

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION  
182(1)(b) OF THE CONSTITUTION AND SECTION 8(1) OF THE PUBLIC  
PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

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*Allegations of improper conduct and maladministration by the Department of  
Correctional Services*

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT  
AND MALADMINISTRATION BY THE DEPARTMENT OF CORRECTIONAL  
SERVICES RELATING TO THE APPOINTMENT OF STAFF AT THE TSWELOPELE  
CORRECTIONAL CENTRE IN KIMBERLEY IN THE NORTHERN CAPE PROVINCE**



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## Executive summary

- (i) This is a report of 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.
- (ii) The report relates to an investigation into allegations of improper conduct and maladministration by the Department of Correctional Services (the Department) pertaining to the appointment in 2010 of Mr Matjedi Milton Sechocho and Ms Oitsiwemang Priscilla Lehule (the Complainants) as Section Heads: Nutritional Services at the Tswelopele Correctional Centre in Kimberley.
- (iii) Based on an analysis of the complaints lodged by the Complainants on 10 October 2012, the following issues were identified to inform and focus the investigation:
  - (a) Whether the Department appointed and remunerated the Complainants incorrectly; and if so
  - (b) Whether the incorrect appointment and/or payment of remuneration was improper and/or resulted in prejudice, as envisaged by section 182(1) of the Constitution and constitutes maladministration, as contemplated by section 6(4)(a)(i) of the Public Protector Act.
- (iv) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Department and the National Commissioner of Correctional Services,

meetings with officials of the Department, analysis of the documents obtained during the investigation and application of the relevant laws and prescripts.

- (v) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:
- (a) **On whether the Department appointed and remunerated the Complainants incorrectly**
- (aa) The allegation that the Complainants were appointed and remunerated incorrectly by Department is substantiated.
- (b) **On whether the incorrect appointment and/or payment of remuneration was improper and/or resulted in prejudice, as envisaged by section 182(1) of the Constitution and constitutes maladministration, as contemplated by section 6(4)(a)(i) of the Public Protector Act**
- (aa) The allegation that the incorrect appointment and remuneration by the Department of the Complainants caused them prejudice, is substantiated. This conduct on the part of the Department was improper, as envisaged by section 182(1) of the Constitution and constitutes maladministration, as contemplated by section 6(4)(a)(i) of the Public Protector Act.
- (vi) **The appropriate remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is the following:**
- (a) **The National Commissioner of Correctional Services:**

- (aa) To take the appropriate steps to ensure that all new positions created by the Department have the appropriate job title, job description, remuneration code and are registered on the PERSAL system before they are advertised and appointments made.

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE DEPARTMENT OF CORRECTIONAL SERVICES RELATING TO THE APPOINTMENT OF STAFF AT THE TSWELOPELE CORRECTIONAL CENTRE IN KIMBERLEY IN THE NORTHERN CAPE PROVINCE**

**1. INTRODUCTION**

- 1.1. This 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 sections 8(1) and 8(3) of the Public Protector Act to the National Commissioner of Correctional Services, Mr A Frazer, to note the outcome of my investigation.
- 1.3. Copies of the report are also provided to the following persons to inform them of the outcome of my investigation:
- 1.3.1 The Regional Commissioner of Correctional Services for the Free State and Northern Cape, Ms S Moodley (the Regional Commissioner); and
- 1.3.2 The Complainants, Mr Matjedi Milton Sechocho and Ms Oitsiwemang Priscilla Lehule.
- 1.4. The report relates to an investigation into allegations of improper conduct and maladministration by the Department of Correctional Services (the Department) pertaining to the appointment in 2010 of the Complainants as Section Heads: Nutritional Services at the Tswelopele Correctional Centre in Kimberley.

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## 2. THE COMPLAINTS

- 2.1. The complaints were lodged on 10 October 2012 at the Northern Cape Provincial Office of the Public Protector South Africa, in Kimberley.
- 2.2. According to the Complainants, they successfully applied for positions of Sectional Head: Nutritional Services that were advertised by the Department, in 2009.
- 2.3. They were accordingly employed by the Department in 2010 at the Tswelopele Correctional Centre in Kimberley.
- 2.4. At the time of their appointment, the Department indicated that it did not have a code for the post *Sectional Head: Nutritional Services* on the Personnel Salary System (PERSAL) and that the Complainants would therefore temporarily be placed on the System as *Security Officer*, until the matter was resolved.
- 2.5. However, by the time that they lodged the complaint, more than two years later, the position was still the same.
- 2.6. The essence of their complaint was that they were appointed to job titles different from what they applied for, as a result of which they were underpaid.

## 3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1. The Public Protector is an independent constitutional institution, 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(1) of the Constitution provides that:

*“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.”*

3.3. Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation.

3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes or to rectify any act or omission through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5. In the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court, per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect<sup>1</sup>. The Constitutional Court further held that: *“When the remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or*

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<sup>1</sup> [2016]ZACC 11;2016(3) SA 580(CC) and 2016 (5) BCLR 618 (cc) at para[76].





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*lawfulness .For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”<sup>2</sup>.*

3.6. The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

## **4. THE INVESTIGATION**

### **4.1 Methodology**

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

4.1.2 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.

### **4.2 Approach to the investigation**

4.2.1 Like every Public Protector investigation, the investigation was approached by using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation constitute improper conduct or maladministration?

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<sup>2</sup> *Supra* at para[73]

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- 4.2.1.4 In the event of improper conduct or maladministration what it would take to remedy the wrong and what action should be taken.
- 4.2.2 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 case, the factual enquiry principally focused on whether the Department appointed the Complainants to an incorrect job title that resulted in them being prejudiced. It should be noted that the Public Protector did not investigate the personnel dispensation and composition of the Department and the reasons for the failure to include the job title of Sectional Head: Nutritional Services on the PERSAL System. These are matters that fall within the remit of the Public Service Commission.
- 4.2.2 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 or prejudice.
- 4.2.3 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration and/or a recurrence thereof.
- 4.3 **Based on an analysis of the complaint, the following issues were identified to inform and focus the investigation:**
- 4.3.1 Whether the Department appointed and remunerated the Complainants incorrectly; and if so
- 4.3.2 Whether the incorrect appointment and/or payment of remuneration was improper and/or resulted in prejudice, as envisaged by section 182(1) of the

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Constitution and constitutes maladministration, as contemplated by section 6(4)(a)(i) of the Public Protector Act.

#### **4.4 KEY SOURCES OF INFORMATION**

##### **4.4.1 Documents**

4.4.1.1 A copy of the advertisement of the posts of Section Head; Nutritionists at the Tswelopele Correctional Centre, published by the Department on 6 September 2009.

4.4.1.2 A copy of the letter of appointment addressed to Mr M Sechocho on 16 February 2010.

4.4.1.3 A copy of confirmation of acceptance of the post, signed by Mr Sechocho on 17 February 2010.

4.4.1.4 A copy of the Settlement Agreement signed by the Department and the Complainants on 24 October 2018.

##### **4.2.4 Interviews/meetings conducted**

4.4.2.1 Meeting with the Regional Commissioner and the Regional Head, Human Resources of the Department, held on 22 January 2015.

4.4.2.2 Meeting with the Complainants held on 19 September 2017.

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#### **4.2.5 Correspondence exchanged between the Public Protector and:**

4.4.3.1. The Department, dated 21 August 2013, 12 September 2013, 10 April 2014, 08 August 2014, and 13 March 2015.

4.4.2 The National Commissioner of Correctional Services in terms of section 7(9) of the Public Protector Act, dated 19 September 2017 and 18 August 2018.

#### **4.4.3 Legislation and other prescripts**

4.4.4 The Constitution of the Republic of South Africa, 1996.

4.4.5 The Public Protector Act 23 of 1994.

4.4.6 The Public Service Act 103 of 1994

4.4.7 The Public Service Regulations, 2001

### **5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS**

5.1. **Regarding whether the Department appointed and remunerated the Complainants incorrectly**

#### **Issues that are common cause**

5.1.1. It is not in dispute that the Complainants applied for positions advertised as *Sectional Head: Nutrition*, but were appointed by the Department in the position of *Security Officer*.

5.1.2. It is also common cause that the remuneration paid to the Complainants as a result of being appointed in the position of *Security Officer* negatively impacted on the employment conditions and emoluments due to them by the Department.

*The Department's response to the complaint*

- 5.1.3. In her response to the complaint, dated 13 March 2015, the Regional Commissioner stated that the matter was raised with the relevant Directorate of the Department dealing with PERSAL. It was established that at the time the positions were advertised, the Tswelopele Correctional Centre in Kimberley was a fairly new establishment. It was not fully staffed and most of the vacant posts were not yet created on the PERSAL System. Amongst the posts not created on PERSAL were the post of Section Head: Nutritional Services, although officials were physically functioning as such. The Department did not have a PERSAL code for the Occupation Specific Dispensation (OSD) posts of Nutritionist.
- 5.1.4. According to the Regional Commissioner, she was advised that a better option was to place Nutritionists in the sub-component Nutritional Services on the Security Post Class. She was further advised that the job description of “*caterers*” should be applied to “*nutritionists*”, as the duties and functions of these jobs at the kitchens of Correctional Centres are the same. This would ensure that the Complainants would not be prejudiced and that they would be remunerated according to the positions that they applied for.
- 5.1.5. The National Commissioner of Correctional Services, Mr A Frazer, responded on 18 August 2018 to a Notice issued in terms of section 7(9) of the Public Protector Act, affording the Department an opportunity to respond to the evidence and information obtained during the investigation, implicating it in improper conduct or maladministration.

5.1.6. He stated that the complaint was investigated by the Department internally. The investigation found that the Complainants were indeed appointed incorrectly. At the time, the Complainants and the Department were in the process of discussing settlement proposals in order to correct and address the inconsistency.

*Application of the Public Service Regulations, 2001*

5.1.7. Regulation I.1 of the Public Service Regulations made in terms of the Public Service Act, 1994 provided that the executing authority of a Department shall establish a job description and job title for each post or group of posts. A code of remuneration had to be determined for an occupational category and an occupational classification system.

5.1.8. Part IV of the Regulations regulating job evaluation meant to, *inter alia* determine the appropriate remuneration for every job and to ensure that work of equal value is remunerated equally.

*The Settlement Agreement between the parties*

5.1.9. The Complainants had also referred their dispute with the Department to the *General Public Service Sector Bargaining Council*, in terms of section 186(2)(a) of the Labour Relations Act, 1995.

5.1.10. At the Arbitration Hearing held on 28 June 2018, the Complainants and the Department agreed to settle the dispute. The main terms and conditions of the Settlement Agreement entered into were that:

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- 5.1.10.1. The appointment annual salary scales of the Complainants would be amended retrospectively from the date of their appointment, from R106 014-00 to R126 585.
- 5.1.10.2. Their salary notches would be adjusted in terms of previous and applicable cost of living adjustments.
- 5.1.10.3. The salary and service bonus arrears would be paid by the Department.
- 5.1.10.4. Their post class and rank code will be that of Security Officer and their job title that of Security Officer 1 (CB1/3).
- 5.1.11. The Settlement Agreement was signed by the parties on 24 October 2018.

### Conclusion

- 5.1.12. The National Commissioner conceded and it appears from the evidence obtained during the investigation that the Complainants were appointed and remunerated incorrectly. Their flawed appointment and remuneration were remedied in terms of a settlement agreement between the Complainants and the Department entered into in terms of the Labour Relations Act, 1995.
- 5.2. **Regarding whether the incorrect appointment and/or payment of remuneration was improper and/or resulted in prejudice, as envisaged by section 182(1) of the Constitution and constitutes maladministration, as contemplated by section 6(4)(a)(i) of the Public Protector Act.**

Issues that are common cause

- 5.2.1. The matter was investigated by the Department internally and the National Commissioner conceded that the Complainants' appointment, and therefore their remuneration were incorrect.
- 5.2.2. The purpose of the Settlement Agreement entered into between the parties was to address the prejudice suffered by them due to the incorrect appointment and remuneration paid to them by the Department.

**6. FINDINGS**

- 6.1. **On whether the Department appointed and remunerated the Complainants incorrectly**
- 6.1.1. The allegation that the Complainants were appointed and remunerated incorrectly by Department is substantiated.
- 6.2. **On whether the incorrect appointment and/or payment of remuneration was improper and/or resulted in prejudice, as envisaged by section 182(1) of the Constitution and constitutes maladministration, as contemplated by section 6(4)(a)(i) of the Public Protector Act.**
- 6.2.1. The allegation that the incorrect appointment remuneration by the Department of the Complainants caused them prejudice, is substantiated. This conduct on the part of the Department was improper, as envisaged by section 182(1) of the Constitution and constitutes maladministration, as contemplated by section 6(4)(a)(i) of the Public Protector Act.



## 7. REMEDIAL ACTION

The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution is the following:

### 7.1 The National Commissioner of Correctional Services:

- 7.1.1 To take the appropriate steps to ensure that all new positions created by the Department have the appropriate job title, job description, remuneration code and are registered on the PERSAL system before they are advertised and appointments made.

## 8. MONITORING

- 8.1 The National Commissioner of Correctional Services to submit an action plan within 30 days, indicating how the remedial action referred to in paragraph 7.1.1 will be implemented.
- 8.2 The remedial action to be implemented within six months from the date of this report.



**ADV BUSISIWE MKHWEBANE**  
**THE PUBLIC PROTECTOR**  
**OF THE REPUBLIC OF SOUTH AFRICA**

DATE: 02/02/2019