

**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: 23 OF 2023/24**

**ISBN NUMBER: 978-1-7764603-6-6**

**INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE FUNCTIONARIES OF  
THE NKETOANA LOCAL MUNICIPALITY TO RESOLVE THE FLOODING THAT  
OCCURS DURING THE RAINY SEASONS ON SITE NUMBER 4466 AND OTHER CO-  
EXISTING SITES AT PETSANA, REITZ**

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## LIST OF ACRONYMS AND ABBREVIATIONS

<b>ACRONYMS/ ABBREVIATIONS</b>	<b>DESCRIPTIONS</b>
Constitution	Constitution of the Republic of South Africa, 1996
Investigation Team	Public Protector Investigation Team
Municipality	Nketoana Local Municipality
Municipal Manager	Mr Nhlapo S M
Public Protector	Public Protector of South Africa
Public Protector Act	Public Protector Act, 1994

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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, 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 allegations of failure by the functionaries of the Nketoana Local Municipality (the Municipality) to resolve the flooding that occurs during the rainy seasons on site number 4466 and other co-existing sites at Petsana, Reitz.
- (v) The investigation originates from a complaint lodged with the Office of the Public Protector by Ms. Z Ndaba on behalf of affected site owners (the Complainants), on 18 July 2022.
- (vi) In the main, the Complainants alleged that:
  - (a) During 2017, the Municipality sold residential site number 4466 and other co-existing sites at Petsana, Reitz in the Free State Province to the Complainants at an amount of five thousand rand (R5 000) each;

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- (b) The Complainants became aware in late 2020, that during rainy season the sites become flooded and as result they are unable to commence with the construction of their houses;
  - (c) Due to the continuous flooding of the sites, the Complainant's decided during 2021 to report the matter to the Municipality; and
  - (d) The Municipality undertook to assist the Complainants in resolving the issue, however, to date the matter remains unresolved.
- (vii) Based on the analysis of the complaint the following issue was identified to inform and focus the investigation:
- (a) Whether the functionaries of the Nketoana Local Municipality failed resolve the flooding that occurs during the rainy seasons on site number 4466 and other co-existing sites at Petsana, Reitz, if so, whether such conduct is improper in terms of section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (viii) 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 and related prescripts.
- (ix) Engagements with the functionaries of the Municipality on 04 September 2023, have resulted in the Municipality admitting to its failure and confirming that it has already obtained a geotechnical report and cost break down to attend to the flooding on the affected sites. A Settlement Agreement facilitated by the Public Protector Investigation Team (Investigation Team) was concluded by the Municipal Manager and the Complainants.

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- (x) 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 04 September 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 Municipal Manager of Nketoana Local Municipality**

- (aa) To ensure that the flooding that occurs during the rainy seasons on site number 4466 and co-existing sites is resolved by 30 June 2024, as per the Settlement Agreement, dated 04 September 2023; and
- (bb) To provide the Public Protector with a progress report every ninety (90) **calendar days** from the date of receipt of the final report with a progress report on the implementation of the Settlement Agreement in line with the implementation plan.

## 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 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 Mr S M Nhlapo, Municipal Manager of Nketoana Local Municipality; and
  - 1.5.2 Ms Z Ndaba, the Complainant;
- 1.6 The report relates to an investigation into allegations of failure by the functionaries of the Nketoana Local Municipality (the Municipality) to resolve the flooding that occurs during the rainy seasons on site number 4466 and other co-existing sites at Petsana, Reitz.

## **2. THE COMPLAINT**

2.1 The complaint was lodged with the Public Protector on 18 July 2022, by Ms Z Ndaba on behalf of affected site owners (the Complainants) of Petsana, Reitz, Free State Province.

2.2 In essence the Complainants alleged that:

2.2.1 During 2017, the Municipality sold residential site number 4466 and other co-existing sites at Petsana, Reitz in the Free State Province to the Complainants at an amount of five thousand rand (R5 000) each;

2.2.2 The Complainants became aware in late 2020, that during rainy seasons the sites become flooded and as a result they are unable to commence with the construction of their houses;

2.2.3 Due to the continuous flooding of the sites, the Complainants decided during 2021 to report the matter to the Municipality; and

2.2.4 The Municipality undertook to assist the Complainants in resolving the issue, however, to date the matter remains unresolved.

## **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 The Nketoana Local 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.
- 3.6 The Public Protector’s powers and jurisdiction to investigate this matter, was not disputed by the Nketoana Local Municipality.

#### **4. ISSUE IDENTIFIED FOR INVESTIGATION**

- 4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

- 4.1.1 Whether the functionaries of Nketoana Local Municipality (the Municipality) failed to resolve the flooding that occurs during the rainy seasons on site number 4466 and other co-existing sites at Petsana, Reitz, if so, whether such conduct is improper as envisaged in section 182(1) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) 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 empowers 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 assist the parties reach a settlement.

### **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.

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- 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 resolve the flooding that occurs during the rainy seasons at the Complainants' sites.
- 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 the improper conduct and/or maladministration.
- 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 Complainants as close as possible to where they 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 applicable 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 The Public Protector Investigation Team (Investigation Team) sent an allegations letter to the Municipal Manager, on 03 October 2022.
- 6.3 On 01 December 2022, the Municipality together with the Land Surveyor conducted a site visit at site number 4466 and other co-existing sites to analyse and determine the type of intervention that can best address the situation;
- 6.4 The Municipality confirmed that site 4466 and other co-existing sites are indeed situated below natural ground level, which collects runoff water to the sites and resulted in flooding during rainy season, as illustrated hereunder:



6.5 The Municipality identified two options to resolve the issue as follows:

*Option 1*

- (a) To solicit a geotechnical report for the area which will likely suggest that removal of the clayish material would have to be done until a level of weathered rock is reached; and
- (b) Having obtained this level, a *G5 material would have to be imported in 150 layers until a level of 200mm above natural ground is reached*. This will then facilitate the necessary raising of the ground level that would allow the area to drain water and be built on according to the layout developed thereon.

*Option 2*

- (a) This option involves quantifying the cost of the truncated existing structure for compensation and relocating the affected owners of the sites in question to an alternative area; and
- (b) Having achieved this, the next step would be to barricade the area and declare it inhabitable to build on. However, the Municipality is currently in no position to provide alternative registered sites to the owners of affected sites.

6.6 In view of the above-mentioned options, the Municipality recommended implementation of *Option 1* to fill up the area with material in order to raise the ground level, with a view to build according to the site layout already existing on the land use scheme; and

6.7 The surveyor expert already developed a cost break down of the cost that needs to be undertaken in order to facilitate usage of the site in question.

6.8 On 04 September 2023, the Investigation Team facilitated a mediation meeting between the Municipality and Complainants for the Complainants to consider the offer made by the Municipality, to raise the ground level that would allow the area to drain water and be built on. The Complainants accepted the offer proposed by the Municipality. The parties resolved to enter into a Settlement Agreement setting out the deliverables and timelines within which the Municipality would address the flooding problem.

## 7. SETTLEMENT AGREEMENT

7.1 The Public Protector facilitated the conclusion of the Settlement Agreement dated 04 September 2023, between the Municipality, duly represented by Mr SM Nhlapo, the Municipal Manager and the Complainants represented by Ms Zandile Ndaba.

7.2 The Municipality undertook to do the following as recorded in the Settlement Agreement:

Item	Activity	Responsible Department	Status of Progress	Estimated time
1.	<b>Earthworks and roadworks</b> Demolish existing structure	Municipality and its Technical Team	Monthly meeting between the Municipality and affected parties, and updates on WhatsApp group created by stakeholders	01 September to 30 October 2023
2.	<b>Site clearance</b> Clear site as directed including spoiling material within 1 km free haul	Municipality and its Technical Team and Service Provider	Monthly meeting between the Municipality and affected parties and updates on WhatsApp group created by stakeholders	30 November 2023 to 31 January 2024

<p>3.</p>	<p><b>Bulk excavation</b> Excavate in all material and use for construction of embankments for buildings and open areas or dispose of as ordered including free haul of 1km onsite  Cut to spoil from excavation on site</p>	<p>Municipality and its Technical Team and Service Provider</p>	<p>Monthly meeting between the Municipality and affected parties and updates on WhatsApp group created by stakeholders</p>	<p>01 February to 31 March 2024</p>
<p>4.</p>	<p><b>Earthworks (Roads) and platforms</b>  Road bed preparation and compaction of material  Compact material to 93% Mod AASHTO density  10t vibratory smooth drum roller  Supply &amp; lay filter fabric lining to subsoil drains; Geotextile (Bidim AG 400) or similar approved incl. material, delivery, unrolling, cutting and placing.  Supply rock fill from commercial sources for miscellaneous areas</p>	<p>Municipality and its Technical Team and Service Provider</p>	<p>Monthly meeting between the Municipality and affected parties and updates on WhatsApp group created by stakeholders</p>	<p>01 April to 30 June 2024</p>

	<p>compacted to 90% Mod AASHTO density.</p> <p>Supply selected G5 material from commercial sources for miscellaneous areas compacted to 95% Mod AASHTO density</p>			
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## 8. THE 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 Complainants, were principally those imposing administrative standards that should have been complied with, by the Municipality or its officials when it failed to resolve the flooding that occurs during the rainy seasons on site number 4466 and other co-existing sites at Petsana, Reitz. The following key legislation influenced the process followed in this report:

### The Constitution of the Republic of South Africa, 1996

8.1.1 Section 152 of the Constitution provides *inter alia* that:

(1) *The objects of local government are -*

(a) *To provide democratic and accountable government for local communities;*

(b) *To ensure the provision of services to communities in a sustainable manner...;*

(2) *A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).*



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..."*

8.1.3 Section 237 of the Constitution places a duty on the Municipality to ensure that all constitutional obligations are performed diligently and without delay.

#### *Analysis*

8.1.4 The evidence obtained during the course of the investigation indicates that in 2020 when the Complainants intended to commence construction of their houses, they established that the sites become flooded during rainy seasons. In 2021 the Complainants reported to the Municipality the flooding on site number 4466 and other co-existing sites, but the Municipality failed to resolve the matter.

8.1.5 The Municipality and its functionaries did not dispute that the Complainants residential sites are situated below natural ground and as a result the sites are flooded during rainy seasons.

8.1.6 The Municipality's failure to timeously resolve the flooding on Complainants' site is inconsistent with the principles espoused in sections 152(1), 195(1) and 237 of the Constitution.

## 9. CONCLUSION

9.1 The Settlement Agreement concluded between the Complainants and the Municipality, in accordance with section 6(4)(b)(i) of the Public Protector Act, constitutes findings of the Public Protector.

9.2 On conclusion of the discussions and the Settlement Agreement, the Municipality was informed on 04 September 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.

## 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 04 September 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:

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## The Municipal Manager Nketoana Local Municipality

- 10.3.1 To ensure that the flooding that occurs during the rainy seasons on site number 4466 and co-existing sites is resolved by 30 June 2024, as per the Settlement Agreement, dated 04 September 2023; and
- 10.3.2 To provide the Public Protector with a progress report every ninety (90) **calendar days** from the date of receipt of the final report with a progress report on the implementation of the Settlement Agreement in line with the implementation plan.

## 11. MONITORING

- 11.1 The Municipal Manager to submit a close off report indicating the full implementation of the remedial action by 30 June 2024.
- 11.2 The implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report.



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**ADV KHOLEKA GCALEKA**  
**ACTING PUBLIC PROTECTOR**  
**OF THE REPUBLIC OF SOUTH AFRICA**  
**DATE: 29 SEPTEMBER 2023**

*Assisted by: Vanessa Mundree*  
*Provincial Representative: Free State*