



**PUBLIC PROTECTOR
SOUTH AFRICA**

**SETTLEMENT AGREEMENT PURSUANT TO SECTION 6(4) (B) OF THE
PUBLIC PROTECTOR ACT, 1994**

IN THE MATTER BETWEEN:

DR ZODWA DLAMINI - COMPLAINANT

AND

**DEPARTMENT OF WATER AND SANITATION REPRESENTED BY MINISTER
NP MOKONYANE - RESPONDENT**

**DETERMINATION OF THE PUBLIC PROTECTOR IN LINE WITH THE
SETTLEMENT AGREEMENT**



1. COMPLAINT SUMMARY

- 1.1. On 17 February 2016 the Public Protector received a complaint from Dr Zodwa Dlamini an employee of the Department of Water and Sanitation. The complaint was raised with Minister Nomvula Mokonyane in a letter dated 22 February 2016.
- 1.2. The Complainant states that she served on the Lesotho Highlands Water Project (LHWP) as Permanent Representative since 2005 based in Maseru. In 2009 she was promoted to the position of Chief Delegate and Permanent Representation on the Lesotho Highlands Water Commission (LHWC).
- 1.3. In summary, the Complaint alleges that she was unlawfully redeployed from her position as Chief Delegate to that of Senior Social Specialist within the Strategy Division of Trans Caledon Tunnel Authority (TCTA) based in South Africa.
- 1.4. The Complainant alleges that Minister Mokonyane without prior consultation removed her from her position at a consultative meeting with other senior officials in Durban, on 29 October 2015. She alleges that at this meeting, the Minister announced that she would be replaced as the Chief Delegate by Mr Bheki Nkosi with effect from 1 December 2015.
- 1.5. She further alleges that since 2009, she was unfairly remunerated following her promotion to Chief Delegate and Permanent Representative of the Republic of South Africa delegation on the LHWC. She stated that her subordinates were compensated more than her, despite reporting directly to her.



- 1.6. She stated that she considers the redeployment as an unfair labour practice in that she was suddenly removed from her post without proper consultation and consideration of the terms and conditions of her contract of employment.
- 1.7. She further stated that she was moved to a junior position compared to the one she previously occupied. She feels this was unjust and translated to demotion. As a remedy, the complainant requested to be reinstated to her position as Chief Delegate Permanent Representative of the Lesotho Highlands Water Commission.

2. BACKGROUND

- 2.1. On 22 February 2016 the Public Protector wrote to the Minister setting out the allegations against her and requested a response to enable her to establish whether the complainant was improperly prejudiced.
- 2.2. In a letter dated 08 March 2016 to the Public Protector, the Minister in summary responded as follows;
- 2.3. The Minister highlighted the importance of the LHWC and stated that in her personal experience coupled with that of her counterparts based in Maseru, the Commission was not performing to the satisfaction of all parties.
- 2.4. Further to that the Minister stated that the Complainant was not accountable to the South African government instead she became aware of issues relating to the work of the Commission from the media and other sources.
- 2.5. The Minister undertook to co-operate with the Public Protector in addressing the complaint and suggested to have a discussion with the Complainant



regarding the best redeployment under the circumstances. She further indicated willingness to have the Public Protector mediate the matter.

2.6. In order to resolve the complaint, on 12 July 2016 an Alternative Dispute Resolution (ADR) session chaired by the Public Protector was held in terms of section 6(4)(b)(i) of the Public Protector Act 23, 1994 which states that “***the Public Protector shall, be competent to endeavor, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation***”.

2.7. The ADR session was attended by:

Adv. Thuli Madonsela, the Public Protector of the Republic of South Africa

Hon. Minister Nomvula Mokonyane, Minister of Water and Sanitation

Ms Lesedi Sekele, Senior Manager (CSM)

Mr Bonginkosi Dlamini, Chief of Staff

Adv. Tshivalule Livhuwani, Investigator Private Office

Dr Thele Moema, Minister’s Political Advisor

Mr Sifiso Mkhize, Acting Director General

Dr Zodwa Dlamini, the Complainant

Adv. M Mphaga, Legal Advisor to the Minister

Adv. Maduna, Friend of the Complainant

3. COMPLAINANT’S VERSION

3.1. The complainant stated that the Minister failed to properly consult her regarding the issue of redeployment.



4. DEPARTMENT'S VERSION

- 4.1. The Minister's view was that she had at different times advised the Complainant of her concerns regarding issues of governance within the LHWC and her failure to deal with issues relating to the Procurement Policy. She further stated even though her intention to remove the complainant was not communicated to her in writing, verbal engagements were sufficient to serve as consultation.

5. SETTLEMENT AGREEMENT

Parties agree as follows:

- 5.1 That the Department will reinstate the Complainant to her position as Chief Delegate and Permanent Representative of the Lesotho Highlands Water Commission with immediate effect;
- 5.2 That the complainant agrees to voluntary release from her contract and the Department to purchase the balance of her contract period;
- 5.3 The Department will within the next 7 days after signing of the agreement, remunerate the complainant according to the salary scale of Chief Delegate back dated with interest to the date of promotion and the amount will be determined taking into account the following:
- 5.3.1. The report on Remuneration of Key Staff dated 7 April 2015 commissioned by TCTA if it was adopted, if not, the report will be used as a guide;
- 5.3.2. The remuneration package of the current Chief Delegate;



- 5.3.3. Further the Department will ascertain whether the Complainant had been receiving out of country benefits and if not, to pay retrospectively to the date of her posting in Maseru;
- 5.4. That if the TCTA report is adopted between now and October 2016 and the payment will be retrospective;
- 5.5. That the Public Protector will refer all other matters that are not part of the settlement agreement to the Auditor General;
- 5.6. That the Public Protector South Africa will play an oversight role and monitor implementation of the settlement of agreement.
- 5.7. A further meeting was held on 21 July 2016 to discuss determination of the amount due to the complainant in terms of Par 5.3.
- 5.8. The session was attended by:

Ms Lesedi Sekele; Senior Manager (CSM)
Dr Thele Moema; Minister's Political Advisor
Dr Zodwa Dlamini; The Complainant
Adv M Mphaga; Legal Advisor to the Minister
Adv Maduna; Friend of the Complainant
Ms Hanya Botha; Executive Manager HR, TCTA

Parties agreed as follows:

- 5.9. That the TCTA will reinstate the Complainant to her position as Chief Delegate and Permanent Representative of the Lesotho Highlands Water Commission with immediate effect;



- 5.10. That the complainant agrees voluntary release from her contract and the TCTA to purchase the balance of her contract period;
- 5.11. The Department offered the complainant a salary increase of 12% back dated to 2009 but she requested 18%.
- 5.12. Parties having been unable to reach agreement on a settlement amount payable to the Complainant agreed that the Public Protector should take a decision that would be regarded as final and binding on them.
- 5.13. Subsequently the Public Protector requested parties to submit written proposal and TCTA proposed as follows:

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1. Using the 2009 Global Edge benchmark for Chief RSA Delegate as primary source:

R 361 683. 93 = final outstanding salary up to 11 October 2016

R 185 165. 18 = Incentive backpay to FY 2008/09 to FY2014/14

R1 454 420.57 =12% backdated increase

R 95 991.76 = 6.6% CPI

R2 097 261. 43 = Total settlement

2. DIRCO allowance

The total cost to company for the Lesotho based employees was inclusive of 15% premium to cover the following:

- *Foreign Service Allowance;*
- *Housing*
- *Water, Electricity and Fuel*
- *Motor Vehicle; and OR*
- *Travel*



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3. Repatriation

TCTA will in addition repatriate Dr Z Dlamini from Lesotho to RSA through the normal supply management process.

4. End of Contract

The current employment contract as the Chief and Permanent Delegate to the Lesotho Highlands Water Commission will automatically terminate on 11 October 2016. Failure to renew or extend the employment contract beyond the termination date, 11 October 2016 shall not constitute a dismissal by the TCTA, as such there shall be no entitlement to any remuneration and/or compensation as a result of such termination.

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5.14. The Complainant submitted her proposal and requested the Public Protector to take the following into consideration in arriving at the determination:

5.14.1. TCTA on all LHWP matters reports to the Lesotho Highlands Water Commission (LHWC) and she was therefore their supervisor that is according to the Treaty of October 27, 1986 and the LHWP Phase II Agreement;

5.14.2. She also attached TCTA management salary scale

5.14.3. She is entitled to DIRCO benefits for personnel working in foreign lands, since she began her tenure from 2005 – 2016 and is open to negotiations which would have to include:

- (a) Rent for her apartment; and
- (b) Monthly travel from Lesotho to Johannesburg.



5.14.4. She attached the computation provided by her financial expert on what is reasonable settlement for salary adjustment from 2009 - 2015. The calculations do not include 2016 and incentives;

Based on the relative differences staying the same:

		2009/04/04	2010/04/04	2011/04/04	2012/04/04	2013/04/04	2014/04/04	2015/04/04	Total	
Chief Delegate	F1	1 518 299	1 590 772	1 659 621	1 761 083	1 864 356	1 978 501	2 087 280	12 439 912	
Chief Fin. Officer	E2	662 801	694 438	724 493	768 785	813 868	863 697	902 452	5 430 534	
Chief Engineer	E2	719 953	754 318	786 985	835 076	884 047	938 172	980 246	5 898 778	
Chief Delegate	F1	Interest	1 593 369	1 373 043	1 151 370	949 884	744 683	538 569	323 643	6 674 562
Chief Fin. Officer	E2	Compounded	695 572	599 390	502 620	414 663	325 085	235 108	141 284	2 913 722
Chief Engineer	E2	to date	755 550	651 075	545 981	450 419	353 118	255 381	153 463	3 164 964
Chief Delegate	F1	GRAND							19 114 473	
Chief Fin. Officer	E2	TOTAL							8 344 256	
Chief Engineer	E2								9 063 742	

Based on the above the complainant believes that from 2009 to 2015, she was entitled to a salary of R19 114 473. 00

6. THE DECISION OF THE PUBLIC PROTECTOR

6.1. The following factors were taken into account in determining the outcome:

6.1.1. There is no dispute that the Report on Remuneration of Key Staff was never formally adopted by the Department however both parties agreed that it will be used as a guide in attempting to determine a fair amount to compensate the Complainant for the additional responsibilities she performed in her position as Chief Delegate of the LHP since 2009;

6.1.2. Amongst others, the Report evaluated the Complainant's position and stated that there was a difference of about R 2 067 278 per annum between the



complainant's current salary and the recommended salary. It stated that there was a difference of 124% which necessitated a need for urgent review of salaries affected by the disparity.

- 6.1.3. If it had been adopted, the amounts reflected in the report would probably have reflected the potential increase in remuneration that could have been expected by the complainant. However there is no legal basis for full reliance and the enforcement of this proposed adjustment as the report was never formally adopted.
- 6.1.4. Both Parties are therefore using the reasoning and motivation in the Report to determine a reasonable settlement amount to compensate the Complainant for the potential prejudice that she suffered as a result of the alleged underpayment.
- 6.1.5. As the Parties could not reach consensus on the final percentage of the escalation amount that would fairly and reasonably reflect the Complainant's potential prejudice, the Public Protector is called upon to decide whether or not the 12 % proposed by the Department is reasonable and fair, or whether there are overriding factors to conclude that the Complainant's claim of 18% is justifiable.
- 6.1.6. Given that there is no ready measure of the potential prejudice suffered by the Complainant, and being satisfied that financial redress is appropriate as agreed by both parties, the parties are in agreement that the amount that would constitute fair and reasonable financial redress is a matter of judgment of the Public Protector.
- 6.1.7 In assessing the proposals presented, I tried to balance the obligations of the State with regard to the public purse as well as the public interest with the demands of fair and just administration. I also took into account the complainant's personal circumstances.



- 6.2. In the circumstances, I am satisfied that a compromise situation dictates that 16% increase presents a fair and reasonable outcome to both parties.
- 6.3. Further, taking into account that the complainant's contract has come to an end, the Department must within 7 days of this decision, in full and final settlement, pay the complainant an amount equal to an increase of 16% of the remuneration package back dated to 2009, with interest.
- 6.4. Regarding repatriation, TCTA must through its supply chain processes assist the Complaint as already undertaken.

ADV KEVIN MALUNGA
DEPUTY PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 14/1/2016

