
PUBLIC PROTECTOR
SOUTH AFRICA

"Allegations of maladministration in the matter between Ms MJ Masibi and the City of Tshwane Metropolitan Municipality"

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REPORT ON AN INVESTIGATION INTO THE ALLEGED MALADMINISTRATION BY THE CITY OF TSHWANE REGARDING THE TRANSFER AND WITHHOLDING OF SALARY OF ITS EMPLOYEE, MS. MJ MASIBI
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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, 23 of 1994 (Public Protector Act).

(ii) The report relates to an investigation into the alleged maladministration during 2009 and 2010, by the City of Tshwane Metropolitan Municipality (the COT) regarding the transfer, non-payment of salary and disciplinary enquiry of one of its employees, Ms Mamotseki Jeanette Masibi (the Complainant). The Complaint was an ambulance practitioner with employment number 16412/4. The complaint was logged with the Public Protector on 03 June 2014.

(iii) The Complainant was previously employed by the COT until her resignation in May 2015. The Complainant alleged that during 2009 and 2010, she suffered improper prejudice as a result of unfair labour practices.

(iv) In the main, the complaint was that:

(a) During 2009 and 2010, the COT transferred the Complainant from Rosslyn Fire Station (Rosslyn station) to Wonderboom Fire Station (Wonderboom station);

(b) Between 17 February 2009 and 21 November 2010, the COT withheld payment of the Complainant’s salary due to her failure to report to Wonderboom station; and

(c) During 2010, the COT improperly subjected the Complainant to a disciplinary process whereby she was disciplined for failing to report to the Wonderboom station.

(v) The COT did not dispute that it had transferred the Complainant, withheld payment of the Complainant’s salary and taken disciplinary action against her as alleged. However,
the COT contended that it was justified in doing so and acted in accordance with the law and applicable prescripts.

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

(a) Whether the COT improperly transferred the Complainant from Rosslyn Fire Station to Wonderboom Fire Station;

(b) Whether the COT improperly withheld the Complainant’s salary between 17 February 2010 and 21 November 2010;

(c) Whether the conduct of the COT improperly prejudiced the Complainant and, if so, what it would take to place the Complainant in a position as close as possible to where she would have been had the COT acted properly.

(vii) The investigation process was conducted through meetings and interviews with Complainant and relevant officials of the COT as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.

(viii) During the investigation process, the Public Protector issued a notice in terms of section 7(9)(a) of the Public Protector Act to the City Manager of COT on 05 October 2017 to afford him an opportunity to respond to the Public Protector’s provisional findings and intended remedial action. The Public Protector received a response through a letter dated 9 November 2017 and the COT's submission contained therein were factored in this report.

(ix) Key laws and policies taken into account to determine if maladministration had occurred on the part of the COT as well as any prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the COT or its officials. These are the following:
(a) Section 23 of the Constitution, entrenches the right to fair labour practices;

(b) Section 33 of the Constitution, entrenches each person’s right to administrative action that is lawful, reasonable and procedurally fair;

(c) Section 185(b) of the Labour Relations Act No. 66 of 1995 (LRA), provides that every employee has the right not to be subjected to unfair labour practice. Section 186(2)(b) defines one of the acts amounting to unfair labour practice as any unfair act or omission that arises between an employer and an employee involving unfair suspension of an employee or any other unfair disciplinary action short of dismissal.

(d) Section 49 of the Basic Conditions of Employment Act No. 75 of 1997 (BCEA), provides for variation of the basic conditions of employment by agreement, through a bargaining council. The Complainant’s right to refer the dispute to the SALGBC is contained within such a collective agreement.

(e) Clause 6 of the Standard Operating Procedure (SOP 6) - Transfer of Personnel, Staff Movement and Redeployment, requires fairness to both the employer and the employee. Clause 6.3 of the SOP provides for a two-staged process:

   (a) The employee must be informed by his/her direct supervisor of the pending transfer as well as the reasons thereof, and

   (b) That at least thirty (30) days written notice of the transfer must be given to the employee, unless the parties agree otherwise.

(f) Clause 2.3.4 of the Grievance Procedure Collective Agreement, provides for the referral of unresolved grievances for arbitration;
(g) Section 3(2)(b) of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), provides that in order to give effect to the right to procedurally fair administrative action, an administrator must give the person whose rights and legitimate expectations have been adversely affected adequate notice of the nature of the proposed administrative action, amongst other things.

(h) The COT’s Collective Agreement - Desertion and Abscondment Policy\(^1\) makes reference to the adherence of fairness and natural justice.

(i) Section 6(3) of the Public Protector Act No. 23 of 1994, imputes discretionary powers on the Public Protector to decline matters wherein complainants have not exhausted available remedies.

(j) The COT objected to the proposed remedial action contained section 7(9) letter of the Public Protector Act on the basis that the complainant’s claim had prescribed in terms of the Prescription Act No. 68 of 1969. The effect of the limitations imposed by this Act to the powers of the Public Protector have been addressed. Prescription does not pose a limitation on the remedial action the Public Protector may take;

(k) The Prescribed Rate of Interest Act No. 55 of 1975 was also discussed in terms of its applicability to the remedial action finding.

(x) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Whether the COT improperly transferred the Complainant from Rosslyn Fire Station to Wonderboom Fire Station;

(aa) The allegation that the COT improperly transferred the Complainant from Rosslyn Fire Station to Wonderboom Fire Station is substantiated;

\(^1\) City of Tshwane Metropolitan Municipality - 10 November 2008.
(bb) The COT failed to adhere to clause 6.3.2 of the SOP 6 by not providing the Complainant with 30 days written notice or obtain her consent prior to the transfer;

(cc) The COT failed to meet the administrative scrutiny of procedural fairness. The COT contravened section 3(2)(b) of PAJA, *audi partem* rule and principles outlined in the Nxele case in that the Complainant was not afforded an opportunity to make representation regarding the transfer; and

(dd) Therefore, the COT’s conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

(b) Whether the COT improperly withheld the Complainant’s salary between 17 February 2010 and 21 November 2010;

(aa) The allegation that the COT improperly withheld the Complainant’s salary between 17 February 2010 and 21 November 2010 is substantiated.

(bb) The COT arbitrarily withheld the Complainant’s salary from 17 February 2010 to 21 November 2010 in contravention of clause 6.2 of the Abscondment Policy.

(cc) The COT further contravened section 3(2)(b) of PAJA and *audi alteram partem* rule when it failed to afford the Complainant an opportunity to make representation on why her salary should not be suspended;
(dd) The conduct of the COT in withholding the Complainant’s salary was inconsistent section 23 of the Constitution and section 185(b) of the LRA which accords the employees with the right to fair labour practices; and

(ee) Therefore, the COT’s conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

(c) Whether the conduct of the COT improperly prejudiced the Complainant and if so, what it would take to place the Complainant as close as possible to where she would have been had the City of Tshwane acted properly;

(aa) The Public Protector finds that the allegation that the conduct of the COT improperly prejudiced the Complainant is substantiated;

(bb) The Complainant was without a salary for a period of about 9 months;

(cc) Had it not being for the improper handling of the transfer and the subsequent suspension of the Complainant’s salary, the Complainant would have received her salary and benefits thereof timeously;

(dd) The COT’s conduct herein resulted in emotional distress to the Complainant in that she was subjected to an undue disciplinary hearing as well as dire financial distress due to her salary and benefits being withheld for a period of 9 months from February 2010 to November 2010; and

(ee) Consequently, the COT’s conduct in this regard amounts to improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.
(xi) In the light of the above findings, the Public Protector is taking the following appropriate remedial action as contemplated in section 182(1)(c) of the Constitution.

(a) The COT must, within fourteen (14) days of the date on which this report is issued, tender a written apology to the Complainant for the improper manner in which the transfer was handled as well as for unduly withholding her salary including benefits related thereto. The COT must, within thirty (30) days of date on which this report is issued, submit a copy of the said written apology to the Public Protector.

(b) The COT must, within thirty (30) days of the date on which this report is issued, pay the Complainant the salary entitlement including benefits (i.e. pension contributions, performance bonus, 13th cheque, etc.) on the salary scale that the Complainant was appointed on at the time related thereto, for the period from 17 February 2010 to 21 November 2010, that the Complainant’s salary was not paid and with the applicable interest rate as per the Prescribed Rate of Interest Act per annum, calculated at 15.5% per annum from 17 February 2010 to date of payment. The COT must, within fourteen (14) days of the said payment submit proof of same to the Public Protector.

(c) The COT has confirmed that the disciplinary record of the Complainant related to the disciplinary charges pertaining to this matter have been expunged due to the fact that they only remained on record for a period of six months after the outcome of the disciplinary hearing on 17 November 2011. The COT is directed not to communicate the existence of the said disciplinary record to any third parties;

(d) An Action Plan indicating how the remedial action will be implemented is to be provided to the Public Protector, within fourteen (14) days of the issuing of this report.
REPORT ON AN INVESTIGATION INTO THE ALLEGED MALADMINISTRATION BY THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY REGARDING THE TRANSFER AND WITHHOLDING OF SALARY OF ITS EMPLOYEE, MS. MJ MASIBI

1. INTRODUCTION

1.1. 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 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation:

1.2.1. The Executive Mayor of the City of Tshwane Metropolitan Municipality (COT);
1.2.2. The City Manager of the COT; and
1.2.3. A copy of the report is also provided to Ms Mamotseki Jeanette Masibi (Complainant) to inform her about the outcome of this investigation.

1.3. The report relates to an investigation into the alleged maladministration by the City of Tshwane Metropolitan Municipality regarding the transfer and withholding of salary of the Complainant.

2. THE COMPLAINT

2.1. The Complainant was formerly employed by the (COT) in the Department of Health and Social Development until her voluntary resignation in May 2015.

2.2. The Complainant alleged that in August 2009, and whilst on maternity leave, she received a telephone call from the COT advising her that she was transferred from the COT’s Rosslyn Fire Station (Rosslyn station) to the Wonderboom Fire Station
(Wonderboom station); and that she would accordingly be reporting to the latter station upon resumption of duties on 01 September 2009.

2.3 On 01 September 2009, the Complainant reported to the Rosslyn fire station and not at the Wonderboom station as per the transfer. The COT requested the Complainant to help out temporarily at Wonderboom station. The Complainant then obliged until 06 September 2009.

2.4 In November 2009, the Complainant lodged a grievance with the COT, for unfair labour practice. She continued to report to the Rosslyn station instead of the Wonderboom station, where she had supposedly been transferred to.

2.5 The COT informed the Complainant on 16 February 2010 that it would be implementing the Abscondment Policy (which policy includes provisions regarding the suspension of salary). On 27 May 2010, the COT subsequently instituted disciplinary action against the Complainant by way of issuing a Notice of Misconduct for her failure to report to the Wonderboom station as per the proposed transfer. In addition thereto, the COT suspended the Complainant’s salary for a period of nine (9) months from 17 February 2010 to 21 November 2010.

2.6 On 27 May 2010, 21 June 2010, 05 August 2010 and 25 October 2010, Notices of Misconduct were issued against the Complainant on the same charges. Eventually on 05 November 2010, a formal set down notice of the disciplinary hearing was issued to the Complainant; which hearing was held on 12 November 2010. On 17 November 2010, the disciplinary action outcome found her guilty of misconduct and the Complainant was given a final written warning to this effect.

2.7 On 19 November 2010, the Complainant lodged an appeal against the outcome of the disciplinary hearing. The appeal was allegedly never attended to.

2.8 While her salary was not paid from 17 February 2010 to 21 November 2010, the disciplinary hearing instituted by the COT against her only took place on 12 November
2010. The outcome thereof was only pronounced on 17 November 2010. The Complainant did not receive her payslips during the period when her salary payment was suspended.

2.9 The Notices of Misconduct that were issued during May 2010 to October 2010, were issued on the same grounds as mentioned above. No reasons for postponements of the disciplinary hearing were provided and the matter was not brought to finality in a timely manner.

2.10 The Complainant sought the intervention of the City Manager, but the matter was not resolved.

2.11 The COT has not paid the Complainant her salary and benefits associated therewith for the period in question to date. This caused her great financial distress and prejudice.

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

3.1 The Public Protector is an independent constitutional body 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 additional powers and functions prescribed by 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 through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*\(^2\) the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

3.5.1 "Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;\(^3\)

3.5.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced;\(^4\)

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;\(^5\)

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\(^2\) CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.

\(^3\) Para [65].

\(^4\) Para [67].

\(^5\) Para [69].
3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow;⁶

3.5.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to;⁷

3.5.6 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of the investigation and the type of findings made;⁸

3.5.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence⁹,

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation;¹⁰

3.5.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case.¹¹

⁶ Para [69].
⁷ Para [70].
⁸ Para [71].
⁹ Para [71(a)].
¹⁰ Para [71(d)].
¹¹ Para [71(e)].
3.5.10 The remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."\(^{13}\)

3.6 The COT is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

3.7 The COT did not object to the Public Protector’s power and jurisdiction to investigate, but objected to the proposed remedial action contained section 7(9) notice on the basis that the complainant’s claim had prescribed in terms of the Prescription Act, no. 68 of 1969 (Prescription Act). The effect of the limitations imposed by the Prescription Act to the powers of the Public Protector have been addressed. Prescription does not pose a limitation on the remedial action the Public Protector may take.

Regarding the applicability of the Prescription Act the following pertains:

3.8 In *Nyayeni v Illovo Sugar Pension Fund & Another* [2004] 11 BPLR 6249 (PFA), the issue of the application of provisions of the Prescription Act in proceedings before the Tribunal of the Pension Fund Adjudicator was considered at length. At paragraphs 16-19 the following is stated:

"16. Chapter III of the Prescription Act applies to claims or legal proceedings instituted for the recovery of a debt. Where the claim or legal process is intended to achieve relief other than a recovery of a debt then chapter III of the Prescription Act can surely does not apply.

\(^{12}\) Para [76].
\(^{13}\) Para [73].
17. The concept of “debt” in the context of the Prescription Act has been given a wide and general meaning. It embraces not only debts sounding in money but also rights of action for enforcement of obligations flowing from a particular right (Evins v Shield Insurance Company Ltd 1979 (3) SA 1136 (W) at 1141F-G; HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N) at 909A-C; ESCOM v Stewarts and Lloyds of South Africa (Pty) Ltd 1981 (3) 7 SA 340 (A) at 344E-F; CGU Insurance Ltd v Rumdel Construction (Pty) Ltd 2004 (2) SA 622 (SCA)).

18. However, notwithstanding its wide ambit as judicially interpreted, the concept of a debt is not synonymous with that of a complaint as defined in the Pension Funds Act. A complaint as defined covers a wider spectrum than a debt. It may well be that in some circumstances a complaint may involve the recovery of a debt. But that does not alter the character of a complaint as defined. From its very definition, it is clear that the jurisdiction of the adjudicator is not limited to claims designed for the recovery of a debt. It extends to the determination of matters relating to the administration of pension funds, including decisions on the investment of pension fund monies, or the application of pension fund rules, or disputes of fact or law relating to pension funds. The appropriate orders which the adjudicator is entitled to make would inevitably include declaratory orders, prohibitory interdicts or determinations of law or fact which may not necessarily entail the recovery of a debt or payment of money or the performance of an obligation. It is conceivable that in making a determination the adjudicator may make an order which entails payment of money or fulfilment of an obligation, thus relating to the recovery of a debt. But that in itself does not mean that the provisions of chapter III of the Prescription Act apply.

19. I say so because section 1 of the Act defines a complaint without making a distinction between complaints that involve the recovery of a debt, on the one hand, and those that do not, on the other. It would be anomalous if such a distinction were imputed and the adjudicator entitled only to extend the three year period in regard to complaints that do not involve the recovery of a debt but
not entitled to do so in regard to complaints that do. Such a result could never have been intended by the legislature. Moreover, section 30l creates a just power. It provides for statutory machinery deliberately designed by the legislature for the resolution of a wide variety of issues relating to pension funds in a just and expeditious manner. When the legislature devised the scheme described in chapter VA of the Act it was mindful of the Prescription Act, including chapter III thereof. It nonetheless elected to include in chapter VA the provisions of section 30l which, although regulating similar issues, are materially different from the provisions of chapter III of the Prescription Act. It would, in my view, make nonsense of section 30l(3) if the legislature had intended at the same time that chapter III of the Prescription Act should apply to chapter VA proceedings. In any event, section 16(1) of Chapter III of the Prescription Act sets out the scope of application of the Act as follows:

'Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save insofar as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of the recovery of a debt or imposes a condition on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.'"

3.9 The same argument can be extended to the powers and jurisdiction of the Public Protector to investigate any conduct, as with the Pension Fund Adjudicator, is not bound by the Prescription Act.

3.10 The Public Protector as a Chapter 9 institution derives its powers from the Constitution. It is trite law that the Constitution is supreme law. In carrying out its mandate, the Public Protector is bound to ensure that the principles enshrined in the Constitution are applied. Thus, in applying any other legal provision, the Constitution values must be upheld, which includes the values of fairness and acting honourably. Against these general overarching principles, it would be improper to limit the
complaint by Ms. Masibi by way of the Prescription Act. Same would also simply reinforce the unfairness which she has alleged to have suffered.

3.11 Writers such as Stephen Owen\(^\text{14}\) accentuated the view that the Ombudsman system of oversight and accountability has developed in response to the shortcomings of legislative and judicial method in ensuring that individuals receive appropriate consideration and protection against adverse government action and wrote that:

"A finding of administrative negligence and a recommendation ... to remedy the harm caused by it pursuant to ombudsman legislation is not necessarily based on the same findings that a court would require to establish legal liability. Ombudsman authority to recommend remedial action derives from the premise that a fair remedy with respect to administrative wrongdoing is not always available at law. ...to a large extent, the office of the ombudsman is established by legislatures in recognition of the inadequacy of the courts to deal with many injustices arising from the nature of modern bureaucracy."

3.12 This is a premise that was equally fundamental to the creation of the institution of the Public Protector as an entity to remedy prejudice and impropriety caused by maladministration or improper conduct as espoused in section 182(1)(c) of the Constitution.

3.13 Furthermore, the Prescription Act does not directly apply as a statutory limitation to matters referred to the Public Protector for investigation and determination. In terms of section 6(9) of the Public Protector Act, 1994, the Public Protector may in special circumstances, within his/ her discretion, investigate matters that have been reported more than two years after the occurrence of the incident or matter concerned. There is no reference or link to the time limitations provided for in the prescription legislation.

3.14 The provisions of the Public Protector Act are in line with the principle established in most jurisdictions with ombudsman institutions that maladministration and the

\(^{14}\) See paragraph 4.4.8.1 below
injustice suffered as a result thereof cannot prescribe (Which does not mean that there is an unlimited period within which such a matter must be reported to the ombudsman).

3.15 Our Courts have noted that a delay in taking steps to review an unlawful administrative decision could result in the uncertainty as to the status of that decision, but does not mean that the right to bring the review had become prescribed and thus could not be enforced.

3.16 If the Public Protector is empowered to investigate a conduct that would have prescribed, if brought by action in a court of law, he/ she would be entitled to exercise his/ her powers under section 182 of the Constitution in relation to such a complaint, namely to:

(a) 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) Report on that conduct;
(c) Take appropriate remedial action;
(d) Be accessible to all persons and communities.

3.17 Regarding the limitation imposed by the Prescription Act on the investigative powers of the Public Protector, and following on from the judgement in the Nyayeni case above, the Public Protector’s powers to investigate conduct of maladministration (which may include making remedial findings for the repayment of a debt owed) are not limited by the Prescription Act. As such the Public Protector is justified in proceeding with its investigation and findings related to the improper conduct of COT for withholding the Complainant’s salary.
3.18 The SCA, in the matter of Minister of Home Affairs v The Public Protector (308/2017) [2018] ZASCA 15 (15 March 2018), held that "the only express exclusion of the Public Protector's investigative jurisdiction is in relation to decisions of courts. For the rest, her jurisdiction is extremely wide and her mandate is clear: she must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance".

3.19 In Public Protector v Mail and Guardian Ltd & others Nugent JA stressed the importance of the office of the Public Protector, which he described as an 'indispensable constitutional guarantee', stating that it 'provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation'.

3.20 Lastly, in its response to a section 7(9) notice dated 09 November 2017, the COT contended that it would be a futile exercise to pursue an investigation into its officials in terms of the MFMA since the majority of the employees involved in this matter had already left the services of the COT. This assertion is not consistent with chapters 15 and 16 of the MFMA pertaining to the civil, criminal and disciplinary liability of municipal officials, managers and office bearers. The COT's response at best accounts only for its ability to take disciplinary action against these persons, but fails to take into account civil and potentially criminal liability as well. Its response also does not take into consideration those persons still within its employ who should still be held to account for their conduct.

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.

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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. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The Public Protector attempted to resolve the complaint by mediation, however given the COT’s defence of the correctness of its conduct, mediation was ultimately not successful after several meetings.

4.1.4. During the investigation process, the Public Protector served a notice in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notice) to the City Manager of COT on 05 October 2017 to afford him an opportunity to respond to the Public Protector’s provisional findings and intended remedial action. The Public Protector received a response through a letter dated 9 November 2017 and the COT’s submissions contained therein were factored in this report.

4.2. Approach to the investigation

4.2.1. As with every Public Protector’s investigation, this investigation was approached using an enquiry process that seeks to establish:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Whether there is a discrepancy between what happened and what should have happened and whether that deviation amounts to maladministration?
4.2.1.4 In the event of maladministration, to determine what it would take to remedy the wrong or place the Complainant in a position as close as possible to where she would have been but for the maladministration or improper conduct?
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 particular case, the factual enquiry principally focused on whether or not the COT acted improperly in transferring the Complainant and whether the COT improperly suspended the Complainant’s salary for her refusal to abide by the transfer instruction.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the COT to prevent maladministration and prejudice.

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

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

4.3.1 Whether the COT improperly transferred the Complainant from Rosslyn Fire Station to Wonderboom Fire Station;

4.3.2 Whether the COT improperly withheld the Complainant’s salary between 17 February 2010 and 21 November 2010; and

4.3.3 Whether the conduct of the COT improperly prejudiced the Complainant and, if so, what it would take to place the Complainant in a position as close as possible to where she would have been had the COT acted properly.

4.4 The Key Sources of information
4.4.1 Documents

4.4.1.1 A copy of the Complainant’s Heads of Argument submitted in the disciplinary hearing on 12 November 2010, wherein she was charged for (i) refusing to obey a lawful instruction, and (ii) being absent from work without leave;

4.4.1.2 A copy of the Complainant’s application for leave to appeal the outcome of said hearing;

4.4.1.3 A copy of the Complainant’s written request for repayment of her outstanding salary dated 21 February 2011;

4.4.1.4 A copy of the disciplinary charges against the Complainant dated 27 May 2010, wherein the Complainant was charged with (i) refusing to obey a lawful instruction, and (ii) being absent from work without leave;

4.4.1.5 A copy of the Complainant’s request for a meeting with the City Manager dated 10 September 2010, and the COT’s response dated 18 October 2010, that such request needs to be referred to the Director of Labour Relations instead;

4.4.1.6 A copy of the outcome of the disciplinary hearing dated 17 November 2010, wherein the Complainant was found guilty on all charges and given a final written warning;

4.4.1.7 A copy of the South African Local Government Bargaining Council (SALBGC) dismissal ruling dated 25 August 2010;

4.4.1.8 A copy of the COT’s letter to the SALBGC dated 16 August 2010, requesting a postponement of the proceedings on 17 August 2010, and that same had been arranged with SAMWU who represented the Complainant;

4.4.1.9 A copy of the Complainant’s grievance form regarding her transfer dated 12 November 2009 and steps thereafter;

4.4.1.10 A copy of a letter from Mr Kau of the COT’s Emergency Medical and Ambulance Services dated 02 December 2011 regarding the Complainant’s unpaid salary;

4.4.1.11 A copy of COT Standard Operating Procedure (SOP) 6 issued in April 2009;

4.4.1.12 A copy of the SALBGC Grievance Procedure Collective Agreement of 26 March 2003;

4.4.1.13 A copy of COT transfer letter to the Complainant dated 13 November 2009;
4.4.1.14 A copy of Mr Kau’s letter dated 16 February 2010, to the Complainant requesting her to refrain from refusing to comply with the transfer instruction despite the outcome of step 3 of the grievance procedure held on 11 February 2010;

4.4.1.15 A copy of the South African Municipal Workers Union (SAMWU) letter dated 10 August 2010, to the COT requesting a postponement of the arbitration before the SALBGC on 17 August 2010 due to the unavailability of the Complainant’s SAMWU representative on that date;

4.4.1.16 A copy of the Complainant’s leave records and leave applications;

4.4.1.17 A copy of the COT’s transfer letter dated 26 January 2005;

4.4.1.18 A copy of a Notice of Disciplinary Hearing dated 05 November 2010;

4.4.1.19 Copies of Notices of Misconduct dated 25 October 2010, 03 August 2010; 21 June 2010; and 27 May 2010; and 05 November 2010;

4.4.1.20 Copies of available Shift Attendance Registers for 2010 and 2011;

4.4.1.21 A copy of Night Report dated 01 September 2009; and 02 September 2009;

4.4.1.22 A copy of the Collective Agreement – Desertion and Abscondment Policy dated 10 November 2008 (Abscondment Policy);

4.4.1.23 A copy of Ms Kale’s letter dated 16 February 2010, regarding the Complainant’s refusal to receive a letter as per paragraph 4.4.1.14 above wherein the complainant stated that the reason for her refusal was due to the fact that the grievance was still pending;

4.4.1.24 A summary of the sequence of events as provided by the COT on 19 May 2016.

4.4.2 Interviews conducted

4.4.2.1 Meetings with the COT on 15 July 2015; 05 May 2016; 20 May 2016; and 25 October 2017;

4.4.2.2 Consultation with the Complainant on 02 June 2015.

4.4.3 Correspondence sent and received

4.4.3.1 A letter from the Public Protector to the COT dated 19 June 2015, raising the complainant’s allegations with the COT for response;
4.4.3.2 A letter from the Public Protector to the COT dated 29 September 2017, in terms of section 7(9) of the Public Protector Act;

4.4.3.3 The City Manager of the COT's written response dated 09 November 2017, to the Public Protector's letter in terms of section 7(9) of the Public Protector Act.

4.4.4 Legislation and other prescripts

4.4.4.1 Basic Conditions of Employment Act No. 75 of 1997 (BCEA);
4.4.4.2 Collective Agreement – Desertion and Abscondment Policy dated 10 November 2008;
4.4.4.3 Constitution of the Republic of South Africa, 1996;
4.4.4.4 Labour Relations Act No. 66 of 1995 (LRA);
4.4.4.5 Municipal Finance Management Act No. 56 of 2003;
4.4.4.6 Prescribed Rate of Interest Act No. 55 of 1975;
4.4.4.7 Prescription Act No. 68 of 1969;
4.4.4.8 Promotion of Administrative Justice Act No. 3 of 2000 (PAJA);
4.4.4.9 Public Protector Act No. 23 of 1994;
4.4.4.10 SALBGC Grievance Procedure Collective Agreement of 26 March 2003;
4.4.4.11 Standard Operating Procedure (SOP) 6 issued in April 2009.

4.4.7 Case law

4.4.7.1 Davehill (Pty) Ltd vs Community Development 1988 (1) SA 290 (A); and Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and others [2013] 2 All SA 1 (SCA) wherein it was held that the interest rate as per the Prescribed Rate of Interest Act is fixed and remains constant at the time when the interest begins to run (i.e. from the date the Debtor is placed in mora and notwithstanding any variations to the interest rate that the Minister may prescribe thereafter).
4.4.7.2 Fedsure Life Assurance & Ors v Greater Johannesburg Transitional Metropolitan Council & Ors 1999 (1) SA 374 (CC) paras [56] – [59]; regarding the exercise of powers by public officials in a manner which is procedurally fair.

4.4.7.3 Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Ors (2006) 27 ILJ 2127 (LC); (2008) 29 ILJ 2708 (LAC) wherein the transfer of an employee was held to be an administrative action.

4.4.7.4 Crous v Blue Crane Route Municipality and Another ((2009) 30 ILJ 840 (Tk)) [2008] ZAECCHC 215; [2008] ZAECCHC 186 (6 November 2008) wherein it was held that “it is expected of organs of state that they behave honourably. Their decisions and their conduct must be ‘informed by the values of our Constitution’.

4.4.7.5 In Nyayeni v Illovo Sugar Pension Fund & Another [2004] 11 BPLR 6249 (PFA), the issue of the application of provisions of the Prescription Act in proceedings before the Tribunal of the Pension Fund Adjudicator was considered at length.

4.4.7.6 The SCA judgment, in the matter of Minister of Home Affairs v The Public Protector (308/2017) [2018] ZASCA 15 (15 March 2018), held that “the only express exclusion of the Public Protector’s investigative jurisdiction is in relation to decisions of courts. For the rest, her jurisdiction is extremely wide and her mandate is clear: she must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance”(own emphasis).

4.4.7.7 Public Protector v Mail and Guardian Ltd & others, wherein Nugent JA stressed the importance of the office of the Public Protector, which he described as an ‘indispensable constitutional guarantee’, stating that it ‘provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation.'
4.4.8 Other sources


4.4.8.3 "Unjust Forfeiture": A Public Protector Report on an investigation into alleged unfair labour practices by the Department of Home Affairs.

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 Whether the City of Tshwane improperly transferred the Complainant from Rosslyn Fire Station to Wonderboom Fire Station

*Common cause issues*

5.1.1 It is common cause that the COT is entitled to transfer employees on the basis of operational requirements and in terms of a prescribed process.

5.1.2 The COT’s SOP 6, contains guidelines to ensure that all deployments of personnel are fair.

5.1.3 Whilst on maternity leave in August 2009, the Complainant was contacted by her supervisor, Ms. Kale, informing her of her transfer to Wonderboom station.
5.1.4 The evidence reveals that on 13 November 2009, the COT issued the Complainant with a letter titled “TRANSFER TO OTHER STATION” [sic] purporting to serve as a letter of transfer and which was effective of same date. The essential contents of the letter read as follows:

"Due to the balancing of stations according to qualifications, you are being transferred from Rosslyn to Wonderboom A shift.

It will be effective from the 13th of November 2009, and you will be transported to your new station until the 12th of Dec 2009. This must not be taken as a permanent deployment. Thanks." [sic]

5.1.5 The COT submitted that the above letter was in compliance with the SOP 6 pertaining to transfers / redeployments. The Complainant did not report to the Wonderboom station subsequent to receipt of the aforesaid letter. Instead, she continued to report at the Rosslyn station and opted to pursue the grievance.

5.1.6 The Complainant initiated grievance proceedings relating to the transfer on 10 November 2009. On 12 November 2009, step one of the grievance process was conducted. This process involved an engagement between the Complainant (as employee) and her immediate supervisor. This process was unsuccessful in resolving the grievance.

5.1.7 On 01 December 2009, step two of the grievance procedure was undertaken between the Complainant, the Head of Department and a union representative. The grievance remained unresolved.

5.1.8 On the 11 February 2010, step three of the grievance procedure took place involving the intervention of the City Manager, which remained unresolved.

5.1.9 On 12 April 2010, the Complainant proceeded to refer the grievance for arbitration to the South African Local Government Bargaining Council (SALGBC) in terms of step
four of the grievance process and in line with the Grievance Procedure Collective Agreement.

5.1.10 On 27 May 2010, the COT issued the Complainant with the first Notice of Misconduct. The matter was set down for 04 June 2010. The allegations of misconduct on which the COT charged the Complainant read as follows:

"Charge 1: 
You Mmamotseki J Masibi have contravened clause 1.2.4 of Annexure A which reads: as follows, You shall obey lawful and reasonable instructions given by a person having the authority to do so. In that you have refused an instruction given to you by your supervisor that you should report on duty at Wonderboom Fire Station you instead remained at Rosslyn against your supervisor's instruction.

Charge 2: 
You have contravened clause 1.1 which reads: Employees are expected to comply in every respect with the conditions of service of employment and collective agreements and related regulations, order and policies, in that you should refrain from any conduct which will give just cause for discipline: You contravened clause 1.2.7 of Annexure A. which reads that you should refrain from being absent from work without leave or permission, except on good cause," [Sic]

5.1.11 On 21 June 2010, the Complainant was issued with the second Notice of Misconduct. It read the same as the first Notice but added the following:

5.1.11.1 That the Complainant's first instruction was given to her on 12 November 2009;

5.1.11.2 That she should report to the Wonderboom station on 13 November 2009;

5.1.11.3 That the Complainant instead reported to the Rosslyn station. The matter was set down for 25 June 2010.
5.1.12 On 05 August 2010, the Complainant was issued with the third Notice of Misconduct, which read the same as the second Notice. The matter was set down for 11 August 2010.

5.1.13 The SALGBC dismissed the Complainant's grievance due to non-attendance by both parties through a ruling dated 20 August 2010.

5.1.14 On 10 September 2010, the Complainant wrote to the City Manager requesting a meeting for his intervention. The City Manager responded on same date, advising the Complainant to refer the matter to Labour Relations. On 27 September 2010, the Complainant wrote to the City Manager again requesting a meeting regarding her salary suspension. From the evidence received from both the Complainant and the COT, the City Manager’s office did not respond to this correspondence.

5.1.15 On 25 October 2010, the Complainant was issued with the fourth Notice of Misconduct, which read the same as the second charge Notice. The matter was set down for 03 November 2010.

5.1.16 On 05 November 2010, the Complainant was issued with a Notice in respect of the disciplinary hearing, which hearing was set down for 12 November 2010. At the hearing, the Complainant pleaded not guilty to all the charges levelled against her. The disciplinary hearing outcome found the Complainant guilty on all charges and the sanctioned was a final written warning, valid for a period of six months. On 19 November 2010, the South African Municipal Workers Union (SAMWU) on behalf of Complainant lodged an appeal against the disciplinary hearing outcome.

5.1.17 On the basis of the disciplinary hearing outcome, the Complainant started reporting at the Wonderboom station from 21 November 2010 until her voluntary resignation in May 2015.

Issues in dispute
5.1.18 The Complainant alleged that she was improperly transferred and that the transfer was not in line with the SOP 6: Transfer of Personnel, Staff Movement and Redeployment\(^{17}\) (SOP 6). The Complainant contended that when she resumed duty at Rosslyn on 01 September 2009, she was requested to temporarily assist at Wonderboom station, which she did for few days only.

5.1.19 On the other hand the COT submitted that the Complainant tacitly accepted the transfer when she reported to Wonderboom station on 01 September 2009. However, the alleged tacit acceptance of the transfer by the Complainant was reflected in the letter dated 13 November 2009 referred to in paragraph 5.1.4 above.

5.1.20 The Complainant further submitted that she was verbally permitted by her immediate supervisor to report to the Rosslyn station from 08 December 2009 to 10 February 2010.

5.1.21 However, in its response to section 7(9) notice dated 9 November 2017, the COT contended that the Complainant consented to the transfer by reporting to the Wonderboom station and by so doing, the written prior notice of 30 days was not necessary. Unfortunately this submission by the COT raised more questions than answers. For instance, if the Complainant had consented to the transfer why did the COT craft the above transfer letter in the manner in which it did? The letter months was also sent 2 months after the Complainant allegedly consented to the transfer.

5.1.22 The question whether the Complainant was properly transferred from the Rosslyn station to Wonderboom station will be determined by the application of law hereunder.

Application of the relevant legal framework

5.1.23 This issue is regulated by the SOP 6 which prescribes the procedure to be followed when undertaking a redeployment.

\(^{17}\) Doc No. ES/A&S/QAP 7.5.1-6 Rev. No. 03 (20/01/2015)
COT's Transfer Procedure

5.1.24 The essential excerpts on the SOP 6 [sic], read:

1. "...The purpose of this Standard Operational Procedure is to provide guidelines that ensure that all deployments of personnel are meaningful, fair and in the interest of the CoT, Emergency Services Department as well as the employee concerned and that the deployments are done in accordance with the Conditions of Service and/or applicable policies as approved from time to time.

..."

4. Redeployment: the redistribution of human resources in order to use it optimally and effectively to meet the needs of the CoT.

..."

Transfer: The placement of an employee in other post in the CoT service by the CoT, in terms of the yet to be negotiated Transfer Policy.

..."

6.1.4 Since the redeployment/transfer of staff members could result in an unfair labour practice, the redeployment must comply with the requirements of equality.

...

6.2.4 Any redeployment/transfer whether requested by an employee or initiated by management must comply with the requirements of fairness to all parties and be in the best interests of the Emergency Services Department and the City Of Tshwane.

..."

6.3 RESPONSIBILITIES OF EMPLOYER REGARDING REDEPLOYMENT / TRANSFER OF EMPLOYEES

6.3.1 The employee must be informed by his/her direct supervisor of the pending redeployment/transfer as well as the reasons thereof.

6.3.2 At least 30 days written notice of redeployment/transfer must be given to the employee (to facilitate logistical and other arrangements) unless otherwise mutually agreed to by the parties concerned.

6.4 APPEALS ON REDEPLOYMENT/TRANSFER
6.4.1 The employees are at liberty to appeal any redeployment/transfer in writing upon receiving official notification of the said redeployment/transfer from their Divisional Heads.

6.5.4 Transfers must take place in accordance with the Basic Conditions of Employment Act 75 of 5 December and/or applicable policies as approved from time to time."[sic]

5.1.25 Clause 6.3 of the SOP 6 thus provides for a two-staged process:

(c) The employee must be informed by his/her direct supervisor of the pending transfer as well as the reasons thereof, and

(d) That at least thirty (30) days written notice of the transfer must be given to the employee, unless the parties agree otherwise.

5.1.26 Whereas it was not disputed that the Complainant was informed of the pending transfer by her direct supervisor, the contention was whether a 30 days written notice or an agreement was reached by the parties regarding the transfer.

5.1.27 From the evidence traversed above, and with reference to COT’s letter of transfer dated 13 November 2009, the requirement of 30 days prior notice was not dispensed with. The COT argued that the 30 days prior notice was dispensed through a mutual agreement that was reached by the parties and as stipulated in the SOP 6. However, the COT could not produce evidence that the Complainant had mutually agreed to the transfer. On the other hand, the clearest indication that the Complainant was not in favour of her transfer to Wonderboom station was the initiation of grievance proceedings on 12 November 2009.

5.1.28 In view of the information discussed above, the COT’s purported written notice dated 13 November 2009 did not afford the Complainant 30 days as required by clause 6.3.1 of the SOP 6. Furthermore, the Complainant’s lodgement of the appeal and her
continued reporting to Wonderboom station indicated that she did not mutually agree to the transfer as required by the aforementioned clause.

Administrative action and the *Audi alteram partem* rule (audi partem rule)

5.1.29 The Labour Appeal Court held in *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others*¹⁸ (*Nxele case*), that the transfer of an employee constituted administrative action. The employee should be informed of a considered transfer and must be given reasons therefor. The employee must also be given an opportunity to make representations before a final decision is made.

5.1.30 Since a transfer is considered to be an administrative action, the PAJA applies. Echoing section 33 of the Constitution, section 3(2)(b) of PAJA provides that in order to give effect to the right to procedurally fair administrative action, an administrator must give the person whose rights and legitimate expectations have been adversely affected adequate notice of the nature of the proposed administrative action, amongst other things.

5.1.31 In the interests of fairness, an employee deserves his/her employer’s audience through representations in response to a notification of an intended transfer, before making a final decision. This appears to have been the COT’s intention in clause 6.3 of the SOP 6. However, the issuing of transfer letter by the COT on 13 November 2009 instructing the Complainant to report to Wonderboom station on the same day did not allow for compliance with the *Nxele case* and compliance with section 3(2)(b) of PAJA.

Conclusion

5.1.32 In the circumstances, the transfer of the Complainant was improper in that it did not comply with clause 6.3.1 of SOP 6 which required the Complainant to be given 30 days written notice or consent to the transfer. Furthermore, the transfer of the Complainant was in contravention of section 3(2)(b) of PAJA and principles outlined in the Nxele case.

5.2 Whether the City of Tshwane improperly withheld the Complainant’s salary from 17 February 2010 to 21 November 2010.

Common cause

5.2.1 It is common cause that the Complainant continued to draw her salary between 1 September 2009 and 16 February 2010. Further that the COT withheld the Complainant’s salary between 17 February 2010 and 21 November 2010.

5.2.2 The COT initiated disciplinary process against the Complainant on 27 May 2017 before her grievance around the same issue could be adjudicated on. The Complainant’s grievance was only dismissed through an Arbitrator’s ruling dated 20 August 2010.

5.2.3 On the basis of the disciplinary hearing outcome, the Complainant started reporting at the Wonderboom station from 21 November 2010 until her voluntary resignation in May 2015.

5.2.4 The Complainant’s salary was reinstated from 21 November 2010, after the outcome of a disciplinary process.

5.2.5 The following table is a chronological summary of key events that occurred:
Aug 2009

The Complainant received a call from her supervisor, Ms Kale requesting her to report to Wonderboom on 01/09/2009.
Complainant reported to Rosslyn. COT requests Complainant to help temporarily at Wonderboom. Complainant obliged until 06/09/2009. COT considers this to be acceptance of transfer.

01/09/2009

Complainant on light duty. Also took sick and study leave days between September and November 2009. No indication on COT records where Complainant was stationed. Complainant states she was on duty at Rosslyn station.

10/11/2009

Complainant lodged grievance regarding transfer (four step process)

12/11/2009

STEP 1: engagement with supervisor - unresolved

13/11/2009

COT issues transfer letter to Complainant to Wonderboom

01/12/2009

STEP 2: engaged Head of Department - unresolved

08/12/2009 to 10/02/2010

Complainant permitted to report to Rosslyn in the interim

11/02/2010

STEP 3: engaged Municipal Manager – unresolved

16/02/2010

Written instruction to Complainant to report to Wonderboom

17/02/2010

Complainant’s salary suspended

12/04/2010

STEP 4: Dispute referred to Bargaining Council

27/05/2010

COT institutes disciplinary action – issues four Notices of Misconduct:
- 27/05/2010
- 21/06/2010
- 05/08/2010
5.2.6 The issue in dispute is whether the COT improperly withheld the Complainant's salary and benefits associated therewith from 17 February 2010 until 21 November 2010.

5.2.7 The COT submitted that the basis for withholding the Complainant's salary was her failure to report to the Wonderboom station. In its response to the section 7(9) notice, the COT submitted that the Complainant unilaterally repudiated the transfer agreement by returning to Rosslyn station only two days after reporting at Wonderboom station. However, the Complainant dismissed this contention by the COT on the basis that her reporting to Wonderboom station was separate from the issue of transfer or deployment in terms of the SOP 6 and therefore could not have constituted a repudiation of a transfer agreement.

5.2.8 In its response to the section 7(9) notice, the COT further contended that due to the above-mentioned repudiation, the COT implemented the "no work, no pay" principle in that the Complainant failed to perform her duties at the agreed station. The COT submitted as evidence, attendance registers for the Rosslyn and Wonderboom stations. The Complainant did not contest that she did not report to the Wonderboom
station, but submitted that she was neither permitted to sign attendance registers nor assigned any duties at the Rosslyn station where she reported during the period in question.

5.2.9 Notwithstanding the above submission by the COT, in its response to section 7(9) notice, the COT also stated that:

"...she [the Complainant] lodged a grievance regarding the matter which was escalated in terms of the dispute resolution mechanism contained in the collective agreement to the SALGB. She however decided not to attend the arbitration scheduled for 25 August 2010. It is unclear why the Complainant abandoned the dispute resolution process but, with the abandonment, she forfeited her right to address the grievance in the appropriate forum."

5.2.10 The Complainant refuted the COT's assertion that she abandoned the dispute resolution process indicating that she was informed that the arbitration was postponed. According to the Arbitrator's ruling dated 20 August 2010, the case was dismissed because the request for postponement was not brought in terms of the rules. The Arbitrator further remarked that the Complainant did not appear because she believed in good faith that the matter would be postponed. In view of the foresaid, the COT's assertion that the Complainant abandoned the arbitration process must be rejected.

5.2.11 The question whether the COT improperly withheld the Complainant's salary will be determined by the application of law hereunder.

Application of the relevant legal framework

5.2.12 The Constitution is the highest governing framework within which labour relations operate. Section 23(1) of the Constitution states that everyone has the right to fair labour practices. This is crystallised by section 185(b) of the Labour Relations Act
which affords every employee a right not to be subjected to unfair labour practices. In this regard, this right will further be discoursed hereunder.

5.2.13 The COT’s Abscondment Policy makes reference to the adherence of fairness and natural justice. The essential excerpts of the policy read that:

5. "GOVERNING PRINCIPLES
That the abscondment by an employee is a misconduct which is subject to disciplinary action..."

That fair procedures and principles of natural justice shall be observed at all times, in the application of this policy.

6. PROCEDURE
6.1 An employee is required to report his/her unauthorised absence from work within two (2) days of his/her absence to their supervisors...

6.2 On the third day of the employee’s absence without permission, a supervisor shall immediately take any two or more of the following steps to ascertain the reason for absence and or whereabouts of such an employee:
- Telephone call/ cellphone call
- Sms message
- Telefax
  - ...

6.3 Should no reasonable explanation for the employees’ unauthorised absence from work be forthcoming within (5) days of absence from work, the Department must recommend suspension of salary to the Human Resources Division with effect from the date of absence; which may be reinstated subject to the discretion of the Department/Head of Division and based on furnished reasons”.

5.2.14 The Complainant’s contention was that she did not abscond from work because she continued to report for work at the Rosslyn station. In this regard, the Complainant
could not have been expected to comply with clause 6.1 and 6.3 of the Abscondment Policy. On the contrary, the COT did not adduce any evidence to show compliance with clause 6.2 of the Abscondment Policy.

5.2.15 The terms and conditions of the Complainant’s employment were that she will be reporting for duty at Rosslyn station and the Complainant complied in this regard. The intended transfer of the Complainant to Wonderboom station had not been effected, since such transfer was subject to a grievance process. Accordingly, the Abscondment Policy was not applicable since the dispute about the intended transfer had not been completed and the Complainant was reporting for duty at her place of work in terms of her terms and condition of employment.

5.2.16 As a result of the above, any suspension of complainant’s salary based on the allegation that the complainant absconded from work due to her refusal to report for duty at Wonderboom station, pending the finalisation of her grievance, was therefore unlawful and constituted an unfair labour practice as envisaged in section 185(b) of the labour relations Act.

5.2.17 The COT should have waited for the finalisation of her grievance prior to implementing the Abscondment Policy. The Abscondment Policy would have only become applicable from the date of dismissal of her grievance, being 20 August 2010.

5.2.18 Section 3(2)(b) of PAJA which contains procedural fairness principles, requires amongst other things, an adequate notice and an opportunity to make representation to be afforded to the Complainant prior to a final decision and/or adverse administration action being taken. This is also in accordance with the principle of natural justice - the *audi alteram partem* (“to hear the other side”) rule - which is premised on fair administrative action. Clause 5 of the Abscondment Policy also enjoins the COT to observe the principles of discussed herein.

5.2.19 The Complainant was not afforded an opportunity to make any representations in terms of section 3(2)(b) of PAJA nor did the COT complied with its own Abscondment Policy before her salary was summarily suspended.
5.2.20 The decision to suspend the salary of the complainant from 17 February 2010 to 21 November 2010 was not only unlawful, but unconstitutional, as it violated the bill of rights, specifically section 23(1) of the Constitution which accords everyone a right to fair labour practice.

Conclusion

5.2.21 Accordingly, the COT withheld the Complainant’s salary without following due process and this was tantamount to an unfair labour practice.

5.2.22 The conduct of the COT in suspending the Complainant’s salary from 17 February 2010 until 21 November 2010 was improper in the circumstances.

5.3 Whether the conduct of the City of Tshwane improperly prejudiced the Complainant and, if so, what it would take to place the Complainant in a position as close as possible to where she would have been had the COT acted properly

Common cause

5.3.1 It is common cause that the complainant’s salary was withheld for a period between 17 February 2010 and 21 November 2017. It is also common cause that the Complainant was disciplined by the COT for her failure to comply with the disputed transfer.

Issue in dispute

5.3.2 The only issue to be determined by the Public Protector is whether the Complainant was improperly prejudiced by the conduct of the COT.
5.3.3 The Public Protector noted that the COT failed to provide the Complainant with adequate notice of a transfer, it logically follows that the withholding of the Complainant’s salary, in consequence to her not abiding by the said transfer, was improper. A procedurally flawed transfer would similarly affect all other actions arising therefrom. Despite the COT’s contention that its actions were justified and as such did not amount to improper prejudice, the Public Protector found that the COT’s conduct was not in accordance with its own policies and consequently the Complainant was improperly prejudiced.

5.3.4 The Complainant submitted that she suffered emotional distress by being subjected to a parallel process pertaining to the same underlying issue; as well as immense financial prejudice due to the suspension of her salary and benefits related thereto.

5.3.5 Placing the Complainant as close to where she would have been had the COT acted properly, would require consideration of the position the Complainant would have been in had the transfer taken place procedurally or not taken place (if appeal thereto by the Complainant was successful). The Complainant would thus have received her salary and benefits timeously.

5.3.6 Furthermore, had a proper process been followed in the purported transfer, the Complainant would not have been subjected to a concurrent disciplinary process (on materially the same issue of the transfer) whilst her grievance was also being attended to. The COT failed to address the challenges presented by its decision to embark on a disciplinary process whilst a grievance process had already been instituted by the Complainant. The opportunity to address same in its response to section 7(9) notice was not utilised by the COT. The COT’s disciplinary action and suspension of salary could not be legally justified.

5.3.7 Based on the investigations and the conclusion reached under the two issues above, it is clear that the conduct of the COT was improper in the circumstances. The answer
to the question whether the ensued prejudice could be regarded as being improper should therefore be in the affirmative.

Application of the relevant legal framework

5.3.8 Section 182(1)(c) of the Constitution empowers the Public Protector to take appropriate remedial action. The determination of appropriateness is a factual enquiry informed by the impact of the maladministration on the Complainant and the circumstances under which the maladministration (if any) occurred. As in the adjudication of delictual claims by the courts, the conduct of the Complainant must also be considered. If it can be established that the Complainant played a role in inviting misfortune or failed to mitigate her loss, some responsibility must be apportioned to her as well.

5.3.9 "Appropriate remedial action" is defined by the provisions of section 6(4)(c) of the Public Protector Act which provides that the Public Protector shall be competent, at a time prior to, during or after an investigation, if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or to make any other appropriate recommendation he or she deems expedient to the affected body or authority.

Conclusion

5.3.10 In view of the above, the Complainant was improperly prejudiced by the conduct of the COT in that both the COT's transfer and the withholding of the Complainant's salary were improper, unlawful, procedurally unfair and unconstitutional. Under the circumstances the Public Protector is empowered to take appropriate remedial action.
6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1 Whether the City of Tshwane improperly transferred the Complainant from Rosslyn Fire Station to Wonderboom Fire Station:

6.1.1 The allegation that the COT improperly transferred the Complainant from Rosslyn Fire Station to Wonderboom Fire Station is substantiated;

6.1.2 The COT failed to adhere to clause 6.3.2 of the SOP 6 by not providing the Complainant with 30 days written notice or obtain her consent prior to the transfer;

6.1.3 The COT failed to meet the administrative scrutiny of fairness. The COT contravened section 3(2)(b) of PAJA, audi partem rule and principles outlined in the Nxele case in that the Complainant was not afforded an opportunity to make representation regarding the transfer; and

6.1.4 Therefore the COT’s conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.2 Whether the City of Tshwane improperly withheld the Complainant’s salary from February 2010 until November 2010

6.2.1 The allegation that the COT improperly withheld the Complainant’s salary between 17 February 2010 and 21 November 2010 is substantiated;

6.2.2 The COT arbitrarily withheld the Complainant’s salary from 17 February 2010 to 21 November 2010 in contravention of clause 6.2 of the Abscondment Policy;
6.2.3 The COT further contravened section 3(2)(b) of PAJA and audi partem rule when it failed to afford the Complainant an opportunity to make representation on why her salary should not be suspended;

6.2.4 The conduct of the COT in withholding the Complainant's salary was inconsistent with section 23 of the Constitution and section 185(b) of the LRA which accords the employees with the right to fair labour practices; and

6.2.5 Therefore, the COT's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.3 Whether the conduct of the City of Tshwane improperly prejudiced the Complainant and if so, what it would take to place the Complainant as close as possible to where she would have been had the City of Tshwane acted properly

6.3.1 The allegation that the conduct of the COT improperly prejudiced the Complainant is substantiated;

6.3.2 The Complainant was without a salary for a period of about 9 months;

6.3.3 Had it not being for the improper handling of the transfer and the subsequent suspension of the Complainant's salary, the Complainant would have received her salary and benefits thereof timeously.

6.3.4 The COT's conduct herein resulted in emotional distress to the Complainant in that she was subjected to an undue disciplinary hearing as well as dire financial distress due to her salary and benefits being withheld for a period of 9 months from February 2010 to November 2010 and

6.3.5 Consequently, the COT's conduct in this regard amounts to improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.
7. REMEDIAL ACTION

In the light of the above findings, the Public Protector is taking the following appropriate remedial actions, as contemplated in section 182(1)(c) of the Constitution:

7.1 The COT must, within fourteen (14) days of the date on which this report is issued, tender a written apology to the Complainant for the improper manner in which the transfer was handled as well as for unduly withholding her salary including benefits related thereto. The COT must, within thirty (30) days of this report, submit a copy of the said written apology to the Public Protector.

7.2 The COT must, within thirty (30) days of the date on which this report is issued, pay the Complainant the salary entitlement including benefits (i.e. pension contributions, performance bonus, 13th cheque, etc.) on the salary scale that the Complainant was appointed on at the time related thereto, for the period from 17 February 2010 to 21 November 2010, that the Complainant’s salary was not paid and with the applicable interest rate as per the Prescribed Rate of Interest Act per annum, calculated at 15.5% per annum from 17 February 2010 to date of payment. The COT must, within fourteen (14) days of the said payment, submit proof of same to the Public Protector;

7.3 The COT has confirmed that the disciplinary record of the Complainant related to the disciplinary charges pertaining to this matter have been expunged due to the fact that they only remained on record for a period of six months after the outcome of the disciplinary hearing on 17 November 2011. The COT is directed not to communicate the existence of the said disciplinary record to any third parties;

8. MONITORING

8.1 The Public Protector will monitor the implementation of the remedial action.
8.2 The COT's City Manager must, within fourteen (14) days of date on which this report is issued, submit an implementation plan with timelines to the Public Protector indicating how the remedial actions referred to above will be implemented.

8.3 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied with within the stated period.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 09/05/2018

Assisted by: Adv A Dathi