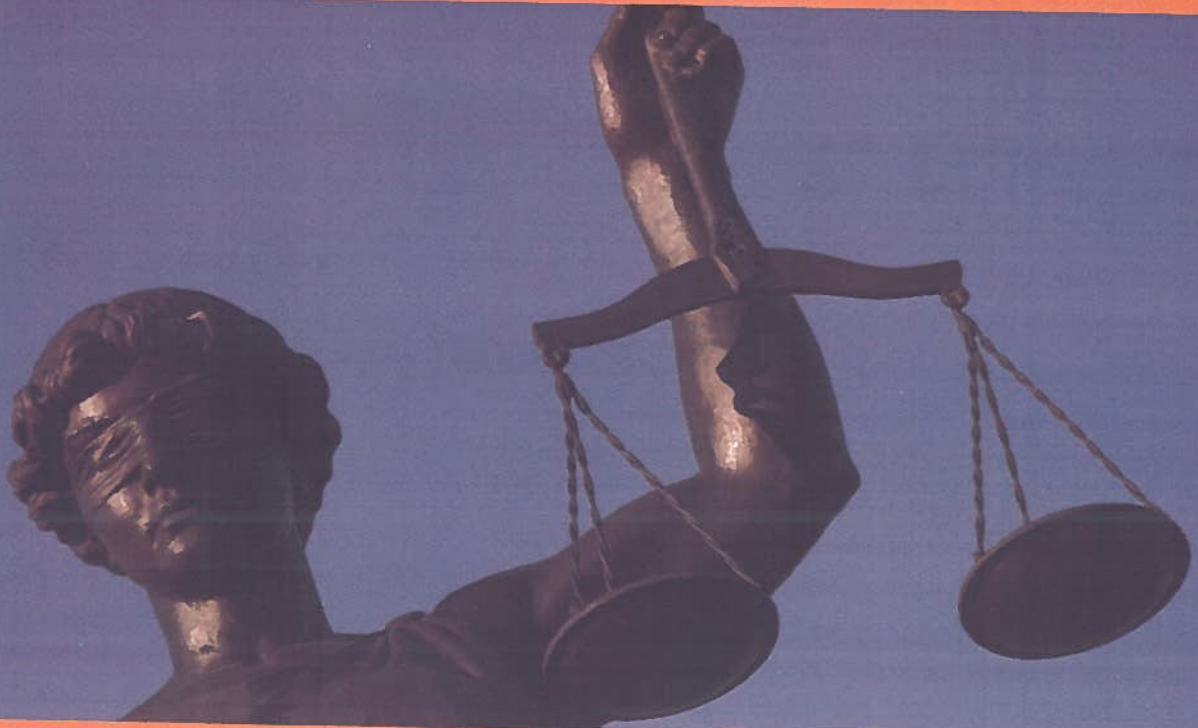


UNSETTLED BUSINESS

Report on an investigation into allegations that the Commission for Gender Equality unfairly excluded its former Chief Executive Officer when they paid arrear contributions to the provident fund to Middle and Senior Management Service employees, and to pay her cellular telephone benefits for the period she was on precautionary suspension

Report No: 13 of 2014/ 2015



PUBLIC PROTECTOR
SOUTH AFRICA

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“The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution”

Moseneke DCJ

In *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC)

Executive Summary

- (i) *“Unsettled Business”* 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, No. 23 of 1994 (the Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action following an investigation into a complaint lodged by Ms Chana Pilane-Majake, on 18 October 2010, alleging improper prejudice suffered as a result of the failure by the Commission for Gender Equality (CGE) to take the Complainant into account when it paid Middle Management Service (MMS) and Senior Management Service (SMS) arrears of the employer’s contribution to the provident fund, and withholding payment of a cellular phone allowance for the period she was on precautionary suspension, despite the fact that she submitted her monthly invoices.
- (iii) The following issues were considered and investigated:
 - (a) Did the CGE unfairly exclude the Complainant (an employee) from the payment of arrears of the employer’s contribution to the provident fund for MMS and SMS employees?
 - (b) Did the CGE unfairly deny or fail to pay the Complainant cellular phone and 3G allowances for the period she was on precautionary suspension?
 - (c) If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?

- (iv) The investigation was conducted by way of telephonic and written correspondence with officials at the CGE and the perusal of documents received. Applicable legislation, policies and relevant prescripts were also analysed and applied. Subsequent to the provisional report being issued, a meeting was held with officials from the CGE regarding the provisional findings made.
- (v) The CGE did not deny that it had not paid the Complainant the provident fund and cell phone claims. The issue accordingly centred on the justification for the non-payment. The standard or yard stick used to make a determination on the propriety of the CGE's conduct was principally derived from the laws and policies regulating rights and privileges of SMS members of staff at the CGE and the provisions of the Complainant's contract. Principles of good administration, particularly as articulated in section 195 of the Constitution and the right to just administrative action entrenched in section 33 of the Constitution provided further benchmarks against which the CGE's conduct was measured.
- (vi) Having considered the facts against the applicable regulatory framework, I make the following findings:
 - (a) **Did the CGE unfairly exclude the Complainant (an employee) from payment of arrears of the employer's contribution to the provident fund for MMS and SMS employees?**
 - (aa) The Complainant's claim is not substantiated.
 - (bb) Evidence, mainly from the CGE payroll records, shows that SMS members did not benefit from the payment of arrear contributions to the provident fund and that only MMS employees received such.
 - (cc) If SMS employees were entitled to be paid arrear contributions to the provident fund she would have been entitled to such payment regardless

of her being on precautionary suspension at the time of her having opted for an exit package that failed to take such matter into account. The justification is that she remained an employee entitled to all her contractual benefits until the date of termination of contract.

- (b) Did the CGE unfairly deny or fail to pay the Complainant cellular phone and 3G allowances for the period she was on precautionary suspension?**
- (aa) The Complainant's complaint is substantiated.
 - (bb) During her precautionary suspension, she surrendered the CGE cellular phone handset and 3G Card. Consequently, given that she had to address communication to the CGE, including queries from the Harries Commission established to adjudicate her matter, these were dealt with through her private telephone and internet services.
 - (cc) As she remained a CGE employee until the termination of her contract of employment, the employer would in terms of paragraph 8.6 of the Principles, Policies, Rules and Regulations (PPRR) for the Staff of the Commission for Gender Equality have to bear the cost.
 - (dd) The CGE's failure to assess and pay the invoices submitted by the Complainant, accordingly constitutes improper conduct and maladministration.
 - (ee) The Complainant incurred expenses for use of her private cellular phone and internet usage for official purposes while she was on precautionary suspension. Therefore, the CGE unfairly refused to reimburse the Complainant for the expenses related to telephone calls made for business purposes.
- (c) If the answer to any of the above issues is in the affirmative, did the Complainant suffer prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act?**

- (aa) The Complainant suffered prejudice in that she was left to personally bear the cost of CGE related communication expenses incurred through the use of her private cellular phone and internet service for official purposes while on precautionary suspension.
 - (bb) She further suffered an administrative injustice in that she expected the CGE to treat her fairly by duly considering her legitimately expected payment.
- (vii) The remedial action I consider appropriate in terms of section 182(1)(c) of the Constitution is to call on:
- (a) The CGE to reimburse the Complainant for use of her private cellular phone and internet services for official purposes during the time she was on precautionary suspension in accordance with the provisions of paragraph 8.6 of The Principles, Policies, Rules and Regulations for the Staff of the Commission for Gender Equality (PPRR); and
 - (b) The CGE to ensure that the reimbursement is to be paid with interest as provided for by the Prescribed Rate of Interest Act 55 of 1975.

REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS THAT THE COMMISSION FOR GENDER EQUALITY UNFAIRLY EXCLUDED THE FORMER CHIEF EXECUTIVE OFFICER WHEN THEY PAID ARREAR CONTRIBUTIONS TO THE PROVIDENT FUND TO MIDDLE AND SENIOR MANAGEMENT SERVICE EMPLOYEES, AND TO PAY HER CELLULAR PHONE BENEFITS FOR THE PERIOD SHE WAS ON PRECAUTIONARY SUSPENSION

1. INTRODUCTION

- 1.1. *“Unsettled Business”* 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 to the Chairperson of the Commission for Gender Equality (CGE), Mr M Shozi, and the Chief Executive Officer of the CGE, Ms K Maema, in terms of section 8(1) of the Public Protector Act.
- 1.3. A copy of the report will also be provided to the Complainant.
- 1.4. The report deals with my findings following an investigation into a complain of maladministration and prejudice made against and involving alleged failure by the CGE to include the Complainant when it adjusted the Middle Management Service (MMS) and Senior Management Service (SMS) employer's contributions to the provident fund; and that the CGE also failed to reimburse her for use of her private cellular phone and 3G for business related activities for the period she was on precautionary suspension, despite the fact that she submitted her monthly invoices.

2. THE COMPLAINT

2.1.1. Ms Chana Pilane-Majake, former Chief Executive Officer of the CGE lodged a complaint to my office in a letter dated 18 October 2010 alleging while having been placed on precautionary suspension in 2008, the CGE excluded her from provident fund and cellphone/internet benefits she was entitled to,

2.1.2. She alleged that:

2.1.2.1 In terms of the contract of employment the Complainant was to be paid an all-inclusive flexible remuneration package (which includes the employer's contribution to the provident fund), which would be adjusted in line with cost of living adjustments effected in the Public Service for employees who are remunerated at the SMS level grade B.

2.1.2.2 Over and above the all-inclusive package, she was entitled to receive cellular phone and 3G allowances or be provided with a cellular phone and 3G device. In this case she had been given a cellular phone and 3G card.

2.1.2.3 In May 2008, the CGE placed her on precautionary suspension due the fact that there was an enquiry and subsequently there was a labour dispute between the Complainant and the CGE.

2.1.2.4 Prior to termination of her employment in 2008, the CGE paid arrears of the employer's contributions to the provident fund for Middle Management Services (MMS) and Senior Management Services (SMS) employees and did not consider her.

2.1.2.5 The CGE refused to reimburse her for the use of her private cellular phone and 3G for the duration of her precautionary suspension (between May 2008 and November 2009) despite the fact that she had incurred expenses and

had returned the CGE cellular phone and 3G device at the commencement of the precautionary suspension.

- 2.1.2.6 She forwarded a request to the CGE in January 2010 for payment of arrears of the employer's pension fund contributions as well as reimbursement of her monthly cellular phone and 3G allowances; however, this request was turned down.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1. The Public Protector is an independent constitutional office established under section 181(1)(b) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2. The Public Protector derives his or her power from Section 182(1) of the Constitution, which provides that the Public Protector has the power, as regulated by national legislation 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, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
- 3.3. The Public Protector is given additional powers by the Public Protector Act 23 of 1994, to investigate and redress maladministration and related improprieties in the conduct of state affairs. The additional powers include the authority to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.4. The Commission for Gender Equality is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the matter falls within my ambit to investigate.

- 3.5. The CGE submitted that:
- 3.5.1 The Complainant was placed on precautionary suspension in 2008 and there was an enquiry. Subsequent to the enquiry there was a labour dispute between the parties. All the complaints, grievances and/or displeasures advanced by the parties against each other were adjudicated through the recognised labour dispute mechanisms.
- 3.5.2 During the arbitration process, the matter was adjourned to explore a settlement agreement and the parties entered into a settlement agreement which was a full and final settlement of all disputes between the parties.
- 3.5.3 The matter became *res judicata* as all disputes arising from the employment relationship were dealt with and my office lacks jurisdiction to deal with issues that were dealt with through legally recognised processes.
- 3.6 The Roman Dutch Law principle of *res judicata* means that a matter or proceedings have come to an end by a judicial decision. This is based and founded on public policy which requires that litigation should come to an end when the same matter has already been adjudicated upon in another forum.
- 3.7 The main requirement of a valid defence of *res judicata* in Roman Dutch Law is that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties and the same thing must have been demanded. Our courts, most notably in *Horowitz vs Brock 1988 (2) SA 160 AD at 178H to 179C*; *Custom Credit Corporation (Pty) Ltd vs Shembe 1972(3) SA 462 AD at 472*, to mention but a few cases, have followed this Roman Dutch approach.
- 3.8 Although the settlement agreement dealt with the termination of service, the focus of the investigation was not on matters dealt with in the termination of the Complainant's contract, but the alleged 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 of the Republic of South Africa, 1996, in respect of the conduct of the CGE unrelated to matters in dispute during the termination of the contract .

- 3.9 Furthermore, the matters were not dealt with by a court of law, but by an arbitrator who only dealt with whatever was in the terms of reference for his or her appointment. The cellular phone and 3G allowance and payment of arrear contributions to the provident fund did not form part of the dispute referred to above. The subject of the maladministration allegation accordingly, has never been subjected to a court decision as envisaged in section 182(3) of the Constitution, which ousters the jurisdiction of the Public Protector on matters already dealt with by a court of law.
- 3.10 The arbitration process, accordingly, did not deal with the issue of improper conduct and maladministration as alleged by the Complainant, which is an issue within the jurisdiction and powers of the Public Protector.

4 THE INVESTIGATION

4.6 Methodology

- 4.6.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.6.2 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. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation if she or he deems fit.
- 4.6.3 The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section

6(4)(b) of the Public Protector Act, 1994. However, after several unsuccessful attempts to conciliate the matter, it was escalated into an investigation.

4.7 Approach to the investigation

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

4.7.1.1 What happened?

4.7.1.2 What should have happened?

4.7.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

4.7.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.7.2 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 CGE excluded the Complainant from receiving arrears of the employer's contribution to the provided fund, while paying same to other SMS employees, while she was on precautionary suspension. I also had to determine if the CGE unfairly denied or failed to pay the Complainant cellular phone and 3G allowances, during the same period.

4.7.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard of good administration that should have been upheld by the CGE or the organ of state to prevent maladministration and prejudice.

4.7.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to

where they would have been had the organ of state involved complied with the regulatory framework setting the applicable standards for good administration.

4.8 The Scope of the Investigation

4.3.1 The scope of the investigation was restricted to the period during which the Complainant was under precautionary suspension until termination of the employment and to the rights and obligations flowing from her contract of employment during that period.

4.9 Method of gathering evidence

4.9.1 Interviews conducted

Interviews were conducted with:

- 4.9.1.1 The Complainant;
- 4.9.1.2 The Chief Executive Officer of the CGE, Ms Koketso Maema; and
- 4.9.1.3 The Chief Financial Officer of the CGE, Mr ME Putu.

4.9.2 Analysis of documents and information

The following relevant documents were perused and analysed:

- 4.9.2.1 The written complaint lodged by the Complainant;
- 4.9.2.2 The contract of employment entered into between the CGE and the Complainant;
- 4.9.2.3 The contract of employment between Ms Joan De Klerk (one of the MMS employees) and the CGE;

4.9.2.4 The Termination of the Employment Agreement entered into between the CGE and the Complainant; and

4.9.2.5 The Principles, Policies, Rules and Regulations (PPRR) for the Staff of the Commission for Gender Equality.

4.9.3 Correspondence considered

4.9.3.1 Representations made by the CGE; and

4.9.3.2 Representations made by the Complainant.

4.9.4 Legislation and other Prescripts

4.9.4.1 The Constitution, 1996;

4.9.4.2 The Public Protector Act, 1994; and

4.9.4.3 The Commission for Gender Equality Act, 1996.

4.10 On analysis of the complaint the following issues were considered and investigated:

4.10.1 Did the CGE unfairly exclude the Complainant (when she was an employee of the CGE) from the payment of arrears of the employer's contribution to the provident fund for MMS and SMS employees?

4.10.2 Did the CGE unfairly deny or fail to pay the Complainant cellular phone and 3G allowances for the period she was on precautionary suspension?

4.10.3 If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?

5 STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.6 Regarding exclusion of the Complainant (an employee) from the payment of arrears of the employer's contribution to the provident fund for MMS and SMS employees?

5.6.1 The Commission for Gender Equality Act (the CGE Act)

5.6.1.1 In terms of section 7(2), a person appointed by the Commission in terms of section 7(1) shall receive such remuneration, allowances and other employment benefits and shall be appointed on terms and conditions and for such periods the Commission may, in consultation with the Minister of Finance, determine.

5.6.1.2 The classification of the CGE is in terms of the equivalent levels in the public service, at SMS Level.

5.7 Regarding the Cellphone allowances

5.7.1 The Principles, Policies, Rules and Regulations for the Staff of the Commission for Gender Equality (PPRR)

5.7.1.1 In terms of paragraph 7.1 Part Six of the PPRR, cellular phones will be allocated to Commissioners and staff members at the discretion of the Chair in the case of Commissioners and the CEO, and in case of staff, with due regard to the requirements of their work .

5.7.1.2 In terms of paragraph 7.2 Part Six of the PPRR, all cellular phones will be personally owned and contracted by the Commissioners and staff members concerned, except in the case of roving cell phones controlled by the OM, for use in field assignments on an ad hoc basis;

- 5.7.1.3 In terms of paragraph 7.3, plenary will set standardized ceilings, based on the average usage of the amounts to be reimbursed to Commissioners and staff members in respect of those authorized to have cellular telephones.
- 5.7.1.4 In terms of paragraph 7.6 all reimbursements for cellular telephones are made subject to receipt of the original monthly invoice.
- 5.7.1.5 In terms of paragraph 8.6, Commissioners and staff members may be reimbursed for the actual cost of the use of their home telephones and fax machines for CGE business.

5.3 General Principles of Good Administration

The conduct of the CGE also had to comply with general principles of good administration. In this regard, I particularly sought guidance from section 195 which outlines principles of good administration. Section 33 of the constitution and at least one case e.g. *Masetlha v President of the Republic of South Africa* (2008 (1) SA 566) prohibiting arbitrary action or irrational employment conduct by an employer.

6 EVIDENCE AND INFORMATION OBTAINED DURING INVESTIGATION

6.6 Common cause facts

- 6.6.1 It is common cause that the Complainant was employed as a Chief Executive Officer of the CGE in terms of section 7(1) of the CGE Act with effect from 19 April 2002 and placed on precautionary suspension from 21 April 2008 to 03 November 2009.
- 6.6.2 The parties are in agreement that the Complainant was employed by the CGE and her contract of employment was terminated by mutual agreement.
- 6.6.3 The CGE also did not deny that it had not paid the Complainant the two payments she complained about being the arrear provident fund and cell phone

and 3G allowance for the period during which she was under precautionary suspension.

6.6.4 The only factual disputes related to whether or not other SMS managers received the provident fund arrears payment and whether or not the Complainant did any CGE work requiring telephone and internet expenses while on cautionary suspension.

6.7 Regarding the exclusion of the Complainant (an employee) from the payment arrears of the employer's contributions to the provident fund for MMS and SMS employees:

6.7.1 *Complainant's Case*

6.7.1.1 The Complainant maintained that prior to the termination of her employment in 2008, the CGE adjusted and paid arrears of the employer's contribution to the provident fund for MMS and SMS.

6.7.2 *CGE's Case*

6.7.2.1 According to Dr Maitse, the Chairperson of the Good Governance component at the CGE, the CGE adjusted and paid arrears of the employer's contribution for MMS employees (Deputy Directors) only and this was based on specific provisions contained in their respective employment contracts. These provisions or any similar clauses are not contained in any other SMS members' contracts, including that of Ms Majake.

6.7.2.2 Following the release of the Public Protector's Provisional Report, the CGE submitted that the previous CGE management made an error when it drafted the MMS employees' employment contracts because they contained a specific clause which provides that the CGE will pay their employer's contributions to the provident fund. The error was merely caused by copying

the contracts from those of employees not on the cost-to-company package. The CGE was obliged then to comply with the adjustment since it was legally binding.

6.7.3 Independent Evidence Obtained

- 6.7.3.1 During the investigation the Public Protector team considered the Complainant's contract of employment together with one of the MMS employee's contract of employment. According to the contract of employment of Ms Joan De Klerk (MMS employee) the employee is entitled to a pension equal to 17% of his/her gross salary fixed in terms of the Public Service scales.
- 6.7.3.2 On the other hand, the Complainant's contract of employment provides that the employee may opt to join a pension or provident fund of her choice with the approval of the Chairperson of the CGE. It further provides that the employer's contribution to a provident fund will be included in the remuneration package.
- 6.7.3.3 At the time when the Complainant was the Chief Executive Officer of the CGE the following employees were on MMS and SMS level:

Provincial Coordinators	Deputy Directors	Senior Managers
Tasneem Du Pont -GP	Vernet Napo	Chana Majake
Nolitha Mazwai - WC	Joan De Klerk	Lefa Mallane
Sipho Dikgale - Limpopo	Keketso Maema	Moshabi Putu
N Sigadi - FS	Victor Mavhidola	
D Tlhaole - NW	Kamraj Anirudura	
Molta Mavuso -MP	Bongekile Bhengu	
M Nxumalo – KZN	Invocation Muhombo	

- 6.7.3.4 According to the CGE VIP payroll system only the following MMS employees were paid arrears of the employer's contribution to the provident fund:

Provincial Coordinators	Deputy Directors
Tasneem Du Pont -GP	Vernet Napo
Nolitha Mazwai - WC	Joan De Klerk
Sipho Dikgale - Limpopo	Keketso Maema
N Sigadi - FS	Victor Mavhidola
D Tlhaole - NW	Kamraj Anirudura
Molta Mavuso -MP	Bongekile Bhengu
M Nxumalo – KZN	Invocation Muhombo

- 6.8 Regarding whether the CGE unfairly denied or failed to pay the Complainant cellular phone and 3G allowances for the period she was on precautionary suspension:

6.8.1 *Complainant's Case*

- 6.8.1.1 The Complainant mentioned that the CGE refused to reimburse her in respect of business related telephone calls and internet usage expenses incurred during the period she was on precautionary suspension. She further maintains that she was entitled to receive a cellular phone allowance because she incurred expenditure related to business calls while she was on precautionary suspension. She contends further that in terms of the CGE policies, employees and Commissioners are entitled to be reimbursed in the event that they use their private cellular phones and 3G cards for business purposes.
- 6.8.1.2 She further contended that the cellular phone allowance accrued to her prior to the settlement agreement and therefore does not form part of the agreement, since it is not payable in terms of the contract of employment, but

she is entitled to it since she used her private cellular phone and 3G card for business related activities.

6.8.2 CGE's Case

- 6.8.2.1 According to Dr T Maitse, the settlement agreement mentioned above was a full and final settlement of all the disputes between the parties and in terms of the law. The matter became *res judicata* as all the disputes arising from the employment relationship between the parties were decisively dealt with in terms of the settlement agreement.
- 6.8.2.2 According to Dr Maitse, *"the current conduct of the Complainant is mala fide and constitutes an abuse of the due process as there was no need for the Public Protector to be involved:-*
- (a) *The Public Protector lacks jurisdiction to deal with issues that were dealt with through legally recognised processes and which were conclusively dealt with.*
 - (b) *In terms of the recognised principles, in our law, ...individuals such as Ms Majake should be discouraged from abusing due process in a shop forum manner by having the same matter adjudicated by different entities without any finality being reached."*
- 6.8.2.3 Dr Maitse further mentioned that clause 3 of the Complainant's contract, which lists her benefits, specifically excludes a cellular phone allowance. Prior to her suspension, the Complainant was using a CGE cellular phone and the costs of the cellular phone including the contract were borne by the CGE.
- 6.8.2.4 She further stated that when CGE employees are on precautionary suspension, all CGE equipment, such as cellular phones, 3G cards and laptops remain with the CGE. Employees on suspension are not entitled to

benefits relating to cellular phones over and above their total remuneration package.

6.8.2.5 CGE Commissioners and employees on SMS (that is other Senior Managers/ Heads of Departments), with the exception of the CEO and COO are allowed a claim of R700 per month. According to Dr Maitse, the Complainant had been using CGE equipment and was therefore not entitled to claim a cellular phone allowance.

6.8.2.6 The GGE submitted further that employees on precautionary suspension are not entitled to receive any allowance which is payable to them due to the nature of their work or for the purposes of furthering CGE business. This includes cellular phone allowances. The Complainant was according to the CGE not performing any duties for the CGE and, was therefore not entitled to any allowance. Furthermore, this amount is paid at the sole discretion of the CGE as the employer.

6.8.2.7 The CGE submitted that the Harries Commission was appointed to conduct an enquiry as a result of a labour dispute between the Complainant and the CGE, and the Complainant was therefore required to attend at her own cost.

6.8.3 *Independent Evidence Obtained*

6.8.3.1 The Complainant mentioned that she incurred business related expenditure through telephone calls and internet usage during the Harries Commission¹. She submitted itemised billing for both the internet account and the cellular phone.

6.8.3.2 Although the Complainant was not performing any duties as the CEO, she was required from time to time to communicate with the CGE and the Chairperson of the Commission through telephone and emails.

¹ Harries Commission was appointed to conduct an enquiry into labour matter between the Complainant and the CGE.

6.9 If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?

6.9.1 Complainant's Case

6.9.1.1 The Complainant mentioned that she suffered prejudice because she was unfairly excluded from benefiting while she was entitled to benefit from the adjustment of the employer's contribution to the provident fund. Furthermore, during the enquiry she incurred expenses because she was using her cellular phone and 3G card for work related activities.

6.9.2 CGE's Case

6.9.2.1 Ms Maema submitted that expenses incurred by the Complainant were not incurred in the furtherance of the CGE business and therefore they were personal.

6.9.2.2 The CGE, however, did not dispute the Complainant's submission that she had dealt with the Harris commission and other CGE queries using her resources during the period in question. I am accordingly unable to doubt the Complainant's version.

7 MEASURING CONDUCT AGAINST THE RULES

7.1 Regarding whether the CGE unfairly excluded the Complainant (an employee) from payment of arrears of the employer's contributions to the provident fund for MMS and SMS employees:

7.1.1 The Complainant alleges that the CGE adjusted and paid arrears of the employer's contribution for MMS and SMS employees, and her contributions were not adjusted despite the fact that she was in the employ of the CGE.

According to the CGE, only the MMS (Deputy Directors) employer's contributions to the provident fund were adjusted, based on their employment agreements.

7.1.2 According to available evidence, the CGE took a decision to pay MMS employees arrears of the employer's contribution to the provided fund based on the specific provision included in their contracts of employment.

7.1.3 The Complainant's contract of employment specifically says that the employer's contribution to the provident fund is included in the all-inclusive remuneration package. According to the available evidence, SMS employees were not paid arrears of the employer's contributions to the provident fund.

7.2 Regarding whether the CGE unfairly denied or failed to pay the Complainant cellular phone and 3G allowances for the period she was on precautionary suspension:

7.2.1 The Complainant mentioned that the CGE refused to reimburse her in respect of business related telephone calls and internet usage expenses incurred during the period she was on precautionary suspension. It is not clear however what business the Complainant would be transacting on behalf of the CGE during her precautionary suspension. The mere fact of suspension presupposes that the employee is precluded from carrying out any business on behalf of the employer.

7.2.2 The CGE mentioned that the Complainant's contract of employment does not include cellular phone benefits. The CGE mentioned further that the Complainant has entered into a settlement agreement with them and the settlement agreement is a full and final settlement of all claims arising from the contract of employment. Therefore, any claims arising directly or indirectly as a result of the contract of employment after the settlement are invalid.

- 7.2.3 The CGE further mentioned that the Complainant was using a CGE cellular phone and the costs of this cellular phone including the contracts were borne by the CGE. When employees are on precautionary suspension, all CGE equipment, such as cellular phones, 3G cards and laptops remain with the CGE. Employees on suspension are not entitled to benefits relating to cellular phones over and above their total remuneration package. The Complainant has not denied making use of a cellular phone and 3G card the cost of which was borne by the CGE. In the circumstances, there would be no need for the CGE to pay what would effectively be an extra allowance for both.
- 7.2.4 The CGE argued that cellular phone allowances are part of additional benefits which are incidental to the contract of employment and they do not form part of the contract of employment, since they are only provided to the employees at the discretion of the employer.
- 7.2.5 According to Ms Maema, the CGE will only reimburse an employee for expenditure incurred by the employee in the furtherance of the CGE's business. In the case of the Complainant, she was attending the Harries Commission which was appointed to deal with a labour dispute between her and the CGE. As already indicated, it is inconceivable to think of any business that an employee who is on precautionary suspension can legally transact on behalf of the employer. However, the Harries Commission was appointed to deal with a matter which is incidental to the running of the operations and business of the CGE, and for that reason any expenditure that is covered by the policies of the CGE and has to do with the Commission would fall within the business of the CGE.
- 7.2.6 The Complainant was allocated a cellular phone at the discretion of the Chairperson of the CGE in terms of paragraph 7.1 of Part Six of the PPRR. Cellular phones benefits do not form part of the Complainant's remuneration package referred to in the contract of employment. Therefore, they may also not form part of any settlement agreement in respect of a termination agreement.

However, in the case of the Complainant it is clear that she did not receive a cellular phone allowance per se, but was given use of a cellular phone and 3G card paid for by the CGE, both of which were surrendered to the CGE on her suspension.

- 7.2.7 In terms of paragraph 7.1 of Part Six of the PPRR, all cellular phones are personally owned and contracted by the Commissioners and staff members concerned. In terms of paragraph 7.3, plenary sets standardized ceilings, based on the average usage of the amounts to be reimbursed to Commissioners and staff members in respect of those authorized to have cellular phones.
- 7.2.8 As already indicated, due to the position occupied by the Complainant, she was given a CGE cellular phone and 3G card. Upon her suspension she was requested to hand the handsets back to the CGE. During the period of precautionary suspension, she was attending to her labour relations issues and not performing her responsibilities as the Chief Executive Officer of the CGE. However as already indicated, the Harries Commission was carrying out activities incidental to the operations of the CGE, and the expenditure incurred by the Complainant are covered by the policies of the CGE.
- 7.2.9 The PPRR makes provision for reimbursement of staff members in the event an employee incurs an expenditure on business calls and internet usage provided the employee is authorized to have a cellular phone. In the present case, the Complainant was suspended with full benefits and she was expected to be in contact with the CGE and also the Harries Commission.
- 7.2.10 The PPRR is silent about the reimbursement for use of private telephones or 3G devices for official purposes while an employee is on precautionary suspension. However, paragraph 8.6 of the PPRR provides that employees may be reimbursed for use of home telephones and telefax machines for CGE business.

7.2.11 It is not clear whether the provision in paragraph 8.6 applies only to fixed home telephones or also to cellular phones. With the modern technology of cellular telephony and wireless internet some people do not view it as necessary to have fixed telephone lines at their homes. In the event of use of a private cellular phone one can conclude that the provisions of paragraph 8.6 of the PPRR will be applicable. In any case, the distinction between fixed and cellular telephony is an artificial one.

8 FINDINGS

The Public Protector's findings are:

8.1 Did the CGE unfairly exclude the Complainant (an employee) from the payment of arrears of the employer's contribution to the provident fund for MMS and SMS employees?

8.1.1 The Complainant's claim is not substantiated.

8.1.2 Evidence, mainly from the CGE payroll records, shows that SMS members did not benefit from the payment of arrear contribution to the provident fund and only MMS employees received such.

8.1.3 If SMS employees were entitled to be paid arrear contribution to the provident fund she would have been entitled to such payment regardless of her being on precautionary suspension at the time of her having opted for an exit package that failed to take such matter into account. The justification is that she remained an employee entitled to all her contractual benefits until the date of termination of contract.

8.2 Did the CGE unfairly deny or failed to pay the Complainant cellular phone and 3G allowances for the period she was on precautionary suspension?

8.2.1 The Complainant's complaint is substantiated.

- 8.2.2 During her precautionary suspension, she surrendered the CGE cellular phone handset and 3G card. Consequently, given that she had to address communication to the CGE, including queries from the Harries Commission established to adjudicate her matter, these were dealt with through her private telephone and internet services.
- 8.2.3 As she remained a CGE employee until the termination of her contract of employment, the employer would in terms of paragraph 8.6 of the Principles, Policies, Rules and Regulations for the Staff of the Commission for Gender Equality (PPRR) have to bear the cost.
- 8.2.4 The CGE's failure to assess and pay the invoices submitted by the Complainant, accordingly constitutes improper conduct and maladministration.
- 8.2.5 The Complainant incurred expenses for use of her private cellular phone and internet usage for official purposes while she was on precautionary suspension. Therefore, the CGE unfairly refused to reimburse the Complainant for the expenses related to telephone calls made for business purposes.
- 8.3 If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?**
- 8.3.1 The Complainant suffered prejudice in that she was left to personally bear the cost of the CGE related communication expenses incurred through the use of her private cellular phone and internet service for official purposes while on precautionary suspension.
- 8.3.2 She further suffered an administrative injustice in that she expected the CGE to treat her fairly by duly considering her legitimately expected payment.

9 REMEDIAL ACTION

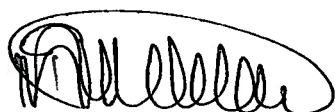
9.1 The remedial action I considered appropriate in terms of section 182(1)(c) of the Constitution is that:

9.1.1 The CGE must reimburse the Complainant for use of her private cellular phone and 3G for official purposes during the time she was on precautionary suspension in accordance with the provisions of paragraph 8.6 of The Principles, Policies, Rules and Regulations for the Staff of the Commission for Gender Equality (PPRR); and

9.1.2 The reimbursement is paid with interest as provided for by the Prescribed Rate of Interest Act 55 of 1975.

10 MONITORING

10.1 The Chairperson of the CGE is required to submit a report indicating the action taken with regard to the implementation of this report within two months of the date of the report.



ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 05/12/2014

Assisted by: Mr N Raedani, Senior Investigator, Service Delivery