BROKEN PROMISES

A report on an investigation into alleged maladministration by the City of Johannesburg relating to the city's failure to comply with its by-laws and the Constitution regarding hijacked buildings

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PUBLIC PROTECTOR
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"Public services are not a privilege in a civilised and democratic society: they are a legitimate expectation."

Batho Pele- People First: White Paper on Transforming Public Service Delivery, 1998

Executive Summary

(i) *"Broken Promises"* is my report as the Public Protector issued 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, 23 of 1994.

(ii) The report relates to an investigation into the alleged maladministration relating to the City of Johannesburg (COJ)'s failure to comply with City by-laws and the Constitution, in connection with illegal occupation by COJ residents of two privately owned buildings, involving alleged failure to terminate services as advised by the Complainants and unduly billing the Complainants for such services; failing to reverse wrongful billing despite numerous undertakings to do so; and failing to keep promises to help with the eviction process while encouraging the said illegal occupation.

(iii) The illegal occupation of buildings, or hijacking of buildings, has become a major nightmare for investors seeking to earn their fortune through property or to use purchased properties for business purposes. While the phenomenon appears to be a national one, anecdotal evidence suggests it is particularly rife in the COJ within the Gauteng province.

(iv) The Complainants, Mr. Tshepo Kgaudi and his wife, Ms Phindi Kgaudi, are young business persons that jointly purchased two property owning companies, Plankomat and Loujac, Jeppestown in the COJ, with intention to use the buildings for a shoe factory and other commercial purposes. During 2009, the Complainants requested the COJ to execute electricity cut offs in the buildings as they were occupied by illegal occupiers. The alleged illegal occupiers were mostly business persons, who had been tenants of business persons whose bid to purchase the buildings that had fallen through on account of non-payment before the buildings were sold to the

Complainants and his wife. The Complainants allegedly approached the COJ for assistance and certain undertakings were made but never honoured by the COJ.

(v) At the core of the complaint is that the COJ: improperly undertook to help with evictions without a court order and later advised it couldn't after laying down various compliance requirements that the Complainants complied with losing time and money in the process; failed to hold one of its councillors, Councillor Zwane, for encouraging the illegal occupation and interfering with eviction attempts in the said buildings; wrongfully failed to terminate electricity and water services to the buildings despite being asked and undertaking to do so several times; wrongfully billing the Complainants for the illegal consumption of services leading to a huge liability which undermined attempts to sell the buildings; failed to honour promises to reverse the wrongful billing despite undertaking to do so several times and generally failed to honour its by-laws regarding law enforcement on illegal consumption of municipal water and electricity; and has for years failed to honour its Constitutional responsibility to provide access to housing, including emergency housing to its residents leaving the Complainants and their family to shoulder such responsibility.

(vi) The background to the complaint as presented by Mr and Mrs Kgaudi, with minimum disagreement from the COJ officials is the following:

(a) **2008**: The Kgaudi's purchase two companies owning a building each in Jeppestown, COJ, Gauteng with each occupied by a few tenants from a previous business person whose attempt to buy the buildings had fallen through;
(b) **2009**: The COJ is requested to cut off services and this is not done;
(c) **2010**: The Complainants commence eviction process with an attorney up to issuing eviction notices;
(d) **2010**: The Premier's Office is approached which referred the Complainants to a Task Team within Department of Planning and Urban Management(DPUM), in the COJ which promised to conduct a raid provided the Complainants provide

proof of having secured security services for the building to ensure there is no reoccupation, among other things;

(e) **2011**: The Complainants secure a private security company which deployed resources to the buildings and provided required proof to the DPUM of the COJ;

(f) **September 2011**: The promised raid is conducted but on the way to raid the buildings, the Complainants received a threatening phone call from Councillor Zwane who said that the raid must not proceed. The raid was carried through but without evictions as promised with illegal occupants only served with 2 month notices to vacate the premises which they ignored. On the same day criminal charges are laid by the Complainants against Councillor Zwane at the Jeppestown Police Station of the South African Police Services (SAPS) for threatening him and the security company;

(g) September 2011: The Mayor is approached about unkempt promises and Councillor Zwane's alleged criminal conduct;

(h) October 2011: A meeting take place at COJ to discuss eviction, health concerns at buildings, service charges and required reversals, disconnection failures and other related matters, where COJ promised spot fines against the illegal occupants but never fulfilled this promise;

(i) February 2012: The Presidency (Help Line) having been approached, facilitates a meeting with COJ where undertakings are made to reverse charges and give consideration to purchasing of buildings from the Complainants and temporary house occupants as COJ residents, until their housing status is sorted but this too fell through;

(j) April 2012: The Public Protector is approached and immediately conciliated resulting in promises to reverse charges, cut services and consider the possibility of purchasing the buildings;

(k) **December 2012**: The Public Protector is advised that the Complainants have been re-invoiced but it turned out that this was not done.

(l) **April 2013:** The Complainants are finally issued with revised invoices but are unhappy with aspects of it and after attempts at further conciliation on all

outstanding issues, a decision was made to make a determination on whether or not there was maladministration on the part of the COJ and if such caused the Complainants, their family and their business prejudice or injustice; and

(vii) Today the Kgaudi's have lost everything, and their home is in the process of being sold in execution of a court order, while the two buildings remain unavailable for use due to illegal occupation. An attempt from my office, to get Legal Aid South Africa (LASA) to help with the evictions was aborted due to the Complainants' inability to raise fees for the sheriff to serve process as required by law. LASA was unable to provide although able to help with the legal assistance aspect of the eviction.

(viii) The COJ has not denied that when the Complainants started on the perilous journey with the COJ, they were young fairly successful business persons who had been able to mobilise the capital outlay to pay for two multiple story buildings for use as a shoe factory and other commercial purposes.

(ix) It is undeniable that before purchasing the buildings, the Kgaudi's were successful business people, who owned a multiple branch shoe business with shoes manufactured in Brazil. It is also undeniable that their business started falling apart when the two buildings purchased at cash with a view to domesticate the shoe making, with a view to creating jobs and maximising profit, could not be used for the purpose for which they were purchased.

(x) It also has not been denied that at the time of the Complainants purchasing the buildings, there were already occupants, albeit quite few, who had been installed by a business person who was in the process of purchasing the buildings from the original owner but failed to secure funding. This means the risk of illegal occupation was not created by the COJ. The COJ also did not have a duty to evict anyone, and in fact doing so, without a court order would have been illegal and unconstitutional.

(xi) If the COJ did not cause the illegal occupation nor did it have a duty to evict the illegal occupants, what then was its wrong?

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

(a) Did the COJ wrongfully fail to disconnect electricity and other services at the Complainants' illegally occupied buildings in violation of its own Municipal By-Laws, and if so, does such conduct constitute maladministration?

(b) Did the COJ improperly bill the Complainants' companies for electricity and other services in respect of the Complainants' illegally occupied properties, and if so, does this constitute maladministration?

(c) Did the COJ promise the Complainants and the Presidency to disconnect municipal services and write off a debt for improperly rendered services relating to their property and later unduly fail to honour such promise?

(d) Did the COJ improperly encourage the illegal occupation of the Complainants' buildings by failing to take action against Councillor Zwane who actively encouraged and admitted to encouraging illegal occupation of the Complainants' buildings?

(e) Did the COJ unduly fail to take resolute criminal action against illegal occupants in violation of its own by-laws?

(f) Did the COJ improperly undertake to assist the Complainants with an eviction process and in the process cause them to incur security costs for security meant to guard the buildings at the conclusion of an eviction process?

(g) Did the COJ fail to discharge its responsibilities in terms of the right to property under sections 25, right to access to housing under section 26, duty to ensure

good administration under section 195 and duty to give priority to Constitutional obligations under section 237 of the Constitution?

(h) Did the Complainants and their family suffer prejudice or injustice due to one or more acts of maladministration by the COJ?

(i) If the Complainants and their family suffered prejudice or injustice, what would it take to place them as close as possible to where they would be but for the COJ's maladministration?

(xiii) The investigation process commenced with an attempt to mediate with a view to endeavouring to help the parties resolve the dispute by mutual;l agreement. When the mediation failed, a formal investigation conducted through meetings and interviews with the Complainants and relevant officials of the Department, as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts followed. The Executive Mayor (the Mayor) was also engaged with through face to face meetings and telephone conversations throughout the process. In this regard I am grateful for the Mayor's compassionate response, including agreeing to have his officials negotiate with a financial institution to delay in the eviction of the Complainants from their home pending the finalisation of the investigation. The COJ assisted in negotiating with the financial institution in putting the impending auction of the Complainants in abeyance.

(xiv) It is worth noting that the COJ has not denied many of the alleged acts of maladministration relating to failure to terminate services, wrongfully billing the Complainants for the unauthorised consumption and failure to timely reverse the wrongful billing. It is also worth noting that the COJ has not denied that no formal investigation or disciplinary process was instituted against Councillor Zwane for possible violation of the relevant Code of Conduct. On the issue of law enforcement, the COJ has conceded that spot fines were only issued once against the illegal

occupants and that no arrests have ever been made. In other words, the illegal occupation of the Complainants' building has principally taken place mostly with impunity in so far as law enforcement is concerned. The COJ has also not denied promising to raid and evict illegal occupants at the said buildings but explained that it was an unlawful promise as the law only allows court authorised evictions. However, it is worth noting that the COJ has to date not indicated its specific solution to the accommodation of the said illegal occupants, as the bearer of responsibility for public housing in its jurisdiction both on an emergency basis and in the long term, as stipulated by the courts in the *Blue Moonlight Properties*[1] judgement and the *Grootboom*[2] judgement, respectively.

(xv) Key laws and policies taken into account to help me determine if there had been maladministration by the COJ and prejudice or injustice suffered by the Complainants were principally those imposing administrative standards that should have been upheld by the COJ or its officials, when dealing with the complaint raised by the Complainants regarding the illegal occupation of their buildings and the illegal consumption of electricity and water in their buildings.

(xvi) Having considered the evidence uncovered during the investigation against the relevant regulatory framework setting the standard the COJ should have complied with, I make the following findings:

[1] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another CCT/2011.*

[2] *Government of Republic of South Africa and Others v Grootboom and Others CCT 11/2000.*

1. ***Regarding whether the COJ wrongfully failed to disconnect electricity and other services at the Complainants' illegally occupied buildings in violation of its own Municipality by-laws and if so does such conduct constitute maladministration? I find that:***

    a. The COJ failed without good reason and over a long period of time failed to disconnect electricity services to the Complainants' illegally occupied properties. This is contra the COJ's Debt control Policy and s95 of the Municipal Systems Act.

    b. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

2. ***Regarding whether the COJ improperly billed the Complainants' companies for electricity and other services in respect of the Complainants' illegally occupied properties and if so does this constitute maladministration? I find that:***

    a. The City did whereas it should not have billed the Complainants for services it supplied in violation of his and his predecessor's request as well as its own by-laws.

    b. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

3. ***Regarding whether the COJ promised the Complainants and the Presidency to disconnect electricity and other services debt at his properties and later improperly failed to honour such promise? I find that:***

a. The City did promise the Complainants and the Presidency.

b. The City failed to keep its promise not only to the Complainants and Presidency but also to my office, not once but several times.

c. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

4. ***Regarding whether the COJ improperly encouraged the illegal occupation of the Complainants' buildings by failing to take action against its Councillor Zwane who actively encouraged and admitted to encouraging illegal occupation of the Complainants' buildings? I find that:***

   a. By failing to take resolute action against Councillor Zwane, the COJ did encourage not only illegal occupation but also encouraged other councillors to do what he did.

   b. By not taking action or instituting an investigation into the matter the COJ contravened the Municipal Systems Management Act and its Code of Conduct. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

5. ***Regarding whether the COJ unduly failed to take resolute criminal action against illegal occupants in violation of its own by-laws? I find that:***

   a. The COJ did indeed fail to enforce its own by laws as per the Greater Johannesburg Metropolitan Electricity by-laws and its policies as explained above.

   b. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

6. ***Regarding whether the COJ undertook to assist the Complainants with an eviction process and later improperly failed to do so and in the process caused him to incur security costs for security meant to guard the buildings at the conclusion of the eviction process? I find that:***

   a. The COJ undertook to do something unlawful, by undertaking to assist in the eviction of the unlawful occupiers whilst it did not have the power or authority to do so, and accordingly could not do it.

   b. The COJ failed to conduct a proper assessment of its powers and accordingly advised the Complainants wrongly in violation of section 195 of the Constitution and because of the wrong advice he lost time and money.

   c. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

7. ***Regarding whether the COJ failed to discharge its responsibilities in terms of the right to property under section 25, right to access of housing under section 26, duty to ensure good administration under section 195 and duty to give priority to constitutional obligations under section 237 of the Constitution? I find that:***

   a. The COJ has known about the need for housing of the illegal occupants occupying the Complainants' buildings and done nothing about it thus causing the Complainants to shoulder its and other responsible organs of state's responsibilities under section 26 of the Constitution, thus violating Complainants' rights under section 25 of the Constitution.

b. The COJ failed to discharge its constitutional responsibilities particularly as outlined in the Blue Moonlight Properties case and under section 237 of the Constitution.

c. The COJ failed to honour promises made to the Public Protector arising from a meeting held on 23 September 2014, that the COJ will assess the Complainants' buildings in view of acquiring them if they meet the requirements for premises earmarked by the COJ for temporary accommodation.

d. The COJ's treatment of the Complainants, involving unmet promises and being misled, further violates principles of public administration in section 195 of the Constitution.

e. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8. ***Regarding whether the Complainants and his family prejudiced by one or more of the City's acts of maladministration? I find that:***

a. The Complainants were severely prejudiced by the COJ's maladministration, financially, emotionally and psychologically.

b. The Complainants' family and employees have also been prejudiced by the COJ's maladministration.

(xvii) The appropriate remedial action I am taking in pursuit of section 182(1)(c), with the view of placing the Complainants as close as possible to where they would have been had the improper conduct or maladministration not occurred, is to call upon:

1. ***The Mayor of the COJ to:***

   a. Cause an urgent evaluation of the Complainants' buildings, approach the Council with the request to buy the buildings as redress for harm caused to the Complainants by the COJ.

   b. Ensure that an internal investigation on the cause of the COJ failure to provide Mr Kgaudi with service expected under section 195 of the Constitution and the Batho Pele principles.

   c. Ensure that an urgent investigation is conducted in respect of all privately owned buildings that are illegally occupied, ensure that the COJ complies with its responsibility to provide emergency housing.

   d. Apologise to the Complainants' family for the gross maladministration and consequent trauma.

2. ***The Chairperson of the Municipal Council to:***

   a. Ensure that appropriate action is taken against Councillor Zwane in terms of the COJ's Code of Conduct for Councillors and to report to the MEC for local government in the province on the matter.

   b. Assists the Mayor with the above remedial action.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE CITY OF JOHANNESBURG RELATING TO THE CITY OF JOHANNESBURG'S FAILURE TO COMPLY WITH CITY BY LAWS AND THE CONSTITUTION REGARDING MR T KGAUDI'S & MRS P KGAUDI'S HIJACKED BUILDINGS

1. INTRODUCTION

1.1. "*The Cost of Broken Promises*" is my report 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 s8(1) of the Public Protector Act, to:

1.2.1. The Speaker acting as the Chairperson of the COJ Council, Hon. Ms C Bapela;

1.2.2. The Mayor of the City of Johannesburg, Mr Tau;

1.2.3. Johannesburg City Councillor Zwane.

1.3. A copy of the report is also provided to the Complainants, Mr Kgaudi.

1.4. The report relates to an investigation into the alleged maladministration by the City of Johannesburg, hereinafter referred to as the COJ, relating to the City of Johannesburg's failure to comply with city by laws and the Constitution regarding Mr Kgaudi's, hereinafter referred to as the Complainants, hijacked buildings.

2. THE COMPLAINT

2.1. Mr. Thepho Kgaudi and his wife Ms. Phindi Kgaudi are young emerging business persons that purchased two companies, Plankomat and Loujac, that own a multiple-story building each, in Jeppestown, within the COJ, Gauteng province, with intention to use the buildings for a shoe factory and other commercial purposes.

2.2. During 2009, the Complaint and his wife requested the COJ to execute electricity cut offs in the buildings as they were occupied by illegal occupiers. The alleged illegal occupiers were mostly business persons, who had been tenants of a business person whose bid to purchase the buildings had fallen through on account of non-payment before the buildings were sold to the Complainants and his wife.

2.3. After a lapse of time with no action from the COJ, the Complainants approached an attorney with intention to evict the illegal occupiers. The Complainants pursued the eviction proceedings during the year 2010 without success and eventually approached the Office of the Premier of the Gauteng Province regarding reversal, cut-off of electricity charges and assistance to evict illegal occupants. They also believed that the buildings were unsafe and posed a health hazard for the illegal occupiers and advised the government accordingly.

2.4. The Office of the Premier referred the Complainants to a Task Team within the COJ dealing with such issues, namely the Department of Planning and Urban Management (DPUM).

2.5. The Complainants met with the officials of the DPUM, and promises were made by the officials that the DPUM will conduct a raid in conjunction with the South African Police Service in order to eject the illegal occupants on condition that the Complainants provides proof that he had procured security services that would take

over at the buildings premises at the conclusion of the raid and after which the buildings would be handed over to the Complainants.

2.6. The promised raid was conducted on 11 September 2011, after the Complainants had secured the security as demanded by the COJ and provided proof that the security services would commence on the day of the raid. On the way to the raid the Complainants allegedly received a phone call from one Councillor Zwane of the COJ's Ward 61. Councillor Zwane threatened the Complainants and advised him not to proceed with the raid.

2.7. The raid was carried out but illegal occupants were allegedly not ejected, rather they were given spot fines and instructed to vacate the two premises within a month.

2.8. On the same day of the raid, the Complainants laid a criminal charge against Councillor Zwane with the South African Police Service. The matter was also allegedly subsequently the matter was reported to the COJ.

2.9. The illegal occupants did not vacate the buildings and the Complainants allegedly informed the DPUM about the status as they were paying huge amounts of monies in respect of the security company procured after the raid. No favourable response was obtained from the DPUM.

2.10. During 2011, the Complainants allegedly approached the offices of the Mayor of COJ for assistance.

2.11. A meeting was allegedly convened during October 2011 in which officials of a department of the COJ attended, namely, the Revenue and Customer Relations Management Department: Credit Management Directorate. The Complainants reported the current status of the buildings and allegedly offered the buildings to the

COJ to buy. The Complainants also allegedly indicated to the COJ that the electricity had not been disconnected as per numerous requests and that the high service charges also chased away prospective buyers. In addition, the Complainants also raised the matter of Councillor Zwane and the health and safety of the buildings.

2.12. During the meeting the COJ allegedly promised to issue spot fines to transgressors occupying the buildings and to take action against Councillor Zwane.

2.13. After months of failure by COJ to take action, the Complainants approached the Presidency. The complaint at this stage included improper billing by the COJ and failure to write off a utility bill accumulated on account of the COJ's alleged failure to discontinue services, to honour the promise to help evict the illegal occupants as well as failure to take criminal action against the illegal occupants for electricity theft and Councillor Zwane for allegedly colluding with them to harass the Complainants and the security personnel that had been guarding the building from date of the evictions were supposed to have taken place.

2.14. During February 2012, a meeting was allegedly conducted at the Presidency. In the meeting, the COJ allegedly undertook to write off all escalating electricity charges timeously, but no time frames were noted.

2.15. The escalating electricity bill, which at some stage was R6m made it impossible to sell the buildings, an alternative the Complainants was now pursuing, because his shoe company had folded on account of having no cash flow because all his cash was spent on buying the two buildings that had since become *white elephants*.

2.16. After a lapse of several months of no progress, the Complainants approached the Public Protector. The complaint was lodged in April 2012 after more than 2 years of fruitless engagement with the COJ.

2.17. The electricity bill was only written off around April 2013, about 5 years after the Complainants' first request and more than 10 years after the previous owner's first request.

2.18. By then the Complainants had allegedly been severely financially prejudiced in that he could not evict the people and was saddled with a huge electricity debt while potential buyers required an undertaking that there would be no occupants or debts. He provided evidence of offers to purchase that were missed due to the situation he attributed to the COJ's maladministration.

2.19. The COJ had further allegedly prejudiced him by failing to honour its Constitutional obligation under section 26 of the Constitution, to provide access to state funded housing to the indigent families that are occupying his buildings despite having been aware of the need as early as 2002 and more acutely during the assessment of the buildings in 2011.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector was established under section 181(1)(b) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that I have 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 take appropriate remedial action. Section 182(2) directs that I have additional powers prescribed in legislation.

3.3. The Public Protector is further mandated by the Public Protector Act 23 of 1994 to investigate and redress maladministration and related improprieties in the conduct

of state affairs. The Public Protector Act further confers additional powers to resolve any disputes involving conduct in state affairs through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4. The City of Johannesburg Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within my ambit.

3.5. Jurisdiction to investigate and related powers were not disputed by any of the parties. This includes the power to make findings and take appropriate remedial action as envisaged in section 182(1)(c) of the Constitution.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act gives me sole discretion, as the Public Protector to determine how to resolve a dispute of alleged improper conduct or maladministration. In addition to recognising the power of the Public Protector to investigate and make findings, Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter or compliant through appropriate dispute resolution (ADR) measures such as conciliation, mediation, negotiation and any other mechanism he or she deems appropriate in the circumstances.

4.1.3. The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act, 1994. However, after several attempts to conciliate the

matter, it was escalated into an investigation. I must indicate that I appreciate the Mayor's cooperation throughout conciliation efforts.

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:

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
- In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they 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.

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 by the Department or organ of state to prevent maladministration and prejudice.

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

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

4.3.1. Did COJ wrongfully fail to disconnect electricity and other services at the Complainants' illegally occupied buildings in violation of its own Municipal By Laws and if so does such conduct constitute maladministration?

4.3.2. Did the COJ improperly bill the Complainants' companies for electricity and other services in respect of the Complainants' illegally occupied properties and if so does this constitute maladministration?

4.3.3. Did the COJ promise the Complainants and the Presidency to disconnect municipal services and write off the debt for improperly rendered services relating to their property and later unduly failed to honour such promise?

4.3.4. Did the COJ unduly encourage the illegal occupation of the Complainants' buildings by failing to take action against Councillor Zwane who actively encouraged and admitted to encouraging illegal occupation of the Complainants' buildings?

4.3.5. Did the COJ unduly fail to take resolute criminal action against illegal occupants in violation of its own by-laws?

4.3.6. Did the City unduly undertake to assist the Complainants with an eviction process and in the process cause him to incur security costs for security meant to guard the buildings at the conclusion of an eviction process?

4.3.7. Did the City fail to discharge its responsibilities in terms of the right to property under sections 25, right to access to housing under section 26, duty to ensure good administration under section 195 and duty to give priority to Constitutional obligations under section 237 of the Constitution?

4.3.8. Were the Complainants and his family prejudiced by one or more of the City's acts of maladministration?

4.3.9. If the Complainants and his family were prejudiced, what would it take to place them as close as possible to where they would be but for the COJ's maladministration?

4.4. **The Key Sources of information**

4.4.1. Documents

4.4.1.1. Affidavit and other documents submitted by the Complainants over 2 two year period

4.4.1.2. A COJ memorandum dated 18th September 2012 titled Hijacked Buildings: Plankomat (Pty) Ltd, Acc. No 501843146 & Loujac Inv (Pty), Acc No 501842801.

4.4.1.3. An undated memorandum by COJ proposing write-off of service charges.

4.4.1.4. A response from the City of Johannesburg regarding the matter dated 9 July 2013.

4.4.1.5. A response from City of Johannesburg regarding the matter dated 17 October 2014.

4.4.1.6. Responses to a provisional notice issued under my hand on .....to the Executive Mayor of the COJ

4.4.2. Interviews conducted

4.4.2.1. Meeting on 22 August 2012 with the COJ (Mr S S Rasoesoe – Legal Advisor: Credit Management and Mr P Masekela – Private Office of the Executive Mayor)

4.4.2.2. Interview conducted with Complainants on 29 May 2013

4.4.2.3. Meeting with COJ on 31 May 2013 (Mr M Ruda – Group Head: Legal & Contracts Department; Mr G Dumas – Chief of Operations and Mr A Selepe – Chief of Staff)

4.4.2.4. 5.2.2.4Meeting with COJ on 23 September 2014 (Mr M Ruda – Group Head: Legal & Contracts Department)

4.4.2.5. Meetings and tele-conversations held with the Mayor of the COJ, Councillor P Tau.

4.4.3. Correspondence sent and received

4.4.3.1. Email from Mr M Ruda 23 October 2014.

4.4.3.2. Email to Mr M Ruda on 17 October 2014.

4.4.3.3. Email from Mr M Ruda on 14 October 2014.

4.4.3.4. Email to Mr M Ruda on 8 October 2014.

4.4.3.5. Email to Mr. M Ruda on 2 October 2014.

4.4.3.6. Email from Mr. M Ruda on 16 September 2014.

4.4.3.7. Email to Mr M Ruda on 12 September 2014.

4.4.3.8. Email to Mr M Ruda on 5 September 2014.

4.4.3.9. Email to Mr M Ruda on 20 August 2014.

4.4.3.10. Email from Mr M Ruda on 18 August 2014.

4.4.3.11. Email to Mayor of COJ on 7 August 2014.

4.4.3.12. Email from Colonel Seshoka on 24 July 2014.

4.4.3.13. Email from Colonel Smith on 17 July 2014.

4.4.3.14. Email to Brigadier Sirkhot on 16 July 2014.

4.4.3.15. Email to Mr Manqa on 15 July 2014.

4.4.3.16. Email to Colonel Smith on 14 July 2014.

4.4.3.17. Email from Mr G Dumas on 14 May 2014.

4.4.3.18. Email to Mr G Dumas on 14 May 2014.

4.4.3.19. Email to Mr G Dumas on 8 May 2014.

4.4.3.20. Email to Mr G Dumas on 09 April 2014.

4.4.3.21. Email from Mr M Ruda on 7 August 2013.

4.4.3.22. Email to Mr M Ruda on 26 July 2013.

4.4.3.23. Email to Mr M Ruda on 11 July 2013.

4.4.3.24. Email from Mr M Ruda on 12 July 2013.

4.4.3.25. Email from Mr M Ruda on 3 July 2013.

4.4.3.26. Email to Mr G Dumas on 3 July 2013.

4.4.3.27. Email to Mr M Ruda on 28 June 2013.

4.4.3.28. Email to Mr M Ruda on 13 June 2013.

4.4.3.29. Email to Mr M Ruda on 6 June 2013.

4.4.3.30. Email to Mr M Ruda on 6 June 2013.

4.4.3.31. Email to Mayor of COJ on 8 May 2013.

4.4.3.32. Letter to Mayor of COJ on 22 April 2013.

4.4.3.33. Letter to prospective buyers of buildings on 18 January 2013.

4.4.3.34. Email form Mr M Ruda on 4 December 2012.

4.4.3.35. Letter to prospective buyers of buildings on 11 December 2012.

4.4.3.36. Email from Mr S S Rasoesoe on 1 November 2012.

4.4.3.37. Email to Mr S S Rasoesoe on 1 November 2012.

4.4.4. Legislation and other prescripts

4.4.4.1. The Constitution of the Republic of South Africa, 1996;

4.4.4.2. Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 1996;

4.4.4.3. National Building Regulations and Standards Act, 1977;

4.4.4.4. City of Johannesburg Credit Control & Debt Collection Policy in terms of Section 96(a) of the Local Government: Municipal Systems Act 32 of 2000;

4.4.4.5. Greater Johannesburg Metropolitan Electricity by-laws;

4.4.4.6. The Role of Local Government in Evictions, Volume 14 No. 3, Prof. J Van Wyk, 2011;

4.4.4.7. Advancing the Rights to Adequate Housing of Desperately Poor People: City of Johannesburg v Rand Properties, Lilian Chenwi;

4.4.4.8. Hijacking the Inner City – Building hijacking in Johannesburg: what can the Courts do?, Morgan Wood;

4.4.4.9. Update on Inner City Property Scheme- Johannesburg Business Forum presentation, City of Johannesburg;

4.4.4.10. *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Another* CCT 23/2012;

4.4.4.11. *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of Newton Urban Village GSJ* 2011/30368;

4.4.4.12. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another CCT/2011;*

4.4.4.13. *Occupiers of 51 Olivia Road, Berea Township and 197 Mani Street Johannesburg v City of Johannesburg and Others CCT 24/2007*;

4.4.4.14. *Port Elizabeth Municipality v Various Occupiers CCT 23/2003.*

5. STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1. **Regarding COJ duty in connection with disconnection of electricity and other services at illegally occupied buildings:**

5.1.1. Chapter 9 of the Municipal Systems Act 32 of 2000 provides for credit control and debt collection by municipalities in the Republic of South Africa.

5.1.2. Section 95 of the Act indicates that a municipality must establish sound customer management system, where consumption of services has to be measured accurately and states:-

"Customer care and management

95. In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity—

(a) establish a sound customer management system that aims to create ~ positive and reciprocal relationship between persons liable for these payments and the municipality, and where applicable, a service provider;

(b) …

(c) *take reasonable steps to ensure that users of services are informed of the costs involved in service provision, the reasons for the payment of service fees, and the manner in which monies raised from the service are utilised;*

(d) *where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;*

(e) *ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;*

(f) *provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;*

(g) *provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;*

(h) *provide mechanisms to monitor the response time and efficiency in complying with paragraph (g); …"*

5.1.3. The section creates an obligation on the municipality to, amongst other; provide an accessible mechanism for dealing with complaints, together with prompt corrective action. The municipality must monitor the response time and efficiency.

5.1.4. Paragraphs 11, 13, 24 and 32 of the City of Johannesburg Credit Control and Debt Collection Policy, provides for hijacked buildings, debt write offs, restriction or termination of services and fraud, forgery, tampering and other criminal activity. The relevant sections state that:-

*"**11. HIJACKED BUILDINGS***

11.1 Services to these buildings will be disconnected and/or terminated upon non-payment of an account in terms of this Policy, or at the request of the owner of the building.

11.2 The owner of the building will still be liable for payment of all outstanding accounts and arrears.

...

13. DEBT WRITE OFFS

13.1 The City has the discretion to write off debt if irrecoverable.

...

24. RESTRICTION OR TERMINATION OF SERVICES

24.1 The City may restrict or terminate the supply of water, electricity and refuse removal or discontinue any other service to any premises whenever a user of any service:

24.1.1 Fails to make full payment on the due date or fails to make acceptable arrangements for the repayment of any amount for services, rates or taxes or other amounts due;

...

32. FRAUD, FORGERY, TAMPERING & OTHER CRIMINAL ACTIVITY

The City shall at its discretion be entitled to withhold the supply water or electricity to a debtor who is found guilty of fraud, theft or any other criminal action relating to the supply of water and electricity, or if it is evident that fraud, theft or any other criminal action has occurred relating to such supply, until the total costs, penalties, other fees, tariffs and rates due to the City have been paid in full."

5.1.5. The policy provides that an account holder is obliged to ensure that illegal reconnection of supply of metered services is not permitted on the property and that positive steps are taken to avoid illegal consumption of municipal services.

5.1.6. The policy also provides that services to hijacked buildings will be disconnected and or terminated upon non-payment of an account or at the request of the owner of the building.

5.1.7. In addition the policy indicates that the COJ may restrict or terminate the supply of water, electricity and refuse removal or discontinue any other service to any

premises whenever a user of any service is in supply of a customer who is not entitled thereto.

5.2. **Regarding COJ's duty with regard to action that should have been taken in response to allegations that Councilor Zwane actively encouraged illegal occupation of the Complainants' buildings:**

5.2.1. Schedule 1 of the Municipal Systems Act 32 of 2000 provides for a Code of Conduct for Councillors (the Code of Conduct).

5.2.2. In terms of section 1 of the Code of Conduct, a councillor must perform functions of office in good faith, honesty and in a transparent manner. A councillor must at all relevant time's act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.

5.2.3. Section 6(1) of the Code of Conduct provides that a councillor may not use the position or privileges of a councillor for private gain or to improperly benefit another person.

5.2.4. Sections 11(a) and (d) of the Code of Conduct further provides that a councillor may not interfere in the management or administration of the municipality. In addition, a councillor may not obstruct the implementation of any decision of the municipality or encourage or participate in any conduct which would cause or contribute to maladministration.

5.2.5. Section 13 stipulates that:-

"Duty of chairpersons of municipal councils

13.(1) If the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of this Code has been breached, the chairperson must—

(a) authorise an investigation of the Facts and circumstances of the alleged breach;

(b) give the councillor a reasonable opportunity to reply in writing regarding the alleged breach; and

(c) report the matter to a meeting of the municipal council after paragraphs (a) and (b) have been complied with.

(2) A report in terms of subitem (1) (c) is open to the public.

(3) The chairperson must report the outcome of the investigation to the MEC for local government in the province concerned.

(4) The chairperson must ensure that each councillor when taking office is given a copy of this Code and that a copy of the Code is available in every room or place where the council meets."

5.2.6. Section 13 of the Code of Conduct provides that the Chairperson of the Municipal Council **must** authorise an investigation into alleged breaches of the Code of Conduct and report the outcome of the investigation to the MEC for local government in the province concerned.

5.2.7. Section 14 of the Code of Conduct states that:-

"Breaches of Code

14.(1) A municipal council may—

(a) investigate and make a finding on any alleged breach of a provision of this Code; or

(b) establish a special committee

(i) to investigate and make a finding on any alleged breach of this Code; and

(ii) to make appropriate recommendations to the council.

(2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may—

(a) issue a formal warning to the councillor;

(b) reprimand the councillor;

(c) request the MEC for local government in the province to suspend the councillor for a period;

(d) fine the councillor; and

(e) request the MEC to remove the councillor from office.

5.2.8. In term of section 14 of the Code of Conduct the council **may** decide to investigate such councillor and thereafter take appropriate sets such as issue a formal warning to a councillor; reprimand the councillor; request the MEC to suspend the councillor; fine the councillor and request the MEC to remove the councillor from office.

5.3. **Regarding the COJ's Duty to take criminal action against illegal occupants in terms of its own by-laws?**

5.3.1. Section 14 of the Greater Johannesburg Metropolitan Council Standardisation of Electricity By-laws (Greater Johannesburg Metropolitan Electricity By-laws) states that:-

"DISCONNECTION OF SUPPLY

(1) When any charges due to the council for or in connection with electricity supplied are in arrear, the council may at any time without notice disconnect the supply to the electrical installation concerned or any part thereof until such charges together with the reconnection charge determined by the council are fully paid.

(2) When conditions are found to exist in an electrical installation which in the opinion of the engineer constitute a danger or potential danger to person or property or interface with the supply to any other consumer, the engineer may at any time without notice disconnect the supply to that installation or any part thereof until such conditions have been remedied or removed.

...

(4) The council shall, on application by a consumer in a form prescribed by the engineer, disconnect the supply and shall reconnect it on payment of the charge determined by the council."

5.3.2. Thus the Council has the power and a duty, in terms of section 14, to limit its damages, as well as that caused to a consumer, by disconnecting the electricity supply on its own accord or on request from a consumer.

5.3.3. Section 15(1) of the Greater Johannesburg Metropolitan Electricity By-laws provides that: *"No person other than an employee of the municipality authorised thereto shall without written permission from the municipality connect or reconnect or attempt to connect or reconnect any electrical installation to the service connection or the supply main."*

5.3.4. Section 15(4) of the Greater Johannesburg Metropolitan Electricity By-laws further provides that unauthorised connections constitute an offence which can be prosecuted.

5.4. **Regarding the Duty of the COJ to Assist the Complainants with an eviction process**

5.4.1. Section 26(3) of the Constitution states that: *"No one may be evicted from their home, or have their home demolished, without an order of court, made after considering all the relevant circumstance. No legislation may permit arbitrary evictions."*

5.4.2. Section 4 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998, provides that an owner of land or property must apply for eviction an eviction order.

5.4.3. Section 12 of the National Building Regulations and Building Standards Act No. 103 of 1977 , gives the municipality authority to remove persons occupying unsafe and unhealthy buildings, order vacation of buildings and order that no such building or structure may be used unless written permission to that effect had been granted by the municipality.

5.4.4. Section 12 is applicable after service of an order of court for eviction; enforcement is preceded by a court order for eviction under the Prevention of Illegal Eviction from Unlawful Occupation of Land Act.

5.4.5. The role of the municipality in evictions has the following attributes as evidenced from Prof. J van Wyk's article on "*The Role Of Local Government In Evictions*"[3] and the relevant case law he discussed in it:

5.4.5.1. The municipality plays an intimate role in facilitation of whether or not courts will grant an eviction order;

5.4.5.2. The municipality must provide all relevant information necessary to establish when an eviction would be just and equitable. Its input must be comprehensive, meaningful and specific to assist the court to come to a just decision;

5.4.5.3. Provide inputs relates to existence of housing and shelter available for the homeless;

[3] PER / PELJ 2011(14)3

5.4.5.4. Failure by the municipality to submit meaningful reports can hamper the court's ability to make decisions which are just and equitable.

5.4.6. Section 26(2) of the Constitution provides that municipalities must develop policies, plans and programmes for their area of jurisdiction, which set out development of housing goals. The effect is that there must be reasonable legislative and other measures in place to realise evictee's right to access to adequate housing.

5.5. **Regarding the COJ's constitutional responsibilities in terms of its residents' rights: to property under section 25, access to housing under section 26, good administration under section 195 and duty its to give priority to constitutional obligations under section 237 of the Constitution**

5.5.1. Section 25 of the Constitution states that no one may be deprived of property except in terms of law of general application.

5.5.2. The purpose of section 25 of the Constitution, right to property, is underpinned in section 25(4) and that is for national commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.

5.5.3. Section 26 states that everyone has the right to access to adequate housing. More specifically, section 26(2) of the Constitution provides that municipalities must develop policies, plans and programmes for their area of jurisdiction, which set out development of housing goals. The effect is that there must be reasonable legislative and other measures in place to realise evictee's right to access to adequate housing.

5.5.4. Section 195 of the Constitution provides for public administration. It states that high standard of professional ethics must be promoted and maintained. The services must be provided impartially, fairly, equitably and without bias. In addition

transparency must be fostered by providing the public with timely, accessible and accurate information.

5.5.5. Section 237 of the Constitution states that all constitutional obligations must be performed diligently and without delay.

5.5.6. The abovementioned sections read together confer the right to housing, not only on persons in ownership of houses but also on persons less privileged. Thus there is a duty on the Municipality to protect persons in ownership of property as well as those in need of housing.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1. It is not disputed that the Complainants complained to the COJ since 2009 in regard to disconnection of electricity and other services at the Complainants' buildings.

6.2. The COJ does not dispute that the Complainants had notified the COJ about the unfair billing and the illegal occupation of the premises since they were acquired by the Complainants in 2009.

6.3. The COJ conceded that there has been a problem with the supply of electricity regarding the premises before and after ownership by the Complainants.

6.4. The COJ in its responses disconnected electricity on the premises on two occasions, namely on the 21 July 2008 and around 12 October 2011.

6.5. The COJ only made reversals to electricity charges in January 2013 and April 2013 since there were aware of the complaint.

6.6. The COJ does not dispute that it did not monitor the occurrence of illegal electricity connections but only reported them to the South African Police Service.

6.7. **Did the COJ fail to disconnect electricity and other services at the Complainants' illegally occupied buildings?**

6.7.1. *Complainants' Case*

6.7.1.1. Correspondence dating back as far as 2002 to 2008 indicates that the previous owners of the buildings had on numerous occasions requested for the disconnection of electricity and other services in the buildings.

6.7.2. *COJ' s Case*

6.7.2.1. The COJ in all its responses has only provided two dates which they allege are the dates of termination of services to the buildings, namely 21 June 2008 and on or about 12 October 2011.

6.7.2.2. The COJ, from its responses, also alleged that disconnection of water supply to the buildings was conducted on 12 September 2012.

6.7.2.3. The COJ has admitted that there had been numerous illegal connections after the COJ had disconnected the service supply to the buildings but the COJ has not indicated what was done to remedy this.

6.7.2.4. The COJ has denied that its actions in dealing with the complaint and electricity supply to the building constitute maladministration.

6.8. **Did the COJ unduly bill the Complainants' companies for electricity and other services in respect of the Complainants' illegally occupied properties and if so does this constitute maladministration?**

6.8.1. It must be borne in mind that since the Complainants bought the buildings in 2009; he has never taken occupation.

6.8.2. Furthermore, escalating service charges to the buildings have been due to and consumed by the illegal occupants because of illegal connections.

6.8.3. *Complainants' Case*

6.8.3.1. Documentary evidence from the responses of the COJ shows that reversals of electricity and other services provided in respect of the buildings were done during April 2012 and January 2013 respectively. Yet the COJ does not deny promising to reverse wrongful billing as early as 2009. It must also be borne in mind that the reversal done in Januarys 203 had been promised to be done by December 2012 and in that month the City announced it had done just that whereas it had not.

6.8.3.2. Even more disturbing is that the Complainants has furnished the investigation team with recent service bills dated 4 August 2014 and 11 September 2014, showing that the COJ is still billing the Complainants for the illicit electricity and water consumption by the illegal occupants.

6.8.4. *COJ' s Case*

6.8.4.1. Although the COJ admits billing the Complainants, it denies that its action above constitute maladministration.

6.9. **Did the COJ promise the Complainants and the Presidency to disconnect electricity and write off the services debt from his property and did it unduly fail to honour such promise?**

6.9.1. It is not disputed by the parties that a meeting was conducted at the office of the Presidency during February 2012.

6.9.2. *COJ' s Case*

6.9.2.1. The COJ in its responses states that the City officials undertook to reverse the electricity charges which had been raised on the buildings.

6.9.2.2. The COJ does not deny that a promise was made; it denies that it committed to time frames in regard to the promise. I must indicate that during my meetings with COJ representatives the promise was not denied, the COJ pleaded bureaucratic hurdles it faced when implementing.

6.9.2.3. The COJ denies its actions constitute maladministration.

6.10. **Did the COJ unduly encourage the illegal occupation of the Complainants' buildings by failing to take action against Counsellor Zwane who actively encouraged and admitted to encouraging illegal occupation of the Complainants' buildings?**

6.10.1. *Complainants' Case*

6.10.1.1. On the night of the raid, 19 September 2011, Councillor Zwane of Ward 61 allegedly contacted the Complainants telephonically and threatened his life. Councillor Zwane warned the Complainants to stop the raid.

6.10.1.2. Councillor Zwane also allegedly threatened the security company and, according to the Complainants, the illegal occupants are part of the ward from which he depends for votes and were promised by him not to be evicted while the evictions were scheduled to take place before the Local Government Elections, held during May 2011.

6.10.1.3. The Complainants reported the matter to the South African Police Services under case number 1298/09/2011. He also reported it to the Mayor and Speaker of the COJ and a conciliation meeting was arranged in pursuit thereof.

6.10.1.4. The South African Police Services reconstructed the case docket after it went missing and the matter is still under investigation.

6.10.2. *COJ' s Case*

6.10.2.1. The COJ has admitted that the matter was reported to it and is of the view that the matter falls within the mandate of South African Police Service. The COJ has only reported the matter to the Speaker of Council.

6.10.2.2. The COJ has not denied the allegation and it has not taken any form of action against Councillor Zwane.

6.11. **Did the COJ unduly fail to take resolute criminal action against illegal occupants in violation of its own by-laws?**

6.11.1. It is common cause that the COJ knew about illegal occupants occupying the buildings since 2009.

6.11.2. It is also common cause that the illegal occupants are conducting criminal activities pertaining to illegal connections and theft of electricity and water.

6.11.3. It is also common cause that the Complainants asked the COJ to act decisively arguing that as long as they enjoy free water and electricity, the illegal occupants are not going to yield easily to pressure to leave.

6.11.4. *COJ' s Case*

6.11.4.1. The COJ states that on the night of the raid, several arrests were made and spot fines issued to several illegal occupants. In addition the COJ states that a criminal case was laid with the South African Police Services.

6.11.4.2. No further action was taken by COJ.

6.12. **Did the COJ unduly undertake to assist the Complainants with an eviction process and in the process cause him to incur security costs for security meant to guard the buildings at the conclusion of an eviction process?**

6.12.1. It is not disputed that the Complainants requested the COJ to assist with an eviction process against the illegal occupants.

6.12.2. It is common cause that the COJ facilitated a raid on the Complainants' buildings on 19 September 2011.

6.12.3. It is in dispute as to whether an undertaking was made by the COJ in regard to assisting the Complainants with an eviction against the illegal occupants of the buildings.

6.12.4. The COJ does not dispute that the Complainants procured security services to guard the buildings but is disputing that this formed part of the original complaint

and it was never presented to the City that the Complainants incurred unnecessary expenditure. It is worth noting that the Complainants haw always said that his financial perils are due to the COJ's service failure relating to the evictions and wrongful billing.

6.12.5. *Complainants' Case*

6.12.5.1. Documentary evidence provided by the Complainants indicates that he procured the services of a security company for guarding of the premises after the raid was conducted.

6.12.6. *COJ' s Case*

6.12.6.1. The COJ contends that the actions under the raid were never supposed to amount to an eviction.

6.12.6.2. The COJ denies making an undertaking to assist the Complainants in regard to an eviction.

6.12.7. Although the COJ now denies it undertook to evict the illegal occupants, in all its oral accounts to me, it never denied it did so. Its explanation was that it wrongly believed it could help.

6.12.8. The question for my determination was whether or not the City's promise to the Complainants to evict and to abandon an eviction process constitutes wrongful action.

6.12.9. Documentary evidence and earlier discussions with the COJ tell a different story, in that it proves that not only did the COJ in their own response, dated 9 July 2009, admit to *"facilitating"* the raid but further that *"various people were arrested"*. The COJ's further bare denial regarding the advice to the Complainants' to obtain

security could not be substantiated and the Complainants' version is accepted in this regard.

6.12.10. It follows then that a reasonable lay person could have been misled to reasonable believe that the COJ would assist with the "*eviction*" of the illegal occupants and that Complainants would be liable to secure the premises and be responsible for the guarding against future illegal occupation.

6.13. **Regarding COJ's alleged failure to discharge its responsibilities in terms of the right to property under section 25, right to access to housing under section 26, duty to ensure good administration under section 195 and the duty to give priority to constitutional obligations under section 237 of the Constitution?:**

6.13.1. The COJ does not deny the existence of illegal occupants in the Complainants' buildings.

6.13.2. The COJ does not deny knowledge of the illegal occupants since at least 2009.

6.13.3. *COJ' s Case*

6.13.4. The COJ contends that it **only has an obligation to provide temporary emergency accommodation to people facing homelessness on eviction** and that it is **not a state entity responsible for the provision of housing**.

6.13.5. The COJ further contends that the provision of housing is a National and Provincial Government function.

6.13.6. The COJ made an undertaking to the Public Protector on 23 September 2014, that it will assess the buildings, as it requires buildings for temporary accommodation and has never denied making that undertaking.

6.14. **Were the Complainants and his family prejudiced by one or more of the City's acts of maladministration?**

6.14.1. It is common cause that there have been a number of delays by the COJ in regard to the disconnection of electricity and other services to the buildings.

6.14.2. It is further common cause that the COJ after making disconnections to the buildings never monitored the situation in order to avoid unjustified billing to the Complainants and that in fact the Complainants was wrongfully billed.

6.14.3. It is also common cause that the Complainants has no home, his business has been sequestrated and has been to countless meetings in this and many other offices as he tries to resolve his dispute with the COJ, including getting the COJ to honour its promise, and that he currently has no money even to pay the sheriff to serve notices on the illegal occupants at his two buildings.

6.14.4. What is in dispute is the extent to the Complaint's misfortune(s) can be legitimately attributed to improper action or inaction by the COJ.

6.14.5. *Complainants' Case*

6.14.5.1. The Complainants submitted that he incurred expenses in procuring the security service provider to guard the buildings after the raid was conducted.

6.14.5.2. He further submitted that he has suffered prejudiced in regard to time, finances, emotionally and psychologically.

6.14.5.3. Time and again the Complainants sent messages to me and the investigation team when there was an undue delay by the COJ, on one occasion this involved writing off the utilities bill which he advised at the time was a condition imposed by a prospective buyer and despite mine and the teams 'follow up with the COJ and undertakings made by various role-players therein the COJ never met its promise on time and by the time the reversal of charges was done the offer was no longer available.

6.14.5.4. While I am not a psychologist, there is no doubt in my mind based on e-mails and sms's from the Complainants that his family has endured trauma due to the municipal charges, unfulfilled promises and inability to offload the buildings.

7. MEASURING CONDUCT AGAINST THE RULES

7.1. **Did the COJ wrongfully fail to disconnect electricity and other services at the Complainants' illegally occupied buildings in violation of its own by-laws and if so does such conduct constitute maladministration? And did the COJ improperly bill the Complainants' companies for electricity and other services in respect of the Complaint's illegally occupied properties and if so does such conduct constitute maladministration?**

7.1.1. The COJ failed in terms of section 95 of the Municipality Systems Act 32 of 2000 to dealing with the complaint together with prompt corrective action. In addition the COJ failed to monitor response time and efficiency.

7.1.2. The COJ in terms section 11(1) of the Credit Control and Debt Collection Policy, failed to take positive steps to prevent illegal consumption of municipality services and to permanently disconnect electricity of hijacked premises after the matter was reported to them.

7.1.3. It is of noteworthy to mention that the Complainants is still currently being unduly billed for the illegally occupied premises.

7.2. **Did the COJ promise the Complainants and the Presidency to disconnect electricity and write off the service debt from his property and did it later unduly fail to honour such promise?**

7.2.1. The COJ, and Mayor Tau himself, made an undertaking to the Complainants and to the Public Protector, respectively, to disconnect the electricity to the hijacked premises and to write off the service debt, however the Municipality only partially complied with its undertaking by writing off only certain amounts only approximately six months after the fact by and only disconnecting the electricity supply during certain periods which led to subsequent billing and which billing still persists.

7.2.2. The Municipality's failure to write off the debt as untaken and which is allowed for is in contravention of section 13(1) of the Credit Control and Debt Collection Policy.

7.3. **Did the COJ unduly encourage the illegal occupation of the Complainants' buildings by failing to take action against Councillor Zwane who actively encouraged and admitted to encouraging illegal occupation of the Complainants' buildings?**

7.3.1. Councillor Zwane acted in contravention of sections 2 and 6(1) of the Code of Conduct of Councillors as provided in Schedule 1 of the Municipal Systems Act, 32 of 200, by not performing the functions of his office in good faith, honestly and in a transparent manner.

7.3.2. He further contravened sections 11(a) and (d) of the Code of Conduct of Councillors by interfering with the management and administration of the Municipality without having being mandated to do so, and in doing so he participated in conduct which caused and contributed to maladministration in the council.

7.3.3. Neither the Chairperson of the Municipal Council nor the council took the required action in terms of sections 13 and 14 of the Code of Conduct and failed to investigate the alleged breach of conduct by Councillor Zwane's and subsequently failed to take the necessary disciplinary action against him.

7.4. **Did the COJ unduly fail to take resolute criminal action against illegal occupants in violation of its own by-laws?**

7.4.1. The COJ has failed in terms of section 15 of the Greater Johannesburg Metropolitan Electricity By-laws to take criminal action against illegal occupants in regard to illegal connections of municipal services.

7.4.2. The COJ has failed to prevent theft of electricity after it was notified of situation occurring in the hijacked buildings since 2009 and did not comply with its own polices as explained above.

7.5. **Did the City improperly undertake to assist the Complainants with an eviction process and in the process cause him to incur security costs for security meant to guard the buildings at the conclusion of an eviction process?**

7.5.1. It has already been established that give the that Section 23 of the Constitution, read with section 4 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, prohibits an eviction without an application

to and an order by a court, the COJ could not lawfully promise an eviction without a court order.

7.5.2. Was it proper for the COJ not to evict on 19 September 2011? The answer must be yes yet that5 whole operation should never have been promised or undertaken as it created a legitimate expectation for the Complainants. He invested a lot of time, money and emotion on it as the key that would unlock the availability of his property for the purpose he purchased it for.

7.5.3. The result of the impropriety caused the Complainants financial prejudice in the amount of R 152 601.36 plus 15% interest, when the Complainants acquired the services of a security company for the purposes of the eviction process.

7.5.4. Section 12 of the National Building Regulations and Building Standards Act No. 103 of 1977 gives the Municipality power to remove persons occupying unsafe and unhealthy building.

7.5.5. In terms of case law as discussed by Prof J van Wyk's article and referred to above, the Municipality plays a crucial role in the facilitation of granting an eviction order and identified certain duties and crucial roles played by Municipalities which the COJ did not fulfil.

7.6. **Did the COJ fail to discharge its responsibilities in terms of the right to property under section 25, right to access to housing under section 26, duty to ensure good administration under section 195 and duty to give priority to constitutional obligations under section 237 of the Constitution?**

7.6.1. Sections 25, 26, 195 and 237 of the Constitution read together confer the right to housing, not only on persons in ownership of houses but also on persons less

privileged. Thus there is a duty on the Municipality to protect persons in ownership of property as well as those in need of housing.

7.6.2. The COJ encouraged deprivation of property in conflict with section 25 of the Constitution by failing to effectively protect and assist the Complainants as property owners.

7.6.3. By failing to provide alternative accommodation to the illegal occupants the COJ failed to promote right to access to housing, in terms of section 26 of the Constitution, since it has been aware of the illegal occupants since 2009.

7.6.4. The COJ failed to provide good and efficient administration of the Complainants' matter in terms of section 195 of the Constitution and further the COJ failed, in terms of section 237 of the Constitution, to act diligently and without delay in handling the complaint.

7.7. **Was the Complainants and his family prejudiced by one or more of the City's acts of maladministration?**

7.7.1. I have already indicated that the Complainants and his family were prejudiced by the actions of the City.

7.7.2. The Complainants were principally prejudiced in regard to time, finances and emotional trauma relating to being sent from pillar to post while their cash flow was dwindling and business falling apart.

8. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

8.1. **Regarding whether the COJ wrongfully failed to disconnect electricity and other services at the Complainants' illegally occupied buildings in violation of its own Municipality by-laws and if so does such conduct constitute maladministration? I find that:**

8.1.1. The COJ failed without good reason and over a long period of time failed to disconnect electricity services to the Complainants' illegally occupied properties. This is contra the COJ's Debt control Policy and s95 of the Municipal Systems Act.

8.1.2. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.2. **Regarding whether the COJ improperly billed the Complainants' companies for electricity and other services in respect of the Complainants' illegally occupied properties and if so does this constitute maladministration? I find that:**

8.2.1. The City did whereas it should not have billed the Complainants for services it supplied in violation of his and his predecessor's request as well as its own by-laws.

8.2.2. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.3. **Regarding whether the COJ promised the Complainants and the Presidency to disconnect electricity and other services debt at his properties and later improperly failed to honour such promise? I find that:**

8.3.1. The City did promise the Complainants and the Presidency.

8.3.2. The City failed to keep its promise not only to the Complainants and Presidency but also to my office, not once but several times.

8.3.3. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.4. **Regarding whether the COJ improperly encouraged the illegal occupation of the Complainants' buildings by failing to take action against its Councillor Zwane who actively encouraged and admitted to encouraging illegal occupation of the Complainants' buildings? I find that:**

8.4.1. By failing to take resolute action against Councillor Zwane, the COJ did encourage not only illegal occupation but also encouraged other councillors to do what he did.

8.4.2. By not taking action or instituting an investigation into the matter the COJ contravened the Municipal Systems Management Act and its Code of

Conduct. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.5. **Regarding whether the COJ unduly failed to take resolute criminal action against illegal occupants in violation of its own by-laws? I find that:**

8.5.1. The COJ did indeed fail to enforce its own by laws as per the Greater Johannesburg Metropolitan Electricity by-laws and its policies as explained above.

8.5.2. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.6. **Regarding whether the COJ undertook to assist the Complainants with an eviction process and later improperly failed to do so and in the process caused him to incur security costs for security meant to guard the buildings at the conclusion of the eviction process? I find that:**

8.6.1. The COJ undertook to do something unlawful, by undertaking to assist in the eviction of the unlawful occupiers whilst it did not have the power or authority to do so, and accordingly could not do it.

8.6.2. The COJ failed to conduct a proper assessment of its powers and accordingly advised the Complainants wrongly in violation of section 195 of the Constitution and because of the wrong advice he lost time and money.

8.6.3. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.7. **Regarding whether the COJ failed to discharge its responsibilities in terms of the right to property under section 25, right to access of housing under section 26, duty to ensure good administration under section 195 and duty to give priority to constitutional obligations under section 237 of the Constitution? I find that:**

8.7.1. The COJ has known about the need for housing of the illegal occupants occupying the Complainants' buildings and done nothing about it thus causing the Complainants to shoulder its and other responsible organs of state's responsibilities under section 26 of the Constitution, thus violating Complainants' rights under section 25 of the Constitution.

8.7.2. The COJ failed to discharge its constitutional responsibilities particularly as outlined in the *Blue Moonlight Properties* case and under section 237 of the Constitution.

8.7.3. The COJ failed to honour promises made to the Public Protector arising from a meeting held on 23 September 2014, that the COJ will assess the Complainants' buildings in view of acquiring them if they meet the requirements for premises earmarked by the COJ for temporary accommodation.

8.7.4. The COJ's treatment of the Complainants, involving unmet promises and being misled, further violates principles of public administration in section 195 of the Constitution.

8.7.5. The acts of the COJ constitute maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.8. **Regarding whether the Complainants and their family were prejudiced by one or more of the City's acts of maladministration? I find that:**

8.8.1. The Complainants were severely prejudiced by the COJ's maladministration, financially, emotionally and psychologically.

8.8.2. The Complainants' family and employees have also been prejudiced by the COJ's maladministration.

9. REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainants as close as possible to where he would have been had the improper conduct or maladministration not occurred is the following:

9.1. **The Mayor of the COJ to:**

9.1.1. Request the Mayor of COJ to cause an urgent evaluation of the Complainants' buildings, approach council with the request to buy the buildings as redress for harm caused to the Complainants by the COJ.

9.1.2. Ensure that an internal investigation on the cause of the COJ failure to provide Mr Kgaudi with service expected under section 195 of the Constitution and the Batho Pele principles.

9.1.3. Ensure that an urgent investigation is conducted in respect of all privately owned buildings that are illegally occupied, ensure that the COJ complies with its responsibility to provide emergency housing.

9.1.4. Apology to Mr Kgaudi and his family for the gross maladministration and consequent trauma.

9.2. **The Chairperson of the Municipal Council to :**

9.2.1. Ensure that appropriate action is taken against Councillor Zwane in terms of the COJ's Code of Conduct for Councillors and to report to the MEC for local government in the province on the matter.

10. MONITORING

10.1. The Mayor of the COJ must within 30 days from date of this report submit an implementation plan indicating the manner in which the remedial action in paragraph 11 will be implemented.

10.2. The Mayor of the COJ must within 21 days of submission of the implementation plan, provide a progress report regarding the implementation of the remedial action taken in paragraph 11.

10.3. The Intake Assessment & Customer Care Unit, IACS, will monitor remedial action over short regular intervals.

ADV THULI N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 17/12/2014

Assisted by: Mrs L Sekele – Senior Manager: IACS
Mr T Kekana – Investigator: IACS
Mr Risenga Maruma: Senior Manager: Executive Support

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