
REPORT NO: 10 of 2011/2012

"In breach of good faith"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE DEPARTMENT OF CORRECTIONAL SERVICES WITH REGARD TO THE EARLY RETIREMENT OF A FORMER EMPLOYEE MR T E NTSANE
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Executive Summary

(i) The Public Protector conducted an investigation into the alleged improper conduct and maladministration by the Department of Correctional Services (the Department) with regard to the early retirement of a former employee Mr T E Ntsane (the Complainant). It was alleged that:

(a) The Department decided to terminate the services of the Complainant and persuaded or coerced him to go on early retirement without penalisation, in the belief that the Department would "grant" him an additional three and a half years of service, a lump sum payment on his salary for this period, as well as payment of all other additional benefits;

(b) The Department failed to provide the Complainant with the terms and conditions of his service termination in writing and terminated his service on 31 October 2010, without following proper procedures and without his written acceptance of the conditions of his service termination;

(c) The Complainant was both financially and emotionally prejudiced by the conduct of the Department.

(ii) The Public Protector found that:

a) The process followed by Department in the termination of the complaint's services did not comply with the requirements of section 16(6)(a) of the Public Service Act, 1994, as well as with the standard of reasonableness and fairness as required by sections 23 and 33 of the Constitution, as well as the provisions of PAJA. The actions of the Department consequently amount to maladministration.
b) The process was procedurally unfair as the department failed to consult with and reach an agreement with the Complainant on the conditions for the termination of his services contrary to the requirement in law, their agreement with the Complainant, the reasonable expectation raised in their communications with the Complainant, or the conditions approved for such termination by the senior management of the Department.

c) The decision by the Department to seek the termination of the complaint’s services on the basis of early retirement instead of considering the requirements of incapacity due to ill health, is arbitrary and not in good faith as it is based on irrelevant considerations, or not supported by substantial evidence as required by PAJA.

d) As a result of the Department’s failure to provide the complainant with correct and accurate information on the conditions and benefits that would have been payable to him in terms of early retirement, he was unable to take informed decisions and acted to his detriment when he vacated his position.

e) As a result of the actions of the Department the complainant suffered prejudice in the form of pecuniary loss in pension benefits and no post retirement medical assistance which is causing severe distress and trauma and seriously affecting the health of the complaint and his access to proper medical care.

(iii) Remedial action to be taken in terms of section 182(1)(c) of the Constitution is:

(a) Immediate re-instatement of the Complainant into employment with effect from 1 November 2010;
(b) Conducting an investigation into the incapacity of the complainant due to ill health and the consideration and processing of the ill Health retirement of the Complainant;

(c) Placement of the Complainant on temporary incapacity leave, until finalization of the ill health retirement; and

(d) Payment of compensation to the Complainant for financial damages suffered, humiliation and suffering.
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1. INTRODUCTION

1.1 This is a report in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act). It is submitted to:

1.1.1 The Minister of Correctional Services (the Minister);

1.1.2 The National Commissioner of the Department of Correctional Services (the Commissioner); and

1.1.3 The Chief Executive Officer of the Government Employees Pension Fund (the GEPF).

1.2 A copy is provided to Mr T E Ntsane (the Complainant) in terms of section 8(3) of the Public Protector Act.

1.3 It relates to an investigation into allegations of improper conduct and maladministration by the Department of Correctional Services (the Department) with regard to the early retirement of a former employee, Mr T E Ntsane.
2. THE COMPLAINT

2.1 The Complainant approached the Public Protector on 18 March 2011 with a complaint.

2.2 He stated that he was employed by the Department as the Director: Cluster and Parliamentary Liaison.

2.3 In early September 2010, he was called to the office of the Chief Deputy Commissioner: Corporate Services, Mr S A Tsetsane and he was informed that the Minister had decided that his employment should be terminated.

2.4 He alleged that he was given certain options to consider, one being the option of early retirement, without reduction of pension benefits, an added period of three and a half years of service, including payment of a salary lump sum for this period, as well as all other benefits.

2.5 He accepted the “package” that was verbally offered to him by the Department, but he never received confirmation of the terms and conditions of his service termination in writing.

2.6 The Department terminated his service on 31 October 2010, without following proper procedures and without his acceptance of the conditions of his service termination.

2.7 According to the Complainant, he finds himself in a desperate financial position, as the Department did not adhere to their undertaking and acted improperly towards him.

2.8 He is financially prejudiced by the fact that he did not receive a lump sum payment on his salary and his gratuity was not enhanced by the additional period of three and a half years, he currently receives no medical subsidy from the State and spends his entire monthly pension on medical expenses.
3. JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution and its additional operational requirements are governed by the Public Protector Act. It was established to strengthen constitutional democracy.

3.2 In terms of Section 182(1) of the Constitution the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.

3.3 Following an investigation, the Public Protector can report on that conduct and take appropriate remedial action.

3.4 In terms of section 6(4) (a) of the Public Protector Act, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government, abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function.

3.5 The complaint accordingly falls within the mandate of the Public Protector.

4. THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act and comprised the following:

4.1 Key Sources of information

4.1.1 Letters and documents submitted to the Public Protector by the Complainant;
4.1.2 Telephonic communications and consultation with the Complainant;

4.1.3 Interviews with officials of the Department;

4.1.4 An interview with Mr P Mudau, an ex-employee of the Department;

4.1.5 Documents obtained from the Department; and

4.1.6 Consideration and application of the applicable Government Employees Pension Law and Rules (GEP law).

4.2 Summary of the investigation process and evidence obtained

4.2.1 Evidence of the Complainant

4.2.1.1 The Complainant stated that he was employed by the Department, as the Director: Cluster and Parliamentary Liaison.

4.2.1.2 In September 2010, the Chief Deputy Commissioner: Corporate Services, Mr S A Tsetsane called him to his office. The (then) Deputy Commissioner: Human Resource Development, Mr P Mudau was also present.

4.2.1.3 The Complainant was informed that the Minister had decided that he “should be removed” from the position of Director: Cluster and Parliamentary Liaison.

4.2.1.4 Mr Tsetsane and Mr Mudau informed him that a few options were available to him:
a) A transfer to another position within the Department at the same level;
b) The opportunity to request the Department to allow him to take early retirement; or
c) Retirement from the Department as if he had reached the age of 60 years, without any penalisation in pension benefits or salary.

4.2.1.5 Mr Tsetsane indicated that the first option was not feasible because no suitable vacant position was available for the Complainant to be transferred to in the Department.

4.2.1.6 He also advised that if the Complainant was to request early retirement it would not be to his advantage as he would have subjected himself to heavy taxation.

4.2.1.7 Mr Mudau advised him to consider the third option, as it would enable him to retire three and a half years earlier, without downscaling/reduction of pension benefits.

4.2.1.8 It was mutually agreed that he would consult his family about these options.

4.2.1.9 Mr Tsetsane was suspended by the Department in early September 2010, before the Complainant took a final decision.

4.2.1.10 Mr Mudau was subsequently appointed Acting Chief Deputy Commissioner: Corporate Services.

4.2.1.11 The Complainant approached Mr Mudau later in September 2010 and indicated that he would accept the option of early retirement by the Department, as if he has reached the age of sixty years and without penalisation in pension, salary and other benefits.
4.2.1.12 According to the Complainant, he was assured that his benefits would include a lump sum payment of his salary up to the age of 60 years, leave benefits, gratuity, pension and a monthly subsidy on his medical aid.

4.2.1.13 Ms Linda Bond, the Deputy Commissioner: Human Resource Management was instructed by Mr Mudau to process the service termination.

4.2.1.14 Ms Bond referred the matter to the Deputy Director: Retention and Termination: Mr J M Ndala to finalise the service termination with the Deputy Director: Auxiliary Services: Mr A L Kutu.

4.2.1.15 Mr Ndala assisted the Complainant with an estimated draft calculation of his gratuity, in which his total years of service were enhanced with the promised additional period and calculated as eighteen and a half years, instead of twelve and a half years.

4.2.1.16 According to the Complainant, he was hospitalised in September 2010 and in October 2010 he was diagnosed with chronic kidney disease (renal failure). During this period, he was not able to follow-up on a written agreement and approval of the terms and conditions of his service termination by the Commissioner.

4.2.1.17 On 3 November 2010, he received a letter from the Deputy Director: Auxiliary Services, Mr A L Kutu, stating that he will only receive his pension benefits to be paid by the GEPF, his capped leave and unused leave credits for the current leave cycle and his service bonus.

4.2.1.18 The Complainant responded to this letter on 16 November 2010, insisting that the Department adhere to the verbal agreement and provide him with a written confirmation of the benefits payable to him in terms of his salary, leave benefits, gratuity and pension benefits.
4.2.1.19 Mr Kutu responded to the Complainant on 8 November 2010, without communicating any information on the salary benefits payable to the Complainant.

4.2.1.20 The Department finalised the pension documents on 18 November 2010 and submitted same to the GEPF for payment of the pension benefits.

4.2.1.21 The Department indicated on the pension document (Z102) submitted to the GEPF for the purpose of calculating the Complainant’s gratuity and annuity that the reason for service termination was early retirement in terms of Rule 14(3) (1) (b) of the GEPF Rules (Early retirement without downscaling of benefits).

4.2.1.22 The service period of the Complainant on the pension form Z102 was recorded as 1 August 1998 to 31 October 2010, amounting to 12 years and 2 months.

4.2.1.23 This implied that he did not qualify for continued monthly government subsidised membership of his medical aid, as this benefit required 15 years of actual government service for members older than 50 years.

4.2.1.24 His pension benefits were paid to him in November 2010.

4.2.1.25 On 14 December 2010, the GEPF officially informed the Complainant that he did not qualify for a monthly medical aid subsidy due to the fact that he had less than 15 years of actual service, and that he would only qualify for a once off payment.

4.2.1.26 He approached the Commissioner in writing on 11 January 2011, seeking clarity on the terms and conditions of his service termination and benefits that were agreed upon.

4.2.1.27 This letter was copied to all the officials who were involved in the process of his service termination.
4.2.1.28 He received no response on this correspondence and on 17 February 2011 he sent another letter to the Commissioner.

4.2.1.29 There was also no response from the Commissioner or any official in the Department to this subsequent letter.

4.2.1.30 The complaint was subsequently lodged with the Public Protector.

4.2.1.31 According to the Complainant, his pension gratuity amounted to R327,072.07 and he currently receives a monthly pension of R7 193.69.

4.2.1.32 Being without any post-retirement medical assistance from government, his entire monthly pension is spent on medical expenses. As a result of his kidney failure, he spends 3 days a week in hospital on dialysis.

4.2.2 Evidence of the Officials interviewed during the investigation

4.2.2.1 Five officials of the Department were interviewed.

4.2.2.2 According to Mr Tsetsane the Department was aware that the complainant had experienced certain health problems. There was an observation that he was not performing as expected and that his performance was affected by his absence from the office. He was suspended and certain incidents were investigated to establish whether there were any grounds to take disciplinary action.

4.2.2.3 His position was discussed during an Executive meeting on 20 August 2010 where it was resolved that the Department should consider avenues to transfer the complainant or terminate his services.

4.2.2.4 It was decided that transfer was not an option. In view of the complainant’s qualification, experience and skills there was no other position to which he could be redeployed. In his Directorate there was no Deputy Director who
could be called upon to assist. The official identified as a possible replacement had been underperforming for 3 years.

4.2.2.5 The next option was retirement on the basis of ill health. According to the records at the time the complainant was not absent for long periods of time and there was doubt whether an application for ill health retirement would have been supported by the reports and opinions of doctors and medical specialists.

4.2.2.6 In Mr Tsetsane’s opinion the most suitable option seemed to have been early retirement. It was noted that the complainant still had 3 year of service before reaching the age of 60. The internal discussions between Mr Tsetsane and Ms Schreiner focused on the acceleration of the complainant’s retirement without penalisation. According to Mr Tsetsane the aim of the negotiations was to reach a position where the Complainant was retired at the age of 57 but with all the benefits that would have accrued to him until the age of 60.

4.2.2.7 Mr Tsetsane discussed the matter with the complainant on that basis and advised him to consult his family and to obtain a written account of the benefits payable in terms of such a dispensation from the relevant directorate on, to enable him to make an informed decision.

4.2.2.8 In the meanwhile it was decided that there were no grounds to proceed with any disciplinary action against the complainant and his suspension was lifted.

4.2.2.9 Mr Tsetsane was subsequently suspended on the basis of unrelated matters and Mr Mduau acted in his position.

4.2.2.10 Mr Mduau tasked Ms Bond to formally process the service termination of the Complainant, as a matter of extreme urgency.

4.2.2.11 Ms Bond instructed Mr Ndala and eventually Mr Kutu to prepare the documents, internal memorandums and other exit documents.
4.2.2.12 Shortly thereafter, Ms Bond was transferred to another position within the Department and Mr Mudau tendered his resignation from the Department.

4.2.2.13 Mr Ndala prepared the internal memorandum on 9 September 2010, for submission to the Commissioner. The memorandum was escalated to seven line managers, before the Commissioner approved it on 6 October 2010.

4.2.2.14 None of these officials ever submitted any document to the Complainant, stating the terms and conditions of his service termination and the benefits that would be payable to him.

4.2.2.15 In October 2010 Mr Ndala presented the complainant with a document that reflected certain numbers and formulas for the calculation of a gratuity as well as an annuity. The figures and numbers were not representative of the complainant’s actual pensionable service or final salary. Mr Ndala explained that the complainant was not provided with a quote or calculations of the benefits that would have been payable in terms of the proposed conditions for early retirement. Instead, he was just provided with the formulas to enable him to do his own calculations.

4.2.2.16 According to Mr Mudau the Complainant conveyed his acceptance of the offer of early retirement by completion and signature of the exit documents and choice form.

4.2.3 Documents obtained from the Department and the Complainant

Several documents that were obtained during the investigation were scrutinized.

4.2.3.1 Internal Memorandum by Mr Ndala

a) The internal memorandum drafted by Mr Ndala stated that the purpose of the memorandum was to request the National
Commissioner to grant permission to terminate the services of the Complainant.

b) It also states that “the Regional Committee Forum meeting on 2010/07/10 discussed the viability of retaining the services of the official and came to the conclusion that terminating the services [of the Complainant] on early retirement could be an option that can be considered by the Office of the National Commissioner if it would be acceptable to him.”

c) Three options “that will have no legal implications on the part of the Department” were presented to the Commissioner in the memorandum, i.e. retirement due to ill health, early retirement and discharge “to promote efficiency in the interest of the employer”.

d) Mr Ndala, as Deputy Director: Service Termination, did not consult the Complainant on his service termination: “this Office did not consult the official on this subject matter. However, the opinion of this office is that should an offer to retire him without penalization be presented to him; he will consider the offer positively.”

e) The memorandum however states that “(u)pon approval of this memorandum, the official will be given an opportunity to state in writing the acceptance or refusal of the offer and the Office of the National Commissioner will be informed accordingly”. (Own emphasis)

f) The service termination of the Complainant was handled as a matter of urgency. The memorandum clearly states that option one (ill health retirement) “may take long” and might “not [be] the best one under the circumstances”. Attempts to gather information from the GEPF on the employer’s financial liability in respect of options two and three were reportedly, unsuccessful and “can take up to six months before receiving the required feedback.”
g) The option of early retirement was discussed in the memorandum as the second option and Mr Ndala (incorrectly) stated: “this option would not need the permission of the official because he will be retired without penalization”.

h) The GEPF apparently agreed with the option of early retirement, provided that the penalty (employer liability) would be paid by the Department, “due to the fact that the early retirement is initiated by the employer, not the official.”

i) Option three was described as “discharge to promote efficiency in the interest of the employer” in terms of section 12(4) (c) of the Correctional Services Act.

j) Under the heading “Legal implications” it is emphasised that “there will be no legal implications against the Department of Correctional Services provided that the option exercised does not negatively affect the benefits of the official” and that the Complainant “will also be afforded opportunity to accept or decline the approved option and the process of service termination will only be activated upon receipt of the letter of acceptance by the official.” (Own emphasis)

k) Under the heading “Recommendations” it was recommended that “option two be approved with one month notice following the approval and the acceptance by the official.” (Own emphasis)

l) The comments on the memorandum made by the Deputy Commissioner: Human Resource Management (DC: HRM), Ms Bond, contained the following instructions to the Officials dealing with the service termination:
“It would be better for the Department to use the early retirement option as the use of the efficiency option may need to be further justified. It is important that the official is given an opportunity to concur with the offer in writing. The terms would have to be compiled in consultation with Legal Services to absolve the Department of any allegations that the official was put under undue pressure to accept the offer.” (Own emphasis)

m) The comments of the Chief Deputy Commissioner: Operations, Ms J Schreiner, dated 9 September 2010, confirm that the matter was regarded as urgent: “This advice is long overdue and the employment situation and stress contributed to Mr Ntsane’s current health deterioration. It is strongly in the interest of the dept to opt for the option that will enable speedy replacement. The date should be as short as possible-Dec 2010 not supported. Corp Services has already raised option 2 with Mr Ntsane as an option apparently.” (Own emphasis)

n) Mr Mudau, then acting in the position of Mr Tsetsane as Chief Deputy Commissioner: Corporate Services, commented as follows:

“Option 2 is strongly supported in line with inputs from DC: HRM that say the member must be consulted again and he must concur in writing if the National Commissioner approves the memo.” (Own emphasis)

o) The final comment on the memorandum was made by the Commissioner on 6 October 2010, with reference to the comments of Ms Bond:

“The comments by DC: HRM are more direct and pertinent and they are supported.”
4.2.3.2 FORM Z 1037: TERMINATION OF SERVICE

a) This document is completed by the employee and the employer in instances of service termination, for submission to the GEPF.

b) The document was signed by the Complainant on 13 October 2010, thus after approval of the Internal Memorandum by the Commissioner.

c) The reason for service termination, as completed by the Complainant, merely states “retirement”.

d) According to the Complainant, this document was brought to his house by officials of the Department and he was requested to sign the document for purpose of his pension payment.

e) Officials were questioned on the absence of any document signed by the Complainant, confirming that he has received an offer from the Department to terminate his service and that he accepts the offer and the benefits contained in the offer. No such document could be presented.

f) One official relied on the contents of the service termination form as “proof” that the Complainant accepted his retirement, whilst another concurred that there was no document available confirming the terms and conditions of service termination and the acceptance thereof by the Complainant.

4.2.3.3 CHOICE FORM FOR POST RETIREMENT MEDICAL CONTRIBUTION BY THE STATE

a) This is a GEPF document, to be completed by members upon retirement.
b) The options provided to members are twofold:

i. Option A - continued state subsidised membership for members older than 50 years and with 15 years of actual service; or

ii. Option B - Gratuity payment (once-off cash amount) for members with more than 10 years but less than 15 years of actual service in government.

c) The Complainant, in the belief that the Department was enhancing his service period with an additional three and a half years of service, opted for Option A and signed the form on 31 October 2010. Mr R A Khoza also signed the form on behalf of the employer, confirming the option, while aware of the fact that the Complainant did not qualify for this option.

4.2.4 Submission by the Minister of Correctional Services

4.2.4.1 Prior to concluding the investigation by means of final report, the Public Protector engaged the Minister of Correctional Services and the National Commissioner as reflected in paragraph 10 below.

4.2.4.2 The Minister confirmed that during 2010, she did indeed become aware of the fact that Parliamentary work in the Department was suffering as a result of the incapacity due to ill health of the Complainant as Director; Cluster and Parliamentary Liaison. She therefore instructed Corporate Services to take steps to ensure that this post is filled with someone who can perform the work and to assist the Complainant with an exit strategy from the Department since it was clear that he was not in a position to continue as an employee within Government.

4.2.4.3 The Minister emphasized that at no stage was it her intention that the Complainant should be penalised by this action or put in a worse position medically and financially. From a reading of the instructions given by senior officials it would appear that in their initial interactions with the
Complainant it was indeed conveyed to him that he would not suffer financially. The Minister reiterated that the fact that this instruction was not correctly implemented by officials lower down does not detract from the fact that her intention was not to prejudice the Complainant, but to provide him with an exit strategy that accommodates his ill health and to fill a critical position with regard to Parliamentary work with an able bodied person.

5. **REGULATORY FRAMEWORK**

5.1 The Public Service Act, 1994

16(6) (a) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17 (2), if sufficient reason exists for the retirement.

5.2 The Government Employees Pension Law, 1996.

5.2.1 The GEP Law was promulgated by Proclamation 21 of 1996. It aimed to rationalise pension fund benefits and to replace certain pension laws relating to the pension funds to which the State contributed as employer. It also made provision for the payment of pension benefits to persons in the employment of Government.

5.2.2 The Rules of the Government Employees Pension Fund are contained in Schedule 1 of the GEP Law.

5.2.3 Rule 10 deals with the recognition of previous and other periods of service as pensionable service, e.g. the purchase of pensionable service, to increase benefits payable to an employee:
"Subject to the provisions of the rules any part or the whole of any of the under mentioned periods may at the written request of a member and with the approval of the Board be recognized as pensionable service—

10.4 a period which is not pensionable service and which follows on the date on which a member attained the age of eighteen years, as well as a period of previous pensionable service to be recognized in respect of a member in terms of rule 10.2, other than a member referred to in rule 10.2 (b), (c) or (d);”

5.2.4 An employee who wants to purchase any period as additional pensionable service should submit an application to the GEPF, which considers the application and provides a quote to the employee on the additional contribution payable. Once the purchase is approved, the GEPF issues a notification of approval to the employee.

5.2.5 There is no provision in the GEPF Law or Rules that enables an employer to simply extend an employee’s pensionable service by “granting” an employee additional years of service.

5.2.6 The Complainant retired in terms of Rule 14.3.1(b) read with 14(3) (3):

"Benefits on retirement of members

14.3.1 If a member retires—

(b) before his or her pension-retirement date in terms of the law governing his or her terms and conditions of service;

such member shall be entitled to the benefits indicated in rule 14.3.2 or 14.3.3, as the case may be.

14.3.2 Members with less than 10 years pensionable service—

a member who retires on account of a reason mentioned in rule 14.3.1 and who has less than 10 years pensionable service to his or her credit, shall receive a gratuity equal to his or her actuarial interest.

14.3.3 Members with 10 years and more pensionable service—

(a) a member who retires on account of a reason mentioned in
rule 14.3.1 (a), (b) or (c) and who has at least 10 years pensionable service to his or her credit, shall be paid the benefits referred to in rule 14.2.1 or 14.2.2: Provided that rules 14.2.3 (a) and 14.2.2 shall apply to members referred to in those rules, where applicable;

(b) a member who retires on account of a reason mentioned in rules 14.3.1 (d) or (e) and who has at least 10 years pensionable service to his or her credit, shall be paid the benefits referred to in rule (a) above: Provided, that such benefits shall be reduced by one third of one per cent for each complete month between the member’s actual date of retirement and his or her pension-retirement date.” (Own emphasis)

5.2.7 Rule 14(3) (b) (above) contains the penalisation clause for early retirement. This was not applicable to the Complainant, as the Department agreed to bear the cost involved in his early retirement.

6. EVALUATION OF EVIDENCE

6.1 Did the complainant request or agreed to early retirement as intended by section 16 (6) (a) of the Public Service Act?

6.1.1 The issue is whether or not the complainant has accepted the Department’s offer and conditions for early retirement. This part will only deal with the issue of acceptance. The question whether or not there was consensus on the conditions for such retirement will be dealt with below.

6.1.2 It is clear in terms of the reading of section 16(6) of the Public Service Act that an employee cannot be forced into early retirement. There must be a voluntary mutual agreement to the effect that the employee’s services were to be terminated by means of early retirement.¹

6.1.3 In addition, the evidence of the Officials confirmed that there was a verbal agreement with the complainant that he would be presented with a calculation of the benefits payable to him, to enable him to consult his

family, prior to deciding whether or not he was going to accept the offer of early retirement.

6.1.4 Finally, the Commissioner approved the termination of the complainant’s services on the express condition and recommendation of all the managers involved, that the complaint accept or consent to the option of early retirement: “It is important that the official is given an opportunity to concur with the offer in writing. The terms would have to be compiled in consultation with Legal Services to absolve the Department of any allegations that the official was put under undue pressure to accept the offer.” and “The member must be consulted again and he must concur in writing if the National Commissioner approves the memo.” (Own emphasis)

6.1.5 The internal memorandum contains clear instructions on how the process ought to have been dealt with: “Upon approval of this memorandum, the official will be given an opportunity to state in writing the acceptance or refusal of the offer and the Office of the National Commissioner will be informed accordingly”.

6.1.6 The evidence of the Department shows that during July 2010 a decision was taken that the services of the Complainant should be terminated as soon as possible.

6.1.7 The Complainant did not oppose the decision and was given three options to exit the Department. There is a discrepancy in the versions of the Complainant and the Department regarding the options. According to the Complainant, he was given the option of a transfer within the Department on the same level, alternatively that he should request early retirement, or that the Department initiate early retirement without penalisation. However, according to the internal memorandum the options that were considered or proposed by the Department were retirement on account of ill health,
alternatively early retirement without penalisation, or discharge to promote efficiency in the interest of the employer.

6.1.8 After the approval of the internal memorandum by the Commissioner, the Department proceeded to process the termination of the complainant’s services without consultation with the Complainant or the involvement of the Legal Section to compile the terms and conditions of the service termination.

6.1.9 The complainant also denies that there was further consultation with him and that he agreed to the conditions for early retirement as approved by the Commissioner. The Complainant states that he would not have accepted the “offer” as it did not provide for any enhanced benefits and, because he had less than 15 years of actual government service, he would not have qualified for a monthly medical subsidy.

6.1.10 The nature of the Complainant’s enquiries after termination of service and his subsequent complaint to the Public Protector is consistent with his version that the proposed conditions for early retirement, as addressed in the internal memorandum, did not represent the earlier negotiations on the conditions for his exit from the Department.

6.1.11 Despite his letters and inquiries into the matter, there was no communication or feedback to the Complainant on the initial “offer” containing the details of benefits payable to him.

6.1.12 This caused severe stress and anxiety to the Complainant, who already had to deal with the issue of his deteriorating health. He also felt humiliated and embarrassed by the way the Department dealt with his service termination and the fact that the Commissioner was ignoring his pleas for assistance.

6.1.13 When questioned about this during the investigation, officials were evasive on the issue and they shifted the responsibility of compiling the terms and
conditions of service termination as well as conveying same to the Complainant, to other officials.

6.1.14 Some officials appeared intimidated during the interviews and elected to remain vague and / or silent on several crucial issues. The impression was gained by the Public Protector’s investigator that they concerned about their positions within the Department, should they “support” the case of the Complainant.

6.1.15 Mr Ndala strongly denied that the estimated draft calculation of the gratuity that was made, represented the benefits payable to the Complainant, and persisted in his explanation that it was imaginary service periods that were used. This was consistent with the reluctance of officials to say anything that might assist the investigation of the matter.

6.1.16 Ms Bond, the then Deputy Commissioner: Human Resource Management, could not recall the meeting between herself, Mr Mudau and the Complainant, but conceded that it was possible that Mr Mudau could have instructed her to process the service termination. She also stated that “instructions were coming from various areas and different places” and “that it was a crazy time.”

6.1.17 The officials all confirmed that relationships within the Department at the time of the service termination of the Complainant, were strained and a lot of tension and uncertainties distressed them. Several officials were suspended, transferred or resigned during this period.

6.1.18 In conclusion, on the issue of mutual agreement it is evident that there was no proper communication between the officials responsible for the process of service termination, and the complainant. This was exacerbated by the fact that certain officials were suspended, others moved to alternative positions and some resigned.
6.1.19 The options that were initially discussed with the Complainant differed from those presented to the Commissioner. It is evident that the Department took a decision that early retirement was the most convenient and expedient option in the circumstances and initially negotiated certain terms with the Complainant, without confirming the details of the terms and conditions of the service termination with the Legal Section.

6.1.20 It is furthermore, clear that the Department unilaterally proceed to retrench or dismiss the complainant and that there was no mutual agreement on the termination of the complainant’s services on the grounds of early retirement.

6.2 Did the Department promise any ancillary benefits and/or furnish the complaint with accurate and correct information?

6.2.1 The Complainant states that he was willing to consent to the initial verbal offer of early retirement without penalisation, in the belief that the Department would “grant” him an additional three and a half years of service, a lump sum payment on his salary for this period, as well as payment of all other additional benefits. He based his financial planning for early retirement on this “offer”.

6.2.2 The only official willing to commit himself to a confirmation of this fact, was Mr Tsetsane, who at first informed the Complainant of the decision to terminate his service. He confirmed that the basis for his discussion/negotiation with the complainant was basically:

“that we retire you at the age of 57, but that all the benefits be calculated and be payable to you that would have accrued at the age of 60”.

6.2.3 Mr Tsetsane’s evidence was approached with the necessary circumspection, as he currently finds himself in almost the same position as
the Complainant, involved in a labour dispute with the Minister and/or the Department. It might therefore be argued by the Department that he cannot be regarded as an objective witness and that his evidence cannot corroborate that of the Complainant.

6.2.4 Mr Mudau, who is no longer employed by the Department, could not give details of the benefits that were “promised” to the Complainant. He however confirmed that there was a commitment that the Complainant would not be prejudiced in any way by the service termination and that he would retire with “full benefits”.

6.2.5 In the memorandum to the Commissioner there is no provision for or reference to any ancillary benefits to enhance the complaint’s pensionable service period with another 3 years or to increase the amount of the gratuity (lump sum) payable with an additional 3 years’ salary.

6.2.6 As discussed earlier, there is no provision in the Public Service Act, 1994 or the GEP Law and Rules to enhance the complaint’s pensionable service in the manner anticipated by him. Therefore, if there was such an understanding it would have been ultra vires and would therefore have constituted a misrepresentation.

6.2.7 It is clear that the complainant acted on the information that was discussed and that the information did not represent the true or full details of the conditions for the complainant’s retirement. Mr Tsetsane advised the complainant to obtain the details of the benefits that would be payable from the Human Resources division and also gave instructions in this regards, which were repeated by Mr Mudau.

6.2.8 Those instructions were not complied with and the complainant was not presented with the relevant information pertaining to the conditions and benefits for his retirement, including the fact that he did not qualify for continued post retirement medical assistance.
6.2.9 It is common cause that an employer owes a duty of good faith to an employee. The Courts emphasised that in the context of innocent or negligent misrepresentation, wrongfulness is determined by establishing "whether or not the Defendant breached a legal duty to furnish the correct information to the person entitled to such information."² Decisions such as *Standard Chartered Bank of Canada v Nedperm Bank Ltd*³ and *Jowell v Bramwell-Jones and Others*⁴ confirmed that parties in such a contractual or fiduciary relationship have a duty to furnish the correct information concerning any matter arising from such relationship.

6.2.10 In the context of this matter the complainant has acted on an understanding of the implications of and conditions for early retirement that did not reflect the true state of affairs. Even if it is disputed that the Department promised ancillary benefits and if it is possible that there might have been a misunderstanding on the basis of the discussion with Mr Tsetsane, the fact remains that the Department failed to provide him with the correct and accurate information on the conditions for his retirement and the benefits owed to him. In the absence of such information he was unable to make informed decisions and consequently acted to his detriment.

6.2.11 In all probability the complainant would have been able to act differently, had the non-disclosures been discovered and the actual situation realized, to avoid such pecuniary loss in pension benefits and medical assistance.

6.2.12 Even if the evidence of Mr Tsetsane is disregarded, the Department and officials, on their own evidence and documents, did not adhere to a fair and transparent dismissal/termination process and acted improperly by disregarding internal instructions and proper labour processes.

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² *Aucamp and Others v University of Stellenbosch (A19/01) [2002] ZAWHC 14 (15 March 2002)*
³ 1994 (4) SA 747 (A) at 770A-771A
⁴ 1998 (1) SA 836 (W) at 877f.
6.3 Was the actions of the Department reasonable and fair?

6.3.1 Although the State’s capacity to enter into contractually based relationships is primarily drawn from legislation, its power to act with such legal personality is sourced in and underpinned by the Constitution itself.\(^5\) In *Kate v MEC for the Department of Welfare, Eastern Cape*,\(^6\) the Court explained that the “State and its organs have no power outside that granted to it by the Constitution or by legislation complying with the Constitution”.

6.3.2 The Public Protector subscribes to the view expressed by some writers and the courts that the public power element can therefore not be ignored simply because a decision is being taken in an employment context. Equity principles (such as reasonableness and fairness) are part of the principles of substantive justice. The Constitutional Court emphasized that “the rights enshrined in ... [the Bill of Rights] give expression to the most profound commitments of our society”.\(^7\) Both the right to fair labour practices in terms of section 23 of the Constitution as well as the right to fair and just administrative action in terms of section 33 of the Constitution would therefore find application.\(^8\)

6.3.3 For an administrative decision to be reasonable it must be explicable and rational – “phrased differently, reasonableness equates to a justifiable reason.”\(^9\) A justifiable reason will be absent if the decision-maker fails to

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6. MEC for the Department of Welfare v Kate (580/04) [2006] ZASCA 49; 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA)

7. *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLR 1097 (CC) at para 89. Cf. *Chiwa v Transnet Ltd* 2008 (2) BLR 97 (CC) at para 139 per Ngcobo J.

8. For a full discussion and analysis of the interdependence between the two rights see Barbara Evelyn Loots. *Public Employment and the Relationship between Labour and Administrative Law.* *Dissertation presented for the degree of Doctor of Laws at the University of Stellenbosch, March 2011.* In *Chiwa v Transnet Ltd* 2008 (2) BLR 97 (CC) the court emphasised that requirements for an administrative action may for example be present where “the person in question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out or by virtue of the class of public employee dismissed.

apply his or her mind or acts *mala fide*, if the decision is arbitrary, based on irrelevant considerations, or not supported by substantial evidence.  

6.3.4 As far as the requirements for just administrative action is concerned, the Promotion of Just Administrative Action Act, 2000 (PAJA) gives legislative effect to s 33 of the Constitution by providing, inter alia, for the right to procedural fairness, the right to reason, as well as requirements of rationality and administrative legality.

6.3.5 Unfairness in the context of employment involves a “*failure to meet an objective standard*”. This will be the case if the employer acts in an “arbitrary, capricious or inconsistent manner ... regardless of whether the employer acts intentionally or negligently.”

6.3.6 Section 3 of PAJA emphasises the importance of the promotion of consultation and dialogue between the decision maker and the person adversely affected by the decision, as a core value of procedural fairness and a shared ideal of both labour and administrative law. Loots stressed that-

“(T)he concept of due process lies at the heart of the law of governance. Through the theory of participation, due process brings a ‘voice’ to the

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10 Pharmaceutical Manufacturers Association of SA: in re Ex Parte President of the RSA 2000 (3) BCLR 116 (CC) at par 90; Foodcorp (Pty) Ltd v Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management 2008 (2) SA 191 (SCA)

11 Section 3

12 Section 5

13 In terms of s 6(2)(f)(ii) administrative action is reviewable if it is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, or the reasons given for it by the administrator - *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA) at par 21; Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA 2006 (11) BCLR 1021 (SCA) at par 25.

14 SACCAWU v Garden Route Chalets (Pty) Ltd 1997 (3) BCLR 325 (CCMA). An employer or employee’s subjective perception of fairness does not dictate the standard required for a fair labour practice - *Sidumo v Rustenburg Platinum Mines Ltd 2007 (12) BCLR 1097 (CC)*.


16 With reference to *Minister of Health NO v New Clicks South Africa (Pty) Ltd 2006 (1) BCLR 1 (CC)*. Barbara Evelyn Loots, Public Employment and the Relationship between Labour and Administrative Law. *Dissertation presented for the degree of Doctor of Laws at the University of Stellenbosch, March 2011*
employment relationship and the opportunity to participate in the decision-making process... endorses the constitutional value of dignity'. When it comes to the possibility of an employee losing his or her job, labour law recognises that the 'employee is entitled to be treated with respect... and to emerge from the process with some semblance of dignity'. Dialogue, as a dignity informed value of procedural fairness, calls for an element of transparency. The codification of the existing administrative and labour law procedural fairness perspective promotes the idea of transparency, as it increases participation and confidence in the process through the provision of adequate notice and sufficient information. The idea of transparency operates against arbitrary action and decisions. Without the element of transparency as a component of procedural fairness, the capricious exercise of discretion results in unfair conduct and decisions (Own emphasis).

6.3.7 On the issue of rationality as required by PAJA\textsuperscript{17}, there are various questions around the Department’s decision to deal with the concerns around the complaint’s performance in terms of misconduct proceedings as opposed to the processes dealing with incapacity. “Incapacity” refers to an employee’s inability to perform his or her work to the standard required by the employer. Incapacity can arise from an employee’s “lack of skill or from physical or mental deficiency”.

6.3.8 From the available evidence it is clear that the Department decided to initiate the termination of the complainant’s services as a result of alleged poor work performance. The Department was aware that the complainant’s persistent absence from work was as a result of health problems. Yet there is no evidence to suggest that the complaint’s situation was properly assessed\textsuperscript{18} to

\textsuperscript{17} See discussion of section 6(2)(f)(ii) above

\textsuperscript{18} Stanfield v Minister of Correctional Services 2003 (12) BCLR 1364 (C) – “It requires a proper consideration and assessment of all the relevant facts and circumstances. If such facts are ignored or misconstrued, the discretion cannot be properly exercised..."
determine the level of incapacity and whether or not any incapacity might have been caused by poor work performance or ill-health.\textsuperscript{19}

6.3.9 Even when the complainant’s health deteriorated significantly to such an extent that it became life-threatening and he was hospitalised, the Department did not consider whether or not the ill health may be temporary or permanent, and did not investigate alternatives short of dismissal.\textsuperscript{20}

6.3.10 In this regard the Code of Good Conduct as well as the Guide on Disciplinary and Incapacity Matters issued by the Department of Public Service and Administration prescribes the following process:

"Step 1 – Investigation"
- Conduct an investigation to determine the extent of the employee’s poor health or injury.
- Obtain relevant medical evidence on the employee’s condition (e.g. from his/her medical practitioner or an independent medical practitioner).
- Allow the employee or his/her trade union representative to state the employee’s case and to give inputs on all issues being investigated or considered.
- Determine whether the nature of the ill-health or injury is temporary or permanent.
- For purposes of the investigation, the following must be considered:
  - nature of the job
  - likely period of absence
  - seriousness of illness or injury
  - remuneration of employee during period of absence
  - possibility of securing temporary replacement.

Step 2 – Report
- Provide employee with a written report on the investigation.

Step 3 – Action
- If the outcome of the investigation points to temporary incapacity, decide on how to cover for expected period of absence of employee (e.g. temporary appointment, secondment of another officer, assigning work to another officer(s), etc). The granting of further disability leave also needs to be considered at this point.

\textsuperscript{19} Zillio v Mafetswai Municipality [2009] JOL 23238 (LC) It was held that if a person is dismissed for misconduct, but the charge and evidence points to incapacity, the dismissal cannot be held to be fair.

\textsuperscript{20} As required by the LRA Code of Good Conduct as well as the Guide On Disciplinary And Incapacity Matters issued by the Department of Public Service and Administration.
• If ill-health or injury proves to be of a permanent nature, consider the following:
  o secure alternative employment for the employee
  o adapt the employee's work circumstances to his/her disability
  o offer boarding on grounds of ill-health or injury.”

6.3.11 There is no evidence to suggest that the Department conducted an investigation to determine the extent of the complaint’s poor health or obtained any relevant medical evidence on his condition (e.g. from his/her medical practitioner or an independent medical practitioner).

6.3.12 Against the requirements of section 23 and 33 of the Constitution as well as the provisions of PAJA, the actions and decisions of the Department cannot pass the test for reasonability and fairness in as far as the Department -

6.3.12.1 Failed to follow due process in engaging the complainant properly and with accurate information prior to taking a decision that affected him adversely.

6.3.12.2 Acted arbitrarily and in disregard of the requirement to secure the complaint’s agreement on the option and conditions for early retirement in terms of the provisions of section 16(6) (a) of the Public Service Act, 1994.

6.3.12.3 Took the decision to terminate the complainant’s services on the basis of early retirement on irrelevant considerations or without a proper consideration and assessment of all the relevant facts and circumstance relating to his ill health or incapacity.

7 CONCLUSIONS

7.1 The following conclusions are drawn from the evaluation of the evidence obtained during the investigation:
7.1.1 During 2010 the Minister of Correctional Services observed that the Department was suffering as a result of the incapacity of the Complainant due to ill health and therefore instructed the Department to take steps to ensure that this post is filled with someone who can perform the work and to assist the Complainant with an exit strategy from the Department since it was evident that he was not in a position to continue as an employee within Government.

7.1.2 The Department persuaded the Complainant to consider the "offer" of early retirement.

7.1.3 The Complainant accepted the provisional verbal "offer" of the Department, on condition that they confirm all benefits payable to him in writing.

7.1.4 The Department failed to provide the Complainant with a written offer on the terms and conditions of his service termination, to enable him to formally accept the termination of his service by the Department.

7.1.5 There was a lack of proper communication between officials of the Department.

7.1.6 The Department terminated the service of the Complainant and submitted his pension documents to the GEPF, without obtaining his acceptance of the terms and conditions of his service termination.

7.1.7 In terms of the GEPF Law and Rules, the Department does not have the authority to "add" years to the pensionable service period of the Complainant, as verbally promised.

7.1.8 Pensionable service could only be increased by way of purchase of service by the employee himself.
7.1.9 The Complainant was prejudiced by the conduct of the Department, as he retired with less than 15 years of actual government service and accordingly will not qualify for a monthly subsidy on his medical aid.

7.1.10 The option of ill health retirement was never discussed or offered to the Complainant, as indicated in the internal memorandum, due to the self imposed urgency of the process.

7.1.11 The option of ill health retirement was more appropriate in the circumstances, as the Complainant was diagnosed with kidney failure, whilst still in the employ of the Department.

7.1.12 The Complainant would then also qualify for a monthly medical subsidy, should he have retired due to ill health.

7.1.13 The service termination process that was followed by the Department was hastened, improper, unreasonable and unfair, and constitutes maladministration.

7.1.14 The maladministration by the Department caused the Complainant to act to his detriment.

7.1.15 The Complainant was both financially prejudiced and severely traumatised by the conduct of the Department.

7.1.16 The Department neglected the duties and obligations arising from the contractual and fiduciary relationship with the Complainant, requiring them to furnish the correct information concerning any matter arising from such relationship, to adhere to proper labour practices and procedures that regulate the service termination process.
7.1.17 At the time of the complainant’s dismissal, the parties had not mutually agreed that he would retire. His dismissal was a unilateral act by the Department.

7.1.18 The Complainant is entitled to be placed in the financial position he would have occupied had the Department adhered to their verbal offer to pay him a salary package for an additional three and a half years, should he accept early retirement, without penalisation.

8. ENGAGING THE DEPARTMENT OF CORRECTIONAL SERVICES ON THE PROVISIONAL REPORT

8.1 Purpose

8.1.1 At the conclusion of in investigation and during the preparation of a report in terms of Section 182(1) (b) of the Constitution and section 8(1) of the Public Protector Act the Public Protector may request the parties involved and implicated in the complaint to respond to the provisional report prior to its finalisation and release.

8.1.2 This process is in line with best practice amongst inquisitorial bodies such as ombudsmen all over the world. The objective is to afford any person who may be affected by the decision of the ombudsman a reasonable opportunity to know the matters which may be likely to affect the decision of the ombudsman against their interest. Any person whose rights may be affected by such a decision may bring any evidence or matter of substance and importance, having the potential to influence the outcome of the investigation, to the ombudsman’s attention.

8.1.3 While this is also an opportunity to seek clarity on the relevant facts with the parties concerned, the consultation process is not intended to subject the Public Protector’s intended findings and remedial action to the consensus or approval of the parties. The public body concerned
or complainant is not requested to "review" the Public Protector's investigation and provide a critique on the Public Protector's adjudication of the complaint in advance of the report being finalised. In terms of the Public Protector Act the Public Protector is the sole, independent adjudicator of the complaint or matter reported to him/ her and has to deal with the matter to his/ her satisfaction and in accordance with the standards expected by law – without fear, favour or prejudice.

8.1.4 The engagement between the Public Protector and the parties prior to the release of the report also assists the Public Protector to take remedial action which flows logically from the report and which are proportionate having regard to the maladministration and adverse effect where this is established.

8.2 Response of the Department of Correctional Services on the provisional report

8.2.1 The Minister of Correctional Services, the Honorable Nosiviwe Mapisa-Nqakula, inter alia, responded as follows:

At the outset I would like to indicate that it is clear that the investigation was brought to the attention of officials within the Department who were interviewed to provide information in this regard. I must however emphasise that there is specific reference to me within the provisional report and yet I was never made aware of this investigation nor was given an opportunity until now to put my statements within context.

8.2.2 The Minster provided the Public Protector with information relating to her instructions to the Department to replace the Complainant as a result of incapacity due to ill health, and the assist the Complainant with an exit strategy from the Department since it was dear that he was not in a position to continue as an employee within Government.

8.2.3 The National Commissioner responded as follows:
"From the reading of your preliminary report it is apparent that the Department did indeed mismanage the process of termination of (the Complainant’s) employment relationship with DCS. Clearly, the option that should have been pursued with (the Complainant) was an investigation into his ill health with the aim of securing medical boarding for him.

In other words, the Department is in agreement with the findings of the Public Protector. As to remedial action to be taken, the Department will take immediate steps to:

- reinstate (the Complainant);
- place him on temporary incapacity leave until the finalization of an investigation into the incapacity of (the Complainant) due to ill health; and
- conduct an investigation into the incapacity of the complainant due to ill health in order to determine whether (the Complainant) could be boarded on ground of ill health."

8.3 Analysis

8.3.1 Regarding the Minister’s concern that she was not approached earlier in the investigation it is confirmed that the purpose of the Public Protector’s engagement with the Minister and other parties was to afford them a reasonable opportunity to have knowledge of any information or evidence obtained during the course of the investigation, relating to them or which may be likely to affect the decisions of the Public Protector. The parties were advised that any person who may be affected by such a decision may bring any evidence or matter of substance and importance, having the potential to influence the outcome of the investigation, to the Public Protector’s attention, as the Minister did.

8.3.2 The Public Protector acknowledges the cooperation of the Minister and the Commissioner in the amicable conclusion of the matter and confirms that
the submissions have been incorporated in the body of the report where applicable.

8.3.3 The Constitutional basis for remedial action by the Public Protector in terms of section 182 of the Constitution is to restore administrative justice to ensure that no member of the public suffers prejudice or injustice as result of the improper performance of an administrative function. The Department did not respond to or expressly accepted the remedial action to be taken in respect of the prejudice suffered by the Complainant as a result of the fact that he had to endure financial hardship, restricted access to medical assistance and emotional distress because the process did not adhere to the minimum standards of administrative justice as required by the Constitution.

8.3.4 The Public Protector seeks to reconcile the citizen with the state by correcting administrative wrongs of the state, demanding accountability and entrenching sustainable, good governance. Section 6(4)(c) of the Public Protector Act, 1994 is one of the provisions that seeks to give effect to the Public Protector’s Constitutional mandate by ensuring that the securing of redress for a complainant for the hardship and prejudice that have resulted from an institution’s maladministration, is a key aspect of the Public Protector’s work.

8.3.5 While it is commendable that the Department is taking accountability for the administrative errors and are committed to taking steps to correct its conduct, “accountability” in terms of upholding the underlying and fundamental principles of constitutional democracy, such as the public interest, public trust, rule of law and good governance, requires the public body to be fair and also take responsibility of consequences of the improper performance of its administrative functions. Consequently, “remedial action” means that the public body should restore the complainant to the position he or she would have been in if the maladministration or poor
service had not occurred. If that is not possible, the public body should compensate him/her appropriately.

9. KEY FINDINGS

9.1.1 From evidence the following key findings are made:

9.1.1.1 The process followed by Department in the termination of the complaint’s services did not comply with the requirements of section 16(6)(a) of the Public Service Act, 1994 as well as with the required standard of reasonableness and fairness as required by sections 23 and 33 of the Constitution, as well as the provisions of PAJA. The actions of the Department consequently amount to maladministration.

9.1.1.2 The process was procedurally unfair as the Department failed to consult with and reach an agreement with the Complainant on the conditions for the termination of his services contrary to the requirement in law, their agreement with the Complainant, the reasonable expectation raised in their communications with the Complainant, or the conditions approved for such termination by the senior management of the Department.

9.1.1.3 The decision by the Department to seek the termination of the complaint’s services on the basis of early retirement instead of considering the requirements of incapacity due to ill health, is arbitrary and not in good faith as it is based on irrelevant considerations, or not supported by substantial evidence as required by PAJA.

9.1.1.4 As a result of the Department’s failure to provide the complainant with correct and accurate information on the conditions and benefits that would have been payable to him in terms of early retirement, he was unable to take informed decisions and acted to his detriment when he vacated his position.
9.1.1.5 As a result of the actions of the Department the complainant suffered prejudice in the form of pecuniary loss in pension benefits and no post retirement medical assistance, which is causing severe distress and trauma and seriously affecting the health of the complaint and his access to proper medical care.

10. REMEDIAL ACTION

10.1 Remedial action in terms of Section 182(1) (c) of the Constitution is as follows:

10.1.1 Immediate re-instatement of the Complainant into employment with effect from 1 November 2010;

10.1.2 Conducting an investigation into the incapacity of the complainant due to ill health and the consideration and processing of the ill health retirement of the Complainant;

10.1.3 Placement of the Complainant on temporary incapacity leave, until finalisation of the ill health retirement; and

10.1.4 Payment of compensation to the Complainant for financial damages suffered, humiliation and suffering.
11. MONITORING

The Commissioner is required to submit an action plan with appropriate timeframes with regard to the implementation of this report within one month of the date of this report.

ADV T MADO SelA
PUBLIC PROCTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 21/09/2011

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