

**REPORT IN TERMS OF SECTION 182(1) (b) OF THE CONSTITUTION AND SECTION 8(1)
OF THE PUBLIC PROTECTOR ACT , 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO 41 OF 2007/8

**REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF IMPROPRIETY BY THE
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT FOR FAILURE
AND/OR REFUSAL TO SUBMIT PROPER COURT RECORDS TO THE DIRECTOR OF
PUBLIC PROSECUTIONS FOR APPEAL PURPOSES**

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EXECUTIVE SUMMARY

1. The Office of the Public Protector (OPP) received a complaint from the Office of the Director of Public Prosecutions, Transvaal, about failure by the Polokwane Magistrates' Court to submit proper court records so that appeal applications could be enrolled.
2. The main problem was that the court records were missing or inaudible, and therefore needed to be reconstructed.
3. Several attempts were made over a long period of time to get the records traced or constructed, but in vain. It was alleged that there was no cooperation at all, particularly from the presiding officer who needed to assist the Clerk of the Court in reconstructing the records.
4. The OPP investigated the matter and made the following findings:

There are several appeal applications from Polokwane Magistrates' Court which cannot be enrolled for hearing due to lack of court records;

The court records were either missing or inaudible;

The Polokwane Magistrates' Court failed to have such records reconstructed;

Only one presiding officer has consistently failed or delayed in reconstructing the court records; and

The delay in reconstructing the records has had a prejudicial effect on applicants as their matters could not be enrolled in the High Court for appeal purposes.

The OPP recommended that the Director-General of the Department of Justice and Constitutional Development direct the Polokwane Magistrates' Court to reconstruct the missing records or to issue a certificate to the National Prosecuting Authority indicating that the records in the above-mentioned matters cannot be reconstructed.

INVESTIGATION INTO THE ALLEGATIONS OF IMPROPRIETY BY THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT FOR FAILURE AND/OR REFUSAL TO SUBMIT PROPER COURT RECORDS TO THE DIRECTOR OF PUBLIC PROSECUTIONS FOR APPEAL PURPOSES

1. INTRODUCTION

1.1 This report is submitted in terms of:-

[a] Section 182[1][b] of the Constitution of the Republic of South Africa, 1996 (the Constitution), and

[b] Section 8[1] of the Public Protector Act, 1994 as amended.

1.2 It deals with an investigation into the allegations of impropriety by the Department of Justice and Constitutional Development (the Department) for failure and/or refusal to reconstruct court records for appeal purposes, after such records went missing and could not be traced, and those that were available were inaudible.

1.3 The report will be submitted to the Director-General, Department of Justice and Constitutional Development; the Regional Head, Department of Justice and Constitutional Development, Limpopo; the Director of Public Prosecutions, Transvaal and the Regional Court President, Polokwane.

2. BACKGROUND

2.1 In February 2006, the Office of the Public Protector (the OPP) received a complaint from the Office of the Director of Public Prosecutions, Transvaal about the failure by the Polokwane Magistrates' Court to reconstruct missing or inaudible court records.

2.2 It was indicated that the Director of Public Prosecutions (the DPP) could not enrol the concerned appeals for hearing without court records, and this had delayed the applications for several years, causing untold prejudice to the appellants.

2.3 The cases concerned are the following:

2.3.1 A524/2000; Magistrate's Court ref. 51/99; Appellant: Brown Tsebetsebe;

2.3.2 A1404/2001; Magistrate's Court ref 43/2001; Appellant: Sphiwe Daniel Nzama; and

2.3.3 A322/2002; Magistrate's Court ref 36/2001; Appellant: Joseph Ramafalo

2.4 The Office of the DPP indicated that despite continuous correspondences with both the Clerk of the Court and the presiding officer concerned, no proper records could be submitted.

3. THE POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR

3.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution as one of a number of bodies that support constitutional democracy. The operational requirements of the OPP are provided for by the Public Protector Act, 1994.

3.2 The Public Protector is appointed by the President after approval by the National Assembly of a candidate recommended by a joint committee. He/she is independent of government and any political party. The Public Protector receives complaints from aggrieved persons and institutions against government agencies and officials. He/She has the power to investigate these matters, to report on his/her findings and to take appropriate remedial action.

3.3 In terms of the Public Protector Act, appropriate remedial action includes mediation, negotiation, conciliation and the making of recommendation to the affected government agency on how any shortcomings found should be rectified and a recurrence of similar deficiencies could be prevented.

3.4 The Public Protector reports on the activities of his/her office to Parliament at least once a year. However, the Public Protector can report to Parliament on the findings of a particular investigation whenever he/she deems it necessary.

3.5 The findings of an investigation by the Public Protector shall, when he/she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.

4. THE INVESTIGATION

4.1 Informal investigations

The investigations were initially conducted by way of written enquiries followed up by telephonic enquiries. The written enquiries were with the Clerk of the Criminal Court, Court Manager, Chief Magistrate and the Regional Court President.

4.2 Formal Investigations

4.1.1 Several visits were made to the Polokwane Magistrates' Court where meetings were held with two Clerks of Court. Inspections were also made in some filing cabinets in order to trace the missing files.

4.1.2 The first Clerk of the Court undertook on several occasions, to facilitate the reconstruction of the court records. However, he reported back that he was not receiving cooperation from the presiding officer who had earlier indicated his willingness to reconstruct the records. The second Clerk of the Court experienced the same problems.

4.1.3 As both Clerks of the Court had failed to persuade the presiding officer to reconstruct the court records, the matter was taken up with the Chief Magistrate who later became the Regional Court President. He undertook to advise the presiding officer to reconstruct the court records. From the correspondence between him and the presiding officer, it was clear that the Regional Court President was also not successful in getting the presiding officer to reconstruct the records. He later informed the OPP that the matter should be taken up with the Director-General of the Department as the Clerks of Courts were directly responsible to him, and they were responsible for the keeping of court records.

4.1.4 The OPP urged the Clerk of the Court to issue a certificate to the NPA indicating that it was not possible to reconstruct both the missing and inaudible court records. He agreed to

do so but on follow up it was established that the process had not taken place. The Clerk of Court indicated that he held the process back for a while as the presiding officer had approached him and indicated that he was busy with the reconstruction of the court records but needed more time as the trials took place some years back.

4.1.5 Several months passed by and the Clerk of the Court kept promising that the court records were in the process of being reconstructed. On the last enquiry by the OPP, the Clerk of the Court was disillusioned and indicated that he could not get the court records reconstructed in time. He indicated that his office did not experience these problems with other presiding officers, and the problem was peculiar to this particular Magistrate. He furnished the OPP with examples of matters which took too long for this presiding officer to finalise:

- (i) S v Brown Sebesebe; RC 440/98 – Appeal 51/99 case and cassettes were submitted to the Magistrate on 27 July 2000 case was received back on 24 February 2006.
- (ii) S v Joseph Ramafalo; RC 143/2001 – Appeal 36/2001 case and cassettes were submitted on 19 July 2004. Another record was sent to the Magistrate on 01 September 2005 as they were informed on follow up that the record sent on 19 July 2004 is untraceable.
- (iii) S v Simon Seemela; RC 14/2001 – Appeal 66/2001 case and cassettes were submitted on 5 February 2003, received back on 24 February 2006.
- (iv) S v Norman Ratsoma; RC 1850/2001 – Appeal 78/2001 was submitted on 31 August 2005, received back on 24 February 2006.

5. LEGISLATIVE PRESCRIPTS REGULATING THE ADMINISTRATION OF JUSTICE

5.1 The Constitution

5.1.1 Section 35(3) (a) of the Constitution states that “every accused person has a right to a fair trial, which includes the right to appeal to, or review by, a higher court.

5.1.2 In terms of Section 165 of the Constitution,

- (a) The Department is responsible for the administration of the courts and constitutional development.
- (b) It performs these functions in conjunction with the Judges, Magistrate, National Director of Public Prosecutions and Directors of Prosecutions, who are independent.
- (c) The Department’s responsibilities include but not limited to the provision of adequate resources for proper functioning of the Criminal and Civil Justice system in the country.

5.2 The Criminal Procedure Act, 1977, Magistrates’ Court Act, 1944 and Magistrates’ Rules of Court

All the above-mentioned legislation and rules regulate matters relating to court records, and the procedure to secure such records for appeal purposes.

6. FINDINGS

The following findings were made from the investigation:

- 6.1 There are several appeal applications from Polokwane Magistrates’ Court which cannot be enrolled for hearing due to lack of court records;
- 6.2 The court records were either missing or inaudible;

- 6.3 The Polokwane Magistrates' Court failed to have such records reconstructed when requested to do so by the DPP;
- 6.4 Only one presiding officer has consistently failed or delayed in reconstructing the court records; and
- 6.5 The delay in reconstructing the records has had a prejudicial effect on applicants as their matters could not be enrolled in the High Court for appeal purposes for several years.

7. RECOMMENDATION

In terms of section 182(1) (c) of the Constitution and section 6(4) (c) (ii) of the Public Protector Act, 1994, it is recommended that the Director-General of the Department direct the Polokwane Magistrates' Court to reconstruct the missing records or to issue a certificate to the Director of Public Prosecutions, Transvaal, indicating that the records in the above-mentioned cases cannot be reconstructed.

ADV. ML MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: _____

PC Lebea: Investigator

NH Mukwevho: Provincial Representative