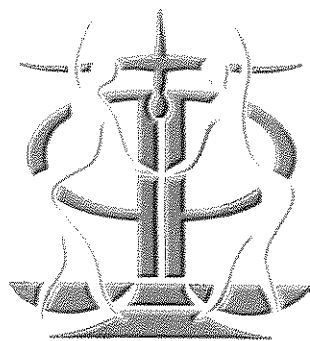


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH
AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR
ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

“JOY, AT LAST, FOR POWER SURGE VICTIM”

REPORT NO. 27 OF 2010/11

**REPORT ON A NEGOTIATED SETTLEMENT OF A DISPUTE INVOLVING THE
DRAKENSTEIN MUNICIPALITY AND MRS N E XHOSA PERTAINING TO THE
DAMAGE CAUSED TO HER HOUSEHOLD ELECTRICAL APPLIANCES BY AN
ELECTRICAL POWER SURGE**

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Executive Summary

- (i) The Public Protector conducted an investigation regarding allegations of unfair treatment by the Drakenstein Municipality (the Municipality).
 - (a) On 15 December 2009, the Public Protector received a complaint from Mrs N E Xhosa (the Complainant) against the Drakenstein Municipality (the Municipality)
 - (b) The Complainant alleged that on 1 June 2009, her household electrical appliances got damaged when an electrical pole opposite her house caught fire. The Complainant reported the matter to the Drakenstein Municipality on the same day. The Municipality asked her to obtain quotations for the damaged electrical appliances. After submitting the quotations, the Municipality offered to reimburse her 50% of their original value arguing that the goods were no longer new and have depreciated in value over the years.
 - (c) Following the intervention of the Public Protector, the Municipality agreed to settle the claim by paying the estimated replacement value of the damaged goods amounting to six thousand six hundred and seventy four rand and thirty six cents (R6 674.36), which amount had since been paid into the Complainant's banking account. The aforesaid amount included the value for replacing the washing machine and hot plate which had previously been in dispute.
- (ii) The Public Protector found that:
 - (a) The amount of time it took for the matter to be resolved by the Municipality was unnecessarily long and prejudicial to the Complainant.

- (b) In the premises, the complaint of unfair treatment was legitimate and substantiated.
- (iii) The following remedial action was prescribed:
- (a) A settlement agreement attached hereto marked "A" was drafted and prepared by the Public Protector and signed by the parties.
 - (b) The Municipality was asked to extend an apology to the Complainant for the inconvenience caused and for the time it has taken to finalise the matter.

**REPORT ON A NEGOTIATED SETTLEMENT OF A DISPUTE INVOLVING THE
DRAKENSTEIN MUNICIPALITY AND MRS N E XHOSA PERTAINING TO THE
DAMAGE CAUSED TO HER HOUSEHOLD ELECTRICAL APPLIANCES
CAUSED BY AN ELECTRICAL POWER SURGE**

1. INTRODUCTION

1.1 This report is submitted to Mrs N E Xhosa (the Complainant) and the Municipal Manager, Drakenstein Municipality (the Municipality) 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 It pertains to an investigation undertaken by the Public Protector following allegations of unfair treatment on the part of the Municipality.

2. THE COMPLAINT

2.1 The Complaint originates from the Complainant, a 66 year old woman, who is a resident of Mbekweni Township within the area of jurisdiction of the Municipality. She approached the Public Protector on 15 December 2009 with the following allegations:

2.1.1 That on 1 June 2009 whilst at home, a street light belonging and operated by the Municipality opposite her house, caught fire resulting in an electric power surge which destroyed a number of her household electrical appliances.

2.1.2 Among the items destroyed were the following:

- (a) 2 X Television sets
- (b) 1 X Music centre
- (c) 1 X Microwave oven
- (d) 1 X Washing machine
- (e) 1 X Hot plate

2.1.3 She reported the damage to the Municipality on the same day.

2.1.4 The Municipality requested her to obtain quotations for the repair of the damaged goods.

2.1.5 She submitted the quotations to the Municipality.

2.1.6 The Municipality referred the quotations to its third party insurance company.

2.1.7 The Municipality was advised to offer 50% of the original purchase price of the goods. It was argued that these goods were not new and their value has deteriorated over the years.

2.1.8 Furthermore, the Municipality refused to reimburse the Complainant for the washing machine and the hot plate.

2.1.9 It was argued that these two items were not in working order when the power surge occurred.

2.1.10 In the circumstances, the Complainant approached the Public Protector to investigate the alleged unfair treatment to which she had been subjected by the Municipality.

3. JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution and its additional operational requirements are governed by the Public Protector Act. The institution was established to strengthen constitutional democracy.
- 3.2 In terms of section 182(1) of the Constitution, the Public Protector has the power 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. Following an investigation, the Public Protector can report on that conduct and take appropriate remedial action.
- 3.3 In terms of the Public Protector Act, appropriate remedial action includes mediation, negotiation and conciliation.
- 3.4 In terms of section 7(1)(b)(i) of The Public Protector Act, the format and procedure to be followed in conducting any investigation are determined by the Public Protector with due regard to the circumstances of each case.
- 3.5 This matter falls within the jurisdiction of the Public Protector.

4. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act, and comprised the following:

4.1 Key Sources of Information

4.1.1 Various written and telephonic communications were exchanged between the Complainant, the Public Protector and the Municipality. The parties were requested to sign the settlement agreement, attached hereto as Annexure "A" in person in Paarl on 6 June 2010.

4.1.2 The Public Liability Policy of the Municipality was examined.

4.1.3 The Electricity Regulation Act, 2006 was examined.

4.2 Summary of the Investigation Process and Evidence

4.2.1 The information gathered during the communication and consultation with the Complainant and the Municipality revealed that:

4.2.1.1 The Municipality was insured against the event which occurred on 1 June 2009. The Municipality accepted its liability for claims arising out of the aforesaid incident.

4.2.1.2 As advised by the third party insurance company, the Municipality sought to limit its liability to 50% of the original value of the damaged household electrical appliances aforementioned, because they were not new.

4.2.1.3 The Municipality also sought to exclude the washing machine and hot plate arguing that they did not get damaged during the power surge.

4.2.1.4 The Complainant was adamant that the Municipality was liable for 100% of the losses and that the Municipality should restore the status *quo ante*.

4.2.1.5 In an effort to reach a solution the Complainant considered the proposition to accept good quality second hand replacement products similar to the damaged goods including the washing machine and hot plate and to obtain a fresh quotation thereof. The Complainant obtained the necessary quotation.

4.2.1.6 The Municipality also agreed to a settlement on that basis.

4.2.1.7 The parties agreed to sign a settlement agreement drafted by the Public Protector to that effect.

4.2.1.8 Whereas the Municipality had initially offered to pay 50% of the estimated value of some of the goods at R3, 036.00 excluding the washing machine and the hot plate in the settlement agreement, it agreed to pay the amount of R6 674.36 all inclusive.

4.3 Evaluation of Evidence

4.3.1 The Complainant's initial demand for the Municipality to restore the status *quo ante* appears to have been reasonable in the circumstances.

4.3.2 The offer to settle at 50% of the original purchase price of some of the goods made by the Municipality on the ground that the goods were old, appears to have been unreasonable.

4.3.3 The offer had the effect of depriving the Complainant of the use and enjoyment of her goods.

4.3.4 There exists no sound argument as to why the washing machine and the hot plate would escape the damage caused by the power surge when all other electrical appliances were so damaged.

4.3.5 The Municipality appears to have allowed the third party insurance company to take the initiative in the settlement negotiations thus abdicating its responsibilities to its residents.

4.3.6 The matter was allowed to drag on for a considerable time to the detriment of the Complainant who was denied the use of her goods during this time.

5. REGULATORY FRAMEWORK

5.1 Municipal Policy on Public Liability

5.1.1 The liability of the Municipality is insured by its policy with Santam Insurance Company Limited, including all sums which the Municipality shall become legally liable to pay as damages consequent upon accidental loss or damage.

In this regard “damage” is defined as:

- (a) *‘Physical injury to tangible property, including all resulting in loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it, or*
- (b) *Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.’*

5.2 Electricity Regulation, 2006

5.2.1 The supply and distribution of electricity in the Republic of South Africa is regulated by the Electricity Regulation, 2006. According to its preamble the purpose of the Act is among other things:

“To establish a national regulatory framework for the electricity supply industry, to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework; to provide for licenses and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity be regulated, to regulate the reticulation of electricity by municipalities;”

- 5.2.2 A Licensee in the Act is defined as meaning the holder of a license granted or deemed to have been granted by the Regulator under the Act and distributor means a person who distributes electricity. In this regard the Municipality is both a licensee and a distributor of electricity. Public liability of a licensee is regulated by Section 25 of the Act which states as follows:

“In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.”

- 5.2.3 Accordingly, the Municipality as a licensee and distributor is deemed to be negligent unless it can prove the contrary. This is the legal position as it relates to municipal liability relating to injury or damage caused by electrical mishaps such as the present one in this complaint. The Municipality was presumed to have been negligent in causing the power surge and all that the Complainant was left to do was to prove her quantum of damages, which she did by way of quotations.

5.2.4 The interpretation accorded to section 25 is in line with the available case law on the subject.

5.2.5 In the matter of *Pietermaritzburg City Council v PMB Armature Winders 1983 (2) All SA 117 (A)* a similar matter was decided in favour of the respondent (confirmed on appeal) and the court awarded compensation for damages in respect of damage done to its equipment by electricity transmitted by the electrical plant and machinery of the appellant.

5.2.6 The same position was followed in the case of *Van Niekerk v City Council of Pretoria 1997 (1) All SA 305 (T)*. In that case facts were similar to the current complaint where a power surge resulted in damage to a homeowner's electrical equipment, and the Council refused to entertain the homeowners claim and a request for a copy of the report it had commissioned on the basis of professional privilege. The Court held that the report could disclose information which was necessary to advance the ratepayers claim and the latter could be said to reasonably require the report.

5.3 The Constitution

5.3.1 Section 33 of The Constitution dealing with Just Administrative Action provides:

"(1) Everyone has a 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"

5.3.2 In the above instance it would appear that there was an unreasonable delay in finalising the Complainant's claim and the spirit of the above provisions of the Constitution were not complied with.

6. CONCLUSION

6.1 It is common cause that the Complainant's electrical appliances were damaged as a result of an electrical power surge which started when the street electrical pole operated by the Municipality caught fire.

6.2 The Municipality eventually agreed to compensate the Complainant for the washing machine and hot plate.

6.3 It is common cause that the Municipality is by law liable for the damages occasioned to the Complainant's household electrical appliances as a result of the aforesaid electrical power surge.

6.4 By offering to reimburse 50% of the original purchase price of some of the damaged goods, excluding the washing machine and the hot plate, the Complainant was effectively being deprived of the use and enjoyment of her goods by the Municipality.

7. FINDINGS

7.1 The amount of time it took for the matter to be resolved by the Municipality was unnecessarily long and was prejudicial to the Complainant.

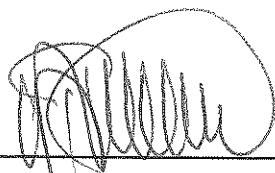
7.2 In the premises, the complaint of unfair treatment was legitimate and substantiated.

8. REMEDIAL ACTION

- 8.1 A settlement agreement prepared by the Public Protector annexed hereto marked "A" has been signed by the parties.
- 8.2 In terms of section 182 (1)(c) of the Constitution the Municipality is required to extend an apology to the Complainant for the inconvenience caused and the time it has taken to finalise this matter.

9. MONITORING

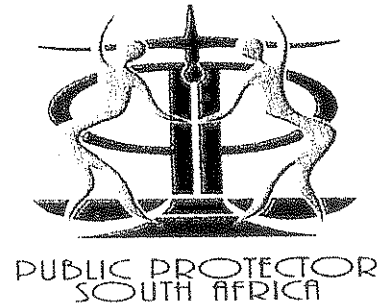
- 9.1 The implementation of the settlement agreement has been effected when the Municipality deposited the sum of R6 674.36 into the Complainants banking account in full and final settlement of the agreed amount.



ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 14/09/2010

Assisted by: Mr A Lose, Senior Investigator, Western Cape Provincial Office



SETTLEMENT AGREEMENT

Between

Mrs N.E. Xhosa

And

DRAKENSTEIN MUNICIPALITY

Settlement Agreement

File No 7/2-19060/10

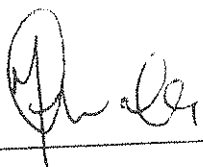
1. Whereas, I Nosipho Esther Xhosa Id No 440728 0279 087 had lodged a complaint with the Office of the Public Protector (Western Cape Provincial Office) against the Drakenstein Municipality for unfair treatment in refusing to compensate me the full replacement value in respect of my electrical appliances that were damaged when an electrical power surge occurred on the 1st June 2009.
2. And, whereas the municipality has accepted liability for the damages occasioned to my household electrical appliances and to compensate me for the full replacement value thereof after the intervention of the Office of the Public Protector.
3. And, whereas the said municipality has now made a financial settlement offer amounting to six thousand six hundred and seventy four rand and thirty six cents (R6 674.36) in full and final settlement of my claim.
4. And, whereas I have now accepted the aforesaid amount and signed a discharge form in settlement of the claim which amount has since been paid into my banking account.
5. This agreement serves to confirm that my claim against the municipality has since been extinguished in full and the matter must be regarded as finalized.

This done and signed in Paarl on the 18 June 2010.

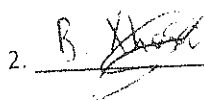
E Xhosa

Nosipiwo Esther Xhosa

Witnesses 1. _____

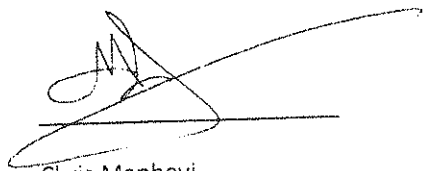


2. _____



I the undersigned Chris Mapheyi (Head of Department) confirm the accuracy of the statements set out above in so far as they related to the Drakenstein Municipality.

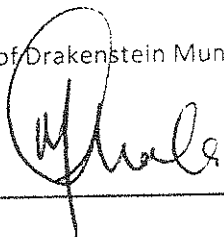
This done and signed in Paarl on the 18 June 2010.



Chris Mapheyi

For and on behalf of Drakenstein Municipality

Witnesses 1. _____



2. _____

