

REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF
THE PUBLIC PROTECTOR ACT, 1994



PUBLIC PROTECTOR
SOUTH AFRICA

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*Allegations of improper conduct and maladministration by the Eastern Cape
Department of Education*

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT
AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF EDUCATION
RELATING TO THE DELAY IN THE PAYMENT OF THE SALARY OF A TEMPORARY
EDUCATOR, MS T SPELMAN

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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, and section 8(1) of the Public Protector Act, 1994.
- (ii) The report relates to an investigation into an allegation of improper conduct and maladministration by the Eastern Cape Department of Education (the Department) in connection with the delay in the payment of the salary of a temporary educator, Ms T Spelman (the Complainant).
- (iii) Based on an analysis of the complaint lodged by the Complainant on 28 January 2016, the following issues were identified to inform and focus the investigation:
 - (a) Whether the Complainant was prejudiced as a result of the late payment by the Department of her salary for the period April 2015 to December 2015; and if so
 - (b) Whether the failure by the Department to compensate the Complainant for the prejudice that she suffered was improper and amounted to maladministration.
- (iv) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Department, meetings with officials of the Department, analysis of the documents obtained during the investigation and application of the relevant laws and prescripts.
- (v) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:
 - (a) **On whether the Complainant was prejudiced as a result of the late payment by the Department of her salary for the period April to December 2015.**

- (aa) The allegation that the Complainant was prejudiced due to the late payment by the Department of her salary for the period April 2015 to December 2015, is substantiated.
- (bb) The failure of the Department to pay the salary of the Complainant for the period April 2015 to December 2015 at the end of every month 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) On whether the failure by the Department to compensate the Complainant for the prejudice that she suffered was improper and amounted to maladministration**
- (aa) The failure by the Department to compensate the complainant for the prejudice that she suffered due to the late payment of her salary 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.
- (vi) The appropriate remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is the following:**
- (a) The Head of the Department:**
- (aa) To take urgent steps to compensate the Complainant for the prejudice that she suffered as a result of the late payment of her salary, by paying interest to her calculated in terms Prescribed Rate of Interest Act, 1975 on the amounts as and when it was to be paid to her, to date of payment, within 15 business days from the date of this report;

- (bb) To tender a written apology to the Complainant for the late payment of her salary and the failure on the part of the Department to compensate her for the prejudice suffered, within 15 business days from the date of this report

- (cc) To take immediate and appropriate steps to ensure that payment of the salary of employees of the Department is not delayed.

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT
AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF EDUCATION
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EDUCATOR, MS T SPELMAN**

1. INTRODUCTION

- 1.1. This is my report as the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to:
 - 1.2.1 The Member of the Executive Council of the Eastern Cape Provincial Government responsible for Education, Mr M Mvoko; and
 - 1.2.2 The Head of the Eastern Cape Department of Education (the Department), Mr T Kojana;to note the outcome of my investigation.
- 1.3. A copy of the report is also provided to the complainant, Ms T Spelman, to inform her of the outcome of my investigation.
- 1.4. The report relates to an investigation into an allegation of improper conduct and maladministration by the Department in connection with the delay in the payment of the salary of a temporary educator, Ms T Spelman (the Complainant).

2. THE COMPLAINT

- 2.1 The complaint was lodged on 28 January 2016 at the Eastern Cape Provincial Office of the Public Protector South Africa (PPSA) in Bhisho.
- 2.2 According to the Complainant, she was employed by the Department as a substitute teacher at the Nzimankulu Senior Secondary School, from April 2015 to December 2015.
- 2.3 She was not paid the remuneration due to her for the services she rendered to the Department for the period April 2015 to December 2015, as a result of which she was prejudiced.

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.”*

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- 3.3 Section 182(2) directs 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 power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.
- 3.5 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect¹. The Constitutional Court further held that: "*When the 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.
- 3.6 The Department is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.
- 3.7 The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

¹ [2016]ZACC 11;2016(3) SA 580(CC) and 2016 (5) BCLR 618 (cc) at para[76].

² *Supra* at para[73]

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.

4.2. 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 improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where she would have been, but for the improper conduct or maladministration?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Department acted improperly by delaying to pay the salary due to the Complainant when it was due and whether she was prejudiced as a result of it.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department to prevent maladministration or 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 he/she would have been, had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the Complainant was prejudiced as a result of the late payment by the Department of her salary for the period April 2015 to December 2015; and if so

4.3.2 Whether the failure by the Department to compensate the Complainant for the prejudice that she suffered was improper and amounted to maladministration.

4.4 KEY SOURCES OF INFORMATION

4.4.1 Documents

4.4.1.1 Copies of the Complainant's salaries advices for the period April 2015 to December 2015.

4.4.1.2 A copy of the Complainant's service record with the Department.

4.4.1.3 A copy of the Complainant's letter of appointment, dated 23 October 2015 signed by the District Director of the Department.

4.4.2 Meetings held

4.4.2.1 Meeting with Miss Flepu, the Head of Human Resources at the District Office of the Department, on 30 August 2016.

4.4.2.2 Meeting with Mr E Scheun, Director: Legal Services of the Department, on 24 April 2018.

4.4.3 Correspondence exchanged between the Public Protector and

4.4.3.1 Mr S N Netshilaphala, then Acting Head of the Department, dated 19 August 2016 and 30 October 2016; and

4.4.3.2 Mr E Scheun, Director: Legal Services of the Department, dated 7 September 2016.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996.

4.4.4.2 The Public Protector Act 23 of 1994.

4.4.4.3 The Employment of Educators Act No 76 of 1998.

4.4.4.4 The Basic Conditions of Employment Act 75 of 1997.

4.4.4.5 The Prescribed Rate of Interest Act 55 of 1975.

4.4.5 Notice issued in terms of section 7(9) of the Public Protector Act

4.4.5.1 On 16 November 2018, a Notice in terms of section 7(9) of the Public Protector Act was issued, affording the Head of the Department an opportunity to respond to the evidence obtained during the investigation that implicates it. However, the Head of the Department failed to respond.

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 Complainant was prejudiced as a result of the late payment by the Department of her salary for the period April to December 2015.

Issues that are common cause

- 5.1.1 It is not in dispute that the Department employed the Complainant as a temporary educator in April 2015 and that she was so employed until the end of December 2015.
- 5.1.2 The Department also did not dispute that the Complainant's salary was to be paid at the end of each month.
- 5.1.3 It is further not in dispute that the Department only paid the Complainant the salary that was due to her in February 2016 and March 2016, after she had lodged a complaint with the Public Protector.
- 5.1.4 The Department did not dispute that its failure to pay the Complainant's salary at the end of every month that she was employed was improper and that it amounted to maladministration.

Application of the relevant law

- 5.1.5 The Complainant was appointed in terms of section 7(2)(b) of the Employment of Educators Act, 1998. This section provides that a person may be appointed as an educator in a temporary capacity for a fixed period of time.

5.1.6 Section 3(b) of the Act provides that the Head of a provincial Department of Education shall be the employer of educators in posts on the educator establishment of that department for all purposes of employment.

Conclusion

5.1.7 The Complainant was entitled to receive a monthly salary from the Department for the period that she was employed, from April 2015 to December 2015. The failure by the Department to pay her monthly salary accordingly resulted in her being prejudiced.

5.2 Regarding whether the failure by the Department to compensate the Complainant for the prejudice that she suffered was improper and amounted to maladministration

Issues that are common cause

5.2.1 It is not in dispute that the Department only paid the salary due to the Complainant for the period April 2015 to December 2015, after she had lodged the complaint with the Public Protector.

5.2.2 The Department paid to the Complainant an amount of R 63 114,49 on 8 February 2016. A further amount of R122 644,31 was paid to her on 7 March 2016.

Issues or Facts in Dispute

5.2.3 The matter of the Department compensating the Complainant for the prejudice that she suffered in the form of the payment of interest on the amounts that were due and payable to her as monthly salary, was raised with Mr E Scheun, the Director: Legal Services. In his response, dated 7 September 2016, Mr Scheun stated that "neither

the Public Service Act, Public Service Regulations, PFMA or the Treasury Regulations makes provision for the payment of interest.”

5.2.4 He further indicated that if the Complainant insists on interest, she should *“issue a summons against the Department, affording the Department the opportunity to defend the claim”*.

5.2.5 In his response in this regard, dated 30 October 2016, the then Acting Head of the Department of the Department, Mr S Netshilaphala, stated that:

“The fact that Mrs Speelman’s (sic) salary payment was delayed is regretted, however, the Department can only pay interest in cases of this nature when ordered so by a Court of law.”

Application of the relevant law

5.2.6 In terms of section 3 of the Basic Conditions of Employment Act, 1997, the Act applies to the Department and its employees.

5.2.7 Section 1 defines *“employee”* for the purposes of the Act, as follows:

- “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;
and
(a) any other person who in any manner assists in carrying on or conducting the business of the employer”*.

5.2.8 An employer must, in terms of section 32(1), pay to an employee any remuneration, daily, weekly or monthly.

5.2.9 Section 32(3)(a) of the Act provides that an employer must pay remuneration not later than seven days after the completion of the period for which the remuneration is payable. In the case of the Complainant, she had to be paid on a monthly basis.

5.2.10 Section 75 of the Act provides that an employer must pay interest on any amount due and payable in terms of this Act at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act, 1975, to any person to whom a payment should have been made.

Conclusion

5.2.11 Monthly payment by the Department of the Complainant's salary for the period April to December 2015 became due and payable on the seventh day of the next month.

5.2.12 The Department only paid the Complainant's salary in February and March 2016, months after it was due.

5.2.13 The Complainant was deprived of her income to which she was entitled to without any justification. The Department made no effort to compensate the Complainant for the prejudice that she had to endure. Its only response was that interest could only be paid if there is an order of court compelling the Department to do so. The Department therefore expected of her to litigate against it at her own cost for compensation which was the result its conceded failure.

6. FINDINGS

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

6.1 Regarding whether the Complainant was prejudiced as a result of the late payment by the Department of her salary for the period April to December 2015.

6.1.1 The allegation that the Complainant was prejudiced due to the late payment by the Department of her salary for the period April 2015 to December 2015, is substantiated.

6.1.2 The failure of the Department to pay the salary of the Complainant for the period April 2015 to December 2015 at the end of every month 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 failure by the Department to compensate the Complainant for the prejudice that she suffered was improper and amounted to maladministration

6.2.1 The failure by the Department to compensate the complainant for the prejudice that she suffered due to the late payment of her salary 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

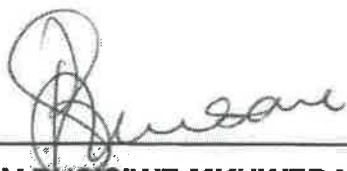
The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution is the following:

7.1 The Head of the Department:

- 7.1.1 To take urgent steps to compensate the Complainant for the prejudice that she suffered as a result of the late payment of her salary, by paying interest to her calculated in terms Prescribed Rate of Interest Act, 1975 on the amounts as and when it was to be paid to her to date of payment, within 15 business days from the date of this report;
- 7.1.2 To Tender a written apology to the Complainant for the late payment of her salary and the failure on the part of the Department to compensate her for the prejudice suffered, within 15 business days from the date of this report; and
- 7.1.3 To take immediate and appropriate steps to ensure that payment of the salary of employees of the Department is not delayed.

8. MONITORING

- 8.1 The Head of the Department to confirm within 15 business days from the date of this report that the remedial action referred to in paragraphs 7.1.1 and 7.1.2 above were implemented and submit the relevant documents in support thereof.
- 8.2 The Head of the Department to submit an action plan within 30 days of the date of this report, indicating how the remedial action referred to in paragraph 7.1.3 is being implemented.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 06/02/20 FA