
PUBLIC PROTECTOR
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"Allegations of undue delay by the Department of Rural Development and Land Reform to allocate and transfer the correct portions of claimed farms to the Tshwale community"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM TO ALLOCATE AND TRANSFER THE CORRECT PORTIONS OF CLAIMED FARMS TO THE TSHWALE COMMUNITY
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Executive Summary

(i) This is my report 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 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of undue delay by the Department of Rural Development and Land Reform (DRDLR) to allocate and transfer the correct portions of claimed farms to the Tshwale community.

(iii) On 08 August 2017, I received a complaint from Mr Mokibelo Felix Mabidilala (the Complainant). The Complainant is the Chairperson of Tshwale Communal Property Association (the CPA).

(iv) In the main, the Complainant alleged that:

(aa) On 30 May 1996 they lodged a land claim with the DRDLR and amongst the farms claimed were Bastkloof 375 LT and Nooitgedacht 342 LT (the farms);

(bb) The farms were simultaneously claimed under the Tshwale Land Claim with reference number: KRP 1870 and Pheeha Land Claim with reference number: KRP 1865;

(cc) The DRDLR erroneously allocated and transferred portions of the farms belonging to Tshwale Community to the Pheeha Community; and

(dd) The DRDLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community.
(v) The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

(vi) On analysis of the complaint, the following issues were identified and investigated:

(aa) Whether the DRDLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community?

(bb) Whether the Tshwale Community suffered prejudiced as a result of the undue delay by the DRDLR?

(vii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the DRDLR and prejudice caused to the Complainant were principally those imposing administrative standards that should have been complied with by the DRDLR when allocating and transferring claimed farms to the relevant claimants. Those are the following:


(cc) The Public Protector Act 23 of 1994

(viii) On 29 October 2019, I issued notices (Notice) in terms of section 7(9)(a) of the Public Protector Act to, amongst others, the Regional Land Claims Commissioner of the Department of Rural Development and Land Reform, Director General of the Department of Rural Development and Land Reform, and the Chief Land Claims Commissioner of the Department of Rural Development and Land Reform to enable them to respond within ten (10) working days of receipt thereof.
(ix) In response to my Notice, the Chief Land Claims Commissioner, Ms N Ntloko-Gobodo (Ms Ntloko-Gobodo) admitted in a letter dated 05 December 2019 that her office tried to resolve the matter amicably between the parties, albeit it took too long, but in vain. She also indicated that the only way to resolve this dispute is to approach the Land Claims Court to adjudicate on the matter and undertook to instruct the Regional Office to commence with the process of referring the matter to court with immediate effect.

(x) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

(a) Regarding whether the DRDCLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community.

(aa) The allegation that the DRDCLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community, is substantiated.

(bb) The DRDCLR conducted an investigation and an addendum was submitted to the Regional Land Claims Commission (RLCC) confirming that the farms were wrongly transferred to Pheeha Community.

(cc) The DRDCLR initially admitted to have made a mistake by allocating and transferring portions of the farms Bastkloof 375 LT and Nooitgedacht 342 LT, to the Pheeha Community instead of the Tshwale Community.

(dd) The DRDCLR took steps to rectify the mistake by conducting an investigation and also had numerous meetings with the Pheeha and Tshwale Land Claimants to try and resolve the issue however, there was no agreement reached. The steps taken were not sufficient as the DRDCLR could have referred the matter to the Land Claims Court for assistance.
(ee) Ms Ntloko-Gobodo contradicted herself in response to my Notice by admitting that the Regional Office took too long to resolve the dispute between the parties, but on the one hand submitted that the DRDLR had initially advised the RLCC that portions of the land belonging to the Tshwale Community were transferred to the Pheeha Community.

(ff) Ms Ntloko-Gobodo also contradicted herself by submitting that the farms were not wrongly transferred to the Pheeha Community but undertook to refer the matter to the Land Claims Court for adjudication to determine the rightful beneficiaries.

(gg) The conduct of the DRDLR was in contravention of Section 195(1) (a) and (f) of the Constitution.

(hh) The conduct of the DRDLR also constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether the Tshwale Community suffered prejudiced as a result of the undue delay by the DRDLR.

(aa) The allegation that the undue delay by the DRDLR prejudiced the Tshwale Community, is substantiated.

(bb) The DRDLR admitted to have failed to resolve the dispute between the Tshwale Community and Pheeha Community as no agreement between the parties could be reached.

(cc) The DRDLR has to date delayed and or failed to allocate and transfer the correct portions of the farms Bastkloof 375 LT and Nooitgedacht 342 LT to the Tshwale Community despite its admission of wrongdoing.
(dd) The DRDLR also failed to take sufficient steps to appoint a mediator and or refer the matter to the Land Claims Court in terms of section 14(1)(a), (b), (c) and (d) of the RLRA.

(ee) Such delay and or failure by the DRDLR to allocate and transfer the correct portions of the farms Bastkloof 375 LT and Nooitgedacht 342 LT to the Tshwale Community or alternatively refer the matter to the Land Claims Court for adjudication, deprived them of the full use and enjoyment of their property, including an opportunity to practice sustainable agricultural farming.

(ff) The conduct of the DRDLR also constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(x) The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

(aa) The Chief Land Claims Commissioner must ensure that within thirty (30) working days from the date of receipt of this report send a written apology to the Tshwale Community for the undue delay and subsequent confusion created in firstly giving the Tshwale Community an expectation that their land would be transferred to them and later stating that there is no error in the redistribution of the land.

(bb) The Chief Land Claims Commissioner must within thirty (30) working days from the date of receipt of this report, ensure that the DRDLR refers the matter to the Land Claims Court to settle the dispute between Tshwale Community and Pheeha Community.

(cc) The Chief Land Claims Commissioner must within thirty (30) working days after Court judgement, ensure that the DRDLR communicates the court
judgment to the affected communities and ensure that it is implemented within the prescribed period.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM TO ALLOCATE AND TRANSFER THE CORRECT PORTIONS OF CLAIMED FARMS TO THE TSHWALE COMMUNITY

1. INTRODUCTION

1.1 This is my report 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 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1 The Chief Land Claims Commissioner of the Department of Rural Development and Land Reform, Ms N Ntloko-Gobodo;

1.2.2 The Director General of the Department of Rural Development and Land Reform, Mr D Shabane;

1.2.3 The Regional Land Claims Commissioner of the Department of Rural Development and Land Reform, Mr Lebjane Maphutha; and

1.3 A copy of the report is also provided to the Complainant, Mr M F Mabidilala to inform him of the outcome of my investigation.
1.4 The report relates to an investigation into allegations of undue delay by the Department of Rural Development and Land Reform to allocate and transfer the correct portions of claimed farms to the Tshwale community.

2. THE COMPLAINT

2.1 On 08 August 2017, I received a complaint from Mr MF Mabidilala (the Complainant) who is the Chairperson of Tshwale Communal Property Association (the CPA). The Complainant requested that I must intervene and investigate what he perceived as maladministration relating to the allocation and transfer of the correct portions of the claimed farms to the Tshwale community. He alleged that:

2.1.1 On 30 May 1996, they lodged a land claim with the DRDLR and amongst the farms claimed were Bastkloof 375 LT and Nooitgedacht 342 LT (the farms);

2.1.2 The farms were simultaneously claimed under the Tshwale Land Claim with reference number: KRP 1870 and Pheeja Land Claim with reference number: KRP 1865;

2.1.3 The DRDLR erroneously allocated and transferred portions of the farms to the Pheeja Community instead of the Tshwale Community; and

2.1.4 The DRDLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The mandate of the Public Protector

3.1.1 The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
3.1.2 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."

3.1.3 Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purposes of an investigation.

3.1.5 In the matter of 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.\(^1\) 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."\(^2\)

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\(^1\) [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

\(^2\) Supra at para [73].
3.1.6. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.1.7 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);

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

3.1.9 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);

3.1.10 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);

3.1.11 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);

3.1.12 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));

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

3.1.14 "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)).

3.1.15 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no. 91139/2016 (13 December 2017), the Court held as follows:

3.1.15.1 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective. (Paragraphs 85 and 152);

3.1.15.2 There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92);

3.1.15.3 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 (paragraphs 100 and 101);

(a) Conduct an investigation;

(b) Report on that conduct; and

(c) To take remedial action.
3.1.15.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (Paragraph 104);

3.1.15.5 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. (Paragraph 105).

3.1.16 To this end, I would like to emphasise that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its adjudicative and judicial nature. The office of the Public Protector is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and prejudice. It is therefore trite that the decisions of the Public Protector are administrative actions.

3.1.17 The fact that there is 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 (paragraphs 107 and 108);

3.1.18 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action. (Paragraph 112);

3.1.19 The Department of Rural Development and Land Reform is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector’s mandate.

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3 Sedumo et al vs Rustenburg Platinum Mines Limited et al, 2008(2) SA 24 (CC) at 235.
4 Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa 1996(4) SA 744 (CC) at 16.
5 Minister of Home Affairs et al vs Public Protector et al 2017(2) SA 597 (GP).
3.1.20 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.

3.1.21 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favorably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute ‘special circumstances’ depends on the merits of each case.

3.1.22 The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) ("PAJA") gives effect to the right to administrative action that is lawful, reasonable and procedurally fair as well as to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996. It seeks to make the administration effective and accountable to people for its actions. Together with the Constitution it embraces the Batho Pele Principles and promotes South African citizens’ right to just administration. I concluded that there are compelling special circumstances in this case that warranted an investigation to determine whether the organs of state and their officials acted in the spirit of the Constitution and PAJA.

3.1.23 On 29 October 2019, I issued notices (Notice) in terms of section 7(9)(a) of the Public Protector Act to, amongst others, the Regional Land Claims Commissioner; the Director-General, and the Chief Land Claims Commissioner to enable them to respond within ten (10) working days of receipt thereof.
4. THE INVESTIGATION

4.1 Methodology

4.1.1 My investigation of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives me 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; to report on that conduct; and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The investigation was conducted by way of correspondence, meetings and interviews with the Complainant and the relevant DRDLR officials, analysis of the relevant documentation and consideration and application of the relevant laws, and regulatory framework.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

(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 or other improper conduct?

(d) In the event of maladministration or improper conduct, 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?

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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeals\(^6\) (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

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 or complied with by the Municipality to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had a state organ complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint, the following issues were considered and investigated:

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\(^6\) Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA).
4.3.1 Whether the DRDLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community?

4.3.2 Whether the undue delay by the DRDLR prejudiced the Tshwale Community?

4.4 The key sources of information

4.4.1 Documents

4.4.1.1 A copy of the complaint form dated 08 August 2017.

4.4.1.2 A copy of the Memorandum issued by the DRDLR on 05 June 2010.

4.4.1.3 A copy of the minutes of the meeting held between the DRDLR and the PPSA dated 09 October 2017.

4.4.1.4 A copy of the section 7(9) Notice signed by me on 29 August 2019 addressed to the Chief Land Claims Commissioner; Director-General and the Regional Land Claims Commissioner.

4.4.2 Correspondence sent and received

4.4.2.1 A copy of the correspondence from my office to the DRDLR dated 26 March 2018.

4.4.2.2 A copy of the correspondence from my office to the DRDLR dated 22 June 2018.

4.4.3 Legislation and other precripts


4.4.3.2 The Public Protector Act 23 of 1994.

4.4.3.3 The Restitution of Land Rights Act 22 of 1994.
4.4.4 Interviews

4.4.4.1 Meeting with the Director Operations, Mr M Nkatingi on 09 October 2017.

4.4.4.2 Meeting with the Director Legal Services, Mr N Mukwevho on 01 August 2018

4.4.4.3 Meeting with the Chief Director, Mr TA Maphoto; Director Operations, Mr M Nkatingi and the Complainant on 18 October 2018.

4.4.5 Case Law

4.4.5.1 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).

4.4.5.2 Sedumo et al v Rustenburg Platinum Mines Limited et al 2008(2) SA 24 (CC) at 235.

4.4.5.3 Ex Parte Chairperson of the Constitutional Assembly; In re; Certificate of the Constitution of the Republic of South Africa 1996(4) SA744 (CC) at 161.

4.4.5.4 Minister of Home Affairs et al v Public Protector et al 2017(2) SA 597 (GP).

4.4.5.5 President of the Republic of South Africa v Office of the Public Protector and Others Case no. 91139/2016 [2017] ZAGPPHC 747.

4.4.5.6 Public Protector v Mail and Guardian 2011(4) SA 420 (SCA).

4.4.5.7 Mazizini Community vs Emfuleni Resorts (PTY) LTD and Others: LCC23/07
5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the DRDLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community.

*Common cause issues*

5.1.1 The Tshwale Community lodged a land claim with the DRDLR on 30 May 1996 and amongst the farms claimed were Bastkloof 375 LT and Nooitgedacht 342 LT.

5.1.2 The farms were simultaneously claimed under Tshwale Land Claim with reference number: KRP 1870 and Pheeha Land Claim with reference number: KRP 1865.

5.1.3 Portions two (2) and thirteen (13) of Nooitgedacht 342 LT and portions from the South East and North Western sides of Bastkloof 375 LT were erroneously transferred by the DRDLR to the Pheeha Land Claimants instead of the Tshwale Community.

*Issue in dispute*

5.1.4 The DRDLR did not dispute that they erroneously transferred portions two (2) and thirteen (13) of Nooitgedacht 342 LT and portions from the South East and North Western sides of Bastkloof 375 LT belonging to the Tshwale Community, to the Pheeha Land Claimants.

5.1.5 The Pheeha Land claimants are refusing to cooperate with the DRDLR in effecting the transfer of the relevant portions to the Tshwale Community arguing that it was not their fault that the portions were allocated to them but that it was the fault of the DRDLR, who allocated and transferred portions of the farms belonging to Tshwale Community to them.
In response to my Notice, Ms Ntloko-Gobodo indicated in a letter dated 05 December 2019 that: "It was only after receipt of the interim report by the Public Protector that the Commission revisited all the information on the matter, and discovered that the subject properties were not wrongly transferred as indicated in the addendum.

It is submitted that the Public Protector relied on the above addendum in concluding that the subject properties were wrongly transferred to Pheeha CPA.

On account of the fact that the subject properties were not wrongly transferred, it would serve no purpose to mediate between the two communities. Furthermore the Pheeha CPA will not accede to their properties being transferred to another community as it has rightfully acquired those properties.

Accordingly, the only resolution to this issue is to refer the matter to court for adjudication”.

Application of the relevant law

Section 195(1) (a) and (f) of the Constitution provides that:

"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) ...
(f) Public administration must be accountable"
5.1.8 These principles enjoin the DRDLR and its officials to exercise a high level of professionalism and ethics including accountability in the performance of their duties and strive to be above reproach.

5.1.9 By allocating and subsequently incorrectly transferring to the Pheeha Land Claimants the portions of land that belongs to Tshwale Community, the DRDLR, failed to uphold the democratic values and principles enshrined in the Constitution and thus acted contrary to the spirit espoused in section 195(1)(a) and (f) of the Constitution.

5.1.10 Section 42A of the Restitution of Land Rights Act 22 of 1994 (RLRA) provides that:

"Where, in terms of this Act, land is acquired or expropriated in order to restore or award the land to a claimant, such land vests in the State, which must transfer it to the claimant".

5.1.11 After acquiring the land in terms of the RLRA on 6 March 2002, the DRDLR was required in terms of section 42(A) of the RLRA to transfer the portions of the farms to the Tshwale Community within a reasonable period, which did not occur.

5.1.12 The DRDLR conceded that its regional office took too long to resolve the dispute between the Pheeha Land Claimants and Tshwale Community. However, it indicated that the delay was due to the complexity of the matter and the fact that it was almost impossible to bring the two parties together.

5.1.13 In Mazizini Community vs Emfuleni Resorts (PTY) LTD and Others: LCC23/07 (12 March 2010) the Judge provided that:

"The Procedure for lodging a restitution claim is, in the first instance, controlled and directed by the Commission on Restitution of Land Rights generally represented by the regional land commissioner. Upon the completion of an investigation in respect of a specific claim the commission is enjoined to resolve any disputes arising among interested parties through negotiations or mediation in order to achieve settlement of the claim. Should such negotiations or mediation fail then the regional land claims
commissioner must refer the matter to the Court if the parties agree in writing and the regional commissioner certifies that resolution is not possible and is of the opinion the claim is ready for hearing by the court”.

5.1.14 The Judge indicated that the dispute that arose among the parties was ultimately not so much in respect of the validity of the claim but rather on the form of redress to which the Mazizini Community was entitled. The Judge further indicated that the Mazizini Community is entitled to the restoration of the land. The Judge granted the Mazizini Community leave to obtain transfer of ownership of the property.

5.1.15 It was expected of the DRDLR to refer the dispute to the Land Claims Court for adjudication.

5.1.16 Ms Ntloko-Gobodo admitted in her response to my Notice that the only way to resolve the dispute was to refer the matter to the Land Claims Court for adjudication. If the farms were not wrongly transferred to the Pheeha Community according to Ms Ntloko-Gobodo, there would not be any dispute between the parties and consequently there would not be a need for mediation and or referral of the matter to the Land Claims Court for mediation.

5.1.17 On 24 August 2018, the investigation team had a meeting with the DRDLR wherein it was indicated that several meetings were held with the Pheeha and Tshwale Land Claimants to try and resolve the issue however, there was no agreement reached.

5.1.18 At the meeting, the DRDLR further indicated that the next process is to appoint a mediator and the legal unit will give my investigation team a schedule outlining the process of mediation and timeframes. That was however not done.

5.1.19 Despite issuing a memorandum on 5 June 2010, acknowledging to have made an error by not allocating and transferring the correct portions of the claimed farms to the Tshwale Community, the DRDLR has delayed to refer the matter to the Land Claims Court.
5.1.20 The DRDLR did not furnish reasons for the delay in allocating and transferring the correct portions of the claimed farms to the Tshwale Community. Such conduct by the DRDLR is unreasonable under the circumstances.

Conclusion

5.1.21 Based on the evidence gathered, it is my considered view that the DRDLR unduly delayed to allocate and transfer portions 2 and 13 of Nooitgedacht and portions from the South East and North Western sides of Bastkloof 375 LT to the Tshwale Community.

5.2 Regarding whether the Tshwale Community suffered prejudice as a result of the undue delay by the DRDLR.

Common cause issues

5.2.1 The DRDLR allocated and transferred portions two (2) and thirteen (13) of Nooitgedacht 342 LT and portions from the South East and North Western sides of Bastkloof 375 LT to the Pheeja Land Claimants.

5.2.2 On 5 June 2010 the DRDLR issued a memorandum signed by the following three officials, Ms Sewela Masipa of the DRDLR on 4 May 2010, Ms Masechaba Monyamane on 12 May 2010 and Mr Tele Maphoto stipulating under the conclusion that:

"...Based on the information provided by the Tshwale claimants it is (sic) clear that they have been dispossessed of the land they have claimed. Tshwale and Pheeja agree and understand their boundaries which is the Letaba River. Looking at the Map of Nooitgedacht the portions that are allocated to Pheeja are not affected by the Tshwale claim because they are on the Northern side of the river."
The remaining extent of Bastkloof is separated by the R36 road and Pheeha CPA has been allocated on the Southern side of the road. The inspection with Tshwale was conducted on the southern and eastern side of the remaining extent.

The natural boundary that separated Tshwale and Pheeha from time of immemorial which is the Letaba River showed that Pheeha should be allocated portions on the Northern eastern side and the North western side of the farm, while Tshwale should be allocated portions on the South east and North western sides.

Therefore I conclude that the portions than were transferred to Pheeha CPA were not the right portion and therefore should be negotiations between the two communities so that Tshwale people can be given their rightful land”.

5.2.3 The DRDCLR could however not resolve the dispute between the two parties despite acknowledging that the relevant portions belong to the Tshwale Land Claimants.

Application of the relevant law

5.2.4 Section 12(1)(a) of the Restitution of Land Rights Act 22 of 1994 (RLRA) provides that: “The Commission may, through a member of the Commission or any person authorised thereto in writing, in order to carry out its functions-

(a) Conduct an investigation”.

5.2.5 Section 13(1)(a), (b), (c) and (d) of the RLRA provides that: “If at any stage during the course of the Commission’s investigation it becomes evident that-

(a) there are two or more competing claims in respect of the same land;

(b) in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult;
(c) where the land which is subject to the claim is not state owned land, the owner or holder of rights in such land is opposed to the claim; or

(d) there is any other issue which might usefully be resolved through mediation and negotiations, the Chief Land Claim Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation”.

5.2.6 Section (13)(2)(a) of the RLRA provides that: “A direction contemplated in subsection (1) shall be made in a written notice, specifying the time when and the place where such process is to start and further that the Chief Land Claims Commissioner shall appoint a mediator to chair the first meeting between the parties:

(a) provided that the parties may at any time during the course of mediation or negotiation by agreement appoint another person to mediate the dispute”.

5.2.7 Section 14(1)(a), (b), (c) and (d) of the RLRA provides that: “If upon completion of an investigation by the Commission in respect of specific claim-

(a) the parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation;
(b) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation; or
(c) …
(d) the regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court”.

5.2.8 On 8 August 2018, during a meeting between my investigation team and the DRDLR, Mr Mukwevho indicated to the investigation team that an investigation was conducted, but that Pheeha Land Claimants made it clear to the DRDLR that they are not willing to give back the portions because it was not their fault that the DRDLR
allocated and transferred portions of the farms belonging to Tshwale Community to them.

5.2.9 It was expected of the DRDLR to refer the dispute to the Land Claims Court for adjudication. On 24 August 2018, the investigation team had a meeting with the DRDLR wherein it was indicated that several meetings were held with Pheeha and Tshwale Land Claimants to try and resolve the issue, however, there was no agreement reached. The DRDLR further indicated that the next process is to appoint a mediator and the legal unit will give my investigation team a schedule outlining the process of mediation and timeframes. That was however not done.

5.2.10 In response to my Notice, Ms Ntloko-Gobodo admitted in a letter dated 05 December 2019 by indicating that: "On account of the fact that the subject properties were not wrongly transferred, it would serve no purpose to mediate between the two communities. Furthermore, the Pheeha CPA will not accede to their properties being transferred to another community as it has rightfully acquired those properties.

Accordingly, the only resolution to this issue is to refer the matter to court for adjudication.

To this extent, my regional office will commence with the process of referring the matter to court with immediate effect”.

**Conclusion**

5.2.11 Based on the evidence gathered, it is my considered view that the Tshwale Community was prejudiced by the undue delay by DRDLR to refer the matter to the Land Claims Court for adjudication.

5.2.12 Due to the undue delay occasioned by the DRDLR in not referring the matter to the Land Claims Court for adjudication, the Tshwale Community have been dispossessed
of their right to access and use the farm and also deprived them of the opportunity to practice sustainable agricultural farming.

6. FINDINGS

6.1 Regarding whether the DRDLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community.

6.1.1 The allegation that the DRDLR unduly delayed to allocate and transfer the correct portions of the claimed farms to the Tshwale Community, is substantiated.

6.1.2 The DRDLR conducted an investigation and an addendum was submitted to the Regional Land Claims Commission (RLCC) confirming that the farms were wrongly transferred to Pheeha Community.

6.1.3 The DRDLR initially admitted to have made a mistake by allocating and transferring portions of the farms Bastkloof 375 LT and Nootgedacht 342 LT, to the Pheeha Community instead of the Tshwale Community.

6.1.4 The DRDLR took steps to rectify the mistake by conducting an investigation and also had numerous meetings with the Pheeha and Tshwale Land Claimants to try and resolve the issue however, there was no agreement reached. The steps taken were not sufficient as the DRDLR could have referred the matter to the Land Claims Court for assistance.

6.1.5 Ms Ntloko-Gobodo contradicted herself in response to my Notice by admitting that the Regional Office took too long to resolve the dispute between the parties, but on the one hand submitted that the DRDLR had initially advised the RLCC that portions of the land belonging to the Tshwale Community were transferred to the Pheeha Community.
6.1.6 Ms Ntloko-Gobodo also contradicted herself by submitting that the farms were not wrongly transferred to the Pheeha Community but undertook to refer the matter to the Land Claims Court for adjudication to determine the rightful beneficiaries.

6.1.7 The conduct of the DRDLR was in contravention of Section 195(1) (a) and (f) of the Constitution.

6.1.8 The conduct of the DRDLR also constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Tshwale Community suffered prejudiced as a result of the undue delay by the DRDLR.

6.2.1 The allegation that the undue delay by the DRDLR prejudiced the Tshwale Community, is substantiated.

6.2.2 The DRDLR admitted to have failed to resolve the dispute between the Tshwale Community and Pheeha Community as no agreement between the parties could be reached.

6.2.3 The DRDLR has to date delayed and or failed to allocate and transfer the correct portions of the farms Bastkloof 375 LT and Nooitgedacht 342 LT to the Tshwale Community despite its admission of wrongdoing.

6.2.4 The DRDLR also failed to take sufficient steps to appoint a mediator and or refer the matter to the Land Claims Court in terms of section 14(1)(a), (b), (c) and (d) of the RLRA.

6.2.5 Such delay and or failure by the DRDLR to allocate and transfer the correct portions of the farms Bastkloof 375 LT and Nooitgedacht 342 LT to the Tshwale Community or alternatively refer the matter to the Land Claims Court for adjudication, deprived
them of the full use and enjoyment of their property, including an opportunity to practice sustainable agricultural farming.

6.2.6 The conduct of the DRDLR also constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. **REMEDIAL ACTION**

7.1 The appropriate remedial action that I am taking is in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

7.1.1 The Chief Land Claims Commissioner must ensure that within thirty (30) working days from the date of receipt of this report send a written apology to the Tshwale Community for the undue delay and subsequent confusion created in firstly giving the Tshwale Community an expectation that their land would be transferred to them and later stating that there is no error in the redistribution of the land.

7.1.2 The Chief Land Claims Commissioner must within thirty (30) working days from the date of receipt of this report, ensure that the DRDLR refers the matter to the Land Claims Court to settle the dispute between Tshwale Community and Pheeheha Community.

7.1.3 The Chief Land Claims Commissioner must within thirty (30) working days after Court judgement, ensure that the DRDLR communicates the court judgment to the affected communities and ensure that it is implemented within the prescribed period.

8. **MONITORING**

8.1 I will require the Chief Land Claims Commissioner to submit the implementation plans to my office within 15 working days from the date of this report indicating how the remedial actions referred to in paragraph 7 above will be implemented.
8.2 The submission of the Implementation Plan and the implementation of my remedial actions shall, in the absence of the court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.

ADV. BUSISIWE MKHWWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 06/01/2020