THEY CALLED IT JUSTICE

Report on an investigation into the alleged failure by the Department of Justice and Constitutional Development to protect a whistleblower (an employee) who made a protected disclosure in terms of the Protected Disclosures Act, 2000

Report No: 23 of 2012/13
## INDEX

**Executive summary** 3

1. INTRODUCTION 10
2. THE COMPLAINT 11
3. POWERS & JURISDICTION OF THE PUBLIC PROTECTOR 12
4. THE INVESTIGATION 13
5. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION 15
6. EVALUATION OF THE EVIDENCE AND INFORMATION RECEIVED DURING THE INVESTIGATION 33
7. LEGAL AND REGULATORY FRAMEWORK 37
8. ISSUES TO BE DECIDED BY THE PUBLIC PROTECTOR 45
9. RESPONSE TO THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR 46
10. CONCLUSION 48
11. FINDINGS 51
12. REMEDIAL ACTION 52
13. MONITORING 55
Executive Summary

(i) "They called it Justice", is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act). It deals with the Public Protector’s findings following an investigation and partial conciliation involving allegations of a failure by the Department of Justice and Constitutional Development (the Department) to protect an employee (a whistleblower) in terms of the Protected Disclosures Act, 2000 (the Protected Disclosures Act).

The Complaint

(ii) The Complainant approached the Public Protector on 3 September 2010 alleging that she had made a “protected disclosure” and suffered an “occupational detriment” as defined in section 1 of the Protected Disclosures Act. The Complainant further alleged that as a result of the “occupational detriment”, she suffered occupational stress and was treated by three medical practitioners (including those by her employer) who confirmed that she was suffering from occupational stress.

(iii) After the Public Protector facilitated a settlement which incorporated back payment of the Complainant’s salary up to 31 March 2011 and resumption of employment on 1 April 2011, the Complainant lodged a further complaint alleging that the Department had failed to implement the terms of the agreement and that she was subjected to further harassment in the form of various contradictory correspondence which she received from different officials.

(iv) The Complainant further alleged that as a result of the failure by the Department to implement the agreement she has suffered enormous prejudice,
including foreclosure on her house, exacerbated health problems and cancellation of her medical aid. Her children have also been traumatised.

Issues and Processes

(v) The following were issues for the Public Protector’s consideration:

(a) Did the Complainant make a protected disclosure and suffer occupational detriment as defined in terms of the Protected Disclosures Act?
(b) In its dismissal of the Complainant, did the Department violate the Protected Disclosures Act and the Labour Relations Act?
(c) Did the Department comply with the PILIR and the Labour Relations Act when they terminated the Complainant’s employment while she was still consulting with the clinical psychologist?
(d) Did the failure by the Director-General to implement the terms of the settlement agreement, post settlement constitute maladministration?
(e) Did the Complainant suffer enormous prejudice as a result of failure by the Department to implement settlement agreement?
(f) Are the actions of the Department regarding the Complainant’s protected disclosure and the occupational detriment, termination of her salary, dismissal and failure to implement the terms of the agreement procedurally and substantively consistent with the value system and human dignity as set out in the Constitution?

(vi) Subsequent to issuing a provisional report on the outcome of this investigation The Director-General agreed to re-integrate the Complainant into the Department and therefore the remedial action contained in this final report incorporates the undertakings made by the Department in this regard.
(vii) The Public Protector’s findings in relation to the complaint are the following:

(a) The Complainant made a protected disclosure as defined in section 1 of the Protected Disclosures Act on 28 May 2004.

(b) The Department’s management failed to protect the Complainant against victimization from her superiors and fellow employees, by ignoring the issues reported by the Complainant and failing to take action against employees implicated. As a result, the Complainant has suffered occupational detriment as defined in section 1 of the Protected Disclosures Act.

(c) The Department’s refusal to transfer the Complainant to another office constitutes further “occupational detriment” as defined in section 1 of the Protected Disclosures Act.

(d) The Department’s management has failed to comply with the sections 2 and 3 of the Protected Disclosures Act which required it to protect the Complainant against occupational detriment. This non-compliance amounts maladministration.

(e) The termination of the Complainant’s salary by the Department and her subsequent dismissal while she was in consultation with medical practitioners appointed by the Department contravenes item 10(1) of Schedule 8 to the Labour Relations Act and the PILIR.

(f) The Complainant’s dismissal amounts to an automatically unfair dismissal as stipulated in section 4(1) of the Protected Disclosures Act and section 187 of the Labour Relations Act.
(g) In its dismissal of the Complainant, the Department failed to comply with section 17(1) of Public Service Act, which requires that termination of service or dismissal should be in accordance with the Labour Relations Act.

(h) Failure by the then Director-General to ensure that the provisions of section 17(1) of the Public Service Act were followed prior to and when the Complainant’s contract was terminated, amounts to non-compliance with the Public Service Act, the Labour Relations Act, the Protected Disclosures Act and PILIR and thus amounts to maladministration.

(i) The Director General has failed to ensure that the terms of the settlement agreement entered into with the Public Protector were implemented, and this amounts to a violation of section 181(3) of the Constitution and the Public Protector Act.

(j) As a result of maladministration by the Department, the Complainant has suffered enormous prejudice, including foreclosure on her house, exacerbated health problems and cancellation of her medical aid. Her children have also been traumatised by the situation. The treatment received by the Complainant was not in line with the value of human dignity as provided for in the Constitution.

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

(a) The Minister and the Director-General of the Department must take urgent steps to ensure that the following undertaking made by the Department to re-integrate the Complainant is implemented within 30 days from the date of this report:
(aa) Subject to negotiations with the Complainant, explore the following placement options based on her skills:

(i) Option A: Re-instatement to the Masters Office in Bisho
(ii) Option B: Re-instatement to State Attorney in Bisho
(iii) Option C: re-instatement to the Regional Office in East London

(bb) Re-instate the Complainant with her full salary and benefits as is her entitlement by operation of the law which includes her salary being backdated to 01 March 2010 and paid with interest as provided for by the Prescribed Interest Rate Act 55 of 1975.

(cc) Upon the Complainant’s re-instatement on 1 March 2013:

(i) Negotiate the terms and conditions of her re-integration with her with regard to the three placement options above;
(ii) Provide her with an orientation programme;
(iii) Provide Organisational development and EAP diagnostics of the agreed environment (for readiness purposes) and individual readiness. Support provided throughout the various stages of her re-integration in to the Department. This support is not limited to but it is inclusive of change management, counselling, training and development;
(iv) Her progress throughout the re-integration will be subject to continuous monitoring and evaluation; and
(v) A mentor and confidante will be provided to Ms Msimang to ensure that she has a channel to communicate her needs in an environment that she feels secure. A mentor, who will be a
Departmental official, will be provided to guide her assimilation into the division that she will be placed.

(b) In addition to the above undertaking made by the Department the Minister and the Director-General must take urgent steps to ensure that:

(aa) A letter of apology is submitted to the Complainant to apologise for the maladministration referred to above;

(bb) In line with the provisions of section 16A(2) of the Public Service Act, immediately take appropriate disciplinary steps against employees who failed to comply with the provisions of the Public Service Act;

(cc) The Department appropriately deals with the allegations of corruption within the Guardian’s Fund that were raised by the Complainant, with a view to ensuring that there is proper financial management in the offices of the Master KZN of the High Court and how to prevent a re-occurrence; and

(dd) The Public Protector and Parliament is furnished with a detailed report on steps taken by the Department to address corruption and maladministration in the offices of the Master of the High Court of South Africa.

(c) The Minister of Justice and Constitutional Development is to engage with the Minister of Public Service and Administration in order to determine the feasibility of the Complainant’s transfer to another department or organ of state should the Complainant not be satisfied with the re-instatement options offered to her.
(ix) The Public Protector will monitor the progress made with the implementation of the remedial action above by requiring from the Minister and the Director-General:

(a) An action plan on the manner in which the Department intends implementing the remedial action referred to above within 30 days from the date of this report.

(b) An implementation report on the implementation of the remedial action referred to above within 60 days from the date if this report
REPORT ON AN INVESTIGATION INTO THE ALLEGED FAILURE BY THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT TO PROTECT A WHISTLEBLOWER (AN EMPLOYEE) WHO MADE A PROTECTED DISCLOSURE IN TERMS OF THE PROTECTED DISCLOSURES ACT, 2000

1. INTRODUCTION

1.1 "They called it justice", is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act). It deals with the Public Protector’s findings following an investigation and partial conciliation involving allegations of a failure by the Department of Justice and Constitutional Development (the Department) to protect an employee (a whistleblower) in terms of the Protected Disclosures Act, 2000 (the Protected Disclosures Act).

1.2 The Report is submitted to:

1.2.1 The Minister of Justice and Constitutional Development;

1.2.2 The Director General of the Department of Justice and Constitutional Development; and

1.2.3 The Speaker of the National Assembly.

1.3 Copies of the report are also distributed to:

1.3.1 Mrs. TP Msimang, the Complainant;

1.3.2 The Director-General in the Presidency as the Chairperson of Forum of South African Director Generals (FOSAD); and
1.3.3 The Minister in the Presidency responsible for Monitoring and Evaluation.

2. THE COMPLAINT

2.1. On 3 September 2010, Mrs TP Msimang (the Complainant) lodged a complaint with the Public Protector against the Department, in which she alleged that she made a “protected disclosure” and suffered “occupational detriment” as defined in the Protected Disclosures Act.

2.2. In her complaint she alleged the following:

2.2.1. She was dismissed by the Department despite the fact that she was at the time consulting with medical practitioners appointed by the Department regarding a psychological condition which she developed as a result of occupational stress;

2.2.2. Prior to her dismissal, she had requested the Department to transfer her to a different environment as she was unable to work in her current position due to the occupational stress she experienced;

2.2.3. The Department terminated her salary long before the date of her dismissal and as a result, her medical aid benefits were suspended and she could not have access to reasonable medical assistance;

2.2.4. Subsequent to the Public Protector’s facilitation of a settlement agreement through alternate dispute resolution processes with the Department and the Complainant, the Complainant submitted another complaint in which she alleged that the Department had failed to implement the terms of the settlement agreement and that she was subjected to further harassment in
the form of contradictory correspondence which she received from various officials in the Department.

2.2.5. As a result of failure by the Department to implement the agreement, she has suffered enormous prejudice, including foreclosure on her house, exacerbated health problems and cancellation of her medical aid. Her children have also been traumatized.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. Section 182 of the Constitution provides that the Public Protector has the powers to:

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

3.1.2 Report on that conduct; and

3.1.3 Take appropriate remedial action.

3.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.

3.3 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, alleged:

3.3.1 Maladministration in connection with the affairs of government at any level; and
3.3.2 Improper conduct by a person performing a public function.

3.4 The Public Protector may, in terms of section 8(1) of the Public Protector Act, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

3.5 In determining whether the conduct complained of was improper or constituted maladministration or any of the violations envisaged in the Public Protector Act, the Public Protector compares the conduct of the government entities and officials complained of against the relevant legislation and other prescripts, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness and transparency as measured against local and international best practice.

3.6 The complaint lodged and the allegations made against the officials of the Department fall within the jurisdiction and powers of the Public Protector.

4. **THE INVESTIGATION**

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

4.1 **The Scope of the Investigation**

4.1.1 The scope of the investigation was restricted to the period from April 2004, when the Complainant was appointed by the Department, up to the conclusion of the investigation referred to in this report, in November 2012.
4.2 Method of gathering evidence

4.2.1 Interviews conducted

Interviews were conducted with:

4.2.1.1 The Complainant;
4.2.1.2 The Director of Labour Relations, Mr D Muzwayine; and
4.2.1.3 The Assistant Director: Labour Relations, Mr T Mabitsela.

4.2.2 Analysis of documentation and information

The following relevant documents were perused and analysed:

4.2.2.1 The written complaints lodged by the Complainant;
4.2.2.2 Correspondence between the Complainant and the former Deputy Master, Master of the High Court, Pietermaritzburg, Ms Sehemo;
4.2.2.3 Correspondence between the Complainant and the former Master of the High Court, Pietermaritzburg, Mr Vahed;
4.2.2.4 Correspondence between the Complainant and the former Senior Manager, Finance, Department, Mr M Khasumba;
4.2.2.5 Correspondence between the Complainant and the former Director General of Department, Adv M Simelane; and
4.2.2.6 Correspondence between the Complainant and the Director of Labour Relations, Department, Mr D Muzwayine.

4.2.3 Correspondence considered

Correspondence between the Public Protector and:
4.2.3.1 Officials from the Department;
4.2.3.2 The Director General of the Department; and
4.2.3.3 The Minister of Justice and Constitutional Development.
4.2.3.4 Legislation and other Prescripts
4.2.3.5 The Constitution of the Republic of South Africa, 1996
4.2.3.6 The Public Protector Act, 1994
4.2.3.7 The Protected Disclosures Act, 2000
4.2.3.8 The Labour Relations Act, 1995 (the LRA)
4.2.3.9 The Public Service Act, 1994
4.2.3.10 The Public Service Regulations, 2001
4.2.3.11 The Policy and Procedure on Incapacity Leave and ill-health Retirement

5 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

The following is an analysis of the evidence and information relied upon as supported by the relevant documentation obtained.

5.1 Common Cause & Disputed Evidence

*The Complainant's Disclosure and Occupational Detriment*

5.1.1 The Complainant was employed by the Department from 1 April 2004. During the first months of her employment, she discovered that certain officials were misappropriating funds from the Guardians Fund.

5.1.2 On 20 April 2004, twenty days after the Complainant commenced her employment, Inspector T Harding from the South African Police Service (SAPS) sent a letter to the Deputy Master: Guardian's Fund, Ms L Sehemo, informing her that the SAPS had received a number of complaints relating to stolen cheques and the Master’s office should stop sending cheques by post.
5.1.3 Misappropriation of funds included \textit{inter alia} the following:

(a) payment of funds to non-existing beneficiaries;

(b) payment of funds to Tracing Agents (under the pretences that the beneficiaries were untraceable); and

(c) sending of empty envelopes to beneficiaries (the officials would then keep the original cheques).

5.1.4 On or about 28 May 2004, the Complainant submitted a memorandum to Ms L Sehemo, the Master, Mr F Vahed, and the Senior Manager Finance, Mr M Khasumba wherein she identified issues relating to financial mismanagement and lack of proper application of financial principles at the Guardian's Fund, the Master of the KZN High Court, Pietermaritzburg.

5.1.5 The memorandum also included proposals to prevent financial mismanagement and measures to assist with the prevention of fraud.

5.1.6 At the fact finding meeting held on 22 February 2011, between the Public Protector Investigation Team (the Investigation Team) and Mr Mabitsela (who represented the Department), the Complainant mentioned that subsequent to her memorandum she was also requested to submit an affidavit to the Department's Forensic Audit division.

5.1.7 On 28 July 2004, the Complainant submitted another memorandum to Ms L Sehemo, complaining about one employee, Mrs Williams, who had acted beyond the scope of her duties by attempting to change dates of payments due to a tracing agency. The Complainant indicated that she believed that Mrs Williams had interest in payments which were due to a tracing agency.
5.1.8 On 24 August 2004, Mr M Khasumba sent an email to the Complainant in support of her proposal to pay beneficiaries through Electronic Funds Transfer (EFT).

5.1.9 On 19 January 2005, the Complainant reported incidents where payments to beneficiaries were made to tracing agents, notwithstanding the fact that the beneficiaries were traceable to Mr M Khasumba (by email).

5.1.10 In July 2005, the Complainant found a note written to Mr Vahed, Mrs S Edwards, Ms L Moathlodl (Ms Sehemo) and Ms J Mthembu and Ms M Malala. Below is the content of the note:

"we don’t want any Xhosa’s [sic] or Suthu’s [sic] here in the Master’s office PMB we want only the Zulu’s. [sic] Mr Vahed sort this thing out because there is a big fight which is coming between the Xhosa’s,[sic] Suthu’s [sic] and blacks.

N.B the heard’s [sic] must clear this before the end of July this year otherwise we must take the decision of doing something or we blacks must kill this peoples [sic] all of them one by one, you Jean tell your friend Malala that we don’t want her here she must go back we want only Zulu’s [sic] here in the Master’s office. Otherwise we must bomb this office”.

5.1.11 On 10 February 2006, the Complainant sent an email to Ms Sehemo informing her about an impropriety concerning the removal of cheque books from the safe and possession of cheque books by unauthorised officials. The Complainant also indicated that a cheque was cashed at the bank without it being signed for at the cash register.

5.1.12 On 24 February 2006, the Complainant sent a memorandum to the then Director-General of the Department, Adv. Menzi Simelane, concerning financial mismanagement at the Master of the KZN High Court. The Complainant sent an email to the Director-General on 06 March 2006 concerning the same matter.
The Director-General acknowledged receipt of her email and complimented her for reporting this impropriety.

*The Complainant’s Consultation with medical practitioners*

5.1.13 On 18 May 2006, Dr Woods, a specialist psychiatrist issued a medical certificate indicating that the Complainant was hospitalized and her situation would only improve if she did not return to work. He further recommended that she must be transferred to another office.

5.1.14 The Department was between May 2006 and July 2010 conducting an investigation into the Complainant’s illness, which included referral to more than three medical practitioners. The first two medical practitioners concluded that the Complainant suffered from occupational stress and recommended that she must be transferred to another office.

5.1.15 From 17 June 2010 to 20 July 2010 (during the time of the alleged dismissal), the Complainant was consulting with a clinical psychologist appointed by the Department.

*Termination of the Complainant’s Employment*

5.1.16 The Complainant’s salary was terminated with effect from March 2010.

5.1.17 In July 2010, while still consulting with a clinical psychologist, the Complainant was advised to report to Pietermaritzburg within seven days and if she failed to do so, her continued absence would be treated as abscondment.

5.1.18 The Complainant wrote a letter to the Department informing them that she was unable to return to work because she was still consulting with the clinical psychologist appointed by the Department in East London.
5.1.19 Mr Muzwayine, Director: Labour Relations, confirmed on 16 November 2010, that according to the Department’s system the Complainant was dismissed.

Acknowledgement of Corruption in the Master of the KwaZulu Natal High Court

5.1.20 The Minister of Justice and Constitutional Development announced in the media in October 2010, that the Special Investigation Unit would be conducting an investigation into allegations of corruption and maladministration in the Master of the High Court, Pietermaritzburg. This was confirmed by Mr Mabitsela during a meeting held in January 2011 when he mentioned that he was investigating the Department’s officials in the Master of the High Court, Pietermaritzburg.

Fact Finding Meeting

5.1.21 At a meeting held on 20 January 2011, Mr Mabitsela agreed in principle that the Complainant made a protected disclosure as defined in the Protected Disclosures Act, and that she suffered an occupational detriment as defined in the Protected Disclosures Act. However, Mr Mabitsela was unable to make a decision since he is not a decision-maker. He further mentioned that the person who was capable of making decisions was the Chief Director: Labour Relations, Mr D Mpholo.

Alternative Dispute Resolution Meeting and the Settlement Agreement

5.1.22 At a meeting held between the Public Protector Investigation Team (the Investigation Team), Messrs Mpholo and Muzwayine it was agreed that the Department:

(a) would reinstate the Complainant effective from March 2011;
(b) would pay the Complainant her salary effective from March 2011;
(c) would be place the Complainant at Department’s office in the Eastern Cape (preferably close to her place of residence);

(d) Provide her with access to the employees wellness programme of the Department to assist her with trauma counselling;

(e) Send her an apology for the mistakes made;

(f) In view of the financial strain that she found herself in, finalize her re-instatement and payment of outstanding salaries by 31 March 2011; and that

(g) The Public Protector would continue to investigate allegations of corruption and the Department officials would co-operate with the Public Protector as required by the Constitution.

5.1.23 Following the aforementioned meeting on 18 March 201, the then, Executive Manager: Early Resolution, Public Protector SA, Dr T Schutte, sent an email to Mr Donald Mpholo of the Department which read as follows:

"Dear Mr Mpholo

1. Our meeting earlier today to see whether the issues pertaining to the employment of Ms Msimang could be resolved expeditiously, refers.

2. I confirm that you have agreed to do the following:

2.1. Re-instate Ms Msimang;

2.2. Pay her salary effective from March 2010;

2.3. Place her in an office of the Department in the Eastern Cape (preferably close to where she finds herself at present);

2.4. Send her an apology for mistakes made;

2.5. Give her access to the employee wellness programme of the Department to assist her with the Trauma of what had happened to her;

2.6. in view of dire financial straits that she finds herself in, finalise her re-instatement and payment of back pay by 31 March 2011;

2.7. Co-operate with our investigator regarding any further investigation regarding the content of the allegations made against staff of the Department."
3. Kindly confirm per returning email that paragraph 2 above records our agreement correctly.

Thanking you in advance

Regards,
Tinus Schutte
Executive Manager: Early Resolution"

5.1.24 On 24 March 2012, Mr Donald Mpholo responded to Dr Schutte’s email as follows:

“Good Morning Sir

I hereby confirm tentatively agreement with paragraph 3 of your communiqué. Please expect a comprehensive agreement once HR “technocrats” have given the green light.

I hope this will suffices for now
Regards,
Donald M. Mpholo
Chief Director HR: Client Management Centre (CMC)
The DOJ & CD”

5.1.25 The Complainant was advised about the outcome of the meeting above and she contacted Mr Muzwayine who represented the Department together with Mr Mpholo and requested him to confirm what was agreed upon in the meeting. Mr Muzwayine forwarded Dr Schutte’s email referred to above to the Complainant.
Our requests for intervention by the Department’s senior management (Post Settlement)

5.1.26 On 30 May 2011, the Public Protector sent a letter to the Minister of Justice and Constitutional Development, Honourable JT Radebe, MP (the Minister) informing him that:

5.1.26.1 Preliminary investigations confirmed that the Complainant’s dismissal was unfair because she had made a protected disclosure and suffered occupational detriment as defined in the Protected Disclosures Act;

5.1.26.2 The Public Protector discussed the Complainant’s case with the Deputy Minister, Honourable Andries Nel, MP (the Deputy Minister) and the Department team which included Dr. De Wee and Mr Simon Jiyane and requested urgent action from the Department, as the matter involves the Complainant’s health and welfare;

5.1.26.3 At a meeting held between the Investigation Team and Messrs D Mzuwayine and D Mpholo an agreement was reached as contemplated in paragraph 5.1.23 above;

5.1.26.4 Pursuant to the agreement, numerous letters were addressed to Messrs Mpholo and Mr Mzuwayine relating to the implementation of the terms of the agreement, after the Public Protector had asked the Deputy Minister to expedite these matters, an email was received from Mr Mzuwayine informing the Investigation Team that:

(i) A number of issues must be considered by the Department, before the Complainant’s matter can be finalized;
(ii) The Complainant must write a letter to the Department requesting her re-instatement and her matter will only be considered upon receipt thereof;

(iii) The leadership of the Department has concerns with regard to the manner in which this matter was handled;

5.1.26.5 The contents of Mr Muzwayine's email were disconcerting since the matter has been settled and his conduct shows deviation from the agreement and as far as the Public Protector's office is concerned, the Department was bound by the agreement;

5.1.26.6 The Minister must under the circumstances, assist to ensure that the Department implements the terms of the agreement reached and reinstates the Complainant retrospective to March 2010.

5.1.27 The Minister acknowledged receipt of the aforementioned letter on 1 June 2011. On 9 June 2011, the Complainant received a letter from the Director-General informing her that:

(a) She was dismissed in terms of section 17(3)(b) of the Public Service Act;

(b) She approached the Public Protector who requested the Department to consider her re-instatement if she complies with the requirements of section 17(3)(b);

(c) The Department is willing to reconsider her re-instatement provided she complies with the requirements of section 17(3)(b);
(d) She must therefore, temporarily report to Bhisho and apply formally for her re-instatement by providing compelling reasons why she should be re-instated.

5.1.28 Subsequently, a second letter was sent to the Minister by the Public Protector on 6 July 2011 informing him that the request by the Director-General was contrary to the agreement reached with the Department and that he must impress upon his officials to abide by the terms and conditions of the agreement reached on 18 March 2011.

5.1.29 The Minister acknowledged receipt of the Public Protector’s letter on 08 July 2011. On the same day, a letter was sent to the Minister referring to the telephonic discussion on 05 July 2011. The Public Protector further thanked the Minister for a constructive and compassionate response when she raised the Complainant’s matter with him. The Public Protector stressed the following:

5.1.29.1 Our investigation concluded, without taking the drastic step of a written formal report, that the Complainant had indeed suffered an occupational detriment;

5.1.29.2 Our investigation confirmed that the Department has failed to protect the Complainant from victimization from the management of the office she had whistle blown against. It further concluded that the Complainant suffered health problems as a result;

5.1.29.3 The Department failed to follow the prescribed administrative procedures, mainly as stipulated in PILIR;

5.1.29.4 The Department has reached an agreement with the Public Protector’s office and the Department on its own volition sent the Complainant a copy of their undertaking by email;
5.1.29.5 The terms of the settlement agreement basically entails the Department conceding that the treatment of the Complainant was against the law, that the Complainant would be resuming work effective from 1 April 2011 and that she would be paid her salary effective from March 2011; and

5.1.29.6 That the Department has since reneged on the undertaking.

The Meeting held on 17 September 2012.

5.1.30 At a meeting held on 17 September 2012 between the Public Protector, the Investigation Team and the Minister, the Public Protector briefed the Minister on the outcome of the investigation. The Minister requested the Public Protector and the Investigation Team to provide him with the background of the complaint, the outcome of the investigation and the conclusion.

5.1.31 The Minister further made an undertaking to consult with the Minister of Public Service and Administration in order to determine whether the Complainant can be transferred to another Department.

5.1.32 On 18 September 2012, the Public Protector sent a letter to the Minister, which included, *inter alia*, the details requested by the Minister referred to above.

5.1.33 On 18 October 2012, the Director-General of the Department, Ms N Sindane responded to the Public Protector’s letter directed to the Minister as follows:

"Dear Adv Madonsela

RE: COMPLAINT: MS P T MSIMANG

*In response to your letter addressed to Minister, Mr JT Radebe, MP, dated 18 September 2012, please find herewith my detailed response thereto.*
In considering your letter, I have noted numerous misrepresentations and inaccuracies on information. I would like to point out to you the following:

1. There was no settlement agreement that was concluded between your office and my Department. According to our records, having verified the information with officials who attended the meeting that was held in your office with Dr Schutte, I am informed that this meeting was a fact finding meeting in order to establish what could be done to resolve the case of Ms Msimang as she was unemployed. There was no settlement agreement entered into between your office and the Department to settle the matter relating to Ms Msimang. In fact, officials from my Department who attended the meeting informed me that they specifically pointed out to your officials at the said meeting that they did not have a mandate to reach any settlement, as the delegate authority in Human Resource will still have to make an input on the resolution of the case, in keeping with the Public Service Act and Regulations. I am therefore baffled by your conclusion that I am “guilty” of maladministration in that I failed to implement the so called settlement agreement that did not exist in the first place. To aver that such settlement agreement exists and to proceed to insist on an implementation thereof is a gross misrepresentation of the facts obtaining in this case.

2. As proof of the proceedings at the meeting above, where it is alleged that a settlement agreement was concluded, Dr. Schutte from your office, in an email dated 18 March 2010, listed 7 (seven) points that he understood to have been discussed at the meeting. Mr Mpholo, to whom the email was directed, responded by stating that he will await response of HR on the technical issues, but he concurred with point 3 of Dr Schutte’s email, where the placement of Ms Msimang to the Bisho Master’s was mentioned. This is indeed consistent with the Department’s actions after this meeting regarding the proposal that Ms Msimang report to Bisho Master’s office. Mr Mpholo’s response verifies the fact that there was indeed no “settlement agreement”; otherwise he would have confirmed each and every point contained in the said email, and not just point 3.

3. The truth of the matter is that the Department attempted in various way to accommodate Ms. Msimang. It is necessary to bring to your attention the following sections of the Public Service Act and regulations, thereto. Section (3) (a) (i) states as follows:

“An employee, other than a member of the service or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of Department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

(ii) If such an employee assumes other employment, he or she shall be deemed to have been dismissed as aforesaid irrespective of whether the said period has expired or not.”
“If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.”

Clearly, section 17(3)(b) has not been complied with.

4. It appears to me that you have taken no notice of, or alternatively, you have ignored my correspondence to you regarding this matter. In doing so, you have not considered the Department’s representations at all. You have sought to draw a conclusion that you had predetermined without receiving our representations and it is a conclusion that you now seek to implement, despite our correspondence to you. I find this a gross breach of due process.

5. Specifically, you chose to ignore all steps the Department took to accommodate Ms. Msimang. In a letter dated 6 September 2011, signed by me, I requested Ms Msimang to do the following:
   a. Temporarily report for duty at the Master: Bisho;
   b. Apply formally for reinstatement; and
   c. Provide compelling reasons why she should be reinstated.

This is in compliance with section 17(3)(b) of the Public Service Act, 1994. There is no explanation forthcoming as to why Ms Msimang did not comply with this process, and there is further, yet, no reason submitted by yourself as to why the legislation governing public servants cannot be adhered to. Needless to say, as the Accounting Officer of the Department I am accountable to ensure adherence to the laws, and to ensure that decisions do not fall foul of the law. I must also be mindful of the precedent we set when we take a decision as such a decision impacts not only my Department but the entire public service. There would indeed be chaos should one simply decide to bypass a standard procedure laid by the law, which is intended to regulate discipline in the public sector.

6. It should also be noted that Ms Msimang was advised by you not to enter into any communication with the Department. This raised questions as to how we resolve her case when we are barred from communicating with her. Further, a legal firm was also employed by her to handle Ms Msimang’s case and the same firm also barred the Department from communicating with Ms Msimang. It was left to those who Ms Msimang appointed to represent her to respond in a timely manner in order to seek a resolution to this matter. Sadly, since her dismissal from the public service by way of abscondment in June 2010, this has not been the case. Letters written on behalf of Ms Msimang has been erratic, with several months passing by before a response, if any is received.
7. Please note that Ms Msimang decided on her own, to stay away from work without authorized leave. She was subsequently absconded, in line with section 17(3)(a)(i) of the Public Service Act.

8. In your letter you rightfully refer to section 17(3)(b). This is exactly what I requested of Ms Msimang in my letter dated 6 December 2011, which has been ignored by your good office.

9. In your letter at paragraph 5.6, you state that the settlement agreement entered into by your office and the department is enforceable and is final. I reject this conclusion in its entirety. I am, in essence, being requested to reinstate an official who has absconded in terms of section 17(3)(a)(i), without adhering to section 17(3)(b), as quoted above. I am also being requested to implement a so-called "settlement agreement" that does not exist. This will amount to maladministration and a breach of the Public Service Act, 1994 and I advise that I cannot and do not accept your finding, in this regard.

10. With regard to your proposed Remedial Action, which is tantamount to you enforcing the so-called "settlement agreement", I respond as follows:

a. Ms. Msimang was requested to write to the Department applying for reinstatement in order to comply with section 182(1)(c) of the Constitution as well as section 17(3)(b) of the Public Service Act.

b. Ms Msimang was given an opportunity to be transferred to the Bisho Master's Office, apparently under advice from your office.

c. You indicated that action must be taken against departmental officials. If indeed there was any wrong doing on the part of any official dealing with this matter, my Department would have taken such action. I found none and if you can provide me with any details of actual misconduct on the part of any official in my Department, I will be glad to receive same and act, where appropriate to do so.

d. I have no authority to transfer Ms Msimang to any other Department as she is no longer employed in the public service. I am rather surprised that we are now being asked to "transfer" Ms Msimang, when all along she was seeking reinstatement. Your office and Ms Msimang have shifted goal posts as it were, which in my view is yet another indication of there never was a settlement agreement in the first place as alleged and further yet, an attempt to seek an easy solution to a matter which was complex, but lawfully concluded, in our view. I reiterate that Ms Msimang was dismissed from the public service through abscondment by way of a letter dated 15 June 2010.

e. It is also necessary at this juncture to deal briefly with the so-called protected disclosure made by Ms Msimang on 7 July 2010. It is to be noted that by this time Ms Msimang had already been absconded. It appears that Ms Msimang was in fact disingenuous when making the so-called protected disclosures, bearing in mind the timing of Ms Msimang’s complaint. The following is to be noted:
(i) The Department timeously conducted a Forensic Investigation into the allegations of Ms Msimang. This revealed that the issues she complained of were reported to the Internal Audit unit long before Ms Msimang absented herself from work without leave or approval by her supervisor. In other words, the allegations made by Ms Msimang after she had been absconded were the same allegations that were made in 2006, which were investigated:

(ii) The 2006 investigation revealed lack of internal controls which were addressed through the implementation of the Guardian’s Fund System. There has, over the years, been several follow-up assessments as well, with a view to ensure an improvement in the processes;

(iii) The Department has recorded enormous successes in the management of funds in the Guardian’s Fund, which has recorded an unqualified audit since 2009; and

(iv) Despite an unqualified audit, and improvements made to the management of the Guardian’s Fund, the Department has nonetheless requested the Special Investigating Unit to investigate. A draft proclamation in this regard has been prepared and is under discussion. Our ongoing efforts to improve the environment with regard to the management of the Guardian’s Fund is through complaints received from the public and indeed our own current employees who, despite having complained, nonetheless still attend work, free from the alleged harassment that Ms Msimang complains of.

f. Given the facts pertaining to the abscondment of Ms Msimang and the other matters I have outlined above, I therefore, vehemently refused to apologise to Ms Msimang. Ms Msimang has been intransigent in adhering to our reasonable requests, both of her own accord or that of your good office.

11. Finally, I must point out that Ms Msimang, seemingly outside your advice and instruction, as you have not referred to the below-mentioned development, approached the GPSSBC in June 2012 to lodge a dispute. The GPSSBC responded that she took an excessively long time to lodge the dispute and her case was therefore dismissed without a hearing, as it fell outside the stipulated timeframes of the council. This supports our conclusion of forum-shopping referred to above. I am of the view that Ms Msimang has forum-shopped with a view to obtaining an outcome that suits her only, and regardless of legal processes. I must add that at the time this was an employee and employer relationship which was being masked as maladministration in order to impose an outcome that would otherwise not be lawfully possible.

12. Your conclusion that I am guilty of maladministration is rejected in its entirety, and with contempt, in view of the aspersions it casts on my ability as the Accounting Officer of the Department. I therefore request that you retract your conclusion that I am guilty of maladministration, and that I receive an apology, in writing, from your office, for conclusions you have reached that are inappropriate and indeed,
unlawful by virtue of the prescripts of the public service. Your conclusions are also unsound by virtue of your office ignoring and or disregarding submissions that we have made. I trust that your final report will be influenced by the facts as they obtain in this case.

Finally, I wish to inform you that the Department will not be adhering to any of your recommendations as per your letter dated 18 September 2012.

Yours Faithfully

MS N SINDANE DIRECTOR—GENERAL DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

DATE

5.1.34 Upon receipt of the letter referred above, the Public Protector sent a letter to the Minister of Justice, which read as follows:

"Dear Minister Radebe

RE: COMPLAINT: MS MSIMANG

I refer to your letter dated 18 September 2012 and our constructive meeting which took place in our Johannesburg Office on 17 September 2010.

I further respectfully draw your attention to a letter from Ms Sindane, Director-General Justice and Constitutional Development, purporting to be a response to my letter to you.

I have decided to reproduce Ms Sindane’s letter in its entirety in my provisional report on this matter to be issued shortly. I will accordingly address its contents in the Provisional Report.

In the meantime, I thought it proper to favour you with a letter of acknowledgement even though the response to my letter was not from you.
I must indicate Minister Radebe that I am shocked by the venom from your Accounting Officer's letter. Prior to this I have had constructive and civil engagements with her and you on this matter.

I particularly draw your attention to page eight of the letter in question where the DOJCD Accounting officer's response to me in my official capacity as Public Protector is as follows:

"Your conclusion that I am guilty of maladministration is rejected in its entirety, and with contempt, in view of the aspersions it casts on my ability as the Accounting Officer of the Department."

Section 9(1) of the Public Protector Act provides that:

"No person shall-

(a) Insult the Public Protector or the Deputy Public Protector:

(b) In connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court."

I request that you direct the Director General to withdraw the bolded part of her statement. Should Ms Sindane not withdraw this in the next seven working days, I will include a contempt of the Public Protector order in the Provisional Report.

Thank you once more for your co-operation. It is not clear to me where things have gone wrong in our communication with the Department of Justice and Constitutional Development. In the Provisional Report, we will include a flow chart of events (Refer to the Annexure 1 for chronological events).

Soon after favouring you with a Provisional Report, I will proceed with our agreement to have a meeting attended by all key parties with a stake in this matter.
Best wishes

ADV TN MADONSELA
PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA"

5.1.35 On 27 November 2012, a month after the Public Protector sent the letter mentioned above, the Public Protector received the following letter from the Director General:

"Dear Colleague

RE: COMPLAINT: MS P MSIMANG

I refer to your letter dated 23 October 2012 addressed to Minister JT Radebe MP and the Minister’s response thereto dated 16 November 2012.

In the response to your dated 16 November 2012, Minister JT Radebe, MP indicated that I was willing to withdraw the words "with contempt" in my letter to you dated 18 October 2012.

I hereby accordingly withdraw the words "with contempt" from my aforesaid letter to yourself and request that the letter be read without those words.

With Kind regards,

MS NSINDANE
DIRECTOR GENERAL
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT"
6 EVALUATION OF THE EVIDENCE AND INFORMATION RECEIVED DURING THE INVESTIGATION

6.1 On 20 April 2004, twenty days after the Complainant commenced her employment, Inspector T Harding of the South African Police Service (SAPS) sent a letter to Ms Sehemo informing her that the SAPS had received a number of complaints concerning stolen cheques and the Master’s office urging them to stop sending cheques by post. Therefore, the SAPS had detected corrupt activities even though they were outside the system.

6.2 The Minister announced that the Special Investigating Unit would be conducting an investigation into allegations of corruption in the Master of the High Court in Pietermaritzburg. This was also confirmed by the Director-General’s letter to the Public Protector dated 18 October 2012.

6.3 On 28 May 2004, the Complainant, barely two months into her employment discovered that some employees were misappropriating funds from the Guardian’s Fund. The Complainant reported this matter to the then Deputy Master, Ms L Sehemo and the then Master, Mr Vahed.

6.4 Following the disclosure, the Complainant continued to report financial mismanagement and non-adherence to accounting principles to the management of the Department. In most cases, the Complainant’s disclosures included measures that could be implemented to prevent re-occurrences.

6.5 The Complainant further reported this matter to the then Senior Manager, Finance, Mr M Khasumba, in July 2004, August 2004 and January 2005. On 24 February 2006, the Complainant made a disclosure to the office of the then Director-General, Adv Menzi Simelane. The Director-General acknowledged receipt of the Complainant’s disclosure.
6.6 However, in paragraph 10.e. of the Director-General’s letter she mentioned that the “so-called protected disclosure” was made on 07 July 2010 by Ms Msimang after she absconded.

6.7 The Complainant found an anonymous note written by other employees who appear to be very discriminatory towards Xhosas and Sothos (who do not originally come from Kwazulu Natal). The Complainant mentioned that she and other Assistant Directors (who were employed with her) were referred to by names. The note confirms the Complainant’s averments that she felt unwelcome.

6.8 The Complainant’s medical practitioner, Dr Woods, diagnosed her with a psychiatric related condition caused by occupational stress and he recommended that she be transferred. The Complainant was admitted to a psychological hospital and upon her release, was on incapacity leave.

6.9 The Department conducted an investigation into the Complaint’s Illness as required by the law between May 2006 and July 2010.

6.10 The Department while conducting an investigation into the Complainant’s illness, appointed three medical practitioners and two of those medical practitioners concluded that the Complainant was suffering from occupational stress and they recommended that she must be transferred to another office.

6.11 The Department referred the Complainant to a clinical psychologist in East London in the beginning of 2010. The Complainant’s sessions were to run up to the end of July 2010.

6.12 In March 2010, the Department stopped the Complainant’s salary while she was still in consultation with a clinical psychologist in East London. In July 2010, the
Department instructed the Complainant to report to work immediately and stated that should she fail to do so, she would be deemed to have absconded.

6.13 The Complainant wrote a letter to the Department informing them that she would not be able to report to work immediately, because she was still consulting with the clinical psychologist appointed by the Department.

6.14 The agreement entered into by the Public Protector and the Department (represented by Messrs Muzwayine and Mr Mpholo) clearly indicated that the Department conceded that the Complainant was unfairly dismissed.

6.15 Dr Schutte sent an email to Mr Mpholo after the Alternative Dispute Resolution meeting held on 18 March 2011, the confirming issues/matters agreed upon during the meeting. The issues agreed upon were listed in paragraph 2 of the email, and in paragraph 3, he requested Mr Mpholo to confirm, by return email, if paragraph 2 of his email covers all aspects of the agreement.

6.16 On 24 March 2012, Mr Mpholo sent a response to Dr Schutte’s email by saying, “I hereby confirm tentatively agreement with paragraph 3 above of your communiqué.” Thus, he confirms with caution or uncertainty paragraph 3 of Dr Schutte email. He further mentioned, “Please expect a comprehensive agreement once HR technocrats have given the green light.” It should be noted that there was no further “comprehensive agreement” from the Department.

6.17 The Director-General sent a letter to the Complainant requesting her to temporarily report to Bisho, apply for re-instatement and provide compelling reasons as to why she should be re-instated.

6.18 The Public Protector sent a letter to the Minister informing him that the request by the Director-General was contrary to the agreement reached with the
Department and he should impress upon his officials to abide by the terms and conditions of the agreement reached on 18 March 2011.

6.19 In a subsequent letter, the Public Protector highlighted the fact that the investigation was concluded, without taking the drastic step of a written formal report, and that she had found that the Complainant had indeed suffered an occupational detriment and that the Department had failed to protect the Complainant from victimization from the management of the office she had whistle blown against and it further concluded that the Complainant suffered health problems as a result.

6.20 The Public Protector further mentioned that the Department failed to follow the prescribed administrative procedures, mainly as stipulated in PILIR, and had reached an agreement with the Public Protector's office in relation to the reinstatement of the Complainant, and the Department had of its own volition sent the Complainant a copy of their undertaking by email. The terms of the settlement basically entail the Department conceding that the Complainant's treatment was against the law, that the Complainant would be allowed to resume work from 1 April 2011 and she would be paid her salary from 1 March 2011. The Department has since reneged on the undertaking.

6.21 The contents of the letter from the Director-General dated 18 October 2012 does not deal with all the matters raised in the provisional report, concentrated mainly on the settlement agreement, the disclosure and the Complainant's abscondment. The letter seeks to deny the existence of the settlement agreement and it further implies that Ms Msimang disclosed things that were in the public knowledge and that this did not make her a whistleblower in terms of the Protected Disclosures Act.
7 LEGAL AND REGULATORY FRAMEWORK


7.1.1 Section 1(a) of the Constitution provides that the Republic of South Africa is one sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

7.1.2 Section 181(2) provides that Chapter 9 institutions are independent, and subject to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

7.1.3 Section 181(3) provides that organs of state through legislative and other measures, must assist and protect Chapter 9 institutions to ensure their independence, impartiality, dignity and effectiveness.

7.1.4 No person or organ of state may interfere with the functioning of these institutions (section 181(4)).

7.2 The Protected Disclosures Act, 2000

7.2.1 The purpose of the Protected Disclosures Act is stated in the Act as follows:

"To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith".

7.2.2 In terms of section 1, a disclosure means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made
by any employee who has reason to believe that the information concerned shows or tends to show inter alia that a criminal offence has been committed, is being committed or is likely to be committed and a miscarriage of justice has occurred, is occurring or is likely to occur.

7.2.3 In terms section 1 of the Protected Disclosures Act, an occupational detriment in relation to the working environment of an employee means inter alia being dismissed, suspended, demoted, harassed or intimidated; being threatened with any of the actions referred to paragraphs (a) to (g) of the definition of "occupational detriment" of the definition of protected disclosure; being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

7.2.4 Section 1 of the Protected Disclosures Act, defines a "protected disclosure" as a disclosure made to inter alia an employer in accordance with section 6. Section 6(1) of the Protected Disclosures Act provides that any disclosure made in good faith by the employee to the employer and substantially in accordance with any procedure prescribed, or authorized by the employee’s employer for reporting or otherwise remedying the impropriety concerned or where there are no prescribed procedures is a protected disclosure.

7.2.5 In terms of section 3 of the Protected Disclosures Act, no employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

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1 Paragraphs (a) to (g) of the definition list some of the situations which will amount to an occupational detriment (e.g. being subjected to any disciplinary action; being dismissed, suspended, demoted, harassed or intimidated; being transferred against one's will; being refused transfer or promotion; being subjected to a term or condition of employment or retirement which is altered or kept altered to one's disadvantage; being refused a reference, or being provided with an adverse reference, from one's employer; being denied appointment to any employment, profession or office;
7.2.6 In terms of section 2(1)(a), one of the objects of the Protected Disclosures Act is to protect an employee, from being subjected to an occupational detriment on account of having made a protected disclosure.

7.2.7 In terms of section 4(1)(b), an employee who has been subjected to, is subjected or may be subjected, to an occupational detriment may inter alia pursue any other process allowed by or prescribed by law.

7.2.8 Section 4(2) provides inter alia, that for the purposes of the Labour Relations Act, any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act.

7.3 The Labour Relations Act, 1995

7.3.1 In terms of section 187(1)(h), a dismissal is automatically unfair if the reason for dismissal is a contravention of the PDA, by the employer on account of an employee having made a protected disclosure as defined in the Protected Disclosures Act.

7.3.2 Item 10(1) of Schedule 8 of the LRA provides that incapacity on the grounds of ill-health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all possible alternatives short of dismissal. When possible alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee.

7.3.3 Item 10(1) provides further that in the event of a permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or
adapting the duties or work circumstances of the employee to accommodate the employee's disability.

7.4 The Public Service Act, 1994

7.4.1 Section 16A(2) of the Public Service Act provides that a head of department shall:

(a) Immediately take appropriate disciplinary steps against an employee of the department who does not comply with the provisions of that Act or a regulation, determination or directive made thereunder;

(b) Immediately report to the Director-General of the Public Service and Administration the particulars of such non-compliance; and

(c) As soon as possible report to the Director-General the particulars of the disciplinary steps taken.

7.4.2 Section 17(1)(a) provides that the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act.

7.4.3 Section 17(3) provides that an employee who absents himself/herself from his or her official duties without permission of his or her head of department, office or institution for a period of one calendar month, shall be deemed to have been dismissed from the Public Service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his place or her place of duty.

7.4.4 Section 17(3)(b) provides that if an employee who is deemed to have been dismissed, reports for duty at any time after the expiry of one calendar month,
the relevant executive authority may on good cause shown approve the reinstatement of that employee in the Public Service in his or her former post or other post or position and in such case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such conditions as the said authority may determine.

7.5 Policy and Procedure on Incapacity leave and ill-health Retirement (PILIR)

7.5.1 Paragraph 3.1 of the PILIR provides that the leave dispensation as determined in the Leave Determination, read with the applicable collective agreements\(^2\) provides for normal sick leave of 36 days working days in a sick leave cycle of three years.

7.5.2 Paragraph 3.1 of the PILIR provides further that if an employee has exhausted his/her normal sick leave, the employer, may at his/her discretion grant additional incapacity leave, i.e. temporary incapacity leave and where applicable, permanent incapacity leave. For this purpose, the employer must conduct an investigation into the nature and extent of the employee’s incapacity. Such investigations must be carried out in accordance with Item 10(1) of Schedule 8 of the Labour Relations Act.

7.5.3 In terms of paragraph 7.1.1 of the PILIR, incapacity leave is not an unlimited amount of additional sick leave days at an employee’s disposal, but additional sick leave granted conditionally at the employer’s discretion, as provided for in the leave determination and PILIR.

7.5.4 Paragraph 7.1.2 provides that an employee who has exhausted his/her normal sick leave, referred to in the Leave Determination, during the prescribed leave cycle and who according to the treating medical practitioner is required to be

absent from work due to temporary incapacity, may apply for temporary incapacity leave with full pay on the application forms prescribed in terms of the PILIR.

7.5.5 In terms of paragraph 7.3.1 of the PILIR, an employee who is absent for more than 30 days on the basis of incapacity leave may be subjected to a full assessment by the Health Risk Manager, which may include a second opinion or further medical opinion assessment by an occupational therapist.

7.5.6 Paragraph 7.3.2 provides further that the employer must immediately on receipt of the employees’ application in the designated office register the date of the receipt on the application form, as well as the central register database.

7.5.7 In terms of paragraph 7.3.3, the employer must within five working days from the receipt of the employee's application for temporary incapacity leave-

7.5.7.1 Verify that the employee has completed the form correctly and if not completed in full, return the form to the employee;

7.5.7.2 Conditionally grant a maximum of 30 consecutive working days temporary incapacity leave with full pay subject to the outcome of the investigation into the nature and extent of the employee’s incapacity;

7.5.7.3 Immediately complete the department’s report to the Health Risk Manager; and

7.5.7.4 The employer must within 30 working days after receipt of both the application form and a medical certificate approve or refuse temporary incapacity leave granted conditionally or where applicable additional temporary incapacity leave.
7.6 Jurisprudence

7.6.1 In National Coalition of Gay and Lesbian Equality and another v Minister of Home Affairs and others\(^3\) the court held that it is clear that the protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.

7.6.2 Dignity of person refers to a special status given to all individuals by virtue of being human; it is inherent in each person. The value of human dignity is synonymous to the African value of Ubuntu, which the court in Pharmaceutical Society of South African and Others v Tshabalala-Msimang and Another NNO\(^4\) took note of in respect to the interpretation of legislation and went further to that it ought to apply to the relationship between organs of state and courts towards citizens and towards each other.

7.6.3 Very recently, the Labour Appeal Court\(^5\) emphasised that a narrow approach would “seriously gut the PDA [Protected Disclosures Act] of its essence and purpose”. The Court reiterated that the “PDA seeks to address important constitutional injunctions regarding clean government and effective public service delivery.” The Court referred to the statement by the Supreme Court of Appeal in City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another, where it was held that a narrow definition of the term “information” under the PDA is inconsistent with the broad purposes of the PDA, namely the encouragement of whistle-blowers in the interests of accountable and transparent governance. The SCA stated in this regard:

“A further difficulty with this approach to the nature of information under the PDA is that its narrow and parsimonious construction of the word is inconsistent with the broad

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\(^3\) 2000 (2) SA 1 (CC); 2000(1) BCLR 39 (CC)
\(^4\) 2005 (3) SA (SCA)
\(^5\) Radebe and Another v Premier, Free State and Others (JIA 61/09) [2012] ZALAC 15; 2012 (5) SA 100 (LAC) (1 June 2012)
purposes of the Act, which seeks to encourage whistle-blowers in the interests of accountable and transparent governance in both the public and the private sector. That engages an important constitutional value and it is by now well-established in our jurisprudence that such values must be given full weight in interpreting legislation. A narrow construction is inconsistent with that approach. On the construction contended for by Mr Pauw the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite.” (emphasis added)

7.6.4 In the context of the matter at hand it is necessary to refer to the following remarks by the Court in the Radebe matter, in full:

“Simply stated if an employee discloses information in good faith and reasonably believes that the information disclosed shows or tends to show that improprieties were committed or continue to be committed then the disclosure is one that is protected. The requirement of ‘reason to believe’ cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. Disclosure of hearsay and opinion would, depending on its reliability, be reasonable”.

7.7. The Public Protector Act, 1994

7.7.1 The Public Protector is empowered in terms section 7(1)(b)(i) to determine the format and the procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

7.7.2 In terms of section 6(4)(a) the Public Protector is be competent to endeavour, in her sole discretion, to inter alia resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation.
8. ISSUES TO BE DECIDED BY THE PUBLIC PROTECTOR

8.1 The following were issues for the Public Protector's consideration:

8.1.1 Did the Complainant make a protected disclosure and suffer occupational detriment as defined in terms of the Protected Disclosures Act?

8.1.2 In its dismissal of the Complainant, did the Department violate the Protected Disclosures Act and the Labour Relations Act?

8.1.3 Did the Department comply with the PILIR and the Labour Relations Act when they terminated the Complainant’s employment while she was still consulting with the clinical psychologist?

8.1.4 Did the failure by the Director-General to implement the terms of the settlement agreement, post settlement constitute maladministration?

8.1.5 Did the Complainant suffer enormous prejudice as a result of failure by the Department to implement settlement agreement?

8.1.6 Are the actions of the Department regarding the Complainant’s protected disclosure and the occupational detriment, termination of her salary, dismissal and failure to implement the terms of the agreement procedurally and substantively consistent with the value system and human dignity as set out in the Constitution?
9. RESPONSE TO THE PUBLIC PROTECTOR’S PROVISIONAL REPORT

9.1. Section 7(9) of the Public Protector, 1994, provides:

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

9.2. The Public Protector therefore decided to issue a provisional report on her investigation to the Director-General of the Department of Justice and Constitutional Development, the Minister of Justice and Constitutional Development and the Complainant. The Provisional Report was distributed as a confidential document in order to provide the recipients thereof an opportunity to respond to its contents.

9.3. The Department responded in a letter dated 18 December 2012 under the hand of Ms N Sindane, the Director-General of the Department. The material aspects of the response are:

9.3.1 The Department is not in agreement with the findings and the proposed remedial action contained therein, because there was no settlement agreement between the Department and the Public Protector.

9.3.2 The Department stated on the email that internal departmental processes would have to take place prior to confirmation of the points of discussion. The conduct of the Department after 18 March 2012 corroborates the Department’s version that there was in fact no settlement agreement. Mr Mpholo stated that he tentatively agrees with paragraph 3 which states that Ms Msimang will be re-
instituted. This is borne out by the fact that the Department did follow up on the discussion by requesting Ms Msimang to report to the Bhisho Master’s office in 2011. This was a bona fide attempt at conciliation, provided that lawful processes were followed.

9.3.3 Mr Mpholo alludes to “once HR technocrats” having given the green light” which is also a clear indication that further discussion and approvals would have to be sought from relevant authorities.

9.3.4 In light of the above, the parties did not agree with regard to the meeting of 18 March 2011, and the Department is of the view that on a balance of probabilities, the outcome of the meeting, and its actions thereafter, favours the Department’s interpretation.

9.3.5 Around 2001, a criminal investigation was underway regarding fraud in the Master’s office in Pietermaritzburg. During 2004, the matter was finalised, resulting in the conviction of an employee of the office of the Master. This case exposed elements of a syndicate being in operation.

9.3.6 In 2004, the Deputy Master in the said office also raised issues of fraud and requested the assistance of the Master in locating files that required investigation. The issue of fraud in the said office was in 2004 already in the knowledge of the Commercial Crime Unit which also raised concerns about the amount of money that was missing from the Guardian’s Fund. The reason for highlighting this is because the issues raised in the complaint by Ms Msimang were already receiving attention.

9.3.7 This level of action and scrutiny was as a result of losses detected in the Guardian’s Fund and concerned employees of the Master’s office had raised them seeking action thereto. Had there been an effort to silence Ms Msimang,
they respectfully submit that this level of scrutiny and action would not have been possible.

9.3.8 The Department’s commitment to rooting out fraud and corruption is to this day evidenced by a Special Investigations Unit investigation that is the pipeline.

9.3.9 In respect of the remedial action and matters connected therewith, the Department made reference to the letter dated 18 November 2011.

9.3.10 The Department timeously conducted a forensic investigation into the allegations by Ms Msimang. This revealed that the issues she complained about were reported to the Internal Audit long before Ms Msimang absented herself from work without leave or approval by her supervisor.

9.3.11 The Department also indicated that serious allegations are also made in the Public Protector’s provisional report at page 17, relating to ethnicity and threats made to certain persons with regard to their ethnicity. The Department do not recall having encountered these allegations in previous correspondence with the Protector.

10. CONCLUSION

10.1 The Complainant made a disclosure to the management of the Department between April 2004 and March 2006. In terms of section 3 of the Protected Disclosures Act, the Complainant was entitled to be protected by not being subjected to occupational detriment as a result of the protected disclosure she made.

10.2 Due to occupational detriment, the Complainant was diagnosed with a mentally related illness and the Department decided to conduct an investigation into her
illness which took more than five years. While the Complainant was still consulting with medical practitioners, her salary was terminated and she was later dismissed.

10.3 Item 10(3) of the Labour Relations Act (read with PILIR) provides that the employer must investigate the extent of an employee's incapacity and injury. This investigation may include seeking various medical opinions. The Department appointed three medical practitioners to assess the Complainant's health from 2006. At the same time, she applied for a transfer and her application was declined.

10.4 Section 1(a) of the Constitution provides that the Republic of South Africa is one sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

10.5 The Complainant's salary was terminated prior to the completion of the investigation into her incapacity by the employer. She was dismissed while she was consulting with a clinical psychologist.

10.6 Section 17(1) of the Public Service Act requires that any discharge of an employee should be made or exercised with due observance of the applicable provisions of the Labour Relations Act. In terms of section 187(1) (h), a dismissal is automatically unfair if it is in contravention of the Protected Disclosures Act.

10.7 Section 4(2) of the Protected Disclosures Act provides *inter alia* that for the purposes of the Labour Relations Act, any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act.
10.8 The Public Protector determined the format and the procedure to be followed in conducting the investigation based on the circumstances of this case in line with the provisions of section 7(1)(b)(i) of the Public Protector Act, and she endeavoured, in her sole discretion, to resolve and rectify this matter through mediation and conciliation. As a result of the process of mediation and conciliation an agreement was entered into between the Department and the Public Protector.

10.9 The Director-General sent an emotional letter to the Public Protector dismissing the fact that the Complainant made a protected disclosure and suffered occupational detriment. The letter was concluded by the statement which seeks to reject the findings of the Public Protector.

10.10 The contents of the letter from the Director-General dated 18 October 2012 does not deal with all the matters raised in the provisional report, concentrated mainly on the settlement agreement, the disclosure and the Complainant’s abscondment.

10.11 The letter seeks to deny the existence of the settlement agreement and it further implies that Ms Msimang disclosed things that were in the public domain and that this did not make her a whistleblower. It should be borne in mind that the Protected Disclosures Act does not provide that the information to be disclosed should not be in the public knowledge or in the employer’s marriage.

10.12 The response to the provisional report is basically the same as the letter dated 18 October 2012, and it seems to concede that there was at best, a tentative agreement which was to be subjected to internal approval.

10.13 The Public Protector, however, acknowledges the letter received from the Director-General, dated 30 January 2013, wherein she advised that she will take the necessary steps to re-instate the Complainant with effect from 1 March
2013 and that an implementation plan regarding the Complainant’s re-
integration into the Department will be submitted.

10.14 The Public Protector welcomes the willingness of the Director General to co-
operate in this manner to bring an end to the plight suffered by the Complainant.

11. FINDINGS

11.1 The Complainant made a protected disclosure as defined in section 1 of the
Protected Disclosures Act on 28 May 2004.

11.2 The Department’s management failed to protect the Complainant against
victimization from her superiors and fellow employees, by ignoring the issues
reported by the Complainant and failing to take action against those employees
implicated. As a result, the Complainant has suffered occupational detriment
as defined in section 1 of the Protected Disclosures Act.

11.3 The Department’s refusal to transfer the Complainant to another office
constitutes further “occupational detriment” as defined in section 1 of the
Protected Disclosures Act.

11.4 The Department’s management has failed to comply with the section 2 and 3 of
the Protected Disclosures Act which required it to protect the Complainant
against occupational detriment. This non-compliance amounts
maladministration.

11.5 The termination of the Complainant’s salary by the Department and her
subsequent dismissal while she was in consultation with medical practitioners
appointed by the Department contravenes item 10(1) of Schedule 8 of the
Labour Relations Act and the PILIR.
11.6 The Complainant's dismissal amounts to an automatically unfair dismissal as stipulated in section 4(1) of the Protected Disclosures Act and section 187 of the Labour Relations Act.

11.7 In its dismissal of the Complainant, the Department failed to comply with section 17(1) of Public Service Act, which requires that termination of service or dismissal should be in accordance with the Labour Relations Act.

11.8 Failure by the then Director-General to ensure that the provisions of section 17(1) of the Public Service Act were followed prior to and when the Complainant's contract was terminated, amounts to non-compliance with the Public Service Act, the Labour Relations Act, the Protected Disclosures Act and PILIR and thus amounts to maladministration.

11.9 The Director General has failed to ensure that the terms of the settlement agreement entered into with the Public Protector were implemented, and this amounts to a violation of section 181(3) of the Constitution and the Public Protector Act.

11.10 As a result of maladministration by the Department, the Complainant has suffered enormous prejudice, including foreclosure on her house, exacerbated health problems and cancellation of her medical aid. Her children have also been traumatised by the situation. The treatment received by the Complainant was not in line with the value of human dignity as provided for in the Constitution.

12. REMEDIAL ACTION

The Public Protector directs that the following remedial action in terms of section 182(1) (c) of the Constitution be taken:
12.1 The Minister and the Director-General of the Department must take urgent steps to ensure that the following undertaking made by the Department to re-integrate the Complainant into the Department is implemented within 30 days from the date of this report:

12.1.1 Subject to negotiations with the Complainant, explore the following placement options based on her skills:
(i) Option A : Re-instatement to the Masters Office in Bisho
(ii) Option B : Re-instatement to State Attorney in Bisho
(iii) Option C: re-instatement to the Regional Office in East London

12.1.2 Re-instate the Complainant with her full salary and benefits as is her entitlement by operation of the law which includes her salary being backdated to 01 March 2010 and paid with interest as provided for by the Prescribed Interest Rate Act 55 of 1975.

12.1.3 Upon the Complainant’s re-instatement on 1 March 2013:

(i) Negotiate the terms and conditions of her re-integration with her with regard to the three placement options above;
(ii) Provide her with an orientation programme;
(iii) Provide Organisational development and EAP diagnostics of the agreed environment (for readiness purposes) and individual readiness. Support provided throughout the various stages of her re-integration in to the Department. This support is not limited to but it is inclusive of change management, counselling, training and development;
(iv) Her progress throughout the re-integration will be subject to continuous monitoring and evaluation; and
(v) A mentor and confidante will be provided to Ms Msimang to ensure that she has a channel to communicate her needs in an environment
that she feels secure. A mentor, who will be a Departmental official, will be provided to guide her assimilation into the division that she will be placed.

12.1.4 In addition to the above undertaking made by the Department the Minister and the Director-General must take urgent steps to ensure that:

(i) A letter of apology is submitted to the Complainant to apologise for the maladministration referred to above;

(ii) In line with the provisions of section 16A(2) of the Public Service Act, immediately take appropriate disciplinary steps against employees who failed to comply with the provisions of the Public Service Act;

(iii) The Department appropriately deals with the allegations of corruption within the Guardian's Fund that were raised by the Complainant, with a view to ensuring that there is proper financial management in the offices of the Master KZN of the High Court and how to prevent a re-occurrence; and

(iv) The Public Protector and Parliament is furnished with a detailed report on steps taken by the Department to address corruption and maladministration in the offices of the Master of the High Court of South Africa.

12.1.5 The Minister of Justice and Constitutional Development is to engage with the Minister of Public Service and Administration in order to determine the feasibility of the Complainant’s transfer to another department or organ of state should the Complainant not be satisfied with the re-instatement options offered to her.
13. MONITORING

13.1 The Public Protector will monitor the progress made with the implementation of the remedial action referred to above by requiring from the Minister and the Director-General:

13.1.1 An action plan on the manner in which the Department intends implementing the remedial action referred to above within 30 days from the date of this report;

13.1.2 An implementation report on the implementation of the remedial action referred to above within 60 days from the date if this report; and

13.1.3 Quarterly implementation reports thereafter.

[Signature]
ADV T N MADONSELA
PUBLIC PROCTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 6 February 2013

Assisted by: Mr N Raedani, Senior Investigator: Service Delivery