
PUBLIC PROTECTOR SOUTH AFRICA

Report No. 30 OF 2017/2018


"Allegations of unfair treatment by the NW Department of Public Works"

REPORT ON AN INVESTIGATION INTO ALLEGED UNFAIR TREATMENT BY THE NORTH WEST DEPARTMENT OF PUBLIC WORKS AND ROADS IN FAILING TO COMPENSATE THE COMPLAINANTS FOR LOSS OF TOOLS OF TRADE AND MATERIALS PURCHASED AND LEFT ON SITE AT LESEDI CLINIC AT POTCHEFSTROOM IN THE NORTH WEST PROVINCE-CONTRACT DPW/143/05
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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 (the Public Protector Act).

(ii) The report relates to an investigation into the alleged unfair treatment by the North West Provincial Department of Public Works and Roads in failing to compensate the Complainants for loss of tools of trade and materials purchased and left on site at Lesedi Clinic at Potchefstroom in the North West Province-contract DPW/143/05.

(iii) The complaint was lodged on 25 April 2012 by Mr Lesley Botoko Molelowatladi on behalf of MLB Construction CC Building and Renovations (the Complainants). The Complainant is Mr LB Molelowatladi on behalf of MLB Construction.

(iv) In the main, the complaint was that the North West Provincial Department of Public Works and Roads (the Department) unfairly removed the Complainants from the Lesedi Clinic construction site and failed to compensate them for the loss of tools of trade and materials purchased and left on site at Lesedi Clinic at Potchefstroom in the North West-contract DPW/143/05.

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

(a) Whether the Department unfairly removed the Complainants from the Lesego Clinic construction site and failed to compensate them for the loss of tools of trade and materials purchased and left on site, and if so whether such removal and failure to compensate for the loss of tools of trade and materials constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act.
(b) Whether the Complainants were improperly prejudiced by the Department's conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act, and if so, what would it take to place them as close as possible to where they would have been had there been no improper conduct by the Department or its functionaries.

(vi) The investigation process was conducted through interviews and meetings with the Complainant; correspondence with the Department; analysis of all relevant documentation; and consideration of and application of all relevant laws, policies and related prescripts.

(vii) Key laws and policies taken into account to determine if there had been maladministration by the Department were principally those imposing administrative standards that should have been complied with by the Department and are the following:

a. Section 195(1)(a) and (f) of the Constitution which provides for a public administration that is governed by the democratic values and principles enshrined in the Constitution which include, inter alia, the promotion and maintenance of a high standard of professional ethics and an accountable public administration. These principles enjoin the Department to exercise a high level of professionalism and ethics including accountability in the performance of their duties. The Department should also to strive to be above reproach;

b. Section 33(1) of the Constitution provides for the right to administrative action that is lawful, reasonable and procedurally fair. Subsection (2) further provides that persons adversely affected by administrative action are entitled to written reasons for the decision.

c. Section 3(1) of the Promotion of Administrative Justice Act, 2000 (PAJA) provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
(viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding whether the Department unfairly removed the Complainants from Lesego Clinic construction site and failed to compensate them for the loss of tools of trade and materials purchased and left on site, and if so whether such removal and failure to compensate for the loss of tools of trade and materials constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(l) of the Public Protector Act:

(aa) The allegation that the Department failed to follow proper processes in removing the Complainants from the Lesego Clinic construction site and failed to compensate them for the loss of tools of trade and materials purchased and left on site is unsubstantiated.

(bb) Although the Department gave the Complainants notice on the same day to vacate the construction site instructing them not to remove any material or tools of trade, this was done in accordance with the JBCC Principal Building Agreement (the Agreement) signed between the parties on 28 June 2007.

(cc) Clause 36.5.6 of the Agreement states that the employer (the Department) may use the contractor's materials and goods, temporary buildings, plant and machinery on the site for proceeding with the works in instances where the employer cancels the contract by reason of the contractor's default.

(dd) Although the Complainants' have a right to fair and just administrative action guaranteed in section 33(1) and (2) of the Constitution and section 3(2)(ii), (iii), (iv) and (v) of the PAJA, the Complainants were placed on terms on 15 April 2008 to remedy the breach of failing to complete the works on time in terms of clause 36
of the contract. The Complainants were given 10 working days to remedy the breach.

(ee) On 6 May 2008, a site meeting was conducted to assess progress made since the intervention measures of 15 April 2008. Despite the intervention, there was still no improvement on the works and the project had long passed the adjustment date.

(ff) On 29 May 2008, the contract was far behind schedule, and penalties of R1200 per day were imposed on the Complainants in terms of clause 30 of the Agreement. In total, an amount of R85 200 was deducted from the contract price as penalties.

(gg) On 23 June 2008, the Department, through the Principal Agent, cancelled the Agreement, in line with clauses 15 and 36 thereof.

(hh) The Complainants were given an opportunity to remedy their default and failed to do so. As a result, the conduct of the Department in the circumstances does not constitute maladministration in terms of section 6(4)(a) of the Public Protector Act and improper conduct as envisaged in terms of section 182(1) of the Constitution.

(b) Regarding whether the Complainants were improperly prejudiced by the Department’s conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place them as close as possible to where they would have been had there been no improper conduct by the Department or its functionaries:

(aa) Clause 34 of the Agreement provides for the final account and final payment. Clause 34.1 provides that the contractor shall cooperate with and assist the Principal Agent in the preparation of the final account by timeously supplying all relevant documents on request.
(bb) The final account was signed by the Complainants on 7 October 2009. Above the Complainant's signature is a statement that reads: "I/We, the undersigned, agree that the above is a true and correct statement of the value of all work executed by me/us under this contract and accept same as full and final settlement of all claims under this contract".

(cc) In the circumstances, there is no evidence to indicate that the Department did not account for any tools of trade and material left on site. The Public Protector is therefore not in a position to make a legal determination, contrary to what is certified in the final account signed by the Complainants.

(ix) In the light of the above finding the Public Protector is not taking any remedial action in this matter, as contemplated in section 182(1) (c) of the Constitution.
REPORT ON AN INVESTIGATION INTO ALLEGED UNFAIR TREATMENT BY THE NORTH WEST PROVINCIAL DEPARTMENT OF PUBLIC WORKS AND ROADS IN FAILING TO COMPENSATE THE COMPLAINANTS FOR LOSS OF TOOLS OF TRADE AND MATERIALS PURCHASED AND LEFT ON SITE AT LESEDI CLINIC AT POTCHEFSTROOM IN THE NORTH WEST-CONTRACT DPW/143/05

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 my investigation:

1.2.1. The North West Premier: Hon SOR Mahumapelo;

1.2.2. The North West Province Director-General: Dr L Sebego;

1.2.3. The MEC for the North West Department of Public Works & Roads: Ms MJ Maluleke; and

1.2.4. The Head of North West Department of the Public Works & Roads: Mr P. Mothupi.

1.3. A copy of the report is also provided to Mr L Molelowatladi, the Complainant to inform him of the outcome of my investigation.

1.4. The report relates to an investigation into the alleged unfair treatment and removal from the Lesego Clinic construction site by the North West Provincial Department of Public Works and Roads (the Department) and failure to compensate the
Complainants for loss of tools of trade and materials purchased and left on site at the Lesedi Clinic construction site at Potchefstroom in the North West-Contract DPW/143/05.

2 THE COMPLAINT

2.1. The complaint was lodged on 25 April 2012 by Mr Lesley Botoko Molelowatladi on behalf of MLB Construction CC Building and Renovations (the Complainants).

2.2. The Complainants in essence alleged that:

2.2.1. The Department refuses to compensate them for tools of trade and unused material left on site after they were ordered to vacate a construction site at Lesego Clinic at Potchefstroom;

2.2.2. They were appointed on 28 June 2007 to upgrade Lesego Clinic at Potchefstroom. Their contract was terminated on 23 June 2008 through a letter from Studio Nouveau Architects (the Principal Agent) directed to them indicating that the termination would take effect on the same day;

2.2.3. They were informed that the termination was done in terms of Clauses 15.3 and 36 of Contract DPW/143/05. On 21 April 2009 another letter from the Principal Agent was directed to them which instructed them to remove the temporary buildings as well as the building rubble dumped by them next to the buildings on the outside of the Lesego clinic premises within 10 working days. They removed the temporary building and rubble on 22 April 2009;

2.2.4. There was an exchange of correspondence between the Department and the Complainants and their attorneys, Mokeleetsi Attorneys (the Attorneys). In a letter dated 26 February 2009 the Department's Deputy Director: Legal Services informed the Attorneys, amongst others, that their client collected the tools of trade
and materials on site on 19 of February 2009 and there was no representative from the Department who was present;

2.2.5. In a letter dated 29 August 2011 the Department informed the Complainants that according to their records they accepted and signed certificate no. 7 as a final payment certificate;

2.2.6. The Department considered the final account for the project as accepted and signed by the contractor and it was therefore concluded as such;

2.2.7. The Principal Agent instructed the Department to terminate their contract and the Department duly obliged on 18 June 2008. As a result of the termination of the contract, they lost tools of trade kept at Lesego Clinic from 24 June 2008 to 30 April 2009 to the value of R 1 450 052 23;

2.2.8. Before the contract was terminated and the site was closed an audit should have been conducted so as to record the available equipment and the materials on the premises according to the Joint Building Contracts Committee (the JBCC) and that was not done;

2.2.9. They approached the Department through the Attorneys on 01 June 2008 after receiving notice of intention to cancel the contract, for conciliation/arbitration, but their request fell on deaf ears;

2.2.10 As a result of their removal from the site by the Department they lost their tools of trade, materials and suffered loss of income as no audit was carried out leading to the Quantity Surveyor not being in a position to pay them;

2.2.11 They are a Small, Medium and Micro Enterprise (SMME) trying to make an honest living out of using the little expertise garnered over the years;

2.2.12 They attempted to seek arbitration and mediation from the Department which failed them drastically;
2.2.13 They have suffered “triple jeopardy and prejudice” in the hands of the Department in that:

2.2.13.1 The contract was terminated illegally and unlawfully, resulting in loss of expected income; and penalties were levied on the little cash the Department was willing to give them;

2.2.13.2 Instead of allowing them to go and wallow in self-pity for the above loss, the Department confiscated their tools of trade thereby resulting in loss of income for a period of one year; and

2.2.13.3. Most tools had been hired, and they were paying monthly rental on them.

2.2.14. The period which stretched out to 311 days, was rather too much for them to carry. The rental became too high, exacerbated by the fact that they were not making any income. The result was the adverse legal action taken by the service providers the impact of which the Complainants are still feeling to date. Other tools which they had purchased with their hard earned income, were unaccounted for.

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:

"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 In the 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. 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."

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

3.5 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.

3.6 The Department 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 Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of 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 sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to, on his or her own initiative, or receipt of a complaint or an allegation, or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6 to conduct an investigation.

4.1.3. The investigation process commenced with a preliminary investigation which included interviews and meetings with the Complainants, the Head of Department (HOD) and other Departmental officials, Alternative Dispute Resolution mechanisms (ADR); correspondence with the Department; analysis of the relevant documentation; conducted research; and the consideration and application of the relevant laws, regulatory framework and jurisprudence.

4.1.4. The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act, 1994, to help the parties settle. However, after several attempts to conciliate the matter, the process did not yield the required settlement which compelled my office to proceed with a formal investigation with a view to making a determination of maladministration, prejudice and impropriety in terms of powers conferred on the Public Protector by the Public Protector Act and the Constitution.
4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached 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 amount to maladministration?
4.2.1.4. In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

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 Department acted improperly and/or irregularly in its treatment of the Complainants in failing to compensate them for loss of tools of trade and materials purchased and left on site at Lesedi Clinic at Potchefstroom in the North West in terms of contract DPW/143/05.

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 Department or organ of state 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.
4.3. On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Whether the Department unfairly removed the Complainants from the Lesego Clinic construction site and failed to compensate them for the loss of tools of trade and materials purchased and left on site, and if so whether such removal and failure to compensate for the loss of tools of trade and materials constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act.

4.3.2 Whether the Complainants were improperly prejudiced by the Department’s conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place them as close as possible to where they would have been had there been no improper conduct by the Department or its functionaries.

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1. A copy of an undated document titled: Matter between MLB Construction v/s Department of Public Works & Transport North West received from MLB Construction.

4.4.1.2. List of contractors 30.04.2009 (MLB Construction Cc Tools of Trade on Site-Lesego Clinic, rates from 24/06.08 to 30/04/09 = days.

4.4.1.3. Copy of the Agreement between the Department and the Complainants dated 28 June 2007.

4.4.1.4. Final payment certificate No.7 dated 12/10/09.
4.4.1.5 Copy of Tax invoice dated 12 October 2009 from MLB Construction.

4.4.1.6 Final statement of account dated 07 October 2009.

4.4.1.7 A copy of a document dated 24 August 2009 entitled Notes of the meeting for Monday received from MLB Construction.

4.4.2 Interviews conducted

4.4.2.1 Consultations with the Complainants.

4.4.2.2 Consultations with officials of the Department.

4.4.3 Correspondence sent and received

4.4.3.1 A copy of a letter dated 29 May 2008 from the Acting Director: Building to the Deputy Director General.

4.4.3.2 A copy of a letter dated 23 June 2008 from Studio Nouveau Architects (Principal Agent) to MLB Construction.

4.4.3.3 A copy of a letter from the Principal Agent dated 23 June 2008 to MLB Construction.

4.4.3.4 A copy of a letter dated 24 June 2008 from Havinga Olivier Quantity Surveyors to SK Bendlela.

4.4.3.5 A copy of an e-mail dated 21 July 2008 from the Principal Agent to Mosuwe Maboea.
4.4.3.6. A copy of a letter dated 29 July 2008 from Havinga Olivier Quantity Surveyors to Mr. Molamu.

4.4.3.7. A copy of a letter dated 15 September 2008 from Hlahla Motlhamme Attorneys to the Deputy Director: Legal Support Services.

4.4.3.8. A copy of a letter dated 21 April 2009 from the Principal Agent to MLB Construction.

4.4.3.9. A copy of a letter dated 03 March 2010 from MLB Construction to Mr JJ Tselane, Director: Public Works.

4.4.3.10. A copy of a letter dated 29 August 2011 from Acting HoD, Mr A Kyereh to MLB Construction.

4.4.3.11. A copy of a letter dated 12 April 2012 from MLB Construction to the Public Protector.

4.4.3.12. A copy of a letter dated 03 December 2012 from the Acting Chief Director, M Gwavu to Mr Ntouane, Legal Services.

4.4.3.13. A copy of a letter dated 12 April 2012 from MLB Construction to the Public Protector.

4.4.3.14. A copy of a letter dated 05 December 2012 from MLB Construction to the Public Protector.

4.4.3.15. A copy of a letter dated 21 July 2016 from Mr Pakiso Mothupi to the Public Protector.

4.4.3.16. A copy of a Section 7(9) Notice to the HoD dated 12 April 2017.
4.4.3.17. A copy of a response and attachments to the Section 7(9) Notice from the HoD, Public Works and Roads dated 25 May 2017.

4.4.3.18. A copy of a response letter from L Molelowatladi to the Public Protector dated 09 June 2017.

4.4.4 Legislation and other prescripts

4.4.4.1. Section 195(1) of the Constitution.

4.4.4.2. Section 33(1) of the Constitution.

4.4.4.3. Section 3(1) of the Promotion of Administrative Justice Act, 2000 (PAJA).

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 unfairly removed the Complainants from the Lesego Clinic construction site and failed to compensate them for the loss of tools of trade and materials purchased and left on site, and if so whether such removal and failure to compensate for the loss of tools of trade and materials constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:
Common Cause issues

5.1.1. From the onset it must be borne in mind that the Complainants indicated that they are not contesting the termination of the contract, but the loss of tools of trade and material purchased and left on site when they were evicted.

5.1.2. The Complainants and the Department entered into an agreement on 28 June 2007 in terms of whereof the former had to carry out construction and related work at the Lesego Clinic for an amount of R2 900 000.00 as per contract number DPW/143/05.

5.1.3. The duration of the said contract was for an initial period of seven (7) months, later increased to eight (8) months and finally extended by twenty-one (21) calendar days.

5.1.4. On 28 June 2007 the parties entered into a JBCC Principal Building Agreement (the Agreement) prepared by the JBCC series 2000 Edition 4.1 Code 2101 of March 2005. The Complainants could not comply with the terms and conditions of the agreement and the contract was terminated as per letter dated 23 June 2008.

5.1.5. On 01 June 2008, Messrs Hlahla Motihamme Attorneys directed correspondence to the Project Manager of the Department and after the Department had informed the Complainants about the Department’s intention to terminate the contract and indicated, amongst others, that the Complainants did not accept the unilateral termination of the agreement and proposed that this matter be referred to arbitration. He further requested the release of goods, plant and equipment left on site.

5.1.6. On 23 June 2008, Mr Kirsten Boshoff of Studio Nouveau Architects (Pty) Ltd directed correspondence to the Complainants that the Department decided to terminate the building contract effective from Monday 23 June 2008 in terms of Clauses 15.3 and 36 of the contract.
5.1.7. According to the letter dated 23 June 2008 such termination was communicated to the Complainants on 23 June 2008 at 16h54.

5.1.8. Furthermore in terms of the above-mentioned letter the Complainants were directed to vacate the building site immediately and from 16h00 were not allowed on site nor allowed to remove any item from the building site including temporary stores and offices. The Complainants received a telefax at 16h54 the same day.

5.1.9. It is common cause that the Complainants were evicted from site and were not allowed to remove anything from the site.

5.1.10. On 24 June 2008 Pierro Venter of Havinga Olivier CC Quantity Surveyors who were appointed by the Department as Quantity Surveyors for the renovations at Lesego Clinic project informed Mr SK Bendiela from the Department that they found the following inside the storeroom at Lesego Clinic during their visit on Monday, 23 June 2008:

5.1.10.1. A storeroom, site office and sleeping quarters; roll of brick force: 5; Bags of cement: 23; electrical trunking cover-packet of 10,3m length of ridge covering 7; boxes with suspended ceiling strips: 5; various 50 mm and 110 mm PVC plumbing fittings; 5L plaster bond: 5; spades: 26; chairs – no number mentioned; and trestle: 2.

5.1.10.2. The following were found on site: 38x38mmxbm Brandering: 11; corrugated iron sheeting; 3m length of ridge covering: 3; barge board; plaster sand 6m3; concrete mix 2m3; Trestle: 6; plate compactor; and a wheel barrow.

5.1.11. The position of the Complainants is that the compilation of the above list drawn up by the Quantity Surveyor is questionable. The alleged list was compiled in their absence after having being evicted from site. They were not invited to be part of the team so as to verify and authenticate the tools of trade and materials
left on site. If they were invited to participate in the compilation of the inventory the matter could have been amicably resolved.

5.1.12. On 24 June 2008, the Complainants directed correspondence to the Deputy Director General (the DDG) of the Department, appealing against the termination of the contract, but the request was not acceded to. On 08 July 2008 Mr O Mongale, the DDG, informed the Complainants per letter of the same date that the termination of the contract could not be withdrawn.

5.1.13. On 21 July 2008, Mr Mosuwe Maboea an official of the Project Manager of the Department directed an email to the Principal Agent and advised them as follows:

"The JBCC Principal Building Agreement should be read as a whole and not only one clause or a portion of a clause.

The clause referred to in the correspondence (clause 36.5.7) begins with “When instructed by the principal agent,” (which is not stated in these correspondence from the Department) “the contractor shall remove from the site his temporary buildings,” This should also be read with the previous clause (clause 35.5.6), where it is stated that “The employer may use the contractor’s materials and goods, temporary buildings, plant and machinery on the site for proceedings with the works.”

This means that, upon termination of the contract (cancellation), the employer may use the temporary buildings, material, etc. to complete the project. Thereafter, on instruction from the principal agent, the contractor shall remove these unused material, temporary buildings, etc. Up to date there was no such instruction from the principal agent to remove any material or buildings and there should not be any until the completion of the project.”
5.1.14. It must be noted that the above paragraph contradicts the contents of a letter that was conveyed to the Complainants dated 23 June 2008. The Department should have informed the Complainants on what was going to happen to their temporary building, unused material etc.

5.1.15. On 21 April 2009 Mr Kirsten Boshoff of the Principal Agent directed correspondence to the Complainants and informed them that they were directed by the Department to remove the temporary buildings (corrugated iron buildings previously used by the Complainants) as well as the building rubble.

5.1.16. The above correspondence from Mr Kirsten Boshoff only reached the Complainants 311 days from the date on which they were removed from site on 24 June 2008.

5.1.17. The Department responded per letter from Mr Ntuane, Acting Director: Legal Services dated 04 December 2012 to the North West Provincial Office of the Public Protector as follows:

"The Department denies liability to any debt alleged by MLB Construction relating to the termination contract. The Department further denies any liability related to the missing tools and in fact also any claim related to rental is denied."

5.1.18. On 30 April 2009 the Complainants presented a document titled “List of Contractor’s (MLB Construction CC) Tools of Trade on site-Lesego Clinic. Rates from 24/06-30/04/09=311 days. The figures were reflected as follows:

<table>
<thead>
<tr>
<th>Sub Total</th>
<th>R1 126 473.10</th>
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<td>VAT</td>
<td>R157 706.23</td>
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<td>Grand Total</td>
<td>R1 284 179.33</td>
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<tr>
<td>Add 15.5%</td>
<td>R165 873.20</td>
</tr>
<tr>
<td>Grand Total</td>
<td>R1 450 052.53</td>
</tr>
</tbody>
</table>
5.1.19 On 17 September 2013 the Deputy Public Protector, Adv K Malungu conducted an ADR session with the Department represented by Mr Magoma, Director: Legal Services and the Complainants were requested to submit a list of tools of trade and materials left on site when they were removed from site. The reason for such a request was that there was a difference of opinion between domestic and industrial tools.

5.1.20 The Deputy Public Protector conducted another ADR session on 19 May 2015 with both parties, the Department represented by Mr Magoma, Director Legal Services. The Complainants submitted a list of tools of trade and materials left on site amounting to R162 155.57 as requested at the previous ADR. After having perused the documents Mr Magoma maintained that the Department was not responsible for such tools of trade and materials left on site.

5.1.21 On 20 May 2015 Mr G Magoma responded as follows to the Public Protector:

“The official position of the Department is as follows:

(a) MLB Construction could not complete the work as appointed by the Department;
(b) The Department is not in possession of any tools belonging to MLB Construction;
(c) The Department cannot be held responsible for any hired tools as no value for money was received due to non-performance by MLB Construction, thus leading to the termination of the contract; and
(d) As a result of these we dispute any indebtedness to MLB Construction.”

5.1.22 The Deputy Public Protector conducted another ADR session between the Complainants and the Department represented by the HOD, Mr Mothupi, on 12 May 2016 and it was agreed that the Department provide documentary evidence regarding its official position. The Complainants were to provide the Department
with documentary evidence i.e. names of companies where tools were hired, invoices, reconstructed documents which would assist in processing payment, if any.

5.1.23. On 27 May 2016 the Complainants directed correspondence to the North West Provincial Office of the Public Protector and submitted documents in support of their claim for material and lost tools of trade. They indicated that the material purchased was contained in the storeroom they had erected and when the site was closed down they were unable to take any of their belongings. They provided their claim as follows: (1) Own tools of trade on site R69 682 31; and (2) Material bought from April to June 2008 R300 857 50 totalling R370 539 81.

5.1.24. On 05 July 2016 Adv IB Mosiapoa, Legal Services of the Department responded as follows to the Public Protector:

“It is further our instruction that the Department of Public Works, Roads & Transport is not aware of any such plant/materials/tools due to MLB Construction and not even aware of any such proof, and such claims should have been reconciled in the Final Account at the time.

There is no proof of police reports or insurance claims, and the alleged plant and materials could have been in the temporary building that the contractor removed.

Subsequently the contractor alleged that material was stored in a place that he had to pay rental on for a period of 365 days, the DPWRT is unaware that any such arrangement was made.

The only store that was there was the temporary building that the contractor was paid for according to the preliminaries and General Conditions of the contract which he was at a later stage instructed to remove.”
5.1.25. Following receipt of the above response from Adv Mosiapa, the HoD directed a letter to the NW Provincial Office of the Public Protector dated 21 July 2016 and stated that:

Our response to the documentation submitted is as follows:

(a) There is no evidence of theft pertaining to this project. There is no police report of a case being reported.

(b) There is no evidence of rental equipment that was hired to this project from any plant and equipment company for this period under review.

(c) Any material that was on site was recorded by the Professional Quantity Surveyor and taken into consideration in the Final Account that was agreed by the Department and the Contractor and paid to the contractor.

(d) All tools that were on site at the time of completion of the contract were returned to the contractor, to which he agrees.

(e) In the JBCC there are avenues to be followed when a contractor has a dispute. No dispute was lodged and any claim has long prescribed”

Issues in dispute

5.1.26. The dispute between the Complainants and the Department is about what was left on site in terms of tools of trade and the materials. It must be noted that Hlahla Motlimame Attorneys as far back as 01 August 2008 proposed to the Department that this matter be referred to arbitration. The contention by the Department as per the above letter that no dispute was lodged with the Department cannot be true.
5.1.27. The Department insists that it was not liable for the tools of trade left on site at the time when Complainants were removed from site.

5.1.28. On 12 April 2017 the Public Protector issued a Section 7(9) Notice against Mr P Mothupi, HoD for a response.

**Department’s response to the Section 7(9) letter**

5.1.29. In his letter dated 25 May 2017 the HoD stated that:

“The contractor did lodge a claim, which was considered at the time (31 August 2009: Annexure A) for loss of tools R26 000.00 Loss of material on site: R8 200, and General loss of income R1 126 473.10 and found to be unsubstantiated. The contractor then agreed to the Final Account. Should there also have been a further dispute regarding Material, Plant and Equipment at the time, this should also have been resolved before agreeing to the Final Account, so that such an amount could have been incorporated into the Final Account. There was no evidence of such at the time. DPWR replied to this allegation on 03 December 2012 and submitted to the OPP on 27 September 2013 (Annexure B). In this Annexure B there is a Sub Annexure D.1, which is a copy of a Final Account dated 08/10/2009. In this Final Account we refer you to Item 2.1 – Material on site, for this amount the contractor was paid an amount of R57 773.38.”

5.1.30. The HOD stated further “that the contractor agreed to the amount of R57 773.38 and saying that there are no more disputes, he is satisfied with his compensation. The money due to this contractor was then paid to him, and the contract with the contractor then becomes effectively complete and henceforth there is no further obligation from the DPW. Upon the signing of the Final Account, the Contractor agrees to the following: “I/We, the undersigned, agree that the above is a true and correct statement of the value of all work executed by me/us under this contract and accept same as full and final settlement of all claims on this contract” (Annexure B, Sub Annexure D. 3) In the JBCC (the contract which was signed
with the contractor), there are dispute resolution mechanisms, which should have been followed by the contractor before the Final Account.

Here is an acknowledgement that the contractor collected his tools trade and material on site on the 19th of February 2009. The contractor further acknowledged this in one of the ADR meetings in the Offices of the Public Protector in Mahikeng. Disputed. See item 3.1 above Annexure A where the claim for lost tools of trade was for an amount of R26 000.00. Also see item 3.4, where there is an acknowledgement that the contractor collected his tools of trade.

An Audit was done by the Professional Quantity Surveying firm Havinga Olivier (Annexure B Sub Annexure F) in terms of the JBCC Clause 36.5.1 and 36.5.2. (Annexure B Sub Annexure b, whereby it clearly states that the contractor must vacate the site and then it is the Principal Agent’s responsibility to see that a survey or audit gets done. Granted, the contractor was not present. In such circumstances the DPWR rely in the Professional integrity of the Quantity Surveyor to do an impartial survey of work done, material on site as well as plant and equipment. The Quantity Surveyor is bound by his/her professional ethics, and if he does not give a true reflection of the work done by him/her, then he/she can be charged at the Council and removed from the roll. Therefore, the likelihood of the Quantity Surveyor wilfully giving an inaccurate reflection, is remote. The DPWR thus acted as per the stipulations of the contract in the interest of the state by protecting its assets.

In fact, in an attempt to assist the contractor, the DPWR waived penalties due by the contractor as per JBCC and extended the contract. The contractor was given due notice of his slow progress and intention to terminate See Annexure D as well as all sub Annexures where the whole process leading up to the OPP, the OPP stated that the dispute is not about the termination of the contract but about the loss of tools and material. In terms of the JBCC Clause 36.5.6 (Annexure B Sub Annexure B) the Employer (DPWR) may use the contractor’s materials and
goods and temporary buildings, plant and machinery on the site for proceeding with the works.

Indeed the tools recorded on site were Spades, chairs, trestles, a plate compactor and wheel barrows. Annexure B Sub Annexure F). During the meeting in the OPP on 12 May 2016, the contractor was afforded the opportunity to furnish proof of such rental by 20 May 2016. No such proof of rental was furnished by the contractor ever.

The DPWR does not have this correspondence and thus we request this document from the OPP, but we noted that the date that is quoted is 01 June 2008, which is before the termination of the contract on 23 June 2008. At this point in time the site was still in possession of the contractor and thus the materials, tools and equipment was [sic] in his possession and not in the possession of the DPWR. The Department was responsible for the materials, for which the contractor was compensated for [sic] as already been indicated in item 3.1 above. The tools and equipment as well as the temporary building was returned to the contractor has acknowledged.

The DPWR now wonders why this amount now differs with the amounts alluded to in item 3.1 above, which was resolved before the Final Account was paid, into which was incorporated the material on site, and the contractor has received his tools, plant and equipment back. The DPWR has given the contractor’s tools back. It cannot be held responsible for any other tools.

The DPWR did reply (Annexure E) and made it clear that we will not entertain any claim from the contractor. The contractor (complainant was to furnish proof of invoices for rented equipment. No proof was forthcoming. No proof has been submitted to the DPWR. Also, also, these amounts now differ substantially from
the amounts. We infer from this statement that the letter from the attorneys was about the termination of the contractor, and not regarding the dispute at hand regarding lost tools, material on site and lost income, as this was prior to the cancellation of the contract. Mr Kirsten Boshoff acted in accordance with the law by warning the contractor and terminating the contractor in accordance with the JBCC. The statement of the OPP is defamatory.

The DPWR went out of its way to assist the contractor by extending the contract period without applying penalties. The department also did not take the contractor to court for the additional costs to complete the project. Further, the DPWR acted in accordance to the law and the contract that binds the two parties. For the OPP to say “The Department failure to allow the complainants to remove their tools of trade and materials on time and to allow them to be present when the audit was conducted was not impartial and fair and smacks of biasness on the part of the department” is derogatory and inflammatory.

What the OPP is suggesting is contrary to the JBCC and contrary to the interest of the state, Had the DPWR given the contractor prior notification, the likelihood that the contractor would have stolen material and equipment that the contractor has been compensated for was high. This risk has been identified in the Building industry for many years and that is exactly why the JBCC Clause 36.5.5 and 36.5.6 (Annexure B Sub Annexure B) is crafted in the manner that it is, to protect the employer, which is the state in the instance. The DPWR thus has acted in accordance with the JBCC and the PAJA and in the interest of the state.

The DPWR has acted in accordance with the JBCC and section 33 of the constitution and section 3 of the PAJA. The contractor was placed In More (on terms) in due process and warned before the time of termination. Please refer to Item 3.12 and 3.13.1 above. The contractor is not allowed to remove anything from the site at this point in time as per the JBCC.
The OPP is misinterpreting this clause 36.5.7 of the JBCC. The following example will assist the OPP. The temporary building of the contractor serves as store and office for the duration of the contract. The contractor has been compensated for that in the Preliminary and General section of the Bills of Quantities guiding the contract. Thus in the interest of the contractor and the state that temporary building must remain on site until completion of the contract so as to keep cost down for the contractor, should the DPWR have elected to use the contractor for the additional costs to complete the project with a new contractor. The contractor can be very fortunate that the DPWR did not pursue this course of action.

The DPWR is not at fault. There is no amount due to the contractor. The OPP recommendation is baseless. The DPWR is not at fault. The HoD will not write a letter of apology. No action plan for remedial action will be initiated. There was no maladministration and prejudice by the DPWR. This response serves as evidence contradicting the findings of the OPP.”

5.1.31. On 08 June 2017 the Investigation team consulted further with Ms Lumka M'belle (the Complainant’s partner) and she responded as follows as per letter dated 09 June 2017:

“We have to emphasize once more that this complaint is not about the termination of our contract but the LOSS OF OUR TOOLS OF TRADE AND MATERIAL LEFT ON SITE.

TOOLS OF TRADE

When we were evicted, no audit was conducted in our presence. The department cannot therefore deny the existence of tools “unknown” to them. It is a requirement as stated in the JBCC that such an audit should have been done. The Contractor had to be present when such an audit was carried out.

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The QS has not given a true reflection of the Audited Tools found in the store room. See Annexure 1 = the Audited statement signed by the QS and Annexure 2 = Unfixed Material on Site pp 36 of the Final Account signed by the same QS. The two are as different as day and night. Where are the professional Ethics here?

It should be noted that when the Contractor was evicted from site, the Contractor had no prior knowledge that this was going to happen, as DPWT so points out "just in case the Contractor stole his tools and material. The tools left behind were the ones used to carry out the project and the "Audited List" does not even begin to account for the tools used for this kind of project.

The Contractor makes a living from the use of these Tools and the Department confiscated our Tools of Trade and kept these for an expanded period of 311 days. This deprived us of making a meaningful use of these tools to make a living. What is worse, when these were released, most of them had been either lost or stolen. The Department denies any liability for this loss despite the fact that they are unable to say with certainty that these tools existed. It is our word against theirs. There is ample proof that the QS failed to carry out his duty and is also economic on truth, despite his professional ethics.

The QS did not mention the presence of beds and clothing he found in the sleeping quarters of our labourers. One wonders when these could have been removed since we had no prior knowledge of this eviction. He makes mention of only one (1) wheelbarrow, for a project of this magnitude, how did the contractor manage to carry out this job?

MATERIAL ON SITE

The Department claims that the Contractor has been paid for Material on the Final Account an amount of R57 773.30. Once more the Ethics of the QS are brought to book here. We have provided receipts for the purchase of material just prior to eviction. The material had been purchased in anticipation of
completing the project, unfortunately the site was closed on the Monday when this job was about to be completed.

Another inconsistency is the amount of plaster sand, he found + 6m3 but on the Final Account the plaster sand accounted for was 10m3. What exactly is going on here?

Most of the material found after permission had been granted to the contractor, was not usable. The cement and rhyolite had hardened.

Most items were not quantified, e.g. Roof sheets and doors, PVC pipes etc. No professional can make an audit of such unquantified items.

The funniest part of this is that the QS listed certain items in his audit list, and yet failed to mention these items as “Unfixed material of Site” in the Final Account. What happened to other items?”

5.1.32. On 09 June 2017 the Investigator contacted Ms M’belle to verify the Department’s assertion that the Complainants had at one of the ADR sessions chaired by the DPP acknowledged that they received materials and tools in 2009. Ms M’belle denied having made such an acknowledgment to both the DPP and the Department. Furthermore, if it is true that the Complainants were compensated for the loss of tools of trade and materials why did the Department request the Complainants at ADR sessions chaired by the DPP to submit proof of purchase of such materials and tools of trade to the Public Protector.

Application of the relevant law

5.1.33. Section 195(1)(a) and (f) of the Constitution, provides that:

“(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.
5.1.34 Section 195(1)(a) of the Constitution, requires that public administration maintains a high standard of professional ethics which needs to be promoted. The actions of Mr Kirsten Boshoff of Studio Nouveau Architects (Pty) Ltd who was acting on behalf of the Department to instruct the Complainants to be removed from the construction site and instruct that they not remove anything from the site is in line with the Agreement and cannot be said to be contradictory to the maintenance of a high standard of professional ethics as envisaged in section 195 of the Constitution.

5.1.35 In terms of section 195(1)(f) of the Constitution, officials of the North West Department of Public Works and Transport must at all times act in a manner that is not contradictory to the provisions of sections 195 of the Constitution. Such Officials must complete their tasks without delay and should strive to do quality work in the performance of their duties in order to give effect to accountable public administration. The Department had to act in the interests of the public in making sure that there was value for money and quality work regarding this contract, and ensure that the works were completed on time.

5.1.36 Section 33 of the Constitution provides that:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

3. National legislation must be enacted to give effect to these rights, and must-
   a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   c. promote an efficient administration.

5.1.37 Section 33(1) of the Constitution provides for the right to administrative action that is lawful, reasonable and procedurally fair. Subsection (2) further provides that persons adversely affected by administrative action are entitled to written reasons for the decision.

5.1.38 In terms of section 33(1) of the Constitution, it follows therefore that the decision to remove the Complainants from Lesedi construction site should have been taken in a lawful manner, that is, in compliance with legal prescripts regulating the terms of the JBCC between the Department and the Complainants dated 28 June 2007 and also be reasonable and procedurally fair.

5.1.39 The national legislation referred to above is the PAJA and section 3 thereof provides as follows:

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(a) A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons in terms of Section 5.

5.1.40 Section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

5.1.41 The requirement for administrative action that is lawful, reasonable and procedurally fair is further emphasized in section 3(1) of the PAJA which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

5.1.42 The Complainants were given adequate time to remedy their defaulting on the Agreement, which they failed to do, and the contract was terminated lawfully in terms of clauses 15 and 36 of the Agreement. Further, the Complainants accepted and signed the final account which was accompanied by the final certificate which reflects the value of the material on site.

5.1.43 Clause 36.1 of the Agreement between the Department and the Complainants dated 28 June 2007 provides that "the employer may cancel this agreement where the contractor fails to comply in terms of 15.1 or 15.3"
5.1.44 Clause 36.2 of the Agreement provides that "where the employer considers terminating this agreement, the principal agent shall be instructed to notify the contractor of such default in terms of 36.1. The issuing of such notice shall be without prejudice to any rights that the employer may have."

5.1.45 Clause 36.5 provides that in cases where the Agreement is cancelled for reasons of default by the contractor, the employment of the contractor shall be cancelled, and execution of works shall cease. Further, the contractor shall vacate the works and the site. This was done on 23 June 2008.

5.1.46 Clause 36.2 of the Agreement provides that where the employer considers cancelling the agreement, the Principal Agent shall be instructed to notify the contractor of the default in terms of Clause 36.1. The issuing of such Notice shall be without prejudice to any rights the employer may have. This was done on 15 April 2008 when the Complainants were given 10 working days grace period to remedy the breach.

5.1.47 Clause 36.5.7 of the Agreement provides that "[W]hen instructed by the Principal Agent, the contractor shall remove from the site his temporary buildings, plants, machinery and surplus materials and goods within such reasonable time as determined by the Principal Agent, in default of which the employer, without being responsible for any loss or damage, may have the same removed and sold. The net profit or loss of such sales shall be for the account of the contractor."

Conclusion

5.1.48 The Department's conduct regarding the removal of the Complainants from the construction site notice on the same day and instructing them not to remove anything from the construction site and only informing them after 311 days is in line with the Agreement entered into between the Department and the Complainants, and cannot be said to be contrary to the principles of fair and just
administrative action as encapsulated in section 33 of the Constitution and section 3 of the PAJA

5.1.49 The attitude of the HoD that he is not going to implement the remedial action of the Public Protector has been noted. It was held in the 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 that "the remedial action taken by the Public Protector has a binding effect. 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". However, given the findings in this report, this has become a moot point.

5.2 Regarding whether the Complainants were improperly prejudiced by the Department's conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place them as close as possible to where they would have been had there been no improper conduct by the Department or its functionaries:

Common Cause issues

5.2.1. The Complainants are emerging contractors whose livelihood depended on the number of tenders they receive from various state organs.

5.2.2. On 23 June 2008 Mr Kirsten Boshoff of Studio Nouveau Architects (Pty) Ltd directed correspondence to the Complainants that the Department had decided to terminate the building contract effective from 23 June 2008 in terms of clauses 15.3 and 36 of the Agreement. According to the letter of 23 June 2008 such termination was communicated to the Complainants on 23 June 2008 at 16h54.

5.2.3. Furthermore, in terms of the above-mentioned letter the Complainants were directed to vacate the building site immediately and from 16h00 were not allowed
on site nor allowed to remove any item from the building site including temporary stores and offices.

5.2.4. On 21 April 2009 Mr Kirsten Boshoff of Studio Nouveau Architects (Pty) Ltd directed correspondence to the Complainants and informed them that they were directed by the Department to remove the temporary buildings (corrugated iron buildings previously used by the Complainants as well as the building rubble.) This was done in terms of clause 36.5.7 of the Agreement.

Conclusion

5.2.5. As a consequence thereof, the Public Protector is of the view that the removal of the Complainants from the construction site without their tools of trade and materials was done in terms of the Agreement signed between the parties.

6. FINDINGS

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

6.1. Regarding whether the Department unfairly removed the Complainants from Lesego Clinic construction site and failed to compensate them for the loss of tools of trade and materials purchased and left on site, and if so whether such removal and failure to compensate for the loss of tools of trade and materials constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:

6.1.1 The allegation that the Department failed to follow proper processes in terminating the contract and evicting the Complainants from the Lesego Clinic construction site is not substantiated.
6.1.2 Although the Department gave the Complainants notice on the same day to vacate the construction site instructing them not to remove any materials or tools of trade, this was done in accordance with the Agreement signed between the parties.

6.1.3 Clause 36.5.6 of the Agreement states that the employer (the Department) may use the contractor's materials and goods, temporary buildings, plant and machinery on the site for proceeding with the works in instances where the employer cancels the contract by reason of the contractor's default.

6.1.4 Although the Complainants' have a right to fair and just administrative action guaranteed in section 33(1) and (2) of the Constitution and section 3(2)(ii), (iii), (iv) and (v) of the PAJA, the Complainants were placed on terms on 15 April 2008 to remedy the breach of failing to complete the works on time in terms of clause 36 of the contract. The Complainants were given 10 working days to remedy the breach.

6.1.5 On 6 May 2008, a site meeting was conducted to assess progress made since the intervention measures of 15 April 2008. Despite the intervention, there was still no improvement on the works and the project had long passed the adjustment date.

6.1.6 On 29 May 2008, the contract was far behind schedule, and penalties of R1200 per day were imposed on the Complainants in terms of clause 30 of the Agreement. In total, an amount of R85 200 was deducted from the contract price as penalties.

6.1.7 On 23 June 2008, the Department, through the Principal Agent, cancelled the Agreement, in line with clauses 15 and 36 thereof.

6.1.8 The Complainants were given a reasonable opportunity to remedy their default and failed to do so. As a result, the conduct of the Department in the circumstances does not constitute maladministration in terms of section 6(4)(a) of the Public
Protector Act and improper conduct as envisaged in terms of section 182(1) of the Constitution.

6.2 Regarding whether the Complainants were improperly prejudiced by the Department’s conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place them as close as possible to where they would have been had there been no improper conduct by the Department:

6.2.1 Clause 34 of the Agreement provides for the final account and final payment. Clause 34.1 provides that the contractor shall cooperate with and assist the Principal Agent in the preparation of the final account by timeously supplying all relevant documents on request.

6.2.2 The final account was signed by the Complainants on 7 October 2009. Above the Complainant’s signature is a statement that reads: “I/We, the undersigned, agree that the above is a true and correct statement of the value of all work executed by me/us under this contract and accept same as full and final settlement of all claims under this contract”.

6.2.3 In the circumstances, there is no evidence to indicate that the Department did not account for any tools of trade and material left on site. The Public Protector is therefore not in a position to make a legal determination contrary to what is certified in the final account, which the Complainants have signed.

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7. REMEDIAL ACTION

In the light of the above finding in favour of the Department, the Public Protector is not taking any remedial action in this matter, as contemplated in section 182(1)(c) of the Constitution and the Complainant’s complaint is hereby dismissed.

Adv Busisiwe Mkhwebane
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 19/12/2017

Assisted by:
Mr Sechele Keebine: Provincial Representative: PPSA: NW
Adv Ike Motshegare: Senior Investigator: PPSA: NW