Regulating Justice

Report on an investigation into a complaint against the South African Bureau of Standards relating to the withdrawal of a permit for the manufacturing and sale of motor vehicle number plates

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Executive Summary

(i) Regulating 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 relates to an investigation into a complaint lodged by Mr J T Prabudass (the Complainant) with the office of the Public Protector during 2001, alleging maladministration by the South African Bureau of Standards (SABS) regarding its enforcement of the SABS specifications in respect of the manufacturing of acrylic number plates, as well as the withdrawal of his manufacturing permit that allowed him to manufacture and sell motor vehicle license plates.

(iii) The Complainant approached my predecessor during 2000/1. The initial complaint lodged was that the SABS did not enforce the set standards in respect of acrylic number plates manufactured by means of the "kiss-cut" method. Later the Complainant lodged another complaint alleging the SABS had unfairly and improperly cancelled his permit for allowing him to manufacture and distribute vehicle number plates on 18 September 2000.

(iv) The investigation was almost concluded but the file was initially closed without a finding during 2003 on account of insufficient information to make a finding. The Complainant reverted to my Office in March 2012 to seek a conclusion on the initial complaints and as a result, the matters were re-opened.

(v) At the time of the initial investigation, the SABS had disputed the allegations by the complainant that the kiss-cut method of manufacturing number plates did not meet the requirements and standards prescribed in SABS 1116-4:1996 or that it failed to take action against manufacturers and distributors of the said defective number plates. On the withdrawal of the complainant’s permit, the SABS initially disputed the complainant’s claims that he was not in any manner operating unlawfully. Currently the SABS also disputed that the complainant’s permit had been withdrawn and submitted that it had lapsed by operation of the law because he failed to comply with the conditions thereof.
(vi) The SABS furthermore, maintained that the matter has prescribed in terms of the Public Protector Act, 1994 and that I should not entertain it further by means of the issuing of this report. I resolved the issue of prescription by alerting SABs that the claim has been filed in terms of the Public Protector Act and that that Act does not have a prescription period but rather a discretionary power is given to the Public Protector to decide whether or not to entertain a matter that is older than 10 years. In the case in point I exercised my discretion in favour of the Complainant easily as the matter had been lodged with my office immediately after the grievance arose in 2001.

(vii) On analysis of the complaint and information sourced during the preliminary investigation, the following issues were identified and investigated:

a) Whether the SABS improperly failed to attend to claims by the Complainant that acrylic number plates manufactured by means of the “kiss-cut” method did not meet the requirements and standards prescribed in SABS 1116-4:1996 or failed to take action against manufacturers and distributors of the said defective number plates;

b) Whether the SABS unfairly withdrew the Complainant’s permit to manufacture and distribute motor vehicle number plates, accordingly action constituting improper conduct and maladministration?; and

c) Whether the actions of the SABS had caused the Complainant to suffer any prejudice?

vi) The investigation process included consultations with the Complainant; scrutinizing of written submissions supported by samples of plastic number plates; interviews with the SABS personnel involved in the matter; correspondence with the SABS management and its Legal Section. Provisions of relevant legislations were analysed and applied.

vii) Key laws and policies taken into account to help me determine if there had been maladministration by the SABS and prejudice to the Complainant were principally those imposing administrative standards that should have been
upheld by the SABS or its officials when ensuring compliance with the standards contained in the (then) SABS 1116-4:1996 as provided for in the National Road Traffic Act, 1996, the National Road Traffic Regulations, 1999 and the Compulsory Specification for Retro-Reflective Number Plates for Motor Vehicles (VC8062). The standard used to determine whether the SABS acted in accordance with the powers conferred upon it by law when it advised the Complainant that his permit had been terminated is provided for by the Regulations in terms of the Standards Act, 1993 (Notice R225 in Government Gazette 20963, dated 17 March 2000) and the Regulations relating to Permit Fees and Certification Marks Permits, issued in terms of the Standards Act, 1993 (Notice R1948 in Government Gazette 1520, dated 15 October 1993). The standards used to determine whether the SABS unfairly withdrew the Complainant's permit, are provided for in section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA).

(viii) Having considered the evidence pointing to what happened and measuring that against the relevant regulatory framework, I make the following findings:

1. Regarding whether the SABS improperly failed to attend to claims by the Complainant that acrylic number plates manufactured by means of the "kiss-cut" method did not meet the requirements and standards prescribed in SABS 1116-4:1996 or failed to take action against manufacturers and distributors of the said defective number plates, I find that:

   aa) Samples of acrylic motor vehicle number plates submitted by the Complainant showed visible defects or deterioration in the form of cracking, blistering or loss of adhesion.

   bb) The dispute between the parties as to whether incidents of accelerated deterioration in acrylic motor vehicle number plates could be directly attributed to the "kiss-cut" method of manufacturing, as opposed to poor workmanship, was not resolved by the evidence obtained during the initial investigation by my predecessor.

   cc) Without independent scientific evidence I am unable to pick up where my predecessor left off by endeavouring to make a finding on the
allegations by the Complainant that the SABS had at the time failed its
duty because acrylic motor vehicle number plates manufactured by
means of the "kiss-cut" method could not meet the required SABS
standards set in the then SABS 1116-4:1996.

dd) Since the Compulsory Specification for Retro-Reflective Number
Plates for Motor Vehicles (VC8062) has in the meanwhile been
withdrawn by the Minister of Trade and Industry and acrylic plates are
being phased out in new motor vehicle registrations in favour of
aluminium plates, any further investigation of the original allegations
would therefore, not be warranted at this point in time.

2. Regarding whether the SABS unfairly or unfairly withdrew the
Complainant's permit to manufacture and distribute motor vehicle
number plates, accordingly action constituting improper conduct and
maladministration, I find that:

aa) The Complainant was in possession of a Valid test report and letter of
confirmation from the SABS dated 02 March 1998 and 17 March 2000,
respectively, stating that the Complainant's "silkscreen" method of
manufacturing number plates as well as the number plates
manufactured by him, complied with SABS specifications SABS 1116-
4:1996

bb) On 18 September 2000 the SABS issued a notice to the Complainant
advising him that the product that he was manufacturing, in terms of the
permit, did not comply with SABS specifications SABS 1116-4:1996, and
that his permit was withdrawn;

cc) The notice addressed to the Complainant was intended to inform him of
a decision by the SABS that the permit had been withdrawn, but merely
informing him of the expiry thereof as a result of alleged relocation of his
premises.

dd) The SABS failed to: –

(i) inform the Complainant of its intention to withdraw the permit,
(ii) provide adequate reasons for the withdrawal of the permit;
(iii) provide the Complainant with an opportunity to respond to adverse information that affected the decision to withdraw the permit; and
(iv) inform the Complainant that he had the right to submit written representations to its Chief Executive Officer (CEO).

ee) The SABS therefore failed to comply with the provisions of the Regulations Relating to Permit Fees and Certification Mark Permits, issued in terms of the Standards Act, 1993, which empowered the Chief Executive Officer to suspend or cancel the registration of a manufacturer of number plates in terms of section 5(4) of the Standards Act, 1993 after prior notification of such intention to the permit holder;

ff) The process followed by the SABS to withdraw a permit was procedurally unfair and not in compliance with the requirements for a just administrative process contained in section 33 of the Constitution and section 3(2)(b) of PAJA.

gg) The conduct of the SABS constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

hh) Because of the continued nature of administrative functions and the consequences for the Complainant, the interests of justice and in an effort to uphold the rights and principles that are espoused in our Constitution, the maladministration and improper conduct in this matter cannot be cured by the mere passage of time.

3. Regarding whether the actions of the SABS had caused the Complainant to suffer any prejudice, I find that:

aa) At the time when the permit was withdrawn the Complainant was self-employed and building a business on an innovation in which he invested a large part of his life in order to establish himself as an individual in an industry where long-established businesses had been controlling the market in terms of vested processes and practices;
bb) The withdrawal of the permit had the effect that the Complainant was not able to lawfully pursue this manufacturing business venture and ended up without any income.

c) Apart from the financial impact, the failure to provide reasons resulted in the complainant not being able to exercise his rights and in essence to victimisation.

d) The maladministration referred to above has prejudiced the Complainant in that he suffered and continues to suffer severe distress and loss of income.

viii) The appropriate remedial action I am taking in pursuit of section 182 (1)(c), with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, is to require the following:

The Chief Executive Officer of the SABS to steps to:

(a) Enable and assist the Complainant to apply for the necessary permission and authorization to be registered as a manufacturer, distributor or reseller of motor vehicle number plates. This includes financial assistance, in consultation with the Complainant but not less than –

   aa) R250 000, 00 to re-apply for a manufacturing permit and to re-open a business to supply number plates to the motoring public (embosser); and

   bb) R150 000, 00 to re-establish a business to manufacture number plate machines and supply number plate accessories in selected areas.

(b) Provide the Complainant with a remedy, including a reasonable amount as a settlement for consolatory compensation, to address the distress and trauma experienced by him and his family as a result of the manner in which the matter has been handled.
1. **INTRODUCTION**

1.1. "Regulating 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 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted to

a) the Chief Executive Officer (CEO) of the South African Bureau of Standards (SABS); and

b) The chairperson of the Board of the South African Bureau of Standards (SABS).

1.3. A copy of the report is also provided to the Complainant in terms of section 8(1) of the Public Protector Act.

1.4. The report relates to an investigation following a complaint against the SABS alleging dereliction of their statutory duties by the SABS as well as unfair treatment, maladministration and prejudice relating to the withdrawal, in 2000, of the Complainant’s permit to produce and sell motor vehicle number plates.

2. **THE COMPLAINT**

2.1. **Allegations**

2.1.1. The Complainant approached the Public Protector in 2001 with a complaint against the SABS for allegedly failing to enforce its standards in respect of acrylic number plates manufactured by means of the "kiss-cut" method¹ (Complaint No 1).

¹ The "kiss-cut" process involves the following:
2.1.2 Soon thereafter, in 2001, the Complainant lodged another complaint (Complaint No 2) with the KwaZulu-Natal (KZN) office of the Public Protector against the SABS alleging that his permit for registration as a manufacturer and distributor of motor vehicle number plates was unfairly and improperly withdrawn by the SABS on 18 September 2000, without-

2.1.2.1 adequate prior notice of intention to suspend or cancel the Complainant’s manufacturing permit;

2.1.2.2 clear reasons for the intended cancellation of the permit; and

2.1.2.3 a reasonable opportunity to make a written representation to the CEO before the decision was taken.

2.1.3 The Complainant further alleged that he immediately communicated with the SABS through his lawyer to determine the reasons for the determination that his product did not comply with the requirements of SABS 1116-4:1996 after having received a positive test result and clearance, as well as the reasons for failing to provide him with prior notice as required by Government Gazette 20963 of 17 March 2000. According to the Complainant, neither he nor his attorney, allegedly, received any response or any information that explained why the permit was withdrawn.

\[a)\] After the acrylic plate is moulded, an epoxy based blue or black screened border is printed onto the clear Perspex blank.

\[b)\] A blue or black vinyl is then laminated onto the blank – with a non-permanent adhesive for ease of weeding out the excessive vinyl after the registration number has been "die cut".

\[c)\] When the number plate is manufactured by an embosser, the blank with the laminated material is placed on top of pre-set blades shaped in the form of letters and numbers – representing the relevant registration numbers.

\[d)\] The blank is then pushed through a set of rollers, which presses ("kiss") the blank onto the "dies" (blades) to cut thru the vinyl.

\[e)\] The excess vinyl is then weeded out leaving just the characters required for the registration numbers.

\[f)\] The complainant's concerns relating to this process were based on the fact that –

\[i)\] in order for the blades to cut the number, the vinyl has to be of a certain thickness. Due to the thickness of the material, air is trapped around the edges of the numbers when the reflective backing was applied, which causes defects when the number plate is exposed to the local weather conditions.

\[ii)\] continuous exposure to the harsh African sun causes the trapped air to expand, allowing water and grime to enter the number plate, resulting in the registration mark no longer being legible as required by the relevant laws.
2.2 Background to the complaints

2.2.1 The Complainant advised the Public Protector that he was a manufacturer in the motor vehicle number plate industry and was distributing number plates that were manufactured in accordance with a "silk screen method" that he had developed. He stated that he submitted his product to the SABS for approval. The approval was granted and the test report obtained from the SABS showed that his product complied with the selected requirements of SABS 1116-4:1996 *Retro-reflective registration plates for motor vehicles* (SABS 1116-4:1996). The Complainant also indicated that he had developed and distributed his own manufacturing machines to approved third party agents.

2.2.2 When the disputes arose between the Complainant and the SABS, which led to the withdrawal of his permit, he approached the National – and KZN offices of the Public Protector respectively. The complaints were investigated and the SABS responded to some of the allegations, including technical information on the alleged deficiencies in the number plates that were manufactured in terms of the "kiss-cut" method.

2.2.3 The responses and outcome of enquiries my National office were communicated to the Complainant. The Public Protector did not make any findings at the time because there was a break in communication with the Complainant in respect of outstanding information. (He explained afterwards that he had fallen into a state of depression at the time as a result of losing his business and did not have the mental energy to proceed with the complaint.) As a result, no further action was taken and the file was ultimately closed. (Put on hold)

2.2.4 The Complainant approached the Public Protector again in February 2012 and it was decided that the case should be re-opened after it was established that the events that led to the Complainant's matter had such a psychological effect on the Complainant that he subsequently went into a state of severe depression. The Complainant alleged that he found it difficult to continue with his "normal" life, and to find the necessary resolve and will to go through the mental
challenges of what was at that time a drawn out dispute with the SABS.

2.2.5 The Complainant indicated that he wanted to resume his business interests in the manufacturing and distribution of motor vehicle number plates and felt that he could make an important contribution to some of the challenges that are facing the number plate industry and road traffic law enforcement as a result of fraudulent and defective motor vehicle identification. He allegedly discovered that the earlier events had a lasting effect on his reputation and credibility and hindered his chances of being accepted as a legitimate role-player and contributor to the number plate industry. The only way to continue with his goal, which was to make a meaningful contribution to reducing the carnage on our roads and the risks and threats caused by fraudulent, faulty and defective registration plates of motor vehicles, was to achieve a conclusion on the matters that he had originally raised with the Public Protector, and the impact of these events on his life.

2.2.6 I subsequently resolved to proceed with a provisional report in terms of section 182(1) (b) of the Constitution and section 8(1) of the Public Protector Act. The objective is to afford any person who may be affected by the decision of the Public Protector a reasonable opportunity in terms of section 7(9) of the Public Protector Act to know the matters which may likely affect the decision of the Public Protector against their interests. Any person whose rights may be affected by such a decision may bring any evidence or matter of substance and importance, having the potential to influence the outcome of the investigation, to the Public Protector’s attention.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector was established under section 181(1) (b) 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 I have 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 I have additional powers prescribed in legislation.

3.3. I am further empowered by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4. The SABS is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within my ambit.

3.5. My jurisdiction to investigate was not disputed by any of the parties, although the SABS raised an objection based on the argument that my report was issued long after the occurrence of the incident(s) that formed the subject of the complaint. The SABS submitted that I should have exercised my “discretion — granted by section 6(3) (b) of the Public Protector Act, 1994 — to refuse to finalise the investigation of the complaint. In the current circumstances, the appropriate result would be to simply close the investigation as was previously done”. The submission was based on the following arguments:

a) The SABS is at a serious disadvantage in responding to the provisional report because the issue at the centre of the report was not part of the initial investigation and the SABS’ version is essentially being sought for the first time 12 years after the fact;

b) Some of the SABS’ employees, who dealt with this matter and would thus have to provide input into the SABS’ response to the provisional report, are no longer in its employ;
c) Due to the previous closure of the Public Protector’s investigation, the SABS’ documentary file relating to the complaint regarding the alleged non-compliance with SABS 1116-4:1996 and withdrawal of the permit in issue, have since been destroyed;

d) The Complainant failed to exhaust the legal remedies at his disposal as referred to in sections 6(4) and (5) of the Public Protector Act, including a request for reasons and institution of proceedings for judicial review (within the prescribed time limits of 90 days and 180 days, respectively) in terms of section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and

e) The Complainant had a remedy to approach a court of law for an order compelling the production of the reasons and information to explaining why the permit was withdrawn, as allegedly requested by the Complainant or his lawyer, of which the SABS stated that it had no record of such a request, despite requesting the same from the Public Protector.

3.6 I considered the objections and submissions made by the SABS in respect of my discretion as the Public Protector in section 6(9) and section 6(3) of the Public Protector Act relate to the late lodging of a complaint, and the refusal to entertain or to lodge an investigation into a complaint, respectively.

3.6.1 In the matter at hand, both complaints were lodged within 2 years after the occurrence of the incidents and both complaints were accepted by the Public Protector, the complaints were also the subject of the investigations by the National Office and the KZN Provincial Office of the Public Protector. The matter does therefore not fall within the ambit of the discretionary reasons to decline a complaint, including complaints older than two years or the availability of alternative legal remedies, as provided for in the Public Protector Act.

3.6.2 Even when I consider the provisions of PAJA amongst other norms and standards for just administrative action in the regulatory framework in order to
determine whether or not a complaint about the administrative action against an organ of state is substantiated, I derive my mandate and powers from the Constitution and legislation such as the Public Protector Act. The law provides me with discretion to accept complaints that fall within my mandate, even if those complaints would have been time-barred if they were to be actioned as proceedings in a court of law or a tribunal in terms of the Prescription Act, 1969 (Prescription Act) and PAJA respectively. In terms of section 6(9) of the Public Protector Act, the Public Protector may in special circumstances, within his/her discretion, investigate matters that have been reported more than two years after the occurrence of the incident or matter concerned. There is no reference or link to the time limitations provided for in the prescription legislation.

3.6.3

I made it clear in the provisional report that I am mindful of the impact of the delay on the interests of the Complainant and the SABS as well as the public. When I decided to proceed with the report in terms of section 182(1)(b) of the Constitution and sections 7(1)(a) and 8(1) of the Public Protector Act I took into account a number of factors including-

a) the nature of the complaint, the reasons for the Complainant's grievance and the redress being sought;

b) the reason given by the Complainant for the delay;

c) \textit{prima facie} indication or suspicion of improper conduct in state administration or of unremedied prejudice to the Complainant;

d) The likelihood of concluding the matter due to the delay having regard to the nature of the allegations;

e) The availability of information, evidence and records, the obligations of an organ of State to manage and maintain its records properly, balanced against concerns that a remedy for an administrative injustice
could be denied or compromised as a result of incorrect or lack of authentic records or failure to retrieve records;

f) The fact that in the matter at hand, a finding was never made and ‘the outcome or the suspension of the investigation was not communicated to the parties in terms of section 8(1) of the Public Protector Act (which raises concerns about the SABS claims that their records were destroyed after the file was closed by the Public Protector).

3.6.5 Subsequently, I also took into account the issues and concerns raised by the SABS in response to the provisional report, as well as the general principles for considering condonation of a delay in the course of legal proceedings in our civil law.

3.6.6 It is important to note the Public Protector Act is a law in its own right and so is section 182 of the Constitution. When people chose the Public Protector avenue for vindicating their rights they make a choice of law. In this regard it is worth noting that the Public Protector is an appropriate forum for resolving disputes as envisaged in section 34 of the Constitution, although it is a forum whose jurisdiction is limited to dispute arising in state affairs. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 among others, recognises the Public Protector as an alternative forum. Government or organs of state cannot accordingly force people to subject themselves to their (government’s) preferred avenue for resolving disputes or vindicating rights.

3.6.7 Furthermore, the Public Protector Act does not provide for prescription. It simply confers a discretion on the Public Protector to reject matters older than two years. However to do so she or he would have to take into account section 182(4) of the Constitution requiring the Public Protector to be accessible to all persons and communities. My view is that there have to be compelling reasons for rejecting someone who needs justice particularly where a matter may have prescribed in relation to courts leaving the injustice unremedied.

3.6.8 Such compelling reasons include unavailability of information and inability to remedy the injustice. I duly considered the risk that the rights of the parties could
be infringed in some way or that some prejudice could be caused if I went ahead, and my Constitutional obligation to exercise my power and perform my functions without fear, favour or prejudice.

4. THE INVESTIGATION

4.1. Methodology

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.

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3. The information and evidence reflected in the report was obtained by means of an investigation in terms of section 6 and 7 of the Public Protector Act in the form of meetings held, documentation obtained and the consideration of applicable legislation and other regulatory provisions.

4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
   - What happened?
   - What should have happened?
   - Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
   - In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced
during the investigation. In this particular case, the factual enquiry principally focused on whether or not the SABS acted improperly in relation to the enforcement of the requirements and standards prescribed in SABS 1116-4:1996. I also had to determine if the SABS had indeed withdrawn the Complainant’s permit, and if so, whether or not they followed a fair and lawful process.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state (SABS) to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3. On analysis of the complaint, the following were issues considered and investigated:

4.3.1. Whether the SABS improperly failed to attend to claims by the Complainant that acrylic number plates manufactured by means of the “kiss-cut” method did not meet the requirements and standards prescribed in SABS 1116-4:1996 or failed to take action against manufacturers and distributors of the said defective number plates;

4.3.2. Whether the SABS unlawfully or unfairly, withdrew the Complainant’s permit to manufacture and distribute motor vehicle number plates, accordingly action constituting improper conduct and maladministration?; and

4.3.3. Whether the actions of the SABS had caused the Complainant to suffer any prejudice?

4.4. The Key Sources of information
4.4.1. Documents

4.4.1.1. Statements of complaint by the Complainant received in 2000;

4.4.1.2. Images of portions of motor vehicle number plates showing signs of deterioration, according to the Complainant attributed to the "kiss-cut" method;

4.4.1.3. Copy of SABS 1116-4:1996;

4.4.1.4. Test report issued by the SABS on 02 March 1998 confirming that the retro-reflective number plates submitted by the Complainant for testing, complied with SABS 1116-4:1996.

4.4.1.5. Letter dated 17 March 2000 issued to the Complainant by the SABS Regional Manager: KZN Assessment services advising him that the silkscreen method of manufacturing motor vehicle number plates is acceptable in terms of SABS 1116.

4.4.1.6. Letter dated 18 September 2000 issued to the Complainant by the SABS Regional Manager: KZN Assessment services advising him that his permit is withdrawn.

4.4.1.7. Form MNP – Application and notice in respect of registration of a manufacturer of number plates.

4.4.1.8. Sample permit and conditions to apply SABS certification Mark

4.4.2. Interviews conducted

4.4.2.1. Meetings with officials of the SABS (during the initial investigation of the complaint relating to the enforcement of the SABS 1116-4:1996) in November 2001.

4.4.2.2. Interviews conducted with the Complainant during the initial stage of the investigations in 2000 and 2001 and subsequently after the re-opening of the matter from 2012 on or around the following dates:

a) 22 March 2012;

b) 6 July 2012;

c) 1 August 2012;

d) 3 October 2012;

e) 16 January 2013;
f) 6 March 2013

j) 29 April 2013;

h) 2 November 2013; and

i) 24 March 2014;

4.4.3. Correspondence sent and received

4.4.3.1. Correspondence between the Complainant (and his legal representative) and the SABS during September 2000;

4.4.3.2. Correspondence from the Complainant over the period 2001 to 2003, and again commencing from March 2012;

4.4.3.3. Correspondence to the SABS from November 2001 to March 2002, and information initially submitted by the SABS in response to requests from the Public Protector's National and Provincial offices;

4.4.3.4. Responses to the Public Protector's provisional report dated 15 May 2013 and 10 September 2013.

4.4.4. Inspections in loco conducted


4.4.5. Legislation and other prescripts

4.4.5.1. The Constitution of the Republic of South Africa, 1996;

4.4.5.2. The Public Management Finance Act, 1 of 1999;

4.4.5.3. Regulations in terms of the Public Finance Management Act, 1999;

4.4.5.4. Framework for Supply Chain Management dated 5 December 2003;

4.4.5.5. Section 27 And 2 Others V Minister Of Education And Another

5. APPLICABLE LAW AND RELATED PRESCRIPTS

5.1 The Constitution

The manner in which the SABS took certain decisions around this matter raises questions of just administrative action as envisaged in section 33 of the
Constitution. Section 33 states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

5.2 **The Promotion of Administrative Justice Act, 2000 (PAJA)**

5.2.1.1 The actions of the SABS must furthermore, be tested against the PAJA, which was enacted in terms of the Constitution to give effect to the right to just administrative action in section 33 of the Constitution.

5.2.1.2 "Administrative action" is defined by the PAJA, as:

"A decision taken, or a failure to take a decision, by an organ of state, when exercising power in terms of the Constitution or in terms of any legislation, which adversely affects the rights of any person, and which has a direct external legal effect."

5.2.1.3 Section 3 of PAJA provides for the requirements for procedurally fair administrative action, which is very relevant to the manner in which the Complainant’s permit was withdrawn in this matter:

"(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)

(a) ....

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable;

(v) adequate notice of the right to request reasons..."
5.3 National Road Traffic Act, 1996 and National Road Traffic Regulations, 1999

5.3.1 The role and duties of the SABS is confirmed in Chapter 11: Registration and licensing of motor vehicles, and registration of manufacturers, builders and importers and manufacturers of number plates.

"Part 1: Registration and licensing of motor vehicles 35. DISPLAY OF LICENSE NUMBER

The license number of a motor vehicle shall be displayed on a plate, to be referred to as a number plate and which complies with the standard specification SABS 1116. "Retro-reflective Registration Plates for Motor Vehicles". Part 2: "Registration plates (Metal)" and Part 4: "Registration plates (plastic)".

5.4 Compulsory Specification for Retro-Reflective Number Plates for Motor Vehicles (VC8062).

5.4.1 Any number plate manufactured or distributed for use on motor vehicles on the South African roads, had to comply with the compulsory specification for retro-reflective number plates for motor vehicles declared on 3 April 1998 by the (then) Minister of Trade and Industry, hereby under section 22 (1) (a) (11) of the Standards Act.

5.4.2 Plastics number plates had to comply with the requirements provided in SANS 1116-4: 1996. Retro-reflective registration plates for motor vehicles - Part 4: Registration plates (plastics), in respect of:

a) Materials
b) Blanks
c) Retro-reflective material
d) Registration mark and border
e) Protective cover
f) Registration mark
g) Graphics
h) Border
i) Application
j) Workmanship
k) Performance
l) Resistance to weathering
m) Resistance to salt fog
n) Resistance to scratching, impact and abrasion
o) Resistance to bending
p) Strength of adhesion
q) Combination of variables

5.4.3 Plastics number plates had to be marked as specified in SABS 1116-4: 1996, Retro-reflective registration plates for motor vehicles - Part 4: Registration plates (plastics).

5.4.4 The Compulsory Specification for Retro-Reflective Number Plates for Motor Vehicles (VC8062) has in the meanwhile been withdrawn by the Minister of Trade and Industry with effect from 26 September 2013 in terms of clause 13(1)(d) of the National Regulator for Compulsory Specifications Act, 2008.

5.5 National Road Traffic Regulations, 2000 (Notice R225 in Government Gazette 20963, dated 17 March 2000)

5.5.1.1 Clause 51(1) of the said Regulations provide the powers of the Chief Executive Officer as well as the procedure for the exercise of such powers for the cancellation of the registration of a manufacturer of number plates:

"51. Manner of suspension or cancellation of registration of manufacturer of number plates

(1) If the chief executive officer intends to suspend or cancel the registration of a manufacturer of number plates in terms of section
5(4) of the Act he or she shall notify such manufacturer of such
intention and the reasons therefor."

(2) The manufacturer of number plates referred to in sub-regulation 1
may, within 21 days after the receipt of the notification referred to in
that sub-regulation, make a written representation to the chief
executive officer.

(3) The chief executive officer shall after due consideration of any
representations made in terms of sub-regulation (2), if any –
a) cancel.... or suspend such registration for such period as he may
deeam fit...."

5.6 Regulations relating to Permit Fees and Certification Mark Permits, issued in terms
of the Standards Act, 1993 (Notice R1948 in Government Gazette 1520, dated 15
October 1993)

5.6.1.1 The SABS relies on item 7 of the Regulations relating to Permit Fees and
Certification Mark Permits (Permit Regulations), for its submission that the
communication was not a notice of withdrawal, but confirmation that the permit
had in fact expired:

"7.1 A mark Permit shall expire if –
a) the permit is withdrawn by the SABS on the date determined in the notice
of withdrawal or the date of substitution of a new mark permit; ...
b) ...
c) ...
d) The permit holder moves his manufacturing activity to new premises and
the SABS is not prepared to amend his permit to apply to such new
premises, on the date of removal.

7.2 Notwithstanding anything to the contrary contained in these regulations, a
person whose permit has expired during the manufacturing period shall
within one month of such expiry date furnish the SABS a manufacturing
figure for the elapsed part of the manufacturing period and shall pay to the
SABS a permit fee....

7.3 Upon expiry of the mark permit the permit holder shall submit to the SABS
an accurate return of the quantity of the commodity on hand to which the
certification mark has been applied until such an expiry date....”

6. EVIDENCE AND INFORMATION OBTAINED

6.1 Evidence on issue 1 - Whether the SABS improperly failed to attend to claims
by the Complainant that acrylic number plates manufactured by means of the
“kiss-cut” method did not meet the requirements and standards prescribed in
SABS 1116-4:1996 or failed to take action against manufacturers and
distributors of the said defective number plates;

6.1.1 Complainant’s case

6.1.1.1 In respect of the first complaint, the Complainant submitted a detailed statement
on the analysis of SABS 1116-4:1996 and the compulsory requirements that
were, in his view, not complied with in respect of the material and processes
used in the “kiss-cut” method of manufacturing.

6.1.1.2 The complainant also submitted several samples of number plates that showed
signs of cracking, blistering or loss of adhesion because the material or
processes used were, inter alia, not resistant to bending, weathering, salt fog,
scratching, impact, abrasion and heat.

Illustration of some of the alleged deficiencies identified by the Complainant

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6.1.3 He, allegedly, further appealed to the SABS to issue a press statement to notify the public of an earlier confirmed incident where defective number plates had found their way into the market. The SABS advised him that they did not find it necessary to issue a press release as there was "no imminent danger to anyone".

6.1.4 His impression was that they did not show a great deal of concern about the issues that he raised and that there was a clear reluctance to put the interests of the consumers (motorists) and the public above that of the established manufacturers and manufacturing processes. He subsequently lodged a complaint with the Public Protector in 2001.

6.1.2 Response from the SABS

6.1.2.1 The SABS disputed any suggestion that it failed to perform its regulatory functions or that it failed to enforce compliance with the specifications of SABS 1116-4:1996 on manufacturers and distributors of retro-reflective registration plates for motor vehicles.

6.1.2.2 The Legal Division of the SABS responded in detail in 2001, to the areas of concern raised by the Complainant in respect of the first complaint on the alleged deficiencies with the number plates manufactured in terms of the "kiss-cut" method:
a) The SABS disputed that it made a statement that it only tested the “kiss-cut” product for wind, cold, bend, salt and fog tests, and overlooked the heat test. The SABS confirmed that it did not consider the “heat test” as relevant or necessary as there was no requirement for a heat test in SABS 1116-4:1996.

b) Any perception that SABS 1116-4: 1996 was based purely on the design of the referred to “kiss-cut method”, was incorrect. The standard of the SABS was mainly a performance based standard where acrylic registration plates must meet specific requirements when tested. No method of manufacturing is defined in SABS 1116-4:1996.

c) The SABS’ standard allowed a small gap around each character where the retro-reflective material was “bridged” over them. This however was not a loss of adhesion, as it was never adhered to in the first place. Loss of adhesion was not exclusive to any specific method of manufacture and could occur for any of the following reasons:

(i) Poor workmanship;
(ii) Inferior quality materials; or
(iii) Incorrect storage and poor handling of materials.

d) The statement that South African Number Plate Association (SANPA) supplied defective retro-reflective number plates in Gauteng during 1997 and 1998 actually referred to the conduct of a specific supplier of retro-reflective material over some 3 years in the past. This problem was identified by the SABS through its regular surveillance inspections and was addressed with the industry. The defective tape was duly withdrawn and replaced by the supplier.

e) As “there was no imminent danger to anyone, the industry was not obliged or expected to make any statement in the media.” The SABS did not, nor was it required to make any similar statement. However, if
consumers had experienced any problems with registration plates due to the aforementioned problem, they had the normal recourse of returning them to the manufacturer who should have replaced them. Failing satisfaction, they could have contacted the SABS for further assistance. The SABS had no knowledge of any customers seeking any such assistance from it.

f) The process and products described by the Complainant relating to the silk screen on the border of the number plates was an example of the industry trying to improve its productivity by its own initiative. However, products by this method were found not to comply and action was duly taken by the SABS and the manufacturers to withdraw the vinyl cut border.

g) Regarding the Complainant's statement that he "advised the SABS that he had studied the existing product (acrylic number plates) and that he had found it to be defective", the SABS did not have any knowledge of who, at the SABS, the complaint was made to by the Complainant; when this complaint was made; in which document the complaint was recorded; and on what grounds the Complainant alleged that the "kiss-cut" method of manufacturing number plates was defective. The SABS has a formal complaints procedure, CSPI 20, for handling all complaints defined therein. The SABS further stated in their response that "we have not found any record of Mr J.T. Prabaduss ever formally complaining to us at SABS on this matter."

h) As far as the "pulling away" from the blank was concerned, this was not supposed to occur if acrylic plates were manufactured correctly using material which is not faulty. Before the SABS could fairly comment on the "damaged" number plates referred to, they needed to know how old they were, what conditions they had been subjected to and the materials used to make them. In this regard it was observed by Mr S. Morgan, of the SABS, that the samples submitted by the Public Protector were believed
to be number plates produced by the use of faulty materials.

i) Mr Morgan advised the Public Protector that the technical committee was in the process of reviewing SABS 1116-4:1996. However, the reason for reviewing the standard was not because of failures of acrylic plates due to loss of adhesion but to accommodate the “graphics” that were then being used, and also to describe more precisely where to test the number plate for reflectivity and to remove any ambiguities thereof.

j) The SABS was aware that “loss of adhesion” can occur but only on acrylic plates incorrectly manufactured or where faulty material was used.

k) They could not categorically state that “loss of adhesion” only occurred on number plates manufactured by the “kiss-cut” method. “Loss of adhesion” most certainly could be attributed to poor workmanship, and over a projected period of time, prolonged exposure to extreme weather conditions could also adversely affect them.

l) If there was a degree of “loss of adhesion” it was possible to still measure certain facets of functionality these being retro-reflectivity, contrast ratio and colour. However, legibility, the prime purpose of a registration plate, was not scientifically measurable. This requirement was removed from the original standard because establishing it was very subjective. With regard to the “risks” to the consumers, it was believed that from all the samples they had tested, the risks would be insignificant although somewhat unsightly, but would however not detract from the primary function of a registration plate (i.e. to identify the registration number of a motor vehicle).

m) There was no basis to consider withdrawing a manufacturer’s right to use the SABS mark on their number plates because of the method used to manufacture the product.
6.1.2.3 The SABS confirmed a problem experienced by a supplier of retro-reflective material more than 3 years earlier. This problem was identified by the SABS through their regular surveillance inspections and was addressed with the industry. The defective tape was duly withdrawn and replaced by the supplier. The SABS confirmed that no action was taken against the supplier.

6.1.2.4 The SABS denied any involvement in any effort or perceived effort to prevent the Complainant from continuing with his business or to "protect" the status quo as far as the positions of the existing manufacturers and distributors were concerned.

6.1.3 Subsequent information provided by the Complainant in 2012 (outstanding evidence)

6.1.3.1 In respect of the statement made by the SABS in their 2001 response above (paragraph 6.2.3 (a)) that "there was no requirement for heat test in SABS 1116-4-1996":

a) The Complainant commented that in paragraph 4.7.1 of SABS 1116-4:1996 manual, there is a requirement for a "resistance to weathering test" which should include heat because Africa is noted for its harsh ray of the sun.

b) The SABS should have realised that cars would be parked in the sun, and as such, they should have tested the product for the effects of the sun which sometimes reached extremely high temperatures.

6.1.3.2 The illustration in SABS 1116-4:1996 showing the gap around the numbers of the characters was removed from all subsequent issues of SABS 1116-4. The cross section of a number plate clearly referred to only the "kiss-cut" machine.

6.1.3.3 Due to the blue character vinyl being of a certain thickness, the gap appears when the reflective tape is applied to a "kiss-cut" number plate only.
6.1.3.4 In the design of the Complainant, the thickness of the registration mark was negligible, and as such there were no air gaps.

6.1.3.5 If a blank plate was used without the blue vinyl and the reflective tape was directly applied, there would be no sign of loss of adhesion.

6.1.3.6 The use of blue vinyl to cut out the registration mark was only restricted to the design of the “kiss-cut” method.

6.1.3.7 The SABS was required to ensure that they deal with:

   a) poor workmanship;
   b) inferior quality materials;
   c) incorrect storage; and
   d) poor handling of materials.

6.1.3.8 The Complainant was of the opinion that if the standards were enforced correctly, all embossers using the “kiss-cut” machines would have had their permits suspended, because every number plate made from the “kiss-cut” method has spots and shows loss of adhesion.

6.1.3.9 The SABS confirmed that a manufacturer supplied defective material to the motoring public but no legal action was taken against the company.

6.1.3.10 The SABS confirmed that they recalled some of the defective stock but did not take any action in respect of the defective stock that was already supplied to the unsuspecting motorist. A number plate is a mandatory item of a motor vehicle on South African roads. In his opinion most motorists are not qualified to detect if their number plates were defective and have to rely on institutions such as the SABS to protect their interests. It is not clear why defective number plates do not present dangers to the public, as stated by the SABS, because:
a) Thousands of motorists daily run through red robots without the camera’s installed picking up the registration number of the motorist due to the registration mark not being clearly visible to the cameras;

b) A pedestrian could get knocked down by a vehicle and an eye witness to the incident would not be able to clearly take down the number plate of the fleeing motorist due to the vehicle’s number plate being manufactured with defective vinyl.

c) Many motorists get away for speeding and it becomes difficult to prosecute them because their number plates were not clearly visible when they were caught by speed cameras.

d) Many Provinces expect the SABS to be correctly regulating the number plate industry and spend billions of tax payers’ money by installing expensive cameras to help with law enforcement, only to later find out that thousands of motorist get away with traffic offences because their number plates could not be clearly picked up by these cameras. The effective implementation of the proposed new E-tolling system relies on correct verification of registration numbers to process billing.

6.1.3.11 The “kiss-cut” number plate manufacturers supplied millions of motorist with defective number plates (around 1999) and continue to do so to date. Instead of screen printing the borders of the number plate they used the same blue vinyl that was used to cut out the registration mark, which caused the reflective vinyl to immediately pull away from the blank. The SABS only picked this up very late and no action was taken against the manufacturers.

6.1.3.12 The Complainant stated that he had initially made several trips to the SABS head office in Pretoria where there was a register, which he had to complete when you entered the LAB, he made several comments on the defects of the “kiss-cut” machine and showed the LAB technicians the difference between his number plate and the “kiss-cut” number plate. He also provided the SABS Durban office with samples of defective “kiss-cut” number plates and had lengthy conversations, with SABS inspectors from the Durban office, on the defective “kiss-cut” number plates.
6.1.3.13 The Complainant maintains that the "kiss-cut" number plates have an inherent defect, it does not matter how old the number plate is, there is air trapped in every number plate made in this manner and once it is exposed to the sun, the problem would escalate.

6.1.3.14 The registration mark is a compulsory requirement for the operation of a motor vehicle on the public roads. If it is not clearly defined it defeats the purpose of the industry being so highly regulated, but still allows defective material into the South African number plate market.

6.1.3.15 The Complainant reiterated that the defect of the "kiss-cut" machine causes air to be trapped around the cut out registration mark when the number plate is made. Once this number plate is exposed to the harsh sunlight, the trapped air expands, the air then pushes towards the edge of the number plate and because the blue cut out vinyl is originally applied with non-permanent adhesive, which is in most cases a water based glue, the expanding air also goes between the registration mark and the blank. In time the air and the glue oxidises resulting in the glue crystallising which turns white in colour, thus parts of the registration mark becomes almost the same colour as the white reflective vinyl making the registration mark invisible to cameras and to the naked eye, when viewed at certain angles.

6.1.3.16 As far as the withdrawal of the permit was concerned, he maintained that his product and process were properly tested and approved in writing with positive test results by the SABS. He was never notified that this approval was at any stage reviewed and that his product and process were found to be defective or not complying with the relevant standard. When the permit was withdrawn he was not furnished with reasons or any notice of the extent to which his product or process was no longer found to be compliant with SABS’ standards. He was never afforded the opportunity to engage the SABS on this matter and to determine if the manner in which they applied the standard to his product and process was consistent with the manner in which they regulated the other
processes and products, including the "kiss-cut" process used by other number plate manufacturers.

6.1.3.17 The Complainant emphasised that it is an expected norm in most countries for Government to set up institutions to regulate and protect its citizens from exposure to defective or hazardous products entering the market place.

6.1.3.18 In his view, the SABS was obliged to properly enforce the standards by first testing batches of raw material from manufacturers before it even reached the embossers. He previously picked up the initial supply of defective reflective tape and the use of vinyl cut border, and immediately brought it to the attention of the SABS, who took steps to rectify the situation in 2000, a few months before the withdrawal of his permit. He was particularly distressed by the fact that after he had engaged the SABS and saved the South African motorists millions of rands, through the prevention of the defective material from entering the market to their detriment, he paid the price for having exposed these defects by having his business being shut down.

6.2 Evidence regarding whether the SABS unlawfully or unfairly withdrew the Complainant’s permit to manufacture and distribute motor vehicle number plates, accordingly action constituting improper conduct and maladministration?

6.2.1 Complainant’s case

6.2.1.1 The Complainant stated that he applied for and was granted a permit for registration as a manufacturer of number plates by the SABS, as the appropriate regulatory body, as per the enclosed communications from the SABS dated 02 March 1998 and 17 March 2000, respectively.

a) SABS test result

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2 SABS 1116-3:96.
# REPORT

**Retro-reflective Registration Plates for Motor Vehicles**

## OBJECT


## SAMPLING

<table>
<thead>
<tr>
<th>Sampling Site</th>
<th>Type</th>
<th>Sample registration plate number</th>
<th>Reflective material</th>
<th>Test code</th>
<th>Reflective code</th>
<th>Tape bond number</th>
<th>Ink</th>
<th>Ink bond number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natal Regional Office</td>
<td>Plastic (long) with silver screen blue new character style</td>
<td>A-Z and 0-9 (blue new character style)</td>
<td>Plastic</td>
<td>UP</td>
<td>05060397</td>
<td>3M (rubber) with white backing</td>
<td>ZAB 102 (watermarked)</td>
<td>Solomon (Gummed)</td>
</tr>
</tbody>
</table>

## RESULT:

Workmanrip - compliant
b) Confirmation by the SABS that the Complainant's method of manufacturing complied with SABS 1116:4

Executive Number Plates
Attention: The Manager

Dear Sir,

TO WHOM IT MAY CONCERN

I hereby wish to confirm that the silkscreen method of manufacturing motor vehicle number plates is acceptable in terms of SABS 1116 provided all aspects are complied with.

Yours faithfully,

N.E. Prince
Manager: KZN Assessment Services

SABS

Our Ref: 5856
Enclosures: N.E. Prince
Ext: 2916
Date: 2000-03-17

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6.2.1.2 On 18 September 2000, the Complainant received a notice from the Manager: KZN Assessment Services of the SABS with the following contents:

Dear Sir,

SABS 1116-IV: NUMBER PLATES

Hereby wish to advise that due to product that clearly does not comply with the SABS Specification, the compulsory specification VC0082 your permit is hereby withdrawn.

Please be advised that you may not place the SABS logo on any Number Plates effective immediately. In terms of the compulsory specification VC0082 you may not manufacture a Number Plate that does not fully comply with SABS 1116-IV. Failure to comply with this will result in Legal Action.

Yours faithfully

N.E. Prince
Manager, KZN Assessment Services.

6.2.1.3 The Complainant alleged that he complied with the notice but immediately communicated with the SABS to determine the reasons for the determination that his product did not comply with the requirements of SABS 1116-4: 1996
after having received a positive test result and clearance, as well as why the SABS failed to provide him with prior notice as required by Government Gazette 20963 of 17 March 2000. (Lawyers letter)

6.2.1.4 According to the Complainant neither he nor his attorney received any response or any information that explained why the permit was withdrawn.

6.2.1.5 The Complainant stated that he suspected, at the time, that the withdrawal of the permit was linked to the fact that for a long time prior to the withdrawal of the permit, he was engaging senior officials at the SABS on concerns about the regulation of the "kiss-cut" method of number plate manufacturing based on the alleged defects, supported by the submission of samples of defective number plates.

6.2.1.6 When his permit was subsequently withdrawn, he immediately thought that the industry was responding through the SABS because he had challenged the regulation of the "kiss-cut" method of manufacturing and the SABS' role as regulator. He was also concerned that he was perceived as a threat to the existing stakeholders in the number plate industry because he had developed his own manufacturing method as an alternative and therefore in competition with the manufacturers who were using the "kiss-cut" method.

6.2.2 SABS' responses

6.2.2.1 When the two complaints were lodged, the SABS existed in terms of the Standards Act, 1993. Its legislative mandate was the promotion, development and maintenance of national standards; the provision of conformity assessment services; and the administration of compulsory specifications of products and processes. The administration of compulsory specifications was conducted by what came to be known as the regulatory department of the SABS (SABS Regulatory) in contradistinction to its standards division.
a) The SABS stated that in benchmarking the South African regulatory system with others in the world, it became apparent that the practice of having it operating as both a standards body and a regulatory body was not optimal and, as a result, the need was identified to reconsider its mandate. This culminated in the promulgation of the National Regulator for Compulsory Specifications Act, 2008 (the NRCS Act) and the Standards Act, 2008, both of which came into force in September 2008.

b) Section 3 of the NRCS Act established a new public entity, the National Regulator for Compulsory Specifications (the NRCS) as the successor in title of the SABS Regulatory. The responsibilities of the NRCS include the administration and maintenance of compulsory specifications and the implementation of a regulatory and compliance system for compulsory specifications.

c) The objects of the NRCS include carrying out market surveillance through inspections in order to monitor compliance with compulsory specifications and enforcing compliance with compulsory specifications.

d) All assets, liabilities, rights and obligations of the SABS Regulatory were transferred to the NRCS from the date on which the NRCS was established, as were all employees of the SABS, employed in the SABS Regulatory and administrative staff responsible for administrative support with regard to compulsory specifications in terms of section 197 of the Labour Relations Act, 1995.

e) All compulsory specifications issued in terms of the Standards Act, 1993, in force as at 1 September 2008 were deemed to be compulsory specifications declared in terms of the NRCS Act.

f) The effect of the NRCS Act was that the SABS' obligations and rights relating to the administration of compulsory specifications, including the compulsory specification, an issue in the first complaint, were excised from the mandate of the SABS and transferred to the NRCS. It follows therefore, that the relevant body to deal with the Complainant's first complaint is, since 1 September 2008, the NRCS.
g) Since 1 September 2008, the SABS existed in terms of the Standards Act, 2008; and is the national institution for the development, promotion and maintenance of South African National Standards. The SABS is a National Public Entity listed in Part B of Schedule 3 to the Public Finance Management Act, 1999 (the PFMA) and is accordingly subject to the provisions of the PFMA and the regulations issued there under.

h) However, since the events that form the subject matter of this report occurred in 2000, they must be considered through the prism of the Standards Act, 1993, together with the Permit Regulations made there under.

6.2.2.2 The SABS furthermore, submitted that the report is addressed to the wrong institution as the National Road Traffic Act, 1996 (the NRTA) and the National Road Traffic Regulations, 2000 (the Regulations), which came into effect on 1 August 2000, vested the responsibility to register a person as a manufacturer of number plates with the CEO of the Road Traffic Management Corporation (the RTMC), and not with the CEO of the SABS.

a) It is also the CEO of the RTMC “who may, provided he has followed a particular process, cancel the registration of a manufacturer of number plates, which will then have the concomitant result that the said person whose registration has been cancelled will no longer be able to lawfully manufacture or sell number plates.”

b) The SABS elaborated on this point by stating that the provisional report proceeded from “the incorrect premise” being that –

i) “The Complainant operated with a permit granted by the SABS as a manufacturer and distributor of motor vehicle number plates through the use of materials and processes that were approved by the SABS. His permit also allowed him to operate as a
designer and distributor of manufacturing machines to other distributors in the motor vehicle number plate industry;"

ii) "the Complainant's alleged loss was [therefore] caused by the withdrawal of the permit previously issued to him by the SABS;"

iii) the Complainant was "entitled to lawfully manufacture or sell number plates" as there is no indication in the provisional report that he was ever registered by the CEO of the RTMC and was therefore entitled to lawfully manufacture or sell number plates, or that such registration as a manufacturer of number plates was cancelled or suspended by the CEO of the RTMC, "who is the only person who could lawfully do so and thus put an end to the Complainant's entitlement to lawfully manufacture or sell number plates" (sic); and

iv) a permit issued by the SABS could have authorised, to the extent that such authorisation was required, the Complainant to operate as a designer and distributor of manufacturing machines to other distributors in the motor vehicle number plate industry as the SABS has not issued a national standard for the design or assembly of a number plate manufacturing machine.

6.2.2.3 The SABS further explained that section 18(1)(a) of the Standards Act, 1993, authorised the Minister, on the recommendation of the Council of the SABS, by notice in the Government Gazette to establish, alter or abolish certification marks. Such a certification mark could only lawfully be applied or used in a manner authorized by the Standards Act, 1993.

a) Pursuant to this provision and an equivalent provision in the Standards Act, 2008, the SABS operates the SABS Mark Scheme. The Mark Scheme aims at providing third party guarantee of quality, safety and reliability of products to the consumer. The presence of the SABS Certification Mark, being a certification mark contemplated in section 18(1)(a) of the Standards
Act, 1993 known as the SABS Mark, on a product is an assurance of conformity to the relevant specifications, usually South African National Standards.

b) The Mark Scheme is voluntary in nature and is largely based on ISO Guide 65, which provides general rules for a third party certification system of determining conformity with product standards through initial testing and assessment of the manufacturer’s quality management system, followed by surveillance that takes into account the manufacturer’s quality management system and the testing of samples from the manufacturer and/ or the open market.

c) The permit issued to the Complainant was a mark permit. Thus, it authorised him only to apply the certification mark depicted above on retro-reflective plastic number plates embossed in accordance with the requirements of mark specification in SABS 1116-4: 1996.

d) During the pre-2008 dispensation, a mark permit was obtainable from the SABS on application accompanied by the fees determined by the SABS. The Permit Regulations required the SABS to determine such application fee after an initial investigation of the applicant’s manufacturing unit. This indicates the centrality of the manufacturing unit to the issue of a mark permit.

e) The SABS was entitled to issue a mark permit for an indefinite period or for a fixed period subject to such conditions as it may deem necessary. This, according to the Permit Regulations, it could do once it had assessed the applicant’s premises, manufacturing processes and quality system for compliance with such requirements as the SABS may lay down to ensure the quality of production.
f) The SABS was entitled to withdraw, subject to such conditions as it may
deeem necessary, suspend a mark permit, or terminate the suspension of
such permit.

g) Section 22(1) (a) (i) of the Standards Act, 1993, authorised the Minister,
acting on the recommendation of the Council, to promote and maintain
standardization and quality of safety, health, consumer protection or the
environment concerned, by notice in the Government Gazette, and to
declare a specification which has been set and issued as a standard or a
provision of such specification to be a compulsory specification.

h) The effect of declaration as compulsory specification was that no person
could lawfully sell a commodity, to which a compulsory specification
applies, unless such a commodity complies with or has been manufactured
in accordance with the compulsory specification concerned.

i) However, the declaration of a national standard or provisions thereof to be
a compulsory specification does not mean that a manufacturer, who
produces a commodity to which the compulsory specification applies, must
hold a mark permit in order to produce that commodity; all that is required
is that such manufacturer must ensure that such commodity complies with
or is manufactured in accordance with the compulsory specification.

j) On 3 April 1998, the Minister, acting under section 22(1) (a) (ii) of the
Standards Act, 1993, declared a compulsory specification for retro-
reflective number plates for motor vehicles. In essence, the compulsory
specification required plastic number plates to comply with the
requirements given in the certain selected sub clauses of SABS
11164:1996. Thus, SABS 1116-4:1996 was not declared to be a
compulsory specification; certain clauses of it were incorporated by
reference into the compulsory specification.
k) According to the SABS, this declaration did not require of all persons who sought to produce plastic number plates to hold a mark permit authorising them to apply the certification mark depicted above on retro-reflective plastic number plates embossed in accordance with the requirements of mark specification in SABS 1116-4: 1996. What such persons were required to do was to ensure that plastic number plates produced by them comply with the requirements given in the certain selected sub clauses of SABS 1116-4:1996 which were incorporated into the compulsory specification by reference.

6.2.2.4 On the relevant facts pertaining to the circumstances that led to the communication addressed to the Complainant by the SABS, the SABS submitted that its KZN Assessment Services, where Mr Prince was the Manager, was responsible for monitoring the Complainant's compliance with the permit conditions at the time.

a) Mr Prince recalled that he had audited the Complainant’s manufacturing facility several times prior to the withdrawal of the permit and that he had identified instances of non-compliance with the permit conditions on more than one occasion. On each occasion, however, he had chosen not to invoke the ultimate penalty of withdrawing the mark permit.

b) “The straw that broke the camel's back was on or about (sic) 15 September 2000 when Mr Prince attended at the complainant's premises for a compliance audit. He found the premises to be locked and vacant.” From enquiries made by him on the premises, he was advised that the Complainant had vacated the premises and relocated his manufacturing facility, which would have meant that the Complainants permit had expired “by operation of the law”.

c) On 18 September 2000, Mr Prince wrote to the Complainant in the following terms:
"SABS 1116-IV: NUMBER PLATES

Dear Sir

I hereby wish to advise that due to product that clearly does not comply with the SABS Specification or the compulsory specification VC8062 your permit is hereby withdrawn. Please be advised that you may not place the SABS logo on any Number Plates effective immediately. In terms of the compulsory specification VC8062 you may not manufacture a Number Plate that does [not] fully comply with SABS 1116-IV. Failure to comply with this will result in legal action."

d) The SABS states that it did not receive any response to this letter. It is however clear that the Complainant received the letter, as the content of this letter founded his supplementary complaint to the Public Protector.

6.2.3 Replying information submitted by the Complainant

6.2.3.1 On the evidence submitted by the SABS that relevant responsibilities were transferred from the SABS to the National Regulator for Compulsory Specifications, the Complainant replied as follows:

a) The Department of Trade and Industry is directly responsible, and through its mandate, the SABS is currently responsible for the testing and certification of manufacturers required for the award of mark permits to manufacture and sell goods into the South African market place. (Current Sabs Mark permit application form)

b) Due to a number plate being a mandatory item on a motor vehicle, it falls under compulsory specifications and thus has to be manufactured by a valid mark permit holder.
c) To this end in October 2010, the Gauteng Provincial Transport Department abandoned the use of plastic number plates and made it compulsory that only aluminium number plates be sold in the Gauteng Province. At the time, only Gauteng implemented this, other Provinces, to date, still make use of and allow plastic number plates to be sold.

d) Although the SABS (claims they) no longer oversees Compulsory Specifications, the events that form the subject of this report occurred from March of 1998 to September of 2000, and during this period the SABS was fully responsible for all aspects thereof.

e) It is noted that the NRCS was established and came into operation as of 1 September 2008, and the SABS transferred over all assets and liabilities to the NRCS on 1 September 2008.

6.2.3.2 On the submission by the SABS that the Complainant ought to have been registered with the RTMC, the Complainant averred as follows:

a) Although during 2000 there was talk over a new legislation being proposed, also making registration with the RTMC a compulsory requirement, it was never implemented in KZN in the year 2000. The registration form appears to have only become available from the Government Printers some time in 2005. Accordingly, he was not aware of any other mode of registration as a manufacturer of motor vehicle number plates except to fill in a “MNP” form.

b) Accordingly, he was never aware of any notice or publication which sought to advise him or any other manufacturer of motor vehicle number plates, to register as such with the CEO of the RTMC in order to continue their operations as such manufacturers. He is also not aware of anybody in the industry who had registered or who had been able to register with the RTMC at the time.
c) He approached the KZN Department of Transport, who has since confirmed that they do not have a database dating back to 2000, and to the best of their knowledge registration with the RTMC was never implemented in KZN in 2000.

d) To his knowledge, the SABS was the only authority involved in the actions of withdrawing his manufacturing permit from him.

6.2.3.3 The Complainant furthermore, responded as follows to the statements by the SABS that the Permit Withdrawal Letter :( for) Permit (6024 /8869) issued on 23 March 1998 was prompted by the relocation of his manufacturing premises.

a) He personally received the withdrawal letter by hand from Mr Prince, dated 18 September 2000.

b) The “thrust of the intention of the letter clearly stated” the reason for the withdrawal –

“Dear Sir, I wish to advise that due to product that clearly does not comply with the SABS Specification or compulsory specification VC 8062 your permit is hereby withdrawn. Please be advised that you may not place the SABS logo on any Number Plates effective immediately. In terms of the compulsory specification VC 8062 you may not manufacture a Number Plate that does [not] fully comply with SABS 1116-IV.” (Complainant’s emphasis)

c) Based purely on the content of the letter dated 18 September 2000, he immediately objected to Mr Prince while he was still at his premises. He challenged him to show him proof that his “product was not complying”. Mr Prince reportedly refused to answer him. Mr Prince was right inside his premises so-
"If, as the SABS has alleged, they could have confiscated my stock, or the very least, if Mr Prince had brought along an alleged defective plate I had made to a member of the public, I would have been able to sort the matter there based on the evidence."

d) He was, at all times, under the impression that the motive for withdrawing the permit, given the background and the subsequent wording in the withdrawal notice, limited the action to non-compliance, in other words – his "product not complying".

e) The Complainant denies that he had relocated to another premises as alleged by the SABS. He stated that in any event, if the notice was clear that this was the reason for the action against him, he would have immediately requested the assistance of his landlord who would have been able to confirm that he was still occupying his premises, and his staff would have further confirmed that they were reporting for duty at his premises. In addition, Mr Prince had his contact details, including a mobile number, and if Mr Prince contacted him, he would not have had to rely on enquiries from third parties as to his whereabouts.

f) In the letter addressed to the SABS by his attorney, dated 22 September 2000, it was clearly stated that the SABS had removed the Permit from the Complainant's premises.

6.3 Evidence Issue 3: Regarding whether the actions of the SABS had caused the Complainant to suffer any prejudice

6.3.1 The Complainant’s case

6.3.1.1 The Complainant submitted that he came up with an innovative alternative and was able to not only generate an income for himself but also employed other people.
6.3.1.2 He made sure that his product complied with the law, and based on the approval of the product and processes that he was using, he extended his business interests by marketing the manufacturing machine to other number plate manufacturers and distributors.

6.3.1.3 As a result if the communication from the SABS, he had to close his number plate machine manufacturing business, leaving many affected customers in the lurch who were also SABS approved embossers. The only alternative for these customers were to revert to "kiss-cut" manufacturers and purchase the "kiss-cut" machine, leaving him without any income even from that business venture as well.

6.3.1.4 Since then he has been unable to generate any income from his preferred mode of business and has suffered financial hardship.

6.3.2 Response by the SABS

6.3.2.1 The SABS submitted that there was no causal connection between the withdrawal of the Complainant's permit and any possible cancellation and suspension of the complainant's registration as a manufacturer of number plates. According to the SABS the notice to the Complainant in September 2000 did not purport to advise the complainant that he could not lawfully produce and sell number plates:

"... on a proper consideration of its contents, the letter did not tell the complainant that he could not lawfully produce and sell number plates; all it did was advise him of the consequence of the withdrawal of the mark permit, which was that he could no longer place the SABS Mark on any number plates that he produced."

6.3.2.2 The SABS stated that it had not issued any national standard for the design or assembly of a number plate manufacturing machine. Similarly, the SABS did not operate any mark scheme for the design or assembly of a number plate manufacturing machine. Thus, a permit issued by the SABS could not have authorised (to the extent that such authorisation was required) the complainant to operate as a designer and distributor of manufacturing machines to other
distributers in the motor vehicle number plate industry as he is reported to have alleged.

6.3.2.3 According to the SABS the withdrawal of the permit could have had any effect on the complainant’s alleged business of designing and distributing manufacturing machines to other distributors in the motor vehicle number plate industry. It denied any causal link between the withdrawal of the mark permit and the damages that the Complainant alleges to have suffered due to the loss of business of designing and distributing manufacturing machines.

6.3.2.4 The SABS further stated that any assessment of the impact of the events on the Complainant’s mental health cannot be diagnosed and quantified without resorting to appropriate clinical experts.

6.3.3 Independently sourced information

6.3.1.1 Regarding the submission by the SABS that the Complainant was not operating lawfully as a manufacturer of motor vehicle number plates as he was not registered by the CEO of the RTMC

a) It is not in dispute that National Road Traffic Regulations, 2000 intended to vest the responsibility to register a person as a manufacturer of number plates with the Chief Executive Officer of the RTMC, and not with the CEO of the SABS. It is also not in dispute that the Complainant was not registered as a manufacturer with the RTMC.

b) It is however, disputed, that the statement by the SABS in this regard actually reflected the de facto position in the motor vehicle number plate industry based on evidence that this provision never actually came into operation or was implemented nationwide in respect of manufacturers of motor vehicle number plates. Several role-players, including an expert who was involved in the actual drafting of the Regulations at the time, confirmed that this was an apparent error in the Regulations as the intention was to
vest this responsibility with the relevant Provincial member of the Executive Council (MEC) and not with the RTMC.

c) Official information obtained from the RTMC website and other sources indicate that it was only established in terms of Section 3 of the Road Traffic Management Corporation (RTMC) Act, 1999 and only commenced with the preparation of a Business Plan and Strategy for its operationalization in April 2005. The RTMC is established at its own offices located in Centurion, Tshwane since August 2005. Officials were seconded from the Department of Transport to assist in the setting-up phase and new positions were created and officials appointed according to the personnel structure and financial model of the RTMC.

d) The following transitional arrangements did not refer to any of the duties and responsibilities of the SABS as mentioned in this report:

   (i) Provincial Transport MEC's have agreed to the transfer of powers and resources from provinces to the RTMC. However, in some Provinces, traffic enforcement has been transferred to Safety and Security, Consultations will take place to resolve these issues;

   (ii) All existing contractual arrangements will be transferred to RTMC;

   (iii) Staff from Land Transport Management will be seconded to the RTMC;

   (iv) A thorough financial modeling exercise will be done to ensure that the RTMC will be financially viable; and

   (v) Powers and responsibilities will be delegated to Departmental and Provincial staff who presently carry out the functions which will be transferred.

e) A scrutiny of all the annual reports of the National Department of Transport until 2005, and subsequently, the Annual reports of the RTMC, does not reflect any activities in relation to the regulation or registration of manufacturers of motor vehicle number plates.
6.3.4 Evaluation of evidence and factual findings on issue 1: Regarding whether the SABS improperly failed to attend to claims by the Complainant that acrylic number plates manufactured by means of the “kiss-cut” method did not meet the requirements and standards prescribed in SABS 1116-4:1996 or failed to take action against manufacturers and distributors of the said defective number plates.

6.3.4.1 At the time when the initial investigation was interrupted as a result of the breakdown in communication with the Complainant, it was not in dispute that there had been incidents of visible defects or deterioration of acrylic number plates on motor vehicles that showed signs of cracking, blistering or loss of adhesion.

6.3.4.2 However, the investigation had not yet reached a point where sufficient evidence was obtained or submitted to determine –

a) whether the confirmed incidents of visible deterioration in acrylic motor vehicle number plates were abnormal to the extent of being caused by weaknesses in the number plates when exposed to ordinary usage conditions, including bending, weathering, salt fog, scratching, impact, abrasion and heat (as alleged by the Complainant); or

b) whether such incidents of deterioration in acrylic motor vehicle number place could attributed to poor workmanship (as contended by the SABS);

c) if there are weaknesses that contributed to the deterioration of such number plates, whether those weaknesses could be directly attributed to the “kiss-cut” method of manufacturing; and

d) whether this implied that acrylic motor vehicle number plates manufactured by means of the “kiss-cut” method did not meet the required SABS standards set in the SANS 1116-4: 1996. Retro-reflective registration plates for motor vehicles - Part 4 in respect of -

(I) Resistance to weathering;
(ii) Resistance to salt fog;
(iii) Resistance to scratching, impact and abrasion.
(iv) Resistance to bending;
(v) Strength of adhesion; and
(vi) Combination of variables

6.3.4.3 In order to come to a conclusion on the actual complaint of the Complainant that amounted to dereliction of duty by the SABS, any determination on the issues referred to above, would have required the Public Protector independent scientific evidence involving experts in the industry as well as the testing environment. Currently the only available evidence on these issues is the two opposing opinions and views submitted by the Complainant and the SABS.

6.3.4.4 In considering whether or not the investigation process should continue with the view to obtain independent information, I took into account that the areas of concern raised by the Complainant at the time, are likely to have found different application in the current manufacturing and distribution practices in the motor vehicle number plate industry, to such an extent that the responses and information that were provided at the time might not have the same evidentiary value in the current environment. In addition, the Compulsory Specification for Retro-Reflective Number Plates for Motor Vehicles (VC8062) has in the meanwhile been withdrawn by the Minister of Trade and Industry and acrylic plates are being phased out in new motor vehicle registrations in favour of aluminium plates. Since the matter is no longer regulated by the Standards Act, 1993 or the Regulations, the issues raised in respect this complaint currently falls outside the mandate of the SABS.

6.3.4.5 I also noted that the Complainant is furthermore of the view that he was vindicated in his efforts by the fact that some of the deficiencies with the plastic number plates have in the meanwhile, been acknowledged and have in fact influenced or contributed to changes in the regulatory environment. Since 2010 the Gauteng Provincial Government has been rolling out a project to switch to aluminium registration plates, which are manufactured in terms of a different process to that of the "kiss-cut" machine. Some of the very same "kiss-cut" manufacturers are now supporting the aluminium registration plates as the preferred product, which in his view confirms that the products
produced by their machines were defective all along as their adverts advertise aluminium registration plates on the basis that "(t)his plate will not delaminate, bubble or crack like plastic plates".

6.3.5 Evaluation of evidence and factual findings on issue 2: Regarding whether the SABS unfairly or unfairly withdrew the Complainant’s permit to manufacture and distribute motor vehicle number plates, accordingly action constituting improper conduct and maladministration?

6.3.5.1 Regarding the submission by the Complainant that his product and process had been approved by the SABS and complied with the compulsory standards.

a) It is common cause that the Complainant invented and designed his own number plate machine, which produced a number plate that compared favourably to and in his view exceeded the standard of the products that were used in the industry at the time. He stated product also had the potential to be sold in the international market bringing in revenue to our country and also creating jobs.

b) It is furthermore, common cause that prior to commencing with any manufacturing or distributing activities, the Complainant submitted the material and the processes used by him in the “silkscreen” method of manufacturing number plates”, to the SABS for approval as required by law.

c) It is also not in dispute that the tests results confirmed that in March 1998 the SABS approved the product and process and again confirmed in March 2000 that it complied with SABS 1116-4:96.

d) Despite Mr Prince’s submission that there has been several instances of non-compliance, the Complainant did not receive any written communication from the SABS between 1998 and the date of the expiry/withdrawal of the permit that any of the products manufactured in terms of the silkscreen method, or the process itself, had failed any compliance testing.

e) During the same period the Complainant had engaged the SABS in his capacity as a manufacturer and based on his experience and the observations made on the reasons why some of the number plates that are displayed by
motor vehicles on the roads, were deteriorating to such extent legibility is affected. He presented the Public Protector (my predecessor) with the issues that he had reportedly raised with the SABS, including the concerns that the “kiss-cut” method had inherent defects that cast a question mark over its compliance with the relevant standard. These issues have to date not been resolved and are only relevant to the Complainant’s impression that the actions against him might have been motivated by irrelevant considerations.

f) It is furthermore common cause that on 18 September 2000 the Complainant received a notice from the Manager: KZN Assessment Services of the SABS informing him that his “product” did “not comply with the SABS Specification or the compulsory specification VC8062” and that his permit was purportedly withdrawn.

g) In his initial response to the enquiries by the KZN office of the Public Protector, Mr Prince also alluded to the fact that the Complainant “was one of several” number plate manufacturers who were operating unlawfully.

h) While I have not been persuaded by the evidence at my disposal to express an opinion whether or not any decision to take action against was justified or unwarranted, I have however, not come across any evidence or records that showed how the product manufactured by the Complainant (number plates) deviated from the samples that were originally tested and approved by the SABS, and therefore, did not comply with the compulsory standards.

i) On the available evidence I am satisfied that the complainant did not need to have been registered with the CEO of the RTMC and was in possession of a valid mark permit issued by the SABS which enabled him to lawfully operate as a manufacturer and distributor of motor vehicle number plates.

6.3.5.2 **Regarding the submission by the SABS that the communication addressed to the Complainant was not intended to serve as a decision that the permit had been withdrawn, but merely informing him of the expiry thereof as a result of alleged relocation of his premises.**

a) The primary factual issue in dispute relates to the allegation by the SABS that the Complainant had relocated his manufacturing premises and therefore
caused his mark permit to expire. Both parties were however, unable to provide direct or substantive proof of their conflicting versions pertaining to the relocation of the manufacturing premises. In line with my approach to manage the risks of adverse conclusions based on the non-availability of evidence and records, I have decided to concentrate on the undisputed evidence and records and not to attach too much weight on the parties’ current views of what happened or should have happened.

b) During an investigation evidence comes from testimony, documents and other records, experts, and site inspections. Testimony and documentary evidence tend to be the most important. There is general consensus amongst ombudsman institutions that documentary evidence that has not been forged may be some of the most reliable evidence in an investigation. Documents tend not to tell lies, except those forged or created to lie or mislead. The actual notice issued by the SABS to the Complainant is therefore a primary source of evidence on this issue.

c) The SABS submits that the communication served as confirmation of the fact that the Complainant’s permit had expired by “operation of the law” because he had relocated his manufacturing premises. There is however, absolutely no reference in the letter to the alleged relocation of the premises or any suggestion that the permit had in fact expired. On face value the document communicated the SABS’s statement that the Complainant’s product did not comply with the compulsory specification, as well as a decision by the SABS to withdraw the mark permit awarded to the Complainant.

d) While there is no reason to suspect that the contents are not authentic, the SABS submitted that the wording should not be taken on face value to mean that the SABS actually withdrew the Complainant’s permit – “though inelegantly worded, what the SABS did by way of the letter of 18 September 2000 was not to withdraw his permit”.

e) To deal with the SABS’s opinion on this issue and its arguments that a different meaning should be attached to the letter, would require an evaluation of the legal principles of interpretation, which will follow in the discussion on the
application of the law and relevant prescripts to the conduct of the SABS in the next chapter of the report.

f) For now, I am inclined to attach more weight to the statements (during the initial stage of the investigation, as well as Mr Prince’s current comments) that the SABS was at the time, on record that the Complainant had been acting unlawfully and that there were “instances of (product) non-compliance with the permit conditions”.

g) The introduction of evidence at this point in time to suggest that the permit expired through the actions of the Complainant is not consistent with the SABS’s own version that it had reached a stage where it was not willing to tolerate the alleged instances of non-compliance any further to a point where an incident served as “the last straw”, prompting the SABS to take action against the Complainant.

h) I have in the analysis of the parties’ response to the provisional report, endeavoured to distinguish between the objectively ascertainable aspects and their subjective views based on their ex post facto (hindsight) assessment of the evidence and records at its disposal. The former do not rely on perception or opinion and can be given considerable weight, whilst the latter, in the absence of direct evidence or corroboration, must be given little weight or rejected as unreliable.

i) Even if the action against the Complainant was triggered by concerns pertaining to the relocation of his premises, the fact remains that this was never encapsulated in the communication and there is no indication that it was intended to refer to a different process relating to the termination of the Complainant’s permit. On the SABS’ own version of events I find it extremely difficult to find the reasons of necessity, ambiguity or absolute intractability of the language used, call for a departure from the literal or ordinary meaning of words used in the communication to the Complainant.

j) I am satisfied that the objectively ascertainable aspects of the available evidence, on a balance of probabilities, favour a conclusion that the letter served to advise the Complainant that his permit had been withdrawn because
his product did not comply with the compulsory SABS specifications and that he was not allowed to continue with operations.

k) As indicated earlier, I will in the next chapter deal with the SABS’s submission which proposes a modicative interpretation of the communication and its contents, to ignore the ordinary meaning of the wording and instead, accept that the communication intended to inform the Complainant that his permit has expired because he failed to comply with the conditions relating to the relocation of his premises.

6.3.5.3 Regarding the process and procedure followed by the SABS

a) The SABS maintained that given the information that the Complainant had vacated the premises and relocated his manufacturing facility, and the fact that the SABS’ permission to amend the permit to apply to such new premises had not been sought, the provisions of Item 7(1) (d) of the Permit Regulations were activated, with the result that the permit issued to the Complainant expired by operation of the law.

“In the circumstances, there was no need to advise the Complainant of the intention to withdraw the permit and request him to make representations as the result was pre-ordained by item 7(1) (d) of the Permit Regulations.”

b) The SABS’ submission that there was no legal obligation on it to follow due process as the mark permit had automatically lapsed on the basis that the Complainant had relocated his manufacturing premises, will be dealt with hereunder in the discussion of the application of the law.

c) On the procedure, it is not in dispute that the SABS did not issue prior notice to the Complainant before communicating to him that the permit had been withdrawn, or provided him with reasons, or an opportunity to make representations.

d) The evidence that were discussed above, confirms on a balance of probabilities that the Complainant was adversely affected by the withdrawal of his mark permit. However, he not presented with any evidence or information which would have enabled him to determine to what extent his product or manufacturing process did not comply with the compulsory specification VC8062 and SABS 1116-4: 1996. The Complainant did not have any
opportunity of evaluating or correcting any possible areas of non-compliance. He was not informed or aware of any avenue or remedy that might have been at his disposal to challenge or dispute the withdrawal of the mark permit, or to seek a review of any of the decisions that affected him adversely.

6.3.6 **Evaluation of evidence and factual findings on issue 3: Whether the actions of the SABS had caused the Complainant to suffer any prejudice?**

6.3.6.1 In terms of the law it is compulsory that any motor vehicle that is operated on a public road in South Africa be fitted with a number plate which is manufactured by use of materials and processes that are approved by the SABS.3

6.3.6.2 In order to obtain SABS approval, a number plate manufacturer has to comply with the compulsory specification, standard or standard method adopted by the SABS, determined by the Minister of Trade and Industry in terms of the Standards Act, 1993 (SABS 1116).

6.3.6.3 The Complainant followed the prescribed procedures to obtain SABS approval for his product and the manufacturing process. He made sure that he operated within the parameters of the law.

6.3.6.4 As the relevant provisions of the Regulations that required registration with the RTMC were not yet in operation at the time of the termination of the permit, the regulatory framework was still governed by the Permit Regulations and any permits issued in terms thereof, remained in force and valid.

6.3.6.5 It was also clear from the evidence presented that the Complainant received a notification from the SABS informing him that his permit was withdrawn, and instructing him, under penalty of the law, to cease any operations as a manufacturer and distributor of motor vehicle number plates.

6.3.6.6 Without the SABS logo to certify that his products complied with the compulsory specification, standard or standard method approved by the SABS, the Complainant was unable to continue to manufacture and distribute motor vehicle number plates.

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3 Regulation 35 of the National Road Traffic Regulations, 2000 and SABS 1116
6.3.6.7 The withdrawal of the Complainant’s mark permit has put the Complainant, and is continuing to put him, through an extremely difficult time indeed. His inability pursue his line of business has caused him and his family unnecessary distress. During engagements between my team and the Complainant it was evident that he experiences serious levels of outrage at, what he perceives as injustice at the hands of the SABS, including loss of reputation, embarrassment, anxiety, disappointment, loss of expectation and stress.

7 MEASURING CONDUCT AGAINST THE RULES

7.1 Issue 1: Regarding whether the SABS improperly failed to attend to claims by the Complainant that acrylic number plates manufactured by means of the “kiss-cut” method did not meet the requirements and standards prescribed in SABS 1116-4:1996 or failed to take action against manufacturers and distributors of the said defective number plates

7.1.1 The National Road Traffic Regulations, 2000 intended to vest the responsibility to register a person as a manufacturer of number plates with the Chief Executive Officer of the RTMC, and not with the CEO of the SABS. This was an apparent error in the Regulations as the intention was to vest this responsibility with the relevant Provincial member of the Executive Council (MEC) and not with the RTMC.

7.1.2 Be it as it may, the specific provisions of the National Road Traffic Regulations, 2000 which transferred the SABS’ responsibilities in this regard to the RTMC, never came into operation, and the SABS continued with its functions in terms of the Standards Act, 1993 until 2008 when the NRCS took over as the successor in title of the SABS Regulatory in terms of the provisions of the 3 of the NRCS Act. The responsibilities of the NRCS include the administration and maintenance of compulsory specifications and the implementation of a regulatory and compliance system for compulsory specifications.

7.1.3 SABS 1116-4:1996 have also been withdrawn in the meanwhile.

7.1.4 Apart from the fact that the further evidence required was only obtained several years after the conclusion of the initial phase of the investigation, The measuring
of the conduct against the rules that were applicable at the time, will in all probabilities lead to conclusions on historical events that might not be a true reflection of the actual state of affairs.

7.2 Issue 2: whether the SABS unfairly or unfairly withdrew the Complainant's permit to manufacture and distribute motor vehicle number plates, accordingly action constituting improper conduct and maladministration?

7.2.1 Regarding the opinion expressed by the SABS that the Complainant was not operating lawfully as a manufacturer of motor vehicle number plates as he was not registered by the CEO of the RTMC

7.2.1.1 On the available evidence it is clear that the provisions of the Road Traffic Regulations, 2000 which sought to transfer the responsibility of regulating the manufacturing of motor vehicle number plates from the SABS to the RTMC, did not come into operation. In the circumstances I am unable to find any confirmation for the submission by the SABS that the Complainant was supposed to have registered with the RTMC as a manufacturer of motor vehicle number plates at the time in question, and therefore, was in any event operating unlawfully on that basis.

7.2.1.2 In as far as the Complainant was deemed to have been able to operate as manufacturer and distributor of motor vehicle number plates under the authority of the SABS prior to the withdrawal/ expiry of his permit, this position was not altered by the promulgation of the Regulations.

7.2.2 Regarding the submission by the SABS that the communication addressed to the Complainant was not intended to serve as a decision that the permit had been withdrawn, but merely informing him of the expiry thereof as a result of alleged relocation of his premises.

7.2.2.1 In what the SABS described as “inelegantly worded” letter to the Complainant, suggests that it is proposing a modicative interpretation of the communication and its contents, and to ignore the ordinary meaning of the wording that stated that the permit was “withdrawn” because the “product” did not “comply” with “the SABS Specification or compulsory specification VC 8062”. The SABS is suggesting a totally different meaning to understand the
Communication as intending to inform the Complainant that his permit has expired because he failed to comply with the conditions relating to the relocation of his premises, and that in terms of the procedure, he was expected to respond to the communication.

7.2.2.2 In this regard I have taken note of the guidance by the Courts that there are certain rules of interpretation which may vindicate departure from the literal or ordinary meaning of words used by the drafter, but only in case of necessity or absolute intractability of the language used, and not to try and rectify the drafter’s “maladroitness or ignorance of the law”.

a) The basic rule of interpretation in our law is that words are to be understood according to their ordinary meaning “that laity attach to specific words”.

b) The Courts emphasised that “interpretation concerns the meaning of words used ..., and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.” The Courts further emphasised that there is “a duty to give effect to every word used, unless necessity or absolute intractability of the language employed compels ... to treat words as not written,” or their presumed intentions at the time.

c) In the Langklopi See Produkte case the Court stated as follows:

“A purposive approach to interpretation is desirable when ... contains open-textured concepts or ambiguity as assessed by a reasonable reader, but when a provision is clear there is no room for ignoring the manifest meaning.”

4 Sanlam v Gerdes
5 Volosenk v Volosenk 1948 TPO 488
6 Abrahamse v East London Municipality and Others 1967(4) SA 613 AD
7 Keyser v Minister of Agriculture 1994 NLR 522 at 523
8 Standard Bank Investment Corporation v The Competition Commission and Others 2009 2 ALL SA 254 SCA
9 Langklopi See Produkte (Pty) Ltd NO v Minister of Environmental Affairs and Tourism NO 1994(4) SA 734
7.2.2.3 In addition, I considered the SABS' interpretation of item 7(1) (d) of the Permit Regulations that any permit would have automatically expired upon the relocation of the manufacturing premises of a permit holder.

a) The Regulations clearly provide that the permit shall expire if the "permit holder removes his manufacturing activity to new premises and the SABS is not prepared to amend his permit to apply to such new premises, on the date of removal..." (own emphasis).

b) There is a definite second component to the expiry of a permit in case a permit relocates his/ her manufacturing activity to other premises, which implies a process in terms of which the SABS had discretion whether or not to amend the permit to apply to any new premises. Going back to the principles of interpretation as discussed above, a court will not lightly accept that the Legislature has used words in vain.\textsuperscript{10} The question therefore, arises whether or not the provision should be regarded as mandatory or merely "directory" (permissive). If it is "the former, strict compliance may be required on pain of invalidity; if the latter, partial compliance or even non-compliance is more likely to be acceptable."\textsuperscript{11}

c) As a general guide, words in legislation such as "shall" create a mandatory provision while permissive language such as "may" does not.\textsuperscript{12} A negative phrase (if... the SABS is not prepared") is also likely to be treated as peremptory, while positive language is more likely to be interpreted as merely directory.\textsuperscript{13}

d) I am therefore convinced that the Regulations did not intend for a permit to be automatically terminated upon the relocation of the manufacturing facility of a permit holder, but sought to impose a positive obligation or confer a duty on the SABS to first consider the amendment of the permit. This obligation is only performed or the condition met once the SABS has pronounced on its willingness to amend the permit.

\textsuperscript{10} Du Plessis and Others v De Klerk and Another 1990(3) SA 850 (CC)
\textsuperscript{11} Administrative law in South Africa, Cora Hoexter, Juta and Company Ltd, 2007, p47
\textsuperscript{12} Sutter v Schweigers 1932 AD 195, where Wessels AJ set out a useful list of guides as to when a provision is directory and peremptory.
\textsuperscript{13} Samuel Thomas Myers v Pretorius 1944 OPD 144; R v Sopete 1960 (3) SA 769 (T)
e) The Regulations are silent on the process and do not provide that such a decision be taken upon application by the permit holder, as suggested by the SABS, but that it was compulsory for the SABS to consider the amendment (when it became aware of such relocation).

f) Guidance was furthermore, sought from the other provisions of the Regulations including –

i) Regulation 2.4, which provided that:

“The SABS may require that the applicant’s premises, his manufacturing process and his quality systems be audited for compliance with such requirements as the SABS may lay down to ensure quality of production, and may from time to time require that such further audits be made as it may deem necessary”; and

ii) Regulation 5.1, which stated that:

“5.1 When a permit is to be amended the SABS may in its discretion either substitute a new permit for the existing permit or issue an endorsement which shall constitute part of and be read with the existing permit;

5.2 Should the SABS consider it necessary to amend the conditions of a permit, it shall give the permit holder written notice of at least one month, or such longer period as the SABS may deem expedient”.

It is furthermore, more reasonable that the Legislature did not intend to penalise a permit holder for wanting to relocate his/ her manufacturing facility, but envisaged a process where the SABS was afforded the opportunity to verify the suitability and compliance of any new facility before a permit holder was allowed to proceed with operations, or to
terminate the permit. This is in line with the following guidelines laid down by the Constitutional court\textsuperscript{14}.

All ... officials when exercising their powers were bound by the provisions of the Constitution (and) to interpret legislation in a manner that was consistent with the Constitution... While employees of the State bore a constitutional obligation to seek to promote the Bill of Rights. If broad discretionary powers contained no express constraints, those who were affected by their exercise would not know what was relevant to the exercise of those powers or in what circumstances they were entitled to seek relief from an adverse decision. (In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials by sections 26(3) and (6) was constrained by the provisions of the Bill of Rights), and in particular, what factors were relevant to the decision to refuse to grant or extend a temporary permit. If rights were to be infringed without redress, the very purposes of the Constitution were defeated.

7.2.3 Regarding whether the Complainant’s permit was lawfully withdrawn.

7.2.3.1 I am satisfied that the action taken by the SABS on the termination of the permit – either in respect of the withdrawal of the permit, or in the unlikely event that the Complaint had relocated his manufacturing facility, imposed an obligation and required the mandatory performance of discretionary powers by the SABS.

7.2.3.2 On the available evidence and my interpretation of the law, the communication from the SABS to the Complainant was indeed intended to serve as a notice of withdrawal as envisaged in clause 51(1) of the Regulations issued in terms of the Standards Act, 1993, which required the exercise of discretionary powers. In addition, even though the SABS’ reliance on Item 7(1) (d) of the Permit Regulations is in my view not supported by the evidence, the expiry of a permit

\textsuperscript{14} Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2003 (8) BCLR 837 (CC)
based on the relocation of manufacturing premises was still the subject of discretionary powers. I am therefore unable to accept the SABS’ submission that the permit expired by operation of the law.

7.2.3.3 Since a decision regarding either the withdrawal or the expiry of the permit would have had an adverse effect on the Complainant and had a direct legal effect on the Complainants ability to operate his business lawfully, I have no doubt that it constituted “administrative action” as envisaged in PAJA.

7.2.3.4 I am mindful of the fact that the current Management of the SABS is basing its submissions *bona fide* on the available evidence and hindsight interpretation of the processes that ought to have been followed.

7.2.3.5 I am nevertheless satisfied, based on the balance of probabilities and the undisputed evidence, that the communication addressed to the Complainant was not issued in accordance with or sanctioned by the empowering provisions of either Clause 51(1) of the Regulations issued in terms of the Standards Act, 1993 or Item 7(1) (d) of the Permit Regulations. The communication is therefore invalid.

7.2.4 Regarding whether the SABS unfairly withdraw the Complainant's permit?

7.2.4.1 Even if the SABS is given the benefit of the doubt that there might have been reason to suspect incidents of non-compliance, and in as far as the actual notice might be purported to impose a sanction or penalty for such non-compliance, procedurally it is not in dispute that the SABS did not inform the Complainant of the intention to withdraw the said permit or provided him with an opportunity to respond to adverse information that affected the decision. He was not furnished with any reasons for the decision or informed that he could appeal to the Chief Executive Officer by means of written representations. According to the SABS this was not necessary in terms of the procedure envisaged for the expiry of the permit due to the relocation of the manufacturing premises.

7.2.4.2 The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of PAJA. The Courts have found that these requirements
are not merely internal prescripts that an organ of State may disregard at whim.\textsuperscript{15}

Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.\textsuperscript{16}

7.2.4.3 The Constitutional Court has stated that a cause of action for the judicial review of administrative action now ordinarily arises from the provisions of PAJA and not directly from the right to just administrative action in section 33 of the Constitution.\textsuperscript{17} The grounds for judicial review under PAJA are contained in section 6, which reads in relevant part:

"(2) A court or tribunal has the power to judicially review an administrative action if—\textsuperscript{18}

(a) ...;\textsuperscript{19}

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;\textsuperscript{19}

(c) the action was procedurally unfair;\textsuperscript{19}

(d) the action was materially influenced by an error of law;\textsuperscript{19}

(e) the action was taken—\textsuperscript{20}

(i) for a reason not authorised by the empowering provision;\textsuperscript{20}

(ii) for an ulterior purpose or motive;\textsuperscript{20}

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;\textsuperscript{20}

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\textsuperscript{15} SASSA v CPS above.
\textsuperscript{16} Compare section 3(4) of PAJA and Member of the Executive Council, Department of Education, Gauteng and Others v Governing Body of Rikonis and Others [2013] ZACC 34; 2013 (6) SA 582 (CC) at para 49(c).
\textsuperscript{17} Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 26; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 73; New Cocks above n 19 at paras 85-7; and Befe Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [2004] ZACC 10, 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 25-6.
\end{flushleft}
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;

7.2.4.4 In terms of the standards for procedural fairness of administrative action as envisaged in terms of section 33 of the Constitution and section 3(2) (b) of PAJA, and which are also prescribed in Regulation 51 of the Regulations issued in terms of Standards Act, 1993, the SABS was required to provide the Complainant with-

a) with adequate notice of intention to suspend or cancel the Complainant's manufacturing permit;
b) clear reasons for the intended cancellation of the permit;
c) a reasonable opportunity to make a written representation to the Chief Executive Officer before the decision was taken; and
d) adequate notice of any right of review or internal appeal, where applicable;

7.2.4.5 The SABS was thus far unable to provide the Public Protector with any records of any communications with the Complainant prior to the withdrawal of the permit, to notify him of its intention and the reasons therefore to inform him whether or not he might appeal against the decision.

7.2.4.6 The actions of the SABS therefore amounted to non-compliance with the prescribed statutory procedure, as well as the standards of procedurally fair administrative action envisaged in section 33 of the Constitution and section 3(2)(b) of PAJA.

7.2.5 Regarding the submission by the SABS to the effect that because of the lengthy lapse of time, the Complainant should be precluded from challenging the validity of the withdrawal of the mark permit and its force in law.

7.2.5.1 Even though it is disputed by the SABS that they ever received any response from the Complainant, the SABS was provided (during the initial stage of the
investigation by the KZN Public Protector office, as well as on a number of occasions during subsequent communications) with correspondence confirming that the Complainant immediately challenged the decision to withdraw the permit through his lawyers, and then proceeded to lodge a direct complaint with the Public Protector, together with related complaints about the manner in which the SABS was enforcing the standard SABS1116- 4:96. The complaint relating to the withdrawal of the permit which was at the time, treated as a collateral matter to the complaints about the manufacturing process, and dependent on verification of the related substantive issues, including whether or not there was proper regulation of compliance with SABS1116- 4:96.

7.2.5.2 I am guided by the approach of the Courts that it does not matter that the alleged defect in the administrative decision was latent and not patent, in other words not related to the substance of the decision, but rather the mere procedure in adopting it:

"In the present case the fact that the defect is limited to procedure is immaterial in the assessment of its validity and force in law because it offends one of the basic principles of our law namely the rule of law. The rule of law is foundational to any relationship between the parties in a constitutional democracy. The parties to any relationship are required to act lawfully in their interaction with each other."

7.2.5.3 The general rule in our law is that an unlawful administrative decision is valid and has legal consequences until such time that it is set aside.

7.2.5.4 The Courts noted that a delay in taking steps to review an unlawful administrative decision could result in the uncertainty as to the status of that decision, but does not mean that the right to bring the review had become prescribed and thus could not be enforced. In the matter of National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and others, the Court noted that for the purpose of determining the entitlement of the party seeking clarity (enforcement) of administrative action, "the defendant or accused in such proceedings cannot, it seems to me, be precluded from raising invalidity as a defence merely on the grounds of delay . . ."
7.2.5.5 In the *Khumalo* case the appellants contented that the Court should not set aside certain promotions that occurred 7 years earlier, because of the lapse of time. The Court stated as follows:

"... it will have regard to the failure by the aggrieved party to institute review proceedings within a reasonable time and whether there is a public interest element in the finality of administrative decisions and the exercise of administrative functions... when making the choice of a just and equitable remedy in terms of PAJA it would be important to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful."

7.2.5.6 The Court also noted that the mere fact that the impugned decision is based on ignorance, mistake or fraud does not necessarily mean that it has to be set aside. In appropriate circumstances a Court will decline, in the exercise of its discretion, to set aside an invalid administrative action in order to avoid or minimise injustice when legality and certainty collide. While it may be true that the review is aimed at setting aside an invalid act on the basis that it fails to satisfy the principle of legality, sometimes practical considerations would require finality, rendering it less desirable to set aside an invalid act. That would be a case where an invalid administrative act has over a period of time remained unchallenged and third parties have arranged their affairs in accordance therewith and its setting aside may cause them injustice. (Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA).

7.2.5.7 The Complainant will continue to be prejudiced by the unlawful actions of the SABS as long as they are not rendered invalid because it offended the basic principles of our law namely the principles of legality and the rule of law.

7.2.5.8 The jurisprudence discussed above furthermore, confirmed that the unlawfulness, and the subsequent invalidity of such administrative action, cannot be cured by the mere passage of time.

7.2.6 Regarding whether the actions of the SABS amounted to improper conduct or maladministration as envisaged in the Constitution and the Public Protector Act?
7.2.6.1 The starting point for an evaluation of the proper approach to administrative justice, is section 33 of the Constitution, as well as PAJA, which give legislative expression to the fundamental right to administrative action “that is lawful, reasonable and procedurally fair”.

7.2.6.2 On the issue of "lawful" administrative action the Constitutional Court had at the time of the events in question already relied on the constitutional ‘principle of legality’ which imposed the requirement on the holder of the administrative power that "the exercise of public power is only legitimate where lawful". In this particular case it implied that the SABS had to act within the powers lawfully conferred upon it.

7.2.6.3 Procedural fairness relates to the principles of natural justice that include, *inter alia*, the principles of *audi alteram partem* and *nemo iudex sua causa*. This means that once particular administrative process is prescribed by law, it is subject to the norms of procedural fairness contained in section 33 of the Constitution and PAJA.

7.2.6.4 In the matter at hand it is also implied that deviations from these norms will result in procedural unfairness, as it did, leaving the Complainant with no clue at all as to why his product was no longer compliant with the specifications that the SABS had previously tested and confirmed, and consequently, no recourse to determine if there was a basis on which this decision could be challenged.

7.2.6.5 I have no hesitation in concluding that the actions of the SABS fell far short of the rights and principles of administrative justice that are espoused in our Constitution.

7.3 Regarding issue 3: Whether the actions of the SABS had caused the Complainant to suffer any prejudice?

7.3.1 Regarding whether the Complainant suffered any injustice in consequence of maladministration by the SABS
7.3.1.1 It is not in dispute that the Complainant was at the time establishing himself as an individual in an industry where long-established businesses had been controlling the market in terms of vested processes and practices.

7.3.1.2 The SABS disputed any causal link between the termination of the permit and any prejudice suffered by the Complainant. As indicated earlier, I am satisfied that the Complainant was in possession with a valid permit under the authority of the SABS that allowed him to operate as a manufacturer and distributor of motor vehicle number plates. Such a manufacturer is by law unable to operate without being able to display the SABS mark on his/ her products. The SABS made it clear in the communication to the Complainant that he would have been acting in contravention of the law should he have proceeded with operations. The de facto and the de jure position was that the withdrawal of the permit had the effect that he was not able to lawfully pursue this manufacturing business venture and ended up without any income.

7.3.1.3 The evidence that the Complainant was hard hit (financially and mentally) by the withdrawal of his permit, especially because he was totally in the dark as to the reasons for the withdrawal, was not disputed. He was left to make his own conclusions that he was being victimised because he wanted to blow the whistle on his concerns about the non-compliance with the SABS standards by the existing (vested) manufacturers.

7.3.1.4 The impact on him cannot be described as “gross inconvenience”. Having been self-employed and building a business on an innovation in which he invested a huge part of his life, the withdrawal of the permit had a significant impact on his mental health.

7.3.1.5 In terms of the law it is compulsory that any motor vehicle that is operated on a public road in South Africa be fitted with a number plate which is manufactured by use of materials and processes that are approved by the SABS.²⁸

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²⁸ Regulation 35 of the National Road Traffic Regulations, 2000 and SABS 1116
7.3.1.6 In order to obtain SABS approval, a number plate manufacturer has to comply with the compulsory specification, standard or standard method adopted by the SABS, determined by the Minister of Trade and Industry in terms of the Standards Act, 1993 (SABS 1116).

7.3.1.7 The Complainant followed the prescribed procedures to obtain SABS approval for his product and the manufacturing process. He made sure that he operated within the parameters of the law.

7.3.1.8 As the relevant provisions of the Regulations that required registration with the RTMC were not yet in operation at the time of the termination of the permit, the regulatory framework was still governed by the Permit Regulations and any permits issued in terms thereof, remained in force and valid.

7.3.1.9 It was also clear from the evidence presented that the Complainant received a notification from the SABS informing him that his permit was withdrawn, and instructing him, under penalty of the law, to cease any operations as a manufacturer and distributor of motor vehicle number plates.

7.3.1.10 Without the SABS logo to certify that his products complied with the compulsory specification, standard or standard method approved by the SABS, the Complainant was unable to continue to manufacture and distribute motor vehicle number plates.

7.3.2 Regarding what it would take to bring the Complainant as close as possible to the position where he would have been if the maladministration had not occurred.

7.3.2.1 As with Ombudsmen all over the world, the underlying principle of the remedial action that I consider in terms of section 182(1) (c) of the Constitution is endeavouring to ensure that the relevant public body restores the complainant to the position he or she would have been in, had the maladministration not occurred. However, there is no checklist to be applied mechanically; instead I use my judgement when applying this principle to produce reasonable, fair, and proportionate remedies in the circumstances of each case. Where it is not possible to put the complainant in the position he/she would have been but for the maladministration, financial compensation might be a means of providing redress for the pecuniary and non-pecuniary
consequences of the maladministration. In respect of non-pecuniary consequences the financial redress should always be linked clearly to the identified injustice. 21

7.3.2.2 When considering an appropriate remedy, I draw on the experience and best practice of my international counterparts to develop suitable and proportionate remedies for complainants whose complaints are upheld and who have suffered injustice or hardship as a result of the same maladministration or poor service. Having regard to the solutions adopted by ombudsmen such as the Parliamentary and Health Services Ombudsman of the UK as well as the European Ombudsman, the following principles would serve as touchstones in the consideration of “appropriate remedial action”:

a) It is good administrative practice to eliminate instances of maladministration as soon as they are discovered.

b) In order to do so, the administration should as far as possible take measures to ensure that complainants are put in the same position they would have been in if the maladministration had not occurred.

c) Where such restitution is not possible, the administration should take action to compensate the complainant for the damage or distress he has suffered. Unless there are more appropriate forms of compensation, financial compensation should be granted.

7.3.2.3 In normal circumstances where it is possible to rectify a flawed decision or process, I might have directed the SABS to reinstate the Complainant’s permit and allow him to proceed with his business.

7.3.2.4 The requirements, both legally and procedurally, as well as the finances required to apply for such a permit, have changed to such an extent that it might not be possible for the Complainant to gain automatic entry into the industry again, and for the permit to be re-instated.

7.3.2.5 Even then, it would not address the fact that the Complainant has been unable to generate any income from his preferred mode of business and has suffered financial hardship.

7.3.2.6 The Complainant also suffered distress as a result of the position in which he found himself. Where an individual has suffered injustice or hardship arising from maladministration an Ombudsman would normally consider the impact that it had on the person such a “gross inconvenience”: that is, the time, trouble, difficulty or discomfort (including stress short of significant injury to health). Individuals may also a significant impact on physical or mental health (referred to as severe distress) as a direct result of maladministration.

8 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

8.1 Regarding whether the SABS improperly failed to attend to claims by the Complainant that acrylic number plates manufactured by means of the “kiss-cut” method did not meet the requirements and standards prescribed in SABS 1116-4:1996 or failed to take action against manufacturers and distributors of the said defective number plates, I find that:

8.1.1 Samples of acrylic motor vehicle number plates on submitted by the Complainants showed visible defects or deterioration in the form of cracking, blistering or loss of adhesion, and was not disputed by the SABS.

8.1.2 The dispute between the parties as to whether incidents of accelerated deterioration in acrylic motor vehicle number plates could be directly attributed to the “kiss-cut” method of manufacturing, as opposed to poor workmanship, was not resolved by the evidence obtained during the initial investigation by my predecessor.

8.1.3 Without independent scientific evidence I am unable to pick up where my predecessor left off by endeavouring to make a finding on the allegations by the
Complainant that the SABS had at the time failed its duty because acrylic motor vehicle number plates manufactured by means of the “kiss-cut” method could not meet the required SABS standards set in the then SABS 1116-4:1996.

8.1.4 Since the Compulsory Specification for Retro-Reflective Number Plates for Motor Vehicles (VC8062) has in the meanwhile been withdrawn by the Minister of Trade and Industry and acrylic plates are being phased out in new motor vehicle registrations in favour of aluminium plates, any further investigation of the original allegations would therefore, not be warranted at this point in time.

8.2 Regarding whether the SABS unfairly or unfairly withdrew the Complainant’s permit to manufacture and distribute motor vehicle number plates, accordingly action constituting improper conduct and maladministration, I find that:

8.2.1 The Complainant was in possession of a test report and letter of confirmation from the SABS dated 02 March 1998 and 17 March 2000, respectively, stating that the Complainant’s “silkscreen” method of manufacturing number plates as well as the number plates manufactured by him, complied with SABS specifications SABS 1116-4:1999.

8.2.2 On 18 September 2000 the SABS issued a notice to the Complainant advising him that the product that he was manufacturing, in terms of the permit, did not comply with SABS specifications SABS 1116-4:1996, and that his permit was withdrawn;

8.2.3 The notice addressed to the Complainant was intended to inform him of a decision by the SABS that the permit had been withdrawn, but merely informing him of the expiry thereof as a result of alleged relocation of his premises.

8.2.4 The SABS failed to:

   a) inform the Complainant of its intention to withdraw the permit,
   b) provide adequate reasons for the withdrawal of the permit;
   c) provide the Complainant with an opportunity to respond to adverse information that affected the decision to withdraw the permit; and
   d) inform the Complainant that he had the right to submit written representations to its Chief Executive Officer (CEO).

8.2.5 The SABS therefore failed to comply with the provisions of the Regulations Relating to Permit Fees and Certification Mark Permits, issued in terms of the
Standards Act, 1993, which empowered the Chief Executive Officer to suspend or cancel the registration of a manufacturer of number plates in terms of section 5(4) of the Standards Act, 1993 after prior notification of such intention to the permit holder;

8.2.6 The process followed by the SABS to withdraw a permit was procedurally unfair and not in compliance with the requirements for a just administrative process contained in section 33 of the Constitution and section 3(2)(b) of PAJA.

8.2.7 The conduct of the SABS constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

8.2.8 Because of the continued nature of administrative functions and the consequences for the Complainant, the interests of justice and in an effort to uphold the rights and principles that are espoused in our Constitution, the maladministration and improper conduct in this matter cannot be cured by the mere passage of time.

8.3 Regarding whether the actions of the SABS had caused the Complainant to suffer any prejudice, I find that:

8.3.1 At the time when the permit was withdrawn the Complainant was self-employed and building a business on an innovation in which he invested a large part of his life in order to establish himself as an individual in an industry where long-established businesses had been controlling the market in terms of vested processes and practices;

8.3.2 The withdrawal of the permit had the effect that the Complainant was not able to lawfully pursue this manufacturing business venture and ended up without any income.

8.3.3 Apart from the financial impact, the failure to provide reasons resulted in the complainant not being able to exercise his rights and in essence to victimisation.

8.3.4 The maladministration referred to above has prejudiced the Complainant in that he suffered and continues to suffer severe distress and loss of income.

9 REMEDIAL ACTION
The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, while addressing systemic procurement management deficiencies in the Department, is the following:

9.1 The Chief Executive Officer of the SABS to take steps to:

9.1.1 Enable and assist the Complainant to apply for the necessary permission and authorization to be registered as a manufacturer, distributer or reseller of motor vehicle number plates. This includes financial assistance, in consultation with the Complainant but not less than –

a) R250 000, 00 to re-apply for a manufacturing permit and to re-open a business to supply number plates to the motoring public (embosser); and

b) R150 000, 00 to re-establish a business to manufacture number plate machines and supply number plate accessories in selected areas.

9.1.2 Provide the Complainant with a remedy, including a reasonable amount as a settlement for consolatory compensation, to address the distress and trauma experienced by him and his family as a result of the manner in which the matter has been handled.

10. MONITORING

10.1 The Chief Executive Officer of the SABS must submit an action plan in respect of the implementation of the remedial action for interim relief referred to in paragraph 9.1.1 above, to the Public Protector within 14 days of the date of this report.

10.2 The SABS must submit an action plan in respect of the implementation of the balance of the remedial action referred to in paragraph 9.1.2 above, to the Public Protector within 21 days of the date of this report.
10.3 The SABS must submit a report within 30 days, as of the date of this report, to the Public Protector on the progress made with the implementation of the remedial action referred to in paragraph 9 above.

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

Assisted by: Adv N van der Merwe: Senior Investigator: Knowledge Management