
PUBLIC PROTECTOR
SOUTH AFRICA

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ALLEGATIONS OF FAILURE BY THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT TO CONFIRM AN ACTING POSITION OF MR. S MABOHO AND TO EFFECT PAYMENT OF AN ACTING ALLOWANCE
Allegations of failure by the Department of Justice and Constitutional Development to confirm an acting position of the Complainant and to effect payment of acting allowance

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Executive Summary

(i) This is my report 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, 23 of 1994.

(ii) This report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint lodged by Mr. S Maboho (the Complainant) on the 13 August 2013, against the Department of Justice and Constitutional Development (herein referred to as the Department) alleging failure by the Department to confirm his acting position and to effect payment of an acting allowance.

(iii) In the main, the Complainant was serving as a Senior Magistrate at the Pretoria-North Magistrate’s office and acting as a Chief Magistrate, as the office was such in rank, and had been headed by a Chief Magistrate who had retired on 30 June 2007. The Complainant thereafter mentioned that he acted as head of the office and in so doing acted as the Chief Magistrate from 1 July 2007 to 17 August 2010, however his acting allowance was never paid for this period.

(iv) The Complainant mentioned that he was later paid an acting allowance from 18 August 2010 to 17 November 2010 when he was duly appointed to act in the position as Chief Magistrate.

(v) He raised the matter with both the former Minister and the Deputy Minister of the Department of Justice and Constitutional Development and also with the Director-General. When the Department failed to respond to his complaint, he lodged a grievance with the Magistrates Commission.
(vi) In response to the grievance that he lodged, the former Deputy Minister of the Department refused to issue an acting judicial appointment to him as an acting Chief Magistrate, citing a decision by the former Minister, that the position of Chief Magistrate for the Pretoria-North office, which had become vacant after the incumbent of the post retired, was kept in abeyance pending the re-demarcation of the magisterial districts. Furthermore, that the post of Chief Magistrate would be hugely affected by the pending re-demarcation process. This is despite the fact that in numerous correspondence, the Department addressed to him as “Acting Chief Magistrate”

(vii) The Complainant mentioned that the Grievances Committee of the Magistrates Commission however upheld his grievance on the ground that the post had not yet been abolished and was still a funded post in the Pretoria-North office and further that the structure thereof had not changed since the former Chief Magistrate retired.

(viii) He further alluded that the vacancy of the Chief Magistrate post at the Pretoria-North office was similar to that in the Odi Magistrate’s Court (Odi) in that filling of both posts was kept in abeyance pending the re-demarcation of magisterial districts.

(ix) Furthermore, the acting Chief Magistrate at the latter court was paid an acting allowance. Also the Regional Magistrate, who was an Acting Chief Magistrate subsequent to his departure, was paid an allowance.

(x) He raised the matter with the Department to pursue the recommendations of the Magistrate’s Commission to no avail.

(xi) Based on an analysis of the allegations, the following issues were identified to inform and focus the investigation:
Allegations of failure by the Department of Justice and Constitutional Development to confirm an acting position of the Complainant and to effect payment of acting allowance

(aa) Regarding whether the Department improperly advised the Minister and unfairly failed to confer any benefit to the Complainant of him having performed duties and mandatory responsibilities in the position of Chief Magistrate that have become temporarily vacant during the period 1 July 2007 until 17 August 2010.

(bb) Whether the Complainant was improperly prejudiced by performing duties of a Chief Magistrate without being remunerated?

(xii) In dealing with the matter, some issues were mediated upon in line with section 6(4)(b) of the Public Protector Act. However, the main investigation was conducted through correspondence, meetings and interviews with the Complainant and the Department.

(xiii) Key laws and policies taken into account to help me determine if there had been improper conduct and/or maladministration by the Department were principally those imposing administrative standards that should have been upheld by the Department and/or its officials.

(xiv) Section 7(9) notice dated 17 March 2020, was sent to the Department on 24 March 2020, to enable them to respond to my provisional findings and a response was received on 29 July 2020.

(xv) Furthermore, discretionary notice was sent to the Complainant on 14 August 2019. I received a response to my discretionary notice from the Complainant on 26 August 2019.

(xvi) Having considered the evidence uncovered during the investigation, as against the relevant regulatory framework, I make the following findings:
Allegations of failure by the Department of Justice and Constitutional Development to confirm an acting position of the Complainant and to effect payment of acting allowance

(a) Regarding whether the Department improperly advised the Minister and unfairly failed to confer any benefit to the Complainant of him having performed duties and mandatory responsibilities in the position of that of Chief Magistrate that had become temporarily vacant during the period 1 July 2007 until 17 August 2010.

(aa) The allegation herein is substantiated.

(bb) The Department failed to properly assess the vacant post of Chief Magistrate at the Pretoria-North, before taking a decision not to appoint an acting Chief Magistrate.

(cc) The Department's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

(b) Whether the Complainant was improperly prejudiced by performing duties of a Chief Magistrate without being remunerated.

(aa) The allegation herein is substantiated.

(bb) The Department was aware of the fact that the post that became vacant at Pretoria-North was that of Chief Magistrate and the functions of the Chief Magistrate did not seize to exist but continued to be performed by the Senior Magistrate.

(cc) The Department's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and improper prejudice and/or injustice as envisaged in section 6(4)(v) of the Public Protector Act.
Allegations of failure by the Department of Justice and Constitutional Development to confirm an acting position of the Complainant and to effect payment of acting allowance

(xvii) **Remedial Action**

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

6.1.1 The Acting Director-General, must within 60 (sixty) working days from the date of this report, calculate and pay the acting allowance in line with applicable prescripts and Legislation provided in the determination of additional remuneration payable to permanent magistrates acting in any other judicial office.
ALLEGATIONS OF FAILURE BY THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT TO CONFIRM AN ACTING POSITION OF MR. S MABOHO AND TO EFFECT PAYMENT OF AN ACTING ALLOWANCE

1. INTRODUCTION

1.1. This is my report 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, 23 of 1994 (Public Protector Act).

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation:

1.2.1. Ms K Pillay, Acting Director-General (Department of Justice and Constitutional Development).

1.2.2. The Complainant, Mr S Maboho.

1.2.3. This report relates to my investigation into allegations of failure by the Department of Justice and Constitutional Development (herein referred to as the Department) to confirm an acting position of the complainant and to effect payment of acting allowance.

1.2.4. A Notice in terms of section 7(9) of the Public Protector Act was issued to the Department on 17 March 2020, providing the Department an opportunity to respond to my intended findings, a response was received on 29 July 2020.

1.2.5. Furthermore, discretionary notice was sent to the Complainant on 14 August 2019. I received a response to my discretionary notice from the Complainant on 26 August 2019.
2. THE COMPLAINT

2.1. The complaint was lodged by Mr Samuel Maboho (the Complainant) on 13 August 2013. The Complainant alleged in essence that:

2.1.1. He was serving as a Senior Magistrate at the Pretoria-North Magistrate's office and acting as a Chief Magistrate, as the office was such in rank, and had been headed by a Chief Magistrate who had retired on 30 June 2007. The Complainant thereafter mentioned that he performed the duties as head of the office and in so doing, acted as the Chief Magistrate from the 1 July 2007 to 17 August 2010, however his acting allowance was never paid for this period.

2.1.2. The Complainant mentioned that he was later paid an acting allowance from 18 August 2010 to 17 November 2010, when he was duly appointed to act in the position as Chief Magistrate.

2.1.3. He raised the matter with both the former Minister and the Deputy Minister of the Department of Justice and Constitutional Development and also with the Director-General. When the Department failed to respond to his complaint, he lodged a grievance with the Magistrates Commission.

2.1.4. In response to the grievance that he lodged, the former Deputy Minister of the Department refused to issue an acting judicial appointment to him as an acting Chief Magistrate, citing a decision by the former Minister, that the position of Chief Magistrate for the Pretoria-North office, which had become vacant after the incumbent of the post retired, was kept in abeyance pending the re-demarcation of the magisterial districts. Furthermore, that the post of Chief Magistrate would be hugely affected by the pending re-demarcation process. This is despite the fact that in numerous correspondence, the Department addressed to him as "Acting Chief Magistrate".
2.1.5. The Complainant mentioned that the Grievances Committee of the Magistrates Commission however upheld his grievance on the ground that the post had not yet been abolished and was still a funded post in the Pretoria-North office and further that the structure thereof had not changed since the former Chief Magistrate retired.

2.1.6. He further alluded that the vacancy of the Chief Magistrate post at the Pretoria-North office was similar to that in the Odi Magistrate’s Court (Odi) in that filling of both posts was kept in abeyance pending the re-demarcation of magisterial districts.

2.1.7. Furthermore, the acting Chief Magistrate at the latter court was paid an acting allowance. Also the Regional Magistrate, who was an Acting Chief Magistrate subsequent to his departure, was paid an allowance.

2.1.8. He raised the matter with the Department to pursue the recommendations of the Magistrates Commission to no avail.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has power as regulated by national legislation—

(a) 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,"
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(b) to report on that conduct; and
(c) to take appropriate remedial action.”

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the constitutional court, in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the Public Protector:

3.5.1 The remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences” (para 73);

3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights
entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

3.5.6 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.5.7 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.5.8 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(c));
3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.10 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

3.6.1 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);

3.6.2 The Public Protector, in appropriate circumstances, has the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);

3.6.3 There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);

3.6.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):
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(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

3.6.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

3.6.6 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105).

3.6.7 The fact that there are no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (para 107 and 108);

3.6.8 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);

3.7 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the
past. What constitutes as 'special circumstances' depends on the merits of each case.

3.8 The Department is an organ of state and their conduct amounts to conduct in state affairs, as a result the complaints falls within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.9 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.

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.

4.2 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:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
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4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?

4.2.1.4 In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where he 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 the role played by the Department’s failure to confirm an acting position of the Complainant and to effect payment of acting allowance.

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 officials of the Department.

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

4.3 Notice issued in terms of section 7(9) of the Public Protector Act:

4.3.1 Section 7(9) notice dated 17 March 2020, was sent to the Department on 24 March 2020, to enable them to respond to my provisional findings and a response was received on 29 July 2020.
4.3.2 Furthermore, a discretionary notice was sent to the Complainant on 14 August 2019. I received a response to my discretionary notice from the Complainant on 26 August 2019.

4.4 Based on analysis of the allegations, I identified the following issues to inform and focus this investigation:

4.4.1 Regarding whether the Department improperly advised the Minister and unfairly failed to confer any benefit to the Complainant of him having performed duties and mandatory responsibilities in the position of Chief Magistrate that had become temporarily vacant during the period 1 July 2007 until 17 August 2010.

4.5.1 Whether the Complainant was improperly prejudiced by performing duties of a Chief Magistrate without being remunerated?

4.5 The Key Sources of information

4.5.1 Documents:

4.5.1.1 Complaint form dated 13 August 2018
4.5.1.2 Letter dated 18 December 2007 from Mr AD Schoeman, Secretary: Magistrates Commission (Application for vacant post of Chief Magistrate at ODI).
4.5.1.3 Letter dated 9 February 2008 from Mr S Maboho to Mr J Jonker.
4.5.1.4 Letter dated 9 March 2008 to Magistrates Commission from Mr Jonker.
4.5.1.5 Letter dated 21 August 2009 from Magistrates Commission to Ministerial Office regarding the grievance.
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4.5.1.6 Letter dated 5 October 2009 from Adv. JB Skosana to Mr AD Schoeman, Secretary: Magistrates Commission (Advertising and filling of 1 post of Regional Magistrate and Criminal Courts).

4.5.1.7 Letter dated 7 October 2010, to the former Deputy Minister, Mr AP Nel, Mr D Nair, Secretary: Chief Magistrates Forum (Chief Magistrate: Pretoria) Remuneration: Mr S Maboho: Acting Chief Magistrate: Pretoria-North.

4.5.1.8 Letter dated 21 August 2009 from Magistrates Commission addressed to Mr S Maboho regarding the grievance lodged.

4.5.1.9 Letter dated 28 June 2017 from the Department.

4.5.1.10 Letters referring to the Complainant as “Acting Chief Magistrate:
4.5.1.10.1 Dated 26 August 2010 to the Chief Magistrates Forum;
4.5.1.10.2 Dated 21 May 2010 from the Ministerial office; and

4.5.1.11 Letter dated 24 August 2010 from the Complainant to Chief Magistrate: Johannesburg.

4.5.1.12 Letter from the Complainant dated 23 August 2019 to the Public Protector.

4.5.1.13 Section 7(9) dated 17 March 2020, to Department.

4.5.1.14 Response to section 7(9) dated 27 July 2020 and legal opinion for the office of the Chief State Law Adviser S Ramaila/JV Nurse/ B Makhene-Gadini.

4.5.2 Meetings:

4.5.2.1 Meeting between the Public Protector and the Department: 12 April 2017

4.5.2.2 Meeting between the Public Protector and the Department: 6 August 2019

4.5.2.3 Meeting between the Acting Director-General, Adv. JB Skosana and Chief Operations Officer and investigation team of the Public Protector: 22 July 2020

4.5.3 Correspondence sent and received

4.5.3.1 18 March 2014 e-mail to Department from Public Protector

4.5.3.2 18 March 2014 e-mail from Department

4.5.3.3 24 March 2014 e-mail to Department from Public Protector
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4.5.3.4 11 April 2014 e-mail from Department
4.5.3.5 24 June 2014 e-mail to Complainant from Public Protector
4.5.3.6 7 July 2014 e-mail to Complainant from Public Protector
4.5.3.7 29 August 2014 e-mail to Complainant from Public Protector
4.5.3.8 25 May 2015 e-mail to Department from Public Protector
4.5.3.9 02 October 2015 e-mail to Department from Public Protector
4.5.3.10 7 December 2015 e-mail to Department from Public Protector
4.5.3.11 10 March 2016 e-mail to Department from Public Protector
4.5.3.12 15 September 2016 e-mail to Department from Public Protector
4.5.3.13 15 November 2016 e-mail to Department from Public Protector
4.5.3.14 16 November 2016 e-mail to Department from Public Protector
4.5.3.15 17 November 2016 e-mail to Department from Public Protector
4.5.3.16 13 December 2016 e-mail to Department from Public Protector
4.5.3.17 19 December 2016 e-mail to Department from Public Protector
4.5.3.18 22 December 2016 e-mail to Department from Public Protector
4.5.3.19 12 January 2017 e-mail to Department from Public Protector
4.5.3.20 7 March 2018 e-mail to Department from Public Protector
4.5.3.21 21 May 2018 e-mail to Department from Public Protector
4.5.3.22 27 September 2018 e-mail to Department from Public Protector
4.5.3.23 19 March 2019 e-mail to Department from Public Protector
4.5.3.24 1 April 2019 e-mail to Department from Public Protector
4.5.3.25 26 June 2019 e-mail from Public Protector to Department
4.5.3.26 4 July 2019 e-mail to Department from Public Protector

4.5.4 Legislation and other prescripts.

4.5.4.1 The Constitution of the Republic of South Africa, 108 of 1996;

4.5.4.2 The Public Protector Act, 23 of 1994;
4.5.4.3 The Magistrates Act, 90 of 1993,

4.5.4.4 Government Gazette No. 30529 dated 30 November 2007 with notice no. 1136 and 1137.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Department improperly advised the Minister and unfairly failed to confer any benefit to the Complainant of him having performed duties and mandatory responsibilities in the position of Chief Magistrate that had become temporarily vacant during the period 1 July 2007 until 17 August 2010.

Common cause

5.1.1 It is common cause that the Complainant was appointed as Magistrate on 18 March 1996 and was appointed as Senior Magistrate on 18 March 1998, serving at the Pretoria-North office.

5.1.2 It is not disputed that the Complainant received an acting allowance for the period 18 August 2010 to 17 November 2010.

Issues in dispute:

5.1.3 The issue for my determination is whether the Department improperly failed to advice the Minister’s Office on the Complainant’s acting appointment as Chief Magistrate of the Pretoria-North office from the 1 July 2007 to 17 August 2010.
5.1.4 The Complainant alleged that he was serving as a Senior Magistrate at the Pretoria-North office and acting as a Chief Magistrate, as the office was such in rank, and had been so headed by a Chief Magistrate who had retired on 30 June 2007. The Complainant thereafter, performed the functions of Chief Magistrate of the Pretoria-North Magistrate’s Office from 1 July 2007 to 17 August 2010, however his acting allowance was never paid save for the period 18 August 2010 to 17 November 2010, when he was duly appointed to act in such a position.

5.1.5 He raised the matter with both the former Minister and the Deputy Minister of the Department of Justice and Constitutional Development as well as with the Director-General. When the Department failed to respond to his complaint, he lodged a grievance with the Magistrates Commission.

5.1.6 In response to the grievance that he lodged, the former Deputy Minister of the Department refused to issue an acting judicial appointment to him as an acting Chief Magistrate, citing a decision by the former Minister, that the position of the Chief Magistrate for the Pretoria-North office, which had become vacant after the incumbent of the post retired, was kept in abeyance pending the re-demarcation of the magisterial districts. Furthermore, that the post of Chief Magistrate would be hugely affected by the pending re-demarcation process. This is despite the fact that in numerous correspondence, the Department addressed to him as “Acting Chief Magistrate”.

5.1.7 The Grievances Committee of the Magistrates Commission however upheld his grievance on the ground that the post had not yet been abolished and was still a funded post in the Pretoria-North office and further that the structure thereof had not changed since the former Chief Magistrate retired.

5.1.8 In a letter dated 18 December 2007, the Magistrates Commission informed the Complainant, that according to their records, the Complainant submitted an
application for appointment in respect of the vacant post of Chief Magistrate at Odi that was advertised by the Magistrates Commission with closing date 23 November 2007.

5.1.9 Further to the above, the Magistrates Commission at its meeting held on 22 November 2007, was informed by the representative of the former Minister that the proposed re-demarcation of magisterial districts will have an impact on the volume of judicial work at Odi which in turn will impact on the current judicial staff establishment and the grading of the office.

5.1.10 Thus, the Commission resolved not to fill the post of Chief Magistrate at Odi at that stage pending the finalisation of the re-demarcation of magisterial districts and directed that all applicants should be informed accordingly.

5.1.11 Mr J Jonker (Chief Magistrate- Johannesburg) after receipt of a letter dated 10 February 2008, from the Complainant raising issues about his acting allowance, wrote a letter dated 9 March 2008, to the Magistrates Commission, firstly stating that the letter serves as a formal grievance as provided for in Regulation 31 of the Regulation for Judicial Officers in Lower Courts, 1993.

5.1.12 Mr Jonker further stated that Ms S van der Walt was the last person who held an appointment as Chief Magistrate for the Wonderboom district (Pretoria North).

5.1.13 Several applications for acting appointment as Chief Magistrate for Mr Maboho were submitted to the office of the Deputy Minister of Justice and Constitutional Development for consideration in terms of section 9(3) of the Magistrates Court Act, 1944. No results were received in respect of any of these applications. At the same stage, the Secretary of the Deputy Minister, Mr B Williams, informed him by phone that the Deputy Minister was not prepared to approve the applications as the Department intended to abandon the post of Chief Magistrate at Wonderboom.
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5.1.14 Mr Jonker further stated that, in his opinion, the situation at present is, however that the post of Chief Magistrate has all along not been abandoned or terminated. Mr Pretorius and Mr Maboho have both acted as Heads of Office and in so doing acted as Chief Magistrates. He further suggested that both Mr Pretorius and Mr Maboho are entitled to receive the acting allowance for the periods that they individually acted as Chief Magistrates.

5.1.15 Furthermore, it is also the view of the Office that the appointments should not have been withheld/suspended for the reasons forwarded by Mr B Williams.

5.1.16 Mr Jonker further highlighted the view of his office, stating that the grading of the Head of Office for Pretoria-North is still that of a Chief Magistrate. It is clear from the provisions of section 9(1) of the Magistrate Court Act, 1944 that the "Minister may appoint for any district or sub-district a magistrate, one or more additional magistrates or one or more assistant magistrate". This implies that one magistrate will be for the district while others will be additional or assistant magistrates. The post of magistrate for the district of Wonderboom (Head of Office) is that of Chief Magistrate and not of a Senior Magistrate. Although it was decided not to fill the post, it has not been abandoned and still exists. It is in this position that Mr Pretorius and Maboho were acting.

5.1.17 Further to the above, Mr Jonker added that the fact of the matter remains that some duties are restricted to be carried out by the Magistrate of the district (Head of Office) which in the case of Wonderboom, has a ranking of a Chief Magistrate. Mr Maboho who acts as Magistrate of the district, automatically acted in the post of Chief Magistrate. It is a post of a higher ranking than the position he held and therefore entitled to the difference in remuneration as provided for in section 12(5)(a) of the Magistrates Act, 1993.
In a letter dated 21 August 2009, from the Magistrates Commission addressed to the then Minister, Mr JT Radebe, regarding the grievance lodged by the Complainant stated the following:

"Senior Magistrate MS Maboho has been acting as head of the Pretoria-North Magistrate’s Office since the former Chief Magistrate retired on 30 June 2007. Mr Maboho is of the view that he is entitled to additional remuneration payable to permanent magistrates acting in any higher judicial office as determined by the Minister for Justice and Constitutional Development and published in Government Gazette No. 30529 dated 30 November 2007.

He argues that since the retirement of the Chief Magistrate, this position is still reflected in the structure of the office as that of a Chief Magistrate. Several applications for acting appointment as Chief Magistrate in respect of Mr Maboho were submitted to the office of the former Deputy Minister for Justice and Constitutional Development for consideration in terms of section 9(3) of the Magistrate’s Court Act, 32 of 1944.

The Deputy Minister however refuses to issue an acting judicial appointment to Mr Maboho as the Chief Magistrate in view of a decision of former Minister Mabandla to move the post of Chief Magistrate at Pretoria-North to Soweto.

The Commission was on 18 April 2009 informed by Minister Mabandla that the position of Chief Magistrate for Pretoria-North which became vacant after the incumbent of the post retired will be hugely affected by the re-demarcation process. The establishment of a detached court at Mamelodi will affect the current grading and structure of the Pretoria-North office and for that reason it was decided to request the Commission not to fill the vacant post of Chief Magistrate. The Minister further informed the Commission that she has deemed it necessary to move the vacant position of Chief Magistrate from Pretoria-North to Soweto where it will be utilized optimally.
Mr Maboho subsequently lodged a grievance with the Commission. The Grievances Committee on 1 October 2008 resolved to uphold the grievance in view of the fact that the post of Chief Magistrate on the establishment of the Pretoria-North office has not been abolished yet and that the structure of the office and the responsibilities of the head of office have also remained unchanged. The Department was informed accordingly.

The matter again served before the Grievances Committee on 12 November 2008 to consider a response received from the Head of the Deputy Minister’s Office, Mr B Williams. The stance of the Deputy Minister’s Office is that a permanent magistrate is only entitled to additional remuneration if he or she has been duly appointed to act in a higher judicial office. It was due to the decision of the former Minister Mabandla to abolish the post of Chief Magistrate at the Pretoria-North office and is not possible to appoint a person as an acting Chief Magistrate for that office.

The Grievances Committee resolved to stand by its decision to uphold the grievance on the ground that the position has not been abolished yet and is still a funded post on the establishment of Pretoria-North. The structure of the Pretoria-North office has not changed since the former Chief Magistrate retired and Mr Maboho is thus entitled to be remunerated for his services whilst acting in a higher post. It was further resolved to refer the matter to the Magistrates Commission for further consideration.

The Magistrates Commission considered the matter at its meeting held on 29 and 30 July 2009. It was resolved to support the decision by the Grievances Committee and to refer the matter to the Minister of Justice and Constitutional Development to reconsider the decision not to pay Mr Maboho the additional remuneration for the period that he acted in a higher judicial office". (sic)
A letter dated 5 October 2010 to Mr AD Schoeman, Secretary: Magistrate Commission from Adv. JB Skosana relating to the advertising and filling of twelve (12) posts of regional magistrates for criminal courts, addressed the issue of the vacant post of a Chief Magistrate Pretoria-North and Pietermaritzburg, that it should not be advertised at that stage in view of the possible impact of the re-demarcation and the transformation of the judiciary processes on them.

The Complainant in a letter dated 17 October 2011, informed the then Director-General of the Department that he has been acting as a Chief Magistrate for Pretoria-North from 1 July 2007 until 30 October 2010 and that the Department only paid him the acting allowance for August to October 2010, when he was duly appointed.

The Complainant in his letter further stated that he lodged a grievance with the Magistrate Commission in February 2008, regarding the non-payment of his acting allowance by the Department. Several letters and reminders were forwarded to the Department and nothing was done about it.

Mr D Nair, Secretary: Chief Magistrates Forum (Chief Magistrate: Pretoria), in a letter dated 7 October 2010, to the former Deputy Minister, Mr AP Nel, confirmed that the Complainant indeed lodged a grievance with the Magistrates Commission which grievance was upheld by the Magistrates Commission. Furthermore, that the Complainant has been performing the duties of the Chief Magistrate at Pretoria-North from the 1 July 2007. The writer of the letter further stated that it is important to note that the District, Wonderboom (Pretoria-North) is still graded as a Chief Magistrate post.

The Magistrates Commission further referred the matter to the Minister for a decision. According to a letter dated 21 August 2009, addressed to the Complainant under the hand of the Secretary of the Magistrates Commission, it was highlighted that the Grievance Committee has resolved to stand by its
decision to uphold the Complainant's grievance on the ground that the post has not yet been abolished and is still funded on the establishment of Pretoria-North.

5.1.24 The Magistrates Commission through the Secretary, in a letter dated 5 February 2009, made reference to a response letter received from the Head of the Deputy Minister's Office, Mr B Williams regarding the grievance and decision upheld by the Magistrates Commission.

5.1.25 In the response letter, Mr Williams indicated that a permanent magistrate is only entitled to additional remuneration if he/she has been duly appointed to act in a higher post. He further indicated that the previous Minister deemed it necessary to move the vacant position of Chief Magistrate from Pretoria-North to Soweto where it will be utilised optimally. The Minister, *inter alia*, indicated that the reason for this approach was that the establishment of a detached court in Mamelodi will affect the current grading and structure of the Pretoria-North office and for that reason the Minister decided not to fill the vacant position of Chief Magistrate in Pretoria-North.

5.1.26 Mr Williams also indicated that he has been in contact with Mr Jonker, Chief Magistrate, Johannesburg and that he informed Mr Jonker that it was not possible to appoint a person as an acting Chief Magistrate for Pretoria-North as he had been informed by Adv. JB Skosana: Chief Director: Policy Coordination, that the post of Chief Magistrate has been put on a moratorium pending the abolition of the position by the Minister in consultation with the Magistrates Commission. In view thereof it was not possible for the Deputy Minister to appoint a person in an acting position of Chief Magistrate as the Minister has already made a policy decision in this regard.

5.1.27 The Secretary in the same letter informed the Committee that according to the Judicial Quality Assurance Office, the post of Chief Magistrate at the Pretoria-North office has not been abolished yet.
5.1.28 The Committee resolved to stand by its decision to uphold the grievance on the ground that the post is still a funded post on the establishment of Pretoria-North and that the Complainant should be remunerated for his services whilst acting in a higher post.

5.1.29 In a letter dated 28 June 2017, signed by the then Director-General: Justice and Constitutional Development, Mr V Madonsela addressed to the former Deputy Public Protector, Adv. K Malunga stated the following:

"The meeting convened between our 2 (two) offices on 12 April 2017, refers.

Regarding Magistrate Maboho's complaint, I wish to inform you that it stems from the non-payment for an acting allowance during the period he purportedly performed functions of a chief Magistrate Pretoria-North.

The non-payment of the acting allowance by the Department for the period alleged by Mr Maboho is based on the non-appointment of Mr Maboho as Acting Chief Magistrate Pretoria-North for the period. Any payment of such an allowance by the Department, in the absence of an acting appointment by the Minister of Justice and Correctional Services, would be unauthorised and irregular and will be in contravention of the Public Finance Management Act, 1999.

The Department sympathises with Mr Maboho's assertion that he performed higher responsibilities in the absence of the Chief Magistrate following the retirement of the incumbent (until such time that the Minister moved the post of Chief Magistrate elsewhere), but in the absence of the actual appointment by the Minister as Acting Chief Magistrate, there is no justification for payment of an allowance for performing the function of a Chief Magistrate. The Department as it was in the process of moving the vacant post of Chief Magistrate to another court where there was need for such a post, did not deem

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it desirable to recommend to the Minister to appoint any person to act in such a position pending the removal of such a post from the one area of jurisdiction to the other.

However, after Mr Maboho initiated court processes to demand payment of the acting allowance. The Department considered to offer settlement on the matter on a reasonable amount. However, during this period, Mr Maboho aborted his court process and there was no legislative framework in terms of which the Department could offer a settlement of the claim by Mr Maboho, also taking into account the Department’s concerns regarding prescription. We anticipate that the Public Protector could facilitate a mediated settlement and thereby provide a basis or framework through which this matter can be resolved and will therefore appreciate the views or guidance of the Public Protector on how we can proceed further on this matter". (sic)

5.1.30 On the 25 June 2019, the Public Protector via e-mail followed up on the letter dated 28 June 2017, requesting that the Department make a settlement offer which will be presented to the complainant for acceptance.

5.1.31 In an e-mail dated 27 September 2019, Mr Blendynn Williams, Director: Legal Services Office of the Deputy Minister for Justice and Constitutional Development, stated:

"Further to our telephonic discussion yesterday afternoon, I wish to confirm that Adv JB Skosana, the Deputy Director-General: Court Services informed me that he will give the State Attorney instruction to communicate with your Office with a view to submit a settlement offer in the Maboho matter". (sic)

5.1.32 In a meeting dated 6 August 2019, between the Public Protector and the Department, Adv. JB Skosana and Mr B Williams stated that they are not in a
position to enter into a settlement agreement as there was no acting appointment as Chief Magistrate for the Complainant.

5.1.33 Adv. Skosana further confirmed that the Complainant was duly appointed as Chief Magistrate for the period 18 August 2010 to 17 November 2010, to facilitate the transfer of the Pretoria-North Court to Soweto.

5.1.34 The Department in their response to the section 7(9) reiterated that: the inability to pay the amount claimed by the Complainant is not a reluctance on the Department’s part to do so, but rather the absence of a legal basis on which such payment could be made. The fact that such payment could only be made as a direct charge from the National Revenue Fund from which the remuneration of magistrates as public office bearers are drawn, further complicates the matter. The Department further stated that the amount claimed cannot be paid from the Department’s compensation of employee’s budget allocation as magistrates are not employees of the Department.

5.1.35 Furthermore, the authorization to pay from the National Revenue Fund must be in a form of an appointment letter duly issued by the Minister. In previous engagements with the former Deputy Public Protector (Adv. K Malungu) the Department averred that in their view an order of court could validly substitute the Minister’s appointment letter. The Department further argued that the Director-General’s decision cannot, validly substitute the appointment letter of the Minister issued under the empowering legislation.

5.1.36 The Department stated that the contemplation of a possible settlement was mooted after the Complainant initiated a court action against the Department for the payment of what he believed was duly owed to him. The advice given by the State Attorney at the time was that the Department consider settling the claim out of court as defending the matter will come at a huge cost to the State.
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5.1.37 Therefore the Department was willing to adopt a reconciliation stance of settling the matter, through an order of court, to legitimize the payment of the settled amount, and an amount of just under R200 000 (two hundred thousand) was mooted as a settlement amount the Department could consider. For reasons unbeknown to the Department, the Complainant chose not to pursue the legal route and much later opted to refer the complaint to the Public Protector. The Department further stated that whilst the amount claimed may be perceived negligible (which was at the time not more than R300 000), the principles involved are sacrosanct to the independence of the judiciary and the Rule of Law.

5.1.38 The Department further stated that their willingness to settle this matter is predicated, firstly on the advice of the Chief Litigation Officer and secondly, on the apprehension that, in the absence of an appointment letter, the remedial action that the Public Protector may possibly give, could provide the required legal basis for the Department to make payment against the National Revenue Fund.

5.1.39 The Department in response to the potential adverse findings against the Department in terms of section 7(9) of the Public Protector Act, 1994, stated the following:

5.1.39.1 There was and still is no intention or negligence on the part of the Department to refuse to pay the acting allowance claimed by the Complainant for the duration stated. The Department inability to pay is as a result of the absence of an acting appointment duly issued in terms of the applicable legislation which would constitute the legal basis to pay such claim as a direct change from the National Revenue Fund;

5.1.39.2 The decision for the non-filling of the post of Chief Magistrate for Pretoria-North was as a result of the constitutional imperative to rationalize the courts
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ostensibly mandated by section 16(6) of the Constitution, which not only was the Judiciary aware of but participated in the said process;

5.1.39.3 The said rationalization process which sought to advance the transformative imperative alluded to in the letter by the former Minister of Justice, Mrs Mabandla;

5.1.39.4 Mr Jonker, the retired Chief Magistrate Johannesburg, to whom the Complainant was reporting, insisted on the appointment of the Complainant against the spirit and purport of the letter of the former Minister Mabandla. There was, for example, no reason why Mr Jonker, as the Judicial Cluster Head could not perform some of the functions and assign others to senior judicial officers at the court. There mere fact that there was a vacancy does not imply that it must be advertised and filled, more especially given the rationalisation process that was under way.

5.1.39.5 The said rationalisation process has eventually resulted in the post of Chief Magistrate for Pretoria-North being abolished from the establishment of the court; and

5.1.39.6 Therefore the assessment of the entire judicial establishment, and not only of the Chief Magistrate’s post, was undertaken by the Department together with the Magistrates Commission as part of the rationalisation process alluded in the preceding paragraph.

5.1.40 The Department stated that the potential finding that the Department failed to properly assess the vacant post of Chief Magistrate of Pretoria-North as stated in the section 7(9) be seen against the background stated above.

5.1.41 The Department further alluded that the outcome of the last engagement with the former Deputy Public Protector, Adv. K Malunga, was that the Department must seek a legal opinion on this matter which could guide a common approach towards resolving this matter. The legal opinion was attached to the
section 7(9) response and their response was informed by such opinion, I duly considered the information provided, including the legal opinion, and independently assessed the merits of the complaint against the objective evidence at my disposal.

*Application of the relevant legal framework:*

5.1.42 Section 9 of the Magistrates' Court Act, 1994 and 10 of the Magistrates Act, 1993, regulates the appointment of magistrates.

5.1.43 Section 9 of the Magistrates' Court Act, 1994, provides as follows:

**Appointment of judicial officers**

9(1)(a) Subject to the Magistrates Act, 1993, and section 10 of this Act, the "Minister may appoint for any district or sub-district a magistrate, one or more additional magistrates or one or more assistant magistrate.

(2) Whenever by reason of absence or incapacity a magistrate, additional magistrate or assistant magistrate is unable to carry out its functions of his office or wherever such office becomes vacant, the Minister, or, if delegated by the Minister, the Secretary or Under-Secretary for Justice may authorize any other competent officer of the public service to act in the place of the absent or incapacitated officer during such absence or incapacity or to act in the vacant office until the vacancy is filled: Provided that when any such vacancy has remained unfilled for a continuous period exceeding six months the fact shall be reported to the Public Service Commission.

(3) The Minister or, if delegated thereto by the Minister, the Secretary or Under-Secretary for Justice may appoint temporarily any competent person to act either generally or in a particular matter as additional or assistant
magistrate for any district or sub-district in addition to the magistrate or any other additional or assistant magistrate...”

Appointment of magistrates

10. The Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts 30 Act.

Qualifications for appointment of judicial officers Subject to the provisions of the Magistrates Act, 1993 (Act 90 of 1993 ), any appropriately qualified woman or man who is a fit and proper person may be appointed as a magistrate, an additional magistrate or a magistrate of a regional division.

Conclusion

5.1.44 As stated above, the issue for my determination is whether the Department improperly failed to advice the Minister’s Office on the Complainant’s acting appointment as Chief Magistrate of the Pretoria-North office from the 1 July 2007 to 17 August 2010.

5.1.45 It is clear from available evidence, that several applications for acting appointment as Chief Magistrate for the Complainant were submitted to the office of the Deputy Minister of Justice and Constitutional Development for consideration in terms of section 9(3) of the Magistrates Court Act, 1944. No results were received in respect of any of these applications.

5.1.46 Although the Secretary of the Deputy Minister, Mr B Williams, informed the Magistrates Commission that the Deputy Minister was not prepared to approve the applications as the Department intended to abandon the post of Chief Magistrate at Wonderboom, the fact remains that the post in the Pretoria-North
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office had not yet been abolished and was still a funded post, and, further that the structure thereof had not changed since the former Chief Magistrate retired.

5.1.47 The fact of the matter remains that some duties were restricted to be carried out by the Magistrate of the district (Head of Office) which in the case of Wonderboom, had a ranking of a Chief Magistrate. The Complainant who at the time was a Senior Magistrate of the district, automatically in performing such duties acted in the post of Chief Magistrate.

5.1.48 It is also evident from numerous correspondence, that the Department addressed the Complainant as “Acting Chief Magistrate”.

5.1.49 The argument of abandoning the post of Chief Magistrate as the reason why the Complainant was never appointed cannot actually hold water more so in view that he later and for a short period of 3 months was appointed as acting Chief Magistrate in the same position and for the same functions he was executing since the departure of the previous incumbent Chief Magistrate.

5.2 Whether the Complainant was improperly prejudiced by performing duties of a Chief Magistrate without being remunerated?

Common cause:

5.2.1 It is common cause that the Complainant was serving as a Senior Magistrate at the Pretoria-North office and had been so headed by a Chief Magistrate who had retired on 30 June 2007. The Complainant thereafter, acted as head, and in so doing acted as Chief Magistrate of the Pretoria-North Magistrate’s Office from 1 July 2007 to 17 August 2010.
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**Issue in dispute**

5.2.2 The issue for my determination is whether the Complainant was improperly prejudiced by performing duties of a Chief Magistrate at the Pretoria-North office, when the position became vacant from the 1 July 2007 to 17 August 2010.

5.2.3 The Complainant mentioned that he was later paid an acting allowance from 18 August 2010 to 17 November 2010, when he was duly appointed to act in the position as a Chief Magistrate.

5.2.4 He further alluded that the vacancy of the Chief Magistrate post at the Pretoria-North office was similar to that in the Odi court, in that the filling of both posts was kept in abeyance pending the re-demarcation of magisterial districts.

5.2.5 Furthermore, the acting Chief Magistrate at the Odi court was paid an acting allowance. Also the Regional Magistrate, who was an Acting Chief Magistrate subsequent to his departure, was paid an allowance.

5.2.6 He raised the matter with both the former Minister and the Deputy Minister of the Department of Justice and Constitutional Development as well as with the Director-General. When the Department failed to respond to his complaint, he lodged a grievance with the Magistrate’s Commission.

5.2.7 In response to the grievance that he lodged, the former Deputy Minister of the Department refused to issue an acting judicial appointment to him as an acting Chief Magistrate, citing a decision by the former Minister, that the position of the Chief Magistrate for the Pretoria-North office, which had become vacant after the incumbent of the post retired, was kept in abeyance pending the re-demarcation of the magisterial districts. Furthermore, that the post of Chief
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Magistrate would be hugely affected by the pending re-demarcation process. This is despite the fact that in numerous correspondence, the Department addressed to him as “Acting Chief Magistrate”.

5.2.8 The Grievances Committee of the Magistrates Commission however upheld his grievance on the ground that the post had not yet been abolished and was still a funded post in the Pretoria-North office and further that the structure thereof had not changed since the former Chief Magistrate retired.

5.2.9 Furthermore, the Magistrates Commission referred the Complainant’s grievance to the Grievance Sub-Committee which Sub-Committee in turn took a resolution that because the post is still funded on the establishment of Pretoria-North, the Complainant be remunerated for his services while acting in the post.

5.2.10 The Secretary of the Chief Magistrates Forum, in a letter dated 21 August 2009 and addressed to the Complainant stated amongst others that he is mandated, following a meeting held on 1 September 2010 to urgently promote the Complainant’s remuneration in an acting capacity from 1 July 2007, given that the Complainant has been appointed from 18 August 2010, as Acting Chief Magistrate.

5.2.11 The Complainant in an e-mail dated 2 October 2019, furnished my office with information of the incumbent that he alleged received an acting allowance after his appointment as Regional Magistrate. According to the information, a certain Ms. Johanna Mthimunye –Ntshingila is the magistrate who was appointed to act as Chief Magistrate after he was appointed as Regional Magistrate.

5.2.12 He further stated that she started acting as a Senior Magistrate with effect from 1 November 2010 until February 2011. From March 2011, she was then appointed to act as the Chief Magistrate while holding the rank of a magistrate.
She thereafter acted as Chief Magistrate until November 2015, when the re-demarcation process was finalized.

5.2.13 The Complainant in his response further stated that he personally spoke to the former Minister of Justice, Mr Surety during an official function of the Department in Mamelodi and he also confirmed that he is entitled to be paid the acting allowance.

5.2.14 The Complainant stated that appointment forms were always submitted to the Department and Mr Williams confirmed receipt in writing. The Complainant finds it strange that there is not a single letter signed by any former Minister or Deputy Minister indicating that they are not prepared to pay him the acting allowance.

Application of the relevant law

5.2.15 Section 12 of the Magistrates Act, 1993 provides for remuneration of magistrates and provides as follows:

12. (1) (a) Subject to the provisions of this section, any person occupying the office of magistrate shall, in respect of that office, be paid a salary in accordance with the scale determined from time to time for his rank and grade by the Minister by notice in the Gazette in consultation with the Commission and after consultation with the Commission for Administration and with the concurrence of the Minister of State Expenditure.

(b) Different categories of salaries and salary scales may be so determined in respect of different categories of magistrates.

(2) A notice in terms of subsection (1) or any provision thereof may commence with effect from a date which may not be more than one year before the date of 45 publication thereof;
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(3) The first notice in terms of subsection (1) shall be issued as soon as possible after the commencement of this Act, and thereafter such a notice shall be issued if circumstances, including any revision and adjustment of salaries and allowances of public servants since the latest revision and adjustment of salaries of magistrates, so justify . . . .

5.2.16 In terms of section 182 of the Constitution the Public Protector has the power, as regulated by national legislation-

(a) 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;

(b) to report on that conduct; and

(c) to take appropriate remedial action." (Emphasis added)

5.2.17 In the matter of the Democratic Alliance vs South African Broadcasting Corporation\(^1\) the Supreme Court of Appeal described the powers of the Public Protector in the following terms:

"It follows that the language, history and purpose of s 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation . . . ."

5.2.18 Constitutional Court findings in the matter of Economic Freedom Fighters vs Speaker of the National Assembly and Others\(^2\) confirmed that the remedial actions by the Public Protector are binding and should be implemented —"to

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2 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11.
achieve the opposite outcome lawfully, an order of court would have to be obtained.”

5.2.19 Moreover, the Constitutional Court\textsuperscript{3} emphasised that:
\begin{quote}
"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences. … [T]he disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. (Own emphasis)"
\end{quote}

5.2.20 Both the Supreme Court of Appeal and the Constitutional Court did not only confirm the binding effect of the remedial action of the Public Protector, but more importantly, made it clear that the Public Protector is not required to apply to the court to make the remedial action an order of court for it to have the force of law and to be enforced through the legal process.

‘Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence’ (Emphasis added)

5.2.21 In the matter of the President of the Republic of South Africa v Office of the Public Protector and others\textsuperscript{4} the Court held that
\begin{quote}
“…the taking of remedial action by the Public Protector is not contingent upon a finding of impropriety or prejudice. The Public Protector’s powers are clearly set out in section
\end{quote}

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\textsuperscript{3} Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11.
\textsuperscript{4} 2018 (5) BCLR 809 (GP).
\end{flushright}
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182(1) of the Constitution.... The prima facie evidence which points to serious State misconduct is a sufficient and appropriate basis for the Public Protector to have taken the remedial action."

5.2.22 The Public Protector's considerations of an appropriate remedy and what constitutes fair and reasonable redress in the circumstances, are primarily based in the concept of "injustice", which is wider in scope than "loss" or "damage", and "indeed these terms were avoided because of the legal concepts they implied."5 Occasionally, where restitution is not possible monetary relief is considered as a means of providing redress for the pecuniary and non-pecuniary consequences of the maladministration. This might be to reimburse a person who has suffered a quantifiable financial loss, or it might be more of a symbolic payment which serves as an acknowledgement of the distress or difficulties they have been put through.

5.2.23 The obligation of such Organs of State and their accounting officers to comply with directives of remedial action sounding in money, is not imposed by or dependent upon a pre-existing legal (contractual) relationship between the parties, as the legislative framework which includes section 182(1)(c) of the Constitution, serves as authority for the payment to be charged as an authorised expenditure against the appropriated budget of the institution concerned.

5.2.24 In the matter of Gobo Gcora Construction & Project and Others v Nelson Mandela Bay Municipality and Another; Nelson Mandela Bay Municipality v Public Protector of the Republic of South Africa and Others 6 the Court noted that the Public Protector duly "performed her functions in terms of legislation outside the sphere of the private law", and that there was a sufficient nexus between the maladministration investigated by the Public Protector, and the prejudice suffered by the Complainant, to warrant the payment of compensation

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despite the absence of any private law (contractual) obligation on the Municipality.

**Conclusion:**

5.2.25 From the evidence obtained it would appear that the Department is presuming that they could only be held liable for the compensation of the Complainant at an acting level, if it is established that his contract of employment and remuneration and conditions of service have in fact been amended through the Departmental processes and at the requisite levels of authority.

5.2.26 I am in agreement that the contract of employment was not amended and he was indeed not necessarily appointed to act in a higher level. I am therefore not trying to enforce a contractual claim based on the Complainant’s employment contract or conditions of service.

5.2.27 Even if we agree that no additional benefit accrued to the Complainant *ex contractu* by virtue of the employment relationship between the Complainant and the Department, I am of the view that monetary relief is appropriate as a means of providing redress for the pecuniary and non-pecuniary consequences of the maladministration by the Department. (This might be to reimburse a person who has suffered a quantifiable financial loss, or it might be more of a symbolic payment which serves as an acknowledgement of the distress or difficulties they have been put through).

5.2.28 The legal basis for such an obligation would therefore accrue *ex lege*, by virtue of the operation of the law, including sections 34 and 182(1)(c) of the Constitution.

5.2.29 Even if no compensation accrued to the Complainant *ex contractu*, one of the sub-issues for determination is whether or not the department acted unfairly or
unfairly benefitted by failure to provide a quid pro quo (benefit) in exchange for the services rendered by the Complainant and accepted by the Department.

5.2.30 The obligation of such Organs of State and their accounting officers to comply with directives of remedial action sounding in money, is not imposed by or dependent upon a pre-existing legal (contractual) relationship between the parties, as the legislative framework which includes section 182(1)(c) of the Constitution, serves as authority for the payment to be charged as an authorized expenditure against the appropriated budget of the institution concerned.

5.2.31 The payment of the acting allowance was also ventilated by the then Acting Director-General, Adv. JB Skosana, in a meeting held on 22 July 2020, with the Chief Operations Officer and investigation team of my office. Adv Skosana indicated that in the absence of an appointment letter as legal basis an acting allowance cannot be paid. The latter is also re-iterated in a letter from the Acting -Director General dated 27 July 2020 in response to my Sec. 7(9) notice. In view of what is said above, I do not agree with this contention.

6 FINDINGS

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

6.2 Regarding whether the Department improperly advised the Minister and unfairly failed to confer any benefit to the Complainant of him having performed duties and mandatory responsibilities in the position of Chief Magistrate that had become temporarily vacant during the period 1 July 2007 until 17 August 2010.

6.2.1 The Department failed to properly assess the vacant post of Chief Magistrate at the Pretoria-North, before taking a decision not to appoint an acting Chief Magistrate.
6.2.2 The Department's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.3 Whether the Complainant was improperly prejudiced by performing duties of a Chief Magistrate without being remunerate?

6.3.1 The allegation herein is substantiated.

6.3.2 The Department was aware of the fact that the post that became vacant at Pretoria- North was that of Chief Magistrate and the functions of the Chief Magistrate did not seize to exist but continued to be performed by the Senior Magistrate.

6.3.3 The Department's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and improper prejudice and/ or injustice as envisaged in section 6(4)(v) of the Public Protector Act.

7 Remedial Action

7.1 The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remediing the improper conduct and maladministration referred to in this report, is the following:

7.1.1 The Acting Director-General, must within 60 (sixty) working days from the date of this report, calculate and pay the acting allowance in line with applicable prescripts and Legislation provided in the determination of additional remuneration payable to permanent magistrates acting in any other judicial office.
8. MONITORING

8.1. The Acting Director-General to submit an action plan, within thirty (30) working days of issuing this report, indicating how the remedial actions mentioned above will be implemented.

8.2. The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

[Signature]

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 20/09/2020