CITIZEN’S ARREST

Report No. 16 of 2011/12 of the Public Protector on an investigation into alleged improper salary deductions implemented by the Auditor-General South Africa
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Executive summary

(i) Citizen’s Arrest is a report of the Public Protector on an investigation into the alleged improper salary deductions implemented by the Auditor-General South Africa (the Auditor-General). It relates to complaints lodged by employees, previously employed by the Department of the Auditor-General in the former Republic of Transkei, who were incorporated into the Office of the Auditor-General on 1 April 1996.

(ii) The salary deductions were made on the basis that overpayments had been made to the said employees after they were irregularly promoted by the Transkei Government shortly before the transition that commenced in 1994. The Judge White Commission, appointed in terms of the Constitution of the Republic of South Africa 1993, found that the promotions were irregular and it was set aside.

(iii) Following court challenges in respect of some of the findings of the Judge White Commission lodged by public servants that were affected, and in terms of the powers granted to accounting officers to remit the debts relating to the overpayments, certain government departments ceased the implementation of salary deductions and remitted the outstanding amounts.

(iv) The complainants raised the matter with the Auditor-General, but their request to be treated equally with their peers in the said government departments, was not granted on the basis that the Auditor-General was obliged by directives of the National Treasury and the Department of Public Service and Administration to recover the overpayment in terms of the provisions of the Public Service Act, 1994.

(v) An analysis and evaluation of the evidence and information obtained during the investigation, including the legal framework that regulated the independent status of the Auditor-General and the appointment of staff at the time when the complainants were incorporated as employees of the organisation, concluded that:

(a) The principle of legality that underpins South African law and in terms of which the Public Protector has to consider and evaluate the conduct of organs of state stipulates that the exercise of public power is only legitimate when it is lawful. This principle is encapsulated in the provisions of section 2 the Constitution, which provides that conduct that is inconsistent with it is invalid.
(b) The Auditor-General is an independent constitutional institution.

(c) Neither the Public Finance Management Act, 1999, the Treasury Regulations, nor the Public Service Act, 1994 apply to employees of the Auditor-General. The latter Act ceased to apply to the complainants on the date (1 April 1996) when they became employees of the Auditor-General.

(d) The recovering of the overpayments by the Auditor-General that commenced on 1 October 1999, therefore could not have been implemented in terms of the legislation referred to above.

(e) No provision was made in the 1993 and 1996 Constitutions and the other legislation regulating the powers and functions of the Auditor-General for the recovering of the overpayments from the salaries of complainants.

(f) The instructions of the National Treasury relating to the recovering of the overpayments had no impact on the Auditor-General.

(g) As an independent constitutional institution, the Auditor-General had no powers to recover debts on behalf of the State from the salaries of its employees in respect of overpayments made to them before the date of their incorporation.

(h) The conduct of the Auditor-General in this regard was therefore invalid as it was not authorised by the relevant legislation.

(i) The Auditor-General was obliged to incorporate the said employees at the remuneration level awarded to them by the former Transkei Government. The impact of the subsequent rulings of the Judge White Commission was that overpayments in their remuneration had been made for a period of more than 3 years.

(j) In terms of section 48 of the Audit Arrangements Act, the Auditor-General had the power to recover the overpayments made by it to the affected employees. However, section 48 also authorised the Deputy Auditor-General, as the accounting officer, to consider the remittance of such overpayments.
(k) The evidence show that the Deputy Auditor-General, as the accounting officer of the Auditor-General held the mistaken view that the Auditor-General was obliged by the directives of the National Treasury and the Department of Public Service and Administration to recover the overpayments.

(l) The failure (albeit bona fide) of the Auditor-General to properly consider the requests of the affected employees in terms of section 48 was therefore based on an error of law.

(m) The evidence further indicates that the National Government implemented measures to enable the accounting officers of government departments at the time to remit similar overpayments. This approach and the discretionary powers afforded by law to the Deputy Auditor-General at the time, entitled the complainants and the other affected employees to have their requests for remittance properly considered, which did not happen.

(n) The provisions of section 48 of the Audit Arrangements Act that authorised the recovery of overpayments were qualified by the provisions of section 34(5) of the Basic Conditions of Employment Act, 1997, in terms of which it had to relate to a calculation error. The overpayments referred to above were not the result of calculation errors and its recovery was therefore prohibited by law as from 1 December 1998.

(o) The Auditor-General could therefore only have recovered overpayments made from 1 April 1996 to 1 December 1998. As indicated above, such recovery was subject to the exercise of the discretion to remit the overpayments, as requested and as happened in other state institutions. The possibility of correcting the failure to exercise this discretion became obsolete due to the replacement of the Audit Arrangements Act with the Public Audit Act which does not provide for such consideration.

(vi) The findings of the Public Protector are

Finding 1: The recovery by the Auditor-General from the remuneration of the complainants and the other affected employees of overpayments made to them
before 1 April 1996, was not authorised by the relevant legislation and amounted to improper conduct

(a) The fact that the State failed to lawfully recover the overpayments made to the complainants and the other affected employees of the Auditor-General before 1 April 1996, cannot be ascribed to any fault on their part. Due to the fact that the recovery from their remuneration by the Auditor-General was not authorised by the relevant legislation and was improper, they are entitled to be placed in the position where they would have found themselves, was it not for the said recovery.

Finding 2: The recovery by the Auditor-General from the remuneration of the complainants and the other affected employees of overpayments made to them during the period 1 April 1996 to 1 December 1998 was not authorised by legislation and amounted to improper conduct and maladministration

(b) The complainants and the other affected employees were entitled by law to have their requests for the remittance of the overpayments properly considered. The reason why this was not done was based on the misconception, albeit bona fide, that the Auditor-General was subject to the directives of the National Treasury and the Department of Public Service and Administration. This failure caused the said employees to be improperly prejudiced, especially taking into account that the overpayments of employees in government departments who found themselves in the same position after the rulings of the Judge White Commission, were remitted in terms of delegated powers afforded to the relevant accounting officers by the Minister of Finance. It amounted to improper conduct and maladministration.

Finding 3: The recovery by the Auditor-General from the remuneration of the complainants and the other affected employees of overpayments made to them during the period 1 December 1998 to date was prohibited by the provisions of the Basic Conditions of Employment Act, 1997 and amounted to improper conduct

(c) Human resource management and related issues, such as the overpayment of remuneration, must, in terms of section 35 of the Public Audit Act, be dealt with in terms of the applicable labour legislation. Section 34(5) of the Basic Conditions Employment Act, 1997 prohibits the recovery of any overpayment that was not made as a result of a calculation error. Due to the fact that the overpayment in this matter
was the result of promotions being declared irregular and therefore not the consequence of a calculation error, the recovery from the remuneration of the complainants and the other affected employees from the date of the commencement of the latter Act (1 December 1998) was prohibited by the Basic Conditions of Employment Act, 1997 and amounted to improper conduct.

(vii) The remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution is the following:

(a) The Auditor-General to reimburse the complainants and their fellow employees, who were similarly affected by the recovery of overpayments on their remuneration, including those that have since left its employ, with the total amounts deducted from their salaries, as referred to in this report; and

(b) The Auditor-General to also pay interest to the employees and former employees concerned on the amounts deducted at a rate calculated in accordance with the provisions of the Prescribed Rate of Interest Act, 1975.
1. **INTRODUCTION**

1.1 *Citizen’s Arrest* is a report of the Public Protector 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 (the Public Protector Act).

1.2 The report is submitted to the Auditor-General of South Africa.

1.3 Copies of the report are also distributed to:

1.3.1 The Minister of Finance;

1.3.2 The Minister of Public Service and Administration;

1.3.3 The Director-General of the National Treasury;

1.3.4 The Director-General of the Department of Public Service and Administration; and

1.3.5 The complainants in this matter, Messrs M K Mxakatho and M Mpambani.

1.4 The report relates to an investigation into the alleged unfair and improper treatment by the Auditor-General South Africa (the Auditor-General) of certain employees of the institution (including the complainants) pertaining to the deduction from their salaries of an amount representing overpayments that originated when they were still employed by the government of the former Republic of Transkei.

2. **THE COMPLAINT**

2.1 Messrs Mxakatho and Mpambani (the complainants) are employees of the Auditor-General. They approached the Public Protector in 2006, complaining about deductions made from their remuneration in respect of overpayments that related to promotions awarded to them when they were still in the employment of the Department of the Auditor-General in the former Republic of Transkei.

2.2 The basis for the said deductions was that their promotions were found to have been irregular. However, other promoted employees of the government of Transkei in respect of whom similar findings were made and who were also incorporated into the
public service of the Republic of South Africa after 1994, did not suffer the same fate as their employers decided not to implement salary deductions and remitted the outstanding amounts.

2.3 The complainants and other affected employees of the Auditor-General on several occasions requested their employer to cease the salary deductions on the basis that they were being treated differently from their peers in other government institutions, but to no avail.

2.4 The Public Protector was requested to investigate the alleged unfair and improper implementation of the said salary deductions by the Auditor-General.

3. BACKGROUND TO THE COMPLAINT

3.1 Much of the information that was obtained during the investigation related to the background to the complaint, which is referred to below.

3.2 Shortly before the first democratic elections were held in the Republic of South Africa on 27 April 1994, the Transkei Public Service Commission recommended (on 17 April 1994) that the complainants and several other employees of the Department of the Auditor-General of Transkei be promoted, with effect from 1 October 1993.

3.3 The relevant Minister approved the said recommendations and the employees were informed accordingly.

3.4 Allegations relating to the impropriety of the promotions awarded in the Transkei came to the attention of the drafters of the Constitution of the Republic of South Africa, 1993 (the interim Constitution), hence the provisions of section 236(6) thereof that provided for the President to appoint a Commission of Enquiry to investigate such matters. This provision authorised the Commission to review and set aside promotions made between 27 April 1993 and 30 September 1994, found to be not proper or justifiable.

3.5 The Commission that was appointed by the President was commonly known firstly as the Browde Commission, and later as the Judge White Commission. The latter was appointed with effect from 25 March 1996.
3.6 The South African Public Servants Association represented the complainants and some of their fellow employees at the hearing on their promotions by the Judge White Commission, which were held on 7 August and 31 October 1996.

3.7 During the process of the incorporation of public bodies of the former Republic of Transkei into public bodies of the Republic of South Africa, after the 27 April 1994 elections, the complainants elected to be incorporated into the Office of the Auditor-General (as it was referred to at the time), in terms of the relevant provisions of the Audit Matters Rationalisation and Amendment Act, 1995, with effect from 1 April 1996.

3.8 On 10 April 1997, the Judge White Commission ruled that the promotions of the complainants and other former employees of the Department of the Auditor-General of Transkei were irregular as it did not comply with the prescripts and policies that applied in Transkei at the time, and it was set aside.

3.9 The affected employees were informed in writing by the Deputy Auditor-General, on 15 December 1998, that the Judge White Commission had finalised its investigations and that their promotions had been set aside with effect from 1 October 1993. They were advised as follows:

“Please note that the findings of the Judge White Commission are orders of the Court and must be implemented within two months since the order has been received by the Office. To adhere to this order your position and compensation have been adjusted as set out in the enclosed documents.” (emphasis added)

3.10 The issue of the overpayment of salary that, according to the Auditor-General, had to be recovered from the said employees was only raised again in a letter addressed to them on 15 September 1999. This time the Deputy Auditor-General informed them, *inter alia*:

3.10.1 Of the details of the overpayments that would be deducted from their salaries;

3.10.2 That the deductions would be made in terms of the relevant Treasury Instructions and the provisions of the Exchequer Act, 1975; and
3.10.3 That the Department of State Expenditure had approved that, in view of the recommendations of the Portfolio Committee on Public Service and Administration, a ceiling was to be placed on the amount of the overpayment that had to be recovered.

3.11 The Deputy Auditor-General also stated that: “It is our opinion that you were not responsible for the ‘irregular’ promotions and that you were in good faith only the recipient thereof. We also realize that the recovery of the overpayment will cause you to suffer undue financial hardship. The Office does, unfortunately, not have a mandate to consider your position, but please be assured of the Office’s commitment to support you during this adjustment phase.” (emphasis added)

3.12 The Auditor-General commenced with the deduction of the overpayments from the salaries of the affected employees on 1 October 1999.

3.13 Several of the rulings of the Judge White Commission were reviewed and set aside by the High Court, but none of these judgments had any impact on the rulings that were made in respect of the affected employees of the Auditor-General.

3.14 Most notable of the reviews, was the judgment of the High Court (Transkei Division) in the so called Yalezo case¹, which in essence found that the Judge White Commission was not a continuation of the Browde Commission. The impact of this finding was reflected in the reaction of government departments in the Eastern Cape Province and, for example, the Department of Labour, that on the basis of legal advice decided not to continue with deductions from salaries of employees based on the findings of the Judge White Commission, pending the outcome of an appeal.

¹ See paragraph 5.3.4
3.15 The judgment referred to above was, however, set aside on appeal by a full bench decision of the same court in June 2001.

3.16 The impact of the judgment of the court of appeal on the fate of the employees of the Auditor-General was the subject of a legal opinion that was prepared by an internal Legal Advisor on 1 October 2001. The opinion referred to the history relating to the recovery of overpaid salary from the employees concerned, as follows:

“It is my understanding that the promotions of twenty seven (27) staff members of the former Transkei Audit Office, who elected to join the office with effect from 1 April 1996 in terms of section 4(1) of the Audit Matters Rationalisation and Amendments Act, 1995 (Act 53 of 1995) were declared irregular and set aside by the White Commission (commission) in terms of hearings no 126 and 177 with effect from 1 October 1993. The Portfolio Committee on Public Service and Administration recommended on 4 November 1998 that the irregular promotions be reversed and that all overpayments as a result of such promotions be recovered within a specified period. The National Treasury in terms of section 38(3) of the Public Service Act approved these recommendations and the office subsequently started with the recovery of the said overpayments.” (emphasis added)

3.17 The legal opinion concluded that the judgment of the court of appeal in the Yalezo case had no impact on the legality of the recovery of the overpayments “as instructed by National Treasury”.

3.18 On 27 August 2002, the Director: Dispensation of the National Treasury informed the Auditor-General in writing that:

3.18.1 The National Treasury was exercising control over the implementation of the findings of the Judge White Commission at the request of the Portfolio Committee on Public Service and Administration;

3.18.2 One of the functions exercised by the National Treasury was the partial remission of wrongly granted remuneration;

3.18.3 The power to remit wrongly granted remuneration had not been delegated to accounting officers; and
3.18.4 The National Treasury had been involved in discussions with the Department of Public Service and Administration in respect of the “cancellation” of the process of the implementation of the findings of the Judge White Commission, but that no approval had been granted.

3.19 On 12 November 2002, the National Treasury issued a circular to the accounting officers of all national departments in connection with Treasury Regulation 11.4.1, which authorised accounting officers to write off debts to the State, under certain prescribed circumstances. Accounting officers were made aware of the fact that the Regulations were in contrast with the provisions of section 38 of the Public Service Act, 1994, as it read at the time, which provided that only National Treasury could remit overpayments that had resulted from wrongly granted remuneration. They were further informed that the discrepancy was addressed by a delegation issued by the Minister of Finance, in terms of section 238 of the Constitution, authorising all “heads of national departments” to remit overpayments that have resulted from wrongly granted remuneration.

3.20 The Executive Council of the Eastern Cape Provincial Government took a decision in 2005 that the overpayment of salaries of those employees that were affected by the findings of the Judge White Commission should be remitted, which resulted in the writing off of an amount of R 73 423 174.

3.21 Documentation submitted by the complainants indicates that the Auditor-General was approached by its employees affected by the recovery of the overpayments, on several occasions, requesting that it be remitted. The basis of their request was that employees of government departments, who were in the same position in respect of promotions that were found to have been irregular, were exempted from the recovery of the overpayments made. An example of how the Auditor-General explained the reasons for declining the request was found in the contents of an internal newsletter, eTalk, dated 7 July 2008, which stated, inter alia, that:

“The Auditor-General has received a number of requests relating to the deductions made from the salaries of some of our employees who are affected by the findings of the Browdie (sic)/White Commission.
The Auditor-General is aware of the financial strain that these deductions cause for our employees and we sympathise with your plight in this respect.

Following a consultation with National Treasury, we are now in a position to clear up any uncertainty regarding the Auditor-General’s obligations to National Treasury. The Browdie/White Commission found that during the previous regime the promotion of certain employees had been irregular, resulting in such persons receiving monies to which they were not entitled. The Browdie/White Commission findings resulted in the Auditor-General being required to collect those monies from the affected employees.

The collection of these amounts is under the direct control of National Treasury.

National Treasury had issued a directive to the respective employers, including the Auditor-General, requiring them to collect the amounts overpaid from each employee.

The Auditor-General has a duty to comply with the directive of National Treasury and we will continue to do so until we receive instructions from an appropriate authority to cease such deductions.” (emphasis added)

4. THE JURISDICTION OF THE PUBLIC PROTECTOR AND THE DECISION TO INVESTIGATE THE COMPLAINT

4.1 Section 182(1) of the Constitution provides that the Public Protector has the power:

4.1.1 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;

4.1.2 To report on that conduct; and

4.1.3 To take appropriate remedial action.
4.2 In terms of section 181(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.

4.3 Section 6(4)(a)(v) of the Public Protector Act provides that the Public Protector shall be competent to investigate any alleged act or omission by a person performing a public function, which results in unlawful or improper prejudice to any other person.

4.4 The Auditor-General is also an independent constitutional body that was established by section 181 of the Constitution to strengthen the constitutional democracy of the Republic of South Africa.

4.5 As the Auditor-General performs a public function and as the complaint relates to the alleged improper denial to remit a debt due to the State resulting in the complainants being prejudiced, the matter falls within the jurisdiction and powers of the Public Protector.

4.6 Section 6(9) of the Public Protector Act provides that:

“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.”

4.7 The deduction from the salaries of the complainants commenced in 1999 and is still on-going. Due to the history of the matter and the alleged prejudice suffered by the complainants as a result of actions taken by the former Transkei Government, which were beyond their control, it was decided that sufficient special circumstances exist to warrant the investigation of the matter.

5. THE INVESTIGATION

5.1 The investigation took a long time to complete due to the uncertainties of the government departments and officials that were approached, in respect of which entity was ultimately responsible for the recovery of the overpaid salaries and who could decide on the remittance of the outstanding amounts in respect of employees of the Auditor-General. It was also a tedious task to obtain the relevant documents,
due to the time lapse between the lodging of the complaint and the incident complained of.

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

5.3 Sources of information utilised during the investigation

5.3.1 Correspondence

Correspondence was addressed to and received in connection with the matter from:

5.3.1.1 The complainants;

5.3.1.2 The Deputy Auditor-General;

5.3.1.3 The Director-General of the National Treasury;

5.3.1.4 The Office of the Premier of the Eastern Cape Provincial Government;

5.3.1.5 The Chief Director: Legal Services of the Department of Public Service and Administration;

5.3.1.6 A Senior Legal Advisor of the Auditor-General.

5.3.2 Official letters, notices and memoranda

The contents of the following documents were considered:

5.3.2.1 Letters addressed to Mr M Mxakatho (one of the complainants) by the Deputy Auditor-General on 15 September 1999, 15 December 1999 and 17 December 1999;

5.3.2.2 A letter addressed to the Auditor-General by the General-Secretary of the South African Public Servants and Allied Workers Union, dated 25 August 1999;

5.3.2.3 A Memorandum of the Office of the State Law Adviser in the Office of the Premier of the Eastern Cape Provincial Government, dated 13 October 1999;
5.3.2.4 Notices addressed to all Heads of National Departments and Provincial Treasuries, issued by the National Treasury on 10 October 2000 and 12 November 2002;

5.3.2.5 An internal legal opinion by the Legal Adviser in the Office of the Auditor-General, dated 1 October 2001;

5.3.2.6 A letter addressed to the Auditor-General by the Director: Dispensation of the National Treasury, dated 27 August 2002;

5.3.2.7 A letter addressed by the complainants to the Director-General of the National Treasury, dated 7 March 2005;

5.3.2.8 A notice to the Heads of Departments issued by the Director-General of the Eastern Cape Provincial Government on 13 December 2003; and

5.3.2.9 An internal newsletter of the Office of the Auditor-General, entitled eTalk, dated 7 July 2008.

5.3.3 Findings of the Judge White Commission

The findings of the Judge White Commission in Hearing No 50, dated 10 April 1997 were considered.

5.3.4 Jurisprudence

5.3.4.1 The judgment of the Full Bench of the High Court of South Africa (Transkei Division) in the matter between The Chairperson, White Commission & 5 Others and Bekimpi Yalezo and 160 Others, was considered and applied.

\[2\] [2001] JOL 8617 (Tk)
5.3.4.2 Reference was also made to relevant parts of *Administrative Law and Justice in South Africa* authored by G E Devenish, K Govender and D Hulme\(^3\).

5.3.5 **Legislation considered**

The relevant provisions of the following legislation were considered and applied:

5.3.5.1 The Constitution of the Republic of South Africa, 1993

5.3.5.2 The Constitution of the Republic of South Africa, 1996

5.3.5.3 The Public Protector Act;

5.3.5.4 The Basic Conditions of Employment Act, 1983;

5.3.5.5 The Exchequer Act, 1975 and the Treasury Instructions issued in terms thereof;

5.3.5.6 The Audit Arrangements Act, 1992;

5.3.5.7 The Auditor-General Act, 1995;

5.3.5.8 The Audit Matters Rationalisation and Amendment Act, 1995;

5.3.5.9 The Basic Conditions of Employment Act, 1997

5.3.5.10 The Public Audit Act, 2004;

5.3.5.11 The Public Finance Management Act, 1999 (PFMA) and the Treasury Regulations issued in terms thereof;

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\(^3\) Butterworths 2001
5.3.5.12 The Public Service Act, 1994; and

5.3.5.13 The Promotion of Administrative Justice Act, 2000.

5.4 The response to the Provisional Report

5.4.1 The response of the Senior Legal Advisor of the Auditor-General, dated 11 August 2011 to the Provisional Report of the Public Protector issued on 5 April 2011, was considered.


6.1 The Constitution of 1993

6.1.1 Section 192 of the interim Constitution, which commenced on 27 April 1994, established the Auditor-General as an independent and impartial institution, subject only to the Constitution and the law.

6.1.2 In terms of section 194, the Auditor-General had the power to appoint such persons as were necessary for the discharge of the work of his/her office. The Auditor-General and the appointed persons were granted such immunities and privileges, by virtue of section 192(2) “as may be assigned to them by or under an Act of Parliament for the purpose of ensuring the independent and impartial exercise and performance of their powers and functions.”

6.2 The Constitution of 1996


6.2.2 The Auditor-General is one of the institutions listed in Chapter 9 of the Constitution under the heading; “STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY.”
6.2.3 In terms of section 188, the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations, all municipalities and any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

6.2.4 The Auditor-General has, in terms section 188(4), the additional powers and functions prescribed by national legislation.

6.2.5 Section 239 provides that “organ of state” includes any functionary or institution exercising a power or performing a function in terms of the Constitution.

6.2.6 The Auditor-General is therefore regarded as an organ of state.

6.3 The Basic Conditions of Employment Act, 1983

6.3.1 This Act was repealed and replaced by the Basic Conditions of Employment Act, 1997 on 1 December 1998.

6.3.2 It regulated certain matters relating to the conditions of certain employees.

6.3.3 In terms of section 1(2) any person employed by the state, including Parliament, was not regarded as an “employee” for the purposes of the Act. It therefore did not apply to employees of the Auditor-General, it being a state institution.

6.4 The Audit Arrangements Act, 1992 (as amended in 1995)

6.4.1 The purpose of this Act was to establish the Office of the Auditor-General as a juristic person and to regulate, inter alia, staff matters of the Office.

6.4.2 In terms of section 27, the Deputy Auditor-General had to be appointed by the Auditor-General. He/she was the head of the Office, responsible also for the effective utilisation of staff.

6.4.3 The appointment, promotion and transfer of staff of the Office of the Auditor-General were regulated by Chapter V of the Act.
6.4.4 Section 18 of the Act established a Staff Management Board, that for all intents and purposes replaced the Public Service Commission for as far as its powers and functions previously related to employees of the Office of the Auditor-General.

6.4.5 According to section 19, a reference in any law, or document in relation the Office of the Auditor-General or its employees to:

6.4.5.1 “The Public Service, shall be construed as a reference to the Office”;

6.4.5.2 “A person who is an officer or employee in the Public Service in terms of the definition of ‘officer’ and ‘employee’ in section 1 of the Public Service Act, shall be construed as a reference to an officer or employee in the service of the Office”; and

6.4.5.3 “The Treasury or the Minister of State Expenditure, shall be construed as a reference to the Auditor-General”.

6.4.6 Section 48(2)(b) provided for the recovery of wrongly granted remuneration or overpayment of remuneration. Subsection 3 authorised the Deputy Auditor–General, as the accounting officer of the Office, to remit the amount of an overpayment to be recovered in whole, or in part.

6.5 The Audit Matters Rationalisation and Amendment Act, 1995

6.5.1 The object of the Act was to rationalise the Office of the Auditor-General and to abolish the audit offices of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei.

6.5.2 Persons in the service of the said audit offices were given the opportunity to elect to serve in the Office of the Auditor-General as from a determined effective date, in terms of section 4 of the Act. All such persons were deemed to be duly appointed in terms of the Audit Arrangements Act.

6.5.3 Although the Act provided for the continuation of investigations instituted and disciplinary steps taken against such persons relating to their employment in the said audit offices, it did not provide for the recovery of any debt that pertained to their service in such offices.
6.5.4 Of note are the provisions of section 4(3), which stated that:

“The Public Service Act, 1994, shall continue to apply to persons in the service of an audit office who do not make the election contemplated in subsection (1).” (Referred to in paragraph 6.5.2 above) (emphasis added)

6.6 The Basic Conditions of Employment Act, 1997

6.6.1 As indicated above, this Act repealed and replaced the Basic Conditions of Employment Act of 1983 with effect from 1 December 1998.

6.6.2 The aim of the Act is to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment.

6.6.3 In terms of section 3, the Act applies to all employees and employers except for the members of certain bodies, which do not include the Auditor-General.

6.6.4 “Employee” is defined by section 1 as meaning:

“(a) any person, excluding an independent contractor, who works for any other person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.” (emphasis added)

6.6.5 Different from what was the case in terms of the 1983 Act, the 1997 Act applies to employees of the Auditor-General.

6.6.6 Section 34 deals with deductions and other acts concerning remuneration. It clearly distinguishes between a deduction made from an employee’s remuneration and a repayment of remuneration.

6.6.7 A deduction from an employee’s remuneration may, in terms of section 34(1) only be made if the employee agreed thereto in writing or if it was required or permitted in terms of a law, collective agreement, court order or arbitration award.
6.6.8 Section 35(5) provides that:

“An employer may not require or permit an employee to-

(a) Repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee’s remuneration; or

(b) acknowledge receipt of an amount greater than the remuneration actually received.” (emphasis added)

6.7 The Public Audit Act, 2004


6.7.2 It effectively abolished the concept of the Office of the Auditor-General as a juristic person.

6.7.3 Section 54 provided that a person who was an employee of the Office of the Auditor-General immediately before the repeal of the Acts referred to in paragraph 6.7.1 above, became an employee of the Auditor General, as defined by the Public Audit Act, 2004.

6.7.4 Section 43 of the Act provides that the Deputy Auditor-General is the accounting officer in the administration of the Auditor-General. The financial responsibilities of the Deputy Auditor-General set out in this section do not provide for the remittance of a debt owed to the State by an employee due to an overpayment or wrongly granted remuneration.

6.7.5 Section 35 provides that:

“Human resource management and related issues, including terms and conditions of employment, must be dealt with in accordance with generally accepted human resource practice and applicable labour legislation through appropriate management, consultative and, where applicable, negotiation processes.” (emphasis added)

7.1 In terms of sections 1 and 2 of the Act, it only applies to "a national department, a national government component, the Office of a Premier, a provincial department or a provincial government component."

7.2 The Public Service Act does not apply to independent constitutional institutions, such as the Auditor-General.

8. THE APPLICATION OF THE PUBLIC FINANCE MANAGEMENT ACT, 1999 AND THE TREASURY REGULATIONS

8.1 The PFMA and the Treasury Regulations issued in terms thereof, apply, according to section 3 to, inter alia, constitutional institutions. For the purposes of the Act, "constitutional institutions" are listed in Schedule 1 thereto, which excludes the Auditor-General.

8.2 The PFMA and the Treasury Regulation therefore do not apply to the Auditor-General.

9. THE RESPONSE OF THE DEPUTY AUDITOR-GENERAL TO THE COMPLAINT

9.1 In his response to the complaint, dated 17 May 2010, the Deputy Auditor-General maintained that the National Treasury was in control of the findings of the Judge White Commission.

9.2 He further stated that:

"Notwithstanding the resolution taken by the Eastern Cape Provincial Executive Council to remit all the debts, the hearings where the findings relating to employees of the Auditor-General (sic) have to date not been challenged and are therefore binding and have full legal force and effect.

The Auditor-General of South Africa has continued to deduct monies in lieu of salary overpayment from a total of twelve(12) employees who still owe the state a combined debt amounting to R 398 676.30 as at 31 March 2010."
The Auditor-General has a duty to comply with the directive of National Treasury until we receive instructions to cease such deductions. (emphasis added)

10. THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

10.1 The Public Protector provided the Auditor-General with her Provisional Report on the investigation on 5 April 2011.

10.2 The provisional findings of the Public Protector based on the application of the legislation applicable to the Auditor-General and its employees and the evidence and information at her disposal at the time were that:

10.2.1 The recovery by the Auditor-General of overpayments in respect of salaries that were paid by the former Transkei Government to former Transkei public servants who were incorporated into the establishment of the Auditor-General by virtue of the provisions of the Audit Matters Rationalisation and Amendment Act, was unlawful;

10.2.2 The unlawful recovery by the Auditor-General of the overpayments from the salaries of the complainants and their fellow employees who were similarly affected, resulted in them being prejudiced as they were deprived of part of their income to which they were entitled.

11. THE AUDITOR-GENERAL’S RESPONSE TO THE PROVISIONAL REPORT

11.1 A Senior Legal Advisor of the Auditor-General responded to the Provisional Report on 11 August 2011.

11.2 The response distinguished between the period 1 October 1993 to 31 March 1996 and 1 April 1996 to date.

11.3 The first period refers to the date of the promotion of the affected employees by the former Transkei Audit Office to the day before their incorporation into the then Office of the Auditor-General, i.e on 1 April 1996.

11.4 The second period therefore refers to the employment by the Auditor-General of the affected employees.
11.5 It was clarified by the response that the affected employees were remunerated at their promoted salary scales with effect from the date of their promotion. On their incorporation into the Auditor-General, the latter was by law compelled to appoint them at the same remuneration scale. The Auditor-General therefore only commenced paying their remuneration as from 1 April 1996. After the rulings of the Judge White Commission, the difference between the promoted remuneration scales and the remuneration that the said employees were entitled to was regarded as an overpayment by the Auditor-General that had to be recovered.

11.6 The response further stated that:

“The Public Protector is correct in finding that the Public Service Act, Exchequer Act and the Treasury Instructions were not applicable to the AGSA (Auditor-General). The Public Protector is also correct in finding that neither the Constitution nor the Public Audit Act (or its predecessors) contain any mechanisms to recover the debt due to the state (i.e. the debt incurred before 1 April 1996). I therefore agree that the deductions of the salary overpayments for the period 1 October 1993 to 31 March 1996 were unlawful.”

11.7 However, the response contested that the same principle applied to the period after 1 April 1996. It contended that the recovery of salary overpayments were justified as it was made in terms of sections 48(1) and (2) of the Audit Arrangements Act and section 19 of the Basic Conditions of Employment Act, 1983. It also stated that:

“The Audit Arrangements Act and the Basic Conditions of Employment Act were later replaced by the Public Audit Act and the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), respectively. Section 35 of the Public Audit Act, read with section 34(1)(b) of the new Basic Conditions of Employment Act, provides a similar mandate to deduct the salary overpayments.”

11.8 In conclusion, the Auditor-General conceded that the recovery of salary overpayments form the affected employees relating to the remuneration that they received before 1 April 1996, was unlawful. As far as the recovery of the overpayments made after 1 April 1996, the Auditor-General maintained that it was justified and in accordance with the law.

11.9 The following recommendations were made in the response:
11.9.1 The recovery by the Auditor-General of salary overpayments since made since 1 April 1996 should continue until the “debt” has been settled in full.

11.9.2 “The deductions made by the AGSA for the period before 1 April 1996 are unlawful. However, the unlawfulness of the deductions does not change the fact that the employees were not entitled thereto. The overpayments still constitute a debt due to the state. The National Treasury has locus standi to recover debts due to the state. Consideration should be given to transfer the matter to the National Treasury who should decide whether to pursue the recovery of the debt due to the state against the individuals or to refund them in accordance with the initial Public Protector recommendations.”

11.9.3 “Consideration should be given to the establishment of a tripartite working group consisting of representatives from the Public Protector, the AGSA and the National Treasury in the event that the Public Protector and the AGSA fail to reach agreement in respect of the interpretation of the legality of the deductions and the treatment of such reductions (sic) going forward. This form of engagement would underpin the spirit of the relationship created by the memorandum of understanding between the Public Protector and the AGSA.”

11.9.4 According to additional information provided by the Auditor-General, 58 employees, including the complainants, were affected by the rulings of the Judge White Commission and the resultant salary deductions in respect of overpayments.

12. **EVALUATION OF THE RESPONSE OF THE AUDITOR-GENERAL TO THE PROVISIONAL REPORT**

12.1 The Auditor-General had the power in terms of section 48(2)(b) of the Audit Arrangements Act to recover salary overpayments from the remuneration of employees. However, the Basic Conditions of Employment Act, 1983 did not apply to employees of the Auditor-General.

12.2 As the Head of the Office of the Auditor-General, the Deputy Auditor-General also had the power, in terms of section 48(3) of the Audit Arrangements Act, to consider the remittance of the overpayments made. The response does not indicate how the Deputy Auditor-General exercised his discretion in this regard.
12.3 The recovery by an employer of salary overpayments based on anything other than a calculation error is prohibited by section 34(5) of the Basic Conditions of Employment Act, 1997, as from 1 December 1998. It is common cause that the overpayments in question were not the result of calculation errors. Consequently, the recovery of the said overpayments by the Auditor-General could only have been made from the date of the appointment of the effected employees i.e. 1 April 1996, to the date of the commencement of section 34(5), i.e 1 December 1998.

12.4 Neither the PFMA, nor the Treasury Regulations provides for the National Treasury to recover “debts due to the state” from individuals not related to it. The responsibility of such recovery is that of the accounting officer of the government institution concerned.

12.5 The approach of the National Treasury in this regard at the relevant time was in any event evident from the contents of the circular issued on 12 November 2002 and the delegation of powers by the former Minister of Finance referred to in paragraph 3.19 above, in terms of which the accounting officers of government departments were authorised to remit the amounts of overpayments made under circumstances similar to that of the complainants and the other affected employees of the Auditor-General.

13. THE RESPONSE OF THE AUDITOR-GENERAL TO THE FINAL DRAFT OF THE REPORT

13.1 Due to the complexity of interpreting the legal issues involved, the Auditor-General was afforded a further opportunity on 18 January 2012, to respond to the final draft of this report, which included an evaluation of his response to the Provisional Report, referred to in paragraph 12 above.

13.2 During a subsequent meeting between with the Public Protector, the Auditor-General and the Deputy Auditor-General, the Auditor-General expressed his general agreement with the remedial action taken, but indicated that it would be of assistance if the inputs of the National Treasury could be obtained before the report is issued.

13.3 The Office of the Accountant-General was approached on 6 March 2012 in this regard. On 7 March 2012, Ms Z Mxunyelwa, the Head: Specialised Audit Services of the Office of the Accountant-General advised that a copy of the final draft report should be submitted to the Accountant-General directly for his response.
13.4 A copy of the final draft report was accordingly presented to the Accountant-General on 10 April 2012. By 23 April 2012, no response was received and the matter was again raised with his office.

13.5 Ms Mxunyelwa responded on 26 April 2012, advising that due to “current important commitments” it was not possible for the Accountant-General to indicate when a response to the final draft report would be provided. She indicated that “the recommended timeframe” would be provided on 4 May 2012. No timeframe was provided by 4 May 2012 and no further response received from the Office of the Accountant-General.


14.1 The principle of legality that underpins South African law and in terms of which the Public Protector has to consider and evaluate the conduct of organs of state, stipulates that the exercise of public power is only legitimate when it is lawful. This principle is encapsulated in the provisions of section 2 the Constitution, which provides that conduct that is inconsistent with it, is invalid.

14.2 The Auditor-General is an independent constitutional institution, the powers and functions and operations of which are regulated by the provisions of section 188 of the Constitution and the Public Audit Act.

14.3 Neither the PFMA, the Treasury Regulations, nor the Public Service Act, applies to employees of the Auditor-General.

14.4 The findings of the Judge White Commission were directed only at the regularity of the promotions that it considered. It could not and did not make rulings in respect of the recovery of the resultant overpayment of remuneration. Its rulings were also not tantamount to that of a court of law.

14.5 Overpayments of remuneration of public servants of the former Transkei that were incorporated into the public service of the Republic of South Africa, following the
transition in 1994, were recovered by the respective employer departments in terms of the provisions of section 38(3) of the Public Service Act, and the Treasury Instructions, issued by virtue of the Exchequer Act, following a decision taken and an instruction issued by the National Treasury.

14.6 The National Treasury attempted in November 2002 to issue instructions to authorise accounting officers of government departments to consider remitting the salary overpayments. However, due to certain legal discrepancies, it was not possible to do so. The predicament was resolved by the Minister of Finance on 15 October 2002 when he issued a delegation in terms of section 238 of the Constitution that authorised heads of national departments to remit such overpayments. However, this delegation did not apply to the Auditor-General as it is not a national department.

14.7 Accounting officers of certain national and provincial departments that employed former Transkei public servants who were affected by the findings of the Judge White Commission, decided to remit the overpayments in salaries in terms of the authority granted to them.

14.8 As from the date when the complainants became employees of the Auditor General (1 April 1996), the provisions of the Public Service Act ceased to apply to them.

14.9 In terms of the Audit Arrangements Act that applied to the complainants when they were employed by the Auditor-General, the reference in any document to “the Treasury” had to be construed as a reference to the Auditor-General. Notifications indicating that the Treasury had instructed that the overpayments in question had to be recovered, therefore had to be construed as a reference to the Auditor-General.

14.10 The recovering of the overpayments by the Auditor-General commenced on 1 October 1999. As already indicated, it could not have been implemented in terms of the Public Service Act and the Treasury Instructions. The PFMA, which commenced on 1 April 2000 and the Treasury Regulations, also do not apply to the Auditor-General.

14.11 No provision was made in the 1993 and 1996 Constitutions, the Audit Matters Rationalisation and Amendment Act, the Audit Arrangements Act or the Public Audit Act for the recovery by the Auditor-General from former public servants of the
Transkei of overpayments made in respect of salaries paid to them prior to their incorporation into the Office of the Auditor-General.

14.12 The legislative and other prescripts in terms of which the overpayment of salaries were to be recovered by national and provincial government departments from former Transkei public servants that were affected by the findings of the Judge White Commission, did not apply to the Auditor-General and therefore not to its affected employees as from the date that they were incorporated and became employees of this independent institution.

14.13 The instructions of the National Treasury relating to the recovering of the overpayments and Ministerial delegation in respect of the remittance of such overpayments therefore also had no impact on the Auditor-General.

14.14 As an independent constitutional institution, the Auditor-General had no powers to recover debts on behalf of the State from the salaries of its former employees. It was conceded by the Auditor-General during the investigation that the recovery of the overpayment in respect of the remuneration of the complainants and the other affected employees, made before their incorporation on 1 April 1996, was unlawful.

14.15 The Auditor-General was obliged to incorporate the said employees at the remuneration level awarded to them by the former Transkei Government. The impact of the subsequent rulings of the Judge White Commission was that overpayments in their remuneration had been made for a period of more than 3 years.

14.16 The Auditor-General had the power in terms of section 48 of the Audit Arrangements Act, to recover the overpayments made by it to the affected employees. However, section 48 also authorised the Deputy Auditor-General, as the accounting officer, to consider the remittance of such overpayments.

14.17 The evidence show that the Deputy Auditor-General, as the accounting officer of the Auditor-General held the mistaken view that the Auditor-General was obliged by the directives of the National Treasury and the Department of Public Service and Administration to recover the overpayments. The decision not to consider the requests for the remittance of the overpayments in terms of section 48 was therefore
based on a misconception of the legal authority of the National Treasury and the Department of Public Service and Administration in respect of the financial and human resource affairs of the Auditor-General and its employees.

14.18 The failure (albeit *bona fide*) of the Auditor-General to properly consider the requests of the affected employees in terms of section 48 was therefore based on an error of law.

14.19 The decision to implement the recovery of the overpayments was taken in 1999, i.e. prior to the commencement of the Promotion of Administrative Justice Act, 2000. (This Act only commenced on 30 November 2000.) However, the failure to consider the remittance of the overpayments under the circumstances was reviewable under the common law. In their discussion on errors of law Devenish, Govender and Hulme in *Administrative Law and Justice in South Africa*\(^4\) stated the following:

"In regard to misinterpretation of the law, our courts will review a mistake of law that has prevented the public body from appreciating the nature of its powers or has otherwise obstructed the proper exercise of its discretion. Stratford JA explained the position as follows:

*If a discretion is conferred by Statute upon an individual and he fails to appreciate the nature of that discretion through misreading of the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to the true question which has been left to his discretion.*\(^5\)

\(^4\) Supra

\(^5\) *Union Government v Union Steel Corporation* 1928 AD 220 234
14.20 Section 6(2)(d) of the Promotion of Administrative Justice Act, 2000 provides that an administrative action that was materially influenced by an error of law can be subjected to judicial review.

14.21 The evidence further indicates that the national government implemented measures to enable the accounting officers of government departments at the time to remit similar overpayments. This approach and the discretionary powers afforded by law to the Deputy Auditor-General at the time, entitled the complainants and the other affected employees to have their requests for remittance properly considered, which did not happen.

14.22 The provisions of section 48 of the Audit Arrangements Act that authorised the recovery of overpayments were qualified by the provisions of section 34(5) of the Basic Conditions of Employment Act, 1997, in terms of which it had to relate to a calculation error. The overpayments referred to above were not the result of calculation errors and its recovery was therefore prohibited by law as from 1 December 1998.

14.23 The Auditor-General could therefore only have recovered overpayments made from 1 April 1996 to 1 December 1998. As indicated above, such recovery was subject to the exercise of the discretion to remit the overpayments, as requested and as happened in other state institutions. The possibility of correcting the failure to exercise this discretion became obsolete due to the replacement of the Audit Arrangements Act with the Public Audit Act, which does not provide for such consideration.

15. FINDINGS

The findings of the Public Protector are

Finding 1: The recovery by the Auditor-General from the remuneration of the complainants and the other affected employees of overpayments made to them before 1 April 1996, was not authorised by the relevant legislation and amounted to improper conduct.
15.1 The fact that the State failed to lawfully recover the overpayments made to the complainants and the other affected employees of the Auditor-General before 1 April 1996, cannot be ascribed to any fault on their part. Due to the fact that the recovery from their remuneration by the Auditor-General was not authorised by law, they are entitled to be placed in the position where they would have found themselves, was it not for the said recovery.

Finding 2: The recovery by the Auditor-General from the remuneration of the complainants and the other affected employees of overpayments made to them during the period 1 April 1996 to 1 December 1998 was not authorised by legislation and amounted to improper conduct and maladministration.

15.2 The complainants and the other affected employees were entitled by law to have their requests for the remittance of the overpayments properly considered. The reason why this was not done was based on the misconception, albeit *bona fide*, that the Auditor-General was subject to the directives of the National Treasury and the Department of Public Service and Administration. This failure caused the said employees to be improperly prejudiced, especially taking into account that the overpayments of employees in government departments who found themselves in the same position after the rulings of the Judge White Commission, were remitted in terms of delegated powers afforded to the accounting officers by the Minister of Finance. It amounted to improper conduct and maladministration.

Finding 3: The recovery by the Auditor-General from the remuneration of the complainants and the other affected employees of overpayments made to them during the period 1 December 1998 to date, was prohibited by the provisions of the Basic Conditions of Employment Act, 1997 and amounted to improper conduct.

15.3 Human resource management and related issues, such as the overpayment of remuneration, must, in terms of section 35 of the Public Audit Act, be dealt with in terms of the applicable labour legislation. Section 34(5) of the Basic Conditions Employment Act, 1997 prohibits the recovery of any overpayment that was not made as a result of a calculation error. Due to the fact that the overpayment in this matter was the result of promotions being declared irregular and therefore not the consequence of a calculation error, the recovery from the remuneration of the complainants and the other affected employees from the date of the commencement
of the latter Act (1 December 1998) was prohibited by the Basic Conditions of Employment Act, 1997 and amounted to improper conduct.

16. REMEDIAL ACTION

The remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution is the following:

16.1 The Auditor-General to reimburse the complainants and their fellow employees, that were similarly affected by the recovery of overpayments on their remuneration, including those that have left its employ, with the total amounts deducted from their salaries, as referred to in this report; and

16.2 The Auditor-General to also pay interest to the employees and former employees on the amounts deducted at a rate calculated in accordance with the provisions of the Prescribed Rate of Interest Act, 1975.

17. MONITORING

17.1 The Auditor-General to present the Public Protector with an action plan in respect of the implementation of the remedial action referred to in paragraph 15 above within 30 days from the date of this report.

17.2 The remedial action referred to in paragraph 15 above to be implemented within 60 days from the date of this report.
Assisted by:

Adv C H Fourie  
Executive Manager: Good Governance and Integrity

Mr I Matlawe  
Senior Investigator: Service Delivery

Public Protector South Africa