
PUBLIC PROTECTOR
SOUTH AFRICA

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"Allegations of maladministration in the matter between Ms Dinah Nancy Thakanyane and the Department of Rural, Environmental and Agricultural Development"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED AS A RESULT OF THE ALLEGED MALADMINISTRATION BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENTAL AND AGRICULTURAL DEVELOPMENT
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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 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report deals with the outcomes of an investigation into alleged failure by the North West Provincial Department of Rural, Environment and Agricultural Development (the Department) to implement the approved outcome of the Labour Relations Unit’s investigation into her absorption grievance and as a result of such failure she suffered prejudice.

(iii) The Complainant is a 53 year old adult female, an employee of the Department based at Bojanala Platinum District. The Complainant alleged that she was absorbed into the Department during February 1997 as a Senior Accounting Clerk Grade 1. She later observed that other members of staff, with the same qualification (Matric) as hers, but lesser experience had been absorbed at the level of Chief Accounting Clerk, a position higher than hers. A grievance was raised with the Department and an investigation conducted. Subsequently an undertaking was made by the Department to rectify the matter by placing her at the same position as her counterparts, but that never happened until the Department issued circular 5/2006 which closed all absorption related cases.

(iv) In the main, the Complainant alleged that the Department failed to implement the recommendations made for the correction of her absorption status from Senior Accounting Clerk Grade 1 to Chief Accounting Clerk and the salary upgrade from R48 360 to R50 888 per annum in line with her counterparts and as a result of such a failure she suffered prejudice.

(v) The Department did not dispute that it undertook to correct the Complainant’s absorption status. Although the Department contended that circular 5/2006 which closed all absorption related cases still stands and it also applies to this complaint, it did not dispute that the author of the circular, the then HOD, advised
the Complainant that all decisions which were taken prior the issuing of the circular were not affected by the contents of the circular.

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

(a) Whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit's investigation into the Complainant's absorption grievance; and

(b) Whether the Complainant was prejudiced as a result of the Department's conduct.

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

(viii) The Public Protector issued a section 7(9) notice dated 17 February 2017 to the Department and the Head of the Department responded in a letter dated 02 March 2017 as follows: “The department has noted the intended findings and remedial action with regard to this matter and wish to indicate that there is no further evidence to submit.”

(ix) Key laws 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. Those are the following:

(a) Section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) were relied on to determine whether the Department improperly failed to take into account the relevant considerations to give effect to the Complainant's right to procedurally fair administrative action;
(b) Section 195(1) of the Constitution, which provides for everyone to be treated impartially, fairly, equitably and without bias was relied on to affirm the Complainant’s rights in that regard and to determine whether she was prejudiced by the conduct of the Department; and

(c) The Department does not have an internal policy dealing with grievance procedures to be embarked upon by its employees as such the Public Service Co-ordinating Bargaining Council (PSCBC) Resolution no. 14 of 2002 is employed by the Department for the advancement of sound labour relations and addressing of grievances as such the Public Protector relied on same to determine if there was any violation on the part of the Department.

(x) 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 unduly failed to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s absorption grievance:

(aa) The allegation that the Department improperly failed to implement the approved outcome of the Labour Relation’s investigation into the Complainant’s absorption grievance is substantiated.

(bb) Although the Department wrote a letter dated 11 January 2013 to the Complainant advising her of its decision regarding her grievance and informing her of its reasons for not considering her claim, the Department failed to take into account the relevant considerations to give effect to the Complainant’s right to procedurally fair administrative action in that regard.
(cc) The Department dealt with the matter in an appropriate way by accepting the Complainant’s grievance when the matter was initially raised by the Complainant on 25 June 2001. It is important to note that the Department conducted an investigation into the matter through its Labour Relations Unit and as such findings were made in favour of the Complainant, recommendations were made and subsequently accepted by the Department.

(dd) The Department undertook to implement the recommendations as per the memorandum dated 18 May 2004 as well as the letter dated 11 June 2004 from the Manager: Service Condition, Mr BA Mosenogi. However, implementation of the recommendations did not happen.

(ee) The Department’s failure to implement the outcome of the investigation, in violation of sections 33 and 195(1) of the Constitution, 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.

(b) Regarding whether the Complainant was prejudiced as a result of the Department’s conduct:

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

(bb) The Complainant was prejudiced by the conduct of the Department as envisaged in section 182(1) (a) of the Constitution because had the Department timeously implemented the outcome of the investigation it would have placed her in a better financial position, but its failure meant that she lost on potential notch progression, monthly salary adjustment, the Government
Employee Pensions Fund (GEPF) contributions, and any other promotion associated with the position.

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

(a) The Head of the Department must ensure that the outcome of the investigation into the Complainant’s absorption grievance is implemented, retrospectively from February 1997, within 30 working days from the date of this report;

(b) The Head of the Department must ensure that the Complainant is paid all monies having taking into account the notch progression that would have been due to her had the recommendations of the investigation into her absorption been implemented effectively from February 1997, together with interest, from February 1997 to date of final payment, calculated at the applicable rate (at the time) as prescribed by the Minister of Justice and Constitutional Development in terms of section 1(2) of the Prescribed Rate of Interest Act 55 of 1975 within 30 working days from date of this report;

(c) The Head of the Department must reimburse the GEPF with the cost implications, including arrear employer and employee contributions, within 60 working days from the date of this report; and

(d) The Head of the Department must write a letter of apology to the Complainant for the prejudice caused to her within 30 working days from the date of this report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED AS A RESULT OF THE ALLEGED MALADMINISTRATION BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENTAL AND AGRICULTURAL DEVELOPMENT

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, 23 of 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 officials:

1.2.1 The Director-General of the North West Provincial Government: Dr Lydia Sebego;

1.2.2 The Member of the Executive Council for Rural, Environment and Agricultural Development: Honourable Manketsi Tlhape; and

1.2.3 Head of the Department of Rural, Environment and Agricultural Development: Dr Poncho Mokaila.

1.3 A copy of the report is also submitted to the Complainant, Ms Dinah Nancy Thakanyane (Nee Lebang), to inform her about the outcome of the investigation.

1.4 The report deals with the outcomes of an investigation into alleged failure by the North West Provincial Department of Rural, Environment and Agricultural Development to implement the recommendations made for the correction of Ms Dinah Nancy Thakanyane/ne Lebang's (Complainant) absorption status from Senior Accounting Clerk Grade 1 to Chief Accounting Clerk and the
salary upgrade from R48360 to R50 888 per annum in line with her counterparts and as a result of such a failure she suffered prejudice.

2. THE COMPLAINT

2.1 The Complainant is a 53 year old adult female employee of the North West Department of Rural, Environment and Agricultural Development (the Department) based at Bojanala Platinum District.

2.2 Around 1990 she was employed by Agricultural Corporation (Agricor), a former parastatal of the erstwhile Bophuthatswana Government, stationed at Dinokana Service Centre as a Bookkeeper.

2.3 During 1996/1997 after the dawn of democracy, the parastatal was dissolved and the decision was taken that its employees be absorbed into the Department and as a result the Complainant was absorbed accordingly.

2.4 During the absorption period she was appointed in the position of Senior Accounting Clerk Grade 1.

2.5 She later observed that her former colleague from Agricor was absorbed into the Department, with same qualification (Matric) as hers, but lesser experience had been absorbed at the level of Chief Accounting Clerk a position higher than hers.

2.6 She thereafter raised a grievance with the Department and an investigation was conducted. Subsequently an undertaking was made by the Department to rectify the matter by placing her at the same position as her counterparts, but that never happened.
2.7 During 2006 the then Head of Department Mr M P Mogotha (HOD) issued a circular advising all the staff of the Department that all grievances relating to 1996/97 absorption would no longer to be entertained by the Department and declared the subject matter closed and staff was advised to follow other external dispute resolution mechanisms in the event they still felt aggrieved.

2.8 She approached the then HOD for clarity in respect of the circular and the response from the latter was that the circular did not affect her.

2.9 After the response received from the then HOD, she followed up the matter with the Department and it remained obdurate with reference to the circular.

2.10 She escalated the matter to various authorities including, the Office of the Premier, the Presidency as well as the Office of the Public Service Commission without success.

The Complaint

2.11 In the main, the Complainant alleged that the Department failed to implement the recommendations made for the correction of her absorption status from Senior Accounting Clerk Grade 1 to Chief Accounting Clerk and the salary upgrade from R48 360 to R50 888 per annum in line with her counterparts and as a result of such failure she suffered prejudice.

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

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

3.2 Section 182(1) of the Constitution provides that:
“The Public Protector has the power, as regulated by legislation, to:

(a) investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) report on that conduct; and
(c) take appropriate remedial action.”

3.3 The Public Protector has additional powers and functions prescribed by national legislation as per the provisions of section 182(2).

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 has additional power to resolve disputes involving conduct in state affairs through conciliation, mediation, negotiation or any other mechanism he or she deems appropriate.

3.5 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.

3.6 The power and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of the parties.

3.7 In re 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, [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
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.”

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3 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 or Touchstones.

4.1.4 The Public Protector issued a section 7(9) notice dated 17 February 2017 to the Department and the Head of the Department responded in a letter dated 02 March 2017 as follows: “The department has noted the intended findings and remedial action with regard to this matter and wish to indicate that there is no further evidence to submit.” Based on the response the Public Protector proceeded to adjudicate on the matter.

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2 Supra at para [73].
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.

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. 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 considered and investigated:

4.3.1 Whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s absorption grievance, and

4.3.2 Whether the Complainant was prejudiced as a result of the Department’s conduct.

4.4 Key sources of information

4.4.1 Documents:

4.4.1.1 A statement giving full particulars of the complaint and chronology of events dated 07 April 2014;

4.4.1.2 A copy of a Report on investigation of grievance submitted by the Complainant dated 26 March 2004; and

4.4.1.3 Administrative Circular No. 5/2006.

4.4.2 Correspondence sent and received

4.4.2.1 Letter from Mr MD Mompei, Assistant Director: Financial Planning dated 25 June 2001;

4.4.2.2 Letter from the Complainant to Mr RS Moraka, Senior Manager: HRM dated 29 August 2003;

4.4.2.3 Letter from Mr RS Moraka, Senior Manager: HRM to Mr Alf Wills, Senior Executive Manager: HRM, 18 May 2004;

4.4.2.4 Letter from Mr BA Mosenogi, Manager: Service Conditions, dated 11 June 2004;
4.4.2.5 Letter from the Complainant to the then HOD, dated 12 July 2006;
4.4.2.6 Letter from the then HOD to the Complainant dated 20 July 2006;
4.4.2.7 Follow-up Letter from the Complainant to the then HOD dated 14 August 2006;
4.4.2.8 Other correspondence submitted by the Complainant, including e-mails and attachments, submitted between 2011 and 2014, mostly correspondence between Complainant and Office of the HOD;
4.4.2.9 The Public Protector’s letter of enquiry addressed to Dr Poncho Mokaila, HOD, dated 12 July 2014; and
4.4.2.10 Response letter from Dr Poncho Mokaila, HOD, dated 04 August 2014.

4.4.3 Meetings and Interviews

4.4.3.1 Meeting with the Complainant on 07 April 2014 regarding issues raised;
4.4.3.2 Telephone discussion between the Public Protector and the Complainant on 26 September 2014 to clarify issues raised by her;
4.4.3.3 Meeting with the Head of the Department, Dr Poncho Mokaila, on 27 August 2014; and
4.4.3.4 ADR session held on 31 August 2015.

4.4.4 Legal and Regulatory Framework

4.4.4.1 The Constitution;
4.4.4.2 Promotion of Administrative Justice Act 3 of 2000 (PAJA); and
4.4.4.3 Public Protector Act.

4.4.5 Case Law

4.4.5.1 Sokhela & Others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & Others ((2009) JOL 23782 (KZP) at para [52])
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit's investigation into the Complainant's grievance:

**Common cause issues**

5.1.1 It is common cause that on 30 April 2003 the Complainant formally lodged a grievance regarding oversights made in her absorption in the Department.

5.1.2 A Departmental investigation regarding the Complainant's grievance was conducted through the Departmental Labour Relations Unit and revealed that there were inconsistencies regarding the Complainant's absorption.

5.1.3 The Department undertook to correct the inconsistencies as per a memorandum dated 18 May 2004 as well as a letter dated 11 June 2004 from Manager Service Condition, Mr BA Mosenogi, to the Complainant which advised the Complainant as follows (*sic erat scriptum*):

"You are kindly informed hereby that the Office of the Senior Executive Officer has approved the recommendation through the Office of HRM for the correction of your absorption status from Senior Accounting Clerk Grade I to Chief Accounting Clerk and the salary from R48360 p.a to R50888 p.a in line with your counterparts. Please take note that the correction is with effect from your date of absorption, which is 01 February 1997.

Please take note that due to budgetary constraints, your correction cannot be implemented immediately, but as soon as funds are made
available from Finance and Admin Directorate, implementation will take effect." (Public Protector’s emphasis)

5.1.4 The Department, after approving the investigative report in respect of her absorption grievance, advised the Complainant that the recommendations made would be implemented as soon as the Department had sourced funds from National Treasury as per a letter dated 11 June 2004.

5.1.5 Whilst awaiting the Department to rectify her absorption status as agreed upon, the Department issued an Administrative Circular 05/2006 informing all employees that:

"…the continuation of the absorption can no longer be justified, morally, ethically or otherwise. It is no longer in the interest of anyone to pursue this matter given inherent problems associated with absorption… this process is officially closed with immediate effect".

5.1.6 The Complainant lodged an enquiry with the Office of the then HOD on the effect of the Circular wherein she relayed the following:

"…I would like to know about the people who got letters confirming that their absorption was wrong because I’m one of them.”

5.1.7 In his response the then HOD in a letter dated 20 July 2006 pronounced the following to the Complainant:

"Kindly be informed that my decision on the above-mentioned matter is effective from the date of the circular and it does not affect previous decisions taken prior to that date"
Issues in dispute

5.1.8 The factual dispute was whether the Department committed to and later defaulted on an agreement and/or undertaking to implement the recommendations that it approved relying on the contents of Admin Circular No 5/2006 for its deviation and whether the Department intended to revoke previous decisions in respect of the Complainant's absorption grievance in issuing Admin Circular No. 5/2006.

Application of the relevant law

The Complainant's Right to Proper Conduct and Good Administration

5.1.9 During the investigation the Public Protector uncovered that the Department does not have a Departmental Policy dealing with grievance procedures and/or rules. The Department relies on the Public Service Co-ordinating Bargaining Council Resolution no. 14 of 2002. It thus is important to point out that the role of the Public Protector is not to replace the role of the Council. The role of the Public Protector in this regard is to make a determination in respect of the conduct of the Department towards the Complainant. Such conduct is an administrative one. This matter was accordingly dealt with in terms of the PSCBC resolution 14 of 2002 and was dismissed for late submission to the Council. The Public Service Commission rejected the matter and the reason advanced was that there is no dispute rather a delay by the Department to implement the recommendations. The Public Protector thus agrees with the view held by the Public Service Commission.

5.1.10 When dealing with people, the Department, like all other organs of state, has a duty to eschew improper conduct as envisaged in section 182 of the Constitution or maladministration in various manifestations as envisaged in section 6 of the Public Protector Act. The proscription of improper conduct and maladministration or bad administration can be viewed as concomitantly giving the people the right to proper conduct and good administration. In
determining the content of proper conduct, the Public Protector considers lawfulness, justice and general acceptability of conduct in the light of the founding values of South Africa as enshrined in the Constitution.

5.1.11 The Department also had a duty, in its dealings with the Complainant, to ensure that its decisions and actions meet the test of just administrative action as envisaged in section 33 of the Constitution which states that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

5.1.12 The Department's conduct further needs to be tested against the principles of good administration outlined in section 195(1) of the Constitution, which state, among others, that "services must be provided impartially, fairly, equitably and without bias"; and that "public administration must be accountable". Among other things, the Department's conduct should have complied with the specific requirement of section 195, that:

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

(a) A high standard of professional ethics must be promoted and maintained;

(b) ..... 

(c) Public administration must be development oriented;

(d) ..... 

(e) People's needs must be responded to.

(f) ..... 

(g) ..... 

(h) Good human-resource management and career development practices, to maximize human potential, must be cultivated"
Duty imposed by the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

5.1.13 In ensuring just and fair administrative action, when dealing with people, the Department, like all other organs of state, has a duty to shun improper conduct and the parameter is set by PAJA. Section 1 of PAJA which provides as follows:

"Administrative action" means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; …

(b) ………..

(c) which adversely affects the rights of any person

5.1.14 In Sokhela & Others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & Others\(^3\), the court held per Wallis J that:

"As section 3(2)(a) of PAJA makes clear what will constitute a fair administrative procedure depends upon circumstances of each case. However, in general, in order to give effect to the right to procedurally fair administrative action the person affected must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations and a clear statement of the administrative action. Ordinarily the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. That is hardly surprising bearing in mind that one of the grounds upon which the decision of an administrator may be set aside is because

\(^3\) [2009] JOL 23782 (KZP) at para [52]
irrelevant considerations were taken into account or relevant considerations were not considered." (Public Protector's emphasis)

Conclusion

5.1.15 The Department dealt with the matter in an appropriate way by accepting the Complainant's grievance when the matter was initially raised by her on 30 April 2003. Of importance to note is that the Department conducted an investigation on the matter through its Labour Relations Unit and as such findings were made in favour of the Complainant, recommendations were made and subsequently accepted by the Department.

5.1.16 The Department did not dispute that it had undertaken to correct the Complainant's absorption. Although the Department contended that circular 5/2006 which closed all absorption related cases still stood and it also applied to this complaint, it did not dispute that the author of the circular, the then HOD, advised the Complainant that all decisions which were taken prior to the issuing of the circular were not affected by the contents of the circular.

5.1.17 The Public Protector has set out the version of both sides concerning the events subsequent to the issuing of the Department's Admin Circular 05/2006. It thus is the Public Protector's view that these events do not raise a genuine dispute of fact that cannot be resolved. The differences between the Complainant and the Department are largely concerned with the interpretation and the conclusions to be drawn from the facts of the then former HOD's response letter to the Complainant's wherein he stated that his decision in respect of the Admin Circular 05/2006 was effective from the date of the circular and it did not affect previous decisions taken prior to that date.

5.1.18 It can be concluded that the Department had a constitutional and statutory duty to observe the provisions of just administrative action as encapsulated in section 33 of the Constitution and section 3 of PAJA once it had made a
decision regarding the Complainants grievance, but failed to uphold to these constitutional duties.

5.2 Regarding whether the Complainant was prejudiced as the result of the Department’s conduct:

5.2.1 It is common cause that the Department did not implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s absorption grievance.

5.2.2 The Complainant would have benefitted financially had the Department acted accordingly.

5.2.3 The Complainant’s potential notch progression, monthly salary adjustment, the GEPF contributions, and any other promotion associated with the position were affected.

Application of the relevant law

5.2.4 Writers such as Stephen Owen⁴, accentuated the view that the Ombudsman system of oversight and accountability has developed in response to the shortcomings of legislative and judicial method in ensuring that individuals receive appropriate consideration and protection against adverse government action:

“A finding of administrative negligence and a recommendation ... to remedy the harm caused by it pursuant to ombudsman legislation is not necessarily based on the same findings that a court would require to establish legal liability. Ombudsman authority to recommend remedial action derives from the premise that a fair remedy with respect to administrative wrongdoing is not

⁴ The Ombudsman: Essential elements and common challenges: The international ombudsman anthology: selected writings from the International Ombudsman Institute. Linda C. Reif, International Ombudsman Institute, 1999
always available at law. ...to a large extent, the office of the ombudsman is established by legislatures in recognition of the inadequacy of the courts to deal with many injustices arising from the nature of modern bureaucracy”.

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

Conclusion

5.2.6 In that regard, the Public Protector is of the view that failure by the Department to implement the approved outcome of the Labour Relation’s Investigation into the Complainant’s grievance was irrational and unfair as it affected her right to benefit financially.

6. FINDINGS

6.1 Regarding whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s grievance:

6.1.1 The allegation that the Department unduly failed to implement the outcome of the internal investigation report is substantiated.

6.1.2 The reasons advanced by the Department in justification for its failure to act properly towards the Complainant are not cogent. The preliminary processes of labour law had been complied with and the Department agreed to rectify discrepancies relating to the Complainant’s absorption subsequent to the investigation report issued by the Labour Relations Unit.

6.1.3 The Department’s failure to implement the outcome of the investigation, in violation of sections 33 and 195(1) of the Constitution, constitutes improper
6.2 Whether the Complainant was prejudiced as the result of the Department’s conduct.

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

6.2.2 The Complainant was prejudiced by the conduct of the Department as envisaged in section 182(1) (a) of the Constitution because had the Department implemented the outcome of the investigation it would have placed her in a better financial position. Failure to implement the outcome meant that she lost out on potential notch progression, monthly salary adjustment, the GEPF contributions, and any other promotion associated with the position.

7. REMEDIAL ACTION

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

7.1 The Head of the Department must ensure that the outcome of the investigation into the Complainant’s absorption grievance is implemented within 30 working days from the date of this report;

7.2 The Head of the Department must ensure that the Complainant is paid all monies due to her (taking into account the notch progression that would have been due to her had the recommendations of the investigation into her absorption been implemented effectively from February 1997, together with interest, from February 1997 to date of final payment, calculated at the applicable rate (at the time) as prescribed by the Minister of Justice and
Constitutional Development in terms of section 1(2) of the Prescribed Rate of Interest Act 55 of 1975 within 30 working days from date of this report:

7.3 The Head of the Department must reimburse the GEPF with the cost implications, including arrear employer and employee contributions, within 60 working days from the date of this report; and

7.4 The Head of the Department must write a letter of apology to the Complainant for the prejudice caused to her within 30 working days from the date of this report.

8 MONITORING

8.3 The Head of the Department must, within 14 working days from the date of this report, submit an Action Plan indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.4 The Head of the Department must submit a report, within 30 working days from the date of this report, to the Public Protector on the progress made with the implementation of the remedial action.

[Signature]
ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 25/09/2017

Assisted by:
Mr Sechabe Keabane (NW: Provincial Representative) and Adv. Odineleng Sebogodi (NW Investigator: Administrative Justice and Service Delivery Unit)