



**Address by Public Protector Adv Thuli Madonsela on the occasion of a media briefing at the Public Protector House in Pretoria, Gauteng on Tuesday, November 08, 2011.**

**Programme Director;  
Deputy Public Protector, Adv Mamiki Shai;  
Members of the media;  
CEO of the Public Protector South Africa, Themba Mthethwa;  
Senior Management and staff of the Public Protector SA;  
Ladies and gentlemen;**

Thank you for your interest in the matters I wish to bring to the attention of the people of South Africa today and for your ongoing interest in my office's work. The Public Protector Team remains indebted to you for your unwavering support.

Ongoing public attention, particularly through the efforts of the media, is an important factor in our quest to be accessible to all persons and communities as directed by section 182(4) of the Constitution. The media is also a critical element in what we refer to as "moral suasion". Moral suasion is the key to the implementation of findings of offices such as the Public Protector.

The act of releasing my report and findings is in line with Section 182(5) of the Constitution, which states that any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

When my team and I planned this briefing the aim was to release my findings in respect of several outstanding investigations. I have unfortunately had to defer the release of those reports where there are outstanding issues. These include my report on allegations of maladministration at **Dipaleseng** Municipality. This morning, I released a provisional report on this investigation. Also outstanding and to be released before the end of the year, are my findings relating to an Executive Members' Ethics investigation dealing with allegations against the Premier and the MEC for Finance in the Northern Cape province. My report on an investigation into allegations of maladministration against a former Limpopo Province MEC for Health has also been temporarily held back.

Today's briefing focuses on two reports. The first is a report under the Public Protector Act, which deals with allegations of maladministration against the Midvaal Municipality and the other forms of improper conduct as envisaged under section 182 of the Constitution. The second report also deals with an investigation under the Public Protector Act and focuses on allegations of maladministration and improper prejudice in the manner that the Government dealt with the privatization of the Venda Pension Fund Schemes.

My team and I are also happy to avail ourselves to answer any of your questions regarding ongoing investigations that are of interest to you.

### **Programme Director;**

The reports and findings I seek to bring to the attention of the people of South Africa and the government require a lot of reflection regarding our ongoing efforts as a people seeking to harness fully the transformational potency of our Constitution.

One of the transformational innovations of our Constitution is the introduction of the Public Protector. Section 182 of the Constitution states that:

***“(1) 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”***

In our efforts to deliver on the constitutional mandate my team and I have had to ask ourselves questions such as: “What did the architects of our democracy mean by “***conduct in state affairs***”?” What exactly is “***improper conduct***”? And what is expected of me when the Constitution directs ***that the Public Protector has the power to “take appropriate remedial action”***?

Tonight I am speaking at the Rotary Club in Johannesburg, where I've been asked to clarify what “***Protecting the Public***” means.

My team and I also constantly ask ourselves what are we required to do to support and strengthen constitutional democracy given the fact that the Public Protector's role is to exact accountability in the exercise of state power. For example we ask to what end is such exaction of accountability. During the recent dialogue with the nation, we proposed that the end result should be administrative justice and ensuring that public power is always exercised in accordance with the law and public interest.

Recently though, we were reminded in Parliament that proper conduct as envisaged in section 182 of the Constitution transcends administrative justice as envisaged in section 33 of the Constitution. I agree with Parliament. Proper conduct which is the goal underpinning the constitutional mandate of the Public Protector involves lawfulness, administrative justice and more. Ultimately public power being borrowed power should be exercised in a manner that is not only lawful, but just, fair proportionate and good.

In our view, the end result of exacting accountability in the exercise of state power should not only contribute to good governance but ultimately to ensuring that the people of South Africa equally enjoy the fruits of democracy, including the fundamental rights promised in the Constitution.

The reports touch on several of such rights, including the right to access to adequate housing (S26), the right to social security (S27) and the right to equality (S9). How then do we interpret proper conduct in a manner that fosters governance that is consistent with the vision and values underpinning our Constitution?

I'm certain that you all have views on these matters and that you use those views to judge for yourself whether my reports and findings meet the constitutional and legal requirements under which I have to exercise my powers and responsibilities. I have no doubt in my mind that your views on these matters will inform your reaction to the findings I am about to announce.

### **It can't be right: Remedying Self-Interest in the Midvaal: Report No 15 of 20/12**

I got involved in the Midvaal investigation when it had already been going on for about a year.

The investigation, which dealt with allegations of systemic maladministration, abuse of power and abuse of state resources in the Midvaal Municipality, was initiated by Mr CG Pypers, a resident and businessperson from the Midvaal area in the Sedibeng Municipality sometime in 2008. Mr Hoffman, a former DA Councillor and Member of the Mayoral Council (MMC) responsible for Finance at Midvaal Local Municipality, also lodged a complementary complaint, leading to a consolidated investigation.

During the investigation, we discovered that the complainants had lodged similar complaints with other agencies, including the police and the Special Investigation Unit (SIU). The Gauteng Member of the Executive Council (MEC) for Local Government had also been approached. The number of allegations also kept increasing with each interaction. These factors together with the challenge of resource constraints impacted negatively on the speedy finalization of the investigation. In fact eventually new complaints were excluded with many of these referred to the SIU, which is conducting a comprehensive forensic investigation incorporating allegations of criminal conduct.

A matter that really struck me when I got involved in the investigation, was an allegation that a person that had for several years acted as the legal advisor, attorney, debt collector, auctioneer and conveyancer for the municipality had been encouraging people to donate their property to the municipality to settle miniscule municipal debts and then hijacking the properties, buying them for himself and then selling them at a huge profit. The complaints also included an allegation that the person in question would buy those properties in the context where his role was to transfer these already donated properties, to the municipality as the municipality's conveyancer.

The allegations were eventually summarised under the following issues:

***(1) The Municipality appointed Odendaal and Summerton Inc. as its sole provider of legal services for the past 30 years without following proper procurement procedures and in terms of the Municipal Structures Act and/or the Municipal Finance Management Act.***

**(2) The Municipality allowed Odendaal and Summerton Inc. to auction properties to the value of R30 million and earned commission/ transfer fees in contravention of the MSA/MFMA.**

**(3) The Municipality was responsible for irregularities in the tender for paving services and alleged efforts to restrict or limit competitive bidders.**

**(4) The Municipality enabled Mr Odendaal to benefit improperly from the sale of properties donated to the Municipality.**

**(5) The use of equipment and resources of the Municipality to remove and transport trees to the former Mayor's residence in December 2004 constituted improper conduct and maladministration.**

**(6) The Municipality pursued irregular debt collection practices, including, the pursuit of fruitless bad debt.**

**(7) The Municipality failed to collect a debt owed to it by a vendor who acted as an agent for the Municipality for the sale of prepaid electricity and failed to collect rates and taxes owed by a son of a former Councillor.**

**(8) The Municipality paid performance bonuses, in an irregular manner, for certain employees who were shortly thereafter dismissed as a result of misconduct.**

**(9) The Municipal manager failed to consult the Complainants and to provide them with copies of the outcome of a forensic investigation that was conducted in respect of the sale of certain properties.**

During the investigation, it was further alleged that Mr Andre Odendaal of OSI made statements to the Law Society that the complaints lodged by the Complainants with my office were without merit and that no action would be taken. It was further alleged that he made similar representations to a court of law.

The investigation was long and extensive. However, some aspects still required a forensic investigation. Due to resource constraints and avoidance of duplication of efforts matters requiring a forensic investigation and allegations of a criminal nature were referred to the SIU and other appropriate bodies.

The additional complaints that were lodged when the investigation was at an advanced stage were referred to institutions such as the SIU. This included allegations of fraud and maladministration in the manner the municipality dealt with a property development venture to the tune of about R240 million.

My findings are based on the answers we found when we asked the standard questions: ***What happened? What should have happened? If there's a discrepancy between the two, does that amount to maladministration? If indeed there was maladministration what should happen to correct the situation as envisaged in section 182(1) (c) of the Constitution?***

The standard investigation process for complex investigations applied. We examined applicable laws, policies and prescripts. We interviewed people face to face and telephonically and

thoroughly examined and analysed a lot of documents, particularly those relating to supply chain management and asset disposal in the Midvaal municipality. We also entered into extensive correspondence.

After examining everything, I have made the following findings:

**1. On the question of whether the Municipality appointed *Odendaal and Summerton Inc.* as its sole provider of legal services for the past 30 years without following proper procurement procedures and in violation of the Municipal Structures Act and/or the Municipal Finance Management Act, my finding is that:**

(a) *Odendaal and Summerton Inc.* have been the Attorneys for the Municipality for the past 29 years, and has been acting as attorney for the former Meyerton Town Council since 1979;

(b) In 2000 *Odendaal and Summerton Inc.* was appointed to render all legal services to the Municipality, including conveyance services, debt collections, legal opinions on labour matters and Magistrate and Supreme Court matters;

(c) *Odendaal and Summerton Inc.* was only appointed on the basis of a tender for the first time in 2006, to provide legal services, debt collection services, and auctioneering services. The Municipality's procurement practice prior to 2006 was in violation of the Preferential Procurement Policy Framework Act, 1999, section 217 of the Constitution, the Local Government Transition Act, 1993, and the MSA;

(d) The procurement processes by the Municipality in 2006, in respect of legal services, debt collecting services and auctioneering services, was formally competitive but not substantively competitive and therefore failed to comply with the principles of fairness and competitiveness as provided for by section 217 of the Constitution, the Local Government Transition Act, 1993 and the Municipal Structures Act. The relevant provisions of the MFMA were not applicable at the time;

(e) The continuous and deliberate extension of *Odendaal and Summerton Inc.*'s contract by the relevant Municipal Managers, in circumstances where the firm gained an unfair advantage over other prospective service providers by having access to information and influence over the procurement instruments, exhibited a failure or lack of commitment to promote the Constitutional obligation of equity in its public procurement processes in accordance with section 217 of the Constitution and the Preferential Procurement Policy Framework Act. This amounts to maladministration; and

(f) The failure by the relevant Municipal Managers to have reasonably foreseen and managed the perceived or actual conflict of interests with Mr Odendaal's position as attorney and debt collector and his 2007 appointment as Constituency Chair, fostered a substantial personal benefit at the expense of the public purse, constitutes maladministration.

**2. On the issue of whether the Municipality allowed *Odendaal and Summerton Inc.* to auction properties to the value of R30 million and earned commission/ transfer fees in contravention of the MSA/MFMA, my finding is that:**

a) *Odendaal and Summerton Inc.* earned commission and fees in respect of the sale and transfer of properties on behalf of the Municipality; and

b) No finding could be made on the complaint that fees and commission were paid by the Municipality in an irregular manner as this matter was referred to the Special Investigating Unit.

**3. Regarding whether the Municipality was responsible for irregularities in the tender for paving services and alleged efforts to restrict or limit competitive bidders, my finding is that:**

a) No tender for the paving of Loch Street, Meyerton, was awarded to ALARN Concrete Products or any other company owned by Mr Odendaal;

b) The action taken against the company by the Municipality, through *Odendaal and Summerton Inc.* as its attorneys, was done based on the company's alleged contraventions of the Town-Planning and Townships Ordinance, 1986; and

c) There were accordingly no irregularities in terms the MSA and the MFMA in the award of the relevant tender, or the legal action taken by the Municipality.

**4. On whether the Municipality enabled Mr Odendaal to benefit improperly from the sale of properties donated to the Municipality, my finding is that:**

a) Eighty five (85) properties were released by owners, through the intervention of *Odendaal and Summerton Inc.*, as donations to the Municipality between 2003 and 2005, mainly from residents who were in arrears with their municipal accounts;

b) The donations in respect of some of these properties were not finalised. Some properties, including Stand 1491 Henley-on-Klip were intercepted, and were not transferred to the Municipality. Those properties that were transferred were not all sold by means of public auction;

c) Stand 1491 Henley-on-Klip was offered for donation to the Municipality in 2003 by the Executrix of Estate Late CC Hennop in settlement of a municipal debt of R5240, 98. On acceptance of the donation by the Municipal Manager, the municipal debt was written off and the Municipal Manager requested *Odendaal and Summerton Inc.* to transfer the property to the Municipality, but the process was not concluded by *Odendaal and Summerton Inc.* ;

d) Instead, the property, which was valued at R118 000, 00 was bought from the estate for R 10 000 by Meyerton Opspoorders, owned by Mr Odendaal, who subsequently sold it for R 180 000;

e) Mr Odendaal, being responsible for the collection of outstanding debt owed to the Municipality by the Estate Late CC Hennop, benefitted in his personal capacity from the purchase and subsequent sale of the property;

f) The Municipality did not have any processes in place to monitor and control the intended donation of Stand 1491 Henley -on-Klip; and

g) The management and sale of properties donated to or intended to be donated to the Municipality by property owners who were in arrears with their municipal accounts, contravened the MFMA for the following reasons:

- The then Accounting Officer failed to maintain a management accounting and information system that accounted for the assets and liabilities of the Municipality, and a system of control of assets and liabilities, including an asset and liabilities register.
- The acquisition and disposal of donated properties to the Municipality was not dealt with by the then Accounting Officer in terms of the duties and responsibilities of the Accounting Officer found in section 62 and 64 of the MFMA.
- The handling of donated houses was irregular as the Municipality failed to ensure legal compliance to prevent financial loss to the state.

**5. On whether the use of equipment and resources of the Municipality to remove and transport trees to the former Mayor's residence in December 2004 constituted improper conduct and maladministration, my finding is that:**

- a) Municipal equipment and resources were used for private purposes for the removal and transport of palm trees to the house of the former Mayor, Mrs Wegner, in 2004. The municipality was reimbursed for the expenditure incurred in this respect;
- b) Allegations on the breach of the Code of Conduct for Councillors were dealt with by the Council in terms of the provisions of the Municipal Structures and Systems Act, 2000;
- c) The matter was reported to the Member responsible for Local Government and Housing of the Gauteng Provincial Government (MEC) in terms of Schedule 1 of the MSA; and
- d) The Municipality's conduct in this instance was improper and constituted maladministration.

**6. On the allegation of irregular debt collection practices, including the complaint that the Municipality pursued fruitless bad debt, my finding is that:**

- a) The Municipality has a strict debt collection policy in terms of section 96 of the MSA which provided that debts be pursued;
- b) On 25 June 2009, after the Public Protector's investigation had commenced, Council approved a report from the Financial Services Department of the Municipality with proposals that an amount of R 6 458 311, 72 be either written off because it had prescribed in terms of the Prescription Act, 1969 or because it could not be collected in a cost effective way; and
- c) No evidence existed to establish that the Municipality continued to incur legal costs in instances where the collection efforts were fruitless or that it acted in any *mala fide* manner. As a result no maladministration could be found in this regard.

**7. On the question of whether the Municipality failed to collect a debt owed to it by a vendor who acted as an agent for the Municipality for the sale of prepaid electricity and failed to collect rates and taxes owed by a son of former Councillor, my finding is that:**

- a) The then Accounting Officer failed to take timeous action against the vendor who owed the Municipality an amount of approximately R706 961, 03, which escalated to an amount of R 869 261, 29, in respect of pre-paid electricity it sold;
- b) The then Accounting Officer did not comply with section 81 of the MSA in the Municipality's conclusion and management of agreements with vendors to sell prepaid electricity;

c) The then Municipal Manager failed to appropriately manage the implementation of vendor agreements and failed to ensure that relevant Departments within the Municipality complied with their responsibilities;

d) The then Accounting Officer did not comply with his accounting responsibilities in terms of section 62 and 64 of the MFMA or the debt collecting obligations in terms of Chapter 9 of the MSA;

e) Despite the recommendations of an internal audit to take disciplinary action against the official(s) involved, including the (then) Municipal Manager and the Chief Financial Officer, the Council decided not to proceed with disciplinary steps; and

f) The Municipality's failure to pursue the debt was improper and unfair and constituted maladministration, particularly as it was a more favourable treatment of this debtor, who owed the Municipality R869 261 as opposed to the Henley-on-Klip estate which was forced to donate its property in settlement of a municipal debt of R 5 240.98.

**8. On the allegation that the Municipality paid performance bonuses, in an irregular manner, for certain employees who were shortly thereafter dismissed as a result of misconduct, my finding is that:**

a) The officials concerned did receive bonuses based on performance assessments for the performance cycle that ended in the year prior to the final year of employment;

b) One was dismissed, two Heads of Department ended their employment contracts based on mutual agreements with the Municipality and the contracts of two other employees were renewed; and

c) No evidence supports the allegation that the Municipality paid performance bonuses irregularly to those employees whose services were terminated under suspicious circumstances.

**9. On the allegation that the Municipal manager fail to consult the Complainants and to provide them with copies of the outcome of a forensic investigation that was conducted in respect of the sale of certain properties, my finding is that:**

a) The relevant Municipal Managers initiated investigations into and submitted reports to the Council on:

- a. Agent Prepaid Electricity by Messrs Connaughton Miller Smith.
- b. Agent Prepaid Electricity by Expert Forensic Services dated 15 March 2007; and
- c. Alleged irregularity with disposal of donated property: Stand 1491 Henley-on-Klip: Estate Late CCC Hennop and other donated properties by Messrs Connaughton Miller Smith and Prof H Pienaar.

b) The Complainants were neither interviewed nor provided with copies of the reports.

**During the investigation, it was alleged that Mr Andre Odendaal of OSI made statements to the Law Society that the complaints lodged by the Complainants with my office were**

**without merit and that no action would be taken. It was further alleged that he made similar representations to a court of law.**

In the report I make the observation that:

a) The submission to the Law Society of the Northern Provinces by Mr Odendaal, in which he stated that: ... ***“The Public Protector did do an investigation. I was told that they found no evidence to substantiate Pypers allegations,”*** was untrue as the investigation had not yet been concluded at the time; and

b) The statement made by Mr Odendaal in his replying affidavit in Alarn Concrete Products (Pty) Ltd and Adriaan Izak Odendaal and CG Pypers, case 08/20738 in the South Gauteng High Court: Johannesburg, that ... ***“I have been visited by the National Public Protector and he has confirmed to me that he regards the Respondent’s complaints as being without merit and that no steps will be taken against me”***, was untrue as Mr Odendaal was consulted by an investigator and not the National Public Protector, and the Public Protector had not made or communicated any findings or views on the outcome of the investigation to any of the parties.

**Remedial action to be taken in pursuit of Section 182(1) (c) of the Constitution is the following:**

**a) General**

aa) **The Municipal Manager must within 60 days** of the receipt of the Public Protector’s report, provide the Council, the MEC and the Public Protector with a progress report on the status of the implementation by the Municipality, of remedial action, including the following reports, as accepted and adopted by the Internal Audit Committee:

1. Report on Agent Prepaid Electricity by Messrs Connaughton Miller Smith
2. Report on Agent Prepaid Electricity by Expert Forensic Services dated 15 March 2007;
3. Report(s) on alleged irregularity with disposal of donated property: Stand 1491 Henley -on-Klip: Estate Late CCC Hennop and other donated properties by Messrs Connaughton Miller Smith and Prof H Pienaar.

bb) **The Municipal Manager must provide the Council, the MEC and the Public Protector** with a report to indicate what steps were take since the promulgation of the Preferential Procurement Policy Frame Work Act, 2000 as well as the MFMA to ensure that the Municipality’s supply chain management framework and practices was aligned to the provisions of this Legislation as well as section 217 of the Constitution.

cc) The Municipal Manager must provide the Council, the MEC and the Public Protector with a report on the control measures that are in place to address and prevent the situation where one primary service provider is utilised for all the legal services, debt collection and auctioneering work, during the current contracts that were awarded from 2009 until 2012, as well as in future.

**B) Award of contracts to provide legal services award of contracts to provide Legal Services, Debt Collection and Auctioneering Services**

#### **aa) Remedial action taken**

1. During the course of the Public Protector's investigation the Municipality appointed a panel of attorneys in 2009, and introduced a segregation of the various functions performed by the Council's attorney.
2. A condition was included in the in the contract with the service providers to provide that "information may not be used for personal gain by the Attorney, his business, any employee, sub-contractor or any agent of the Attorney or any person, body or organisation receiving information or data through the Attorney, or any of their employees or agents." Failure to observe these conditions would constitute a breach of contract, which could result in termination of the contract.
3. In addition, certain key performance indicators were also included in the Performance Management System for External Service Providers rendering legal Services: Debt Collection

#### **bb) Remedial action required**

1. **The Accounting Officer must, within 60 days** of the receipt of this report, submit a report to the Midvaal Municipal Council in accordance with the Midvaal Municipal Supply Chain Management Policy And Procedures (January 2010) to enable the Council to deal with the non compliance with the Constitution.
2. The report must be made public in accordance with section 21A of the MSA
3. The Council must in terms of section 171 of the MFMA investigate the conduct the accounting officer, chief financial officer and officials involved.
4. If the investigation warrants such a step, disciplinary proceedings must be instituted against the accounting officer, chief financial officer or the senior manager or other official in accordance with systems and procedures referred to in section 67 of the MSA, read with Schedule 2 of that Act.
5. The Accounting Officer must review the services performed **on behalf** of the Municipality by Odendaal and Summerton in terms of section 80 and 81 of the MSA and take appropriate steps to ensure that these services comply with section 195 of the Constitution, including the consideration of suspension of duties and responsibilities that are incompatible with the political activities of the service provider.

#### **C) The management and sale of Stand 1491 Henley -on-Klip: Estate Late CC Hennop and other donated properties**

##### **aa) Remedial action taken**

1. The following recommendations were adopted by the Municipality's Internal Audit Committee:
  - i. All future contracts with the Council's attorneys should stipulate that any interests of the attorneys in transactions should be disclosed in writing to Council;
  - ii. The progress of attorneys on handed over accounts should be properly monitored and reported on; and.
  - iii. Policies and procedures should be considered in respect of the follow up of handed over

accounts, control over properties donated to the municipality: information recorded in the register for donated land.

**bb) Remedial Action to be taken**

1. The Council must investigate the deficiencies and non-compliance with the policies and control mechanisms in respect of Stand 1491 Henley -on-Klip: Estate Late CCC Hennop and other donated properties by the officials involved and responsible for the management of the acquisition and disposal of donated property in terms of section 171 of the MFMA.
2. The outcome of the current investigation by the SAPS, any investigation by the Special Investigating Unit, must be reported to the Council within 60 days of the receipt thereof.
3. The Law Society of the Northern Provinces, as the appropriate public body and authority to deal with allegations relating to the professional conduct of a legal practitioner in terms of Attorneys Act, 1979 and the relevant Rules, is requested in terms section 6(4) (c) (ii) of the Public Protector Act to deal with matters emanating from this report relating to the professional conduct of the partners in the law firm of Odendaal and Summerton.

**D) Debt collecting practices relating to the management of agent prepaid electricity accounts**

**aa) Remedial Action taken**

1. Deficiencies were identified in respect of the management of agent prepaid electricity accounts and recommendations were made to the Council to improve and correct current systems and procedures.
2. Measures were also proposed to monitor and control debt collection activities by the Council's Attorneys and to follow up on handed over accounts at regular intervals.

**bb) Remedial Action required**

1. The Council must investigate the deficiencies and non-compliance with the policies and control mechanisms by the officials involved and responsible for the management of the debt collection policy of the Municipality in terms of chapter 9 of the MSA, as well as the management of the provision of service through external mechanisms in terms of section 80 of the MSA.
2. The Council must in terms of section 171 of the MFMA investigate allegations of financial misconduct against the accounting officer, chief financial officer and officials involved and determine accountability for the irregular expenditure incurred by the Council because of the debt that had to be written off.

**iv) Referrals**

aa) Allegations that parties (officials and service provider) benefitted unlawfully from the transfer and sale of donated properties to the Municipality, is one of the matters that required a full forensic investigation before adjudicating the complainant's allegations of corrupt and criminal conduct in respect of the sale and benefit of donated properties.

bb) This matter is currently the subject of investigation by the SAPS, and was included in the proclamation issued to the Special Investigating Unit in terms of the Special Investigating Units

and Special Tribunals Act, 1996.

cc) In the light of this no specific referral is required in Public Protector Act.

dd) Allegations relating to the unethical or unprofessional conduct of the partners in the law firm of Odendaal and Summerton, are referred to the Law Society of the Northern Provinces, in terms section 6(4)(c)(ii) of the Public Protector Act, as the appropriate public body and authority to deal with matters emanating from this report relating to the conduct of a legal practitioner in terms of Attorneys Act, 1979 and the relevant Rules.

ee) A copy of the report is referred to the Parliamentary Committee for Private Members' Legislative Proposals & Special Petitions (the Committee) which is considering legislative proposals to amend the Executive Members' Ethics Act, 1998 to prohibit contracting between an organ of state in the national sphere of government and companies whose directors are party political office bearers or public representatives of political parties.

ff) A further copy of the Report is referred to the Minister of Cooperative Governance and Traditional Affairs to consider whether any action is required to regulate the offering, donation, management and disposal of residential properties to and by local authorities, in lieu of arrear or outstanding municipal debt ; including:

1. The appropriateness of such a practice in terms of the relevant accounting policies as well as Constitutional framework, including the obligation on government in terms of section 26 of the Constitution relating to access to housing to land.
2. The basis for the recognition of such properties as revenue or assets as well as the determination of the value of the recognition *vis-a-vis* the value of the municipal debt

### **Report No18 of 2011/12 EQUITABLE ACCESS TO SOCIAL SECURITY**

I have given Public Protector Report No 18 of 2011/12, the title, "***Equitable Access to Social Security***" as it raises questions on the meaning of section 27 to the average citizen and the responsibility of the state with regard to making section 27 a reality. The issues I had to deal with also touch on the content of the right to equality, particularly the essence of what it means to be treated with equal consideration as envisaged by the court in the case of *Walker versus Pretoria Municipality*.

The report emanates from a complaint lodged by the representatives of a group called Vhembe Concerned Pensioners. They alleged that the State; in particular the Government Employees Pension Fund (GEPF) and National Treasury had acted improperly during the privatisation of the Venda Pension Fund around 1992. This resulted in the Complainants and other members of the Venda Pension Fund being prejudiced by the actions or omissions of the State.

Among other things, the Complainants argued that, had it not been for the privatisation, the members of the Venda Pension Fund would have been entitled today to their full defined benefits in terms of the Government Employees Pension Law, 1996 (GEP Law). They contended that during 1992 they were wrongfully influenced by government to accept a privatisation scheme of the then Venda Government, which amounts to a partial advance payment of the members' pension entitlement. They further argued that the process was, from

the beginning never properly conducted and was accordingly defective. The argued further that no sufficient reason existed for denying individuals their right to a full pension.

The investigation took the same format as the one on the report titled "*It Can't Be Right*"

At the conclusion of the investigation I have made two sets of findings. One set relates to findings of maladministration by organs of state involved and the other to the prejudice suffered by the Complainants.

## **1. Findings on Maladministration**

(1) The management of the Venda Pension Fund prior to amalgamation led to a situation where there was a different dispensation for members who participated in the First Privatisation Scheme, the Second Privatisation Scheme, and members who elected not to transfer their interests or share.

(2) This amounted to unequal treatment of the members of the Fund in terms of which certain members were worse off than others even though they contributed equally to the Fund.

(3) The Venda Pension Fund, as well as the Government and its predecessors who managed the Fund prior to and directly after amalgamation, did not exercise a sufficient duty of care towards the affected members of the Venda Pension Fund to ensure that their pension interests were fully protected and secured. This amounted to maladministration.

(4) The acts of the Venda Pension Fund in relation to the calculation of the benefits of the members who privatised resulted in maladministration as the members were entitled to 100% of their accrued benefits.

(5) The acts and omissions of the South African Government and in particular the failure by the DPSA and the GEPF to address the complaints about the First Privatisation Scheme and to enquire as to how the transfers to SANLAM were calculated for each member, constitutes maladministration.

(6) The acts and omissions of the South African Government and in particular the failure by the DPSA and the GEPF to address the complaints of the six complainants regarding the purchasing of pensionable service that have been bought back, constitutes maladministration.

(7) The omission of the South African Government, and in particular the GEPF's failure, to implement the recommendations of the Public Protector in Report No. 18 of 2002 amounts to maladministration and a violation of the section 181(3) of the Constitution.

## **2. Findings on prejudice**

(a) The Complainants suffered prejudice as they were influenced to privatise their pension benefits but were not properly informed about the consequences of the privatisation.

(b) The Complainants suffered prejudice when they were influenced to privatise their

pension benefits as they forfeited all the benefits of a defined benefit fund such as a spouse's pension, funeral benefits and orphans benefits as well as a medical aid subsidy after retirement.

(b) The Complainants suffered prejudice when their complaints and problems were ignored by the different Government institutions which they complained to.

(c) The Complainants suffered prejudice when they had to apply for an old age grant despite having accumulated numerous years of service, and they lost the status that they had during their period of employment with the Government.

### 3. Remedial Action

Remedial action to be taken in compliance with Section 182(1) (c) of the Constitution is the following:

#### 3.1. Remedial Action in respect of the three Complainants:

(a) The GEPF should recalculate the pension benefits of Mr T J Tshiololi as if he retired with all his years of service as a member of the GEPF including the Venda Pension Fund and afford him the opportunity to repay any benefits he might have received, excluding the amounts repaid by him to the Venda Government.

(b) The GEPF should recalculate the pension benefits of Mr M P Ramavhale as if he retired with all his years of service as a member of the GEPF including the Venda Pension Fund and afford him the opportunity to repay any benefits he might have received, excluding the amounts repaid by him to the Venda Government.

(c) The DPSA and Treasury should address the complaint of Mr L J Rambau and order a forensic audit of the list of the First Privatisation Scheme of the Venda Pension Fund to determine the accuracy of the transferred amounts in respect of each member.

#### 3.2 Remedial Action in respect of all members of the former Venda Pension Funds

(a) The Ministers of Public Service and Administration and of Finance should appoint a task team, including members of the Government Pensions Administration, in collaboration with the Public Protector to -

(b) Review the implementation of the Privatisations Schemes of the former Venda Pension Funds;

(c) Consider changes to the GEP Law and Rules to enable members who participated in the privatisation schemes the opportunity to repay the benefits received and to recalculate their pension benefits in terms of the rules regulating normal retirement; and

(d) Determine whether or not the service periods that have been bought back before the privatisation schemes of the Venda Pension Funds should be included when recalculating the benefits of the members.

(e) The Government should apologise to the members of the Venda Pension Funds who suffered prejudice as a result of maladministration by the different Government institutions.

Regarding the implementation of this remedial action, I am to be advised by the State about planned action, indicating time lines, within 30 days of the issuing of this report.

All parties implicated in all these reports were afforded an opportunity to respond to my provisional findings. I am therefore confident that there will be a smooth implementation of remedies contained therein with a view to respond to specific complaints but also to fix the systems so as to avoid recurrences in the future.

Both reports provide timelines for the corrective or remedial action to be taken. The first timeline is a thirty day period for a response to the report, including an implementation plan.

The Deputy Public Protector (DPP) Advocate Mamiki Shai served as the Team leader in the investigation team that helped me with "It Can't Be Right." Adv Neels van der Merwe was the main investigator on that investigation and Ms Chrystal Pillay helped with quality assurance. Adv Erika Cilliers was the investigator in the investigation that yielded equitable access to social security and Ms Pillay and Adv van der Merwe helped with quality assurance. I'm deeply indebted to the DPP, the rest of the investigation team and other staff members that helped at various stages of the investigation.

**Adv TN Madonsela**  
**Public Protector of the Republic of South Africa**