

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



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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR PAYMENT OF REMUNERATION AND FAILURE TO REGISTER THE COMPLAINANT ON THE PERSAL SYSTEM BY THE MPUMALANGA DEPARTMENT OF HEALTH

TABLE OF CONTENTS

LIST OF ACRONYMS	3
1. INTRODUCTION	4
2. THE COMPLAINT	4
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	5
4. ISSUES IDENTIFIED FOR INVESTIGATION	6
5. THE INVESTIGATION	7
6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	11
7. FINDINGS	25
8. CONCLUSION	27

LIST OF ACRONYMS

Adv	Advocate
AHoD	The Acting Head of the Department of Health
BAS	Basic Accounting System
CHW	Community Health Worker
Complainant	Mr Raina Mabuza
Constitution	The Constitution of the Republic of South Africa, 1996
Department	The Mpumalanga Department of Health
DG	The Director-General of the National Department of Health
Email	Electronic mail correspondence
NPO	Non Profit Organisations
OTL	Outreach Team Leader
PERSAL	Personnel and Salary (PERSAL) system
PFMA	The Public Finance Management Act, 1999
PHSDSBC	Public Health and Social Development Sectoral Bargaining Council
PII: Inland	Provincial Investigations and Integration, Inland
Public Protector Act	Public Protector Act 23 of 1994
The Public Protector	Public Protector of the Republic of South Africa
WBPHCOT	Ward Based Primary Health Care Outreach Team

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1. INTRODUCTION

- 1.1. This is a closing 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 sections 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant) for such persons to note the outcome of the investigation.
- 1.3. A copy of the closing report is provided to the Complainant, Ms Raina Mabuza and to the Mpumalanga Department of Health.
- 1.4. The report relates to an investigation into allegations of improper conduct against the Mpumalanga Department of Health in respect of the irregular payment of remuneration and failure to register the Complainant on the PERSAL system.

2. THE COMPLAINT

- 2.1. Two complaints were lodged with the Public Protector South Africa by Ms Raina Mabuza (the Complainant), on 17 December 2019 and 31 August 2021, respectively.

- 2.2. In her initial complaint of 17 December 2019, the Complainant made the following allegations:
- 2.2.1. She and her colleague, a Ms. Maki Mokwena, were working as Community Health Workers (CHW) for an NPO in Bushbuckridge, supporting the Ward Based Primary Health Care Outreach Team at the Jim Brown Clinic.
- 2.2.2 Whilst working for another NPO by the name of Siyanakekela Home Based Care in the Bohlabela District, they discovered that their remuneration was paid through the Ward Based Primary Health Care Outreach Team (WBPHCOT) and further that the said remuneration was paid out in the names of other people.
- 2.2.3 She was working for a home based care centre under the supervision of one Tshepiso, who was receiving monies using the names of other people to pay the Complainant and her colleague. By October 2019, the Complainant and her colleague had worked for Siyanakekela Home Based Care for a period of five (5) months (i.e. from June to October 2019), without signing a contract of employment and when she enquired from the Mpumalanga Department of Health (the Department) about the matter, it was reported that her name and that of her colleague were not reflected on the Department's database.

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 of the Republic of South Africa, 1996 (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 power as regulated by national legislation –

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

- 3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
- 3.4. The Mpumalanga Department of Health is an organ of state as contemplated in section 239 of the Constitution and its conduct amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls within its competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and sections 6(4) and (5) of the Act.
- 3.5. The Public Protector’s power and jurisdiction to investigate this matter was not disputed by the Mpumalanga Department of Health.

4. ISSUES IDENTIFIED FOR INVESTIGATION

- 4.1 Based on an analysis of the complaint, the following issues were identified to inform and focus the investigation:
- 4.1.1 Whether the Mpumalanga Department of Health irregularly paid remuneration to the Complainant and her colleague using the names of other people in 2019; and if so, whether such conduct amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 4.1.2 Whether the Mpumalanga Department of Health failed to employ or integrate the Complainant and others into its PERSAL system in April 2020 despite issuing them with employment contract forms and if so, whether such conduct

amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

4.2 The Public Protector has concluded the investigation and based on the information and evidence obtained during the course thereof, the Public Protector is now in a position to make findings.

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Protector Act.

5.1.2 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.

5.2 The investigation approach

5.2.1 The approach to the investigation commenced with an analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?
- (d) In the event of a violation, what action should be taken?

- 5.2.3 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 alleged conduct was inconsistent with the applicable prescripts.
- 5.2.4 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 in managing the process of absorbing the Community Health Workers into the Department.
- 5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration.

5.3 The Investigation Process

- 5.3.1 A preliminary investigation was conducted in terms of section 7(1) of the Act seeks to determine the merits of the complaint, allegation or information, and the manner in which the matter should be dealt with, including whether or not a “full scale” investigation was justified. Subsequently, a full scale investigation was embarked on.
- 5.3.2 The investigation process commenced with correspondence to the Department on 03 June 2020 (in relation to the initial complaint) and 13 September 2021 (in relation to the second complaint), wherein the Department was informed of the investigation, the legislation in terms of which the investigation was conducted, as well what information is required and the format thereof.

5.3.3 The format and the procedure followed in conducting the investigation included

- a) Communications with the affected parties, by telephone, email and letters;
- b) meeting with the Complainant;
- c) obtaining records or documents relevant to the investigation which were in the possession of the Department.

5.4 Key sources of information

5.4.1 Documents and e-mail correspondence

- 5.4.1.1 Copy of the original complaint of Ms Raina Mabuza, via email dated 3 October 2019;
- 5.4.1.2 Copy of subsequent complaint of Ms Mabuza via email dated 31 August 2021;
- 5.4.1.3 Copy of email from the Public Protector to Ms Mabuza dated 31 August 2021;
- 5.4.1.4 Copy of email from Ms Mabuza to the Public Protector dated 31 August 2021;
- 5.4.1.5 Letter from the Public Protector to the Acting HOD of the Department of Health in Mpumalanga, Ms DC Mdluli (the Acting HOD), dated 13 September 2021;
- 5.4.1.6 Letter from the Acting HOD to the Public Protector dated 7 October 2021;
- 5.4.1.7 Letter from the Public Protector to Ms Mabuza, dated 13 October 2021;
- 5.4.1.8 Email from Ms Mabuza to Ms Nkuna of National Treasury, dated 20 July 2021;
- 5.4.1.9 Response email from Mr Makhubela of the Department of Health to National Treasury, dated 21 July 2021;
- 5.4.1.10 Letter from the Acting HOD to the Public Protector dated 18 June 2020;
- 5.4.1.11 Email from the Secretary of the Acting HOD to Mr Makhubela, dated 2 July 2021;

- 5.4.1.12 Letter from the former HOD, Dr Mohangi to the Public Service Commission, dated 30 October 2019;
- 5.4.1.13 Letter from the Acting HOD to the Director-General of the National Department of Health (the DG), dated 5 July 2021;
- 5.4.1.14 Letter from the Acting HOD to the Director-General in Mpumalanga (Office of the Premier), dated 7 January 2022;
- 5.4.1.15 Letter from the Protector to the Acting HOD, dated 14 January 2022; and
- 5.4.1.16 Response letter from the Action HOD to the Public Protector, dated 3 February 2022.

5.4.2 Legislation and other prescripts

- 5.4.2.1 The Constitution of the Republic of South Africa, 1996.
- 5.4.2.2 The Public Protector Act, No. 23 of 1994.
- 5.4.2.3 The Public Finance Management Act, No. 1 of 1999.
- 5.4.2.4 Public Health And Social Development Sectoral Bargaining Council: Resolution 1 of 2018.

5.4.3 Notice issued in terms of Rule 41(1) of the Public Protector Rules.

- 5.4.3.1 On 13 October 2021, a Discretionary Notice was issued in terms of rule 41(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018* (the Public Protector Rules) as amended, and as promulgated under section 7(11) of the Public Protector Act, 23 of 1994 (the Act), to the Complainant to provide her an opportunity to make representations on the intended findings and closure of the file.
- 5.4.3.2 The Complainant did not provide a response to the Discretionary Notoce by the deadline of 27 October 2021.

6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

6.1 Whether the Mpumalanga Department of Health irregularly paid remuneration to the Complainant and her colleague using the names of other people in 2019; and if so, whether such conduct amounted to improper conduct in terms of section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Common cause issues

6.1.1 The Complainant, together with Ms Mokwena, a fellow Community Health Worker (CHW), initially worked for Jim Brown Non-Profit Organisations (NPO), in Bushbuckridge. This NPO was not funded by the Department of Health.

6.1.2 Thereafter, they worked for Siyanakekela Home Based Care (Siyananakela) in Bohlabela District, on a temporary basis, which was confirmed by Ms Tshepiso Mashaba, a manager at Siyanakekela.

Issues in dispute

6.1.3 The issue for determination is whether the Department irregularly paid the remuneration of the Complainant using another person's name.

Background to the investigation

6.1.4 An investigation was conducted into the allegations by the Complainant in respect of the 2019 complaint. The matter was finalised and the file was closed on 30 July 2020, based on the following findings:

- 6.1.5 The Complainant worked as a Community Health Worker (CHW) for a non-funded, Ward-Based Primary Health Care Outreach Team at the Jim Brown Clinic (WBPHCOT), in Bushbuckridge, Mpumalanga Province.
- 6.1.6 Subsequently, the Complainant worked for Siyanakekela Home Based Care (Siyanakekela) in Bohlabela District, on a temporary basis, and received remuneration through the WBPHCOT.
- 6.1.7 During this period, the Department did not employ CHWs directly, but funded NPOs, who in turn, employed and remunerated CHWs according to their own policies and procedures. The Complainant did not adduce any information to refute the evidence found during the course of the investigation. The Complainant also could not prove the existence of a contractual relationship between herself and the Department which placed an obligation on the Department to pay her remuneration.
- 6.1.8 In essence, the Department could not have irregularly paid the Complainant and her colleague using other people's names as there was no agreement between the parties. Such payment could only have been facilitated by the NPO that the Complainant and her colleagues worked for at the time.
- 6.1.9 As a result, the Complainant was advised to report the alleged fraudulent payment of remuneration to the South African Police Service for further investigation, on the grounds that the investigation did not find any wrongdoing on the part of the Department. Furthermore, that Public Protector South Africa (PPSA) does not have jurisdiction to investigate complaints against private entities such as NPOs.
- 6.1.10 The Complainant indicated her dissatisfaction with the outcome of the investigation, and was advised to provide additional information to substantiate her allegations through the internal review process, since the file was already closed.

- 6.1.11 On 12 August 2022, the Complainant duly lodged an application for internal review, however, she subsequently withdrew it and sought the direct intervention of the Public Protector. Since it could not be established how the Complainant was deceived, more so that the Investigator who was assigned the initial investigation was no longer with the PPSA, a teleconference was arranged with the Complainant. The meeting was held with the Complainant on 31 August 2021 and attended by Adv. N Nkabinde, the Executive Manager: PII Inland and Mr BG Sithole, the Provincial Representative for Mpumalanga.
- 6.1.12 During the teleconference, the following issues were discussed:
- 6.1.12.1 The Complainant's discontent with the manner in which her initial complaint was investigated and closed. The Complainant reiterated that the erstwhile Investigator misled her by reporting that she and her colleague would be integrated into the Department's PERSAL system, but that the matter was closed before the said integration took place;
- 6.1.12.2 The payments they alleged received from the NPO even though they were not on the NPO's registry or database; and
- 6.1.12.3 The Complainant further alleged that on 15 July 2020, they were provided with contracts of employment forms, which they completed and submitted back to the Department the following day, but they had still not received any feedback and/or were not integrated on the PERSAL system.
- 6.1.13 The meeting resolved that:
- 6.1.13.1 The Complainant would provide the investigation team with copies of the contracts of employment that she and her colleague signed on 16 July 2020 and submitted to the Department, accompanied by detailed information regarding:

- (a) Details of the person who provided them with the contracts of employment, including the place and date;
- (b) Process that had to be followed regarding the completion and submission of the employment contracts, if any;
- (c) Date when the Complainant returned the contracts; and
- (d) Any other detailed information that may assist the investigation.

6.1.13.2 It was further resolved that, upon receipt of the required information, the investigation team would study the contract(s) to determine the provisions thereof, and a new investigation file would be opened and assigned to a new Investigator who would conduct further investigation on the original issues relating to the irregular payment and the alleged failure by the Department to integrate/appoint the Complainant, as per the alleged contracts of employment issued to them.

6.1.14 The Complainant provided the 'employment forms' allegedly issued by the Department. As a result, a new file was opened and assigned to a new Investigator to conduct further investigation on the two issues that were identified.

Responses received from the Department:

6.1.15 In its responses dated 18 June 2020 and 07 October 2021, respectively, in connection with the allegations of payment of remuneration to the Complainant using another person's name and working without a contract, the Department stated that:

6.1.15.1 Prior to 1 April 2020, the Department provided Primary Health Care Services at household level, by contracting Non-Profit Organisations (NPOs), who in turn, contracted Community Health Workers (CHWs), independent of the Department. The Department further stated that NPOs are self-regulated and they contracted CHWs, subject to their own Human Resources policies;

- 6.1.15.2 It was only in the beginning of the 2020/21 financial year that it embarked on a process of employing Community Health Workers directly, on a contractual basis, to provide primary health care services to the community from the beginning;
- 6.1.15.3 These Community Health Workers were recruited from the NPOs previously funded by the Department, using the same budget, and were paid their remuneration directly into their bank accounts. However, the Complainant was not part of those CHWs who were appointed by the Department;
- 6.1.15.4 The Department further stated that Siyanakekela Home Based Care (Siyananakela) at Thaba Chweu sub-district, reported that they had savings from their budget after two of their caregivers left the organisation, and that they were looking for replacements. As a result, the Complainant and her colleague joined Siyanakekela for a temporary period of five (5) months - ending in March 2020, and they received remuneration from that NPO in this period; and
- 6.1.15.5 Therefore, any alleged irregularity relating to the payment of remuneration to the Complainant cannot be attributed to the Department and should be directed to the NPO responsible for the employment of the Complainant during that period.

Application of the relevant legal prescripts

The Constitution of the Republic of South Africa, 1996 (“the Constitution”)

- 6.1.16 Section 195(1) of the Constitution, 1996 provides *that*, “*public administration must be governed by the democratic values and principles enshrined in the Constitution*”. It requires, *inter alia*, a high standard of professional ethics and accountable public administration which is impartial, fair and transparent.

- 6.1.17 Prior to April 2020, the Department was not involved in the payment of remuneration to the CHWs as the NPOs were solely responsible for the employment and compensation of CHWs in accordance with their own policies.
- 6.1.18 There is no evidence before the PPSA to suggest that the Department acted contrary to the provisions of section 195(1) of the Constitution. Siyanakekela Home Based Care was responsible for the payment of remuneration to its employees.

The Public Finance Management Act, 1999 (“the PFMA, 1999”)¹

- 6.1.19 According to section 39 (1) of the PFMA, 1999, the accounting officer for a Department is responsible for ensuring that effective and appropriate steps are taken to prevent unauthorised expenditure.
- 6.1.20 Irregular expenditure is defined in section 1 of the **Public Finance Management Act 1 of 1999** (PFMA) “as expenditure, other than unauthorised expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation”. (Own emphasis)
- 6.1.21 Section 38(1)(a)(i) of the PFMA provides that the accounting officer for a department must ensure that the department has and maintains effective, efficient and transparent systems of financial and risk management and internal control.
- 6.1.22 Section 38(1)(c)(ii) of the PFMA provides that the accounting officer for a Department, trading entity or constitutional institution must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct.

¹ Act no. 1 of 1999

6.1.23 Section 38(1)(b) of the PFMA provides that the accounting officer for a department, trading entity or constitutional institutional institution is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution.

6.1.24 6.1.5.9 Section 45 of the PFMA, provides as follows:

“An official in a department, trading entity or constitutional institution–

(a)

(b)

(c) must take effective and appropriate steps to prevent, within that official’s area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due”;

6.1.25 The Department is enjoined in terms of the PFMA to ensure compliance with the applicable legal prescripts and to put in place effective, efficient and transparent systems of financial and risk management and internal control.

6.1.26 The Department provided funding to the NPO who in turn, independently contracted the Complainant to provide community health services. These contracts were regulated and managed by the NPO and not the Department. As a result, no evidence could be found that the Department contravened the provisions of the PFMA in respect of the payment of remuneration allegedly fraudulently made by the NPO to the Complainant as there was no contract between the parties.

Conclusion

6.1.27 Based on the information and evidence obtained during the course of the investigation, it can be concluded that the decision to pay the Complainant (and Ms Mokwena) using the names of employees who had left the employ,

was not taken by the Department. The investigation found that the Complainant was appointed on a temporary basis by Siyanakekela when they had vacant positions.

6.1.28 The Department submitted that Siyanakekela notified it about the savings from their 2019/20 budget; since two of their carers had left the organisation. Therefore, the appointment and remuneration of the Complainant was solely based on the discretion of Siyananakela and not the Department.

6.2 Whether the Mpumalanga Department of Health failed to employ or integrate the Complainant and others onto its PERSAL system in April 2020 despite issuing them with employment contract forms and if so, whether such conduct amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act

Common cause issues

6.2.1 The Complainant was, at the time of lodging her initial complaint, a Community Health Worker for the WBPHCOT, a non-funded NPO at Bushbuckridge, Mpumalanga Province. She was subsequently employed by Siyanakekela on a temporary basis for a period of five (5) months, ending in March 2020; and

6.2.2 In July 2020, they received forms from the Department to complete and submit back to the Department.

Issues in dispute

6.2.3 The issue for determination is whether the Department failed to employ or integrate the Complainant and others onto its PERSAL system in April 2020 despite issuing them with employment contract forms.

The Complainant's version

- 6.2.4 The Complainant alleged that the former Investigator informed her that they will be integrated onto the Department's PERSAL system, but despite that, the Department failed to employ them.
- 6.2.5 During the teleconference held on 31 August 2021, the Complainant made new allegations and stated that:
- 6.2.5.1 She and her friend, Ms Makie Mokwena, received forms from their Outreach Team Leader (OTL) at the Jim Brown Clinic, Ms Sunny Magagula, on 15 July 2020, for proofreading and signing. She further stated that they submitted the said forms the following day, on 16 July 2020, at Marite Clinic in the presence of Ms Sunny Magagula;
- 6.2.5.2 The Complainant also stated that the signed forms or "*contracts*", (as she called it) together with all the required documentation were sealed and made out for the attention of one Siwelani. Her understanding of these forms was that they were for employment purposes i.e. contracts of employment. Copies of these forms were attached to her complaint to the Public Protector.
- 6.2.6 These new allegations were raised with the Department on 15 September 2021 and the following information was requested by the Public Protector's investigation team:
- (a) An explanation regarding the purpose of the forms that were given to the Complainant and her colleague by the Department.
 - (b) An explanation on how the recruitment of CHWs was done; the requirements and whether Complainant and her colleague did apply and if so, whether they met the requirements for appointment?
 - (c) Whether they belonged to a funded or unfunded NPO?

6.2.7 The investigation team went further to determine how the migration of CHWs to the Department was managed, the process followed, and why the Department paid the Complainant and others for the five (5) days, if that responsibility fell under the NPOs.

Response from the Department

6.2.8 In its response dated 7 October 2021, the Department disputed the Complainant and her colleague's allegations that it provided them with contract forms meant for their integration onto the Department's PERSAL system.

6.2.9 The Department submitted that the Complainant and her colleague were working in Bushbuckridge for a non-funded NPO, supporting the Ward-Based Primary Health Care Outreach Team at the Jim Brown Clinic, and that they were not receiving any stipend.

6.2.10 The Department went further to state that in 2019/20, a funded NPO, that is, Siyanakekela Home Based Care at Thaba Chweu sub-district, reported that they had savings from their budget after two of their caregivers left the organisation, and that they were looking for replacements. As a result, the Complainant and her colleague joined Siyanakekela Home Based Care for a temporary period of five (5) months - ending in March 2020, and that they received remuneration from that NPO in this period.

6.2.11 The process of migration of CHWs project from NPOs was a mandate from the National Department of Health and the enforcement of the project was through Resolution 1 of 2018 of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC). It was meant to mitigate challenges experienced by CHWs under NPO management and to standardise CHW remuneration. Due to limited funding, the Department could not absorb all CHWs, but only those from funded NPOs as it had already been budgeted for.

- 6.2.12 This project meant that the Department would no longer engage with CHWs through NPOs, but rather directly with CHWs and also pay their remuneration directly, whereas before the migration, the Department contracted and funded the NPOs, who in turn were responsible for the payment of remuneration to the CHWs.
- 6.2.13 In April 2020, the Department absorbed some of the Community Health Workers from Siyanakekela Home Based Care. Unfortunately, the Complainant and her colleague did not form part of the CHWs that were absorbed by the Department and as such, the Complainant and 69 other CHWs continued to work for the NPO for a period of five (5) days before they were instructed to stop working.
- 6.2.14 The Investigation team sought to understand why the Department paid the Complainant and others for the 5 days when it found itself to have no obligation to pay employees of NPOs which were not funded. In its response contained in a letter dated 03 February 2022, the Department indicated that the Complainant and others were paid because the *“Department had started implementing the PERSAL payment system of stipends directly to CHWs and could no longer implement a system of voluntary services that are not remunerated for.”*
- 6.2.15 The Department further contended that it had an obligation to pay the Complainant and others for extra days worked since the responsibility to pay the CHWs no longer rested with the NPO’s but was now with the Department.
- 6.2.16 The Department subsequently resolved to pay the Complainant and 69 others for the five (5) days they had worked. In that regard, they were issued with BAS Entity forms to sign and submit, together with their banking details, so that they could be paid for the services they had rendered for the five (5) days. The Department decided to use the BAS system to pay the

Complainant and others since they were not contracted to the Department and were therefore not on PERSAL.

- 6.2.17 The Complainant and others duly signed the BAS forms and were paid for the five (5) days worked. The Department explained that the BAS forms were in no way an offer of employment or integration into the PERSAL system, but were meant to capture payments in respect of the five (5) day services that they rendered. The Department reiterated that these payments were duly made into the Complainant's banking account, which the Complainant and fellow CHWs had provided and furthermore, that this payment was not irregular.

Analysis of evidence obtained

- 6.2.18 Upon perusal of the forms that the Complainant had provided to the Investigation team, it was established that these were Vendor forms (BAS ENTITY SDB 4) and not contract of employment forms. Nothing in the forms could, in any way, be construed to convey and/or confirm the Department's intention to have the Complainant integrated into the Department's PERSAL system.
- 6.2.19 In essence, this means that although the Complainant's five (5) months temporary employment with Siyanakekela Home Based Care had ended (at the end of the financial year i.e. 31 March 2020), she and others continued to work for 5 more days into April 2020, before their services were halted by the Department. During those 5 months, they were paid by Siyanakekela, but from 1 April 2020, the Department had assumed the responsibility to pay remuneration to the CHWs. However, since the Complainant and others were not on PERSAL, they were paid through the BAS system after they had completed and submitted the BAS Entity forms (SBD4 forms) with their banking details. The five (5) days worked and remunerated for, was for services that they had rendered to the Department for COVID-19 screening

from April 1 to April 5, 2020, after the Department had absorbed the qualifying CHWs.

- 6.2.20 The difference between the vendor form and employment contract is that the latter would allow one to be an employee of the state and be allocated a PERSAL number, through which one would be remunerated for work done. However, the vendor forms would allow for service providers who are not employed by the state to be paid for ad hoc services rendered. Since the Complainant and others were not on PERSAL, as they had not been absorbed and had volunteered their services at the time, they had to be paid through the BAS system.
- 6.2.21 The Complainant and others could not have been given employment contracts as they did not qualify to be absorbed onto the PERSAL system and the only way that they could be paid for the services they rendered was through the BAS system.. As a result, the Complainant received payment for the 5 days worked through the BAS system. The Complainant had mistaken the vendor forms for employment contract forms.

Application of the relevant law and prescripts

**Public Health And Social Development Sectoral Bargaining Council:
Resolution 1 of 2018 (Resolution 1 of 2018)²**

- 6.2.22 The purpose of Resolution 1 of 2018 is the following:
- (a) To ensure the standardisation of payment of remuneration for CMWs in the Department of Health.
 - (b) To ensure adequate protection for the remuneration payment of the CHWs into Personnel and Salary (PERSAL) system.

² On the Agreement on the Standardisation of Remuneration for Community Health Workers in the Department of Health.

- (c) Ensure appropriate implementation and management of recruitment, selection, appointment, remuneration, skills development, dispute resolution and occupational health for all members of Ward Based Primary Health Care Outreach Team (WBPHCOT).

6.2.23 The Department and the Trade Unions (the parties) agreed, *inter alia*, as follows:

- (a) A non-service remuneration payment of three thousand and five hundred rand (R3500.00) should be for those CHWs that have matric or either experience and those that can benefit from Recognition of Prior Learning will be processed through the PERSAL system.
- (b) Provincial HODs are accountable for the recruitment of CHWs and provide them with tools needed to do their work in line with the policy.
- (c) The professional nurses remains accountable for oversight for CHWs.

6.2.24 This Resolution enabled the Department to regulate and standardise the employment and payment of CHWs. The National budget only covered CHWs from funded NPOs, hence the migration to PERSAL was limited to CHWs from funded NPOs as their remuneration was already budgeted for and covered.

Conclusion

6.2.25 Based on the information and evidence obtained during the course of the investigation, it can be concluded that the decision to absorb CHWs from funded NPOs was not in contravention with Resolution 1 of 2018. Due to the existing contractual agreements between funded NPOs and the Department, the said decision allowed the Department to align itself to the Resolution in April 2020.

6.2.26 It can also be concluded that the implications of Resolution 1 of 2018, are that the Department took over the responsibility of paying the remuneration

directly to the CHWs and further that all CHWs would be treated the same. The involvement of the Department did not extend the payment of remuneration to CHWs who were not receiving remuneration from unfunded NPOs, but rather to regulate the employment status of the absorbed CHWs.

- 6.2.27 It can be concluded as well that the Department could not absorb them because they were initially employed by an unfunded NPO. They were only temporarily attached to the Siyanakekela Home Based Care, a funded NPO. They were not formally employed or contracted to Siyanakekela Home Based Care, and they did not appear on the records of Siyanakekela. As a result they were paid using the names of employees who had already left the employment of Siyanakekela.
- 6.2.28 As indicated by the Department in paragraphs 6.2.2.13 and 6.2.2.14 above, the Complainants were issued with BAS vendor forms in order to facilitate payment for the five (5) days worked.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standards the Department should have complied with, the Public Protector makes the following findings:

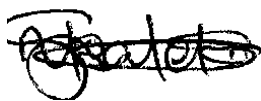
- 7.1 Whether the Mpumalanga Department of Health irregularly paid remuneration to the Complainant and her colleague using the names of other people in 2019, and if so, whether such conduct amounted to improper conduct in terms of section 182(1) of the constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and caused the Complainant to suffer improper prejudice.**
- 7.1.1 The allegation that the Department paid remuneration to the Complainant and Ms Mokwena, her colleague using other people's names, was not supported by evidence and is, therefore, unsubstantiated.

- 7.1.2 The Department was not part of the appointment arrangement between the Complainant, Ms Mokwena and the Siyanakekela Home Based Care as the latter appointed staff independent of the Department. The Department was also not responsible for the signing of contracts between the Home Based Care and the Complainant.
- 7.1.3 In this regard the Complainant was advised during the Public Protector's initial investigation as per paragraph 2.4 above, to direct any evidence of any fraudulent activities by the NPO she worked for, to the South African Police Services for further investigation since the Public Protector lacks the necessary jurisdiction to pursue this matter against the NPO as Siyanakekela is not a state organ.
- 7.1.4 Therefore, the conduct of the Department does not constitute 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.
- 7.2 Whether the Mpumalanga Department of Health failed to employ or integrate the Complainant and others onto its PERSAL system in April 2020 despite issuing them with employment contract forms and if so, whether such conduct amounted to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.**
- 7.2.1 Evidence at the disposal of the Public Protector, indicates that the Complainant and Ms Mokwena were Community Health Workers working for an unfunded NPO at Bushbuckridge, from which they rendered their services for free i.e. on a voluntary basis.
- 7.2.2 They were later temporarily attached to a funded NPO called Siyanakekela Home Based Care and they received remuneration from it. Only CHWs employed by the funded NPOs were absorbed or migrated to the Department.

- 7.2.3 The responsibility for the payment of remuneration before 1 April 2020, rested with the funded NPO and not with the Department. Furthermore, there is no evidence to support the allegation that the Department provided them with forms for employment. the Department also did not promise to integrate them onto PERSAL.
- 7.2.4 The only forms that were given to the Complainant and others to complete were the BAS Entity forms meant to capture their payment for services they rendered for 5 days in April 2020, which resulted in payment being made into their own bank accounts and on their names.
- 7.2.5 Therefore, the conduct of the Department does not constitute 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.

8. CONCLUSION

- 8.1 The Public Protector considers this matter as finalised. Should any party wish to challenge this decision they are at liberty explore legal remedies at their disposal.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 30 SEPTEMBER 2022

Assisted by: Mr BG Sithole

Provincial Representative: Mpumalanga