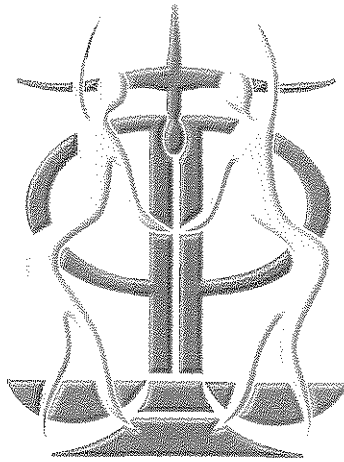


REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION  
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH  
AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR  
ACT, 1994



PUBLIC PROTECTOR  
SOUTH AFRICA

REPORT NO. 37 OF 2010/2011

*"Agony over power surge"*

REPORT ON A DISPUTE INVOLVING THE THEEWATERSKLOOF  
MUNICIPALITY AND MR J C SCHICKERLING PERTAINING TO THE DAMAGE  
CAUSED TO HIS HOUSEHOLD ELECTRICAL APPLIANCES BY AN  
ELECTRICAL POWER SURGE

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## Executive Summary

- (i) The Public Protector South Africa conducted an investigation regarding allegations of unfair treatment by the Theewaterskloof Municipality (the Municipality). Mr J C Schickerling (the Complainant) alleged that on 13 August 2009, his household electrical appliances were damaged when an electrical power surge occurred caused by strong winds. The Complainant reported the matter to the Municipality the following day. A municipal electrician was sent to the premises and confirmed the power surge.
- (ii) The Public Protector found that-
- a) The Complainant suffered financial damages to the amount of R13 710.00 as a result of an electrical power surge.
  - b) In terms of section 25 of the Electricity Regulation Act, 2006 (Electricity Regulation Act) the damage is deemed to have been caused by the Municipality unless there was credible evidence to the contrary. Section 22 of the Theewaterskloof Municipality: Electricity Supply By-Law, 2005 (Electricity By-Law) which transferred the presumption of liability to the consumer, is inconsistent with the provisions of section 25 of the Electricity Regulation Act.
  - c) In the absence of any process to establish the existence of any credible evidence to the contrary, the repudiation of the Complainant's claim by the Municipality is materially and procedurally flawed and unreasonable given the circumstances of his case.
  - d) The complaint of unfair treatment is legitimate and substantiated.
  - e) The Municipality is therefore in law liable and reasonably expected to accept liability to compensate the Complainant in the amount of R13 710.00.
- (iii) The following remedial action is to be taken:

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- (a) Payment of the amount of R13 710.00 to the Complainant must be made within 30 days of the issue and receipt of this report by the Executive Mayor and the Municipal Manager of the Municipality.
- (b) The Municipal Council must attend to the amendment of section 22 of its Electricity By-Law in order to align it with the provisions of section 25 of the Electricity Regulation Act. Such an amendment to the By-Law is to be effected within six months of the issue and receipt of this report by the Executive Mayor and the Municipal Manager. The Public Protector must be furnished with a copy of the amended By-Law within 30 days after such an amendment has been effected by the Municipal Council.
- (c) The Municipality must extend a written apology to the Complainant for the inconvenience caused and for the long time it has taken to finalise the matter.

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**REPORT ON AN INVESTIGATION OF A DISPUTE INVOLVING THE  
THEEWATERSKLOOF MUNICIPALITY AND MR J C SCHICKERLING  
PERTAINING TO THE DAMAGE CAUSED TO HIS HOUSEHOLD ELECTRICAL  
APPLIANCES CAUSED BY AN ELECTRICAL POWER SURGE**

**1. INTRODUCTION**

- 1.1 This report is submitted to the Executive Mayor and to the Municipal Manager, Theewaterskloof 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 A copy is provided to Mr J C Schickerling (the Complainant) in terms of section 8(3) of the Public Protector Act.
- 1.3 It pertains to an investigation undertaken by the Public Protector following an allegation of unfair treatment on the part of the Municipality.

**2. THE COMPLAINT**

- 2.1 The complaint originated from a resident of Villiersdorp located within the area of jurisdiction of the Municipality. He approached the Public Protector on 18 November 2010 with the following allegations:
- 2.1.1 On 13 August 2009 whilst at home a streetlight operated by the Municipality caused the power supply to the house to be interrupted abruptly. This caused an electrical power surge resulting in the destruction of, or damage to his electrical household appliances.
- 2.1.2 Amongst the goods destroyed or damaged were the following:

- 2.1.2.1 6 globes;
- 2.1.2.2 electrical accent frying pan;
- 2.1.2.3 TV antenna (Ellies);
- 2.1.2.4 Panasonic TV set;
- 2.1.2.5 Odiodel Radio;
- 2.1.2.6 Osaka Clock Radio;
- 2.1.2.7 Sansui Cassette/Disk player;
- 2.1.2.8 Power Box DVD;
- 2.1.2.9 Defy Washing Machine 7,2 Kg; and
- 2.1.2.10 Computer set.

2.1.3 The total value of the items is calculated at R13 710.00.

2.1.4 He reported the damage to the Municipality the following day.

2.1.5 The Municipality sent an electrician to the premises to confirm the incident.

2.1.6 The electrician confirmed that a power surge had occurred as a result of a faulty street light.

2.1.7 The Municipality requested the Complainant to obtain and submit quotations for the repair or replacement of the damaged / destroyed electrical appliances.

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

2.1.9 The Municipality was advised to repudiate liability.

2.1.10 The claim was repudiated by the Municipality citing the provisions of section 22 of its Electricity By-Law as the legal basis upon which it relied.

2.1.11 In the circumstances, the Complainant approached the Public Protector to investigate the alleged unfair treatment to which he has been subjected.

### **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. It 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 The complaint accordingly falls within the mandate of the Public Protector.

### **4. THE INVESTIGATION**

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

#### **4.1 Key sources of information**

4.1.1 Various written and telephonic communications between the Complainant, the Public Protector and the Municipality.



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4.1.2 Theewaterskloof Municipality: Electricity Supply By-Law 7 of 2005 (Provincial Gazette 6234 of 8 March 2005).

4.1.3 The three quotations obtained by the Complainant.

4.1.4 The repudiation letters from the Lion of Africa Insurance Company and the Municipality.

4.1.5 The Electricity Regulation Act, 2006.

4.1.6 The Constitution.

## **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 that occurred on 13 August 2009.

4.2.1.2 The insurer is Lion of Africa Insurance Company based in Johannesburg.

4.2.1.3 The insurance company advised the Municipality to repudiate liability in respect of the complaint.

4.2.1.4 The Municipality duly followed the above-mentioned advice and repudiated liability.

4.2.1.5 The repudiation of liability was said to be based on the provisions of section 22 of the above-mentioned Electricity By-Law.

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- 4.2.1.6 As a result of the repudiation, the Complainant was compelled to approach the Public Protector for assistance.
- 4.2.1.7 The Public Protector requested the Municipality to reconsider its repudiation of the claim citing the provisions of the Electricity Regulations Act in support of the request.
- 4.2.1.8 The Municipality refused to reconsider the repudiation, acting on advice from the third party insurer.
- 4.2.1.9 It was again argued by the Municipality that, unless the Complainant could show that the Municipality or its employees has acted negligently, section 22 of its Electricity By-Law exempted the Municipality from liability.
- 4.2.1.10 Even when it was pointed out to the Municipality that the provisions of the aforesaid Electricity By-Law were subordinate to the provisions of national legislation, which placed the burden of rebuttal of the presumption of negligence upon the Municipality in the event of a civil dispute arising out of damages caused by the supply of electricity, the Municipality refused to reconsider its stance towards the claim.
- 4.2.1.11 The Public Protector, in a letter directed to the Municipality advised same that it had completed its preliminary investigation and that an adverse finding could be made against the Municipality.
- 4.2.1.12 The Municipality, was invited to comment on the adverse findings of the Public Protector, to confirm or dispute any of the accepted factual information, and its acceptance of the proposed remedial action.

4.2.1.13 The Municipality was afforded a reasonable opportunity to comment or make representations to the Public Protector regarding the proposed findings and the proposed remedial action.

4.2.1.14 The Municipality has responded by restating its repudiation of liability on the advice of its third party insurer.

#### 4.3 Evaluation of evidence

4.3.1 The claim of compensation made by the Complainant is reasonable.

4.3.2 The Municipality appears to have abdicated its responsibilities in this matter to the insurance company.

4.3.3 Even when it was pointed out that the subordinate legislation relied upon to repudiate liability could not take precedence over national legislation, the insurance company still advised the Municipality to continue to reject liability.

4.3.4 In the circumstances, it appears that the Municipality has not been properly advised in repudiating the Complainant's claim.

4.3.5 It would appear that in order to bring the provisions of section 22 of the Electricity By-Law in line with section 25 of the Electricity Regulation Act, the By-Law would require amendment.

4.3.6 The matter has been allowed to drag for a considerable period of time to the detriment of the Complainant who has been denied the use of his electrical appliances.

## 5. REGULATORY FRAMEWORK

### 5.1 The Municipality's Electricity By-Law.

5.1.1 The By-Law was promulgated on 8 March 2005.

5.1.2 Its objective is to regulate the supply of electricity and related matters within the Municipality's area of jurisdiction.

5.1.3 Of relevance here are the following provisions of section 22:

*"The Municipality is not liable for any loss or damage, direct or consequential, suffered or sustained by a consumer as a result of or arising from the cessation, interruption or any other abnormality of the supply of electricity, unless caused by the negligence on the part of the Council."*

5.1.4 The insurance company's interpretation of the above provisions has been that, unless it can be shown that the Municipality was negligent, it could not be held liable for any damages caused by electricity supply to a consumer.

5.1.5 In this case it was argued that the Municipality could not have foreseen the occurrence of the power surge or prevented it.

5.1.6 This argument failed to take into account the provisions of section 25 of the Electricity Regulation Act.

5.1.7 It is submitted that in so far as the provisions of section 22 of the Electricity By-law purports to contradict the provisions of section 25 of the Electricity Regulation Act, it is null and void and the provisions of the Act must supersede the provisions of the By-Law.

5.1.8 Thus if the above principle is upheld, the Municipality must be held liable to compensate the Complainant for the proven amount of damages suffered.

## 5.2 Electricity Regulation Act

5.2.1 The supply and distribution of electricity in the Republic of South Africa is regulated by the Electricity Regulation Act. 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" is defined in this Act as the holder of a license granted or deemed to have been granted by the Regulator under the Act, and "distributor" is defined as a person who distributes electricity. In this regard the Municipality is both a licensee and a distributor of electricity. Public liability of a licensee (e.g. Municipality) is regulated by section 25 of the Act which provides 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."*

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- 5.2.3 In terms of the provisions of the above section, the Municipality as a licensee and distributor of electricity is deemed to have been negligent where damages have been caused to the property of a third party unless the Municipality can produce credible evidence to the contrary.
- 5.2.4 In the present case, the Complainant does not carry any onus to prove that the Municipality was negligent. The Municipality is deemed to have been negligent and it therefore carries the burden of rebuttal. It must rebut the presumption that it was negligent by adducing credible evidence.
- 5.2.5 Mere allegations that it could not have foreseen and prevented the occurrence of the incident will not be sufficient. In order to rebut the presumption which operated against it, it needs to show by means of credible evidence that it could not have foreseen and prevented the power surge and the damage it caused. It must also show that the occurrence is quite remote and far-fetched and could not be reasonably expected to occur in the circumstances of the case. It is submitted that any reasonable electricity licensee or distributor would expect that from time to time electrical power surges would occur resulting in the damage or destruction of third party electrical appliances and would have taken appropriate reasonable measures to prevent or mitigate its occurrence and effects.
- 5.2.6 In the present case, the disruption of the electricity was said to have been caused by strong winds or a storm which resulted in a power surge that destroyed the Complainant's electrical appliances.
- 5.2.7 A power surge can be caused by many factors including forces of nature like strong and powerful winds, storms, etc. This occurrence is not remote or far-fetched, it can occur at any time as the electric poles are always exposed to the elements.

- 5.2.8 The Municipality as a distributor of electricity ought to put preventative measures in place or if that is not feasible, put measures in place that will mitigate the effects of strong winds or storms.
- 5.2.9 The Municipality has produced no credible evidence that it has done so. In the premises, the result is that it has failed to rebut or to discharge the presumption of negligence placed on it by the Legislature.
- 5.2.10 The above interpretation accorded to section 25 is in line with available case law on the subject.
- 5.2.11 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 awarded compensation in respect of damages done to its equipment by electricity transmitted by the electrical plant and machinery of the appellant. The Court upheld the homeowners claim based on its interpretation of section 50 of the Electricity Act, 1987 which is an identical predecessor of section 25 of the current Act.
- 5.2.12 The same view was held in the case of *Van Niekerk v City Council of Pretoria [1997] 1 All SA 305(T)*. In that case a power surge had resulted in damages to the electrical equipment of a homeowner. The City Council was requested to furnish a report compiled in respect of such damage. The City Council refused to allow the homeowner access to the report citing professional privilege. There was a comprehensive debate on the interpretation of section 23 of the Constitution of the Republic of South Africa, 1993 (which was applicable at the time). It was decided that the right to information (as provided for in section 23 of the aforesaid Act) may not be thwarted by a claim for professional privilege. The Court found that the report could disclose information which was necessary to advance the homeowner's claim and the latter could be said to reasonably "require" the

report. In the end the homeowner succeeded in his claim against the City Council.

### **5.3 The Constitution**

5.3.1 Section 33 of the Constitution dealing with Just administrative action provides as follows:

*" 33(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 present case the actions of the Municipality appear to have been unreasonable in repudiating liability based on an overreliance on the advice rendered to it by its third party insurer and failure to duly consider the matter.

## **6. CONCLUSION**

6.1 It is common cause that the Complainants' electrical appliances were destroyed or damaged following an electrical power surge.

6.2 The cause of the power surge is also not in dispute.

6.3 It is also not in dispute that the Complainant suffered damages amounting to R13 710.00 which represents the replacement value of the destroyed or damaged goods.

6.4 The Complainant has from the outset held the opinion that the Municipality was liable for compensating him for the repair and/or replacement of his household electrical appliances.



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- 6.5 Purporting to rely on the provisions of section 22 of its Electricity By-Law, the Municipality has denied liability.
- 6.6 In so far as the provisions of section 22 of the aforesaid By-Law are inconsistent and in contradiction with the provisions of section 25 of the Electricity Regulation Act, it must be regarded as *pro non scripto* and null and void.

## 7. FINDINGS

- 7.1 The Complainant suffered financial damages to the amount of R13 710.00 as a result of an electrical power surge.
- 7.2 In terms of section 25 of the Electricity Regulation Act the damage is deemed to have been caused by the Municipality unless there was credible evidence to the contrary. Section 22 of the Municipality's Electricity By-Law, which transferred the presumption of liability to the consumer, is inconsistent with the provisions of section 25 of the Electricity Regulation Act.
- 7.3 In the absence of any process to establish the existence of any credible evidence to the contrary, the repudiation of the Complainant's claim by the Municipality is materially and procedurally flawed and unreasonable given the circumstances of his case.
- 7.4 The complaint of unfair treatment is legitimate and substantiated.
- 7.5 The Municipality is therefore in law liable and reasonably expected to accept liability to compensate the Complainant in the amount of R13 710.00.

## **8. REMEDIAL ACTION**

The following remedial action in terms of section 182(1) of the Constitution is to be taken:

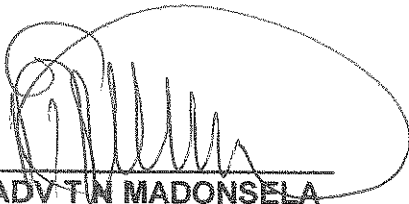
- 8.1 Payment of the aforesaid amount of R13 710.00 must be made to the Complainant as compensation for the destruction or damage occasioned to his electrical appliances. Such payment is to be effected within 30 days of the date of issue and receipt of this report by the Executive Mayor and the Municipal Manager of the Municipality.
- 8.2 The Municipal Council must attend to the amendment of section 22 of its Electricity By-Law in order to align it with the provisions of section 25 of the Electricity Regulation Act. Such an amendment to the By-law is to be effected within six months of the issue and receipt of this Report by the Executive Mayor and the Municipal Manager. The Public Protector must be furnished with a copy of the amended By-Law within 30 days after such an amendment has been effected by the Municipal Council. The Municipal Manager is responsible for furnishing the Public Protector with the aforesaid document.
- 8.3 The Municipality must extend a written apology to the Complainant for the inconvenience caused and the time it has taken to finalise this matter.

## **9. MONITORING**

9.1 The Municipal Manager of the Municipality is required to:

- 9.1.1 Acknowledge receipt and indicate whether or not the report is accepted, within 10 days of the date of the report; and

9.1.2 Provide the Public Protector with an action plan for the implementation of the report within 30 days of the date of the report.



ADV. TIN MADONSELA

PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

DATE: 25/03/2011

Assisted by: Mr A T Lose, Senior Investigator: Western Cape