RIGHT OR PRIVILEGE

Report of the Public Protector on an investigation into a complaint of improper prejudice caused by the refusal of the Department of Correctional Services to apply to National Treasury for a Persal deduction code

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INDEX

Executive summary 3

1. INTRODUCTION 6

2. THE COMPLAINT 6

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR 7

4. ISSUES TO BE CONSIDERED BY THE PUBLIC PROTECTOR 8

5. THE INVESTIGATION 8

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION 10

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION 24

8. LEGAL AND REGULATORY FRAMEWORK 31

9. ANALYSIS AND CONCLUSION 33

10. FINDINGS 35

11. REMEDIAL ACTION 37

12. MONITORING 37
Executive Summary

(i) "Right or Privilege" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector’s Act, 1994.

(ii) The report communicates the Public Protector’s findings and directives on appropriate remedial action following an investigation into a complaint lodged by Mr M, a member of the public (the Complainant), on 29 November 2010, alleging he had suffered prejudice due to maladministration by the Department of Correctional Services (the Department). The alleged maladministration involved refusal of the Facilities Funds Section of the Department to apply to the National Treasury for a Persal deduction code to be awarded to the Complainant’s company in order to enable it supply sports clothing to the Department’s employees.

(iii) The Public Protector considered the following issues:

(a) Did the Department refuse to provide the Complainant with a Persal deduction code and if so was such refusal improper or constitute maladministration?

(b) Was the Complainant prejudiced by the refusal of the Department to apply to National Treasury to provide him with access to a Persal deduction code?

(c) Did the Department’s appointment of the current service providers constitute maladministration?

(iv) The investigation was conducted by way of telephonic and written correspondence with officials at the Department of Correctional Services and National Treasury and the perusal of documents received. Applicable legislation, policies and Treasury Regulations and internal prescripts, were also analysed and applied.
(v) The Public Protector makes the following findings:

(a) The Complainant’s application was declined on the basis that the Department did not have a need for an additional service provider;

(b) The Department failed to provide the Complainant with written reasons why his application for a Persal deduction code was declined and to give him adequate notice of his right of review or internal appeal. The Department also failed to provide him with a clear statement regarding its decision to terminate the use of the Persal deduction codes. The Department’s conduct was in violation of section 33 of the Constitution and section 3 of PAJA and was accordingly improper and constitutes maladministration.

(c) The Department’s failure to provide the Complainant with written reasons why his application for a Persal deduction code was declined and to give him adequate notice of his right of review or internal appeal, as well as the failure to provide him with a clear statement regarding its decision to terminate the use of the Persal deduction codes was in violation of the Complainant’s right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution and section 3 of PAJA. The Department’s conduct was accordingly, improper and constitutes maladministration;

(d) The Complainant was prejudiced by the Department’s conduct in that he waited without knowing about the reasons for the Department’s decision and could not take the decision on appeal or review.

(e) The appointment of existing service providers for the provisioning of sports clothing was not preceded by an open tender system as envisaged in section 217(1) of the Constitution, section 2 of the National Treasury General Procurement Guidelines and Item 12.5 of its Sport and
Recreation Policy. The Department failed to implement a procurement system which is fair, equitable, transparent, competitive and cost effective and accordingly, its conduct was improper and amounts to maladministration.

(vi) Appropriate remedial action to be taken in terms of section 182 (1) (c) of the Constitution is that: the National Commissioner of the Department must take urgent steps to:

(a) Provide the Public Protector with a written report regarding the outcome of his engagement with the members of the executive management as indicated in his response to the Public Protector’s Provisional Report and the action taken against any wrongdoer in that regard.

(b) Submit a letter of apology to the Complainant for the manner in which his application for a Persal deduction code was handled;

(c) Provide the Public Protector with copies of letters terminating the services of the current service providers as undertaken in his response to the Public Protector’s Provisional Report.

(d) Ensure that proper procurement procedures in terms of section 217 of the Constitution, the National Treasury Procurement Guidelines and item 12.5 of the Department’s Sport and Recreation Policy are complied with when appointing new service providers for the supply of sport clothing to its members.
REPORT ON AN INVESTIGATION INTO A COMPLAINT OF IMPROPER PREJUDICE CAUSED BY THE REFUSAL OF THE DEPARTMENT OF CORRECTIONAL SERVICES TO APPLY TO THE NATIONAL TREASURY FOR A PERSAL DEDUCTION CODE

1. INTRODUCTION

1.1 “Right or Privilege” is a final 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, 1994 (the Public Protector Act).

1.2 The report is submitted to the Minister of Correctional Services, and the National Commissioner of Correctional Services, in terms of section 8(1) of the Public Protector Act.

1.3 A copy of the report is also provided to the Complainant, Mr Mdlankomo, in terms of section 8(1) of the Public Protector Act.

1.4 The report relates to an investigation into a complaint of prejudice caused by the refusal of the Department of Correctional Services: Facilities Funds to apply to the National Treasury for a Persal deduction code to be awarded to Mayizole Sport Traders in order to enable them to provide a sport clothing service to the Department of Correctional Services (the Department).

2. THE COMPLAINT

2.1 On 29 November 2010, Mr T N Mdlankomo (the Complainant) submitted a complaint to the Public Protector in which he alleged that the Department refused to apply to the National Treasury for a Persal deduction code to be
awarded to Mayizole Sport Traders (the Complainant’s company) to enable it to provide a sport clothing service to the Department.

2.2 The Complainant alleged that the Department had previously applied for Persal deduction codes in favour of three (3) other service providers to render the same service his company wanted to render.

2.3 The Complainant was of the view that he was improperly prejudiced by the refusal of the Department to apply for a Persal deduction code in his company’s favour from the National Treasury.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector was established in terms of Chapter 9 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 the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.3 The Public Protector is further empowered by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4 The Department of Correctional Services is an organ of state and its conduct amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.
3.5 The jurisdiction of the Public Protector was not disputed by any of the parties.

4. THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR

4.1 The following were issues for the Public Protector’s consideration:

4.1.1 Did the Department refuse to provide the Complainant with a Persal deduction code and if so was such refusal improper?

4.1.2 Was the Complainant improperly prejudiced by the refusal of the Department to apply to National Treasury to provide him with access to a Persal deduction code?

4.1.3 Did the Department’s appointment of the current service providers constitute maladministration?

5. THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, 1994.

5.1 Key sources of information

5.1.1 Correspondence

5.1.1.1 Telephonic communication with the Complainant;

5.1.1.2 Telephonic and written communication with Mr M J Nkhabu, the Director of Facilities Funds at the Department of Correctional Services;

5.1.1.3 Telephonic and written communication with Mr K van Wyk at the National Treasury;
5.1.1.4 Written communication with Mr T S Moyane, the National Commissioner of the Department of Correctional Services; and

5.1.1.5 Written communication with Mr Z I Modise, Chief Deputy Commissioner for Corrections of the Department of Correctional Services;

5.1.2 Documentation

5.1.2.1 The letter of complaint and supporting documentation submitted by the Complainant;

5.1.2.2 A copy of the Department’s policy document relating to Sport and Recreation;

5.1.2.3 Copies of agreements entered into between the Department and two (2) current service providers;

5.1.2.4 A copy of the National Treasury’s letter relating to the approval of discretionary deductions on Persal which include approval in favour of three (3) service providers to the Department dated 21 May 2002;

5.1.2.5 A copy of an undated letter of approval, from the Department, for an application for deduction code on Persal in favour of a service provider in response to an application dated 16 November 1996;

5.1.2.6 A copy of a letter of application for reinstatement of a deduction code on Persal received from a current service provider dated 10 May 2001;

5.1.2.7 Copies of letters of notice of termination of Persal deductions addressed to current service providers dated 2 August 2011;

5.1.2.8 A copy of a letter of motivation for the use of Persal deduction codes by the Department addressed to the Accountant-General at the National Treasury
by the Director: Financial Administration of the Department dated 18 May 2001;

5.2 Legislation and other prescripts

5.2.1 The relevant provisions of the following legislation and other prescripts were considered and applied where appropriate:

5.2.1.1 The Constitution of the Republic of South Africa, 1996;

5.2.1.2 The Public Protector Act 23, 1994;

5.2.1.3 The Promotion of Administrative Justice Act 3, 2000;

5.2.1.4 The Department of Correctional Services Policy on Sport and Recreation;

5.2.1.5 The National Treasury Regulations, 2002;

5.2.1.6 The National Treasury: Government Procurement: General Conditions of Contract, 2010; and

5.2.1.7 The National Treasury: General Procurement Guidelines.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Complainant’s submission

6.1.1 The Complainant alleged that he applied to the Department to be provided with access to use the Persal deduction code to enable his company to provide a sports clothing service to the Department.
6.1.2 The Complainant submitted supporting documentation to the Public Protector in the form of a copy of the correspondence to the Department dated 5 May 2009, in which he indicated that given the size of the Department they would ‘kick-start’ the trading in the Eastern Cape and gradually move the business to other management areas of the Department.

6.1.3 According to the correspondence the Complainant envisaged that in the first three (3) months, they would be able to service the following areas:

(i) SADA Management Area;

(ii) Middledrift Management Area;

(iii) KWT Management Area;

(iv) Kirkwood Management Area;

(v) Goedemoed Management Area; and

(vi) Bloemfontein Management Area.

6.1.4 The Complainant also indicated in the correspondence that each and every month after the first three (3) months, they would gradually move the business to other management areas of the Northern Cape and the Free State and that the Department’s colleges are also included in their operational plan. It is noted that at the end of the correspondence, the Complainant emphasised that they are committed and ready to service the entire Department.

6.1.5 The Complainant provided the Public Protector with a copy of correspondence addressed to Mr A Witbooi at the Communications office of the Department dated 18 June 2009, in which he complained about the
denial of the opportunity to supply the Department with sports clothing. In the correspondence the Complainant alleged that after an application for a Persal deduction code was forwarded to the Department's Facilities Fund, a week later Mr M J Nkhabu phoned and informed them that one of the key areas for consideration was to be able to cater the service countrywide and that someone from Facility Fund would phone them and further explain the process to follow.

6.1.6 The Complainant further alleged in the correspondence that Mr D de Jager from the Facilities Fund phoned on the same day and assisted them further in explaining the process as follows:

(i) They were expected to make a formal application to SITA (as they had already submitted one to the Department) so as to be accredited for the service and that a Persal deduction code would be granted by SITA, if they qualified;

(ii) They were expected to cater the service countrywide;

(iii) They were expected to register for income tax; and that

(iv) They were expected to register their company.

6.1.7 The Complainant further alleged that Mr de Jager told him to phone him back as soon as they were ready with the business proposal in order for him to provide them with the contact details of the person at SITA. The Complainant alleged that on 1 June 2009 he phoned the Facilities Fund but could not get hold of Mr de Jager who was said to be in Cape Town and that he would be back on the Monday of the following week on 8 June 2009. According to the Complainant he was able to speak to Mr de Jager on 8 June 2009, who gave him the contact number (012) 657 4191. However, the person he was referred to was allegedly not in a position to
assist him and she told him to call (012) 315 5111 and speak to Mr K van Wyk.

6.1.8 The Complainant alleged that he phoned Mr van Wyk who happened to be the right person because the Persal deduction code they were applying for was to be granted by his office. According to the Complainant he explained to him the purpose of his call and in his response Mr van Wyk allegedly explained that Correctional Services as the Department that needed a service provider should find one themselves and do their screening of the applicant and when satisfied contact SITA for the Persal deduction code. According to the Complainant Mr van Wyk was puzzled that he had been referred to SITA and he requested him to ask Mr de Jager to phone him.

6.1.9 The Complainant alleged that he phoned Mr de Jager and explained to him but instead of Mr de Jager phoning Mr van Wyk in order to have a common understanding of the issue Mr de Jager allegedly told him a lot of things allegedly to discourage him. According the Complainant Mr de Jager told him the following:

(i) That it might be that SITA did not want to give him the opportunity;

(ii) There were 200 other companies who had applied for the same service;

(iii) The Board will take time to meet for the handling of his application; and

(iv) The Minister will reshuffle the Board.

6.1.10 The Complainant further alleged that Mr de Jager promised to phone Mr van Wyk the next day and revert to him but never did.
6.1.11 The Complainant provided the Public Protector with a copy of e-mail dated 3 September 2009 addressed to Mr Nkhabu by Mr de Jager. In the e-mail Mr de Jager informed Mr Nkhabu that they received a letter from the Complainant's company requesting authorisation for the distribution of sport products to the Department's members. Further that the Complainant indicated that he wants to do business in the Eastern Cape and highlighted six (6) management areas.

6.1.12 Mr de Jager further informed Mr Nkhabu in the e-mail that he had phoned the Complainant and informed him that it is not their policy to give authorisation to suppliers only to a single region. Further that it was indicated to the Complainant that they can only consider applications for national distribution for all members. According to Mr de Jager the Complainant was not satisfied with his explanation and asked if there is another way that he could be helped. Mr de Jager allegedly indicated to the Complainant that if he could apply from SITA for a Persal deduction for his company to service state departments in terms of their Discretionary Policy that would give him an advantage whenever he would apply. Further that he provided the Complainant with Mr van Wyk's contact details at SITA and specifically indicated to him that he must request the code for him individually and not on the name of the Department as he was not allowed to do so.

6.1.13 The Complainant also provided the Public Protector with a copy of e-mail correspondence between Mr Nkhabu and Mr L Mpondo at the SAHRC dated 13 April 2010, in which Mr Nkhabu responded to the SAHRC enquiry after the Complainant had lodged a complaint with the SAHRC. In the correspondence Mr Nkhabu informed Mr Mpondo that the Complainant had mentioned to him that they are already doing business with the Department's officials in the Eastern Cape in few management areas and that they intend to expand to Free State in the foreseeable future. Further that Mr de Jager had explained to the Complainant that to qualify for a sport service provider his company must have the infrastructure and capacity to
provide the service to all the members in all the regions of the Department. According to Mr Nkhabu the Complainant’s company was unable to get a Persal deduction code from SITA because they did not meet the minimum requirement of supplying nationally and that the Department already had suppliers who had Persal deduction codes.

6.1.14 The Public Protector was also provided with a copy of letter of demand addressed to Mr H Davids at the Department by the Complainant’s attorneys dated 3 August 2010. The letter of demand confirmed a meeting of 27 July 2010 between the Complainant, his attorney, Mr Davids and another unnamed official of the Department. The letter of demand further confirmed the following:

(i) Mr Davids informed them that the Department no longer applied for deduction codes on behalf of businesses;

(ii) Mr Davids referred to a policy wherein the above-mentioned decision was recorded;

(iii) Notwithstanding that policy, Mr Davids also mentioned that there were currently still two Close Corporations who were still doing business with deduction codes allocated to them by the Department; and

(iv) Mr Davids also mentioned the Department already served notices on the two Close Corporations to notify them of the Department’s intention to withdraw the deduction codes allocated to them.

6.1.15 The Complainant’s attorneys were instructed to demand a copy of the policy and the notices referred to above. The Complainant alleged that they were never provided with the documents as demanded.
6.2 Department's response

6.2.1 The Public Protector’s request to the Department for information regarding the criteria or requirements which are applicable to a business entity that wants to apply for a Persal deduction code to supply goods or services to it, was not responded to.

6.2.2 However, the Department indicated that it only go out to sports suppliers when it had a need for mass supply. The Department indicated that prospective suppliers did submit proposals and that a process was followed to select current suppliers who were assisted with Persal deduction codes.

6.2.3 The National Commissioner indicated that the current service providers were invited to make presentations during the meeting of the Board of Trustees held on 26 August 2002. However, a letter dated 10 May 2001 by one of the current service providers addressed to the National Commissioner suggested that its access to a Persal deduction code existed since January 1997, a specific Persal deduction code in that regard is mentioned, and it was stopped.

6.2.4 In the said correspondence the current service provider requested that the Persal deduction code be reinstated. The National Commissioner also conceded that the relationship with the service provider alluded to above existed as early as January 1997. The Department failed to provide the Public Protector with copies of presentations or proposals made by the current service providers as alleged by the National Commissioner.

6.2.5 The reason provided for the failure to provide copies of presentations or proposals was that it could either be that they were misplaced as a result of movement of office from the Pretoria Management Area to the Head Office or that the proposals were not provided.
However, the Department was able to provide the Public Protector with copies of agreements entered into with the two (2) current service providers. Both agreements were signed by the service providers only and both were not dated. Furthermore, both agreements do not specify the period of their duration.

The Department conceded that both agreements signed in 2002 do not specify their duration and that there was no formal process to renew them but that the continued implementation of the duties and obligations therein can be construed as continued recognition of the agreements.

The Department could not provide a reasonable explanation regarding the difference in the percentages of turnover to be paid to it by the respective service providers. The Department further indicated that it did not have any specific reason to explain why the agreements were not signed by its Facilities Fund and conceded that unsigned agreements border on invalidity. However, the Department alleged that the parties to the presumed or unsigned agreements did live by their terms with regard to duties and obligations as though the agreements had been signed.

The Department contended that their Facilities Fund section applied for Persal deduction codes for the three suppliers because its Board of Trustees had taken a decision to use them as suppliers to the Department as there was a need for suppliers. Further that the Complainant’s company was advised to continue doing business with the Department’s members like other suppliers are doing in the regions using cash and or debit order and that only when there is a need to procure new suppliers, his company would be invited like the others.

The Department further indicated that it had completed forms to apply for all recreational clubs and sport suppliers and sent them to SITA and copies were filed at its Registry. However, the copies could not be found as they had allegedly been prepared for archiving since the documents are more
than eight (8) years old already. There was no explanation given why the copies could not be retrieved from the archives.

6.2.11 The Department could only provide the Public Protector with a copy of a letter dated 21 May 2005 from the National Treasury which indicated that a maximum limit should be imposed on Persal deductions to prevent exploitation of employees by service providers. On further enquiry with Mr K van Wyk at the National Treasury it was established that the Department had initially applied for 146 Persal deduction codes and had subsequently applied for a further 43 Persal deduction codes which were approved by the Accountant-General on 14 December 2001 including in favour of three (3) departmental sportswear suppliers. According to the documentation obtained from Mr van Wyk, two of those suppliers were the Department’s current service providers. Mr van Wyk further indicated that there were 4025 active deduction codes on the payroll for sport clothing providers, including the Persal deduction codes in favour of the Department’s current service providers.

6.2.12 In a response from the National Commissioner, the Department alleged that the Facilities Fund and their two current service providers had a meeting on 20 September 2010 where the service providers were informed that their Persal deduction codes were going to be stopped and that they would be given reasonable time to ensure that stop orders which were already effected would be fully paid and then stop the facility. However, the Department failed to provide the Public Protector with a copy of the resolution taken to phase out the use of the Persal deduction codes including a copy of the minutes of the meeting at which such a resolution was taken including the meeting alluded to above. The Public Protector was only provided with copies of letters addressed to the current service providers dated 2 August 2011 informing them of the decision to terminate the use of the Persal facility until a new tender process to procure sports supply services was finalised.
6.2.13 The Department provided the Public Protector with a copy of its Sport and Recreation Policy. Item 12.5 of the Policy provides that "provisioning of sport clothes will be put to tender and the successful tender will design sport clothes in accordance with official colours to be approved by the Board of Trustees."

6.2.14 The Department contended that its handling of the Complainant's application was in compliance with administrative justice in that the procedure to apply for a Persal deduction code was explained to the Complainant and he was given full disclosure of the process. Further that the Complainant was referred to Mr van Wyk at the National Treasury because he had indicated that he wanted to supply not only the Department of Correctional Services staff but also in other departments.

6.3 Responses to the Public Protector's provisional report

6.3.1 Section 7(9) of the Public Protector Act, 1994, provides:

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

6.3.2 The Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act on 30 October 2012. The Provisional Report was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents. The Provisional Report was issued to the Minister of Correctional Services, the National Commissioner of Correctional Services and the Complainant Mr T N Mdlankomo.
6.3.3 No response was received from the Minister of Correctional Services. Upon enquiry it was later established that the National Commissioner of Correctional Services had been mandated to respond on behalf of the Minister.

The response of the National Commissioner

6.3.4 The National Commissioner responded as follows to the Provisional Report in a letter dated 4 December 2012.

6.3.5 The National Commissioner indicated that it would be appreciated that the final report make a finding on whether or not Mr Nkhabu was personally involved in the appointment of the service providers, as the matter had previously been raised in the Public Protector's correspondence dated 24 October 2011.

6.3.6 The National Commissioner reiterated that at the time the Complainant requested to be assisted with a Persal deduction code, the Department had not advertised any tender thus he could not be assisted.

6.3.7 The National Commissioner alleged that written responses were given via e-mail to all institutions which were assisting Mayizole Traders in this matter. The view of the Department is that WD Van Berg Attorneys as well as the Human Rights Commission communicated all their responses to the Complainant on their behalf.

6.3.8 The National Commissioner admitted that the two written contracts between DCS Facilities Fund and the two sports suppliers were not signed by DCS Facilities Fund representatives. The National Commissioner indicated that the department was unable to indicate whether this was a result of the wanting the terms to be adjusted before signing or it was a simple error. However, both parties did live by the terms of the contracts.
6.3.9 The National Commissioner indicated that there was no evidence at their disposal to either suggest that there was a tender issued to procure sports suppliers or not, as well as whether the two current sports suppliers did submit proposals or not. The National Commissioner reiterated that there was communication which proved that the Department did help the current sport suppliers to apply for Persal deduction codes after a decision was made to appoint them.

6.3.10 The National Commissioner indicated that he would engage any of the members of the Executive Management in the Department who might have institutional memory in the workings of the Board of the Trustees, to find out if they could share light into the events leading to the appointment of the sports suppliers. The National Commissioner indicated that might shed some light on who the wrongdoers were and that appropriate action could then be taken. The National Commissioner committed himself to a due date of 31 January 2013 regarding the identification of the executive management as aforesaid.

6.3.11 The National Commissioner indicated that the Department felt that adequate reasons were given to the Complainant telephonically as well as through his representatives on why his request could not be accepted regarding the Persal deduction code. The National Commissioner indicated that the fact that the Department failed to review the contracts and test the market for potential suppliers in terms of the new procurement dispensation needs to be corrected.

6.3.12 The National Commissioner indicated that communication was sent to the current service providers in August 2011 informing them that they would not be allowed to trade with the Department, and that a further communication would be sent to them by 6 December 2012 informing them that their Persal code facility is terminated with immediate effect.
The response of the Complainant

6.3.13 The Complainant’s response to the Provisional Report was received per letter dated 14 January 2013; in the following:

6.3.14 The Complainant requested the Public Protector to reconsider the following issues in the Provisional Report:

6.3.14.1 The finding at paragraph 9.1 which stated that “The Complainant’s application was declined on the basis that the Department did not have a need for an additional service provider.”

   (i) The Complainant indicated that in both presentations sent to the Public Protector in November 2010 and January 2011 the reason for his complaint was based on the fact that he did not get an adequate response to the application he had sent to the Department.

   (ii) The Complainant stated that all his efforts to get recourse against the actions of the Department were in vein and that instead of getting a response he received a letter contradicting the events of what had actually happened.

   (iii) The Complainant recognised the Public Protector’s finding at paragraph 9.2 in terms of PAJA regarding the Department’s failure to provide him with written reasons and indicated that the Department owed him a response and that by not providing him with a response they were in violation of the Act.

   (iv) The Complainant would like the Public Protector to change the finding in paragraph 9.1 to “The complainant’s application was not appropriately handled”.

22
(v) The Complainant also wanted the Public Protector to reconsider the finding in paragraph 9.2 in that according to him it created the impression that he was provided with a response. The Complainant alleged that he only became aware of the Department’s response after the Public Protector had made enquiries with the Department and after receiving a letter through fax from his attorney of record. The Complainant was adamant that the Public Protector should find that the Department never responded to him.

(vi) The Complainant alleged that in a meeting held with the Department on the 27 July 2010, the Department informed them that they decided to phase out the service. However, when his attorney asked for a record of that in writing, the Department could not provide the documents up to date.

6.3.14.2 The Complainant wanted the Public Protector to indicate that the purpose of his resignation was to finance a legal practitioner.

(i) The Complainant was of the view that if the Department was found to have been at fault, it was then to be guaranteed that he was also going to be given an opportunity in the distribution of sports clothing for the Department’s officials on Persal.

(ii) The Complainant insisted that his resignation to finance the services of a legal practitioner was to ensure that he received a response from the Department and requested that the issue be reflected in the Public Protector’s report. The Complainant further stated that due to difficulties in accessing the Persal deduction facility he decided on voluntary resignation from the Department after a service of 12 years.
7. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

7.1 The Complainant’s application for a Persal deduction code

7.1.1 It is common cause that the Complainant applied to the Department to be provided with access to use the Persal deduction code to enable his company to provide a sport clothing service to the Department. It is, however, in dispute whether the Complainant applied to provide such a service nationally or just in the Eastern Cape since the Department had indicated that they only assist with the applications for a Persal deduction code if they need a service provider to render the service nationally.

7.1.2 The evidence obtained during the investigation showed that the Complainant intended to service the Department nationally starting with the Eastern Cape and gradually expanding to the other provinces.

7.1.3 Therefore, the Department’s contention that the Complainant applied for a Persal deduction code solely to do business in the Eastern Cape is misconstrued. It appears that there was a misunderstanding between the parties regarding the nature and extent of the Complainant’s application. However, at the time of the application the Complainant’s company was not in a position to immediately service the entire Department. Furthermore the Department was not in need of a service provider to render the service offered by him since it had already appointed two service providers in 2002 who were rendering the service nationally.

7.1.4 It is noted that the Department had allegedly through Mr Davids indicated to the Complainant and his attorney at a meeting on 27 July 2010 that notices had been issued to its current service providers to inform them of the intention to withdraw the use of Persal deduction codes allocated to them. On the contrary a response received from the National Commissioner indicated that the current service providers were informed in a meeting on
20 September 2010 that their Persal deduction codes were going to be stopped. However, the Public Protector was provided with copies of letters of notices dated 2 August 2011 informing them of the decision to terminate the Persal deductions on sports supply with effect from 15 October 2011 until the new tender process to procure sports supply services had been finalised. It is noted that the letters of notices do not say anything about the alleged meeting of 20 September 2010 or any other prior notice in that regard as alleged by Mr Davids.

7.1.5 Therefore in the circumstances it is inconceivable that such notices could have been issued any time prior to 2 August 2011. Furthermore if such notices had been issued prior to 2 August 2011 as alleged by Mr Davids, there was no reason why the Department could not provide the Complainant and his attorney with copies of such when requested to do so. Therefore the Complainant and his attorney were misled in that the notices were only issued on 2 August 2011 contrary to what they had allegedly been told at the meeting of 27 July 2010.

7.2 The appointment of current service providers

7.2.1 It is noted that the Public Protector received contradictory responses regarding the manner in which the current service providers were identified and appointed. In the initial correspondence the Department indicated that it approached two sport suppliers when they had a need for mass supply, and that the prospective suppliers submitted their proposals and a process was followed to select the current suppliers who were assisted with Persal deduction codes. However, the Department was not able to outline the process that was followed to select their current suppliers, and to indicate how the suppliers were identified from the other hundreds of potential suppliers.

7.2.2 In another correspondence dated 2 September 2011, the Public Protector was informed that according to Mr de Jager (now former employee of the
Department) there was no invitation sent out to the prospective suppliers but that the three service providers had sent proposals which were discussed by the Board of Trustees.

7.2.3 In the final correspondence from the National Commissioner, the Department indicated that the current service providers were invited to give presentations during the meeting of the Board of Trustees held on 26 August 2002. However, it was conceded that a letter dated 10 May 2001 by one of the current service providers suggests that access to Persal deduction code existed since January 1997.

7.2.4 It is also noted that the Department could not provide the Public Protector with copies of written invitations or tenders to supply the Department with a sports clothing service. The Department could also not provide the Public Protector with copies of the current service providers’ written proposals or presentations made to the Board of Trustees as alleged. It was speculated that the reason for the failure to provide copies of written proposals or presentations by the current service providers was either due to those documents being misplaced after the office of the Facilities Fund was moved from the Pretoria Management Area to Head Office or that the proposals or written presentations were not provided.

7.2.5 There was no explanation as to why the Department was able to locate the copies of the unsigned contracts yet be unable to locate copies of other documents which in the ordinary course of business would have been filed together.

7.2.6 The Department could also not provide the Public Protector with copies of letters of motivation to the National Treasury regarding the approval of the Persal deduction codes in favour of the current service providers. However, it was established through Mr van Wyk at the National Treasury that the Department had initially applied for a total of 146 Persal deduction codes and had applied for a further 43 Persal deduction codes including in favour
of its current service providers. Approval in this regard was granted by the Accountant-General on 14 December 2001.

7.2.7 Despite the Department having provided the Public Protector with a copy of its Sport and Recreation Policy, it has not been able to demonstrate to the Public Protector whether its Policy was complied with in the appointment of its current service providers. The Department failed to provide the Public Protector with the statement of the actual process and policy considerations that were followed in the appointment of its current service providers. Instead the Public Protector was provided with contradictory statements in that regard.

7.3 Unsigned agreements

7.3.1 It was conceded that unsigned and undated agreements may be deemed invalid. However, it was contended that the parties to the agreements did live by their terms i.e. duties and obligations as though the agreements had been signed. There was no reasonable explanation provided by the Department as to why the agreements were not dated and only signed by the service providers and not by the Department. It was also noted that there was no formal process to renew the agreements despite the fact that the agreements do not specify any duration of their existence. The Department could also not provide a reasonable explanation regarding the difference in the percentage of turnover to be paid to it by the respective service providers.

7.4 Compliance with section 33 of the Constitution and PAJA

7.4.1 The Department could not provide the Public Protector with any other evidence to prove that it had complied with section 33 of the Constitution and PAJA, except to allege that the procedure to apply for a Persal deduction code was explained to the Complainant and he was given full disclosure of the process.
7.5. Responses received to the provisional report

The response of the National Commissioner

7.5.1 The National Commissioner sought the Public Protector to make a finding on the allegation on whether or not Mr Nkhabu was personally involved in the appointment of the Department’s service providers as the matter had previously been raised in the Public Protector’s correspondence dated 24 October 2011.

7.5.1.1 The allegation referred to above was made by the Complainant, however it was never substantiated or investigated hence it did not form part of the evidence obtained or the evaluation thereof. In the circumstances there was no need for the Public Protector to make a finding in that regard.

7.5.2 The National Commissioner’s contention that at the time the Complainant requested to be assisted with a Persal deduction code, the Department had not advertised any tender and thus he could not be assisted, does not take this matter any further since it does not affect the Public Protector’s finding in that regard.

7.5.3 The National Commissioner correctly pointed out that written responses were given via e-mail to the institutions which assisted the Complainant’s company in this matter. Indeed the Complainant provided the Public Protector with a copy of an e-mail correspondence dated 13 April 2010 addressed by Mr Nkhabu at the Department of Correctional Services Facilities Fund to Mr Mpondo at the SAHRC in response to enquiries made by the SAHRC regarding the matter.

7.5.4 The National Commissioner’s response regarding the unsigned contracts and the manner in which the Department’s current service providers were
appointed also does not take this matter any further since it does not disprove or change the Public Protector’s findings in that regard.

7.5.5 The National Commissioner’s contention that the Department felt that adequate reasons were given to the Complainant telephonically as well as through his representatives on why his request could not be accepted regarding the Persal deduction code cannot be sustained for the following reasons:

7.5.5.1 It was never disputed that Mr D de Jager phoned the Complainant to explain the process of applying for a Persal deduction code. It was also not disputed that Mr de Jager informed the Complainant to phone him back as soon as they were ready with the business proposal in order for him to provide them with the contact details of the person at SITA.

7.5.5.2 It therefore begs the question why would Mr de Jager let the Complainant go through such trouble if the Department knew that they were not looking for an additional service provider. Had the Complainant been provided with adequate reasons as contended by the National Commissioner, he would not have gone through such trouble only to be told at SITA that the Department had to apply for a Persal deduction code on his behalf.

The response of the Complainant

7.5.6 The Complainant’s request that the Public Protector reconsider the finding at paragraph 9.1 of the Provisional Report which stated that “The Complainant’s application was declined on the basis that the Department did not have a need for an additional service provider” and change it to “The Complainant’s application was not appropriately handled” cannot be sustained for the following reasons:

7.5.6.1 The finding at paragraph 9.1 is based on the fact that the Public Protector could not find any reason other than that the Department did not have a
need for an additional service provider hence the Complainant’s application was not granted.

7.5.6.2 The suggestion that the Complainant’s application was not appropriately handled is sufficiently covered by the finding at paragraph 9.1.1 of the Provisional Report in which the Public Protector found that the Department failed to provide him with written reasons as to why his application for a Persal deduction code was declined and to give him adequate notice of his right of review or internal appeal. The Public Protector further found that the Department failed to provide him with a clear statement regarding its decision to terminate the use of Persal deduction codes.

7.5.7 The Complainant’s contention that he never received any response from the Department regarding his application has been alluded to in this report and hence his decision to approach the SAHRC. It therefore does not take this matter any further since the Department’s failure in that regard is linked to the finding at paragraph 9.1.1 referred to above.

7.5.8 In the light of the above the Complainant’s contention that the Public Protector reconsiders the finding at paragraph 9.2 of the Provisional Report since according to him it created the impression that he was provided with a response is misconstrued.

7.5.9 The Complainant requested the Public Protector to reconsider reflecting in the final report that he voluntarily resigned in the Department with the hope that his application would be considered by the Department.

7.5.9.1 The above request does not take the matter any further since it does not constitute conduct in state affairs or in the public administration which is improper or result in impropriety or prejudice in terms of section 182(1)(a) of the Constitution. Hence it does not fall within the mandate of the Public Protector to make a finding in that regard.
8. LEGAL AND REGULATORY FRAMEWORK

8.1 The Constitution

8.1.1 Section 33 of the Constitution, 1996 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The aforesaid provisions are also further elaborated on in section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA).

8.1.1.1 In terms of section 33 of the Constitution and section 3 of PAJA, the Complainant was entitled to be given written reasons by the Department as to why his application for a Persal deduction code was not accepted including adequate notice of any right of review or internal appeal. The Complainant was also entitled to be provided with a clear statement regarding the Department's decision to terminate the use of the Persal deduction codes.

8.1.2 Section 195(1)(f) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, which include that public administration must be accountable.

8.1.2.1 In terms of section 195(1)(f), the Department should have dated and signed the written agreements between it and its current service providers to ensure accountability in the event that disputes arose from those agreements.

8.1.3 Section 217(1) of the Constitution, 1996 provides that: “when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.” (Emphasis added)
8.1.3.1 In terms of section 217(1) of the Constitution, the Department had a constitutional obligation to ensure that when it contracted for a service to provide its members with sports clothing, it did so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

8.2 Procurement

8.2.1 The National Treasury General Procurement Guidelines\(^1\) in section 2 provides that there should be openness in the procurement process and encouragement of effective competition through procurement methods suited to market circumstances. Further that Departments should ensure that potential suppliers have reasonable access to procurement opportunities and that available opportunities are notified at least in the Government Tender Bulletin.

8.2.1.1 In terms of section 2 of the National Treasury General Procurement Guidelines the Department should have ensured that there was openness and effective competition in the procurement of a service to provide its members with sports clothing. The Department should have ensured that potential suppliers had reasonable access to the opportunity to provide a sport clothing service to its members and ensured that the opportunity was at least advertised in the Government Tender Bulletin.

8.2.2 Chapter 17 of the Department's Sport and Recreation Policy provides in Item 12.5 that: "provisioning of sport clothes will be put on tender and the successful tenderer will design sport clothes in accordance with official colours to be approved by the Board of Trustees." (emphasis added)

8.2.2.1 The Department should have put the procurement of sport clothes for its members on tender in terms of Item 12.5 of its Sport and Recreation Policy.

\(^1\) The Guidelines can be sourced from the National Treasury’s website: www.treasury.gov.za.
9. ANALYSIS AND CONCLUSION

9.1 The Complainant applied to the Department for a Persal deduction code to enable his company to provide sports clothing to its members but his application was declined. However, his application was declined on the basis that the Department already had service providers who were rendering the same service nationally and did not have a need for an additional service provider. Furthermore the Complainant did not have the capacity to immediately render the service nationally at the time when he applied. It has also been established that no tender was advertised which would have entitled the Complainant to have his proposal considered.

9.2 However, the Complainant was not given written reasons why his application was declined and he was also not given adequate notice of his right of review or internal appeal in terms of section 33 of the Constitution and section 3 of PAJA. The Department could not provide evidence that it had complied with section 33 of the Constitution and PAJA in its handling of the Complainant's application, except to allege that the procedure to apply for a Persal deduction code was explained to him and that he was given full disclosure of the process.

9.3 The Complainant was not provided with a clear statement regarding the Department's decision to terminate the use of the Persal deduction codes in terms of section 3(2)(b)(iii) of PAJA, despite his request through his attorney on 3 August 2010 to be provided with a copy of the policy in that regard and copies of notices that had been issued to the Department's current service providers. The notices to the Department's current service providers were only issued on 2 August 2011, which is a year after the Complainant had requested copies thereof. It is noted that Mr van Wyk at the National Treasury indicated that there were 4025 active deduction codes on the payroll for sport clothing providers, including the Persal deduction codes in favour of the Department's current service providers as at 7 June 2012, although the notices issued on 2 August 2011 indicated
that the Persal deduction codes would be stopped with effect from 15 October 2011.

9.4 It is noted that while section 195(1) (f) of the Constitution places an obligation on the state to take necessary precaution in order to be accountable for the decisions taken, the Department's official(s) did not append signatures and dates to the written agreements entered into between it and its current service providers to ensure accountability in the event that disputes arose from those agreements. The National Commissioner's response to the Public Protector's Provisional Report in this regard did not take the matter any further except to contend that both parties did live by the terms of the contracts.

9.5 It is noted further that the Department invited its current service providers to make presentations to its Board of Trustees and excluded all other potential suppliers during the procurement process which deviates from the requirements of section 217(1) of the Constitution which requires the all procurement process for the appointment of service providers to be done in accordance with a process that is fair, equitable, transparent, competitive and cost effective in terms of.

9.6 The Department was unable to explain the reasons for which the provisioning of sport clothes was not put on tender as required by item 12.5 of its Sport and Recreation Policy. Neither did the Department provide just cause for the deviation from section 2 of the National Treasury General Procurement Guidelines which required it to ensure that potential suppliers had reasonable access to the opportunity to supply its members with sports clothing as the opportunity was not advertised in the Government Tender Bulletin.

9.7 The National Commissioner conceded in his response to the Public Protector's Provisional Report that there is no evidence at their disposal to either suggest that there was a tender issued to procure sports suppliers or
not, as well as whether the two current suppliers did submit proposals or not.

9.8 The National Commissioner indicated in his response to the Public Protector’s Provisional Report that he will engage any of the members of the executive management in the Department who might have institutional memory in the workings of the Board of Trustees to find out if they could share light into the events leading to the appointment of the sports suppliers. He further indicated that that could also provide some light on who were the wrongdoers and that appropriate action could then be taken. The National Commissioner undertook to do the above by 31 January 2013.

9.9 The National Commissioner also indicated that by 6 December 2012, he shall have signed correspondence to the current suppliers informing them of the immediate termination of their use of Persal deduction codes.

9.10 An evaluation of the Complainant’s response to the Public Protector’s Provisional Report has revealed that his submissions do not take the matter any further in that the concerns raised by him are sufficiently covered in the provisional findings. The request regarding the final report reflecting the circumstances around his resignation do not fall within the mandate of the Public Protector in terms of section 182(1)(a) of the Constitution and therefore no finding in that regard can be made.

10. **FINDINGS**

The Public Protector makes the following findings:

10.1 The Complainant’s application was declined on the basis that the Department did not have a need for an additional service provider;
10.2 The Department failed to provide the Complainant with written reasons why his application for a Persal deduction code was declined and to give him adequate notice of his right of review or internal appeal. The Department also failed to provide him with a clear statement regarding its decision to terminate the use of the Persal deduction codes. The department's conduct was in violation of section 33 of the Constitution and section 3 of PAJA and was accordingly improper and constitutes maladministration.

10.3 The Department's failure to provide the Complainant with written reasons why his application for a Persal deduction code was declined and to give him adequate notice of his right of review or internal appeal, as well as the failure to provide him with a clear statement regarding its decision to terminate the use of the Persal deduction codes was in violation of the Complainant's right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution and section 3 of PAJA. The Department's conduct was accordingly, improper and constitutes maladministration;

10.4 The Complainant was prejudiced by the Department's conduct in that he waited without knowing about the reasons for the Department's decision and could not take the decision on appeal or review.

10.5 The appointment of existing service providers for the provisioning of sports clothing was not preceded by an open tender system as in section 217(1) of the Constitution, section 2 of the National Treasury General Procurement Guidelines and Item 12.5 of its Sport and Recreation Policy. The Department failed to implement a procurement system which is fair, equitable, transparent, competitive and cost effective. The Department's conduct was improper and amounts to maladministration.
11. **REMEDIAL ACTION**

Appropriate remedial action to be taken in terms of section 182 (1) (c) of the Constitution is that the National Commissioner of the Department must take urgent steps to:

11.1 Provide the Public Protector with a written report regarding the outcome of his engagement with the members of the executive management as indicated in his response to the Public Protector's Provisional Report and the action taken against any wrongdoer in that regard.

11.2 Submit a letter of apology to the Complainant for the manner in which his application for a Persal deduction code was handled;

11.3 Provide the Public Protector with copies of letters terminating the services of the current service providers as undertaken in his response to the Public Protector's Provisional Report.

11.4 Ensure that proper procurement procedures in terms of section 217 of the Constitution, the National Treasury Procurement Guidelines and item 12.5 of the Department's Sport and Recreation Policy are complied with when appointing new service providers for the supply of sport clothing to its members.

12. **MONITORING**

The Public Protector will require:

12.1 The National Commissioner of Correctional Services is to submit a copy of the report referred to at paragraph 11.1 and copies of letters referred at paragraph 11.2 and paragraph 11.3 above within 30 days from the date of this report;
12.2 The National Commissioner is to submit a progress report regarding the implementation of the remedial action referred to in paragraph 11.4 within 60 days from the date of publication of this report.

12.3 The Public Protector will monitor the progress made in implementing the remedial action over regular intervals.

ADV T N MADONSELA
PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 24/04/2013

Assisted by Mr M I MATLAWE: Senior Investigator: Service Delivery