM that the house in question belongs to the Complainant in terms of the municipal RDP housing subsidy records.

6.1.4 The Complainant has since April 2019, been receiving municipal statements for account number 600 217 808 000, registered in his name, in respect of his approved house number 29459, Missionvale. However the said house remains occupied by somebody else and NMBM has failed to take any steps to rectify the situation.

6.1.5 As a result, the Complainant is prejudiced and cannot enjoy occupation, title deed and/or ownership in respect of his approved RDP house.

- 6.1.6 This conduct by NMBM and in particular its failure to enable access, and occupation of the said RDP house to the Complainant and to evict the unlawful occupier, is at variance with the provisions of section 26(1)and(2), section 33 (1) and section 195 (1) (e) and (f) of the Constitution; Section 2(1) (a)(b) of the Housing Act; Section 3(1) and section 5(1) of the Promotion of Administrative Justice Act; Section 3(1), section 4(1)(2), section 6(1)(a) and section 7(1) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act and 16 of the Deeds Registries Act.
- 6.1.7 The conduct of the NMBM accordingly constitutes improper conduct as envisaged by section 182(1) (a) of the Constitution and maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act. It also prejudices the Complainant.

7. REMEDIAL ACTION

- 7.1 **The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:**

The Acting City Manager of NMBM to:

- 7.1.1 Take the appropriate steps to ensure that the Complainant is given lawful occupation in respect of his approved RDP and to ensure that Complainant is provided with the title deed documents in respect of Erf 29459, Missionvale, working with the relevant Department of Human Settlements within ninety (90) business days from the date of this report;
- 7.1.2 Report to the Council of the NMBM on the steps to be taken as referred to in paragraphs 7.1.1 above within ninety (90) business days from the date of this report; and

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7.1.3 Apologise in writing to the Complainant for the delay in giving him occupation of his approved RDP house and further inform him of the steps to be taken as referred to in paragraph 7. 1.1 above, within thirty (30) business days from the date of issue of Final Report.

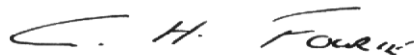
8. MONITORING

8.1.1 The City Manager of the NMBM must submit an Implementation Plan to the Public Protector within thirty (30) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.1.2 The submission of the implementation plan and the implementation of the remedial action taken shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



**ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/06/2021**



Assisted by: Adv. C H Fourie, Executive Manager: PII Coastal