LAW AND JUSTICE

A report on an investigation into allegations of maladministration against the South African Broadcasting Corporation (SABC), Legal Aid South Africa (LASA), Department of Justice and Constitutional Development, South African Police Service (SAPS) and the Department of International Relations and Cooperation

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A REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND ABUSE OF POWER MADE BY MS TA MAKUDUBELA AGAINST THE SOUTH AFRICAN BROADCASTING CORPORATION (SABC), LEGAL AID BOARD (LASA), DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT (DOJCD), DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION (DIRCO) AND DEPARTMENT OF HEALTH
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Executive Summary

(i) "Law and Justice" is my report as Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and section (8)(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and appropriate remedial action taken in terms of Section 182(1)(c) of the Constitution following an investigation into complaints of maladministration and prejudice lodged by Ms TA Makudubela (the Complainant) on 24 August 2011 against the South African Broadcasting Corporation (SABC), Legal Aid South Africa (LASA), the Department of Justice (DOJC), South African Police Services (SAPS), Department of International Relations and Cooperation (DIRCO) and a medical practitioner at Steve Biko Academic Hospital.

(iii) Although all the complaints were lodged on the same day, they are mostly unrelated except for those relating to the SABC matter. It was an administrative error to bundle them together as one complaint.

(iv) One of the complaints my office intermittently receives from low income members of the public is an allegation that some or other organ of state unjustly appropriated the complainant's intellectual property rights or failed to regulate or to act to protect such rights. Typically, the complainant is a young innovator not different from the Vodacom case, who alleges that an invention showed to public officials was stolen. In all the cases the original was returned but the

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1 Quoted in Dawson R, Justice as Attunement: Transforming Constitutions in Law, Literature and the Rest of Life: Taylor and Francis ©2014
concept was reproduced and presented as originating from the organ of state or other alleged offending institution.

(v) The Complainant, Ms Makudubela's main grievance in this matter also centres on alleged violation of intellectual property rights, involving copyright to a song packaged in the form of a music video and presented in pursuit of an agreement to the SABC to play in its gospel programme. She has alleged improper conduct involving maladministration and prejudice against the SABC and organs of state that she interacted with in her quest to get assistance to resolve her complaint of alleged unfair treatment by the SABC, involving refusal to play her music and violation of her copyright to her music or intellectual property rights. The related complaints are against: LASA for allegedly failing to help her vindicate her rights against the SABC; the DOJCD for the same and for calling the police who arrested her when she refused to leave without suing the Minister of Justice and Constitutional Development, having allegedly come on the basis of a pre-arranged meeting to see the Minister of Justice, and the SAPS for unduly arresting her, keeping her in prison for several days and releasing her without a trial.

(vi) The other complaints were lodged against various police stations of the SAPS mainly for alleged failure to investigate matters she reported to the police, with some involving alleged domestic violence and others involving alleged wrongful arrest and police brutality. The police stations she complained against were the following:

(a) Sunnyside Police Station;
(b) Sinoville Police Station; and
(c) Brooklyn Police Station.

(vii) In one of the domestic violence complaints, her complaint was also against DIRCO, for obfuscating the serving of domestic violence papers against her alleged domestic partner, a Russian diplomat. In the same complaint and the
one involving arrest at the DOJC, the Complainant accused the SAPS of subjecting her to police brutality. She also lodged a complaint against a doctor at Steve Biko Academic Hospital for treating her inhumanely and botching an operation on her leg.

(viii) The specific allegations by the Complainant were the following:

(a) She approached the SABC in 2006 to request the national broadcaster to play her music to promote her latest album titled "GOBOIMA LEFAASENG". The SABC refused to play the title track despite her protest as she thought it was her right to have the national broadcaster promote her music.

(b) Having agreed to play one track on her album titled "MPULELE DITSELA" on the Gospel Gold programme, the SABC violated her copyright to her music. In pursuit of an agreement to play her music, she gave the SABC a video of the agreed song, which video had been produced at her expense by a professional music video producer.

(c) She later discovered when she saw the video being played on one of the SABC's channels, that the SABC had remixed the video with the impact of changing the sound, to her gross disappointment. Her specific words were:

"They changed the sound of that song the way that it was recorded; they recorded their new sound on top of my original sound and instrument ...."They destroyed that song inn (sic) a way that everyone who would see the video would not want to buy my music".

(d) LASA improperly refused her legal aid to assist her in the matter against the SABC;
(e) She reported a case relating to assault to the Brooklyn Police Station, but officials of the Brooklyn Police Station failed to conduct a proper investigation;

(f) Officials of the Sinoville Police Station failed to properly investigate a criminal case which she opened against the children of her then fiancé, Dr P de Klerk;

(g) She reported a case of malicious damage to property to the Sunnyside Police Station, but officials at that Police Station failed to investigate the case properly;

(h) She was wrongfully arrested and imprisoned when she went to the DOJCD to see the Minister, after being invited by the Minister to attend a meeting regarding complaints she had raised;

(i) She was wrongfully arrested and imprisoned following a visit to DIRCO in pursuit of a police complaint she had made about a Russian diplomat who had allegedly assaulted her;

(j) The SAPS acted improperly in relation to the mysterious death of her brother (Wilson Makudubela) and failed to investigate the case. She made similar allegations in relation to the death of her fiancé, a certain Mr de Klerk;

(k) A medical practitioner who treated her at Steve Biko Hospital acted negligently and abusively towards her causing her leg not to heal properly;

(l) Various public officials in the organs of state she had interacted with insulted her questioning her mental state and that she needed this settled through a voluntary psychiatric assessment.
(m) She requested the removal or expunction of the record of criminal convictions rising from the arrests she experienced as she pursued justice in respect of the SABC music dispute and the SAPS service failure relating to the investigation of the murder, domestic violence and malicious damage to property cases she had reported.

(ix) On analysis of the allegations considered to merit an investigation and preliminary information on those matters, the following issues were considered and investigated:

**CONCERNING THE MUSIC RIGHTS DISPUTE WITH THE SABC**

(a) Whether the SABC improperly refused to play the Complainant’s title track “GOBOIMA LEFAASENG”, and if so whether this constitutes improper conduct and maladministration;

(b) Whether the SABC improperly remixed the sound of the Complainant’s video “MPULELE DITSELA”, in violation of her copyright to her music and if this constitutes improper conduct and/or maladministration as envisaged in section 6(4) of the Public Protector Act, and caused the Complainant to suffer prejudice;

(c) Whether LASA unduly failed to help the Complainant vindicate her intellectual Property rights against the SABC and if this constitutes improper conduct, maladministration and caused prejudice to the Complainant;

(d) Did the DOJCD improperly refuse to hold an agreed meeting with the Complainant to discuss her cases at a set time and date and if so does this constitute improper conduct, maladministration and caused prejudice to the Complainant?;
(e) Did SAPS improperly remove the Complainant from the DOJCD premises by means of arrest and imprisonment and if so does such amount to improper conduct, maladministration and/or abuse of power?

CONCERNING ALLEGED DOMESTIC VIOLENCE BY A DIPLOMAT

(f) Did DIRCO set and then improperly refuse to hold meeting(s) with the Complainant at set times and dates and if does this constitute improper conduct and maladministration?

(g) Did SAPS improperly remove the Complainant from DIRCO premises by means of arrest, police brutality and imprisonment and if so does this constitute improper conduct, maladministration and/or abuse of power?

CONCERNING ALLEGED SERVICE FAILURE & BRUTALITY BY POLICE

(h) Whether relevant police officers of the Sinoville, Brooklyn or Sunnyside Police Stations unduly failed to properly investigate the Complainant's cases and if so does this constitute improper conduct, maladministration and/or abuse of power?

(i) The cases in question are:

i. A criminal case against her then fiancé's children;

ii. Failure to properly investigate the death of her fiancé and brother;

iii. Cases relating to assault and intimidation by a Russian diplomat;

iv. Malicious damage to property by her landlord; and

v. Assault by the diplomatic police.
CONCERNING THE OTHER MATTERS

(j) If and how the alleged abuse and unprofessional conduct against the Complainant by a medical doctor from Steve Biko Academic Hospital should be dealt with.

(k) If and how she could be assisted with the request to have her criminal record for arrests and conviction relating to above matters.

(x) A decision was taken upfront not to investigate the alleged malpractice by a medical doctor, in view of the lapse of time, and the Complainant asked to consider asking the Department of Health to look into it. The Civilian Secretariat will also be asked to look into alleged failure to investigate the two murder investigations and apparent disappearance of information relating to the brother.

(xi) She has been asked to approach the Minister of Justice and Correctional Services with regard to having her criminal record relating to arrests in connection with matters subject to complaints in this report, expunged.

(xii) The investigation involved telephonic and written correspondence, as well as interviews and meetings with officials of all implicated organs of state and the Complainant. It also included the sourcing and analysis of relevant documents. Applicable laws and policies were researched, analysed and applied.

(xiii) The SABC never denied that it refused to play the Complainant's one video and changed the sound on the one it had agreed to play. Its explanation was that the changes were necessary and customary to meet its broadcast quality requirements. LASA did not deny refusing her legal assistance and explained such decision on the basis of its policy of pursuing cases where there is a real likelihood of success, among other considerations. The DOJC never denied it
asked SAPS to arrest her and neither did SAPS deny the arrest. What was
denied was police brutality and failure to investigate. However, in response to the
notice issued to the SAPS National Commissioner alerting her of my likely
findings on the SAPS cases, in pursuit of section 7(9) of the Public Protector Act,
the SAPS conceded some investigative lapses and undertook to reinvestigate.
SAPS further indicated that some of the remedial action had commenced and for
this I am grateful to General Riah Phiyega, the National Police Commissioner.

(xiv) In dealing with the case, I had to be mindful that the Public Protector’s power and
responsibility to investigate and redress improper conduct, including
maladministration and abuse of power in state affairs transcends compliance
with legality by organs of state. It requires consciousness of the fact that ours is
a transformative Constitution whose impact, among other things, is to reconcile
law and justice. It is for this reason that I consider the opening quote from the
late Chief Justice Ismail Mohamed apposite.

(xv) The standard I used to assess the conduct of all organs of state was principally
based on the requirements of the opposite of maladministration which is good
administration. The starting point on good administration was section 195 of the
Constitution, which outlines principles of good administration, in the process
spelling out the acceptable standard of care to be expected by those who seek
service from or interact with organs of state. Key among these, is the
requirement of professionalism and fairness. The right to just administrative
action, and court jurisprudence on the standard imposed by this right, were also
instructive as were the specific laws and policies that regulate how the services
and interactions complained of were required to unfold. On the SABC music
dispute, the Copyright Act 98 of 1978 and the Performers Protection Act 11 of
1967, were very helpful in providing guidance on the standard that was expected
by law from the SABC regarding the protection of intellectual property rights of
performing artists.
(xvi) Having considered the evidence and regulatory framework on each of the complaints I make the following findings:

(a) The allegations relating to the conduct of the SABC:

(aa) Regarding whether the SABC unduly refused to air the Complainant’s music video “GOBOIMA LEFAASENG” and if such conduct constitutes improper conduct or maladministration, my finding is that:

i. The complaint that the SABC unduly refused to play the Complainant’s music, has not been substantiated.

ii. Although the SABC has a duty as a national broadcaster to ensure equitable access to its broadcast opportunities and has to meet certain ICASA determined quotas, it does not have to play all music presented to it if such music does not meet its objective quality requirements.

(bb) Regarding whether the SABC improperly changed the sound of the music video “MPULELE DITSELA” and whether that is unlawful and constitutes maladministration?

iii. The allegation of impropriety is substantiated. The SABC had no right to change the Complainant’s sound as that violated her copyright to her music.

iv. The SABC is required to know and apply the provisions of the Copyright Act and the Performers’ Protection Act. In terms of Section 23(1) of the Copyright Act, copyright is infringed by “any person, not being the owner of the copyright who, without license of such owner, does or causes any other person to do, in the Republic, any act which
the owner of the copyright has the exclusive right to do or to authorise”.

v. By failing to consult with the Complainant before making substantial changes to her music video and/or getting her consent before flighting the changed product which was branded as hers, the SABC can be said to have technically violated the Complainant’s rights in terms of the Copyright Act.

vi. These rights allow artists to protect themselves from infringement or the unauthorised use and misuse of their creations.

vii. I am further convinced that the SABC did not meet the standard of fairness and reasonability required in terms of Section 195 of the Constitution, because the actions of officials of SABC’s actions do not show that they knew and applied the provisions of the Copyright Act and the Performers’ Protection Act to avoid a violation of the Complainant’s rights as a performing artist.

viii. The fact that the SABC receives a massive number of music compact discs (CDs) and videos from artists, record companies and producers who are “anxious” to have their music and videos broadcasted by the SABC stations and channels, does not justify its ignorance of the contractual or statutory rights of performers and record companies. My reading of section 195 is that it makes the SABC the party that should have ensured that uncertainty is eliminated through a written agreement and clear communication to the Complainant about her rights.

ix. The conduct of the SABC accordingly constitutes maladministration.

x. On the question whether or not the Complainant was prejudiced or suffered an injustice, is that she was indeed prejudiced in that due to the SABC’s failure to consult or involve her on the changes it made to
her music video, she ended up being associated with a product that was not approved by her purporting to be the one she had produced at her own cost and which represented how she wanted to represent herself and to be perceived as an artist. In fact it can be reasonably concluded that it was partly in pursuit of her SABC copyright claim that Complainant went down the perilous journey that left her on a collision course with LASA, the DOJCD and SAPS.

xi. Does it matter that the original video was returned to her? I don’t think so. Intellectual property is not violated simply by depriving an artist possession of the physical representation of his or her property. Distorting her property and representing the new product as hers without her consent, as was the case here, suffices.

xii. However, I am unfortunately unable to find a direct nexus or causal link between the Complainant’s alleged loss of revenue and the SABC’s maladministration.

(cc) The remedial action I consider appropriate in pursuit of section 182(1) (c) of the Constitution is to call upon-

i. The SABC Acting CEO to apologise in writing to the Complainant for the corporation’s failure to secure her consent before making changes or her approval before representing the new artwork as hers.

ii. The Board of the SABC to adopt policies that would guide its interface with artists and prevent the exploitation of their intellectual property.

iii. The Board of the SABC to put written contracts in place to regulate the relationship between the SABC and performing artists to ensure that all terms of engagement are in writing and comply with the copyright and the Protection of performing artists Acts.
(b) Regarding Whether LASA unduly refused to assist the Complainant vindicate her intellectual property rights against the SABC and if this constitutes improper conduct, maladministration and prejudice, my finding is that:

i. With the evidence before me, I am unable to uphold the complaint;

ii. Evidence does not show that LASA deviated from its own policies;

iii. However, although I take note of LASA's submission that it followed its regulatory framework in determining the merits of a civil case against the SABC, in particular the non-existence of a contract between the Complainant and the SABC regarding changes to the Complainant's video, and the absence of a clear nexus between the airing/non airing of her video and the alleged loss of revenue, I am of the view that LASA took a very narrow view of the facts of this case;

iv. According to section 2 of the Copyright Act, sound recordings and musical works are eligible for copyright and the rights of owners are accordingly protected under the Act;

v. Furthermore, given the power relations between the Complainant and the SABC, LASA should have viewed the case of the Complainant more leniently in line with the provisions of the Copyright Act, more especially in the absence of the written agreement as good administration as envisaged in section 195 of the Constitution placed on it, as an organ of state, the responsibility to act professionally and to safeguard the interests of members the public.

(c) The allegations relating to the wrongful arrest and imprisonment at DOJCD
(aa) Regarding SAPS’ alleged removal of the Complainant from DOJCD premises by means of arrest and imprisonment and if such constitutes improper conduct, maladministration and/or abuse of power, I find that:

i. While the arrest of the Complainant may have been lawful, it was neither just nor fair and cannot be said to have been the most efficient use of limited policing resources. The conduct accordingly constitutes improper conduct, maladministration and does border on abuse of power.

ii. The conduct of members of the SAPS did not meet the standard of fairness and reasonableness required by Section 195 of the Constitution, because there was no indication of when the conduct of the Complainant, although it might have been unreasonable, crossed the boundary between unreasonableness and unlawfulness and thus warranted her arrest as opposed to alternative options.

iii. Imprisonment was not the only or the least adverse or ubuntu resonant action that could have been taken to ensure that business is able to continue at the DOJCD reception area without interruption by her. Imprisonment was also not consistent with section 195 requiring optimal and efficient use of public resources, which includes giving consideration to the spaces available in the country’s overcrowded prisons and the administrative burden that goes with arrest.

(bb) The remedial action I consider appropriate to redress the injustice in pursuit of section 182(1) (c) of the Constitution is the following:
i. The Minister of the Department of Public Service and Administration and the Minister of Police must adopt a policy to guide public authorities on decisions relating to unreasonable conduct of members of the public and the possible limitation and refusal of services to such persons in a manner that is consistent with the Constitution, to prevent arbitrary, inhumane and discriminatory actions.

(cc) Regarding the conduct of DOJCD allegedly setting up a meeting with the Complainant and failing to hold the meeting at the agreed date and time, and if relevant acts constitute improper conduct, maladministration and/or abuse of power, I find that:

i. The complaint is not substantiated as I could not find evidence buttressing the allegation that the Minister of Justice and Constitutional Development agreed to a meeting and later refused or failed to honour her undertaking.

(d) The allegations relating to the wrongful arrest and imprisonment at DIRCO.

(aa) Regarding DIRCO allegedly setting up meeting(s) with the Complainant and not holding the meeting(s) at the set times and if such acts constitute improper conduct, is improper as envisaged in section 182 of the Constitution and constitutes maladministration as envisaged in Section 6(4) of the Public Protector Act, I find that:

i. DIRCO did set and later fail to honour meetings but the allegation regarding whether or not the Complainant was advised before arriving for such meetings of the cancellation thereof, is inconclusive;
Such conduct can’t be said to be consistent with the standard of
good administration expected under section 195 of the Constitution,
which includes professional and responsive treatment of members
of the public. Neither is the conduct consistent with section 33 of
the Constitution entrenching the right for the Complainant to enjoy
just administrative action, which includes protection from unjust,
unfair and arbitrary action when interacting with organs of state.
The conduct is also not resonant with Batho Pele principle of
fairness and the Constitutional value of Ubuntu; and.

However, the handling by DIRCO of the Complainant’s request to
be assisted with the alleged domestic violence by a Russian
diplomat could have been handled better.

The handling of the Complainant by DIRCO cannot be said to meet
the standard envisaged under sections 33 and 195 of the
Constitution and accordingly constitutes improper conduct and
maladministration.

(bb) The appropriate remedial action I'm taking in pursuit of 182(1)(c) of
the Constitution, to redress the prejudice or injustice suffered by the
Complainant, is to call upon:

i. DIRCO to apologise to the Complainant in writing for unduly failing
to offer her responsive assistance resulting in her arrest as she
demanded responsive service.

(cc) Regarding the propriety of SAPS' removal of the Complainant from
DIRCO by means of arrest and imprisonment and if such acts
constitute improper conduct, maladministration and/or abuse of
power?
i. The conduct of members of the SAPS officials did not meet the standard of fairness and reasonability required by Section 195 of the Constitution, because there was no indication of when the conduct of the Complainant, although it might have been unreasonable, crossed the boundary between unreasonable and unlawfulness which may have warranted her arrest as opposed to alternative options.

(dd) The appropriate remedial action I am taking to redress the injustice suffered by the Complainant action to be taken in terms of section 182(1)(c), to redress the prejudice or injustice suffered the Complainant and prevent similar pain to others is that:

i. The Station Commander of Brooklyn Police Station issues an apology to the Complainant for the imprisonment.

ii. The Minister of the Department of Public Service and Administration and the Minister of Police to develop and adopt a policy to guide public authorities on decisions relating to unreasonable conduct of members of the public and the possible limitation or refusal of services to such persons in a manner that is consistent with the Constitution, to prevent arbitrary, inhumane and discriminatory actions.

(ee) The appropriate remedial action I'm taking in pursuit of 182(1)(c) of the Constitution, to redress the prejudice or injustice suffered by the Complainant, is that:

ii. DIRCO is to apologise to the Complainant in writing for failing to honour the appointment made with the Complainant which resulted in her arrest.
(e) Allegations relating to the investigation of a criminal case against her then fiancé’s children, Mr de Klerk by officials of the Sinoville Police Station.

i. Regarding the conduct and service failure allegations against police officers to whom the Complainant requested an investigation into criminal allegations against her fiancé’s children for physical abuse, I am unable, on the available evidence, and given the considerable lapse of time, to conclude that the investigation was not properly dealt with by officials of the SAPS and the ICD.

(f) Allegations against the SAPS relating to the investigation of the mysterious death the Complainant’s fiancé, Mr de Klerk and her brother, Mr Wilson Makudubela

i. With the available evidence, I am unable to make a determination on the conduct of the SAPS.

ii. I am, however, deeply concerned about unsolved suspected murders as such may entail impunity for a murderer or murders somewhere. The fact that Mr Makudubela’s docket seems to be missing heightens my concern and is something to be given serious consideration.

iii. The remedial action I intend taking is to refer these matters to the matter to the Civilian Secretariat for investigation. Our limited resources prevented a proper investigation into what really happened.

(g) *Allegations against Brooklyn Police Station relating to the investigation of the alleged assault and intimidation (domestic violence) by a diplomat: my finding is that:*

i. It is clear that there is a discrepancy in the correspondence relating to the case of assault and intimidation by a Russian diplomat.
Paragraph 6.3.1.25 (b) (letter dated 2 April 2009, the SAPS, Mr AH Lamoer (Divisional Commissioner Visible Policing: Pretoria) states that "the case was registered as assault and "closed undetected" due to the fact that the suspect was out of the country".

Paragraph 6.3.2.1(letter dated 20 January 2012 from Colonel SA Masuluke- Branch Commander of the Brooklyn Police Station) states:

"The matter was investigated and the police could not serve the protection order on the suspect due to lack of information concerning the suspect which made it difficult for the police to trace the suspect. As a result the case was filed”.

It is clear from the above statements that DIRCO and the SAPS did not conduct the investigation properly and this constitutes maladministration.

However, no effective remedy can be provided to the Complainant in this regard as the diplomat is no longer in the country.

The remedial action to be taken in terms of section 182(1)(c) of the Constitution is the following:

a. The National Commissioner of SAPS and the Director General at DIRCO must indicate what policies or directives are in place between the SAPS and DIRCO when dealing with matters concerning diplomats.

b. DIRCO and the SAPS must apologise to the Complainant in writing for failing to handle the matter properly.
(h) Allegations relating to the investigation of Malicious Damage to Property by officials of the Brooklyn Police Station

i. The case was reopened and investigated. The docket was sent to the Senior Public Prosecutor for a decision because there were no grounds to arrest the suspect, or a witness or damages to prove the allegations. Prosecutors have delegated discretion in terms of the National Prosecuting Authority Act to refuse to prosecute if it is of the opinion that there is insufficient evidence to prosecute.

j. However, there is inconclusive evidence regarding whether or not SAPS did properly investigate and submitted a credible docket to enable the NPA to make the right decision.
A REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AGAINST VARIOUS INSTITUTIONS BY MS MAKUDUBELA

1. INTRODUCTION

1.1. “Law and Justice” is my report as Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(1) of the Public Protector Act to:

1.2.1. National Commissioner, General MV Phiyega (SAPS);
1.2.2. Ms V Vedralankar (Chief Executive Officer of the Legal Aid South Africa (LASA));
1.2.3. Mr T Olivier (Acting Chief Executive Officer of the South African Broadcast Corporation (SABC));
1.2.4. Mr JM Matjila (Ambassador at the Department of International Relations and Cooperation (DIRCO));
1.2.5. Mr TM Masutha (Minister of the Department of Justice and Correctional Services (DOJC)); and
1.2.6. Mr C Chabane (Minister of the Department of Public Service and Administration (DPSA)).

1.3. Copies of the report are also provided to the Complainant, Ms TA Makudubela and Dr E Kenoshi (Chief Executive Officer - Steve Biko Hospital) for noting purposes.

1.4. The report relates to an investigation into allegations of maladministration against various institutions and their alleged improper conduct.
2. **THE COMPLAINT**

2.1. The Complainant approached the Public Protector on 24 August 2011 with allegations of maladministration and improper conduct in a number of incidents or events where she was treated improperly by the institutions or bodies concerned.

2.2. She alleged that:

2.2.1. In 2006 she gave the SABC two videos of her latest album "GOBOIMA LEFAASENG". The SABC did not want to play the title track and the Complainant wanted to know the reason for refusing to play the title track, since it is "her right" to have her music played on all the SABC channels as well as radio and stations.

2.2.2. The SABC allegedly played the video of the song "MPULELE DITSELA" and allegedly changed the sound of the song by "putting new sound on top of the original". She specifically made the following accusation against the SABC:

"They changed the sound of that song the way that it was recorded; they recorded their new sound on top of my original sound and instrument "...."They destroyed that song inn (sic) a way that everyone who would see the video would not want to buy my music".

2.2.3. LASA refused to assist her in the matter against the SABC;

2.2.4. Officials of the Brooklyn Police Station failed to investigate cases of assault, intimidation and malicious damage to property. Regarding the case of the alleged assault by the Russian diplomat, she indicates that she believes that he was sent by the South African government to kill her as he was trained to kill;
2.2.5. She was wrongfully arrested and imprisoned when she went to the DOJC offices to see the Minister, after being invited by the Minister to attend a meeting regarding her complaints;

2.2.6. She was arrested and imprisoned when she went to DIRCO to report a Russian Diplomat for allegedly assaulting her;

2.2.7. A Medical Practitioner who treated her at Steve Biko Hospital was negligent and abusive towards her and caused her leg not to heal properly;

2.2.8. Members of the Sinoville Police Station failed to investigate a case against her then fiancé's children; and

2.2.9. The SAPS failed to investigate or failed to inform her of the outcome of investigations relating to the mysterious death of her brother (Wilson Makudubela).

2.3 The complaint was assessed and preliminary information analysed to extract issues for investigation. In the end, the following issues were considered and investigated:

2.3.1 CONCERNING THE MUSIC RIGHTS DISPUTE WITH THE SABC

2.3.1.1 Whether the SABC improperly refused to play the Complainant's title track "GOBOIMA LEFAASENG", and if so whether this constitutes improper conduct and maladministration?

2.3.1.2 Whether the SABC improperly remixed the sound of the Complainant's video "MPELELE DITSELA", in violation of her copyright to her music and if this constitutes improper conduct, maladministration as envisaged in section 6(4) of the Public Protector Act, and caused the Complainant to suffer prejudice?
2.3.1.2 Whether LASA unduly failed to help the Complainant vindicate her intellectual property rights and if this constitutes improper conduct, maladministration and caused prejudice to the Complainant?

2.3.2 CONCERNING THE SERVICE FAILURE COMPLAINT AGAINST THE DOJCD

2.3.2.1 Did the DOJCD improperly refuse to hold an agreed meeting with the Complainant at a set time and date and if so does this constitute improper conduct, maladministration and caused prejudice to the Complainant?

2.3.2.2 Did SAPS improperly remove the Complainant from the DOJCD premises by means of arrest and imprisonment and if so does such conduct amount to maladministration and/or abuse of power as envisaged in Section 6(4) of the Public Protector Act?

2.3.3 CONCERNING ALLEGED DOMESTIC VIOLENCE BY A DIPLOMAT

2.3.3.1 Did DIRCO set and then improperly refuse to honour meeting(s) with the Complainant at set times and dates and if so do such acts constitute improper conduct and maladministration?

2.3.3.2 Did SAPS improperly remove the Complainant from DIRCO by means of arrest, police brutality and imprisonment and if so do such acts constitute improper conduct, maladministration and/or abuse of power?

2.2.3 CONCERNING ALLEGED SERVICE FAILURE & BRUTALITY BY POLICE

2.2.4.1 Whether or not relevant police officers of the Sinoville, Brooklyn or Sunnyside Police Stations unduly failed to properly investigate the Complainant's cases and if their acts constitute improper conduct, maladministration and/or abuse of power? The cases in question are:
(a) A criminal case against her then fiancé's children;
(b) Failure to properly investigate the death of her fiancé and brother;
(c) Cases relating to assault and intimidation by a Russian diplomat;
(d) Malicious damage to property by her landlord; and
(e) Assault by the diplomatic police.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent constitutional office established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that the Public Protector has the power 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 prescribed in legislation.

3.3. In terms of Section (6)(4) of the Public Protector Act, the Public Protector is competent to investigate, on his/her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level and any alleged improper conduct by a person performing a public function.

3.4. The Public Protector is further mandated by the Public Protector Act, 23 of 1994, to investigate and redress maladministration, abuse of power and related improprieties in the conduct of state affairs. The Public Protector Act also confers on the Public Protector additional power to resolve disputes through conciliation, mediation, negotiation or any other means deemed appropriate by him or her.
3.5. The aspects of the complaints against the officials and office bearers of the SABC; SAPS service centres in the Brooklyn, Sunnyside and Sinoville Police Stations; DOJC, DIRCO and LASA, that are alleged or suspected to be improper or result in any impropriety or prejudice fall within the jurisdiction of the Public Protector.

3.6. While the Public Protector has jurisdiction to deal with healthcare issues at public hospitals and medical facilities in so far as such acts may be classified as maladministration and other forms of improper conduct under section 6 of the Public Protector Act, I took into account the time that has elapsed since the accident occurred and concluded that I am unable to take this matter further.

3.7. I also had to decide whether or not to take some of the complaints as they related to events that happened as early as 2006. In the end I exercised my discretion in her favour because she had been actively engaged in challenging the outcomes with various institutions, including Parliament, for years before coming to my office. I also thought her matters dealt with important public interest matters of intellectual property rights of artists in the music industry and the use of force and the appropriateness of arrest in the arrest of persons refusing to leave public service centres.

3.8. Where I made findings of impropriety, I had to consider appropriate remedies as envisaged in section 182(1)(c) of the Constitution and section 7 of the Public Protector Act. The key consideration was to place the Complainant as close as possible to where she would have been but for the maladministration or abuse of power and the consequent prejudice or injustice suffered by her. I also had to consider remedies that seek to prevent a recurrence of such maladministration or related improper conduct with a view to ensuring that no member of the public suffers the same fate in the future.
4. THE INVESTIGATION

4.1 Investigation approach:

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, 1994.

4.1.2 The investigation was conducted by way of telephonic interviews and written correspondence, as well as interviews and meetings with officials of the respective organs of state, relevant external witnesses and with the Complainant. It also included sourcing and analysis of relevant documents. Applicable laws and policies were researched, analysed and applied.

4.2 The Investigation Process and Key Sources of information

4.2.1 Correspondence

4.2.1.1 Telephonic communication between the Public Protector and the Complainant on various dates between April 2012 and November 2014.

4.2.1.2 Telephonic communication between the Public Protector and members of the Brooklyn and Sunnyside Police Stations on 13 June 2012, 20 July 2012 and 27 July 2012 respectively;

4.2.1.3 Correspondence and telephonic communication between the Public Protector and DIRCO on 2 August 2012 and 17 August 2012;

4.2.1.4 Telephonic communication between the Public Protector and Mr Paul Mabilo, former producer and keyboard player for the Complainant, on 1 April 2013 and 14 November 2013; and
4.2.1.5 Correspondence and telephonic communication between the Public Protector and Mr Keith Lister (Chairperson - The South African Music Performance Rights Association-SAMPRA) on 28 November 2013 and 9 December 2013.

4.2.2 Meetings

4.2.2.1 Meetings with the Complainant on various dates between April 2012 and November 2014.

4.2.2.2 Meetings with Captain Mashige (Brooklyn Police Station) on 13 June 2012, Captain de Beer (Sunnyside Police Station) on 27 July 2012, Colonel Daniels (Diplomatic Policing) on 20 April 2012 and Major General Johnson (Head: General Crime Investigations SAPS) on 13 November 2014.

4.3 Documents

4.3.1 Letter of complaint and other documentation submitted by the Complainant dated 23 August 2011;

4.3.2 Copies of affidavits of Mr N Moloi dated 14 May 2007, Mr P Mamphitha undated and Mr P Mabilo dated 14 May 2007 relating to the change in sound of the music video of the Complainant;

4.3.3 Copy of a letter from the Office of the Speaker Mr P Lebeko (Executive Director) addressing various issues dated 8 June 2010;

4.3.4 Copy of a letter from the South African Human Rights Commission (SAHRC) addressing the various issues dated 21 December 2010;

4.3.5 Copy of an undated letter from Legal Aid South Africa (LASA) stating the reasons for refusal of Legal Aid and a copy of a letter regarding the appeal against the refusal of Legal Aid dated 9 April 2009;
4.3.6 Copy of a letter from the International Liaison Nodal Point for Diplomatic Policing in South Africa addressed to Mr T Govender at DIRCO regarding the alleged assault and intimidation by a Russian diplomat dated 26 November 2008; and

4.3.7 Copies of statements from the SAPS, relating to the cases opened by the Complainant and to her arrest dated 09 December 2008, 25 February 2009, and 2 April 2009.

4.4 Legislation and Other Prescripts

4.4.1 The provisions of the following applicable legislation and other prescripts were considered and applied where appropriate:

4.4.1.1 The Constitution of the Republic of South Africa Act, 1996 (the Constitution);
4.4.1.2 The Public Protector Act 23, 1994 (the Act);
4.4.1.3 Copyright Act 98 of 1978;
4.4.1.4 Performers Protection Act 11 of 1967;
4.4.1.5 The SABC Policy on Local Content;
4.4.1.6 Criminal Procedure Act 51, 1977; and
4.4.1.7 Applicable case law.

5. LEGAL AND REGULATORY FRAMEWORK: STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1 Complaint Against the SABC

5.1.1 Regulation of Opportunities for a Performing Artist's Music to be Played

5.1.1.1 The SABC Local Content Policy provides that the SABC has to comply with certain quotas set by ICASA. The SABC's music stations (those that devote
15% of their airtime to music) have to comply with these quotas. The quotas stipulate that a percentage of the tracks played between 5h00 and 23h00 have to be South African. Further, each radio station has the responsibility to ensure that they comply with local content quotas applicable to them.

5.1.2 Intellectual Property Rights for Performing Artists

5.1.2.1 The conduct of the SABC in dealing with the Complainant’s music video had to comply with the Copyright Act. Section 2 of the Copyright Act states that sound recordings and musical works are eligible for copyright, in other words, the Act will grant protection to these categories of work.

5.1.2.2 On copyright infringement, section 23(1) of the Copyright Act that Copyright is infringed when “any person, not being the owner of the copyright who, without license of such owner, does or causes any other person to do, in the Republic, any act which the owner of the copyright has the exclusive right to do or to authorise”.

5.1.2.3 The SABC's conduct also had to comply with the requirements of the performers Protection Act 11 of 1967. Section 5(1) of the Act prohibits certain conduct in relation to the work of a performer without his or her authorisation. This includes fixating and distribution. Important to note is that where consent is given to broadcast work not yet fixated, the consent is deemed to cover everything the broadcaster needs to do to get the works ready for broadcast. My reading of the section is that it does not extend that authority to repackage work already fixated without the owner's authority.

5.1.3 General Principles of Good Administration and Just Administrative Action

5.1.3.1 Like all organs of state, the SABC is obliged to comply with all key constitutional requirements all its dealings, including its dealings with performing artists. Key constitutional provisions relevant to the impugned
conduct relating to the handling of the Complainant are principally those setting the standard for good administration in the exercise power. In this regard I considered section 195 of the Constitution apposite.

5.1.3.2 Section 195(1) provides that:

"Public administration must be governed by democratic principles enshrined in the Constitution, including the following principles:

(a) A high standard of professionalism must be promoted and maintained
(b) ....
(c) Public administration must be development oriented....
(d) ....
(e) People's needs must be responded to ....
(f) ....
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

5.1.3.3 Section 33 of the Constitution enjoins the SABC to respect the Complainant's right to administrative action that is lawful reasonable and procedurally fair. Compliance with section 33 of the Constitution would have required the SABC to comply with all relevant laws including the Copyright Act and the Performers Protection Act, in addition to being procedurally fair and eschewing unreasonable action.

5.2 Complaints against SAPS and the Other Organs of State

5.2.1 The Complainant's complaints about the standard of service that she received from the SAPS and other organs of state also raised questions about the level of compliance with Section 195 of the Constitution and proper service delivery as provided for in the Batho Pele principles. Batho Pele principles require, among other things, fairness in the delivery of public services. Section 33 of the Constitution entrenching the right to just administrative action, also applies to SAPS and other organs of state.
5.2.2 **Regarding alleged wrongful arrest, police brutality and imprisonment**

5.2.2.1 Whereas section 35 of the Constitution, spelling out the rights of arrested and detained and accused persons, does not limit the circumstances under which arrest may be used, arrest is a form of administrative action that must conform with sections 195, 33 and the rest of the provisions in the bill of rights and the founding values the Constitution. Furthermore the Constitutional court and other courts have laid down guidelines on the purpose of arrest and proper way of effecting arrests in resonance with the dictates of the rest of the architecture of South Africa’s constitutional democracy including with entrenched human rights and the founding values and the societal vision in the Constitution.

5.2.2.2 Regarding the values, one of the values, all state action must comply with is according to the Constitutional Court in *S v Makwanyane*, the value of Ubuntu. The court, in *Makwanyane*, further said that all conduct in state affairs must be rational, in other words, it is not enough for an administrator to say there is no law prohibiting him or her from doing something or that there is a law authorising him or her to do it. Ultimately there must be proportionality between the means used and the ends desired and if there is more compassionate way to reach the same ends, such must be preferred.

5.2.2.3 The courts have also said public power must always be exercised in accordance with the law and in the public interest.

5.2.2.4 It follows that an arrest is lawful only when effected in accordance with statutory regulations (*Ramphal v Minister of Safety and Security 2009 (1) SACR 211 (E) at [9]*). The object of an arrest must be to bring the arrested person before a court to be charged, tried and then either convicted or acquitted (*Kotze v Minister of Safety and Security 2012 (1) SACR 396 (GSJ) AT [28]*) The decision to arrest must be based on an intention to bring the
arrested person to justice and not for ulterior purposes, or to “educate” the arrested person or to teach him or her a lesson (Erasmus v MEC for Transport, Eastern Cape 2011 (2) SACR 367 (ECM) at [21]).

5.2.2.5 Section 50 of the Criminal Procedure Act, 1977 (Act 51 of 1977) contemplates the possibility of the release of a suspect after detention if further investigation has revealed no proof to substantiate a prima facie case against the suspect (Duncan v Minister of Law and Order 1986 (2) SA 805 (A) 819 H-820E). However, should the person effecting the arrest not intend to bring the detainee before a court at all, and arrest him exclusively for other reasons, the arrest will not be lawful for purposes of section 40(1)(b) (A second category consists of persons reasonably suspected of having committed or of having attempted to commit an offence). (Duncan v Minister of Law and Order 1984 (3) SA 460 (T) 465 et seq). Anyone who arrests a person to punish or reprimand him is guilty of unlawful arrest (R v Malindisa 1961(3) SA 377 (T) 380).

5.2.2.6 Although arrest is generally a more drastic method of obtaining the presence of an accused at his trial than is a summons, an arrest is only lawful if statutorily permissible. In Mvu v Minister of Safety and Security & another 2009 (2) SACR 291 (GSJ), relying on Hofmeyr v Minister of Justice & another 1993 (3) SA 108 (C) and Minister of Justice v Hofmeyr 1993 (3) SA 131 (A), Willis J held that even when an arrest had been lawful, a police officer had to apply his mind as to whether the detention of a suspect was necessary at all. ([14]). A suspect should not be subjected to pre-trial detention if the sentence likely to be imposed upon conviction would be in the form of a fine or a sentence other than imprisonment ([12]). An arresting officer should always consider avoiding detention either by releasing the suspect on warning or on bail depending on the circumstances of the case ([13]). The detention of a suspect will not be lawful and a reasonable interference with his liberty and fundamental dignity where his detention was not necessary to secure his attendance before court or to protect the public.
5.2.2.7 Arrest is the most drastic method whereby an accused's attendance at his/her trial can be ensured; and it ought, as a matter of policy and principle, to be confined to those serious cases where less invasive options are not available. Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution, 1996 (Act 108 of 1996), the Criminal Procedure Act (Act 51 of 1977) and other legislation concerning the circumstances when a person may be arrested and how such person should be treated, must therefore be strictly adhered to.

5.2.3 Alleged Failure to Investigate and Prosecute on Reported Criminal Cases

5.2.3.1 Again the SAPS is obliged to meet the dictates of just administrative action and good administration envisaged in section 33, and 195, respectively in dealing with the cases reported by the Complainants at its police stations. It also had to comply with constitutional values and Batho Pele principles.

5.2.3.2 Although not investigated, it is worth noting that the role and function of the National Prosecuting Authority (NPA) which is responsible for the institution of criminal proceedings after SAPS has investigated, is regulated by the Constitution of the Republic of South Africa, 1996, and governed by the National Prosecuting Authority Act, 32 of 1998. The Constitution read with the National Prosecuting Authority Act provides the NPA with power to institute criminal proceedings on behalf of the State, to carry out any necessary functions incidental to institution of criminal proceedings and to discontinue criminal proceedings

5.2.3.3 The Director of Public Prosecutions has discretion in terms of the Act to refuse to prosecute if he or she is of the opinion that there is no sufficient evidence to prosecute. (Public Prosecutors have a delegated discretion). However, if we accept the rationality guidance in Makwanyane, the decision-making should be rational, not arbitrary and based on a proper investigation. It also follows that the
decision should also take into account public interest. In this regard, failure to investigate an unexplained killing of a person cannot be said to be rational or in the public interest as there is potential impunity for a murderer. Needless to say to that would be at odds with the founding values of accountability and the rule of law, entrenched in section 1 of the Constitution.

5.3 The Public Protector Act, 1994

5.3.1 It is worth noting that the impugned conduct of all implicated organs of state and individuals ultimately has to be fitted into the categories of prohibited conduct under section 6 of the Public Protector Act. In the case in point, the key possible violations identified, were maladministration and abuse of power.

5.3.2 I also took into account powers conferred by the Public Protector Act regarding possible relief or remedies in the event I found in the Complainant’s favour and in the application thereof also took into account section 182(1)(c) of the Constitution which states that:

"(1) The Public Protector has the power as regulated by national legislation:
(a) to take appropriate remedial action".

5.3.3 In the consideration of relief, which as indicated earlier, is about placing the Complainant as close as possible to where she would have been but for the impugned conduct of state actors, I also sought guidance from the Batho Pele principle of redress.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Complaint against the SABC

6.1.1 Allegations and information presented by the Complainant
6.1.1.1. The Complainant alleges that she is a gospel musician who earns her living through music sales and that through improper conduct by the SABC, following her approaching it to play her music, having played some of her music previously, one track was rejected and another was accepted for play but ended up being altered without her consent.

6.1.1.2. The Complainant alleged that in January 2006, she approached the SABC to request that her music be promoted and played on its television channels. She said that upon giving the SABC two videos of her latest album "GOBOIMA LEFAASENG", the SABC refused to play the title track but agreed to play one of the other tracks. The SABC allegedly played the video of the song "MPULELE DITSELA". The SABC allegedly changed the sound of the song by "putting new sound on top of the original".

6.1.1.3. She stated that her producer, Mr Paul Mabilo, accompanied by two of her backing vocalists went to the SABC to meet with the Gospel Gold team and Mr Solly Mabelane. The SABC denied changing the music, but when her producer indicated the changes made to her music video, she and her producer were told to find an expert to analyse the music video. She did not have the money to do so.

6.1.1.4. In January 2007, the Complainant obtained the services of a lawyer to assist her with the case against the SABC. Soon after her lawyer came into contact with the SABC, he stopped working on her case. She then approached a certain Advocate Mogagabe to help her with her case. According to the Complainant, when he got into contact with the SABC, Adv. Mogagabe also stopped working on her case. The Complainant and her family went to protest at DOJCD. The Department agreed to assist the Complainant with her case against the SABC and then appointed Beyers Dat Attorneys to assist her. The attorneys requested financial information and later informed her that she does not qualify to get help from government.
6.1.1.5. The Complainant has submitted that after destroying her music, the SABC no longer plays her music in its TV channels and radio stations.

6.1.1.6. In support of her allegations, the Complainant submitted sworn affidavits from:

(a) Nelson Moloi, sound engineer at Cool Spot, dated 14 May 2007, stating that “the following on Tholedi’s track Mpuleleditsela, the sound is different (bad) from the original of the CD & Beta Cam”.

(b) Prince Mamphitha, sound engineer at Face off Studio, undated stating that “Gospel Gold “played something different to the original one”.

(c) Paul Mabilo, former producer and keyboard player of Complainant, dated 14 May 2007, stating:

“I really don’t know what is it that they have done to drastically change the sounds on that track. I am saying this because I personally played all the tracks and they really sound very different from the CDs, cassettes and betacom. During the 29 January broadcast I even phoned Tholedi trying to understand what was happening, I even thought maybe it was my TV set only to find out that everywhere it was like that.”

6.1.1.7 She further submitted correspondence showing that the complaint against the SABC had over the years been taken to a private lawyer, who failed to take it forward, then the Department of Justice, Legal Aid South Africa(LASA), South African Human Rights Commission, the Presidency and Parliament without success. Our records confirmed this to be true.

6.1.2 Evidence and information obtained from Mr P Mabilo
6.1.2.1 A telephonic interview was conducted on 3 July 2012, with Mr Paul Mabilo (former producer and keyboard player for the Complainant) who basically confirmed her allegations. He submitted that:

"Complainant and I met with an SABC representative to explain the change in the music, they were informed that the DVD was not reliable and had to be transferred to another reliable tape, and since the music was played already he felt that there was nothing further they could do".

6.1.2.2 Mr Mabilo further explained that there is no contractual obligation for the SABC to play an artist’s music, that it is the discretion of SABC to air or not to air music and that any music cannot be played indefinitely.

6.1.3 Evidence and information obtained from Mr K Lister (South African Music Performance Rights Association (SAMPRA))

On 28 November 2013 the investigator contacted Mr Lister (Chairperson of SAMPRA which is a collective licensing society of copyright owners of music sound recordings). An e-mail was then sent on 5 December 2013 and on 9 December 2013 Mr Lister responded to the e-mail by stating the following:

"I would need to know how the SABC changed the sound of the songs on the video. In principle, a broadcaster should not make any changes to content supplied to it by a copyright owner. However, in practice, broadcasters do normally suggest to the copyright owner that steps should be taken to enhance the quality of content if necessary, rather than not using the content because it is not of broadcast quality. SABC could be criticised for not having consulted with the complainant in this instance before making the changes, but I think that their response to such a complaint would be that they did what they did in good faith and in what they thought was in the best interests of the complainant because if they had not done what they did they would not have broadcast the video at all."
The complainant is wrong in contending that "it is her right for her music to be played" since it is entirely within the discretion of SABC or any other television or radio broadcaster - as to what video or tracks they can choose to broadcast.

Normal SABC practice is to require a person who submits videos to them to sign a document that gives SABC the right to flight the video. If in this instance the delivery of the video took place in 2006. It really is difficult to comment on what the SABC policy was at the time. However it is clear that the Complainant delivered the videos to the SABC with the clear intention that they should be broadcast. It would be difficult to sustain a formal complaint against the SABC for thereafter doing what the complainant clearly wanted them to do.

**There are no policies that regulate the relationship between an artist and SABC.** SABC is required to know and apply the provisions of the Copyright Act and the Performers Protection Act. While it is technically possible to find fault with SABC in this instance for not having, apparently, obtained a written approval by the complainant to broadcast her videos and for not having consulted with her before they made changes to the quality of her videos, in balance I don't believe that this matter in which SABC can realistically be held legally at fault for its conduct even if it has technically violated the complainants rights.

It should be borne in mind that **SABC receives a massive number of tracks and videos from artists, record companies and producers who are anxious to have their tracks and videos broadcast by SABC stations and channels.** This has undoubtedly, **created a state of mind on the part of some SABC programme and content managers that leads them to from time to time ignore the contractual rights or the statutory rights of performers and records companies.** (My emphasis)

6.1.4 Records and correspondence of the Office of the Speaker of Parliament
6.1.4.1 The Office of the Speaker of Parliament investigated the Complainant’s allegations against the SABC and in a letter dated 8 June 2010, Mr P Lebeko, the Executive Director, reported as follows to the Complainant:

(a) “On the 25 June 2010 the SABC (TV-Religion: Content Hub SABC) wrote to you and thanked you for the meeting on 21 June 2006 in which they agreed to broadcast each video once in a television programme called Gospel Gold.

(b) They stated that the videos that you provided were not broadcast quality and that certain archive footage featured in the songs called Go Boima and we are all the children were copyrighted material that could not be broadcasted by SABC. They informed you that it would be replaced with suitable shots from the original video recordings which you had to supply.

(c) On 20 February 2007 Mkhabela Attorneys wrote to the SABC on your behalf complaining that you “never had a rosy relationship with Gospel Gold” that your complaints dated back to 2004 and that they were never resolved by Rev Solly Mabelane. On 19 April 2007 the SABC responded, after they were served by the sheriff on 6 April 2007. They stated your allegations were investigated and that you were informed on 3 October 2006 that your allegations were unfounded. They were of the opinion that the matter was thoroughly investigated, that you were informed accordingly and denied any fault on their part.

(d) On 17 August 2007 you lodged a complaint with the Minister of Justice against Mkhabela Attorneys and their handling of your case against SABC Gospel Gold Programme for (putting new sound on top of the original sound of Complainants music). They provided the assistance of Beyers Dat Attorneys and you subsequently met with Anna Strydom and Vanessa van Zyl on 25 October 2007 to establish if you had a “proper cause of action to institute such action”. They informed you on 3 April 2008 that
based on the available evidence “no unprofessional conduct” on the part of the attorney could be found and that no disciplinary steps would be justified against Advocate Mkhabela.”

6.1.5 Response of Mr T Olivier (Acting-Group Chief Executive Officer of SABC), to my Notice to him in terms of Section 7(9)(a) of the Public Protector Act

6.1.5.1 In compliance with Section 7(9) (a) of the Public Protector Act, I informed Mr T Olivier (Acting- Group Chief Executive Officer of SABC) of my intended findings in this matter.

6.1.5.2 Mr Olivier in his letter dated 29 August 2014, responded by stating that the challenge his office faced regarding a response to the above allegation(s) is that all the personnel who worked with the matter have since left the employ of the SABC and have been unable to locate any record of the matter, except for the response prepared by the Parliament of the Republic of South Africa, covering several issues raised by the Complainant, which included the matter against the SABC, i.e. (iv) of the response dated 08 June 2014.

6.1.5.3 Response of the Parliament of the Republic of South Africa

6.1.5.3.1 The Office of the Speaker of Parliament investigated the Complainant’s allegations against the SABC and in a letter dated 8 June 2010, Mr P Lebeko, the Executive Director, repeated what is captured in paragraph 6.14 above. The only additions were that the past payment dispute with the SABC had been resolved and the Complainant paid for her music and that LASA, through government’s assistance had considered her complaint and found it to be without merit. It further mentioned that an appeal opportunity was granted by LASA with outcomes remaining unchanged.

6.2 Complaint against the LASA for refusal of legal aid
6.2.1 Records and correspondence from LASA

6.2.1.1 The Complainant applied for legal aid regarding the SABC issue. In an undated letter LASA wrote to the Complainant informing her that "after careful consideration of your application for legal aid, there are no merits in your application for assistance and we regretfully advice that legal aid has been refused". The Complainant was further informed of her rights to appeal against refusal of legal aid.

6.2.1.2 In a letter dated 9 April 2009, LASA, under the signature of W Lambley Regional Operations Executive, Gauteng/Limpopo Regional Office, acknowledged receipt of the Complainant’s appeal documents and indicated that it has investigated the matter and found the following:

(a) “Your application for legal aid, in a civil case was unsuccessful. In the absence of any agreement between yourself and the SABC, there is no legal obligation on the SABC to screen your music video.

(b) Furthermore, it is normal practice for any broadcaster to rectify levels of packaging of a music video and again, there is no agreement prohibiting this.

(c) It is not possible to determin[e] any nexus between the airing or non-airing of Complainant’s video as well as the rectifying of the packaging, and Complainant’s alleged loss of revenue.

Legal Aid Board provides legal assistance in civil matters if the applicant qualifies in terms of the means test and if there are sufficient merits in the matter. In view of the above the Legal Aid Board was of the opinion that there were no merits in Complainant’s application.

(d) Therefore the Complainant’s appeal against refusal of legal aid was unsuccessful.
(e) The Complainant was further advised that she has the right to appeal further to the National Executive Office, by writing a letter to the National Office and providing the necessary documentation. The Complainant was also provided with an address of the said office.

6.3 Complaint against Brooklyn Police Station - Alleged Assault and Intimidation: SA Citizen Ms Makudubela by a Russian Diplomat (CASE 457/11/2008)

6.3.1 Allegations and information submitted by the Complainant

6.3.1.1. The Complainant alleged that on 5 November 2008, she was nearly killed by a Russian man who works at the Russian Embassy in Pretoria. According to the Complainant, he strangled her until she couldn’t breathe. At the time, she was with her sister’s son, Andrew Ramafela, who helped her.

6.3.1.2. The Complainant went to the Brooklyn Police Station to report the matter. Officer M Ramala opened a case of attempted murder and informed the Complainant to go to the Pretoria Central Court to obtain a protection order. Officer Ramala told her that upon receipt of the protection order, she must come back to the police station so that they could arrange with the Diplomatic Police to accompany her to the Russian Embassy.

6.3.1.3. Two officials of the Diplomatic Police accompanied her to the Russian Embassy. When they got to the Embassy they were refused entry to the building. A Russian man who according to the Complainant, was named Andrey Kolkol, knew her and the man who nearly killed her spoke to them. The Diplomatic Police informed Andrey Kolkol that they wanted to see the man who tried to kill her. He told them that they could not enter the building but he would take the protection order to the man. The Diplomatic Police gave him the protection order. At that moment Andreyer Seger (the man who
allegedly tried to kill the Complainant) walked out of the building to where his car was parked.

6.3.1.4. The Complainant informed the Diplomatic Police that he was the man who tried to kill her. Mr Kolkol went to the suspect, spoke to him and came back and told the Complainant and Diplomatic Police that the man refused to sign for the protection order.

6.3.1.5. The Diplomatic Police advised the Complainant to speak to their senior Ms M De Lang. During consultation with Ms de Lang, she informed the Complainant that she knew a Russian man who worked at the Russian Embassy, and she contacted the man and made an appointment for the Complainant to see him.

6.3.1.6. The Complainant also went to DIRCO where she met with Mr T Govender, who contacted the Brooklyn Police station for a case number. He was informed that there is no case of attempted murder and the Complainant was told to re-open the case. Mr Govender spoke to a policewoman who was present at the time when she opened the initial case who also witnessed the bruises on her neck. The policewoman reopened the case and furnished Mr Govender with a case number.

6.3.1.7. The Complainant went to see Mr Govender and he informed her that he had contacted the Russian Embassy and they informed him that they do not know the man he was talking about. The Complainant asked Mr Govender to ask about the protection order that was signed for by Mr Kolkol.

6.3.1.8. The Complainant went to see Colonel Daniels (Diplomatic Policing). He informed her that he was not aware of the case and asked a Mr Kutumela to take over the case from Ms de Lang.
6.3.1.9. The Complainant accompanied by Mr Kutumela, went to the Russian Embassy and they were informed that the DIRCO is in possession of all diplomats' photographs and should be able to assist her in identifying the man.

6.3.1.10. The Complainant and Mr Kutumela went back to Mr Govender to tell him of the outcome, but he was not in the office. Mr Kutumela told the Complainant to come the following day since she had an appointment with Colonel Daniels.

6.3.1.11. The next day the Complainant and Mr Kutumela went to see Colonel Daniels and told him what had happened at the Russian Embassy. Colonel Daniels contacted Mr Govender and informed him that Colonel Daniels will bring a letter to him.

6.3.1.12. Mr Govender informed the Complainant that the Russian Embassy told him again that they do not know the man who the Complainant was referring to. Mr Kutumela told Mr Govender what the Russian Embassy told them at DIRCO, namely that the Complainant could identify the Russian man from the photos they have on file.

6.3.1.13. Mr Govender agreed, but before they could show the Complainant the photographs, Mr Govender received a call and afterwards informed them that he could not show them the photographs and that they must go back to the Russian Embassy and ask for the name and surname of the man.

6.3.1.14. Mr Govender also informed the Complainant to give him two days to speak to his superior, Mr Makhubela. When the Complainant went to see Mr Govender after two days he informed her that Mr Makhubela was very angry with the Russian Embassy for hiding the man and said that a meeting would be arranged between the Russian man, his Ambassador and the Complainant's family. When the Complainant asked why they have to meet
with him, Mr Govender told her that because the suspect is a diplomat, protocol needed to be followed in order to arrest him.

6.3.1.15. When the Complainant went to see Mr Govender after a week, he told her that he is awaiting a response from the Russian Embassy and gave the Complainant a copy of the letter he wrote to the Russian Embassy.

6.3.1.16. After the meeting with Mr Govender, the Complainant received a call from Mr Kutumela informing her that the case was closed. The Complainant phoned Mr Govender and he denied telling Mr Kutumela that the case was closed.

6.3.1.17. The Complainant further alleges that Mr Govender told her that the Russian "man could cut her in pieces and would still not be arrested". The Complainant requested to see Mr Makhubela. Mr Govender told her that she cannot see him. The Complainant then asked him to write down everything he said to her.

6.3.1.18. The Complainant went to the reception to ask to see Mr Makhubela. The receptionist by the name of Gugu told her that there is another person she can see before Mr Makhubela. She took the Complainant's contact number. Subsequently, the receptionist contacted the Complainant and told her that the person she told her about refused to see her. The Complainant asked the receptionist whether she can speak to Mr Makhubela's secretary to make an appointment.

6.3.1.19. According to the Complainant, the receptionist swore at her using vulgar words and also said "she opened her legs and slept with a man whose name she does not even know, she brings shame to South African women and the man should have killed her, stopping her from complaining about everything".
6.3.1.20. The alleged assault, where the receptionist swore and pushed the Complainant and wanted to hit her was witnessed by two women who intervened and called security officials to help. The two women took the Complainant to an office and apologised for the behaviour of the receptionist.

6.3.1.21. According to the Complainant she recorded the incident with her cell phone where the receptionist swore at her and pushed her. The cell phone and her wallet were later stolen.

6.3.1.22 On 26 November 2008 Superintendent M De Lange at the International Liaison Nodal Point for Diplomatic Policing in the South African Police Service wrote to Mr T Govender at the Diplomatic Immunities and Privileges Department regarding an “Alleged assault and intimidation: SA citizen Ms Makudubela by a Russian Diplomat (CASE 457/11/2008)”. He requested the DIRCO for their assistance since the SAPS did not have jurisdiction to investigate cases against diplomats.

6.3.1.23 Mr T Govender (Deputy Director) responded in an e-mail dated 27 November 2008 to Superintendent Daniels (Ms de Lange’s senior) stating the following:

“I refer to your letter dated 26 November 2008, as well as the interim protection order against domestic violence submitted by Ms Makudubela against her former boyfriend Mr Serge Andrue of the Russian Embassy.

Kindly be advised that according to the Department’s records there is no person with the name Serge Andrue at the Russian Embassy. The vehicle registration number 137D138D is a vehicle belonging to the Russian Embassy hence the Department cannot obtain any details of Mr Andrue through the vehicle registration provided.
The Department has conducted a search through its records to identify Ms Makudubela’s former partner (Serge Andrué) but as indicated above no person at the Russian Embassy with that name exists. In addition, without a date of birth, or a photograph or any other information that can be provided by Ms Makudubela, it is extremely difficult to possibly identify the person concerned.

The Department cannot also allow Ms Makudubela to peruse through the Department’s records to identify her former partner.

Whilst the department considers the situation most unfortunate, it cannot, without correct information officially bring to the attention of the Russian Embassy the content of this protection order. The SAPS is requested to find out more details of the person concerned and advice the Department accordingly to enable the Department to bring this protection order to the attention of the Embassy of Russia.

It should also be noted that as accredited officials of a diplomatic mission enjoy inviolability, this interim protection order cannot be served on a diplomatic agent.

The Department does however assist in bringing the matter to the relevant diplomat’s attention.

The department will however forward the SAPS request to the Embassy of Russia, requesting its assistance in identifying the official concerned after consultation with the Department’s bilateral desk and the Deputy Chief of State Protocol.”

6.3.1.24 On 12 December 2008 Mr T Govender at Diplomatic Immunities wrote to the Complainant advising her that the content of the Interim Protection Order against the Russian Official (issued in terms of section 5(2) of the Domestic
Violence Act, 1998 (Act 116 of 1998) was brought to the attention of the Embassy of Russia.

6.3.1.25 On 2 April 2009 the SAPS, Mr AH Lamoer (Divisional Commissioner Visible Policing – Pretoria) wrote to the Complainant regarding CASE 457/11/2008 stating the following:

(a) The Complainant opened two cases at Brooklyn Police Station, one of common assault (CASE 457/11/2008) another of theft involving money and a bank card (CASE 241/11/2008). He stated that although the Complainant alleged that the suspect nearly killed her, the “facts could not be established” due to the fact that Complainant did not consult a medical doctor to determine the extent of her injuries.

(b) The case was registered as assault and “closed undetected” due to the fact that the suspect was out of the country. Complainant was further advised to open a case against the police officials who insulted or harassed her as it was her “right to be heard at any police station”.

6.3.2 Evidence obtained from the SAPS and DIRCO

6.3.2.1 A letter was written to Brigadier Wiesse, the Station Commissioner – Brooklyn Police Station, enquiring into CASE 457/11/2008. Colonel SA Masuluke (Branch Commander of the Brooklyn Police Station) responded in a letter dated 20 January 2012 as follows:

“The matter was investigated and the police could not serve the protection order on the suspect due to lack of information concerning the suspect which made it difficult for the police to trace the suspect. As a result the case was filed.
There is a procedural protocol when dealing with Embassy matters. The police at station level are guided by Police Embassy Unit to obtain information. There was nothing that Brooklyn SAPS could do after the report from Diplomatic Security and Immunity disputes. The Complainant was also given feedback on the matter.

6.3.2.2 When the Complainant was sent a letter outlining the response from the SAPS and also advised of my intended findings as per letter dated 26 March 2012, she disputed the SAPS version.

6.3.2.3 During the meeting with one of the investigators, the Complainant contended that the statement by Colonel Masuluke regarding the assault case was incorrect since she was present when the protection order was served on the suspect who refused to sign for it.

6.3.2.4 In support of the above is a letter dated 26 November 2008 wherein the Diplomatic Policing Unit requested the assistance of the Diplomatic Immunities and Privileges Department, where paragraph 3 of the letter states:

"On Tuesday 2008-11-25 Supt. De Lange requested Captain Kutumela to accompany Ms Makudubela to the Russian Embassy in an attempt to find the person and get the necessary information. They then spoke to Mr Sergey Kolesnikov from the Embassy who informed them that the Department of Foreign Affairs is in possession of all the diplomats' photos. He knew who she was talking about considering he was previously involved in this matter, but refused to give them information."

6.3.2.5 Attempts to contact Mr T Govendor at DIRCO were unsuccessful until a certain Ms Julia Sambo (Foreign Affairs: Administration Officer) advised that Mr Govendor no longer worked there. She undertook to refer correspondence that had been sent to Mr Govendor, to Ms Ilja Kellerman at Diplomatic Accreditation.
6.3.2.6 Ms Ilja Kellerman responded via e-mail dated 17 August 2012 stating the following:

"I discussed the matter with my Director and was requested to inform the office of the Public Protector that DIRCO stands by the content of the e-mail forwarded by Terry Govender on 27 November 2008.

DIRCO has no records of the former partner of Ms Makudubela and no person with the name of Mr Serge Andrue is reflected on their records.

Furthermore none of the officials who dealt with the matter are still working in State Protocol including the Russian Diplomat, Mr Sergey Kolesnikov (mentioned in the SAPS letter dated 26 November 2008) who left Republic of South Africa on 11 November 2011.

DIRCO is therefore not in a position to provide any information and would advise for the case to be closed."

6.3.3 Response of Ambassador JM Matjila (Director-General DIRCO), to my Notice to him in terms of Section 7(9)(a) of the Public Protector Act

6.3.3.1 In compliance with Section 7(9)(a) of the Public Protector Act, I informed Ambassador Matjila of my intended finding in this matter. On 20 August 2014, Ambassador Matjila responded as follows:

"Background

"Ms Tloledi Anna Makudubela, a South African national, was in a relationship with Mr Endrue Serge, a gentleman who she identified as a diplomat working at the Russian Embassy in Pretoria and driving a diplomatic vehicle."
An agreement was reached between Ms Makudubela and Mr Serge that she would enter into a lease agreement for a flat in Pretoria and that Mr Serge would pay the monthly rental on the property. When Mr Serge informed Ms Makudubela that he wanted to work on his marriage, Ms Makudubela chose to end the relationship but requested he continue to pay the rental on the flat until the end of the contract. When Mr Serge failed to make the payment, Ms Makudubela went to the Embassy and met with his supervisors who she identified as Mr Sergey Kolesnikov (First Secretary and Head of Security) and Mr Sergey Ryanzantsev, a colleague of Mr Serge. They requested a copy of the contract and agreed to look into the matter.

Later, Mr Serge requested to meet with Ms Makudubela so that he could hand over the money for the rent. At this meeting on 5 November 2008, Mr Serge allegedly assaulted her.

10 November 2008, Ms Makudubela applied for a letter of demand addressed to Serge Endrue of Lynwood Street and or Brooklyn Pretoria which was issued in terms of Section 29 of the Small Claims Court Act, 1984.

12 November 2008, Ms Makudubela opened a case number 457/1/2008 at the South African Police Services (SAPS) in Brooklyn against Mr Endrue Serge for assault and intimidation. She also obtained an Interim Protection Order in terms of the Domestic Violence Act, 1998 (Act 16 of 1998).

26 November 2008, Mr Terry Govender who at the stage was attached to the Directorate Diplomatic Immunities and Privileges (DIAP) and the Deputy Director responsible for Diplomatic Security and Immunity Disputes, received a letter from the Diplomatic Policing Unit (DPU) requesting DIRCO’s assistance in identifying Ms Makudubela’s attacker as their investigation determined that there was no such person working at the Russian Embassy.
DIRCO support provided to Ms Makudubela and the DPU during the course of the investigation

"DIAP officials undertook a search on the Accreditation database for the Embassy of Russia but were unable to find a diplomat named Endrue Serge.

27 November 2008, Mr Govender sent an e-mail to Colonel Daniels of the DPU. The following matters were raised in this e-mail:

(a) The Department did not have any record of a, Mr Serge.

(b) Requested additional information from the DPU such as a date of birth, photograph or any other identifiable information that can assist the department to verify Ms Makudubela’s attacker. In the absence of additional information the department was unable to assist with the request verification.

(c) Cautioned against the direct serving of the Protection Order as the Embassy of Russia as the Embassy enjoys inviolability.

(d) Undertook to bring the matter under the attention of the Embassy and request for the identification of the diplomat, this would be done in consultation with Bilateral desk responsible for the Embassy as well as the Deputy Chief of State Protocol.

With regards to the request for Ms Makudubela to peruse the Department’s database in an attempt to identify her attacker, this was declined. In accordance to the Diplomatic Immunities and Privileges Act 37 of 2001, the Mission and its archives enjoys inviolability. Article 24 states, “the archives and documents of the mission shall be inviolable at any time and wherever they may be”. The photos submitted to DIRCO for accreditation purposes formed part of the archives of the Embassy of Russia.
A search against the diplomatic vehicle registration (137D138D) provided by Ms Makudubela revealed that the vehicle was registered in the name of the Embassy of Russia, DIAP was therefore unable to identify her attacker using this search method.

Note Verbale PROT/5/P7 dated 12 December 2008 was sent to the Embassy of Russia informing the Embassy of:

(a) the alleged attack by a Russian Diplomat, “Mr Endrue Serge on a South African Citizen;
(b) the Interim Protection Order that Ms Makudubela had taken out against Mr Serge;
(c) Mr Serge had access to and was driving a diplomatic vehicle with registration number 137D183D which is registered in the name of the Embassy.

The Embassy was requested to provide the full name of the individual concerned to the SAPS and to bring the contents of the Protection Order to the attention of the individual concerned. No responses were received from the Embassy to the requests in this Note Verbale.

The Department also sent Ms Makudubela a letter dated 12 December 2008 confirming that the Interim Protection Order was sent to the Embassy of Russia.

January 2009, SAPS closed the case as undetected as no suspect could be identified.

29 January 2009, a letter was sent to Ms Makudubela in response to her letter submitted to the Department dated 27 January 2009 (her letter could not be located in the file).
The focus of the above letters to Ms Makudubela was:

(a) Draw to the attention of Ms Makudubela that she had been previously warned against contravening the inviolability of the Embassy and the consequence if she continued to directly serve on the Embassy.

(b) That the Department does not have a record of the person she had identified.

(c) Advised that the South African Government cannot withdraw the immunity of any diplomatic agent. The waiver of immunity would have to come from the sending state.

(d) That any interaction with the office of the Deputy Chief of State Protocol or the Chief of State Protocol would have to be done in writing and with a prior appointment.

Due to the unavailability of the Senior Managers on the day Ms Makudubela visited the office of the DIRCO, Mr Govender met with Ms Makudubela in a further attempt to support her. Ms Makudubela became disruptive which affected the operations at DIAP to the extent that SAPS was called to remove her from the building.

Conclusion:

"The DIAP is unable to confirm all the events that transpired on the day referred to in the letter from the Public Protector since all the officials have either left the Department (Ambassador Kingsley Makhubela is now at the Department of Tourism, Mr Harold Hoyana at the Presidency), Mr Terry Govender and Ms Monita Weenick are no longer attached to DIAP and Ms Thoko Huma who was at reception at the time of the incident has since passed away".

"Attachments confirming content of report:"
(a) Letter from the Public Protector – Notice in terms of Section 7(9) of the Public Protector Act, 1994.
(b) Letter from the Public Protector- Ms Makudubela complaint.
(c) Letter of Demand – payment of rental by Mr Endru Serge.
(d) Request for assistance from the SAPS.
(e) E-mail to DPU from DIAP.
(f) NV PROT/5/P7 to the Embassy of Russia.
(g) Letter to Ms Makudubela confirming the Protection Order was sent to the Embassy.
(h) Report from DD at DIAP to Director regarding the case and support provided.
(i) Letter from DIRCO to Ms Makudubela dated January 2009.
(j) Confirmation on closure of the case from the DPU.
(k) Lease Agreement’.

6.3.4 Response of Major-General Ngakane (South African Police Service-SAPS), to my Notice issued in terms of Section 7(9)(a) of the Public Protector Act

6.3.4.1 In compliance with Section 7(9)(a) of the Public Protector Act, I informed the National Commissioner of the SAPS, General MV Phiyega, of my intended findings in this matter.

6.3.4.2 On 7 August 2014, Major-General KE Ngakane responded by firstly thanking the Office for having brought this matter to his attention, including the elaborated report on how Ms Makudubela was allegedly unfairly treated by members of the Service.

6.3.4.3 He further stated that from the onset, he established a team to ensure the expeditious finalisation of the investigation of this matter.

6.3.4.4 The preliminary investigation conducted has revealed the following information:

i. The complainant registered this case against her ex-boyfriend, a Russian Diplomat, who strangled her between the period 2008-11-05 at 20:30 and 2008-11-06 at 08:30 at Gurdan flat no. 86, Newlands, Caraway Street, Brooklyn.

ii. The case docket has been closed as “Undetected” because the suspect could not be traced and is registered as a Diplomat, which according to Major-General Ngakane, is a serious concern to him.

iii. However, Major-General Ngakane stated that he is of the view that the investigation of this case docket should be re-opened for further investigation and thereafter it should be submitted to the Director of Public Prosecution for his/her decision.

6.3.4.5 Major-General Ngakane further stated that this Office will receive a final report on or before 28 August 2014 since a thorough investigation had to be conducted.

6.4 Complaint against the Brooklyn Police Station - Malicious damage to property (CASE 820/07/2008)

6.4.1 Allegations and information submitted by the Complainant

6.4.1.1 The Complainant alleged that on 31 May 2008 she reported a matter at the Brooklyn Police Station against a certain Inge Dyer for pouring water on her computer, video machine and bed. According to the Complainant the bed, speakers, printer and keyboard were damaged.
6.4.1.2 A policeman named Dreyer accompanied by a policewoman and a man named August or October with two police officials attended the complaint. According to the Complainant, they witnessed the damage and asked Ms Dyer if she was the one who damaged her belongings and Ms Dyer replied "yes". The police took statements from both the Complainant and Ms Dyer and promised to open a case against Ms Dyer.

6.4.1.3 After three months the Complainant went to the Brooklyn Police Station to enquire about the case when she heard nothing from the police. She was informed that no case was opened against Ms Dyer.

6.4.1.4 The police reopened the case in September 2008 and it was investigated by Sergeant Benny Kgomo.

6.4.2 Evidence obtained from the SAPS

6.4.2.1 A sworn statement of Sergeant Benny Kgomo (investigating officer of above case) attached to the Brooklyn Police Station taken on 9 December 2008, contains the following information:

(a) The Complainant alleged that the suspect known as Ms Frieda Annette Dyer poured water in her garden flat, she alleged that the suspect used a garden hose pipe to sprinkle the water into her room. She further stated that the police were called and the suspect acknowledged that she had done this.

(b) He asked the Complainant to provide the names of the police officials who attended the complaint, but she could not provide the names of the officials.
(c) When he asked the Complainant to show him the damaged items, the Complainant could not show him the damaged items.

(d) He obtained a warning statement of the suspect Mrs Frieda Annette Dyer and the suspect informed Sergeant Kgomo that she had entered into an agreement with a certain Emmanoyil Kasouris and he was renting a room from her. The Complainant later moved into the flat with Emmanoyil without her knowledge. Both Complainant and Emmanoyil failed to pay rent and she asked them to move out.

(e) She denied damaging the Complainant's items. She further stated that the Complainant was accompanied by police when she came to remove her items and she did not complain. According to the Complainant the incident happened on/or between 15 April 2008 and 30 April 2008 but she opened the docket on 23 July 2008. The docket is sent for decision by the Public Prosecutor.

6.4.2.2 Upon enquiry by the Public Protector regarding the above case, Colonel SA Masuluke (Branch Commander of the Brooklyn Police Station) responded in a letter dated 20 January 2012 as follows:

"CAS 820/07/2008 malicious damage to property- the docket was sent to the Senior Public Prosecutor for a decision for there were no grounds to arrest the suspect or a witness or damage statement to prove the allegations. The Prosecutor's decision was that there are no prospects of a successful prosecution in this matter. The Complainant was given feedback on the Seniors Public Prosecutor's decision."

6.5 Complaint relating to alleged wrongful arrest and imprisonment at the DIRCO: CASE 1296/02/2009

6.5.1 Allegations and information presented by the Complainant
6.5.1.1 The Complainant alleged that after her mobile telephone was stolen, Mr Govender did not want to talk to her or arrange for a meeting which he promised her. He said the case was closed without any reason. The Complainant went to reception where she asked the security officials to see the Ambassador’s secretary. The secretary, Sindiswa, came down and took the Complainant to the Ambassador’s office. She told the Complainant to wait until January 2009 for feedback. It was December 2008 at the time.

6.5.1.2 The secretary told the Complainant that she will talk to the Ambassador. The Complainant told her that she wanted an appointment to see the Ambassador since she was certain that she is not safe if this case was not finalised because “they” came to her flat in broad daylight. The consequences might be fatal if “they” came at night, especially if the case is not attended to and nobody would link the events.

6.5.1.3 On 5 January 2009 the Complainant went to see Sindiswa, who gave the Complainant a date of 9 February 2009 to see the Ambassador. On 9 February 2009, Sindiswa phoned the Complainant and cancelled the meeting. Sindiswa gave the Complainant a date of 16 February 2009, but again on this day she postponed.

6.5.1.4 On 25 February 2009 the Complainant went to DIRCO again to enquire about her complaint. The Complainant asked the security officer to call Sindiswa. After an hour of waiting, Sindiswa telephoned the security guard who informed the Complainant that Sindiswa was not coming anymore. The security guard said that the Complainant must give him the letter to take to Sindiswa. The Complainant asked the security guard Mr Sithole whether he will witness by writing on the copy of the letter that Sindiswa signed the letter. The request was refused.
6.5.1.5 The Complainant told the security officer to ask Sidiswa just to come to reception to sign the letter in front of her so that she could have proof of a letter with her signature and stamp.

6.5.1.6 According to the Complainant Mr Govender called the police to arrest her, without her doing anything wrong.

6.5.2 Evidence obtained from the SAPS

6.5.2.1 A statement by the Complainant obtained from docket CASE 1296/02/2009 from SAPS (Sunnyside) indicated that:

(a) The Complainant denied allegations brought against her. The Complainant further stated that on 16 February 2009 she received a call from the office of the Ambassador, Mr Makhubela. The reason for the call was to reschedule the appointment that was cancelled on 9 February 2009.

(b) On 25 February 2009 at about 10h30 the Complainant was at DIRCO. She asked the security officer to inform the Ambassador’s secretary that she had arrived. The Complainant spoke to the secretary telephonically and informed her that she wanted written confirmation of the appointment. After 30 minutes the secretary called the security officer to tell the Complainant to come back in March. The Complainant asked the security officer to ask the secretary to put it in writing.

(c) The Complainant waited for an hour and she saw police and they asked the security officer about the complaint they received. Several police officers attended the complaint. They arrived at different times and all of them went to Mr Govender’s office. After an hour, seven police officers came down with Mr Govender and asked the Complainant what she wanted. The Complainant told them that she wanted the appointment in
writing. Mr Govender informed the police officers that appointments with the Ambassador can only be made telephonically and if the Complainant did not agree the police officers must arrest her. The Complainant was arrested for trespassing and intimidation.

(d) On 10 March 2009, the Complainant went to DIRCO to give the Ambassador’s secretary a letter to confirm the appointment. The Complainant asked the security officer to call the Ambassador’s secretary and he said to her that she must give him the letter and he would call the Ambassador’s secretary. As she was waiting, Mr Govender contacted the police again. The Diplomatic Police arrested her again. The Complainant alleges that the Diplomatic Police assaulted her, abused her emotionally, physically and mentally on 10 March 2009. As they were handcuffing her, they pulled her shoulder and it felt like her shoulder was broken. The Complainant further alleges that as she was screaming telling them that they are breaking her shoulder they laughed at her and said she cannot even speak English. They continued hitting her against the stairs and her spinal cord and shoulders nearly broke, the skin tissue all over her body was damaged and black and now she has scars on her body.

(e) The Diplomatic Police said she has a mental problem and that she is crazy. They said who did she think she was to think she can put the South African Police in order and said they were going to show her what South African Police can do to a person like her.

(f) Two women working for DIRCO came and asked the Diplomatic Police and the security officers why they were doing that to her. A senior security officer whose name is unknown to her said they must keep quiet. The two women took pictures of the police while they were undressing her from her head to her skirt; they were doing all of that while she was handcuffed.
(g) She was taken to Sunnyside Police Station, where she asked the police to call a state doctor for her and they refused. She asked the police to open a case against the Diplomatic Police and they refused. She spent the night in pain.

(h) On 11 March 2009 the Complainant appeared in court where there were three female prosecutors, and they saw the injuries and told her that the judge said she was not supposed to have been arrested. The prosecutors told the Complainant to lodge a complaint against the police. One of the prosecutors wrote the name of the station commander of Sunnyside Police Station. The Complainant told them that it is not going to work because this is a fight between the police and government to end her life. The Complainant told them that she tried to talk to the station commanders in the past and they did nothing. It just created more enemies each time, so how many enemies should she have in her life. Besides, she could not walk that day as she was in pain.

6.5.2.2 A statement by Mr Govender obtained from docket CASE 1296/02/2009 from SAPS (Sunnyside) indicated the following:

(a) Mr Govender in his statement stated that on Wednesday 25 February 2009 at about 10h00 he was summoned by Mrs Yogeeta Dheda telling him that there is a woman at the reception area who insists on seeing the Ambassador. Mrs Dheda informed him that she called the Complainant and informed her that the Ambassador is not around he is out on “duty calls”. The Complainant was told that DIRCO has its own protocol that she cannot approach the office without an appointment and insist on seeing the Ambassador (Chief of Protocol). The Complainant started intimidating everyone in the building shouting and speaking very harshly with staff members. Some of the staff members were even scared to come to the reception area because she demanded to know who they were.
(b) Mr Govender called the police to remove her from the building peacefully, but she started to be aggressive to everyone demanding to see the Ambassador because she does not think the Ambassador is out on *duty calls*. Mr Govender decided to open a case against the Complainant for trespassing and intimidation. He requested further investigation into the matter because the Complainant had been coming to the Department on several occasions. Mr Govender also stated that Mrs Dheda is his witness regarding this matter.

6.5.2.3 A statement by officer MJ Chabalala obtained from docket CASE 1296/02/2009 SAPS (Sunnyside) indicated the following:

(a) Officer Chabalala stated under oath that on 25 February 2009 at about 12:45 the Control Room reported a complaint, and officer Chabalala and crew member Constable Chauke found the complaint to be positive.

(b) They arrested a female with the name of Tholedi Anna Makudubela. They detained the suspect at the Sunnyside Police Station without any injuries. The suspect was informed of her rights and arrested at Hamilton and Edmond Streets.

6.5.3 Evidence obtained from the SAPS

6.5.3.1 A statement by Officer C Ross obtained from docket CASE 424/03/2009 SAPS (Sunnyside) indicated that:

(a) On 10 March 2009 he received a complaint from DIRCO of a woman who was trespassing at the premises. When he arrived at the scene at Hamilton and Edmond Streets, he found the security officials who pointed out the female who was causing trouble. She refused to co-operate and started screaming and after that she started intimidating them. Officer Ross arrested the female suspect for trespassing and intimidation and
resisting arrest as she refused to be handcuffed and threw herself to the ground.

(b) Officer Ross stated that the suspect was detained free from any injuries or complaint and that the suspect has been arrested before for trespassing and intimidation. (CASE 1296/02/09)

6.5.3.2 A statement by SD Poto Security Officer at DIRCO obtained from docket CASE 424/3/2009 Sunnyside Police Station indicated that:

(a) On Tuesday 10 March 2009 at about 12h30 an unknown female came through the main door of the DIRCO building and asked to see Ambassador Makhubela, and then a fellow security officer, Mr Sithole, phoned the Ambassador’s office. He spoke to the Ambassador’s Personal Assistant (PA) about the woman who brought documents to be signed.

(b) The Ambassador’s PA told Mr Sithole that the woman must leave the documents so that they could be signed. The woman refused to do so.

(c) Security was phoned to remove the woman from reception and place her outside the building, but she refused to leave the premises and started to be rebellious and shouting at them. Her refusal to leave the premises and aggression towards, and refusal to listen to anyone became a problem to the administration staff and made it difficult for them to work or carry on with work.

(d) They tried to warn her that she is not allowed to enter the building as there was a case opened against her, but she would not listen.

6.5.3.3 The case referred to was CASE 1296/02/09. On 26 February 2009 the Complainant appeared in court. According to the Complainant, the prosecutor
told her that the "judge" said that there is no case against her before the court. The magistrate found that there were no prospects for successful prosecution.

6.5.3.4 In regard to CASE 424/03/2009, the Complainant appeared in the Magistrates Court on 11 March 2009. The magistrate found that there were no prospects for a successful prosecution.

6.5.4 Response of Major-General Ngakane (South African Police Service-SAPS) to my Notice in terms of Section 7(9)(a) of the Public Protector Act

6.5.4.1 As already indicated above, Major General KE Ngakane responded as follows:

6.5.4.2 "The preliminary investigation conducted has revealed the following information:

Sunnyside CAS 1296/02/2009- Trespassing and Intimidation. Complainant, Mr JT Govender and the suspect Ms AT Makudabela.
Date reported 25 February 2009.

i. The complainant stated that Ms Makudabela arrived at the Department of International Relations and Cooperation (DIRCO) where she persisted to see the Ambassador and shouted to the officials.

ii. It was indicated that the police were contacted to come and arrest her for Trespass and Intimidation. Ms Makudabela was arrested on 25 February 2009 at 15:00 pm and charged on the same day.

iii. However, the Public Prosecutor withdraw the case on the following day 26 February 2009."
iv. It should be noted that the alleged conduct of the SAPS officials which did not meet the standard of fairness and reasonability required by Section 195 of the Constitution, will be given proper attention during this investigation.

6.5.4.3 Major-General Ngakane further stated that this Office will receive a final report on or before 28 August 2014 since a thorough investigation had to be conducted.

6.6 Complaint relating to alleged wrongful arrest and imprisonment at DOJC

6.6.1 The Complainant alleged that she went to the DOJC to ask for help. She asked to see the then Minister and she was told that the Minister was in England and the officials did not know when she would be back. The Complainant stayed at the Department for three days. A female employee at the Department told the Complainant about the party that was going to be hosted at the Pretoria Zoo by the Minister. The Complainant went to the party and found the Minister there. The Complainant asked the Minister why she did not help her with her cases. The Minister told her that she would help her with her cases. The Minister allegedly indicated that the Complainant should meet with her on Monday.

6.6.2 When the Complainant arrived at the Department on Monday, the Minister refused to see her as she had promised. The Complainant told them that she is not going anywhere until the Minister attended to her. The officials called the police who arrested the Complainant without her doing anything wrong.

6.6.3 It was on 11 December 2007 when she was arrested and the following day she appeared in court and she was found not guilty and the "judge" told her that if she had money she could sue the Department because she was put in jail for not doing anything wrong.
6.6.4 **Evidence obtained from the SAPS**

6.6.4.1 No docket could be located at the Sunnyside Police Station regarding the arrest.

6.6.5 Response of Major-General Ngakane (South African Police Service-SAPS), to my Notice in terms of Section 7(9)(a) of the Public Protector Act

6.6.5.1 As already indicated above, Major-General KE Ngakane responded on 7 August 2014 as follows:

6.6.5.2 "The preliminary investigation conducted has revealed the following information:

i. Sunnyside CAS 424/03/2009. Although this docket could not be found, the Station Commander of Sunnyside Police Station has been instructed to locate and bring it to the investigation team.

ii. It should be noted that the alleged conduct of the SAPS officials which did not meet the standard of fairness and reasonability required by Section 195 of the Constitution, will be given proper attention during this investigation".

6.6.5.3 Major-General Ngakane further stated that this Office will receive a final report on or before 28 August 2014 since a thorough investigation had to be conducted.

6.6.5.4 Subsequent to the letter from Major General Ngakane dated 7 August 2014 a meeting between my Office and Major General C Johnson (Head: General Crime Investigation SAPS) was held on 13 November 2014 where the assault and intimidation case as well as the two arrest cases were discussed.
6.6.5.5 Major General Johnson indicated in the meeting that the two cases where the Complainant was arrested and the prosecutor refused to prosecute are being reinvestigated and that they are going to present the dockets to the prosecutor or the DPP (Director of Public Prosecutions) of North Gauteng for a decision. He also mentioned that the only hindering factor is that Mr Govender is currently residing in another country. They need to retake his statement regarding what actually happened on that day at DIRCO when he summoned the police.

6.6.5.6 Regarding the assault and intimidation case, the docket was reopened for investigation. Major General Johnson indicated that the National Instruction outlines the procedures on how to deal with matters relating to diplomats. The SAPS cannot approach the Embassies of foreign countries directly, they have to do it through the assistance of DIRCO. DIRCO arranges meetings and informs the SAPS whether the Embassy or the personnel of the Embassy will cooperate. In the event that they do not want to cooperate DIRCO issues the SAPS with a statement that the Embassy relies on Diplomatic Immunity. SAPS will then send the statement in the case of a criminal case to the Prosecution Authority for a decision. In matters such as the current one, the Prosecution Authority usually declines to prosecute based on the Diplomatic Immunity Act.

6.6.5.7 Regarding the question: When does the conduct of a person accessing a public building warrant an arrest? Major General Johnson indicated that in a public office or space where the public has a right to go even without an appointment, once the occupant or head of the department terminates the privilege of a person to be in that space because of his/her conduct and that head complains to the police and insists that a docket be opened, then it becomes unlawful conduct and trespassing. The head or person in charge can ask a person to leave, and if the person refuses to leave then that person is trespassing. If the head or person in charge insists that the police open a trespassing docket and arrest the person, the police must do so because a crime is now committed, although it might not be a serious offense in terms of the Criminal Procedure
Act. When a crime, no matter how trivial, is committed in the presence of a police officer the Criminal Procedure Act allows the effecting of an arrest.

6.7 **Complaint against members of the Sinoville Police Station**

6.7.1 **Allegations and information obtained from the Complainant**

6.7.1.1 The Complainant laid charges at the Sinoville Police Station on 13 December 1997 against the children of her then fiancé and alleged racist remarks against her. In August 1998, the Complainant lodged a complaint with the ICD and alleged that the poor investigation by a certain Detective van Zyl led to the decision by the Senior Prosecutor not to prosecute the suspects.

6.7.1.2 The Complainant alleged that the South African Government “oppressed” her with this case and that she was assaulted “very badly” and her life and that of her late then fiancé were threatened. She was also called by a very sad name “kaffir”. Her fiancé was later killed and according to the Complainant, she was supposed to have been killed with him because of this case and the other cases she opened against the Ministers in the South African government and their police.

6.7.1.3 According to the Complainant she was saved when she refused to go to the place where her fiancé was killed after being contacted by the police to go there.

6.7.1.4 According to the Complainant, Detective van Zyl (investigating officer-Sinoville Police Station) saw how badly injured she was and promised to arrest “this people”, but he did not. The Complainant spoke to Captain Swart and the Station Commander C Petersen, who informed her that the case was closed before it could even go to court, without any reason. They lied about the Pretoria-North Prosecutor by telling her that he is the one who said the case was closed.
6.7.1.5 According to the Complainant, the ICD found out that "they" lied about the case and forced them to reopen the case. After the Complainant reported the officials and the Station Commander of the Sinoville Police Station and the Minister of Safety and Security to the former President of South Africa, Mr Mandela, "they" started to kill everyone who was involved and/or witness to the case.

6.7.1.6 The first witness was the late Mr D Mahlangu, who was with the Complainant when she opened the case. Her late fiancé, Johan de Clerk and her late brother Wilson Makudubela, who was helping her with these cases were also killed. According to the Complainant, the late Mr D Mahlangu helped her by asking the South African government to help her with the "people" who threatened to kill her and said that they were sent by the police who she complained about.

6.7.1.7 Evidence obtained from the ICD

On 22 July 1999 the ICD responded to the Complainant and stated that they intervened by reopening the case docket. They held a roundtable conference on 5 May 1999 at the ICD offices with the Complainant and others including Captain Swart (SAPS) and Detective van Zyl (SAPS). They also called a meeting to mediate a dispute arising out of the Complainant's discontent with the investigations and Captain Swart undertook to reinvestigate the matter and thereafter resubmit it to the Senior Prosecutor for a decision.

Upon inquiry it transpired that the Complainant's witness, Mr Mahlangu had passed away, but it was nevertheless decided that the matter would be fully reinvestigated. On 30 July 1999 the ICD informed the Complainant that Detective Fourie of the Sinoville Police Station obtained the statements of more witnesses than those agreed upon during the roundtable conference to bring the case to finality. The case docket was subsequently transferred to the Director of Public Prosecutions at the latter's request. The ICD stated that they
were satisfied that they have investigated the matter properly and closed the file accordingly.

6.8 Allegations against the SAPS relating to the mysterious death of her brother (Wilson Makudubela)

6.8.1 Allegations submitted by the Complainant

6.8.1.1 The Complainant alleged that the South African Government killed her brother in December 2002. The family found him dead four days after he was killed. The case of his death was closed without telling the family the reason for his death. The Complainant and her family have been living in fear for 12 years, especially after the way her brother was killed.

6.8.1.2 According to the Complainant, the police told them that there was a woman found dead with her brother. The police said that the dead bodies were found by a man called King Maben. The Complainant and her family asked the police to take them to the man and the police refused. Mr Ramsapedi, her brother's best friend was with him on the day he was killed. They were supposed to have travelled together to Polokwane on the said day. He, according to the Complainant, said that he left her brother for a few minutes to put petrol in his car and when he went back to pick up her brother he found the door closed, and did not attempt to open the door. He left for Polokwane. On his return after three days he informed the family about her brother's death. According to the Complainant the police did nothing about the case.

6.8.1.3 The Complainant alleged that the police lied about her brother's death. The police gave the family two letters and told the family that they were from her brother as well as the woman whose body was found dead with the brother. The letter from the woman stated that that the Complainant's brother is "killing her and he is jealous of her". The police said that the Complainant's brother
killed the woman with a knife. According to the Complainant her brother’s clothes were not full of blood and there was no knife.

6.8.1.4 The Complainant believes that there was no woman. If there was a woman it means that, that woman saw who killed her brother and therefore was also killed.

Evidence obtained from the Brooklyn Police Station

6.8.1.5 The investigator in this matter contacted the Brooklyn Police Station (Captain Mashige) and requested assistance in locating the docket relating to the death of the Complainant’s brother. The investigator furnished Captain Mashige with information such as the date and place of death as well as identity number. Captain Mashige contacted the Hammanskraal Police Station for assistance. Despite the information, they were unable to locate any records relating to the death of her brother.

6.9 Evaluation of Evidence

6.9.1 Complaint against the SABC

6.9.1.1 The SABC did not deny that it refused to play the Complainant’s title track. Its defence is that the quality did not meet the national broadcaster’s quality requirements. The Complainant did not press this matter further when given feedback from the SABC. Her main concern was the video that was accepted.

6.9.1.2 The SABC conceded that it agreed to play the video of the song “MPULELE DITSELA”. It also conceded that it changed the sound on the video in question.

6.9.1.3 The justification for changing the sound of the video provided by the Complainant was that it was not of broadcast quality and certain archive
footage featured, was copyrighted material that could not be broadcasted by the SABC.

6.9.1.4 Regarding whether or not the sound was damaged in the process, it was not possible for me to decide between the competing narratives of the Complainant and the SABC. Both agreed that the final product was bad and not usable with each blaming each other for that. The SABC said the final product was bad because the Complainant’s original sound was irredeemably poor, while the Complainant maintained that the quality of her original was good and that it was the SABC that messed the copy up during the editing. I must acknowledge though that the Complainant’s version is corroborated by two experts, Mr Paul Mabilo, her former producer, Nelson Moloi, sound engineer at Cool Spot and Prince Mamphitha, sound engineer at Face off Studio, who all signed affidavits. I concluded that the evidence regarding whose fault was it that the video that emerged from the SABC’s process was bad, was inconclusive.

6.9.1.5 The crux of the dispute though remained whether or not the Complainant gave consent to the SABC to temper with her original video, including the sound.

6.9.1.6 It is worth noting that the SABC did not say it knew for sure that consent was given. The SABC said it is practice for it to require a person who submits videos to them to sign a document that gives SABC the right to air the video but could not provide proof to refute the Complainant’s claim that she was not consulted and did not give consent. However it is clear that the Complainant delivered the video to the SABC with the clear intention that it be broadcast having been professionally produced at her cost before being brought to the SABC. Mr Lister’s evidence seems to corroborate the view that the SABC tends to assume that consent to have music played includes acquiescing to any changes the SABC may deem necessary whereas the requirement, in his view is for the SABC to ask the owner to fix what the SABC considers needs fixing.
6.9.1.7 I must indicate that it is also a source of discomfort to me that the SABC confirmed that it changed the video in her absence and proceeded to play it as hers without her seeing the final product or approving it.

6.9.2 Complaint against LASA

6.9.2.1 There is no dispute that LASA was approached for assistance and declined after assessing the request on the basis of its internal policy that helps determine how to use its limited resources. There is also no dispute that she was accorded an internal appeal opportunity and that her request was still declined.

6.9.2.2 Mine was to make a determination regarding the propriety of the refusal to help and the evidence shows that LASA applied its internal policy, which allows it discretionary power to take or refuse cases. There was nothing unlawful in LASA's conduct. However, a question has to be asked whether a slightly higher standard of care than that meted out was not possible taking into account the vulnerability of artists with regard to abuse of their intellectual property rights and the fact that the SABC's duty of care is higher than an ordinary commercial broadcaster as it has to meet the requirements of good administration in section 195 and proper conduct in section 195 of the Constitution.

6.9.2.3 Though I particularly wondered if the responsibilities of the SABC under the Copyright and Performers' Protection Acts were taken into account such decision, I was mindful that LASA had exercised discretionary power which could only be challenged on the basis of illegality, unreasonableness and irrationality.

6.9.3 Complaint against Officials of the Brooklyn, Sunnyside and Sinoville Police Stations
6.9.3.1 Though made forcefully and backed by some body marks that look like they could have been contusions, the allegation of police brutality was not substantiated.

6.9.3.2 Regarding the allegation relating to the investigation of the assault and intimidation case by a Russian diplomat, it is clear, due to the discrepancy in the letter dated 2 April 2009 from Mr AH Lamoer (Divisional Commissioner Visible Policing: Pretoria) (para. 6.3.1.25(b)) and letter dated 20 January 2012 from Colonel SA Masuluken (Branch Commander of the Brooklyn Police Station) (para.6.3.2.1) that the SAPS did not conduct the investigation properly and this constitutes maladministration.

6.9.3.3 Regarding the allegation relating to the investigation of Malicious Damage to Property, it is clear on the available evidence, that the investigation was conducted properly.

6.9.3.4 Regarding the investigation of the criminal case against her then fiancé’s children, Mr de Klerk, the allegation that the investigation was not properly dealt with by SAPS officials is not substantiated by the available evidence.

6.9.3.5 Regarding the allegation against the SAPS relating to the mysterious death of her brother (Wilson Makudubela), with the evidence presented, it is impossible to make a determination. The Complainant can refer the matter to the Civilian Secretariat for Police for investigation.

6.9.4 **Wrongful arrest and imprisonment at the DIRCO and the DOJC**

6.9.4.1 On 25 February 2009, the Complainant went to the Russian Embassy to report a case of assault and intimidation by a Russian diplomat. According to the Complainant she was arrested without just cause. She also stated that she was assaulted and sworn at when arrested.
6.9.4.2 The Complainant stated that on 11 December 2007 she went to the DOJC to see the Minister, after she had been invited by the Minister to come see her regarding her cases that were never resolved. According to the Complainant, the Minister did not want to see her as promised and the Complainant refused to leave the building. Complainant was arrested for trespassing and intimidation.

6.9.4.3 Any violation to the right of access to public services in terms of Section 195 of the Constitution has to be tested against the yardstick of rationality and standards of reasonableness. In this case it was not reasonable because the officials did not consider alternative options to arrest.

6.9.5 Allegations against the SAPS relating to the mysterious death of the Complainant’s Fiancé (Mr de Klerk) and her brother (Mr Wilson Makudubela)

6.9.5.1 Despite the information provided to locate the records relating to the death of the Complainant’s brother, Mr Wilson Makudubela, the SAPS were unable to trace any records relating such death. This is a major source of concern to me as any unresolved death means possible impunity for a murderer. It’s also of concern to me that although this may be classified as a cold case, it now appears untraceable, as information could surface anytime that could help solve the circumstances of the killing.

6.9.5.2 I must indicate that I’m equally concerned about the death of her alleged fiancé, Mr de Klerk, which also appears to be an unsolved murder.

7 ANALYSIS AND CONCLUSION

7.1 The Music Play and Alleged Copyright Infringement Dispute with SABC

7.1.1 The constitutionally protected freedom of expression is, like all other rights in the Bill of Rights, subject to limitations as allowed by Section 16 of the Constitution.
In the case of artistic expression or creativity this might include the right to a fair and equal opportunity to have your music as artist played by the SABC as the national broadcaster. It also includes protection from arbitrary action by an administrator curtailing such right.

7.1.2 However, as indicated earlier, the SABC could not have been under an obligation to play a music video that does not meet its quality or professional requirement. It also could not have been expected to play music containing materials in violation of the copyrights of others.

7.1.3 However, in complying with its quality requirements and legal obligations, the SABC did not acquire licence to deal with the intellectual property of artists as it pleases without their express consent. Apart from undermining artistic agency, if the SABC were to have such licence, an artist could find themselves associated with views or representations that offend their conscience, religion, preferences or do not represent who they are. In the case in point, the Complainant specifically insists that she has a way of representing herself, has done so in previous music videos successfully played and paid for by the SABC and that what was done in this case deviated drastically from how she chooses to represent herself as an artist.

7.1.4 I am certain that the Copyright Act gives her the freedom to choose how to express herself and that should a broadcaster or anyone want to help improve her sound it should be done with her express consent.

7.1.5 The copyright in each type of work or other subject matter has independent existence, for example for a broadcast on television, separate copyright may subsist in the film itself, the broadcast of a film, the underlying script and any sound recordings which is part of the film. In respect of the soundtrack there may be a separate copyright in the lyrics, the composition arrangement of the music and the sound recording of the work. As an organ of the state, the SABC is in terms of Section 7(2) of the Constitution obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.
7.1.6 While the SABC's claim that part of the changes were in pursuit of removing material that violated the copyright of others, which is a noble and dutiful thing, that exercise does not vitiate the SABC's duty to involve the Complainant in the production of what will be attributed to her. She could have been contacted either at point of production or before airing it as hers.

7.2 The Dispute with LASA over Legal Aid

7.2.1 There is no evidence that LASA acted outside the scope of the functions afforded to it by law or that it arbitrarily denied legal aid to the Complainant.

7.2.2 However, though I do take note that that LASA followed its regulatory framework in determining the merits of a civil case against the SABC, in particular the non-existence of a contract between the Complainant and the SABC regarding changes to the Complainant’s video, and the absence of a clear nexus between the airing/non airing of her video and the alleged loss of revenue, I am of the view that LASA took a very narrow view of the facts of this case. I also think it missed an opportunity to engage the SABC on the protection of intellectual property rights of performing artists, a particularly vulnerable group to exploitation, I may add.

7.2.3 Having already indicated that the SABC’s conduct did not comply with the provisions of the Copyright Act and the Performers Protection Act, I'm left wondering if LASA, as a legal services provider of the most disadvantaged in society, could not have explored the implications of this further and even possibly negotiated a settlement involving compliance with the law by the SABC. I'm also uncertain if LASA could not have quietly whispered to the SABC to fix the relationship regulation gap to help performers to operate in an environment that is more transparently regulated and therefore more responsive and developmental, as envisaged in section 195 of the Constitution.
7.3 The Service Failure Complaints Against the DOJCD and DIRCO

7.3.1 The question I had to ask was whether I could say with good conscience that the Complainant was treated in accordance with the standards expected from the public sector under sections 195 and 33 of the Constitution even though on the facts, it could not be conclusively proven that the alleged appointments had been made with the Complainant only to be dishonoured when she was already on the premises.

7.3.2 The Constitution commits the state to the establishment and maintenance of an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. That is a transformational injunction that promises more than compliance with the law or the principle of legality in the treatment of people who interface with public officials and office bearers. The courts have said that injunction in section 195 requires ensuring that the administration transcends compliance with the law and acts ethically, transparently and accountably. Can it be conscientiously said that that is the treatment that was received by the Complainant? I do not think so.

7.3.3 Beyond the Constitution, Batho Pele principles further elaborate on the quality of services persons can expect as good administration in the public sector. One of the principles is the principle of fairness. Fairness is part of the requirements of just administrative action as envisaged I section 33 of the Constitution. The question is was the Complainant treated fairly.

7.3.4 The question remains: when does the conduct of a person exceed the norms and standards for the level of tolerance required by public servants, and when does it constitute a threat to the personal safety of public officials, the person him/herself and state property?

7.3.5 Any violation to the right of access to public services in terms of Section 195 of the Constitution has to be tested against the yardstick of rationality and standard of reasonableness. In this case it was not reasonable because the relevant
departments did not consider alternative options and there are no clear guidelines to deal with such cases.

7.4 Complaints of Unlawful Arrest and Imprisonment Against SAPS

7.4.1 The question I had to determine was whether the conduct of SAPS in arresting and imprisoning the Complainant for refusal to leave without an audience with the Minister and the Director General at the DOJCD and DIRCO, respectively was properly made on the basis of the same considerations in so far as compliance with sections 33 and 195 of the Constitution are concerned.

7.4.2 I also factored in the value of Ubuntu, which was affirmed by the Constitutional court in S v Makwanyane and asked if the conduct of role players in the institutions complained against did meet its dictates. Worth noting in the Makwanyane judgement is that the court said the state's conduct must always be rational.

7.4.3 I was not convinced of the proportionality of the arrest to the purpose it was meant to serve and rationality thereof. SAPS did not present any case for the arrest other than it has the power given by law to arrest once a person is regarded as trespassing. Why less corrosive and humane measures such removing her and dropping her at a bus stop or her house were not considered, was not canvassed in the submission. Furthermore given the dispute regarding whether or not a meeting had been agreed to, it is not clear when her presence transcended unreasonableness to trespassing hence illegal.

7.4.4 Regarding the Complainant's brother, despite the information that was furnished to assist in locating the records, such records could not be located.

8 FINDINGS

8.1 Having considered the facts and regulatory framework on each of the complaints I make the following findings:
8.1.1 The allegations relating to the conduct of the SABC:

8.1.1.1 Regarding whether the SABC unduly refused to air the Complainant’s music video “GOBOIMA LEFAASENG” and if such conduct constitutes improper conduct or maladministration, my finding is that:

i. The complaint that the SABC unduly refused to play the Complainant’s music, has not been substantiated.

ii. Although the SABC has a duty as a national broadcaster to ensure equitable access to its broadcast opportunities and has to meet certain ICASA determined quotas, it does not have to play all music presented to it if such music does not meet its objective quality requirements.

8.1.1.2 Regarding whether the SABC improperly changed the sound of the music video “MPULELE DITSELA” and whether that is unlawful and constitutes maladministration?

i. The allegation of impropriety is substantiated. The SABC had no right to change the Complainant’s sound as that violated her copyright to her music.

ii. The SABC is required to know and apply the provisions of the Copyright Act and the Performers’ Protection Act. In terms of Section 23(1) of the Copyright Act, copyright is infringed by “any person, not being the owner of the copyright who, without license of such owner, does or causes any other person to do, in the Republic, any act which the owner of the copyright has the exclusive right to do or to authorise”.

iii. By failing to consult with the Complainant before making substantial changes to her music video and/or getting her consent before flighting the changed product which was branded as hers, the SABC can be said to
have technically violated the Complainant’s rights in terms of the Copyright Act.

iv. These rights allow artists to protect themselves from infringement or the unauthorised use and misuse of their creations.

v. I am further convinced that the SABC did not meet the standard of fairness and reasonability required in terms of Section 195 of the Constitution, because the actions of officials of SABC’s actions do not show that they knew and applied the provisions of the Copyright Act and the Performers Protection Act to avoid a violation of the Complainant’s rights as a performing artist.

vi. The fact that the SABC receives a massive number of music compact discs (CDs) and videos from artists, record companies and producers who are “anxious” to have their music and videos broadcasted by the SABC stations and channels, does not justify its ignorance of the contractual or statutory rights of performers and record companies. My reading of section 195 is that it makes the SABC the party that should have ensured that uncertainty is eliminated through a written agreement and clear communication to the Complainant about her rights.

vii. The conduct of the SABC accordingly constitutes maladministration.

viii. On the question whether or not the Complainant was prejudiced or suffered an injustice, is that she was indeed prejudiced in that due to the SABC’s failure to consult or involve her on the changes it made to her music video, she ended up being associated with a product that was not approved by her purporting to be the one she had produced at her own cost and which represented how she wanted represent herself and to be perceived as an artist. In fact it can be reasonably concluded that it was partly in pursuit of her SABC copyright claim that Complainant went down
the perilous journey that left her on a collision course with LASA, the DOJCD and SAPS.

ix. Does it matter that the original video was returned to her? I don't think so. Intellectual property is not violated simply by depriving an artist possession of the physical representation of his or her property. Distorting her property and representing the new product as hers without her consent, as was the case here, suffices.

x. However, I am unfortunately unable to find a direct nexus or causal link between the Complainant’s alleged loss of revenue and the SABC’s maladministration.

8.1.1.3 Regarding Whether LASA unduly refused to assist the Complainant vindicate her intellectual property rights against the SABC and if this constitutes improper conduct, maladministration and prejudice, my finding is that:

i. With the evidence before me, I am unable to uphold the complaint;

ii. Evidence does not show that LASA deviated from its own policies;

iii. However, although I take note of LASA’s submission that it followed its regulatory framework in determining the merits of a civil case against the SABC, in particular the non-existence of a contract between the Complainant and the SABC regarding changes to the Complainant’s video, and the absence of a clear nexus between the airing/non airing of her video and the alleged loss of revenue, I am of the view that LASA took a very narrow view of the facts of this case;

iv. According to section 2 of the Copyright Act, sound recordings and musical works are eligible for copyright and the rights of owners are accordingly protected under the Act;
Furthermore, given the power relations between the Complainant and the SABC, LASA should have viewed the case of the Complainant more leniently in line with the provisions of the Copyright Act, more especially in the absence of the written agreement as good administration as envisaged in section 195 of the Constitution placed on it, as an organ of state, the responsibility to act professionally and to safeguard the interests of members the public.

The allegations relating to the wrongful arrest and imprisonment at DOJC

8.1.1.4  Regarding SAPS' alleged removal of the Complainant from DOJC premises by means of arrest and imprisonment and if such constitutes improper conduct, maladministration and/or abuse of power, I find that:

i. While the arrest of the Complainant may have been lawful, it was neither just nor fair and cannot be said to have been the most efficient use of limited policing resources. The conduct accordingly constitutes improper conduct, maladministration and does border on abuse of power.

ii. The conduct of members of the SAPS did not meet the standard of fairness and reasonableness required by Section 195 of the Constitution, because there was no indication of when the conduct of the Complainant, although it might have been unreasonable, crossed the boundary between unreasonableness and unlawfulness and thus warranted her arrest as opposed to alternative options.

iii. Imprisonment was not the only or the least adverse or ubuntu resonant action that could have been taken to ensure that business is able to continue at the DOJCD reception area without interruption by her. Imprisonment was also not consistent with section 195 requiring optimal and efficient use of public resources, which includes giving consideration
to the spaces available in the country's overcrowded prisons and the administrative burden that goes with arrest.

8.1.1.5 Regarding the conduct of DOJCD allegedly setting up a meeting with the Complainant and failing to hold the meeting at the agreed date and time, and if relevant acts constitute improper conduct, maladministration and/or abuse of power, I find that:

i. The complaint is not substantiated as I could not find evidence buttressing the allegation that the Minister of Justice and Constitutional Development agreed to a meeting and later refused or failed to honour her undertaking.

The allegations relating to the wrongful arrest and imprisonment at DIRCO.

8.1.1.6 Regarding DIRCO allegedly setting up meeting(s) with the Complainant and not holding the meeting(s) at the set times and if such acts constitute improper conduct, is improper as envisaged in section 182 of the Constitution and constitutes maladministration as envisaged in Section 6(4) of the Public Protector Act, I find that:

i. DIRCO did set and later failed to honour meetings but the allegation regarding whether or not the Complainant was advised before arriving for such meetings of the cancellation thereof, is inconclusive;

ii. Such conduct can't be said to be consistent with the standard of good administration expected under section 195 of the Constitution, which includes professional and responsive treatment of members of the public. Neither is the conduct consistent with section 33 of the Constitution entrenching the right for the Complainant to enjoy just administrative action, which includes protection from unjust, unfair and arbitrary action when interacting with organs of state. The conduct is also not resonant
with the Batho Pele principle of fairness and the Constitutional value of Ubuntu; and

iii. However, the handling by DIRCO of the Complainant’s request to be assisted with the alleged domestic violence by a Russian diplomat could have been handled better.

iv. The handling of the Complainant by DIRCO cannot be said to meet the standard envisaged under sections 33 and 195 of the Constitution and accordingly constitutes improper conduct and maladministration.

8.1.1.7 Regarding the propriety of SAPS’ removal of the Complainant from DIRCO by means of arrest and imprisonment and if such acts constitute improper conduct, maladministration and/or abuse of power?

i. The conduct of members of the SAPS officials did not meet the standard of fairness and reasonability required by Section 195 of the Constitution, because there was no indication of when the conduct of the Complainant, although it might have been unreasonable, crossed the boundary between unreasonable and unlawfulness which may have warranted her arrest as opposed to alternative options.

8.1.1.8 Allegations relating to the investigation of a criminal case against her then fiancé’s children, Mr de Klerk by officials of the Sinoville Police Station.

i. Regarding the conduct and service failure allegations against police officers to whom the Complainant requested an investigation into criminal allegations against her fiancé’s children for physical abuse, I am unable, on the available evidence, and given the considerable lapse of time, to conclude that the investigation was not properly dealt with by officials of the SAPS and the ICD.
8.1.1.9 Allegations against the SAPS relating to the investigation of the mysterious death the Complainant’s fiancé, Mr de Klerk and her brother, Mr Wilson Makudubela

i. With the available evidence, I am unable to make a determination on the conduct of the SAPS.

ii. I am, however, deeply concerned about unsolved suspected murders as such may entail impunity for a murderer or murders somewhere. The fact that Mr Makudubela’s docket seems to be missing heightens my concern and is something to be given serious consideration.

8.1.1.10 Allegations against Brooklyn Police Station relating to the investigation of the alleged assault and intimidation (domestic violence) by a diplomat: my finding is that:

i. It is clear that there is a discrepancy in the correspondence relating to the case of assault and intimidation by a Russian diplomat.

ii. Paragraph 6.3.1.25 (b) (letter dated 2 April 2009, the SAPS, Mr AH Lamoer (Divisional Commissioner Visible Policing: Pretoria) states that “the case was registered as assault and “closed undetected” due to the fact that the suspect was out of the country”.

iii. Paragraph 6.3.2.1(letter dated 20 January 2012 from Colonel SA Masuluke- Branch Commander of the Brooklyn Police Station) states:

“The matter was investigated and the police could not serve the protection order on the suspect due to lack of information concerning the suspect which made it difficult for the police to trace the suspect. As a result the case was filed”.

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iv. It is clear from the above statements that DIRCO and the SAPS did not conduct the investigation properly and this constitutes maladministration.

v. However, no effective remedy can be provided to the Complainant in this regard as the diplomat is no longer in the country.

8.1.1.11 Allegations relating to the investigation of Malicious Damage to Property by officials of the Brooklyn Police Station

i. The case was reopened and investigated. The docket was sent to the Senior Public Prosecutor for a decision because there were no grounds to arrest the suspect, or a witness or damages to prove the allegations. Prosecutors have delegated discretion in terms of the NationalProsecuting Authority Act to refuse to prosecute if it is of the opinion that there is insufficient evidence to prosecute.

ii. However, there is inconclusive evidence regarding whether or not SAPS did properly investigate and submitted a credible docket to enable the NPA to make the right decision.

9 REMEDIAL ACTION

The remedial action I am taking in pursuit of section 182(1) (c) of the Constitution is to call upon:

9.1.1 The allegations relating to the conduct of the SABC:

9.1.1.1 Regarding whether the SABC improperly changed the sound of the music video “MPULELE DITSELA” and whether that is unlawful and constitutes maladministration:
i. The SABC Acting CEO to apologise in writing to the Complainant for the corporation’s failure to secure her consent before making changes or her approval before representing the new artwork as hers.

ii. The Board of the SABC to adopt policies that would guide its interface with artists and prevent the exploitation of their intellectual property.

iii. The Board of the SABC to put written contracts in place to regulate the relationship between the SABC and performing artists to ensure that all terms of engagement are in writing and comply with the Copyright Act and the Performers Protection Act.

The allegations relating to the wrongful arrest and imprisonment at DOJCD

9.1.1.2 Regarding SAPS’ alleged removal of the Complainant from DOJCD premises by means of arrest and imprisonment and if such constitutes improper conduct, maladministration and/or abuse of power:

i. The Minister of the Department of Public Service and Administration and the Minister of Police must adopt a policy to guide public authorities on decisions relating to unreasonable conduct of members of the public and the possible limitation and refusal of services to such persons in a manner that is consistent with the Constitution, to prevent arbitrary, inhumane and discriminatory actions.

The allegations relating to the wrongful arrest and imprisonment at DIRCO.

9.1.1.3 Regarding DIRCO allegedly setting up meeting(s) with the Complainant and not holding the meeting(s) at the set times and if such acts constitute improper conduct, is improper as envisaged in section 182 of
the Constitution and constitutes maladministration as envisaged in Section 6(4) of the Public Protector Act:

i. DIRCO to apologise to the Complainant in writing for unduly failing to offer her responsive assistance resulting in her arrest as she demanded responsive service.

9.1.1.4 Regarding the propriety of SAPS’ removal of the Complainant from DIRCO by means of arrest and imprisonment and if such acts constitute improper conduct, maladministration and/or abuse of power?:

i. The Station Commander of Brooklyn Police Station issues an apology to the Complainant for the imprisonment.

ii. The Minister of the Department of Public Service and Administration and the Minister of Police to develop and adopt a policy to guide public authorities on decisions relating to unreasonable conduct of members of the public and the possible limitation or refusal of services to such persons in a manner that is consistent with the Constitution, to prevent arbitrary, inhumane and discriminatory actions.

iii. DIRCO is to apologise to the Complainant in writing for failing to honour the appointment made with the Complainant which resulted in her arrest.

9.1.1.5 Allegations relating to the investigation of a criminal case against her then fiancé’s children, Mr de Klerk by officials of the Sinoville Police Station: and

9.1.1.6 Allegations against the SAPS relating to the investigation of the mysterious death the Complainant’s fiancé, Mr de Klerk and her brother, Mr Wilson Makudubela:
i. The remedial action I intend taking is to refer these matters to the Civilian Secretariat for investigation. Our limited resources prevented a proper investigation into what really happened.

9.1.1.7 Allegations against Brooklyn Police Station relating to the investigation of the alleged assault and intimidation (domestic violence) by a diplomat:

i. The National Commissioner of SAPS and the Director General at DIRCO must indicate what policies or directives are in place between the SAPS and DIRCO when dealing with matters concerning diplomats.

ii. DIRCO and the SAPS must apologise to the Complainant in writing for failing to handle the matter properly.

10 MONITORING AND GRATITUDE

10.1 The Director General of the DPSA, the Minister of Police, the National Commissioner of the SAPS, the Chief Executive Officer of the SABC and the Ambassador of DIRCO are to submit, within 30 days from the date of this report, implementation plans to the Public Protector indicating the manner in which the remedial action taken in paragraph 9 will be implemented.

10.2 The Director General of the DPSA, the National Commissioner, the Chief Executive Officer of the SABC and the Director General of DIRCO are to submit, within 30 days, implementation plans to the Public Protector,

10.3 All organs of state are to submit closing reports within 90 days regarding the implementation of the remedial action taken in paragraph 9.
10.4 My team and I are grateful to all of the organs of state and parties that have assisted during the investigation. We particularly thank SAPS for commencing with the remedial action and promptly assisting in a new unrelated matter involving the Complainant.

ADV THULI N. MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 15 December, 2014
Assisted by:
Ms Sylvia van Wyk
Senior Investigator: Service Delivery
Supervised by Mr Reginald Ndou
Executive Manager Service Delivery and
Adv Elsabe de Waal
Chief Investigator Service Delivery