
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO. 20 of 2012/2013

ABOVE THE LAW

REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF MALADMINISTRATION BY BLOEMWATER FOR FAILURE TO COMPLY WITH THE DECISION OF ITS INTERNAL APPEAL AUTHORITY AND AN AWARD OF THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL
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Executive Summary

(i) "Above the law" is a report of the Public Protector following an investigation into allegations of maladministration by Bloemwater for failure to reinstate Mr K D Nyareli as recommended by the Internal Appeals Authority (Appeals Authority) regarding his disciplinary hearing as well as the failure to comply with the award of the South African Local Government Bargaining Council (SALGBC).

(ii) The investigation involved legal research, interviews, perusal of institutional documents such as policies, minutes and correspondence and an inconclusive conciliation process undertaken in terms of section 6(4)(b) of the Public Protector Act of 1994. The award of the SALGBC was also analysed.

(iii) The following steps in the investigation are worth noting:

(a) In an attempt to resolve the matter, the Public Protector held an Alternative Dispute Resolution meeting with the Complainant and Bloemwater on 16 September 2011. At the meeting the parties could not reach a settlement.

(b) On 5 November 2011 the Complainant approached the Public Protector with an arbitration award from the SALGBC ordering Bloemwater to reinstate the latter. The Complainant alleged that Bloemwater refused to re-instate him and that they intend to take the case on review to the Labour Court.

(c) In a meeting held on 10 November 2011 the Public Protector recommended that Bloemwater re-instate the Complainant as per the arbitration award of SALGBC. Bloemwater rejected the recommendation stating on 16 November 2011 that they have already registered a review application at the Labour Court.
(iv) The Public Protector makes the following findings:

(a) Although the Bloemwater Board has indicated its compliance with the SALGBC award and the court order in so far as payment of the Complainants outstanding salaries is concerned, it nevertheless failed to reasonably justify its full compliance with the award and the court order in respect of the following issues:

(aa) Re-imburse the Complainant the outstanding salary amount in terms of the court order, including interest at a rate of 15.5% on the monetary award from 1 October 2011 in terms of Section 143(2) of the LRA;

(bb) Re-instate the Complainant on the same or similar terms and conditions that existed before termination of his the services;

(cc) Re-imburse the Complainant for the costs of the arbitration procedure in accordance with the SALGBC award and the legal costs in accordance with the court order.

(b) Such non-compliance is found to be improper and unjustified and thus amounts to maladministration.

(c) The above maladministration prejudiced the Complainant in that he has not received the full income that he should have received for a long period of time despite being given recourse by two legal forums and a court of law.

(v) In terms of section 182(1) (c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, the appropriate remedial action to be taken is that the Chairperson of the Bloemwater Board must take urgent steps to:

(a) Comply with the award of the SALGBC and the court order with immediate effect by ensuring that the Complainant is paid an amount as
instructed by the Court Order of the Labour Court, including interest at a rate of 15.5% on the monetary award from 1 October 2011 in terms of Section 143(2) of the LRA;

(b) Provide the Complainant with an indication of what the amount paid entails;

(c) Re-instate the Complainant on the same or similar terms and conditions that existed before termination of his services;

(d) Comply with the arbitration award and Court orders and pay all costs and legal costs;

(e) Comply with the Labour Court, Johannesburg and re-instate the membership of the Complainant subject to the rules of the medical aid scheme; and

(f) Review and amend the Internal Appeals Authority procedure to provide direction and certainty in circumstances where the Executive Authority rejects the recommendations of the Appeals Authority.
REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF MALADMINISTRATION BY BLOEMWATER FOR FAILURE TO COMPLY WITH THE DECISION OF ITS INTERNAL APPEAL AUTHORITY AND AN AWARD OF THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL

1. INTRODUCTION

1.1 "Above the law" is a report of the Public Protector in terms of section 182 of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) and Section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 It is submitted in terms of section 8(1) of the Public Protector Act to the following persons:

1.2.1. The Chairman of the Bloemwater Board and
1.2.2 The Chief Executive Officer (CEO) of Bloemwater.

1.3 A copy is provided in terms of section 8(3) of the Public Protector Act to the:

1.3.1 Speaker of the National Assembly;
1.3.2 Chairperson of the Justice and Constitutional Development Portfolio Committee; and
1.3.3 Complainant.

1.4 It deals with an investigation into an allegation of maladministration by Bloemwater for the failure to comply with the award of its Internal Appeals Authority regarding the disciplinary hearing of the Complainant and the award of the South African Local Government Bargaining Council (SALGBC) in this regard.
2. **THE COMPLAINT**

2.1 On 28 March 2011 the Complainant lodged a complaint with the Public Protector South Africa, Free State Provincial Office in which he alleged the following:

(a) He was dismissed from employment through a disciplinary hearing at Bloemwater (the Employer).

(b) He lodged an internal appeal and the Internal Appeals Authority (the Appeals Authority) recommended that he be re-instated on 7 January 2010. However, the Employer has refused and/or neglected to comply with the recommendation of its own Appeals Authority.

(c) He submitted a complaint to the South African Human Rights Commission (the SAHRC) and the Employer informed the SAHRC that it lodged an application for review with the Labour Court. This, he stated, was untrue as no documents were served on him or his legal representative. The SAHRC declined to investigate the matter on the basis that it was the subject matter of a court case.

(d) The Complainant subsequently approached the Public Protector for assistance.

(e) Prior to the finalisation of the investigation the Complainant lodged a complaint with the SALGBC which made an award on 5 November 2011 to the effect that the Employer must reinstate the Complainant and compensate him with an amount equal to twenty-one months of his salary.

(f) Bloemwater failed to comply with the award of the SALGBC and as a result the Complainant requested the Public Protector to assist with the implementation of the SALGBC award.
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector was established in terms of Chapter 9 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. It further directs that the Public Protector has additional powers prescribed in legislation.

3.3 The Public Protector's operations are regulated by the Public Protector Act which mandates the Public Protector to investigate and redress maladministration and related improprieties in the conduct of state affairs and further mandates the Public Protector to resolve the disputes through conciliation.

3.4 Bloemwater is an organ of state and its conduct amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector's mandate.

4. THE INVESTIGATION

4.1 Key Sources of Information

4.1.1 Interview held with the Complainant and perusal of the documents he submitted.

4.1.2 Correspondence with the Employer.
4.1.3 Mediation meeting held with the Complainant and the Employer on 16 September 2012.

4.1.4 Interview with the Complainant regarding the SALGBC arbitration award on 5 November 2011.

4.1.5 Correspondence and meeting with the Employer regarding the SALGBC arbitration award on 10 November 2011.

4.1.6 Consideration of the applicable legislative framework.

4.2. Interview with the Complainant and documents submitted

4.2.1 The Complainant informed the Public Protector investigation during the interview that the Employer refused to implement the award of its Appeals Authority following a disciplinary hearing which led to his dismissal.

4.2.2 During consultation the Complainant provided various documents to substantiate his allegations.

4.3. Correspondence with the Employer

4.3.1 The Employer was requested to submit reasons for its refusal to re-instate the Complainant as recommended by the Appeals Authority and to submit reasons for the delay in filing documents for the review application at the Labour Court.

4.3.2 The Employer responded as follows:

"I confirm that Mr K D Nyareli was employed at Bloemwater from 2004 until December 2009.

I further confirm that Mr Nyareli was dismissed on the abovementioned date of 9 December 2009. On 16 September 2009, Mr K D Nyareli appeared before a disciplinary hearing represented by SAMWU Shop Steward, Mr S."
Hash. During the hearing a few points in limine were raised, including the application for recusal of the presiding officer, Mr M Lithoko practicing attorney at M Lithoko Inc. All their points in limine including the application for recusal were opposed by the initiator, Z Mkhosana. Their application and points in limine were unsuccessful and were dismissed. The application for recusal was based on their arguments that the presiding officer was biased.

As you are aware the application for recusal must be in line with the judgement of SA Rugby Union versus The State President and other apprehension of bias. When their application was not successful they left the hearing (walk out). The hearing continued in their absence. Mr Nyareli was found guilty on all the charges and he was given the opportunity to plead in mitigation. He failed to submit mitigation factors and he was dismissed. Mr Nyareli appealed. I can confirm the outcome of the appeal. The employer decided not to accept the recommendation by a presiding officer of a disciplinary hearing or appeal hearing:

1. Ignore the recommendation
2. Recharge
3. Review the recommendation/decision

I refer you to the relevant judgment in this regard (see MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE KZN AND ANOTHER VERSUS DARKEN AND OTHERS, 2008 29 ILJ 1707 LAC). It was the intention of Bloemwater to take that recommendation/decision on review. Unfortunately we could not trace the appeal chairperson. We contacted NACTU because we were told that he was working for that organization. As you would know that in terms of Rule 7 (A) labour Court rules, all affected parties must be cited on the review application.

After not succeeding to trace the appeal chairperson, we considered recharging Mr Nyareli, hence the charge sheet in the documents you forwarded to us. Before we could proceed, we were given a mandate to settle in monetary terms, not as an admission of guilt but as an amicable solution to the dispute. Mr K D Nyareli turned down the offer.
It must also be noted that Mr K D Nyareli must be blamed himself for the delay in this matter. He has been changing representatives; initially he referred the matter to the CCMA which did not have jurisdiction over the matter. When he attended the CCMA hearing he came with two representatives, one from Louis Blok Attorneys and Mr Hash from SAMWU. At a later stage he came with Mr H B Mampe from NEHAWU. Mr Komati from KOMATI CC from Kroonstad was also at some stage involved. Each time Mr Nyareli came with a new representative; his instructions changed. At the moment Mr Mphafi Khang from Mphafi Khang Inc. is his attorney on record.

I must also mention that Mr K D Nyareli referred the dispute to the SALBC after a year and few months. The late referral was condoned. Mr Nyareli failed to attend the conclusion hearing on the 19th April 2011 and the matter was dismissed by the Commissioner A Ntheko. It is not the intention of the Bloemwater to prejudice Mr K D Nyareli. Mr K D Nyareli is responsible for delaying the process by changing representation at every arbitration hearing of conciliation process. He failed to appear on the 19th April 2011. If SALGBC made mistake, Bloemwater cannot be blamed.

Bloemwater is prepared to find an amicable settlement to resolve the dispute. It must however be made very clear then when we state we are prepared to find an amicable solution, we are not admitting guilt, but to bring the matter to an end..."

4.4 Mediation meeting

4.4.1 The Public Protector convened a mediation meeting in order to find a solution that would satisfy both the Employer and the Complainant. The mediation meeting was held on 16 September 2011. The Employer and Complainant were present.
4.4.2 The Complainant submitted that after his dismissal he was afforded the opportunity to appeal. The Appeals Authority recommended re-instatement. However, he was not re-instated but was advised to take the matter to the Commission for Conciliation Mediation and Arbitration (the CCMA). He was later advised that the Employer intended to take the matter on review to the Labour Court but this was not taken further. He complained to the SAHRC. Upon lodging his complaint with the CCMA the matter was referred to the SALGBC.

4.4.3 The Complainant further submitted that he was not happy with the fact that the Employer delayed instituting proceedings at the Labour Court. He did not receive any salary and was not allowed to return to work. He was further dissatisfied about the fact that the Employer defended the matter at SALGBC but did not take the matter on review to the Labour Court. His matter was at that stage, to be heard at the SALGBC on 19 September 2011.

4.4.4 The Complainant stated that he attempted to report for duty as per the decision of the Appeals Authority but he was not allowed to resume his employment.

4.4.5 The Complainant submitted that he was forty years of age, for nearly two years he was not allowed to return to work despite the fact that he has two degrees, and he was dismissed by default.

4.4.6 The Employer submitted that the charges were indeed investigated by interviewing other staff members, taking notes and a decision to charge the Complainant was taken. The whole investigation lasted three months. A date was determined for the disciplinary hearing.

4.4.7 The Employer representative arrived late for the disciplinary hearing due to the fact that an interpreter had to be found, as the interpreter arranged for the day was not available.
4.4.8 The Complainant's representative objected to the continuation of the hearing but the Chairperson of the disciplinary hearing dismissed the objection. The representative of the Complainant then applied for the recusal of the Chairperson, which was also dismissed. The Complainant and his representative then left the hearing. The hearing continued in their absence. After evidence was heard the matter was postponed and the Complainant properly informed of the date for sentencing. He did not appear and no submission in respect of sentencing was made on his behalf.

4.4.9 All the documents were drafted to take the decision of the Internal Appeals Authority on review but despite numerous efforts the Chairperson of the Internal Appeals Authority could not be traced. In terms of the rules of the Labour Court, the court would not have heard the case without the Chairperson being properly served.

4.4.10 The Employer indicated that an offer was previously made to the attorney of the Complainant equivalent to four months' salary and that it would not consider re-instatement as it subsequently discovered further possible charges against the Complainant.

4.4.11 The parties could not reach an agreement and the Complainant was requested to indicate an offer that he would consider. Both parties were informed that no court matter can be certain and therefore it may be worthwhile to accept or make an offer than to attend a court hearing. The Complainant would not indicate what offer would be acceptable. The Employer was requested to approach the Executive Authority and obtain a mandate to make an increased offer. The Employer undertook to submit the offer to the Complainant's attorney of record.

4.4.12 The parties could not reach an agreement as the Complainant was not prepared to accept any offer other than re-instatement.
4.5  The South African Local Government Bargaining Council Arbitration Award

4.5.1 The Complainant approached the Public Protector with a second complaint on 5 November 2011.

4.5.2 He presented the Public Protector with an arbitration award from the SALGBC which awarded him re-instatement and twenty-one months’ salary as compensation.

4.5.3 The award indicated that he should return to the Employer for duty on 3 October 2011.

4.5.4 The Complainant alleged that he reported for duty on 3 October 2011 but was refused re-instatement and that no payment to date was made in respect of the SALGBC award.

4.6 Correspondence and meeting with employer on SALGBC arbitration award

4.6.1 The Public Protector addressed a letter to the Employer on 5 November 2011 requesting them to adhere to the arbitration award of the SALGBC with immediate effect.

4.6.2 The Employer did not respond and on 8 November 2011 a letter to the CEO of the Employer was hand delivered to his office. The CEO was requested to re-instate the Complainant with immediate effect.

4.6.3 The Public Protector indicated to the CEO that in terms of the labour agreement between the Employer and the SALGBC provides that all labour disputes will be adjudicated by the SALGBC. Therefore, in accordance with this agreement the award amounts to a contractual agreement in accordance with the authority of the SALGBC.
4.6.4 The Public Protector further indicated to the CEO of the Employer that the labour agreement between the Employer and the SALGBC determines which procedures are to be followed by the SALGBC in conflict resolution. The award which ends the dispute is binding on all parties since it is one of the effects of the arbitration agreement. When the parties finalise this agreement, they are committed to accepting it with all its implications, including the implementation of the arbitration award. The agreement is the basis for determining the legal nature of the system of arbitration and awards it will pronounce.

4.6.5 The Public Protector advised that until the review process is concluded the arbitration award is binding on the Employer\(^1\). The delay to re-instate the Complainant continues to prejudice him.

4.6.6 The Employer requested a meeting with the Public Protector. The meeting took place on 10 November 2011.

4.6.7 The Employer was again informed that the Complainant had suffered enough prejudice and that a legal obligation existed to implement the award of the SALGBC. This would not prevent the Employer to proceed with review procedures in the Labour Court.\(^2\)

4.6.8 The Employer was also requested, during the meeting, to indicate why the Complainant was never criminally charged for one of the offences he was charged with during the disciplinary hearing. Not laying criminal charges against him constitutes non-compliance with the provisions of the PFMA.

4.6.9 The Employer requested time to consult with its management and undertook to revert back to the Public Protector on its decision.

4.6.10 The Employer responded in writing, on 16 November 2011, as follows:

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\(^1\)Section 145 of the Labour Relations Act No 66 of 1995

\(^2\)Section 145 of the Labour Relations Act No 66 of 1995
"...Your letter dated 8 November 2011 and the subsequent meeting held on 10 November 2011 in your office have reference.

The concerns raised in your letter and the discussions were duly noted. The matter was discussed with the Chief Executive and Bloemwater's legal advisor on the matter, Mr S Narian.

At this point Bloemwater maintains that the employer will be prejudiced if Mr Nyareli is reinstated pending the outcome of the review process. The employer exercised its right and registered a review application at the Labour Court, Case number C906/2011...”

5. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

5.1 The Complainant was employed with the Employer since 2004. He was dismissed on 16 December 2009.

5.2 At his disciplinary hearing of 9 December 2009 he was found guilty on charges of fraud and the disciplinary committee recommended his dismissal.

5.3 He subsequently appealed the decision of the disciplinary committee to the Appeals Authority which upheld his appeal and recommended his reinstatement on 7 January 2010.

5.4 The Employer chose not to adhere to the recommendations of the Appeals Authority and decided to take its decision on review to the Labour Court. The delay in proceeding with the review was attributed to the fact that the Employer was unable to reach the Chairperson of the Appeals Authority to serve him with the review application as he was cited as a party to the review application in accordance with the rules of Labour Court.
5.5 A year later the Complainant referred the matter to the SALGBC, which on 5 November 2011, made an award which required the Employer to re-instate the Complainant and compensate him with an amount equal to twenty-one months' salary.

5.6 The Employer was of the view that it was not obliged to comply with the award of the SALGBC and applied to the Labour Court for the review of the SALGBC award in June 2011. The review was filed in the middle of the investigation of the Public Protector, a process the Employer was fully aware of.

5.7 The Complainant thereafter approached the court and applied for the arbitration award to be an order of court. The court combined the Complainant’s application and the Employer’s review application and at the first court hearing instructed the Employer not to fill the position of the Complainant until the court has finalised its proceedings.

5.8 The matter is still pending before the Labour Court.

5.9 The Public Protector’s attempt to reach a mediated solution to the dispute, in September 2011, was unsuccessful as the parties were unable to reach an agreement.

5.10 The Employer provided no legal justification for its non-compliance with the SALGBC award as there was no law which prevented it from re-instituting the Complainant pending the outcome of its review process.

6. LEGAL AND REGULATORY FRAMEWORK


6.1.1 Section 9 of the Constitution of the Republic of South Africa (the Constitution) states that:
“(1) Everyone is equal before the law and has the right to equal protection and benefits of the law

(2) Equality includes the full and equal enjoyment of all rights and freedom. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”

6.1.2 Section 10 of the Constitution provides for the dignity of every person to be respected and protected.

6.1.3 Section 23 of the Constitution affords fair labour practices to everyone and section 33 of the Constitution provides for administrative action to be lawful, reasonable and procedurally fair.

6.2 Labour Relations Act, 1995

6.2.1 Section 28 of the labour Relations Act, 1995 (the LRA) describes the powers and functions of Bargaining Councils. The powers and functions of a bargaining council in relation to its registered scope include the following:

“(a) To conclude collective agreements;
(b) To enforce those collective agreements;
(c) To prevent and resolve labour disputes;
(d) To perform the dispute resolution functions referred to in section 51;
(e) To establish and administer a fund to be used for resolving disputes;
(f) To promote and establish training and education schemes;
(g) To establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;
(h) To develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;
(i) To determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace; and

(ij) To confer on workplace forums additional matters for consultation."

6.2.2 Section 145. Review of arbitration awards.—“(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;

(b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.[Para. (b) substituted by s. 36 (1) of Act No. 12 of 2004].

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

(2) A defect referred to in subsection (1), means—

(a) that the commissioner—

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner’s powers; or

(iv) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.
(4) If the award is set aside, the Labour Court may—

(a) determine the dispute in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

6.3 Public Finance Management Act, 1999

6.3.1 In terms of section 49 of the Public Finance Management Act (the PFMA) a public entity that has a board or other controlling body, that board or controlling body is the accounting authority for that entity.

6.3.2 In terms of section 38 (1)(h) of the PFMA “the accounting officer for the Department, Trading entity, or constitutional institution —(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who-
(i) contravenes or fails to comply with a provision of this Act;
(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or
(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure.”

6.3.3 In terms of section 51(1) (b) the Accounting Authority must take effective and appropriate steps to prevent losses resulting from criminal conduct.

6.3.4 In terms of section 86 of the PFMA contravention by the Accounting Officer of section 38 of the PMFA is a criminal offence. The Complainant was charged with fraud during the disciplinary hearings but no criminal charges were brought against him in a court of law or reported to the Police, by the Accounting Officer, to date.
6.4 Establishment of Bloemwater

6.4.1 Bloemwater was established as a Water Board in 1991, with the mandate to provide water services to the southern and central areas of the Free State. In terms of the Public Finance Management Act, Act 1 of 1999, Bloemwater is a Schedule 3 B entity, (a National Government Business Enterprise) reporting to Parliament via its Executive Authority, Department of Water and Environmental Affairs.

6.4.2 In terms of the Constitution of South Africa, Bloemwater is an organ of state, established in terms of the Water Services Act, Act 108 of 1997.

6.4.3 The Bloemwater Board is responsible for the strategic leadership of the Organisation, in essence encompassing sound corporate governance practices, ensuring a clear strategic direction, optimising operational performance and the consideration of various business related matters such as financial performance, legislative compliance and overall risk management.

6.5 The Disciplinary Policy of Bloemwater

6.5.1 The Disciplinary Policy of Bloemwater in respect of disciplinary action determines that the Employer may elect to appoint an external presiding officer who is legally qualified. An external presiding officer was appointed for the disciplinary hearing of the Complainant.

6.5.2 The Disciplinary Policy also states that the grounds for an appeal are either procedural or substantive fairness or both. An employee may lodge an appeal in writing within seven working days of receipt of the outcome of a disciplinary process. If the appeal is not made within the stipulated time frame, the decision of the chairperson shall be binding unless reasonable cause for the delay is furnished in writing, accompanying such grounds of appeal.

6.5.3 The appeal chairperson must convene and complete the appeal hearing within a reasonable time on receipt of the grounds of appeal. The appeal is
not a hearing _de novo_ unless the chairperson directs otherwise and the appeal shall be considered on paper. The appeal presiding officer shall be furnished with all the records of the disciplinary inquiry.

6.5.4 The appeal chairperson may uphold the appeal, reduce the sanction or confirm the outcome of the disciplinary hearing. In a case of dismissal the chairperson/appeal authority may order the reinstatement of the employee.

6.5.5 The Disciplinary Policy does not indicate whether the appeal hearing findings are binding on the Employer or not.

6.5.6 It is the submission of the Complainant that he did not receive reasons for the decision not to implement the decision of the Appeals Authority although he could not indicate whether or not it was formally requested.

6.6 _Jurisprudence and other authorities considered_

6.6.1 The Department of Labour published the Memorandum of Objects, Labour Relations Amendment Bill, in May 2012.

6.6.2 In respect of Section 145 of the LRA the Memorandum states the following:

> "This section is amended by introducing certain measures intended to reduce the number of review applications that are brought to frustrate or delay compliance with arbitration awards, and to speed up the finalisation of applications brought to the Labour Court to review arbitration awards.

> At present, a review application does not suspend the operation of an arbitration award. This often results in separate or interlocutory applications to stay enforcement of awards pending review proceedings. It is proposed that the operation of an arbitration award would be suspended if security is provided by the applicant in an amount specified in the provision, or any lesser amount permitted by the Labour Court."
In order to prevent delay by applicants, the amended provisions require that an applicant must apply for a date for the hearing of a review application within six months of commencing proceedings. Judgment in review matters must be handed down within six weeks unless there are exceptional circumstances."

6.6.3 In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* the Court remarked that "the provisions of the LRA must be purposively construed to give effect to the right protected by section 23(1) of the Constitution that is enjoyed by both employers and employees."

6.6.4 In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* where the matter was only heard by the Court after substantial delays. The Court remarked that "It was the employer's own conduct in causing this delay that led to this state of affairs. Whether that conduct was motivated by a cynical 'playing of the system', or a genuine but belated recognition of its own misconception of the correct legal principles, matters not. Neither the institutional part of the system nor the employee was to blame for the unnecessary prolonging of the proceedings."

6.6.5 In *AG’s Distributors v CCMA and Others* the Court noted that unlike an appeal, a review application does not automatically suspend the operation of an award. The accepted rule of practice in our courts is generally, the execution of a judgment is automatically suspended upon noting of an appeal. However, an appeal must be distinguished from a review.

6.6.6 In *NEHAWU obo Vermeulen v Director General: Department of Labour* the court held that the mere fact that a review application is pending does automatically bar making an award an order of court.

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3 [CCT 88/07] [2008] ZACC 16
4 [CCT 72/09] [2010] ZACC 3
5 2009 (5) BLLR 407 (LC)
6 2005 (8) BLLR 840 (LC)
6.6.7 In *Khoza v Sasol Ltd* the court stated:

"The object of expeditiously resolving labour disputes would certainly be compromised were employers to be permitted with impunity to ignore awards indefinitely without taking action under section 144 (of the LRA) and then block the employee when he ultimately seeks to have the award enforced (by making it an order of court)"

7. CONCLUSION

7.1 It is not disputed that the Complainant was charged with fraud by the Employer and found guilty of all charges and was subsequently dismissed on 16 December 2012.

7.2 It is also not disputed that the Complainant appealed to the Employer’s Appeals Authority which recommended, on 7 January 2010, that the Complainant be re-instated.

7.3 The Employer did not comply with the recommendation of the Appeals Authority but chose to review the decision. Its review application at the Labour Court was delayed, as the Chairperson of the Appeals Authority, who was party to the review, could not be located.

7.4 During the Public Protector’s investigation, the Complainant lodged a complaint with the SALGBC regarding the enforcement of the Appeals Authority’s recommendation in September 2011.

7.5 The Arbitrator, at the SALGBC hearing, was of the view that the Employer did not present sufficient reasons as to why it did not adhere to the Appeals Authority’s recommendation and awarded the re-instatement of the

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[2002] 9 BLLR 868 (LC)
Complainant with compensation equal to the amount of twenty-one months' salary.

7.6 The Employer's application for review in the Labour Court and the Complainant's application for the enforcement of the SALGBC award are currently pending before the Labour Court.

7.7 From the submissions made by the Employer hereunder, it can be seen that little effort was made to locate the Chairperson in respect of its review of the Appeal Authority's decision in order to progress the review application, which was lodged one year and three months after the decision of the Appeals Authority.

7.8 It was observed that a number of avenues were available to the Complainant to file an application for review at the Labour Court and/or to determine the whereabouts of the Chairperson of the Appeals Authority in order to curb the delay that was caused; such as serve the review application at the last known address of the Chairperson. The Chairperson is an attorney admitted by the High Court and registered with the Free State Law Society and therefore the Employer should have requested information from the Free State Law Society.

7.9 In any event, this review application did not materialise, as a result of the Employer abandoning the application in order to pursue the review of the SALGBC award.

7.10 The Employer's explanation for its non-compliance with the SALGBC award until the review application was finalised thwarts the operation of effective and efficient dispute resolution mechanisms which the LRA and the SALGBC is charged to uphold.

7.11 Further, an application of the relevant jurisprudence in this matter appears to support the view that the mere fact that the Employer's application for review is pending should not suspend the operation of the SALGBC. In the interim, nothing prevents the Employer from complying with the order of the SALGBC.
until the Court has reached a decision in the matter. The failure by the Employer to do so results in continued prejudice to the Complainant.

7.12 The SALGBC issued its award in November 2011, while the Employer’s review application was lodged in June 2011. There was therefore a delay of seven months by the Employer. Since the Employer did not take necessary action to progress its review application, the award of the SALGBC and its enforcement should not be suspended to the detriment of the Complainant.

8 RESPONSE TO THE PUBLIC PROTECTOR’S PROVISIONAL REPORT

8.1. Section 7(9) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

8.2. The Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act on 24 August 2012. The Provisional Report was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents.

8.3. Response from Bloemwater

In response to the Provisional Report, Bloemwater made the following submissions:

8.3.1 As a result of the Public Protector’s provisional findings and remedial action, Bloemwater reinstated the Complainant on 10 September 2012 and has since
paid all outstanding salaries owed to him from the date of dismissal in the amount of R466 694.31;

8.3.2 As a result the SALGBC Award has been complied with;

8.3.3 The Disciplinary Code and Procedure Policy is currently under review to accommodate the amendments suggested in the provisional report; and

8.3.4 The crime was a criminal case has been with the Boithuso SAPS office under case number: CAS 134/2012.

8.4 **Response by the Complainant**

In response to the Provisional Report, the Complainant made the following observations:

8.4.1 **Remedial Action**

(i) The Complainant confirmed that on 7 September 2012, he received a letter of reinstatement from Bloemwater and on 10 September 2012, he received a cheque to the amount of R466 694.31.

(ii) The Complainant raised his concern that since Bloemwater has now accepted the award made by the SALGBC on September 2011, it should pay him the salary he would have earned for a period of twelve months had Bloemwater complied with the award in September 2011.

(iii) The Complainant further responded that he did not receive any benefits attached to his post.
8.4.2 Legal Costs

(i) On 17 August 2012, the Labour Court issued an interim Court Order and ordered Bloemwater to pay all the outstanding salaries from 1 October 2011 (in terms of the Arbitration Award) and to pay interest on the amount at an interest rate of 15.5%.

(ii) The Court further ordered Bloemwater to pay the Legal Cost on an attorney and client scale.

(iii) The Complainant was advised by his attorney that the amount of cost which Bloemwater was ordered to pay will not cover all the legal fees, consequently thereof he is liable for a further R160 000.00.

(iv) The Complainant argued that Bloemwater’s failure to adhere to the SALGBC Award has placed him in a position which required him to approach legal representation and as a result, he humbly requested that Bloemwater pays all his outstanding legal costs to prevent any further prejudice to him in this regard.

8.4.3 Benefits

(i) The Complainant indicated that he was further prejudiced because had he been re-instated in accordance with the SALGBC award, he would have been entitled to receive his annual bonus (13th cheque) during his birthday month and his medical aid contributions in accordance with his benefits at the time of his employment.

(ii) As a result he is of the view that the Employer should be liable to reimburse him the amounts he would have received had he continued employment with Bloemwater and had the Employer complied with the SALGBC award in September 2011 in respect of his 13th cheque and medical aid benefits.
8.4.4 Outstanding issues

(i) Prior to re-instatement, Bloemwater offered to pay his outstanding salaries and a further six months’ salary on condition that he leaves its employment. Bloemwater advised him that if he did not accept this condition of the offer, upon re-instatement he will be charged with transgressions allegedly committed before his dismissal for which he was not initially charged.

(ii) The Complainant is of the view that such actions are tantamount to victimisation as the policy is clear that a person should be charged within thirty days from the date in which the misconduct is discovered. He thus requests the employer to ensure that steps are taken to prevent any victimisation against him, especially in light of the condition of his offer.

9. EVALUATION OF THE RESPONSES TO THE PUBLIC PROTECTORS PROVISIONAL REPORT

9.1 Bloemwater has considered and duly implemented the remedial action of the Provisional Report of the Public Protector. Bloemwater has paid the Complainant the outstanding salaries from the date of dismissal to 10 September 2012 in the amount of R466,694.31. It is noted, however, that Bloemwater did not provide any new evidence and/or raise objections to the findings and remedial action recommended by the Public Protector.

9.2 The Complainant confirmed receipt of the amount of R466,694.31 as his outstanding salaries. The concerns raised by the Complainant at paragraph 8.4 above were accordingly evaluated as follows:
9.2.1 Remedial Action

(i) The Complainant indicated that the amount he received on re-instatement in adherence to the arbitration award as well as in terms of the Labour Court award, was for his salary from 1 October 2011.

(ii) Bloemwater, however, in its response indicated that outstanding salaries were paid from the date of the dismissal of the Complainant. This response could be interpreted to mean that the Complainant was not put in the same position that he was in at the date of dismissal as no benefits that would have accrued for that period were included in the amount.

(iii) Further, Bloemwater did not provide an indication of what the amount paid to the Complainant entailed.

(iv) On 17 August 2012 the SALGBC and the Labour Court ordered Bloemwater to pay interest at a rate of 15.5% on the monetary award from 1 October 2011 in terms of Section 143(2) of the LRA. Bloemwater was to ensure that the arbitration award was adhered to. The Arbitrator awarded re-instatement on the same or similar terms and conditions that existed before termination of the services of the Complainant.

9.2.2 Legal Costs

(i) The SALGBC award required Bloemwater to pay the costs of the arbitration from the date of request for arbitration submitted to SALGBC by the Complainant.

(ii) The Complainant thereafter approached the Labour Court, Cape Town with an interdict and a review application since Bloemwater failed to implement the arbitration award. The court order in this regard was that that Bloemwater was required t settle the legal costs.
(iii) The Complainant was advised by his attorney that the amount of costs which Bloemwater has been ordered to pay will not cover all the legal fees, consequently thereof he is liable for a further R160 000.00.

(iv) Bloemwater is thus obligated to implement the terms of the court order in respect of legal costs and costs incurred in respect of the arbitration procedure.

9.2.3 Benefits

(i) The SALGBC award included re-instatement of the Complainant on the same or similar terms and conditions of employment prior to his dismissal. As a result Bloemwater is required to calculate the medical aid contributions, the 13th cheque and any other benefits that the Complainant would have received prior to his dismissal.

(ii) Bloemwater is required to adhere to all the terms of both the arbitration award and the court order and not adhere to only those issues that it finds suitable to implement.

9.2.4 Outstanding issues

(i) Paragraph 2, of the Policy Statement of the Code of Conduct and Procedures Policy of Bloemwater states that all cases of alleged breach of Bloemwater rules and regulations must be heard within a reasonable time but not later than thirty days after such alleged offence has been reported. A further reasonable period of extension may be given by the Employer on good cause shown.

(ii) In terms of section 191 of the LRA an employee can refer an alleged unfair labour practice to the SALGBC within ninety days of the date of the act or omission which allegedly constitutes an unfair labour practice.
(iii) The Complainant thus does have recourse in respect of this matter especially in the light of the fact that the disciplinary process has commenced.

10. FINDINGS

The Public Protector makes the following findings:

10.1 Although the Bloemwater Board has indicated its compliance with the SALGBC award and the court order in so far as payment of the Complainants outstanding salaries is concerned, it nevertheless failed to reasonably justify its full compliance with the award and the court order in respect of the following issues:

10.1.1 Re-imburse the Complainant the outstanding salary amount in terms of the court order, including interest at a rate of 15.5% on the monetary award from 1 October 2011 in terms of Section 143(2) of the LRA;

10.1.2 Re-instate the Complainant on the same or similar terms and conditions that existed before termination of his the services;

10.1.3 Re-imburse the Complainant for the costs of the arbitration procedure in accordance with the SALGBC award and the legal costs in accordance with the court order.

10.2 Such non-compliance is found to be improper and unjustified and thus amounts to maladministration.

10.3 The above maladministration prejudiced the Complainant in that he has not received the full income that he should have received for a long period of time despite being given recourse by two legal forums and a court of law.
11. REMEDIAL ACTION

In terms of section 182(1) (c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, the appropriate remedial action to be taken is that the Chairperson of the Bloemwater Board must take urgent steps to:

11.1 Comply with the award of the SALGBC and the court order with immediate effect by ensuring that the Complainant is paid an amount as instructed by the Court Order of the Labour Court, including interest at a rate of 15.5% on the monetary award from 1 October 2011 in terms of Section 143(2) of the LRA;

11.2 Provide the Complainant with an indication of what the amount paid entails;

11.3 Re-instate the Complainant on the same or similar terms and conditions that existed before termination of his services;

11.4 Comply with the arbitration award and Court orders and pay all costs and legal costs;

11.5 Comply with the Labour Court, Johannesburg and re-instate the membership of the Complainant subject to the rules of the medical aid scheme; and

11.6 Review and amend the Internal Appeals Authority procedure to provide direction and certainty in circumstances where the Executive Authority rejects the recommendations of the Appeals Authority.

12. MONITORING

The Public Protector will require:

12.1 An implementation plan from the Chairperson of the Bloemwater Board, indicating how the remedial action referred to in paragraph 11 above will be implemented, within thirty days from the date of this report;
12.2 Require a progress report from the Chairperson of the Bloemwater Board within twenty-one days of submission of the implementation plan referred to above; and

12.3 Monitor the progress made in this regard over regular intervals.

ADV T MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 31/01/13

Assisted by: Adv V N Maseko and Mr. M M Mashinini