

**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 NUMBER: 16 OF 2023/2024

ISBN NUMBER: 978-1-991244-49-9

**INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE NELSON MANDELA
BAY METROPOLITAN MUNICIPALITY TO COMPLETE THE CONSTRUCTION AND
HANDING OVER OF A RECONSTRUCTION AND DEVELOPMENT PROGRAMME
(RDP) HOUSE TO MS NOMVUSELELO SAM**

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LIST OF ACRONYMS/ABBREVIATIONS

ACRONYMS/ ABBREVIATIONS	DESCRIPTIONS
Adv	Advocate
Constitution	Constitution of the Republic of South Africa, 1996
ECDoHS	Eastern Cape Department of Human Settlements
HoD	Head of the Department of Human Settlements
HSS	Housing Subsidy System
IHP	Incomplete Housing Programme
NMBM	Nelson Mandela Bay Municipality
PA	Personal Assistant
PR	Provincial Representative
Public Protector	Public Protector of the Republic of South Africa
Public Protector Act	Public Protector Act, 1994
RDP	Reconstruction and Development Programme

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, which empowers the Public Protector to report any conduct in the state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protection Act, 1994, which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The complaint was resolved through mediation, in terms of section 6(4)(b)(i) of the Public Protector Act.
- (iii) The findings and the remedial action of the Public Protector are as a result of the outcome of a mediation and conciliation process.
- (iv) The report relates to an investigation into the alleged failure by the functionaries of the Nelson Mandela Bay Metropolitan Municipality to complete the construction and the handing over of a Reconstruction and Development Programme (RDP) house to Ms Nomvuselelo Sam, which was supposed to be built on stand number 39 Zingela Street, Holomisa, Kwanobuhle in Kariega.
- (v) The investigation originates from a complaint lodged with the office of the Public Protector by Ms Nomvuselelo Sam (the Complainant), on 13 April 2022.
- (vi) In the main, the Complainant alleged that:
 - (a) Her house at number 39 Zingela Street, Holomisa, Kwanobuhle in Kariega was never completed and she is still staying in a shack. She knows that the

government paid for the subsidy of her house, however, the house remains incomplete.

- (b) Her house was approved in March 2001 and the construction of the house started in 2002, but was never completed.
- (vi) Based on the analysis of the complaint the following issue was considered and investigated:
 - (a) Whether the functionaries of the Nelson Mandela Bay Metropolitan Municipality failed to complete the construction and handover of the Complainant's Reconstruction and Development Programme (RDP) house, and if so, whether such conduct was improper as envisaged in section 182(1) of the Constitution and amounted to maladministration and prejudice in terms of section 6(4)(a)(i) and (v) of the Public Protection Act, 1994.
 - (vii) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of the relevant laws, cases and related prescripts.
 - (viii) An engagement with the officials from the Municipality on 03 July 2023 has resulted in the municipality admitting to its failure and confirming that it has already allocated a budget to complete the RDP house. A Settlement Agreement, facilitated by the Public Protector Investigation Team, was concluded by the Municipal Manager (City Manager) and the Complainant.
 - (ix) Having regard to the evidence, regulatory framework determining the standard that the Municipality should have complied with and the Settlement Agreement concluded between the parties, dated 02 August 2023 the Public Protector

takes the following remedial action in terms of section 182(1)(c) of the Constitution, as agreed by the parties to the Settlement Agreement:

The City Manager of the Nelson Mandela Bay Metropolitan Municipality

- (aa) Ensure that the construction of the Complainant's RDP house is completed and handed over to her within the 2023/2024 financial year ending on 30 June 2024, as per the Settlement Agreement, dated 02 August 2023;
- (bb) Within **thirty (30) calendar days** after the handover of the house, provide the Public Protector with proof of occupation of the house by the Complainant; and
- (cc) Within **thirty (30) calendar days** of this report, submit to the Public Protector, an Implementation Plan of the remedial action contained in paragraphs (aa) and (bb) above and provide to the Public Protector with updates every sixty (60) days, on the progress made thereon.

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, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings and remedial action, in the manner he or she deems fit, to affected parties, for such parties to note the outcome of the investigation and to implement the remedial action, where applicable.
- 1.3 The complaint was resolved through mediation and conciliation, in terms of section 6(4)(b)(i) of the Public Protector Act.
- 1.4 The findings and remedial action of the Public Protector are as a result of the outcome of the mediation and conciliation process.
- 1.5 A copy of the report is provided to the following persons:
 - 1.5.1 Dr Noxolo L. Nqwazi, City Manager of the Nelson Mandela Bay Metropolitan Municipality;
 - 1.5.2 Ms Eugene Johnson, Speaker of Council, Nelson Mandela Bay Metropolitan Municipality;
 - 1.5.3 Mr Garry Van Niekerk, Executive Mayor of the Nelson Mandela Bay Metropolitan Municipality; and
 - 1.5.4 Ms Nomvuselelo Sam, the Complainant.

- 1.6 The report relates to an investigation into the alleged failure by the functionaries of the Nelson Mandela Bay Metropolitan Municipality to complete the construction and the handing over of a Reconstruction and Development Programme (RDP) house to Ms Nomvuselelo Sam, which was supposed to be built on stand number 39 Zingela Street, Holomisa, KwaNobuhle in Kariega.

2. THE COMPLAINT

- 2.1 The complaint was lodged with the Public Protector by Ms Nomvuselelo Sam (the Complainant), on 13 April 2022. The Complainant in essence alleged that:

- 2.1.1 Her house at number 39 Zingela Street, Holomisa, KwaNobuhle in Kariega was never completed and she is still staying in a shack. She knows that the government paid for the subsidy house, however, the house remains incomplete.

- 2.1.2 Her house was approved in March 2001 and the construction of the house started in 2002, but was never completed.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

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

- 3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.
- 3.4 Section 6(4)(b)(i) of the Public Protector Act provides that *“the Public Protector shall, be competent to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation”.*
- 3.5 Section 6(9) of the Public Protector Act provides that, *“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned”.*
- 3.6 Since the incident or matter concerned occurred more than two years prior to the reporting of the matter to the Public Protector, a discretion in terms of section 6(9) of the Public Protector Act has been exercised, to entertain the complaint based on the following special circumstances as envisaged in Rule 10(1) of the Public Protector Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended (the Public Protector Rules):

- 3.6.1 The Complainant provided sufficient and compelling information of alleged or suspected improper or prejudicial conduct in that she is still staying in a shack due to the incomplete construction of her RDP house;
- 3.6.2 The Complainant provided a reasonable explanation for the delay in reporting the matter to the Public Protector in that she has been engaged in continuous efforts to resolve the matter with the Municipality since 2002, when her RDP house was not completed;
- 3.6.3 The alleged failure to complete and hand over the house by the Municipality in this case is still continuous. The Complainant is still prejudiced as the RDP House has not yet been completed and handed over to her; and
- 3.6.4 It was therefore in the interest of justice and good governance for the Public Protector to exercise her discretion by accepting this matter.
- 3.7 The Nelson Mandela Bay Metropolitan Municipality is an organ of state in terms of section 239 of the Constitution and its conduct amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls within its competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and section 6(4) of the Public Protector Act.
- 3.8 The Public Protector's powers and jurisdiction to investigate this matter, was not disputed by the NMBM.

4 ISSUE IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issue was investigated:
- 4.1.1 Whether the functionaries of the Nelson Mandela Bay Municipality failed to complete the construction and handover of the Complainant's Reconstruction

and Development Programme (RDP) house, and if so, whether such conduct was improper as envisaged in section 182(1) of the Constitution and amounted to maladministration and prejudice in terms of section 6(4)(a)(i) and (v) of the Public Protector Act, 1994.

5 THE INVESTIGATION

5.1 Methodology

- 5.1.1 The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.
- 5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act authorises the Public Protector to resolve a matter or remedy an act or omission through Alternative Dispute Resolution (ADR), measures such as conciliation, mediation and negotiation.
- 5.1.3 The complaint was classified as a Service Delivery matter capable of resolution by way of a conciliation or mediation process in line with section 6(4)(b)(i) of the Public Protector Act, in order to help the parties reach a settlement.
- 5.1.4 The outcome of the mediation was for the Complainant to consider the offer made by the Municipality to complete the construction and the handing over of the RDP House to her within the 2023/2024 financial year.

5.2 Approach to the investigation

- 5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.
- 5.2.2 The investigation was approached using an enquiry process that seeks to determine:
- (a) What happened?
 - (b) What should have happened?
 - (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, abuse of power or other improper conduct?
 - (d) In the event of improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where she would have been, but for the maladministration or improper conduct?
- 5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the functionaries of the Municipality failed to complete the construction and handing over of the RDP house to the Complainant, after her application was approved in 2001.
- 5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the functionaries of the

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

- 5.2.5 The question regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where she would have been had the functionaries of the Municipality complied with the regulatory framework setting the applicable standards for good administration.

6. MEDIATION AND CONCILIATION

- 6.1 Having considered the evidence at hand against the above regulatory framework, the Public Protector decided to resolve the matter through a mediation and conciliation process in accordance with section 6(4)(b)(i) of the Public Protector Act.
- 6.2 Section 6(4)(b)(i) of the Public Protector Act provides that, the Public Protector shall be competent to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation, or negotiation.
- 6.3 On 03 July 2023, the Public Protector facilitated a mediation and conciliation process between the Municipality and the Complainant with a view of assisting the parties to find an amicable solution to the failure by the Municipality to complete the construction of the Complainant's RDP house which was only built to the foundation level.
- 6.4 The mediation and conciliation resulted in the Municipality admitting to its failure and confirming that it has already allocated a budget to complete the construction of the Complainant's RDP house.

7. SETTLEMENT AGREEMENT

- 7.1 The outcome of the above-mentioned mediation and conciliation is recorded in the Settlement Agreement, dated 02 August 2023, which was facilitated by the Public Protector and concluded between the Complainant, Ms Nomvuselelo Sam, and the Municipality, duly represented by Dr N.L. Nqwazi (Dr Nqwazi), in her capacity as the City Manager of the Nelson Mandela Bay Metropolitan Municipality.
- 7.2 The parties have agreed to rectify the omission as follows:
- 7.2.1 The Municipality shall appoint a service provider to complete the construction of the RDP house for the Complainant in the 2023/24 financial year, ending on 30 June 2024;
- 7.2.2 The Municipality shall take appropriate steps to ensure that the RDP house is handed over to the Complainant and that she is given lawful occupation of the said house, immediately upon completion; and
- 7.2.3 The Complainant accepts the offer proposed by the Municipality.
- 7.3 On conclusion of the discussions and the Settlement Agreement, the municipality was informed on 03 July 2023, that the Settlement Agreement will be converted into a formal report in order to ensure that the agreement is implemented within the agreed time frames.

8. APPLICABLE LEGAL PRESCRIPTS

8.1 Key laws and policies taken into account to determine if there had been maladministration by the Municipality and prejudice to the Complainant, were principally those imposing administrative standards that should have been complied with, by the Municipality or its officials when it failed to complete and hand over the RDP house to the Complainant. The following key legislation influenced the process followed in this report:

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

8.1.1 Section 26(1) of the Constitution provides that *“everyone has the right to have access to adequate housing”*. Subsection (2) further provides that *“the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”*

8.1.2 Section 195 of the Constitution makes provision for the principles of good administration in all spheres of government, and it provides as follows:

(1) *Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

- (a) *A high standard of professional ethics must be promoted and maintained,*
- (b) *...;*
- (c) *...;*
- (d) *...;*
- (e) *People’s needs must be responded to...;*
- (f) *Public administration must be accountable;*
- (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information...”*

The Housing Act, 1997 (the Housing Act)

- 8.1.3 Section 9(1)(i) of the Housing Act provides that *“every municipality must as part of the municipalities process of integrated development planning take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis.”*

Analysis

- 8.1.4 The evidence obtained during the course of the investigation indicates that the Municipality failed to complete the construction of the Complainant’s RDP house and as a result, the Municipality failed to ensure that the Complainant’s right to have access to adequate housing materialized, despite the approval of her application for a housing subsidy in 2001, which caused her prejudice.
- 8.1.5 The Municipality was expected to maintain a high standard of professional ethics when it dealt with the Complainant’s matter. It was further expected of the Municipality to ensure that it responded to the Complainant’s enquiries when she enquired about when her house would be completed. Transparency would be fostered if the Municipality responded promptly to the Complainant’s enquiries. The Municipality was also expected to conduct itself in an accountable manner. However, this has not been the case in the manner in which it dealt with the Complainant’s matter.
- 8.1.6 Therefore, the Municipality’s failure to complete the construction and handing over of the RDP House to the Complainant, is inconsistent with the principles espoused in section 195(1) of the Constitution. According to this section, the Municipality is required to provide the Complainant with adequate housing. The Municipality was therefore expected to take all reasonable steps to ensure that

the Complainant's constitutional right to adequate housing was complied with by making sure that the construction of her RDP house was completed and handed over to her.

- 8.1.7 This section also created a legal and moral obligation on the Municipality to do everything in its power to promote and facilitate the provision of adequate housing, especially to the approved beneficiaries such as the Complainant.
- 8.1.8 By allowing the service provider to abandon the Complainant's site without completing the house, the Municipality abdicated its responsibilities under section 26(1) of the Constitution and section 9 (1) of the Housing Act.

9. CONCLUSION

- 9.1 The Nelson Mandela Bay Metropolitan Municipality failed to complete the construction and handover of the RDP House to the Complainant.
- 9.2 The Complainant's subsidy application was approved in 2001 and a slab was built, whereafter no further construction took place.
- 9.3 The Settlement Agreement concluded between the Complainant and the Municipality, in accordance with section 6(4)(b)(i) of the Public Protector Act, constitutes findings of the Public Protector.

10. REMEDIAL ACTION

- 10.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report.

- 10.2 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 1 at para 76 and 105, the Constitutional Court held that the remedial action taken by the Public Protector has a binding effect.
- 10.3 Having regard to the evidence, regulatory framework determining the standard that the Municipality should have complied with, and the Settlement Agreement concluded between the parties, dated 02 August 2023, the Public Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution, as agreed by the parties to the Settlement Agreement, which is hereby attached:

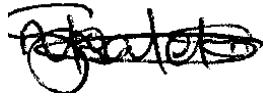
The City Manager of Nelson Mandela Bay Municipality

- 10.3.1 Ensure that the construction of the Complainant's RDP house is completed and handed over to her within the 2023/2024 financial year ending on 30 June 2024, as per the Settlement Agreement, dated 02 August 2023;
- 10.3.2 Within **thirty (30) calendar days** after the handover of the house, provide the Public Protector with proof of occupation of the house by the Complainant; and
- 10.3.3 Within **thirty (30) calendar days** of this report, submit to the Public Protector an Implementation Plan of the remedial action contained in paragraphs 10.3.1 and 10.3.2 above and provide to the Public Protector with updates every sixty (60) days, on the progress made thereon.

11. MONITORING

- 11.1 The City Manager to submit a close off report indicating the full implementation of the remedial action by 30 June 2024.

11.2 The submission of the implementation plan and the implementation of the remedial action 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 KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 29 SEPTEMBER 2023

Assisted by: Adv Deon Barnard
Executive Manager, PII Coastal