UNSETTLED SETTLEMENT

Report on an investigation into the alleged refusal by the Gauteng Department of Health to pay for services rendered by CKB Washroom Sales and Services CC

Report No: 1 of 2014/15
INDEX

Executive Summary 3

1. INTRODUCTION 11
2. THE COMPLAINT 11
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR 15
4. ISSUES CONSIDERED AND INVESTIGATED 17
5. THE INVESTIGATION 17
6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION 24
7. EVALUATION OF THE EVIDENCE 37
8. LEGAL AND REGULATORY FRAMEWORK 43
9. ANALYSIS AND CONCLUSION 49
10. FINDINGS 55
11. REMEDIAL ACTION 58
12. MONITORING 60
Executive Summary

(i) "Unsettled Settlement" is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.

(ii) The report relates to an investigation into the alleged refusal and undue delay by the Gauteng Provincial Department of Health (hereinafter referred to as the Department) to pay for services allegedly rendered by CKB Washroom Sales and Services CC (hereinafter referred to as CKB) involving the supply of hygiene equipment to several Health Service Centres (Clinics) in the Gauteng province. At the time the dispute arose, the Department was called the Department of Health and Social Development.

(iii) The Complainant is a 35 year old small business owner and the Managing Director of CKB, a small wholly black owned business registered under registration number 2006/142319/23. The company’s main business is the supply of hygiene and sanitary equipment which includes air freshener dispensers, hand soap dispensers, foams, soap dispensers, paper towel dispensers, hand dryers, seat sprays, wipe sanitizers and sanitary bins. CKB was initially contracted by individual clinics of the Provincial Department of Health to supply the hygiene equipment, on a rental basis, while providing related support services. When the Service Agreements were cancelled by the Department, the Complainant instituted court action. The court process culminated in an out of court settlement that extended the Service Agreements to the end of July 2010, a period later extended by the Department to 30 September 2010.

(iv) In the main, the complaint was that: 1) the Department failed to pay CKB the amount of R2 960 112. 60 which was allegedly owed for services that CKB continued to provide to the Department’s clinics beyond 30 September 2010 and; 2) the Department wrote to Standard Bank, a financial services institution, confirming that it owed R1 448 790.06 to CKB, in the context of a bridging finance
application made by CKB and granted by Standard Bank, but the Department subsequently repudiated CKB’s claim.

(v) The Department did not dispute that it had entered into a court settlement with CKB extending CKB’s services to the Department’s clinics until end of July 2010 and that it further extended CKB’s services to 30 September 2010. The Department also did not dispute that a letter was issued in its name to Standard Bank confirming that the Department owed the Complainant R1 448 790.06. It also did not dispute that the Complainant’s hygiene equipment remained at its clinics during the period alleged by the Complainant.

(vi) While the Department did not dispute that the letter to Standard Bank came from one of its officials, it submitted that the author had no authority to issue such letter, and that it did not owe the Complainant any money and that it was in fact the Complainant that owed it R 295 180, 20, which was an over payment made during the agreed service period following the out of court settlement. The Department also maintained that it wasn’t its fault that the Complainant continued to provide the service beyond the agreed period and that it derived no value from such service.

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

(a) Whether the Gauteng Department of Health improperly caused the Complainant’s hygiene equipment to remain in its Health Services Centres (clinics) after the period agreed in an out of court settlement and mutually extended?

(b) Whether the Gauteng Department of Health improperly represented to Standard Bank that it owed the Complainant R1 448 790.06 and which it later improperly refused to pay;

(c) Whether the conduct of the Gauteng Department of Health had prejudiced the Complainant;
(d) If all or some of the above were answered affirmatively, what would it take to place the Complainant as close as possible to where he would have been had the improper conduct not occurred.

(viii) The investigation process commenced with an attempt to mediate with a view to getting the parties to resolve the dispute by mutual agreement. When the mediation failed, a formal investigation, conducted through meetings and interviews with Complainant and relevant officials of the Department as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts, followed.

(ix) Key laws and policies taken into account to help me determine if there had been maladministration by the Department and prejudice to the Complainant were principally those imposing administrative standards that should have been upheld by the Department or its officials when managing the exit agreement with the Complainant’s company, the communication of the acknowledgment of debt to Standard Bank and management of the procurement of a service provider to service the clinics after 30 September 2010.

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

1. Regarding whether the Gauteng Department of Health improperly caused the Complainant’s hygiene equipment to remain in its Health Services Centres (clinics) after the period agreed on in an out of court settlement, I find that:

   a) The Department failed to take resolute action to get the Complainant’s company CKB to remove its equipment from its clinics and to prevent the continued use of CKB’s hygiene equipment thus causing the clinics
continue to benefit from the Complainant's property beyond the agreed service period.

b) On a balance of probabilities, some of the complainant's equipment, including sanitary bins, continued to be used by the clinics from 01 October 2010 until date of removal.

c) Having decided that it would not pay CKB the money it had initially determined to be owed to CKB for rental beyond 30 September 2010, the Department failed to verify the equipment rental claim and to adjudicate it timely to ensure that payment or a determination on payment was done within 30 days as required under Regulation 8.2.3 of Treasury Regulations issued under the PFMA during March 2005.

d) The impact of the Department's action is that it failed to subject the Complainant to an appropriate procurement system that is fair, equitable, transparent, competitive and cost-effective in violation of section 38 of the Public Finance Management Act. It equally failed to provide the Complainant with timely, accurate and accessible information regarding the claim he believed to have against it, in violation of section 195(1)(g) of the Constitution.

e) From a general governance point of view, the Department failed to ensure financial risk management and to prevent unauthorised and irregular expenditure in violation of section 38 of the Public Finance Management Act and to ensure efficient, economic and effective use of public resources in violation of section 195 of the Constitution.

f) The Department's conduct regarding failure to take decisive action to prevent the unauthorised retention of the Complainant's hygiene equipment after 30 September 2010 and to adjudicate his claim for payment properly
and expeditiously, constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution

2. Regarding whether the Gauteng Department of Health improperly represented to Standard Bank that it owed the Complainant R1 448 790.06 and which it later improperly refused to pay, I find that:

a) Mrs N Mekgwe, a Chief Director in the Gauteng Department of Health, issued, in her capacity as such, a letter: Acknowledging that the Department owed CKB the sum of R1 448 790.06 for work done for the Department; stating that the Department was not in the position to make this payment to CKB and that a payment would be made into the accounts of a clinic in April 2011 and; requesting the bank to assist CKB with bridging funding to allow it to run its operations without interruptions in the meantime.

b) It does not matter in the circumstances whether the Department vicariously incurred liability through Mrs N Mekgwe’s actions. All that matters in the circumstances is that a senior manager of the Department made a written undertaking that placed the Complainant in a position where he legitimately expected to be paid shortly and on the strength of the promise incurred further debt instead of cutting his losses.

c) Mrs N Mekgwe’s issuing of the letter of commitment to Standard Bank without properly adjudicating CKB’s claim and following the necessary authorisation procedure for regularising unauthorised expenditure constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 (1) of the Constitution.
3. Regarding whether the conduct of the Gauteng Department of Health prejudiced the Complainant, I find that:

a) The Department probably continued to use and derive value from the continued possession and use of some of the hygiene equipment by its clinics while the complainant suffered a financial detriment principally due to the rental he continued to pay to the principal renting company and business overheads.

b) The Department’s failure to competently and expeditiously assess the Complainant’s claim while failing to pay for a period of four (4) years has also prejudiced the Complainant.

c) The Complainant was treated unfairly and suffered an injustice or prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act when Mrs N Mekgwe negligently communicated an acknowledgement of debt to Standard Bank without properly assessing the Complainant’s claim and regularising the unauthorised expenditure that would have arisen from expenses incurred by the Department for rental beyond 30 September 2010 as such expenses would have been incurred without an agreement or proper approval.

4. Additional Maladministration Observations

a) The Department failed to the manage the exit of CKB’s services from its clinics and to ensure a seamless transition to properly procured hygiene equipment and related services in its clinics thus prejudicing the Complainant from competing in an open tender process that should have taken place by 30 September 2010;
b) The Department's untidy handling of the procurement of hygiene equipment and related services in pursuit of the out of court settlement in 2010 has, without doubt, risked systemic service failure regarding the provision of hygiene equipment and related services at the affected clinics. It is worth noting that such equipment and services form a critical part of the National Department of Health's efforts aimed at cleanliness and preventing infections in clinics and hospitals as part of its national priorities that are linked to Millennium Development Goals.

c) The conduct of the Department regarding the poor handling of the procurement of hygiene equipment and related services for affected clinics constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

(xii) The appropriate remedial action I am taking in pursuit of section 182(1)(c), with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, while addressing systemic procurement management deficiencies in the Department, is the following:

1. The Head of Department must:

   a) In consultation with the Complainant, subject CKB's invoices submitted in March 2012 (totalling to R 2 960 112.60) to an audit process and determine a reasonably payable amount for rental chargeable for the period starting on 1 October 2010 until the equipment was removed, taking into consideration the overpayment already made to the Complainant in the amount of R 295 180.20, and pay the Complainant accordingly within sixty (60) days after the issuing of this report.
b) Take urgent action to ensure that finality is attained regarding the procurement of hygiene equipment and related services for affected clinics, giving serious consideration to purchasing things that should ideally not be rented and where rental is opted for, to rent from a manufacturer rather than a middle company.

c) Expeditiously finalise disciplinary proceedings currently underway against Ms Mekgwe in terms of section 38(1)(h) of the Public Finance Management Act, 1999.

d) Ensure that all of its management and general staff, including those in health centres, are trained on the correct Supply Chain and Procurement Processes and Procedures in order to avoid the recurrence of a similar matter in the future.

2. The MEC to:

   a) Request the Auditor General to audit all payments made in respect of hygiene equipment and related services in hospitals and clinics;

   b) Decide whether or not disciplinary action should be taken against all the officials who are responsible for exposing the Department to unauthorised expenditure and other financial risks in violation of the PFMA and

   c) Look into a possible systemic deficiency within the Department of Health regarding the payment of monies owed to service providers, particularly small business enterprises as non-payment contributes to their demise and loss of jobs.
REPORT ON AN INVESTIGATION INTO THE ALLEGED REFUSAL BY THE GAUTENG DEPARTMENT OF HEALTH TO PAY FOR SERVICES RENDERED BY CKB WASHROOM SALES AND SERVICES CC

1. INTRODUCTION

1.1 "Unsettled Settlement" is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to:

1.2.1 The MEC for Health in the Gauteng Province;

1.2.2 The HOD for Health in the Gauteng Province;

1.3 Copies of the report are also provided to the Complainant, Mr MS Ndlovu, the Managing Director of CKB; and to the Speakers of the Gauteng Legislature for noting purposes.

1.4 The report relates to an investigation into the alleged refusal and undue delay by the Gauteng Provincial Department of Health to pay for services rendered by CKB.

2. THE COMPLAINT

2.1 Mr Malcolm Sipho Ndlovu (the Complainant), managing director of CKB, lodged a complaint at the Public Protector's Gauteng Provincial office, on 18 July 2011, alleging that the Gauteng Provincial Department of Health (the Department) had failed to pay for the hygiene services his company had provided to several health
centres (clinics) around Gauteng despite the Department’s Chief Director of Health Services issuing a letter of commitment, to Standard Bank, acknowledging that the Department owed the Complainant approximately R1 448 790.06, and services having been rendered and consumed by the Department’s clinics.

2.2. The Complainant alleged that:

2.2.1. The Department had refused to pay for services the Complainant’s company, CKB, had rendered beyond a period agreed to in an out of court settlement agreement with and later extended by the Department, which services involved the provision of, amongst others, air freshener dispensers, hand soap dispensers, foams, soap dispensers, paper towel dispensers, hand dryers, seat sprays, wipes sanitizers and sanitary bins.

2.2.2. The refusal to pay was despite a letter sent on 07 March 2011 by the Department’s Chief Director for Health Services, Mrs N Mekgwe, to Standard Bank acknowledging that the Department owed CKB approximately R1 448 790.06 and requested the bank to provide a loan facility to CKB while the Department was processing payment. The Department subsequently failed to settle the debt which caused devastating financial loss for CKB and the Complainant.

2.2.3. In spite of the commitment letter from Mrs N Mekgwe and several meetings with officials of the Department, attempts to resolve the matter amicably, through mediation, were unsuccessful as the Department continued to deny liability.

2.2.4. The Complainant is a 35 year old small business owner and the Managing Director of CKB, a small wholly black owned business registered under registration number 2006/142319/23. His company, CKB, supplied hygiene equipment and related services to several Gauteng clinics on the basis of individual Service Agreements with those clinics since around 2006. When the Service Agreements were cancelled by the Department around 2008, the Complainant instituted court action which
resulted in an out of court settlement that extended the service agreements until the end of July 2010, a period later extended by the Department to 30 September 2010.

2.2.5. The company principally supplies hygiene and sanitary equipment, which includes, air freshener dispensers, hand soap dispensers, foams, soap dispensers, paper towel dispensers, hand dryers, seat sprays, wipes sanitizers and sanitary bins.

2.2.6. In December 2008, CKB instituted civil action against the Department for breach of contract and requested the South Gauteng High Court to declare some Service Agreements signed with several clinics around Gauteng as valid and binding contracts, and to order the Department to pay approximately R3,7million (three million seven hundred thousand rand) in respect of services already provided under those contracts.

2.2.7. The Department initially defended the action on the basis that the provisions of the Public Finance Management Act of 1999 (the PFMA) as well as the Department’s supply chain management processes and procedures had not been adhered to when the managers of the various clinics signed the Service Agreements with CKB. The Department intended to request the court to render the Service Agreements invalid on the grounds that the clinic officials who signed these service agreements acted outside their powers. The Department also argued that CKB had misrepresented facts and ‘duped’ clinic managers into signing these service agreements.

2.2.8. An out of court settlement was reached in 2010, where the parties agreed that the service agreements would end in July 2010 and CKB would be paid for the services rendered to several clinics, notwithstanding the fact that proper supply chain procedures were not followed. This agreement was reached based on a legal opinion received from the State Attorney in 2009.
2.2.9. The Department thereafter proceeded to pay the settlement amount. However, it transpired that during the process of paying, the Department had erroneously overpaid CKB by R295 180, 20 (two hundred and ninety five thousand, one hundred and eighty rand and twenty cents).

2.2.10. By end of July 2010, the Department had no yet procured a service provider to supply the services CKB was supplying and extended the agreement with CKB to 30 September 2010.

2.2.11. At the end of September 2010, CKB did not remove its equipment, having approached the Department for a further extension in the light of there still being no property procured service provider, and the clinics, allegedly, continued to use the equipment even though CKB stopped refilling refillables.

2.2.12. Around the beginning of 2011, CKB billed the Department for the rental of its hygiene equipment on the basis that the clinics had derived value from continued use of the said equipment.

2.2.13. CKB received written confirmation in March 2011 that the Department was in the process of settling the debt and would do so by the end of April 2011. The confirmation included a letter acknowledging debt to the tune of R1 448 790.06 and expressing intention to pay in April 2011, sent to Standard Bank in support of CKB’s application for bridging funding.

2.2.14. The Complainant did not dispute having received the alleged overpayment; instead he alleged that the debt had already been offset by Mrs N Mekgwe from the amount they had agreed was owed to CKB by the Department for the continued use of his company’s Hygiene equipment for additional months since 1 October 2010.

2.2.15. The Complainant alleged that at the time a letter was prepared for the Bank, CKB was owed R1,7million (one million seven hundred thousand rand) and that after it had offset the R295 180,20 (two hundred and ninety five thousand one hundred and
eighty rand and twenty cents), the balance of R1 448 790.06 was now due and payable to CKB.

2.2.16. On 25 January 2011, CKB and the Department's Chief Financial Officer met, wherein CKB stated its claim for the alleged delay in paying for the continued use of its equipment months after its Service Agreements expired but the Department denied any liability.

2.2.17. When the payment did not materialise, the Complainant lodged a complaint with the Public Protector Office in Johannesburg, which was initially understood to be a matter of undue delay.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

3.2 Section 182 of the Constitution provides that:

"(1) The Public Protector has the power, as regulated by national legislation-

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation."
3.3 The Public Protector is further given the power 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 Gauteng Department of Health is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.

3.5 The jurisdiction and powers of the Public Protector were not disputed by any of the parties. The Department, initially argued that it was premature for the Complainant to address my office as it was still assessing the Complainant's claim. The investigation team proceeded with the matter as it involved funds for a small business and in this regard had cash flow risk implications for CKB.

3.6 The initial idea was to employ the conciliation and mediation powers of the Public Protector under section 6(4) to help the parties settle. Unfortunately this process did not yield the required settlement which compelled my office to proceed with a formal investigation with a view to making a determination of maladministration, prejudice and impropriety in terms of powers conferred on me by the Public protector Act and the Constitution.

3.7 The outcome of the mediation was the issuing of a letter authorising CKB to remove its hygiene equipment from the clinics. CKB complied and removed its equipment. CKB then submitted invoices to the Department for the period October 2010 to March 2012 for which an acknowledgement note was received.
4. **ISSUES CONSIDERED AND INVESTIGATED**

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

4.1.1. Whether the Gauteng Department of Health improperly caused CKB's hygiene equipment to remain in its Health Services Centres (clinics) after the period agreed in an out of court settlement and mutually extended;

4.1.2. Whether the Gauteng Department of Health improperly represented to Standard Bank that it owed the Complainant R1 448 790.06 and which it later improperly refused to pay;

4.1.3. Whether the conduct of the Department of Health's prejudiced the Complainant;

4.1.4. If all or some of the above are answered affirmatively, what would it take to place the Complainant as close as possible to where he would have been had the improper conduct not occurred.

5. **THE INVESTIGATION**

5.1. **Methodology**

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

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

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

5.2. Approach to the investigation

5.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
   - What happened?
   - What should have happened?
   - Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
   - In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

5.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Department acted improperly in relation to the continued retention of the Complainant’s equipment in its clinics. I also had to determine if the Department had indeed communicated to Standard Bank that it owed the Complainant the amount of R1 448 790.06 and the impact thereof.
5.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration and prejudice.

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

5.2.5. The investigation revealed that it involved much more than a mere case of undue delay or failure by the Department to pay for services rendered by CKB. A number of issues relating to maladministration and good governance were uncovered during the investigation.

5.3 The Key Sources of Information

5.3.1 Documents

5.3.1.1 Several installation documents signed by officials responsible for various health centres where CKB’s hygiene equipment was installed:

<table>
<thead>
<tr>
<th>CLINIC</th>
<th>SIGNED BY</th>
<th>DATE SIGNED</th>
</tr>
</thead>
<tbody>
<tr>
<td>i) Barney Molokoane Clinic</td>
<td>N C Mjingwana</td>
<td>18.07.2008</td>
</tr>
<tr>
<td>ii) Bristlecone Clinic</td>
<td>S Mphatsoe</td>
<td>18.07.2008</td>
</tr>
<tr>
<td>iii) Diepkloof Clinic</td>
<td>R M Kamalo</td>
<td>15.07.2008</td>
</tr>
<tr>
<td>iv) Fine Town Clinic</td>
<td>N R Ramogale</td>
<td>29.07.2008</td>
</tr>
<tr>
<td>v) Kliptown</td>
<td>E Sebeo</td>
<td>31.07.2008</td>
</tr>
<tr>
<td>vii) Meadowlands Clinic Zone 2</td>
<td>R Mbuli</td>
<td>15.07.2008</td>
</tr>
<tr>
<td>viii) Noordgesig Clinic</td>
<td>O Kubayi</td>
<td>14.07.2008</td>
</tr>
</tbody>
</table>
x) Orlando Clinic  D Mogorosi  15.07.2008
xi) Sinethemba Clinic  B Serathi  29.07.2008
xii) Thembelihihe Clinic  N S S Mabaso  18.07.2008
xiii) Vlaakfontein Clinic  M M Cebekulu  18.07.2008
xiv) Wildeesfontein Clinic  J Morolo  18.07.2008

5.3.1.2 A copy of offer of settlement between the Department of Health and the Complainant in a purported settlement of the civil suit between the parties (unsigned);

5.3.1.3 A letter from the State Attorney's Office, accepting the abovementioned offer, dated 10 November 2009;

5.3.1.4 A letter of commitment, dated 7 March 2011, addressed to the Manager of Standard Bank of South Africa and signed on behalf of the Chief Director of the Gauteng Department of Health;

5.3.1.5 An internal memorandum dated, 6 November 2009, from Mr DT Borole to a number of recipients, including Mrs N Mekgwe, informing the recipients that CKB was awarded a tender for the installation of hygiene goods and services as from 9 November 2009 on a monthly basis. The memorandum further requested that all parties cooperate by allowing CKB onto their premises;

5.3.1.6 A legal opinion drafted by Ms F Patel from the State Attorney's office during July 2009;
5.3.1.7 A letter from the Complainant addressed to the MEC of Health dated 10 December 2010;

5.3.1.8 A letter from Mr S Sithole, Senior Legal Administration Officer, addressed to Ms LH Mekgwe,(the MEC), Mr KS Chetty, (HOD), Dr A Rahman (Chief of Operations), Mr I Van Der Merwe (CFO), K Mosweu (Director of Finance), and Mr T Monyemangene (Principal Legal Administration Officer) dated 24 May 2011;

5.3.1.9 Three affidavits dated 10 December 2013 obtained from health facilities, Patricia Thankiso Maphisa, Sina Mphatsoe, and Duduzile Molefe indicating that CKB facilities were not utilised after 30 September 2010;

5.3.1.10 A statement from Mrs N Mekgwe dated 27 November 2013 stating that she was duped by CKB into issuing the commitment letter;

5.3.1.11 A statement obtained from Mrs E R van Staden, Deputy Director Corporate Services at the Johannesburg Health District, stating that she notified various clinics with a letter dated 4 August 2010 that CKB’s service agreements was extended to 30 September 2010;

5.3.1.12 A letter dated 4 August 2010 by Mrs E R van Staden to all facility managers stating that CKB’s service agreements were extended to 30 September 2010;

5.3.1.13 A copy of a quotation from Kimberly Clarke dated 9 July 2010 before the expiry of the service agreements with CKB; and

5.3.1.14 Copies of VA 2 documents were also furnished as proof that the clinics had ordered the Department’s consumables. They are internal requisition, issue, and receipt vouchers used within the Department. Consumables referred to include hand paper towels, toilet paper, floor polish etc. Only consumables were ordered in terms of the VA 2 documents received from the Department.
5.3.1.15 Letter dated 14 March 2012, sent on 15 March 2012, from CKB to the Department accompanied by 14 Invoices for the period October 2010 to March 2012 for rental of CKB's hygiene equipment totalling to R 2 960 112.60.

5.3.1.16 Sample invoices dated August 2010 and September 2010 respectively, issued by CKB in favour of the Department, Health Region Hillbrow.

5.3.1.17 An e-mail dated 15 March 2012 from Mr S Sithole from the Department addressed to the Complainant.

5.3.1.18 An internal memorandum drafted by Ms Sekele, the former Gauteng Provincial Representative of the Public Protector, dated 21 June 2012 and addressed to the then MEC of Health, Ms N Mekgwe.

5.3.2 Meetings and Interviews

5.3.2.1 Meeting on 03 December 2013 between the Public Protector, Adv Thuli Madonsela, (accompanied by Ms D Dube Gauteng Provincial Representative and Mr M Malapile, Senior Investigator Gauteng) and the Department represented by Dr Goswell the Director General and Mrs Damane-Nkosana DDG: Legal Service, Mr Makhudu Acting District Manager and Mr Tsoke Acting Director: Legal Service at the national office of the Public Protector in Pretoria.

5.3.2.2 Two meetings between the Public Protector, Adv Thuli Madonsela, and Mr Ndlovu on 5 August 2013 in Johannesburg at the Leratong Hospital, Mogale City; and on 19 May 2014 in Pretoria.

5.3.2.3 Meeting on 11 December 2013 between the Public Protector Provincial Representative Gauteng, Ms Dinki Dube, (accompanied by Mr M Malapile, Senior Investigator Gauteng) and the Department represented by Mrs Damane-Nkosana DDG: Legal Service, Mr Hamca Chief of Staff, Mr P Mathole Deputy
5.3.2.4 Telephonic interview with Mrs N Mekgwe, the Chief Director of Health Services on 18 February 2013;

5.3.2.5 Telephonic interview with Ms P Thamae, Personal Assistant to the Chief Director of Health Services, on 18 February 2013;

5.3.2.6 Telephonic interview with Mr T Monyemangene, from the Department’s Legal Services on 18 February 2013; and

5.3.2.7 Telephonic interview with Ms F Patel from the State Attorney’s office on 18 February 2013.

5.3.3 Legislation and other prescripts

5.3.3.1 Sections 33, 195 and 217 of the Constitution of the Republic of South Africa, 1996;

5.3.3.2 The Public Protector Act, 23 of 1994

5.3.3.2 The Public Management Finance Act 1of 1999;

5.3.3.3 Regulations in terms of the Public Finance Management Act, 1999: Framework for Supply Chain Management dated 5 December 2003; and

5.3.3.4 Portion 29 Golden Highway (PTY) LTD v Patel and Patel (A5038/07) [2010] ZAGPJHC 15; [2010] 4 All SA 219 (GSJ) (25 March 2010)
5.3.3.5 D Visser, *Unjustified Enrichment* 2008, Juta & Co Ltd: Cape Town.

6. **EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

6.1. **Matters not in dispute**

6.1.1. During the investigation, the Complainant and the Department agreed that they had entered into an out of court settlement extending the services of the Complainant’s company, CKB, to the Department’s clinics to the end of July, later extended by the Department to 30 September 2010. The parties further agreed that a letter had been issued in the name of the Department, to Standard Bank, confirming that the Department owed the Complainant R1 448 790.06, which was in the process of being paid. The parties further agreed that the Complainant’s hygiene equipment had remained at the Department’s clinics during the period alleged by the Complainant. The parties also agreed that the Complainant had been overpaid by about R295 000 for the services legitimately rendered during the agreed period ending on 30 September 2010. In this regard, the Department did not dispute the Complainant’s allegation that the letter to Standard Bank already took into account and reduced the alleged debt to CKB from approximately R1.7 million to R1 448 790.06.

6.1.2. I must indicate upfront that this investigation did not focus on the irregularity of the original three year service agreements that were consolidated into one agreement by the out of court settlement extending over a period that ended on 30 September 2010. The investigation did not question the regularity of the out of court settlement except to note that no signed version of it could be produced by any of the parties during the investigation, which is improper. The reason the investigation did not go into the irregularity of the service agreements was because the matter had already been addressed by a court of law and the issue addressed by the investigation was the propriety of the implementation of the out of court settlement.
6.1.3. As indicated earlier, I was required to make a determination on whether or not the Department acted improperly in allowing the Complainant’s equipment to remain in its clinics after 30 September 2010. I was also required to make a determination regarding whether or not the letter addressed to Standard Bank amounted to Departmental conduct. Ultimately I had to determine whether the Complainant was prejudiced by the conduct of the Department and if so how to remedy such prejudice or injustice.

6.2. The Complainant’s case

6.2.1. The Complainant presented his case through the original complaint, several meetings held with myself and the investigation team and documents submitted regarding the original Service Agreements, the settlement agreement, the letter to Standard Bank and documents seeking to prove the prejudice allegedly suffered in respect of unpaid services.

6.2.2. Regarding the retention of CKB’s equipment at the Departments clinics after 30 September 2010:

6.2.2.1. After the Department cancelled CKB’s service agreements an out of court settlement was reached allowing CKB to provide the hygiene equipment to the Department’s clinic for a further period which the Department later extended to 30 September 2010.

6.2.2.2. At the end of the extended period the Complainant requested a further extension on account of services still being needed as the Department had not procured a service provider to take over seamlessly to avoid difficulties for the clinics.

6.2.2.3. The Department had not appointed a properly procured service provider by 1 October 2010 or any of the dates during which the Complainant allegedly
continued to rent its hygiene equipment to the Department during the period in question.

6.2.2.4. CKB was unable to remove its equipment from the Department's clinics without a letter from the Department authorising it to do so and that such letter was not given.

6.2.2.5. The Complainant accordingly continued to provide value for money services to the Department. As the equipment was rented by CKB from a supplier, CKB continued to incur rental costs from the supplier.

6.2.2.6. On 15 March 2012 the Complainant submitted 14 invoices to the Department demanding payment for value derived from the continued possession and use of its hygiene equipment at the Department's health clinics.

6.2.2.7. The total amount claimed in terms of the invoices rendered was R 2 960 112.60 for the period October 2010 to March 2012.

6.2.2.8. On the same day Mr S Sithole, from the Department, acknowledged receipt of the invoices and demand and advised the complainant to remove CKB's hygiene equipment within 7 days failing which the Department would do so at CKB's cost.

6.2.2.9. The Complainant submitted that none of the hygienic equipment provided was restricted by locks and that the Department had full access to same.

6.2.2.10. A memo drafted by Ms Sekele, the then Gauteng Provincial Representative of the Public Protector, and addressed to the then MEC of the Gauteng department of Health, dated 21 June 2012, stated:
1. THE COMPLAINT

In 2011, Mr. Ndlovu, owner of CKB Washroom Services approached the Public Protector with a complaint alleging that the Gauteng Provincial Department of Health was owing him an amount of R1,4 Million for services rendered and was delaying/failing to settle the account in spite of many requests from him. He alleged that he was contracted by the Department to provide hygiene services devices at various clinics in and around Soweto for a period of 3 years however the contracts were terminated after 9 months.

2. INVESTIGATION

We engaged the Department of Health and we agreed to meet in order to facilitate resolution of the matter as we believed that it was possible for both "parties-to come to an amicable solution". The purpose of the meeting was also to verify facts and obtain response to the allegations as stated by Mr. Ndlovu to the Public Protector.

At the meeting, the following came to light:

I.

CKB washroom was appointed as a service provider for a period of 3 years however, the Department subsequently cancelled the agreement because it appeared that officials within the Department followed incorrect procurement procedure and were not properly authorized to enter into such agreements on behalf of the Department.

II.

The Department then sought to enter into an out of court settlement with Mr. Ndlovu’s attorneys and it was agreed that:

- The contracts that were concluded with CKB would be cancelled and be replaced by 9 months agreement, ending July 2010.
- An amount of R2, 126 367-35 would be paid in exchange for services.

At the end of July 2010, contracts came to an end but Mr. Ndlovu did not remove his equipment from any of the Health Centres because part of the agreement was also that they would be furnished with a written notice three months prior the termination date to enable them to remove and find alternative storage for the equipment. In June 2010, Mr Ndlovu alleges that he attended a meeting at the legal department where Mr Tsopane, Mr Borole, Mr Munene and Mr Shabane informed him that the Department would continue to utilize their services because there was still a need and there was no alternative service provider at that time. At the end of July, CKB alleges that they heard nothing from the Department and therefore did not remove the equipment. This is the crux of the problem because he is now claiming that he could not have access to the buildings because the Department failed/neglected to furnish him with a written authorization to enter
the premises and remove. He also alleges that he is entitled to payment for the use of the equipment because he did observe that they were being used even though he did not provide re-fill material. In addition, the Department paid for services that were rendered two months after the expiry of the contract but services continued 20 months thereafter.

3. OUTCOME OF THE MEETING BETWEEN THE PUBLIC PROTECTOR AND DEPARTMENT OF HEALTH

It became clear at the meeting that the department had failed to ensure that Mr. Ndlovu removes his equipment from the clinics thereby creating an impression that there was still need for his services. There is a dispute as to whether or not the equipment was used but it is not unreasonable to conclude that the health centres continued to utilize them as no alternative was provided. The Department should have acted in a resolute manner and confirmed termination of the agreement in writing and ensured that Mr. Ndlovu is granted access and authorized to remove everything that belonged to him from all the clinics. So far, the Department has not produced any document which served as notification to Mr Ndlovu that the equipment had to be removed.

By failing to finalise the agreement properly the Department opened a gap which possibly created further liability and prolonged the relationship with CKB. The Public Protector then advised the Department to write to Mr. Ndlovu and to demand that he removes all his equipment within seven days of the letter, failing which they it would be removed and stored on his behalf without further notice to him. This happened and upon receipt of correspondence, Mr Ndlovu took possession and removed his property.

PROPOSED WAY FORWARD

We are of the view that seeing that Mr Ndlovu was adamant that the equipment was used by the various clinics for a period of 20 months after the expiry of the agreement that ended in July 2010, the Department must allow him to submit an invoice for rental to the Department for it to be considered and settlement thereof be negotiated. We request that the MEC’s office should take centre stage in this matter and ensure that decisions regarding the indebtedness of the Department to CKB are taken and communicated to CKB in writing, as soon as possible.”

6.2.2.11. CKB deserved to be paid for services rendered and utilised by the Department’s clinics and suffered injustice when the Department failed or refused to pay.
6.2.2.12. The evidence provided by CKB in support of its claim included:

(a) A copy of the out of court settlement agreement,
(b) Copies of CKB Service Agreements with individual clinics,
(c) Correspondence between CKB and the Department,
(d) Copies of the invoice statements after 30 September 2010,
(e) 14 Invoices dated 14 March 2012 sent via e-mail to the department on 15 March 2012,
(f) An e-mail dated 15 March 2012 from Mr S Sithole, from the Department, addressed to the Complainant,
(g) A memo from the Gauteng Provincial office of the Public Protector to the then MEC of Health, Ms N Mekgwe, dated 21 June 2012.

6.2.3. Regarding the Departmental letter addressed to Standard Bank:

6.2.3.1. The Complainant advised that the Department acknowledged that it owed CKB the amount of R1 448 790.06 in a letter directed to Standard Bank dated 7 March 2011, which stated the following:

"Please note that the Gauteng Department of Health and Social Development is in receipt of claims totalling R1, 448, 790, 06 from CKB WASHROOM SALES AND SERVICES for work done for the Department.

The Department is currently not in the position to make this payment to CKB WASHROOM SALES AND SERVICES. A payment will be made into the account of the clinic during April 2011.

We would like to request that you assist them with a fund that will allow them to run their operations without interruptions in the meantime."

6.2.3.2. Regarding the Department’s contention that Mrs N Mekgwe’s action cannot be attributed to the Department as she exceeded her authority, the Complainant
submitted that she was a Chief Director of the Department and CKB was not in a position to tell that she exceeded her powers.

6.2.3.3. Regarding Mrs N Mekgwe's contention that she did not sign or authorise the letter, the compliant argued that she was not telling the truth as she had authorised her PA to prepare the letter at CKB’s request in view of the delay in the payment of the debt that had already been acknowledged by the Department.

6.2.3.4. The evidence provided by CKB in support of its case regarding the letter addressed to Standard Bank included:

(a) A copy of the letter addressed to Standard Bank.

6.2.3.5. The investigation further elicited a statement from Mrs N Mekgwe's PA confirming the letter was authorised by her and a hand written draft of the letter in Mrs N Mekgwe's handwriting.

6.2.4. Regarding prejudice suffered:

6.2.4.1. CKB suffered financial prejudice as it had to continue paying rental to the mother company, pay salaries and pay its overhead costs which were primarily dependant on the service agreements with the Department.

6.2.4.2. It further contended that on the strength of the commitment letter issued by the Department CKB further indebted itself to Standard Bank and incurred further debt it was unable to service.

6.2.4.3. CKB believes that it is entitled to R1.7 million as adjudicated by the Department (through the actions of Mrs N Mekgwe) as duly owed less R295 180.20 which was over paid to it for the period ending on 30 September 2010.
6.2.5. In response to the provisional report:

6.2.5.1. The Complainant indicated that CKB supports the findings and remedial action despite the fact that the investigation team could not find evidence to support its claim that the Department owed CKB approximately R3 million.

6.2.5.2. He disputed the application of the ‘Clean Hands Rule’ which in the provisional report had sought to apply with the effect of diminishing the Department’s liability on account of CKB’s failure to limit its own loss. He contended that CKB had acted in good faith when contracting with the Department.

6.3. The Department’s case

6.3.1. The Department presented its response through several meetings held with myself and the investigation team and documents submitted regarding the original service agreements, the settlement agreement and correspondence between itself and the Complainant. It also submitted State Attorney letters on CKB invoices.

6.3.2. Regarding the retention of CKB’s equipment at the Department’s clinics after 30 September 2010, the Department:

6.3.2.1. Conceded that after it cancelled CKB’s Service Agreements, an out of court settlement was reached allowing CKB to provide the hygiene equipment to the Department’s clinics until 31 July 2010 and which agreement was subsequently extended by the Department to 30 September 2010.

6.3.2.2. Further conceded that at the end of the extended period, the Complainant requested a further extension which it claimed to have rejected. However it has never provided the letter of rejection it promised at a meeting held during December 2013.
6.3.2.3. Contended that it was CKB that failed to remove its own equipment from the Department’s clinics and that it was CKB’s duty to do so and it did not need a letter from the Department authorising it to do so as the settlement agreement could have been used as authority to collect its equipment from the clinics.

6.3.2.4. In support of its version of events, alluded to a letter from the Complainant dated 10 December 2010, in which the Complainant is said to have admitted the following:

"CKB WASHROOM SALES AND SERVICES is here by in acknowledgment of the overpaid amount on the month of June 2010 of R295 000.

We here propose to the Department to pay back the amount by rendering the service to the value of the above amount, however due to the delay of the payment of the months of August and September 2010 till to date we have not received any payment.

As per the attached letter to you have stated clearly that the services rendered to the Department/clinics be terminated by the end of September 2010, since we have not received payment in due time we were unable to remove our equipment the dispensers on rental by the 30th of September 2010, it is not in our interest for the services rendered to the Department to be terminated as you are aware that for the past two years we have done everything in our ability to satisfy your needs and we look forward to do so in the next coming years.

The challenge that we are facing now in that our supplier is charging us rental each month for the equipment/ dispensers that are still in your premises/ respective clinics as you are aware that the initial contract was for the period of three years our company has gone into deeper and deeper debts, blacklisted, closing down etc. I appeal to you to reconsider your termination based on our
service history with the Departments/clinics since 2007. I have now renegotiated
the price with our supplier to give us the opportunity to rectify our mistakes and
give you better price as to satisfy your needs and work together we highly
depend on you to come out of this situation please find the attach new price
proposal for next year. May I also inform you that our office lease has been
terminated by the 30th of December 2010 and we are here request you to assist
us with the storage of the dispensers of the following clinics LILIAN NGOYI,
MOFOLO, STRATFORD AND LENASIA SOUTH.

The refills for the month of October, November and December be delivered to the
respective clinics and amount of R234 409, 91x3=R703 229, 73-R295 000=R408
229, 73 is due/ will be charged." [Sic] (Emphasis added)

6.3.2.5. The Complainant had, in any event, obtained the Service Agreements through
questionable means which included the fact that the officials who had signed the
agreements did not understand the implications, follow proper procurement
procedures and acted outside their scope of authority.

6.3.2.6. The Complainant had, according to the state attorney, allegedly over billed,
double billed and fraudulently billed the Department, and at the time of lodging
the complaint, owed the Department an amount of R 295 180.20 due to over
payments made in relation to services provided during the settlement period.

6.3.2.7. The Complainant does not have a claim against the Department as the clinics
had not used the Complainant's services after 30 September 2010 because it
was not possible for the Department's facilities to use CKB's equipment as they
were not compatible with the consumables provided by the Department. The
dispensers were locked and only CKB could open them.

6.3.2.8. A procurement process for the same services in order to replace the expired
service agreements with CKB had commenced and providing a quotation from a
manufacturer, Kimberly Clarke, on the 9th of July 2010 before the expiry of the service agreements with CKB, as evidence.

6.3.2.9. Although the procurement process was not completed and no alternative service provider was appointed, the services of CKB were not used as from October 2010, the clinics were using the Department's consumables. Copies of VA 2 documents were furnished as proof that the clinics had ordered the Department's consumables. VA 2 documents are internal requisition, issue, and receipt vouchers in the Department. Consumables here include hand paper towels, toilet paper, floor polish etc. Only consumables were ordered in terms of the VA 2 documents received from Department.

6.3.2.10. Submitted a statement obtained from Mrs E van Staden, Deputy Director Corporate Services at the Johannesburg Health District, stating that she did not notify various clinics, with a letter dated 4 August 2010, that CKB's service agreements were extended to 30 September 2010. She also referred to a letter addressed to CKB, dated 8 April 2010, notifying them that CKB's service agreements with the clinics were terminating on 30 September 2010 and would not be renewed. However, the letter was unsigned and no proof of its service was provided. The Complainant disputed ever receiving the letter mentioned. These documents were also not in the file inspected by the investigation team before December 2013 and were only availed on 12 December 2013.

6.3.2.11. Submitted that it did not get value from CKB’s hygiene equipment as it did not utilise such equipment. It submitted that:

(a) CKB did not refill the consumables,
(b) Only CKB could access and refill the hygiene equipment and
(c) The clinics bought their own consumables which were not compatible with CKB equipment.
(d) An unsigned letter from the Department dated 8 April 2010 addressed to the Complainant.
6.3.2.12. The Department argued that CKB had no claim against it as it clearly informed CKB that the extended period had ended on 30 September 2010 and it had no intention to extend it further and did not use CKB’s equipment after 30 September 2010.

6.3.2.13. The evidence provided by the Department in support of its version of events included:

(a) A statement from Mrs E Van Staden, Deputy Director Corporate Services at the Johannesburg Health District dated December 2013,
(b) A sample of the original service agreements the clinics entered into with CKB,
(c) A copy of the Complainant’s letter dated 10 December 2010,
(d) CKB’s Invoices,
(e) Advisory notes from the State Attorney.

6.3.3. **Regarding the Departmental letter addressed to Standard Bank:**

6.3.3.1. The Department conceded, as indicated earlier, during meetings and in its correspondence that, a letter purporting to be from it had been addressed to Standard Bank acknowledging debt to CKB in the amount of R1 448 790.06.

6.3.3.2. After initially arguing that the letter was not issued under Mrs N Mekgwe authority, the Department eventually admitted that the letter was issued under her instructions but that she did not have the authority to issue the letter on behalf of the Department.

6.3.3.3. The Department further advised that it was taking disciplinary action against Mrs N Mekgwe in connection with, among others, the said letter.
6.3.3.4. The Department denied any liability arising from the issuing of the letter by Mrs N Mekgwe on account of her having transcended her authority.

6.3.4. *Regarding prejudice suffered:*

6.3.4.1. The Department denied that CKB suffered any prejudice on account of improper conduct by itself.

6.3.5. *In response to the provisional report, the Department:*

6.3.5.1. Reiterated its position that it was not responsible for CKB leaving its equipment at the Department’s clinics beyond the agreed period.

6.3.5.2. Reiterated its position that CKB should never have entered into the Service Agreements with the clinics and that even the out of court settlement was ill conceived.

6.3.5.3. Contended that Mrs N Mekgwe had no authority to issue the letter of commitment to Standard Bank and therefore the Department is not liable for the consequences of such letter.

6.3.5.4. Contended that CKB had no claim against the Department and that CKB owed the Department to the tune of R 295 180.20 arising from over payment to it.
7. EVALUATION OF THE EVIDENCE

7.1. Overview

7.1.1. The parties agreed that the complaint flowed from the implementation of an out of court settlement reached between the Gauteng Department of Health and the Complainant’s company CKB in 2010. The out of court settlement sought to settle a dispute that had been taken to court over the Department’s cancellation of contracts or Service Agreements that CKB had entered into with individual Gauteng Department of Health clinics over a period of time. The Service Agreements had allowed CKB to rent hygiene equipment such as sanitary equipment, which includes air freshener dispensers, hand soap dispensers, foams, soap dispensers, paper towel dispensers, hand dryers, seat sprays, wipe sanitizers and sanitary bins to several clinics spread throughout Gauteng since around 2006. The arrangement was that CKB rents the equipment from an owning company and rents the equipment to the clinics, while taking care of refills and maintenance, where required.

7.1.2. The parties further agreed that the out of court settlement had allowed CKB to continue providing the services until the end of July 2010 and that the Department subsequently extended that period to 30 September 2010. They further agreed that CKB’s equipment remained at the clinics beyond September 2010 following the Complainant’s attempt to get the Department to extend the service period.

7.1.3. The parties further agreed that the Complainant invoiced the Department for the period beyond September 2010. The parties further agreed that subsequent to that, a letter to a financial service institution, Standard Bank, was prepared on the Department’s letter head under the name of Ms N Mekgwe, acknowledging the debt that now forms the basis of the complaint at the core of the investigation.
7.1.4. Worth noting is that the letter in question specifically asked Standard Bank to note that the Department had received invoices from CKB amounting to R1 448 790, 06, was not able to pay that amount at the time, intended to pay the amount to the clinic’s account during April 2011 and requested Standard Bank to “Assist with a fund that will allow them to run their operations without interruption in the meantime.”

7.1.5. The parties also agreed that CKB owed R295 180.20 to the Department which had been overpaid by the clinics for services provided during the period ending on 30 September 2013.

7.1.6. The factual dispute to be resolved through the investigation primarily centred around CKB’s allegation that the retention of its equipment at the clinics beyond 30 September 2010 was the Department’s fault involving the latter’s failure to give CKB a letter authorizing it to collect its equipment from the clinics when the agreed period ended on 30 September 2010. Linked to this allegation by the Complainant was that the Department derived value from the uncollected equipment while CKB was left out of pocket as it continued to pay the rent to the company owning the equipment and bore overhead costs of running its business which principally provided hygiene equipment rental service to clinics.

7.1.7. A related factual dispute arose from the Department’s contention that Mrs N Mekgwe and her PA did not act on its behalf as neither had authority to write the letter to Standard Bank. As noted in the evidence, the Department went further to indicate that disciplinary action was being taken against Ms Mekgwe in connection with the said letter.

7.1.8. Regarding the R295 180.20 owed by CKB to the Department, the Department’s submissions seemed to suggest that the amount had not been deducted from the alleged principal debt to CKB, while the Complainant firmly submitted that the original principal debt was about R1.7 million and Ms Mekgwe had already
deducted the R295 180.20 from the Department’s capital debt thus reducing her
acknowledgement of debt in the Standard Bank letter to R1 448 790, 06.

7.2. Regarding the non-collection of CKB’s Hygiene Equipment from the
Department’s Clinics

7.2.1. It is common cause that:

7.2.1.1. The equipment had been installed at the Department’s clinics on the basis of
service agreements entered directly between CKB and the Department’s clinics
without the Department’s involvement.

7.2.1.2. The out of court settlement and subsequent extension by the Department
consolidated the arrangement into one agreement and the period of such
agreement ended on 30 September 2010, the date on which CKB was entitled to
remove its equipment.

7.2.1.3. When the agreement was extended from end of July to 30 September 2010, the
Corporate Services Department issued a notification to that effect on 04 August
2010.

7.2.1.4. The equipment stayed at the clinics during the period, after 30 September 2010,
for which CKB bases its R2 960 112. 60 claim.

7.2.1.5. No letter was issued by the Department authorising the removal of the
equipment.

7.2.1.6. CKB was never denied access to its equipment or the right to remove it from any
of the clinics.
7.2.1.7. No new service provider had been appointed by the Department to take over from CKB during the period CKB had left its equipment at the clinics.

7.2.1.8. Up until October 2013 a tender has not been issued to properly appoint a service provider.

7.2.2. What was in dispute is:

7.2.2.1. Was it necessary for CKB to be given a letter by the Department authorizing it and would it have been impossible for CKB to collect its equipment without such letter?

7.2.2.2. Did the Department's clinics derive value from the uncollected equipment?

7.2.2.3. Regarding CKB attributing to the non-collection of its equipment and the Department's failure to issue it with a letter authorizing such collection. CKB's argument that they required the letter to remove the equipment, appears reasonable and seems likely that the clinics would have required a letter of authorisation after the 12th to remove the assets from under the clinic's care. On the question of whether not providing such a letter or actively getting CKB equipment out of the premises, I have deferred this to the regulatory framework with a view to measuring such inaction against the principles of good administration.

7.2.2.4. Regarding whether the Department's clinic's derived value from the uncollected equipment, it has already been established that although the Department had commenced the process of procuring CKB's successor, none had been appointed during the period when CKB's equipment remained at the clinics.

7.2.2.5. The question for my determination was whether or not to accept the Department's submission that none of its clinics used the equipment as CKB did not refill required consumables during the period in question and its staff had
keys to refill. The Department states that it resorted to using its own consumables that were incompatible with CKB's equipment.

7.2.2.6. The question could only be resolved by examining the nature of equipment. In relation to equipment such as sanitary bins and toilet paper holders it is difficult to accept the Department's submission that these were not used. How practical is that? Did they place notices to users not to use facilities such as hand dryers? The Complainant submitted that were no keys required to open and use the hygiene equipment as none of the equipment could be locked. I am inclined to accept, on a balance of probabilities, CKB's argument that value was obtained by the Department, through the use of the items listed on CKB's invoice or part thereof.

7.2.2.7. Two years since undertaking to verify the R2 960 112. 60 claim of CKB, the Department has not done so. Instead it submitted three statements dated December 2013 by three employees confirming its version that there was no use. It did not undertake the proper assessment it promised Mrs Sekele and the Complainant.

7.3. Regarding the Department's alleged acknowledgement of CKB Debt to Standard Bank

7.3.1. It is common cause that:

7.3.1.1. At the request of the Complainant, a letter not only acknowledging debt to the tune of R1 448 790, 06 but promising to pay in April 2011 and supporting a loan application was issued in the name of the Department by a PA of the Department's senior official, Chief Director Ms Mekgwe on 7 March 2011.

7.3.1.2. The Complainant's company CKB got credit on the strength of that letter
7.3.1.3. The R1 448 790, 06 was never paid and the Department has since taken the position that CKB is not entitled to that or any money from it.

7.3.2. What was in dispute is:

7.3.2.1. Was the letter issued on Mrs N Mekgwe’s authority?

7.3.2.2. Should Mrs N Mekgwe’s action be ascribed to the Department?

7.3.2.3. Regarding whether the letter was issued on Mrs N Mekgwe’s authority, her denial of instructing her PA is contradicted by the handwritten draft of the Standard Bank letter that she wrote and gave to the PA to type. I have accordingly accepted that, the letter was issued on her authority. I must also indicate that I take note of her attempt not to take responsibility and shift the blame to the PA. I’m particularly saddened that our investigations have come across a few like her who shameless pass the buck on to hapless junior staff. That is grossly inappropriate.

7.3.2.4. Regarding whether the letter should be attributed to and liability arising there from assigned to the Department, this is a matter of law rather than fact. What is clear from the evidence is that Mrs N Mekgwe acted in her capacity as Chief Director and represented herself to the Complainant and Standard Bank as competent to act on behalf of her Department in the manner she did. It is worth noting that a Chief director is a very senior official in government, the position being only two ranks below the highest rank in the civil service.

7.4. Regarding the issue of prejudice to the Complainant
7.4.1. The determination of prejudice to the Complainant requires a combination of factual considerations and legal or regulatory framework considerations. On the evidence, CKB must have continued to incur rental costs in respect of the equipment, as it was rented equipment. It is also common cause that CKB secured a loan as bridging funding from a financial services institution on the strength of what it understood to be a firm undertaking by the Department, which loan clearly incurred interest.

8. LEGAL AND REGULATORY FRAMEWORK

8.1. General principles regarding improper conduct and maladministration

8.1.1 As the Constitution gives the Public Protector the power to investigate improper conduct in all state affairs or the public administration, it is reasonable to infer that it prohibits improper conduct while requiring proper conduct from those who act on behalf of the state or “state actors”.

8.1.2 In the same token the Public Protector Act’s recognition of the Public Protector’s power to investigate maladministration and improper prejudice must have as a corollary a requirement that the conduct of state actors should be the opposite of maladministration and prejudice.

8.1.3 What is clear is that maladministration refers to the manner in which state actors should not conduct themselves while improper prejudice relates to how they should not treat the public or those affected by the conduct in question. If maladministration is prohibited, it must follow that good administration is prescribed. In the same token, fair and just treatment of those impacted by administrative decisions of state actors must be expected as the opposite of improper prejudice.

8.1.4 In order to determine whether the conduct of the Department and individual state actors involved was improper, constituting maladministration or prejudicial to the
Complainant, some yard stick had to be used to determine the standard that should have been met for the conduct to qualify, so to speak, as proper conduct devoid of maladministration and improper prejudice. This is the determination of what should have happened, which is made by appealing to the regulatory framework that would have set out the standard that should have been met.

8.1.5 What standard should have been met by the Department to avoid improper conduct and maladministration?

8.2 Regarding the Gauteng Department of Health improperly causing the Complainant’s hygiene equipment to remain in its Health Services Centres (clinics) after the period agreed on in an out of court settlement:

8.2.1 Duty Imposed by Supply Chain Management Prescripts

8.2.1.1 To avoid improper conduct or maladministration, the Department should have complied with supply chain management prescripts and such prescripts are found in the Constitution, the law, regulations, Treasury Guides and policies, including institutional policies.

8.2.1.2 Accordingly, in dealing with CKB, including the handling of the removal of its hygiene equipment from its clinics, the Department should have complied with the constitution and the law. It is worth noting that the Constitution imposes a duty on all organs of state to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Section 217 of the Constitution states that:

"(1)When an organ of state in the national and provincial or local sphere of government or any institution identified in national legislation contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."
8.2.1.3 The Department's failure to take decisive action to either sever ties with the Complainant's company and/or adjudicate with finality its suspicions on wrongdoing by the said company regarding billing needs to be measured against constitutional dictates regarding good administration. Section 195 of the Constitution, laying down principles of public administration, further requires that all administrative actions of the state, which include the procurement of goods and services, to comply with values and principles governing good administration. In this regard, the Department's conduct regarding the non-removal of CKB's hygiene equipment from its clinics should have complied with the requirement that:

"195 (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including:
   (a) A high standard of professional ethics must be promoted and maintained.
   (b) ...
   (c) Public administration must be development oriented
   (d) Services must be provided impartially, fairly, equitably, and without bias
   (e) ...
   (f) Transparency must be fostered by providing the public with timely, accessible and accurate information."

8.2.2 Duty arising from government policy on treatment of small enterprises

8.2.2.1 The second key prescript that the Department should have complied with is a prescript requiring that state contractors be paid within 30 days. Section 38 of the PFMA, provides that:

"(1) The accounting officer of a department, trading entity or constitutional institution-
   (a) Must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period..."
8.2.2.2 Compliance with this standard requires competent authorities to ensure that goods and services in state affairs are procured in the prescribed manner and that when it is time to pay, service providers are paid for their services without delay. Payment can only be timely if there is a proper contract management system with disputes minimised. Government further places emphasis on the timely payment of small enterprises to the point of requiring government departments to regularly report to the Monitoring Unit in the Presidency on the state of compliance with this responsibility.

8.2.2.3 It is also worth noting that complying with the Constitution and the law would have created a possibility for a clean break with CKB and procurement of a new tender, thus avoiding leaving the Complainant in limbo regarding the future of his company’s business dealings with the clinics.

8.3.3 On the Complainant’s argument that the Department derived value and must pay for it

8.3.3.1 Although not on all fours, the doctrine of unjustified enrichment offers the best benchmark for use in determining the link between the retention of the Complainant’s property at the Department’s clinics and the Complainant’s claim for usage during that period.

8.3.3.2 The general requirements for unjustified enrichment to be present as set out in Portion 29 Golden Highway (PTY) LTD v Patel and Patel are 1) enrichment on the part of the person being asked to pay 2) impoverishment on the part of the claimant 3) the enrichment of the person being asked to pay must be at the expense of the claimant 4) the enrichment must be unjustified.

8.3.3.3 I am mindful of the fact that mine is to make a determination of maladministration and prejudice and not unjustified enrichment. I have accordingly cautiously veered into unjustified enrichment to find an equivalent situation where there was
no agreement for continued possession and probable use of goods or services but it happened and the owner now claims compensation. Having drawn a lot of insights from Visser (at p670), on the subject of enrichment and circumstances where payment is justified, I found the following comment by Visser instructive:

"...where a possessor uses property in terms of previous dealings between himself and the owner, but the original agreements does not cover that use, the owner should, irrespective of whether the possessor gave value or not, be able to recover on the basis of the possessor's enrichment, which would normally be represented by a reasonable rental for the property (which he saved by infringing the rights of the defendant)."

8.3.3.4 According to the principles of enrichment, where a contract expires, but the parties continue to act as if the contract is still in working, the one would have a claim against the other should there be value derived from such dealings.

8.4 Regarding the propriety of the Gauteng Department of Health representing Standard Bank that it owed the Complainant about R1 448 790.06 and later refusing to pay:

8.4.3 The closest principle against which the Department's accountability for Mrs N Mekgwe's actions could be benchmarked is the doctrine of vicarious liability. This is the doctrine that allows, among others, victims of hospital malpractice by doctors and nurses to claim against the national and provincial Departments of Health.

8.4.4 As a general rule an employer is vicariously liable for the wrongful acts or omissions of an employee committed in the course and scope of the employment. Thus the Department can be held liable for the wrongful act committed by one of its employees if that act was committed during the course and scope of employment.
8.4.5 Personal Accountability for Mrs N Mekgwe

8.4.5.1 Without avoiding institutional accountability, Mrs N Mekgwe should be held accountable for her actions. Like all government officials, Mrs N Mekgwe’s conduct should have complied with the Constitution, the law and related procurements prescripts.

8.4.5.2 As stated previously section 38(2) of the PFMA provides that an accounting officer or his delegate may not commit a Department to any liability for which money has not been appropriated. This means that, Mrs N Mekgwe as an employee had no authority to commit the Department unless she had been appointed as the accounting officer or delegated by the accounting officer to do so.

8.4.5.3 Mrs N Mekgwe also had a duty to ensure that before, committing to pay, the authorised supply of services had been regularised.

8.5 Regarding the prejudice allegedly suffered by the Complainant due to the Department’s alleged improper conduct:

8.5.1 Section 182(1) (c) of the Constitution, gives the Public Protector the power to take appropriate remedial action. Appropriateness is a situational enquiry informed by the impact of maladministration on the complainant and the circumstances under which the maladministration occurred.

8.5.2 As in the adjudication of delictual claims in the courts, it is inevitable that the question whether or not the Complainant played a role in inviting misfortune or failed to mitigate his or her loss must be asked. If the answer is affirmative, some apportionment of responsibility takes place. We refer to this as the “Clean Hands Rule”. Where the Complainant can be partly held responsible for the prejudice he or she suffered or failed to mitigate its impact, this is taken into account in determining
the most fair way to place him or her as close as possible to where he or she would have been had there been no maladministration or improper conduct.

8.5.3 Having determined in this case that both the Department and CKB could have avoided some of the Complainant’s prejudice or loss, the principle of fairness is paramount to deciding what would be the appropriate remedial action as envisaged in section 182(1)(c) of the Constitution.

9 ANALYSIS AND CONCLUSION

9.1 General Principles

9.1.1 After determining what happened through analysing and evaluating evidence and determining what should have happened had there been compliance with the regulatory framework, I had to decide if there had been a discrepancy between the manner in which the Department managed its relationship with CKB and the standard of good administration the Department should have met in compliance with the law and related prescripts.

9.1.2 I also had to use the same logic to determine if the Complainant had been prejudiced in the manner alleged by him and if so what it would take to place him and his company CKB as close as possible to where it would have been had the Department acted properly and in accordance with principles of good administration.

9.1.3 The investigation also found it difficult to overlook the conduct of the Department regarding the general mismanagement of the transition from the maligned CKB Service Agreements to properly procured hygiene equipment and related services contracts. Apart from giving attention to such as part of my responsibility as Public Protector to go beyond a complaint where necessary, the failure to timely conclude the proper procurement process meant CKB could not have attempted to avail its services through that process.
9.2 Regarding the Department failing to supply a letter permitting removal of CKB’s hygiene equipment from its clinics and general management of the transitional process:

9.2.1 CKB’s argument that it needed a letter from the Department authorising it to remove its equipment has not been supported by evidence. There is no law which prohibited the Complainant from approaching the clinics with the original service agreements and the out of court settlement agreement in an attempt to recover the equipment.

9.2.2 However, a letter would have assisted with gaining access and removing the equipment from clinics and would have subsequently mitigated the period during which the equipment remained in the Department’s possession.

9.3 Regarding the allegation that the conduct of the Gauteng Department of Health improperly caused the Complainant’s hygiene equipment to remain in its Health Service Centres (Clinics) after the agreed period

9.3.1 The question that must be answered is whether CKB’s hygiene equipment would have remained in the possession of the Department’s clinics 20 months after 30 September 2010, the date on which the agreed period of service ended, had the Department’s accounting officer and officials delegated by him or her, including Mrs N Mekgwe, complied with their responsibilities in terms of sections 217 and 195 of the Constitution as well as section 38 of the PFMA, Treasury regulations and its own procurement and financial management and risk management policies.

9.3.2 Section 217 enjoins the Department and other organs of state to ensure, when procuring goods and services, that it does so “in accordance with a system that is fair, equitable, transparent, competitive and cost effective”. Was the handling of the CKB’s contract fair, equitable, transparent and competitive?
9.3.3 Can the Department’s conduct regarding failure to take decisive action to achieve a clean break with the Complainant and refusal to pay his claim for services provided without properly assessing such claim, be regarded as complying with the standard required of it by the Constitution, particularly the principles of public administration in section 195, which include the highest standard of professional ethics, developmental orientation and the provision to the public of timely, accessible and accurate information?

9.3.4 It also worth noting that the provisions of sections 217 and 195 of the Constitution read with section 38 of the PFMA and Treasury Regulations place a specific responsibility on the Department and organs of state and officials therein, particularly accounting officers, to manage the procurement of services in a fair, transparent and efficient manner that limits liabilities to the state while preventing undue harm or prejudice to state contractors while promoting effective, economic and efficient administration of public funds. Thus, the Department had a greater duty to curb any further incurring of liabilities or debt relating to the original service agreements and subsequent out of court settlement.

9.3.5 As noted in the evaluation of evidence, his claim has never been properly assessed despite Mrs N Mekgwe having accepted the original claim following the first few months of unauthorised service. This brings the issue of just administrative action. In terms of section 33 of the Constitution, the Complainant was entitled to a better treatment than being the subject of gossip and innuendos regarding false billing, over billing and getting contracts through questionable means. While on the issue of the CKB service agreements, despite having decided not to investigate the original CKB Service Agreements and out of court settlement, I examined one of these in the presence of the Department’s accounting officer and legal team and found no evidence of under handedness on the part of the Complainant or CKB.

9.3.6 The failure to subject CKB to a process to determine whether or not it has conducted itself dishonestly, in violation of the standard set for the Department by section 38 of
the PFMA, has had the effect of excluding CKB from the anticipated tender on the hygiene equipment and related services for Gauteng clinics and possibly other procurement opportunities, which can't be fair.

9.4 Regarding the Department’s liability to pay CKB for the retention of its hygiene equipment

9.4.1 Having determined that the Department’s failure to meet the standard set for it by the Constitution and the law enabled the continued retention and likely use of CKB’s hygiene equipment in clinics where these had been placed on the basis of lapsed service agreements, the question to be answered was whether or not the Department had a duty to pay for the period post 30 September 2010.

9.4.2 It cannot be reasonably said that the four elements required for unjust enrichment cannot be established in the present case. During the period on which the Department failed to take decisive action to make a clean break with CKB the following obtained:

- **Enrichment:** The Department was enriched in that it did not spend on the unpaid services of CKB, by its own admission, buying only consumables, thus making a saving. CKB’s property in the form of hygiene equipment remained in the possession of the Department and despite the Department’s denials backed by 3 affidavits obtained in December 2013, the clinics probably used the hygiene equipment such as sanitary bins after 30 September 2014.

- **Impoverishment:** While the Department got an unpaid albeit unsolicited service, the Complainant was impoverished in that that he had to pay rental to the company owning the equipment, pay company overheads and service a bank loan.
- **Enrichment at expense of the Complainant:** By taking too long to finalise the tender process and allowing a situation where the clinics only bought consumables the Department placed itself in the position of benefiting at the expense of the Complainant. It's worth noting here that the Department provided no evidence to prove it told clinics not to use CKB's equipment and since such equipment was never taken to store rooms, there is no guessing that visitors and staff in clinics used whatever was usable without CKB's involvement.

- **Unjustified:** The Department's conduct is clearly unjustified. Making a saving at the expense of another is unjust and it is even worse if that other is a small business person, a group government has committed itself to support with a view to advance the economy while creating jobs. No reasonable explanation has been provided to explain why the tender process was not concluded by 30 September 2010 or why no decisive action was taken to sever ties with CKB. It must be noted here though that while CKB's failure to remove its equipment deprived it of a clean hands situation, its behaviour is partially understandable as, by the failure to conclude the tender process, the Department left CKB with some legitimate expectation that it was a possible supplier of services under the anticipated tender.

9.5 Regarding alleged impropriety by the Gauteng Department of Health on account of Mrs N Mekgwe's representation to Standard Bank that it owed the Complainant R1 448 790.06 and the Department later refusing to pay:

9.5.1 On a day to day basis organs of state are held liable for acts and omissions of their employees who harm other in the course of discharging their employment responsibilities. In delictual claims this is usually achieved through the application of the doctrine of vicarious liability.
9.5.2 Regarding the Department dissociating itself from the actions of its employee Mrs N Mekgwe, it is clear that Mrs N Mekgwe acted during the course and scope of her employment. Alternatively she represented to Standard Bank and the Complainant that she acted during the course and scope of her employment which representation led to Standard Bank extending the loan and the Complainant accepting same.

9.5.3 If the requirements of vicarious liability are met with regard to Mrs N Mekgwe's actions regarding the letter of Acknowledgement of Debt, the Department of Health would be held liable for Mrs N Mekgwe's wrongful acts. The wrongful act in this case would be that the Complainant obtained a loan on the strength of the representation made by Mrs N Mekgwe.

9.5.4 I have decided not to make a determination on the Department's dissociation of itself from Mrs N Mekgwe's conduct on account of her exceeding her authority, although I take a very deem view of this act of “passing the buck”. The question I have decided to focus on is the propriety of the Department's conduct in arriving at its decision not to honour Mrs N Mekgwe's undertaking to the Complainant and Bank and failure to assess CKB's claim with finality to date.

9.5.5 The Department's conduct again cannot be said to have met the standard set for it by sections 195 and 217 of the Constitution, section 38 of the PFMA, Government policy on the payment of small enterprises and the principles of just administrative action.

9.5.6 To date the Department has no definite answer on whether or not some of CKB's hygiene equipment was used. Submitting to my office 3 affidavits in respect of the service centres cannot constitute an assessment as promised two (2) years ago by the Department. The conduct of the Department clearly cannot be found to be fair or reasonable.
10 FINDINGS

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

10.1 Regarding whether the Gauteng Department of Health improperly caused the Complainant's hygiene equipment to remain in its Health Services Centres (clinics) after the period agreed on in an out of court settlement, I find that:

10.1.1 The Department failed to take resolute action to get the Complainant's company CKB to remove its equipment from its clinics and to prevent the continued use of CKB’s hygiene equipment thus causing the clinics to continue to benefit from the Complainant's property beyond the agreed service period.

10.1.2 On a balance of probabilities, some of the complainant's equipment, including sanitary bins, continued to be used by the clinics from 01 October 2010 until date of removal.

10.1.3 Having decided that it would not pay CKB the money it had initially determined to be owed to CKB for rental beyond 30 September 2010, the Department failed to verify the equipment rental claim and to adjudicate it timely to ensure that payment or a determination on payment was done within 30 days as required under Regulation 8.2.3 of Treasury Regulations issued under the PFMA during March 2005.

10.1.4 The impact of the Department's action is that it failed to subject the Complainant to an appropriate procurement system that is fair, equitable, transparent, competitive and cost-effective in violation of section 38 of the Public Finance Management Act. It equally failed to provide the Complainant with timely, accurate and accessible information regarding the claim he believed to have against it, in violation of section 195(1)(g) of the Constitution.
10.1.5 From a general governance point of view, the Department failed to ensure financial risk management and to prevent unauthorised and irregular expenditure in violation of section 38 of the Public Finance Management Act and to ensure efficient, economic and effective use of public resources in violation of section 195 of the Constitution.

10.1.6 The Department's conduct regarding failure to take decisive action to prevent the unauthorised retention of the Complainant's hygiene equipment after 30 September 2010 and to adjudicate his claim for payment properly and expeditiously, constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

10.2 Regarding whether the Gauteng Department of Health improperly represented to Standard Bank that it owed the Complainant R1 448 790.06 and which it later improperly refused to pay, I find that:

10.2.1 Mrs N Mekgwe, a Chief Director in the Gauteng Department of Health, issued, in her capacity as such, a letter: Acknowledging that the Department owed CKB the sum of R1 448 790.06 for work done for the Department; stating that the Department was not in the position to make this payment to CKB and that a payment would be made into the accounts of a clinic in April 2011 and; requesting the bank to assist CKB with bridging funding to allow it to run its operations without interruptions in the meantime.

10.2.2 It does not matter in the circumstances whether the Department vicariously incurred liability through Mrs N Mekgwe's actions. All that matters in the circumstances is that a senior manager of the Department made a written undertaking that placed the Complainant in a position where he legitimately expected to be paid shortly and on the strength of the promise incurred further debt instead of cutting his losses.
10.2.3 Mrs N Mekgwe's issuing of the letter of commitment to Standard Bank without properly adjudicating CKB's claim and following the necessary authorisation procedure for regularising unauthorised expenditure constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 (1) of the Constitution.

10.3 Regarding whether the conduct of the Gauteng Department of Health prejudiced the Complainant, I find that:

10.3.1 The Department probably continued to use and derive value from the continued possession and use of some of the hygiene equipment by its clinics while the complainant suffered a financial detriment principally due to the rental he continued to pay to the principal renting company and business overheads.

10.3.2 The Department's failure to competently and expeditiously assess the Complainant's claim while failing to pay for a period of four (4) years has also prejudiced the Complainant.

10.3.3 The Complainant was treated unfairly and suffered an injustice or prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act when Mrs N Mekgwe negligently communicated an acknowledgement of debt to Standard Bank without properly assessing the Complainant's claim and regularising the unauthorised expenditure that would have arisen from expenses incurred by the Department for rental beyond 30 September 2010 as such expenses would have been incurred without an agreement or proper approval.

10.4 Additional Maladministration Observations

10.4.1 The Department failed to the manage the exit of CKB's services from its clinics and to ensure a seamless transition to properly procured hygiene equipment and related
services in its clinics thus prejudicing the Complainant from competing in an open
tender process that should have taken place by 30 September 2010;

10.4.2 The Department’s untidy handling of the procurement of hygiene equipment and
related services in pursuit of the out of court settlement in 2010 has, without doubt,
risked systemic service failure regarding the provision of hygiene equipment and
related services at the affected clinics. It is worth noting that such equipment and
services form a critical part of the National Department of Health’s efforts aimed at
cleanliness and preventing infections in clinics and hospitals as part of its national
priorities that are linked to Millennium Development Goals.

10.4.3 The conduct of the Department regarding the poor handling of the procurement of
hygiene equipment and related services for affected clinics constitutes
maladministration as envisaged in section 6 of the Public Protector Act and
improper conduct as envisaged in section 182(1) of the Constitution.

11 REMEDIAL ACTION

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

11.1 The Head of Department must:

11.1.1 In consultation with the Complainant, subject CKB’s invoices submitted in March
2012 (totalling to R 2 960 112.60) to an audit process and determine a reasonably
payable amount for rental chargeable for the period starting on 1 October 2010
until the equipment was removed, taking into consideration the overpayment
already made to the Complainant in the amount of R 295 180.20, and pay the Complainant accordingly within sixty (60) days after the issuing of this report.

11.1.2 Take urgent action to ensure that finality is attained regarding the procurement of hygiene equipment and related services for affected clinics, giving serious consideration to purchasing things that should ideally not be rented and where rental is opted for, to rent from a manufacturer rather than a middle company.

11.1.3 Expeditiously finalise disciplinary proceedings currently underway against Ms Mekgwe in terms of section 38(1)(h) of the Public Finance Management Act, 1999.

11.1.4 Ensure that all of its management and general staff, including those in health centres, are trained on the correct Supply Chain and Procurement Processes and Procedures in order to avoid the recurrence of a similar matter in the future.

11.2 The MEC to:

11.2.1 Request the Auditor General to audit all payments made in respect of hygiene equipment and related services in hospitals and clinics;

11.2.2 Decide whether or not disciplinary action should be taken against all the officials who are responsible for exposing the Department to unauthorised expenditure and other financial risks in violation of the PFMA and

11.2.3 Look into a possible systemic deficiency within the Department of Health regarding the payment of monies owed to service providers, particularly small business enterprises as non-payment contributes to their demise and loss of jobs.
12 MONITORING

12.1 The Public Protector must be advised of the response from the Gauteng Provincial Department of Health, including action plan and timeframes within 30 days after this report was issued.

12.2 The implementation of the remedial actions should be finalised within 60 days after this report is issued.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30 June 2014

Assisted by: Mr Malose Malapile, Senior Investigator: Gauteng Provincial office and Ms Dinkie Dube, Provincial Representative: Gauteng Provincial office.