
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT No. 131 of 2019/2020
ISBN: 978-1-928507-91-8

"Allegations of failure by the Department of Health to process an appeal lodged by Mr. Benjamin Sentsho following a disciplinary process".

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE NORTH WEST PROVINCIAL DEPARTMENT OF HEALTH TO PROCESS AN APPEAL LODGED BY MR BENJAMIN SENTSHO
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>3</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>7</td>
</tr>
<tr>
<td>2. THE COMPLAINT</td>
<td>8</td>
</tr>
<tr>
<td>3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</td>
<td>9</td>
</tr>
<tr>
<td>4. THE INVESTIGATION</td>
<td>14</td>
</tr>
<tr>
<td>5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE</td>
<td>18</td>
</tr>
<tr>
<td>OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND</td>
<td></td>
</tr>
<tr>
<td>PRESCRIPTS</td>
<td></td>
</tr>
<tr>
<td>6. FINDINGS</td>
<td>30</td>
</tr>
<tr>
<td>7. REMEDIAL ACTION</td>
<td>32</td>
</tr>
<tr>
<td>8. MONITORING</td>
<td>32</td>
</tr>
</tbody>
</table>
Executive Summary

(i) This is my report 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 communicates my findings and appropriate remedial that I am taking in terms of section 182(1)(c) of the Constitution following an investigation into allegations of a failure by the North West Provincial Department of Health (the Department) to process an appeal that was lodged by Mr Benjamin Sentsho following the outcome of a disciplinary process that was instituted against him.

(iii) In the main, the Complainant alleged that during April 2012, the Department subjected him to a disciplinary hearing process on charges of fraud and corruption. During December 2012, he was given the outcome of the disciplinary process in which the Presiding Officer found him guilty and recommended a sanction of dismissal.

(iv) The Complainant lodged an appeal with the MEC for Health, Dr Magome Masike against the findings of the Presiding Officer. The Department failed to process his appeal and when he enquired, the Department indicated that his contract of employment had expired on 31 January 2013, before the appeal could be processed and further that since he was no longer an employee of the Department, it was no longer necessary to process his appeal.

(v) Based on an analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Department improperly failed to process the appeal lodged by the Complainant.
(b) Whether the Complainant was prejudiced by the conduct of the Department.

(vi) Key laws and policies taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Department or its officials when dealing with this complaint.

These are the following:

(a) The Constitution, 1996.
(b) Public Service Act, 103 of 1994.
(c) Regulation 1 of 2003: Disciplinary Code and Procedures for Public Servants,
(d) The Public Protector Act, 1994
(f) Labour Relations Act 66 of 1995; and the
(g) The Public Finance Management Act, 1999

(vii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. In included meetings, interviews, sourcing and analysing of documents and correspondence, examination of regulatory instruments, including constitutional provisions, legislation and relevant court decisions.

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

(a) Regarding whether the Department improperly failed to process the appeal lodged by the Complainant.

(aa) The allegation that the Department failed to process the appeal lodged by the Complainant, is substantiated.
(bb) The Complainant lodged his appeal during December 2012 in line with the provisions of section 16B of the Public Service Act 103 of 1994. The Department should have processed his appeal within thirty (30) days after it was lodged, but it failed to do so.

(cc) Failure to process and finalise the appeal violated the provisions of clause 8.8 of Regulation 1 of 2003 Disciplinary Code and Procedures for Public Servants which requires the appeal to be processed within thirty (30) days after being lodged. It also amounted to fruitless and wasteful expenditure in violation of the PFMA.

(dd) Such failure constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Whether the Complainant was prejudiced by the conduct of the Department:

(aa) The allegation that the Complainant was prejudiced as a result of the Department’s conduct, is substantiated.

(bb) The Department should have processed the appeal lodged by the Complainant but failed to do so. The Complainant was found guilty of fraud and corruption which are serious charges and the record of that verdict still stands. By failing to process his appeal, the Department effectively denied him an opportunity to have his conviction considered by a different executive authority (the MEC) who could have come to a different conclusion altogether and thereby exonerated himself.

(cc) Failure to process the Complainant’s appeal was contrary to the principle of procedural fairness. In terms of clause 8 of Resolution 1 of 2003 as well as section 16B of the Public Service Act 103 of 1994, the Complainant had...
the right to appeal the outcome of the disciplinary hearing and the Department had an obligation to process it and provide him with the outcome thereof.

(ix) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

The MEC, must:

(aa) Within thirty (30) working days from the date of this report, objectively process Mr Sentsho’s appeal and provide the Complainant with the outcome.

(bb) Within thirty (30) working days from the date of this report, provide my office with a copy of the outcome of the appeal.

The Head of Department must:

(cc) Within thirty (30) working days from the date of this report, take disciplinary steps against the official(s) who allowed Mr Sentsho to continue working without a formal contract of employment during the period 1 February 2012 until 31 January 2013.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A FAILURE BY THE DEPARTMENT OF HEALTH TO PROCESS AN APPEAL LODGED BY MR BENJAMIN SENTSCHO FOLLOWING THE OUTCOME OF A DISCIPLINARY PROCESS

1. INTRODUCTION

1.1 This is my report 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 (the Public Protector Act).

1.2 The report is submitted in terms of section 8 of the Public Protector Act to the following officials:

1.1.1. The Premier of the North West Provincial Government: Prof Job Mokgoro;

1.1.2. The Member of the Executive Council (MEC) for the Department of Health: Mr Madoda Sambathalwe;

1.1.3. The Head of Department (HOD) for the Department of Health: Mr Thabo Lekalakala;

1.3 A copy of the report is also submitted to the Complainant, Mr Benjamin Sentsho to inform him about the outcome of the investigation.

1.4 The report deals with the outcomes of an investigation into allegations of a failure by the North West Provincial Department of Health (the Department) to process an appeal that was lodged by Mr Benjamin Sentsho following a disciplinary process that was instituted against him.
2. **THE COMPLAINT**

2.1 On 12 February 2013, my office received a complaint from Mr Benjamin Sentsho (the Complainant), an adult male person of house no 11 Labourie Street, Cashan in Rustenburg.

2.2 The Complainant alleged, *inter alia*, that:

2.2.1 He was employed by the Department as a Site Project Manager, Hospital Revitalisation, on a fixed term contract from 01 March 2010 until 31 January 2012;

2.2.2 On 31 January 2012, or about fifteen (15) days before his contract could expire, he was placed under suspension due to allegations of fraud and corruption that were levelled against him;

2.2.3 Although his employment contract was supposed to have been terminated on 31 January 2012, he, however, continued to receive his monthly salary beyond January 2012. During April 2012, he was then formally charged with fraud and corruption, and was taken through a disciplinary hearing process;

2.2.4 During December 2012, the outcome of the disciplinary process was sent to him in a letter dated 14 December 2012 signed by the Head of Department (HOD), Dr M Radebe. The letter informed him that he had been found guilty of fraud and corruption, and that the Presiding Officer had recommended a sanction of dismissal;

2.2.5 The said letter informed him further that he had the right to appeal the decision of the Presiding Officer if he so wished. In case he decided to appeal, the sanction by the Presiding Officer would not be implemented pending the outcome of the appeal;
2.2.6 On a date which he could not remember, but during December 2012, he then lodged an internal appeal with the former Member of the Executive Council (MEC), Dr Magome Masike;

2.2.7 The Department failed to communicate with him regarding his appeal and when he enquired about its progress, he was taken from pillar to post until he finally decided to lodge a complaint with my office;

2.2.8 When my office enquired with the Department about the appeal, the Department indicated that the Complainant’s contract of employment came to an end on 31 January 2013 before his appeal could be considered and since he was no longer an employee of the Department, it was no longer necessary for the Department to consider his appeal;

2.2.9 The Complainant approached me for relief on the basis that he was prejudiced by the Department’s conduct in that he remained with a guilty verdict and the Department denied him an opportunity to clear his name.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power, as regulated by national legislation,-
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action.”

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

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 \textit{In re Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others}¹ the Constitutional Court, per Mogoeng CJ, held that the remedial action taken by the Public Protector has a binding effect [at para 76]. The Constitutional Court further held that: “\textit{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.}”² The Court further confirmed the Public Protector’s powers as follows:

3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.5.2 An appropriate remedy must mean \textit{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.} (paragraph 67);

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
² at para [73].
3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints, as 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 (paragraph 68);

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. (paragraph 69);

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. (paragraph 70);

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 investigation and the type of findings made. (paragraph 71);

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 consequence; (paragraph 71(a));
3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d));

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" (paragraph 71(e));

3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);

3.6.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the Constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);

3.6.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers ( paragraphs 100 and 101 of the judgment):

a) Conduct an investigation;

b) Report on that conduct; and

c) To take remedial action.
3.6.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (paragraph 104 of the judgment);

3.6.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105 of the judgment). [This was a finding on EEF judgment as well];

3.6.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector form taking remedial action. The Public Protector’s observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108 of the Judgment); and

3.6.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgment).

3.7 The Department is an organ of state and its conduct and the conduct of its officials constitute conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.

3.8 Section 6(9) of the Public Protector Act gives me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident.

3.9 In this specific case, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint include the following:

3.9.1 The seriousness of the allegations, especially with regard to the possible misuse of public funds where an employee was paid a salary for twelve
months while sitting at home and not rendering any service to the Department.

3.9.2. There were sufficient documents and records that were availed to my office which would assist me to successfully investigate the complaint.

3.9.3. There were also various alternative best remedies in the circumstances which could be offered to the Complainant.

3.9.4. The successful investigation of this matter could assist to address some of the systemic failures within the Department where employees are without valid contracts of employment.

3.9.5. The successful investigation of this matter will compel state institutions to finalise and complete projects instead of simply abandoning them half way which has serious financial implications on public resources.

3.9.6. The overall impact of this investigations especially with regard to issues of good governance within the Department.

3.10 The powers and jurisdiction of the Public Protector to investigate and take appropriate remedial action were 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, 1994.
4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to
determine how to resolve a dispute of alleged improper conduct or
maladministration.

4.1.3 The process involved sourcing and analysing documents, correspondence,
interviews and examination of regulatory instruments, including constitutional
provisions, legislation, regulations, relevant court decisions and applicable
previous Public Protector Decisions.

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 or improper
conduct?

4.2.1.4 In the event of maladministration or improper conduct 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.

4.2.3 The enquiry regarding what should have happened, focuses on the law or
rules that regulate the standards that should have been met by the
Department to prevent improper conduct and/or maladministration as well as
prejudice.
4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the state institution complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the Department improperly failed to process the appeal by the Complainant; and

4.3.2 Whether the Complainant was prejudiced by the conduct of the Department.

4.4 Key sources of information

4.4.1 Documents:

4.4.1.1 A letter from my office addressed to the Head of Department dated 6 March 2013.
4.4.1.2 A letter from my office addressed to the Head of Department dated 11 April 2013.
4.4.1.3 A letter from my office to the Head of Department dated 03 June 2013.
4.4.1.4 An email from my office dated 25 July 2013 addressed to the Director of Legal Services, Mr Thelvi Mmako.
4.4.1.5 An email from my office dated 29 July 2013 addressed to the Director of Legal Services Mr Thelvi Mmako.
4.4.1.6 A letter dated 4 September 2014 addressed to the Head of Department.
4.4.1.7 A letter dated 3 March 2019 addressed to the Head of Department.
4.4.1.8 A letter dated 23 May 2019 from Head of Department addressed to my office.
4.4.1.9 An email from Mr T Mmako dated 29 July 2013 addressed to my office.
4.4.1.10 An email from Mr T Mmakoe addressed to my office dated 06 July 2013
4.4.1.11 A letter from the HOD dated 21 August 2013 addressed to my office.
4.4.1.12 A letter from the HOD dated 04 April 2014 addressed to my office.
4.4.1.13 A letter from the HOD dated 04 June 2015 addressed to my office.
4.4.1.14 A letter dated 26 March 2019 from the MEC Mr Madoda Sambatha.
4.4.1.15 A letter dated 14 May 2012 from Mr K Motene, Acting Chief Director-Planning Services addressed to Mr S Lenong, Director Human Settlement.
4.4.1.16 A letter dated 06 August 2012 from the HOD addressed to Mr Benjamin Sentsho.
4.4.1.17 A letter dated 08 August 2012 from the HOD addressed to Mr WVS Mbulawa, Chief Director Corporate Service.
4.4.1.18 A letter dated 14 December 2012 from the HOD addressed to Mr Benjamin Sentsho.

4.4.2 Meetings and Interviews

4.4.2.1 Meeting held on 14 December 2015 between my office, the Department and the Complainant.

4.4.3 Legal and Regulatory Framework

4.4.3.1 The Constitution of the Republic of South Africa, 1996;
4.4.3.2 The Public Protector Act, Act no 23 of 1994;
4.4.3.3 The Disciplinary Code and Procedures for the Public Service: Regulation 1 of 2003;
4.4.3.4 The Public Service Act 103 of 1994;
4.4.3.5 Labour Relations Act 66 of 1995; and the
4.4.3.6 The Public Finance Management Act, 1999.
4.4.4 Case Law

4.4.4.1 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC);

4.4.4.2 The President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017);

4.4.4.3 Owen and Others v Department of Health, Kwazulu Natal (2009) JOL2312(LC);


4.4.4.5 Grogan (2014) Workplace Law (ed) Juta and Company Ltd, 26

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 improperly failed to process the appeal by the Complainant.

Common cause issues

5.1.1 The Complainant entered into a fixed term contract of employment with the Department for the period 01 March 2010 until 31 January 2012

5.1.2 About fifteen (15) days before the contract was due to expire, the Complainant was placed under suspension on allegations of fraud and corruption. The conditions pertaining to his suspension were as follow:

(a) He was suspended pending the outcome of an investigation into allegations of fraud and corruption levelled against him;

(b) The suspension did not mean that he was guilty of any wrongdoing;
(c) He was suspended with full pay and all benefits; and
(d) He would remain suspended until further notice from the HOD.

5.1.3 The Complainant continued to receive his monthly salary after the expiry of
the employment contract on 31 January 2012.

5.1.4 He did not at any stage, prior to the expiry of the contract, receive any letter
from the Department informing him that his contract would be extended, nor
did he sign any new contract with the Department after 31 January 2012.

5.1.5 During April 2012, the Complainant was formally charged with fraud and
corruption, and was then taken through a disciplinary hearing.

5.1.6 On or about 30 June 2012, he was removed from the persal system. He did
not receive any letter to that effect and he only discovered that when he did
not receive his salary for July 2012. When his union enquired on his behalf, it
was only then that he was told that he had been terminated on 30 June 2012.

5.1.7 On 8 August 2012, the Complainant was re-instated back into the persal
system. At the end of August 2012, he received his salary for the month of
August 2012. He was also paid his outstanding salary for July 2012.

5.1.8 Complainant was given the outcome of the disciplinary hearing through a
letter dated 14 December 2012 signed by the HOD. He was informed that the
Presiding Officer of the disciplinary hearing had found him guilty on all the
charges preferred against him and had recommended a sanction of dismissal.

5.1.9 The letter further advised him of his right to appeal the outcome of the
disciplinary hearing. It further indicated to him that if he appealed the outcome
by the Presiding Officer, the recommended sanction would not be
implemented pending the outcome of the appeal.
5.1.10 During December 2012, on a date he could not remember, the Complainant lodged an appeal with the office of the then MEC Dr Magome Masike, but it was never processed.

Issues in dispute

5.1.11 The matter was raised by my office with the Department through an email dated 25 July 2013. The Department’s Head of Legal Services, Mr Thelvi Mmako, through an email on the same date, informed my office that the Department could not deal with the Complainant’s appeal as his contract of employment ended on 31 January 2013 before the appeal could be considered.

5.1.12 Therefore, the issue in dispute would be whether the contract naturally terminated on 31 January 2013, after running its natural course or whether the termination thereof was occasioned by the Department’s conduct.

5.1.13 At a meeting held between the Department and my investigation team on 12 December 2015, Mr Mmako indicated that the reason for not considering the appeal on time was also due to a high backlog that the Department faced at that time.

5.1.14 The Department furnished my office with a letter dated 04 April 2014, signed by the HOD, Dr Andrew Kyereh, wherein they had attached a copy of the employment contract between the Department and the Complainant.

5.1.15 In the same letter of 04 April 2014, the Department also attached a copy of another letter dated 14 May 2012 which was from Planning Services, signed by the Acting Chief Director Mr K Motene addressed to the Director of Human Resource Management, Mr S Lenong. In that letter of 14 May 2012, Mr Motene requested permission to terminate the Complainant’s contract of employment at the end of June 2012.
5.1.16 The said letter stated as follows: "... we could not terminate his contract on 31 January 2012 because there were investigations of alleged fraud that were conducted against him and we wanted the whole process to be completed first before we could terminate his contract. Now that the process has been completed and charges have been issued against him, we would therefore want to terminate his contract by the end of June 2012."

5.1.17 The said request to terminate the contract on 30 June 2012 was approved by both the Director of Human Resource, Mr Sam Lenonyane, and Chief Director of Corporate Services, Mr Vuyo Mbulawa, on 17 May 2012.

5.1.18 From the contents of the above letter of 14 May 2012, it appears that the only reason that led the Department to prolong the Complainant's employment after his contract had expired, was for them to conclude their investigations into allegations of fraud and corruption and to proffer charges against him.

5.1.19 After charges were preferred against him in April 2012, the Department did not see the need to continue his employment, hence a request was made to terminate his services at the end of June 2012.

5.1.20 Indeed, on 30 June 2012, the Complainant was removed from the persal system with a view of terminating his work relationship with the Department. At that time, the disciplinary process against him had already began but not yet concluded. Accordingly, on August 2012, he was 'reinstated' into his employment so that the disciplinary process could continue.

5.1.21 In a letter dated 08 August 2012, signed by the HOD and addressed to the Chief Director of Corporate Services, Mr W Mbulawa, the HOD wrote the following: "...you are requested to re-activate Mr Sentsho on the persal system until 31 January 2013 in order for the disciplinary hearings to continue."
5.1.22 The HOD went on to send another letter dated 06 August 2012 to the Complainant, informing him that his contract of employment with the Department would end on 31 January 2013, and that it would not be renewed when it expired in January 2013. The letter stated the following: "The department entered into a contract of employment with yourself which was effective from 01 March 2010 and due to terminate on 31 January 2013..."

5.1.23 A simple interpretation of the letter is that it creates an impression that the Complainant and the Department signed a contract of employment which began on 01 March 2010 and was to end on 31 January 2013.

5.1.24 Another interpretation of this letter could be that the Department had intended for this letter to be an extension of the contract of employment between the Department and the Complainant which had ended on 31 January 2012, in order to conclude the disciplinary enquiry.

5.1.25 If this was the intention of the Department, then clearly this letter was not crafted in clear terms and was therefore ambiguous. The Department should have clearly stated that the Complainant and the Department entered into a contract of employment which started on 01 March 2010 and ended on 31 January 2012, and further that this letter seeks to extend that contract until 31 January 2013.

5.1.26 As stated above, evidence in my possession indicates that the only contract of employment concluded by the Complainant and the Department, began on 01 March 2010 and ended on 31 January 2012. There is no other contract that was signed by the two parties, which began on 01 March 2010 and ended on 31 January 2013. Therefore the letter from the Department was somehow misleading.

5.1.27 My office had sent a letter dated 04 September 2014 addressed to the HOD, requesting the Department to indicate if there was any other contract that was
concluded between the Department and the Complainant besides the one mentioned above, and to provide me with a copy of same. However nothing was forthcoming from the Department.

5.1.28 Therefore, the only conclusion that I can deduce from the letter of 06 August 2012 addressed to the Complainant, is that the HOD simply wanted to convey to the Complainant that his contract of employment would be terminated on 31 January 2013.

5.1.29 After concluding my investigation, I sent my preliminary report with probable adverse findings to the HOD and to the MEC of Health, Mr Madoda Sambatha.

5.1.30 In his response, the MEC insisted that Mr Sentsho’s contract of employment was formally extended by the Department through a letter which was allegedly sent to my office during their interaction with my office.

5.1.31 I requested the Department to provide me with a copy of the letter purportedly sent to my office. However in their response, they indicated that they could not find the alleged letter. Therefore in the current circumstances, the Department cannot account for their own document and record management.

5.1.32 I however wish to point out that the only letter furnished to my office by the Department, which could be construed as an extension of the contract, is the one dated 06 August 2012 from the HOD addressed to the Complainant, which I have already referred to under paragraphs 5.1.23 to 5.1.25 above.

5.1.33 As indicated above, that letter is not clear. Even if I was to accept that the said letter was indeed an extension of the contract, still this was only done six months later. There was no explanation from the Department as to why the extension was not done before the contract expired in January 2012 or immediately thereafter. In other words there was no explanation from the Department why it took them six months to formally extend the contract.
Application of the relevant law

5.1.34 The Complainant was a public servant employed in terms of the Public Service Act 103 of 1994 (PSA) as amended. In terms of the PSA, disciplinary processes of public servants are dealt with in accordance with the Disciplinary Code and Procedures for the Public Service.

5.1.35 The Code was adopted by all parties to the Public Service Co-ordinating Bargaining Council (the PSCBC) which included the state and various trade unions, including National Health and Allied Workers Union (NEHAWU), which represents employees in the health sector, including the Complainant.

5.1.36 Clause 2(4) of the Code provides as follows: “A disciplinary code is necessary for the efficient delivery of service and fair treatment of public servants and ensures that employees:

(a) Have a fair hearing in a formal or informal setting;
(b)...
(c)...
(d) Have the right to appeal against any decision

5.1.37 Clause 7.4(a) provides that if an employee has committed a misconduct, the chairperson must pronounce a sanction within five working days after the conclusion of the hearing, depending on the nature of the case.

5.1.38 Clause 7.4(c) of the code provides that “the employer shall not implement the sanction during the appeal by the employee”.

5.1.39 This clause is in line with the HOD’s advice to the Complainant as per his letter of 14 December 2012 that if he appealed the decision of the Presiding Officer, then the recommended sanction would not be implemented pending the outcome of the appeal.
5.1.40Clause 8.8 of the Code provides as follows: "Departments must finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, he/she must resume duties immediately and wait for the outcome of the appeal while on duty".

5.1.41From the above, it is clear that if the Complainant had lodged his appeal during December 2012, then the Department should have finalised the appeal within 30 days from the date it was lodged, failing which the Complainant should have been called back to resume his duties and wait for the outcome of the appeal while on duty. In terms of this clause, the appeal should have been finalised at least during the month of January 2013, given the fact that it was lodged in December 2012. The thirty (30) day period would have fallen within the period of 31 January 2013.

5.1.42The Department has, however, argued that the Complainant’s contract of employment ended on 31 January 2013, before it could deal with the appeal and further that it was due to the backlog that it was facing at that time.

5.1.43If the Department was aware of the fact that Complainant’s contract would be terminated on 31 January 2013, then they should have prioritised the appeal so as to ensure that it was finalised within the required time frame.

5.1.44As already explained, by continuing to pay the Complainant his salary even though his contract had expired, the Department tacitly renewed the employment contract. Further, it was also the intention of the Department to keep him as an employee even after the expiry of the contract, so that he could be charged with fraud and corruption. This was clearly stated in the Department’s letter of 14 May 2012 which I have already discussed supra.

5.1.45According to Grogan (2014) Workplace Law (ed) Juta and Company Ltd, 26 (August 2014), a fixed term contract can be converted into an indefinite period contract if the employee is permitted to continue working after the expiry of
the contract. The contract will be deemed to have been tacitly renewed on the same terms, except that the contractual relationship is of an indefinite duration. Once this happens, the only way in which the contract can be terminated is by way of dismissal with or without notice or by the employee’s resignation.

5.1.46 In the case of Owen and Others v Department of Health, Kwazulu Natal (2009) JOL2312(LC), the court held that if an employer permits an employee to continue working beyond the expiry of a fixed term contract, the contract is deemed to have been renewed. The court held that an employee in such circumstances may be entitled to be granted permanent employment.

5.1.47 Section 186(1)(b) of the Labour Relations Act 66 of 1995 (LRA) defines dismissal as meaning that "an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it."

5.1.48 In Grogan J (2014) Workplace Law (ed) Juta and Company Ltd, 26 August 2014, it is stated that "the employee must prove the existence of facts that, in ordinary course, would lead to a reasonable person to anticipate renewal".

5.1.49 Even though the issue of reasonable expectation was never raised as an issue by the complainant, it is still relevant to reflect on the conduct of the Department from an administrative and governance point of view. It can be argued that a reasonable expectation to renew the contract had been created.

5.1.50 The fact that the Department tacitly renewed the contract after it expired in January 2012 so as to subject the Complainant to a disciplinary hearing, and again in August 2012, so that the disciplinary hearing can continue, after it terminated on 30 June 2012, can be said to have justifiably created a reasonable expectation on the part of the Complainant that the Department
would renew the contract so that his appeal could be processed. The Complainant would not have expected the Department to simply abandon the disciplinary process half way and not deal with his appeal.

5.1.51 In the case of *Denel v Voster* (2004) ILJ 659 (SCA) the Supreme Court of Appeal held that "*employers are bound by their own codes and procedures to the same extent as a person would be bound by a contract*".

5.1.52 The court made it clear that once the employer committed to the disciplinary process, to deal with the conduct of an employee (even a fixed term contract employee), it is bound to that election and cannot half way through another process decide to abandon the process provided for in the disciplinary policy and proceed with another different process.

5.1.53 Therefore in the current case, the Department was bound by its Disciplinary Code through which it undertook to deal with the Complainant. It cannot just simply abandon the disciplinary process half way without completing it and unilaterally decide that it was going to end the Complainant’s employment by simply terminating his contract.

5.1.54 Consequently, the submission by the Department that the Complainant’s contract of employment came to an end on 31 January 2013 cannot be accepted. The contract ended on 31 January 2013, not because it had ran its natural course, but it ended because of an act of the Department. Even if it can be accepted that the contract naturally ended in January 2013, still the appeal was lodged in December 2012 and therefore the Department had an entire month of January 2013 to process and finalise with the appeal, but failed to do so.

5.1.55 If the Department had intended to terminate the services of the Complainant in terms of the contract, it had the opportunity to do so at the end of January 2012. Instead, it elected to go through a costly process of retaining the
services of an employee it no longer required, in order to pursue action
going against him in terms of its disciplinary policy.

5.1.56 While an accounting officer of the Department is obliged by the Public Finance
Management Act 1 of 1999 (the PFMA) to ensure that the appropriate
disciplinary action is taken in respect of incidents of financial misconduct, the
expenditure incurred in retaining the services of the Complainant for a year in
pursuance of this objective, might be regarded as fruitless and wasteful, if the
process was abandoned half way without an effective outcome.

Conclusion

5.1.57 The Complainant lodged his appeal during December 2012 and the contract
terminated on 31 January 2013. The Department had a period of more than
30 days by which it could have processed the appeal but did not do so. The
Department, by its own conduct, had an option of further extending the
Complainant’s contract had it extended to process his appeal as previously
done in pursuance of the disciplinary hearing.

5.1.58 In any event, the Department was bound by its own election and undertaking
to pursue the disciplinary action against the Complainant until the finalisation
of the disciplinary process which included the conclusion of the appeal. The
decision of the Department to effectively abandon the disciplinary process
and revert to the provisions of the contract for the termination of
Complainant’s services was improper and amounted to fruitless and wasteful
expenditure in terms of the PFMA.
5.2 Regarding whether the Complainant was prejudiced by the conduct of the Department.

Common cause issues

5.2.1 The Complainant was found guilty of fraud and corruption following a disciplinary hearing.

5.2.2 He lodged an appeal with the Department.

5.2.3 The appeal was never processed.

Issues in dispute

5.2.4. It is not in dispute that the appeal was processed. However, the Department says that it was no necessary to process the appeal since Complainant was no longer an employee.

5.2.5. By refusing to process the appeal, the Complainant was denied an opportunity to vindicate himself, in that after processing the appeal, the Appeal Authority might have arrived at a different conclusion than the Presiding Officer. He or she might have set aside both the conviction and the sanction.

5.2.7. During 2015, the Complainant applied to the Public Health and Social Development Sectorial Bargaining Council for condonation. In its opposition to the application, the Department in an affidavit deposed to by its Labour Relations Officer, one Babby Maggy Sefondi, stated that the Complainant committed a statutory offence in that he requested bribery of R50 000-00 from a certain Mr Ben Rakgomo and subsequently accepted an offer of R3000-00 from him.
5.2.8. In this regard, the said official of the Department, was referring to the charges and allegations that were brought against the Complainant during the disciplinary hearing and for which he was already convicted. It therefore shows that the records of the disciplinary hearing were still relevant to the Department, hence it was able to use the same issues raised during the hearing, during its opposition to the application.

**Conclusion**

5.2.9. The Complainant was prejudiced by the Department’s conduct, in that the failure to process and finalise his appeal meant that he was denied an opportunity to exonerate himself. The record of the disciplinary hearing was still intact and it was still being used by the Department against the Complainant.

6 **FINDINGS**

Having considered the evidence uncovered during the investigation against the relevant regulatory framework determining the standard that the Department of Health should have complied with and the impact to the Complainant, I therefore make the following findings:

6.1 **Regarding whether the Department improperly failed to process the appeal by the Complainant.**

6.1.1 The allegation that the Department improperly failed to process the Complainant’s appeal, is substantiated.

6.1.2 The Department abandoned its own disciplinary process which it had elected to pursue and was bound by law to complete.
6.1.3 Failure to deal with the Complainant’s application for appeal violated the provisions of clause 8.8 of Regulation 1 of 2003 which requires the appeal to be processed within 30 days after being lodged. The said conduct further amounted to fruitless and wasteful expenditure in violation of the PFMA.

6.1.4 Such failure constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Complainant was prejudiced by the conduct of the Department.

6.2.1 The allegation that the Complainant was prejudiced as a result of the conduct of the Department, is substantiated.

6.2.2 The Complainant has been prejudiced because he remains with a guilty verdict of fraud and corruption, which is on his departmental record.

6.2.3 The Complainant was unduly denied by the Department, an outcome of his application for appeal against the verdict and sanction, which is contrary to the principle of procedural fairness. In terms of clause 8 of Regulation 1 of 2003 as well as section 16B of the Public Service Act 103 of 1994 the Complainant had the right to appeal the outcome of the disciplinary hearing and the Department had an obligation to process it and provide him with the outcome.

6.2.4 Such conduct by the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
7 REMEDIAL ACTION

In light of the above findings, I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution:

The MEC must:

7.1 Within thirty (30) working days from the date of this report, objectively process Mr Sentsho’s appeal and provide the Complainant with the outcome of his application;

7.2 Within thirty (30) working days from the date of this report, provide my office with a copy of the outcome the appeal.

The Head of Department must

7.3 Within thirty (30) working days from the date of this report, take disciplinary steps against the official(s) who allowed Mr Sentsho to continue working without a formal contract of employment during the period 1 February 2012 until 31 January 2013.

8. MONITORING

The Head of the Department must:

8.1 Within fifteen (15) working days from the date of this report, submit an Action Plan to my office indicating how the remedial action stated in paragraph 7 above will be implemented.

8.4 I wish to bring to your attention that in line with the Constitutional Court judgement in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speaker of the
**National Assembly and Others [2016] ZACC 11**, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding, unless a Court order directing otherwise is obtained.

ADV. BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA  
DATE: **21/02/2020**

Assisted by:  
Mr Sechele Keebine (NW: Provincial Representative); and  
Mr Kleinbooi Matsetela (NW: Senior Investigator—Good Governance and Integrity Unit)