
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO 9 OF 2017/2018
ISBN 978-1-928366-30-0

"Allegations of maladministration against the North West Department of Education and Sports Development"

REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION AND IMPROPER CONDUCT BY THE NORTH WEST DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT REGARDING THE DEATH OF THABANG M'BELLE WHILE PLAYING RUGBY FOR POTCHEFSTROOM BOYS HIGH SCHOOL IN 2002.
<table>
<thead>
<tr>
<th>INDEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
</tr>
<tr>
<td>2. THE COMPLAINT</td>
</tr>
<tr>
<td>3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</td>
</tr>
<tr>
<td>4. THE INVESTIGATION</td>
</tr>
<tr>
<td>5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS</td>
</tr>
<tr>
<td>6. FINDINGS</td>
</tr>
<tr>
<td>7. REMEDIAL ACTION</td>
</tr>
<tr>
<td>8. MONITORING</td>
</tr>
</tbody>
</table>
Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates the Public Protector’s findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into alleged improper conduct by the North West Department of Education and Sports Development regarding the death of Thabang M’Belle (Thabang) while playing rugby for Potchefstroom Boys High School (the school) on 29 April 2002; failure of the Department to keep and preserve a proper management of records of this incident; failure to inform the Complainant of the outcome of its internal investigation and failure to report the death to the South African Police Service. At the time of his death, Thabang was 18 years old and in the process of completing his matric. He was a star rugby player with junior Springbok colours. Thabang was the son of Ms. Lumka M’Belle (the Complainant).

(iii) This complaint was lodged at Mafikeng Provincial Office of the Public Protector on 20 August 2013, eleven (11) years after the incident took place. The Complainant alleged the following:

(a) Her son, Thabang was a matriculant at Potchefstroom Boys High School in 2002;
(b) He was a rugby player for the senior team at the school;
(c) That he was injured in one of the rugby matches and on the advice of a medical doctor he was advised to recuperate and not to participate in further rugby games until the doctor prescribed otherwise;
"Allegations of maladministration against the North West Department of Education and Sport Development."

Report of the Public Protector July 2017

(d) However subsequent to that, the school undertook a trip to Johannesburg where Thabang participated in a rugby game and sustained a secondary head injury whereby he lost consciousness. He was airlifted from the rugby field to Milpark Hospital and remained comatose until he was pronounced dead two (2) days later; on 01 May 2002.

(e) That the school did not inform her (the Complainant) about the trip to Johannesburg nor seek her permission as Thabang’s parent;

(f) That the school did not inform her about the incident and that she was only called by Milpark Hospital to tell her that her son was admitted and was in a coma; and

(g) That she lodged the complaint with the Department of Education in North West Province in order to find out how her son died but could not get any responses until she decided to turn to the Office of the Public Protector for intervention.

(iv) In the main, the complaint is that the Department failed to inform the Complainant the reasons why and how her son died, the School failed to inform the Complainant about the trip that her son undertook to play rugby for the school in Johannesburg; the school negligently forced her son to play rugby despite her son having been declared unfit to play rugby while he was still recovering from a previous injury (concussion), the school failed to inform the Complainant about the subsequent secondary injury which led to her son’s hospitalisation at Milpark Hospital due to sustaining another concussion; the school failed to report the death of her son to the South African Police Service; the school’s failure to keep the proper records of this whole incident and the Department’s failure to compensate her for the loss, pain and suffering as the result of the death of her son.

(v) The Department did not dispute these allegations and in fact confirmed that it had lost most of the documents relating to this incident due to the lapse of time and due to the change of staff at the school and in the Department itself. However, the
Department submitted that they covered the deceased’s medical costs and solicited sponsors to pay for the burial costs.

(vi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Department improperly failed to inform the Complainant about the school trip that her son undertook in order to play rugby for the school at Johannesburg.

(b) Whether the Department improperly failed to allow the Complainant access to information relating to the death of her son.

(c) Whether the Department improperly failed to keep a proper management, preservation and care of the records relating to the death of the Complainant’s son.

(d) Whether the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died.

(e) Whether the Department improperly failed to report the death of the Complainant’s son to the South African Police Service for a criminal investigations to be instituted.

(f) Whether the school negligently forced the Complainant’s son to play rugby on the day of this incident despite her son having been declared unfit to play rugby while he was still recovering from a previous head injury.
(g) Whether the Department improperly failed to inform the Complainant about the subsequent secondary injury that her son suffered which led to his hospitalisation and death.

(h) Whether the Department improperly failed to compensate the Complainant for the loss of her son, pain and suffering either delictually or in a form of ex gratia payment.

(i) Whether the Complainant was prejudiced by the conduct of the Department in the circumstances.

(vii) Key laws and policies taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Department or its officials when handling this matter. These are the following:

(a) Section 32(1)(a)(b) of the Constitution, 1996, which provides for the right of everyone to have access to information held by the state and any information held by another person and that is required for the exercise or protection of any rights and section 11 of Promotion of Access to Information Act 2 of 2000 (PAIA) which provides for the access to records of public bodies were relied on to affirm the Complainant's rights in that regard and to determine whether she was prejudiced by the conduct of the Department;

(b) Section 13(2)(a) of National Archives and Record Service of South Africa Act 43 of 1998, which provides that no public record under the control of a governmental body shall be transferred to an archives repository, destroyed, erased or otherwise disposed of without the written authorisation of the National...
Archivist was relied on to determine whether the Complainant was in any way prejudiced by the Department. Section 16A(2) of South African School Act 84 of 1996 which provides that the School Principal in undertaking his or her professional duties and responsibilities of a management of a public school, include the safekeeping of all school records and implementation of policy and legislation, was also relied upon to determine if there was any duty on the School Principal to keep records of this incident and whether the Complainant was prejudiced by the Department.

(c) Section 11(d) of The Prescription Act 68 of 1969, which provides that a period of prescription of any debt (debt means any debt arising from any cause of action such as delictual, contractual or any other liability), save where an Act of Parliament provides otherwise shall be three years, was relied on to determine whether the Complainant was in any way prejudiced by the Department;

(d) Section 3(1)(a) and (2)(a) of Institutions of Legal Proceedings Against Certain Organs of State Act 40 of 2002 which provides that no legal proceedings for the recovery of any debt may be instituted against an organ of the state unless the creditor has given the organ of the state in question a notice in writing of his her intention to institute the legal proceedings in question. A notice must within six months from the date on which the debt became due, be served on the organ of state, was relied on to determine whether the Complainant was in any way prejudiced by the Department.

(e) Section 195(1)(e) to (g) of the Constitution which provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution including the following: People’s need must be responded to and the public must be encouraged to participate in policy making, Public Administration must be accountable and transparency must be fostered
by providing the public with timely, accessible and accurate information was also relied upon to determine whether the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died.

(f) Section 6(4)(a)(i) of the Public Protector Act 23 of 1994, was relied upon to determine if the Complainant was prejudiced by the conduct of the Department and whether such conduct amounted to maladministration.

(g) Section 2 of the Inquest Act 58 of 1959 provides that any person who has reason to believe that any other person has died and that death was due to other than natural causes, shall as soon as possible report accordingly to a policeman, unless he has reason to believe that a report has been or will be made by any other person, was relied upon to determine if the Complainant was prejudiced by the conduct of the Department.

(viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Whether the Department improperly failed to inform the Complainant about the school trip that her son undertook in order to play rugby for the school at Johannesburg:

(aa) The allegation that the school improperly failed to inform the Complainant about the school trip that her son undertook in order to play rugby for the school at Johannesburg is substantiated.

(bb) Although the Department contends that all parents were issued with a schedule of game or sport activities at the beginning of the year, no
documentary evidence of such was furnished by the school or the Department to the Public Protector as the proof to substantiate this claim.

(cc) Testimony given by the current Deputy School principal Mr J Swanepoel and two other teachers namely, MJ Van Vuuren, D Schmidt, does not confirm if a school had a system in place of informing parents beforehand about any trips for sporting activities or matches except a mere general conjecture that all parents are given a schedule of matches or tournaments for the year at the beginning of each school year.

(dd) The School and the Department failed to furnish the Public Protector with the records or copies of such schedule of matches and tournaments that were allegedly provided to the parents in 2002.

(ee) Accordingly, the conduct of the Department in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Whether the Department improperly failed to allow the Complainant access to information relating to the death of her son:

(aa) The allegation that the Department improperly failed to enable the Complainant access to information relating to the death of her son is substantiated.

(bb) The Department failed to provide the Complainant with the requested information and upon request for such information by the Public Protector, it indicated that records relating to the death of Thabang
M'Belle could not be traced due to the change of staff in both the Office of the MEC and Superintendent General since 2002.

(cc) The Department’s failure to provide the Complainant with the requested information was in violation of section 32(1) of the Constitution and section 11 of Promotion of Access to Information Act 2 of 2000.

(dd) Such conduct by the Department amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

(c) Whether the Department as the governmental body improperly failed to keep a proper management, preservation and care of the records relating to the death of the Complainant’s son:

(aa) The allegation that the Department improperly failed to keep a proper management, preservation and care of the records relating to the death of the Complainant’s son is substantiated;

(bb) The School Principal and the Department itself failed to keep a proper management, preservation, custody and care of the records relating to the death of the Complainant’s son. The record surrounding the death of a human being should be construed as a record with enduring value which should have been kept and preserved by the Department or duty transferred to the national archive repository for future access.

(cc) The failure by the school and the Department to keep a proper management, preservation, custody and care of the records relating to
the death of the Complainant’s son was in violation of section 13(2)(a) of the National Archives and Record Service of South Africa Act 43 of 1996 and section 16A(2) of South African School Act 84 of 1996,

(dd) The conduct of the Department in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

(d) Whether the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died:

(aa) The allegation that the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died is substantiated.

(bb) The Department failed to inform the Complainant about the outcome of investigation conducted by it and the reasons why her son died. The Department had a duty to provide the Complainant with accurate information relating to the death of her son in terms of section 195(1)(g) of the Constitution, which provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution including that transparency must be fostered by providing the public with timely, accessible and accurate information.

(cc) The Department’s failure to inform the Complainant about the outcome of investigation conducted by it and the reasons why her son died was in violation of section 195(1)(g) of the Constitution.
(dd) Such conduct by the Department amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

(e) Whether the Department improperly failed to report the death of the Complainant's son to the South African Police Service for criminal investigation to be instituted:

(aa) The allegation that the Department improperly failed to report the death of the Complainant's son to the South African Police Service for criminal investigations to be instituted is substantiated.

(bb) The Department failed to report the death of Thabang M'Belle to the South African Police Service for criminal investigation to be instituted. The Department had the legal duty to report the death to the South African Police Service as the deceased was a border at its subsidiary (Pothchefstroom Boys High School) and his death is largely related to the school sporting activities. Section 2 of the Inquest Act 58 of 1959 provides that any person who has reason to believe that any other person has died and that death was due to other than natural causes, shall as soon as possible report accordingly to a policeman, unless he has reason to believe that a report has been or will be made by any other person.

(cc) The Department's failure to report the death of Thabang M'Belle to the South African Police Service for criminal investigation to be instituted was in violation of section 2 of the Inquest Act 58 of 1959.
"Allegations of maladministration against the North West Department of Education and Sport Development."

Report of the Public Protector July 2017

(dd) Such conduct by the department amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

(f) Whether the school negligently forced the Complainant’s son to play rugby on the day of this incident despite her son having been declared unfit to play rugby while he was still recovering from a previous head injury:

(aa) The allegation that the School negligently forced the Complainant’s son to play rugby on the day of this incident despite her son having been declared unfit to play rugby while he was still recovering from previous injury of brain concussion is not substantiated.

(bb) This allegation is not supported by any form of evidence from the Complainant. It is further not corroborated by any independent witness in the form of testimony in this regard. The school coach, Mr D Schmidt gave an affidavit dated 15 August 2016 in which he stated that the deceased had a medical certificate declaring him fit to play on the day. Such medical certificate is part of the medical records that the department has improperly failed to keep and preserve or destroyed.

(cc) The conduct of the Department in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.
(g) Whether the Department improperly failed to inform the Complainant about the subsequent secondary injury that her son suffered which led to his hospitalisation and death:

(aa) The allegation that the Department improperly failed to inform the Complainant about the subsequent secondary injury that her son suffered while playing rugby for the school in Johannesburg and which led to his hospitalisation and death at Milpark Hospital due to brain concussion is not substantiated.

(bb) The Department gave an adequate and reasonable explanation as to why the Complainant was not informed of the injury and hospitalisation of her son, which is based on the advice of the medical doctor that such should be done by a grief counsellor.

(cc) The grief counsellor did in fact contact the Complainant. The Complainant and her family arrived at the hospital at 22:30 pm on the same day of the incident and were again met by the grief counsellor employed by Milpark Hospital.

(cc) The conduct of the Department in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.
Whether the Department improperly failed to compensate the Complainant for the loss of her son, pain and suffering either delictually or in a form of ex gratia payment.

(aa) The allegation that the Department improperly failed to compensate the Complainant for the loss of her son, pain and suffering either delictually or in a form of ex gratia payment is not substantiated as the complainant did not lodge any legal processes to claim such. However, the issue of compensation in the form of ex-gratia payment is considered in the remedial action taken by the Public Protector on compassionate and humanitarian grounds based on precedent.

(bb) Section 3(1)(a) and (2) (a) of Institutions of Legal Proceedings Against Certain Organs of State Act 40 of 2002 provides that no legal proceedings for the recovery of any debt may be instituted against an organ of the state unless the creditor has given the organ of the state in question a notice in writing of his her intention to institute the legal proceedings in question. A notice must within six months from the date on which the debt became due, be served on the organ of state. There is no evidence that the complainant has done that in this matter.

(cc) Section 11(d) of the Prescription Act 68 of 1969, provides that a period of prescription of any debt (debt means any debt arising from any cause of action such as delictual, contractual or any other liability), save where an Act of Parliament provides otherwise shall be three years. There is no evidence in this case which shows that the Complainant has ever at any stage engaged in the delictual or any other form of litigation against the Department within three (3) years since this incident took place in 2002. As the result of this failure by the Complainant, this matter has in terms
of section 11(d) of the Prescription Act prescribed save where an Act of Parliament provides otherwise.

(cc) The conduct of the Department in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

(i) Whether the Complainant was prejudiced by the conduct of the Department in the circumstances:

(aa) The conclusion that the Complainant was prejudiced by the conduct of the Department in the circumstances is substantiated as follows:

(bb) The Department improperly failed to allow the Complainant access to such information and records that relates to the death of her son. Such records and information could have enabled the Complainant to understand why and how her son died, however this conduct failure by the Department unfairly placed her in the precarious position of being unable to exercise her rights as enshrined in section 32 of the Constitution.

(cc) The Complainant suffered severe emotional and psychological stress as the result of the loss of her biological son, from 2002 up to date. The Complainant incurred financial expenses while making follow ups with the Department without getting any answers, and she suffered the pain, disappointment and distress. She suffered as a result of the improper conduct of the school which she had entrusted with the care of her child.
Had the Department acted properly by assisting the Complainant with all the necessary information, reasons, counselling and other professional support relating to the death of her son, the Complainant would have found closure to this matter.

The Department failed to keep a proper management, preservation, custody and care of the records relating to the death of the complainant’s son. The record surrounding the death of a human being should be construed as a record with enduring value which should have been kept and preserved by the Department or duly transferred to the national archive repository for future access. The Department also failed to assist the Complainant with professional support that was necessary for her in order to find closure on this matter.

The conduct of the Department in the circumstances resulted in prejudice to the Complainant as envisaged in section 182(1)(a) of the Constitution.

The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

1. The MEC of Education and Sport Development in North West Province –

(a) Must ensure that the HOD implement the remedial action taken within the time frames specified.
2. The HOD for the North West Department of Education and Sport Development

(aa) Must within 90 days of the issue of this report, pay an *Ex Gratia* payment (out of good will and/or humanitarian ground) to the complainant, having taken into account the circumstances under which the complainant’s child died and the trauma which the complaint suffered as a result of the death of her son. The *Ex Gratia* payment should be based on the previous settlement made by the Department in the similar cases as experienced by the Department in the recent past.

(bb) Must within 90 days of the issue this report, arrange the requisite support in the form of professional counselling for the Complainant regarding the death of her son.

(cc) Must within 90 days of the issue of this report establish contact with the National Archivist within the Department of Arts and Culture and ensure that the National Archivist assists and trains the Department’s officials to draft and conclude its own internal Policy and Regulations relating to the management, keeping, preserving and transfer of public records to the National Archivist. All officials of the Department responsible for records keeping must receive training in this regard.

(dd) Must within 30 days of the issue of this report ensure that the death of Thabang M’Belle is reported to the South African Police Service for a criminal investigation of an Inquest docket to be conducted.
(ff) Must within 90 days of the issue of this report in consultation with the National Department of Basic Education create, review and implement a policy on the safety of learners engaged in school sporting activities. Such policy must encapsulate clear provisions on the Department’s liability in such cases including but not limited to negligence by officials.
REPORT ON AN INVESTIGATION INTO AN ALLEGED MALADMINISTRATION AND IMPROPER CONDUCT BY THE NORTH WEST DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT REGARDING THE DEATH OF THABANG M’BELLE

1. INTRODUCTION

1.1. This is a report of the 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 in terms of section 8(1) of the Public Protector Act to:

1.2.1. MEC Sello Lehari, MEC for Education and Sports Development in the North West Province;

1.2.2. Dr I S Molale, HOD for the North West Department of Education and Sports Development; and

1.2.3. Mr Xolani Nyoka, Director of Legal Services: North West Department of Education and Sport Development.

1.3. A copy of the report is also provided in terms of section 8(3) to the following people to inform them about the outcome of the Public Protector’s investigation:

1.3.1 Hon. S O R Mahumapelo, the Premier of the North West Province;
1.3.2 Dr L K Sebego, Director-General of the North West Provincial Government; and

1.3.3 Mrs Lumka M'Belle, the Complainant.

2. THE COMPLAINT

2.1 The Complainant is Ms Lumka M'Belle, a 58 year old woman who is the biological mother of the deceased, Thabang M'Belle.

2.2 This complaint was lodged at the Mafikeng Provincial Office of the Public Protector on 20 August 2013, 11 years after the incident. The Complainant alleged the following:

2.2.1 That her son Thabang was a matriculant at Potchefstroom Boys High School in 2002;

2.2.2 That he was a rugby player for the senior team at the school;

2.2.3 That Thabang was injured in one of the rugby matches and on the advice of a medical doctor he was advised to recuperate and not to participate in further rugby games;

2.2.4 However and subsequent to that, the school undertook a trip to Johannesburg where Thabang participated in a rugby game and was injured, as a result he sustained a secondary head injury where he lost consciousness. He was airlifted from the rugby field to Milpark Hospital and remained comatose until he was pronounced dead two (2) days after admission to the hospital;

2.2.5 That the school did not inform her about the trip to Johannesburg nor seek her permission as parent;
2.2.6 That the school did not inform her about the incident and that she was only called by Milpark Hospital to tell her that her son was admitted and was in a coma; and

2.2.7 That she lodged a complaint with the Department of Education in North West in order to find out how her son died but could not get any responses until she decided to turn to the Office of the Public Protector for intervention.

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 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."

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
" Allegations of maladministration against the North West Department of Education and Sport Development."

**Report of the Public Protector July 2017**

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 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that: “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.”²

3.6 The Department of Basic Education is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

3.7 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

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.

---

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
² *Supra* at para [73].
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. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act, 1994. However, after several attempts to conciliate the matter, it was escalated into an investigation.

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?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
4.2.1.4 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 Department acted improperly by failing to keep, manage or preserve the records of this case, unduly denying the Complainant access to information relating to this case, failing to report this case to the South African Police and whether the Department improperly failed to inform the Complainant about the outcome of its internal forensic investigation, and to allow the Complainant to make her representation on their findings.

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 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 Department improperly failed to inform the Complainant about the school trip that her son undertook in order to play rugby for the school in Johannesburg.

4.3.2 Whether the Department improperly failed to allow the Complainant access to information relating to the death of her son.

4.3.3 Whether the Department improperly failed to keep a proper management, preservation and care of the records relating to the death of the Complainant’s son.
4.3.4 Whether the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died.

4.3.5 Whether the Department improperly failed to report the death of the Complainant’s son to the South African Police Service for criminal investigations to be instituted.

4.3.6 Whether the school negligently forced the Complainant’s son to play rugby on the day of this incident despite her son having been declared unfit to play rugby while he was still recovering from previous head injury.

4.3.7 Whether the Department improperly failed to inform the Complainant about the subsequent secondary injury that her son suffered which led to his hospitalisation and death.

4.3.8 Whether the Department improperly failed to compensate the Complainant for the loss of her son, pain and suffering either delictually or in a form of ex gratia payment.

4.3.9 Whether the Complainant was prejudiced by the conduct of the Department in the circumstances.

4.4 Key Sources of information

4.4.1 Documents

4.4.1.1 A copy of the Complainant’s claim documents;
4.4.1.2 Report (which contains affidavits from the officials of the school interviewed) from Department of Education and Sports Development, North West Province in response to the allegations;
4.4.1.3 Medical Records from Milpark Hospital;
4.4.1.4 ADR tape recordings of the session attended by Prof Boffard from Milpark Hospital, officials from the Department of Education, North West, School Deputy Principal and the complainant;

4.4.1.5 Affidavit from Dion Schmidt (the school coach on the day of this incident);

4.4.1.6 Affidavit from Medi-Cross Clinic at Potchefstroom;

4.4.1.7 Summary of expenses paid by Potchefstroom High School for Boys towards Thabang M’Belle’s medical expenses;

4.4.1.8 Document setting out clarity in respect of how the Department of Education in North West settled matters of similar nature before.

4.4.1.9 Copy of Death Certificate of the Deceased from Milpark Hospital.

4.4.2 Interviews conducted

4.4.2.1 Meeting with Ms Lumka M’Belle (complainant) on 2016-06-09;

4.4.2.2 Meeting with Mr Xolani Nyoka, Director of Legal Services of the Department of Education and Sport Development, North West Province on 2016-06-09;

4.4.2.3 Meeting with Professor K D Boffard, a specialist trauma surgeon at Milpark Hospital on 2016-06-09;

4.4.2.4 Meeting with Mr J Swanepoel, a Deputy Principal at Potchefstroom Boys High School on 2016-06-09.

4.4.3 Correspondence sent and received

4.4.3.1 Emails exchanged between PPSA and Potchefstroom Boys High School as regards the requests of information about this case;

4.4.3.2 Emails exchanged between PPSA and Medi-Cross Clinic at Potchefstroom as regards the request of information about this case;

4.4.3.3 Emails exchanged between PPSA and the complainant (Lumka M’Belle);

4.4.3.4 Emails exchanged between PPSA and Chris Burger and Petro Jackson Foundation;
4.4.3.5 Letters exchanged between PPSA and the Department of Education and Sports Development as regards request of information.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996;
4.4.4.2 Prescription Act 68 of 1969
4.4.4.3 Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002
4.4.4.4 Inquest Act 58 of 1959
4.4.4.5 National Archives and Record Service of South Africa Act 43 of 1996
4.4.4.6 South African School Act 84 of 1996
4.4.4.7 Promotion of Access to Information Act 2 of 2000

4.4.7 Case law

4.4.7.1 Obotseng vs Lebone and Others 1994 (4) S.A.88
4.4.7.2 The Public Protector v Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1June 2011)"

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 Whether the Department improperly failed to inform the Complainant about the school trip that her son undertook in order to play rugby for the school in Johannesburg:

Common cause
"Allegations of maladministration against the North West Department of Education and Sport Development."

Report of the Public Protector July 2017

5.1.1 The Department failed, despite being given an opportunity by Public Protector to produce any proof which indicates that the Complainant was indeed informed of the school trip that her son undertook in order to play rugby for the school in Johannesburg.

Issues in dispute

5.1.2 The Department contended that at the beginning of each school year all the parents are issued with an annual calendar detailing all the sporting activities and the trips for that particular year.

5.1.3 The Complainant denied that she was ever provided with a schedule or an annual calendar of all the sporting activities/trips by the School or Department and further denied that she gave her permission for her child to travel with the school to Johannesburg to play rugby on the day of this incident. She contended that she sent her child to the school to study.

5.1.4 Although the Department argued that, all parents were issued with a schedule of game or sport activities at the beginning of the year, no documentary evidence of such was furnished by the school or the Department to the Public Protector as the proof to substantiate that claim.

5.1.5 The testimony given by the Deputy School Principal Mr J Swanepoel and two other teachers namely, Messrs M J Van Vuuren, D Schmidt could not objectively corroborate the allegation that the school had a system of informing parents beforehand of any trips for sporting activities since no documentary proof could be provided in that regard.
Application of the relevant law

5.1.6 The Department and the School have no policy in place that regulates the manner on how the parents are being informed about every school trip undertaken by their children for sporting activities.

Conclusion

5.1.7 The school or the Department failed to furnish the Public Protector with the records or copies of such schedule of matches and tournaments that were allegedly served to the parents in 2002.

5.1.8 The Department’s conduct in this regard was improper.

5.2 Whether the Department improperly failed to allow the Complainant access to information relating to the death of her son:

Common cause

5.2.1 The Complainant was not be provided with all the necessary and adequate information relating to the death of her son while playing rugby for the school in 2002.

5.2.2 That to date the Complainant still does not have all the information relating to the death of her son in this matter.
5.2.3 The Department did not dispute that it no longer has all the information relating to this case due to a change of staff in its leadership and the non-availability of records relating to this case.

Application of the relevant law

5.2.4 In terms of section 32(1) of the Constitution, everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.

5.2.5 Section 11 of Promotion of Access to Information Act 2 of 2000 also provides that a requester must be given access to a record of a public body if that requester complies with all the procedural requirements relating to a request for access to that record. Public Protector, South Africa has applied and requested such record and information from the Department on numerous occasions so that it could enable the complainant to exercise her rights as allowed in terms of the Constitution.

5.2.6 The Department’s response in this regard has been very clear in that it no longer has records relating to the death of Thabang due to the change of guard in both the Office of the MEC and Superintendent General since 2002. Although the Department acknowledges that this matter was extensively investigated by the Department of Education but regrettably they are unable to locate the said investigation material and report.

Conclusion

5.2.7 The Department improperly failed to enable the Complainant access to such information and record as required by section 32 of the Constitution and section 11 of Promotion of Access to Information Act 2 of 2000 since no such records were kept.
Whether the Department had a duty to preserve such records will be discussed hereinafter.

5.3 Whether the Department as the governmental body improperly failed to keep a proper management, preservation and care of the records relating to the death of the complainant’s son:

Common cause

5.3.1 The Department could not be provide the Complainant with all records relating to the death of her son while playing rugby at school.

5.3.2 Furthermore the Department has destroyed the records relating to the death of Thabang without the required disposal authority from the Archivist.

5.3.3 To date the Complainant still does not have the records relating to the death of her son in this matter.

Application of the relevant law

5.3.4 In terms of section 13(2)(a) of the National Archives and Record Service of South Africa Act 43 of 1996, no public record under the control of the governmental body shall be transferred to an archives repository, destroyed, erased or otherwise disposed of without the written authorization of the National Archivist.

5.3.4 Also in terms of Regulation 10 of the Management and Care of Records, the head of a governmental body shall be responsible for ensuring that all records of such body—
(a) Receive appropriate physical care,
(b) Are protected by appropriate security measures; and
(c) Are managed in terms of standing orders of that body and other relevant legislation.

5.3.5 The head of a governmental body shall supply the National Archivist with such information related to the management of records under his/her control as the National Archivist may require.

5.3.6 The head of a governmental body shall comply with all directives and instructions issued by the National Archivist and pertaining to the management and care of public records.

5.3.7 The transfer to an archives repository, destruction or other disposal of such records shall be effected in terms of a disposal authority.

5.3.8 Section 16A(2) of South African School Act 84 of 1996 provides that the School Principal in undertaking his or her professional duties and responsibilities of a management of a Public School, that shall include the safekeeping of all school records and implementation of policy and legislation.

5.3.9 The record surrounding the death of a human being should be construed as a record with enduring value which should have been kept and preserved by both the School and the Department or duly transferred to the national archive repository for future access.

5.3.10 The Department's response in this regard has been very clear and unequivocal, in that they no longer have records relating to the death of Thabang due to the change
"Allegations of maladministration against the North West Department of Education and Sport Development."

Report of the Public Protector July 2017

of guard in both the Office of the MEC and Superintendent General since 2002. The Department has also acknowledged that it was the practice at the school to destroy records after five (5) years and that the school no longer has records relating to this incident as more than five years have lapsed.

5.3.11 Although the Department submitted that this matter was extensively investigated by the Department of Education, regrettably they are unable to locate the said investigation report as well, due to loss of records.

Conclusion

5.3.12 The Department failed to comply with the relevant legal prescripts regulating the preservation, custody and care of the records relating to the death of the Complainant's son.

5.4 Whether the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died:

Common cause

5.4.1 The Complainant was not informed about the outcome of any investigation conducted by the Department nor was she furnished with reasons why her son died.

5.4.2 The Complainant to date does not have the outcomes and the reasons relating to the death of her son in this matter.

Application of the relevant law
5.4.3 Section 195(1)(g) of the Constitution provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution including that transparency must be fostered by providing the public with timely, accessible and accurate information.

5.4.6 Section 6(4)(a)(i) and (v) of the Public Protector Act provides amongst other things that the Public Protector shall be competent to investigate on his or her own initiative or on receipt of a complaint any alleged maladministration in connection with the affairs of government at any level, act or omission by a person in the employ of government at any level.

5.4.7 It is clear in this particular case that the Department, in dealing with the Complainant failed to uphold and promote the Principles of Public Administration as required by section 195 of the Constitution. No courtesy, responsiveness to the needs of the people or a sense of redress was shown by the Department to the Complainant after the death of her son while in custody of the School as required by the Batho Pele Principles.

Conclusion

5.4.8 The Department's conduct in the circumstances was in violation of section 195(1)(g) of the Constitution and Principles 4 and 7 of the Batho Pele Principles.

5.5 Whether the Department improperly failed to report the death of her son to the South African Police Service for criminal investigation to be instituted:

Common cause
5.5.1 The Department failed to report the death of the Complainant’s son to the South African Police Service for a criminal case docket to be registered and investigated.

5.5.3 The Department did not dispute that the death of the Complainant’s son was never reported to the South African Police Service for investigation of an Inquest docket but alleges that in their view it was natural death that did not necessitate it being reported to the South African Police.

5.5.4 The Department’s submission in this regard ought to be rejected on the basis that it is clear from the evidence of Dr KD Boffard (a specialist trauma surgeon) who treated the deceased when he arrived in Milpark Hospital at about 18:20 from the rugby field. Dr Boffard testified on record during our ADR session held on 09 June 2016 that the deceased came in with a history of having been tackled while playing rugby. Dr Boffard further testified that according to paramedics that attended Thabang from the rugby field, there were no signs of life or breathing. Dr Boffard testified further that after a brief examination of Thabang by him, he observed that Thabang had a swollen brain with no oxygen supply to the brain. According to Dr Boffard, Thabang also had a small collection of blood on the brain surface, measuring about 500 millimetres.

5.5.5 Dr Boffard further indicated in his testimony that the pressure on the brain could have stopped Thabang from breathing thereby resulting to brain death. Dr Boffard concluded his testimony by indicating that a tackle plus brain concussion can cause the death and that Thabang should not have played rugby on that day if he was still booked off due to a previous brain concussion.

Application of the relevant law
Section 2 of the Inquest Act 58 of 1959 provides that any person who has reason to believe that any other person has died and that death was due to other than natural causes, shall as soon as possible report accordingly to a policeman, unless he has reason to believe that a report has been or will be made by any other person.

Copy of the Death Certificate from Home Affairs of the deceased indicates that the cause of death remains inconclusive (e.g. awaits Histology). This part of forensic pathology and criminal investigation is within the powers and jurisdiction of the South African Police Service to pursue under Inquest police docket, however this case was not reported to the South African Police Service for criminal investigation as required by Inquest Act. As a result no post-mortem was conducted on Thabang’s body by a forensic pathologist in order to determine the cause of death and to follow up on the results of histology.

**Conclusion**

The Department had the duty to report the death to the South African Police Service as the deceased was a border at its subsidiary (Potchefstroom Boys High School) and his death is attributable to the school’s sporting activities. The Department’s failure to report the death to the South African Police Service was improper.

Whether the School negligently forced her son to play rugby on the day of this incident despite her son having been declared unfit to play rugby while he was still recovering from previous injury of brain concussion:

**Common cause**

Thabang did travel with the school to Johannesburg on the day of his fateful injury, despite having been previously booked off by a medical doctor from playing rugby.
5.6.2 Furthermore, Thabang was fielded by the coach of the school rugby team (Mr D Schmidt) to play rugby on that day at Johannesburg.

5.6.3 During the course of the game Thabang was involved in a tackle with another player and subsequently fell on the ground and immediately went into a coma until he was airlifted to Milpark Hospital, where he later died, having been declared brain dead as a result of secondary head injury. This was corroborated by Prof K. Boffard who treated the deceased on the day of the incident in an ADR meeting held on 9 June 2016.

Issues in dispute

5.6.4 The Complainant alleged that the coach, Mr Schmidt forced her son to play rugby on that fateful day by saying to the deceased "You are a sissy", which led to the boy being coerced to play.

5.6.3 However, the Complainant could not provide anything in support or corroboration of this allegation. It is further not corroborated by any other testimony in the form of an eye witness evidence in this regard. On the other hand the school coach (Mr Schmidt) gave the affidavit in which he states that the deceased had a medical certificate declaring him fit to play on the day. Such medical certificate is part of the medical records that the Department improperly failed to keep, and preserve.

5.6.3 The Department contended that the deceased had produced another medical certificate from a medical doctor which declared him fit to play rugby again and that the coach fielded him on the strength of that medical certificate. The Department further contended that if the deceased had a medical certificate declaring him fit to
5.6.4 The Department further disputed the allegation that the deceased was forced to play rugby on that fateful day by the coach or any of its officials. The Department insisted that the deceased had given them a medical certificate declaring him fit to play rugby and that is why he was fielded on that day. The coach (Schmidt) submits that such medical certificate was handed over by the school to the Department together with other records that were given to the Department for their internal investigation.

Conclusion

5.6.5 The Public Protector accordingly could not find any supporting evidence to this allegation (except a bare allegation by the Complainant) and neither could she find any improper conduct on the part of the Department in relation to the allegation that Complainant’s son was forced to play rugby on the day of this incident.

5.7 Whether the Department improperly failed to inform the Complainant about the subsequent secondary injury that her son suffered and which led to his hospitalisation and death at Milpark Hospital due to brain concussion:

Common cause

5.7.1 Thabang suffered a secondary injury on the head while playing rugby for the school in Johannesburg and which led to his hospitalisation and death at Milpark Hospital due to brain concussion.

5.7.2 The school did not take it upon themselves to report this incident to the Complainant but the Milpark Hospital did so.
5.7.3 The Complainant’s son died following a brain concussion emanating from the secondary impact while playing rugby for the school.

*Issues in dispute*

5.7.4 The Department reasonably argued that it did not inform the Complainant on its own about the injury and hospitalisation of her son, based on the advice of the medical doctor that such should be done by the grief counsellor of Milpark Hospital. The grief counsellor did in fact contact the Complainant. The Complainant and her family arrived at the hospital at 22:30 pm and were met by the grief counsellor.

*Conclusion*

5.7.5 The Public Protector accordingly could not find any substance to this allegation and neither could she find any improper conduct on the part of the Department in relation to the allegation that the Complainant was not informed about the injury and the subsequent hospitalisation of her son to Milpark Hospital. The Public Protector concludes that due to the sensitivity of this case it was appropriate that the complainant be informed by a professional, like a grief counsellor as it happened in this case. This would appear to have been deliberately done in order to protect the complainant from shock as it might have been occasioned by the insensitive nature of breaking such bad news by any ordinary person other than a grief counsellor.

5.8 Whether the Department improperly failed to compensate the Complainant for the loss of her son, pain and suffering either delictually or in a form of ex gratia:

*Common cause*
5.8.2 The Complainant was not compensated by the Department for loss of her son, pain and suffering either delictually or in form of ex gratia for the simple reason that she did not lodge any legal processes to claim for such compensation within the permitted time frame in terms of the law.

5.8.3 The school however paid for medical costs and secured the sponsorship of Chris Burger and Petro Jackson Foundation who contributed and covered certain funeral costs of the deceased in this case.

5.8.4 The contributions made by the School and Petro Jackson can be summarised in the table below:

<table>
<thead>
<tr>
<th>DATE</th>
<th>PERSON/COMPANY</th>
<th>AMOUNT PAID</th>
</tr>
</thead>
<tbody>
<tr>
<td>15/05/2002</td>
<td>Dr Haageneen &amp; Laurie Inc.</td>
<td>R1 898.10</td>
</tr>
<tr>
<td>10/06/2002</td>
<td>Dr Du Buisson &amp; Partners</td>
<td>R1 925.40</td>
</tr>
<tr>
<td>20/06/2002</td>
<td>Drs Monteith &amp;Partners</td>
<td>R 426.00</td>
</tr>
<tr>
<td>28/08/2002</td>
<td>EmergencyTrauma Ambulance (Helicopter)</td>
<td>R3 911.35</td>
</tr>
</tbody>
</table>
"Allegations of maladministration against the North West Department of Education and Sport Development."

**Report of the Public Protector July 2017**

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>09/09/2002</td>
<td>Prof K.D.Boffard</td>
<td>R1 138.70</td>
</tr>
<tr>
<td>04/04/2002</td>
<td>Trauma Med cc</td>
<td>R1 314.30</td>
</tr>
<tr>
<td>29/10/2003</td>
<td>AMS Africure</td>
<td>R 594.95</td>
</tr>
<tr>
<td>19/05/2004</td>
<td>Milpark Hospital</td>
<td>R9 141.65</td>
</tr>
<tr>
<td>07/12/2004</td>
<td>Death Certificate</td>
<td>R 43.00</td>
</tr>
<tr>
<td>05/08/2005</td>
<td>Milpark Hospital</td>
<td>R9 212.27</td>
</tr>
<tr>
<td></td>
<td><strong>TOTAL EXPENSES PAID BY SCHOOL</strong></td>
<td><strong>R29 605.72</strong></td>
</tr>
<tr>
<td>07/05/2002</td>
<td>Unpaid School Fees written off as bad debt</td>
<td>R 410.00</td>
</tr>
</tbody>
</table>

5.8.5 Mr Swanepoel (current Deputy Principal at Potchefstroom Boys High School) further testified that funeral expenses for the deceased were paid for by the SA Rugby Union and also by the Petro Jackson and Chris Burger Foundation (NGO).

5.8.6 It has been confirmed in the documentary evidence in the Public Protector’s possession that a contribution of R10, 000 was made by Petro Jackson and Chris Burger Foundation towards the funeral costs shown on the table below:

**FUNERAL QUOTATION FROM BAROLOGIN FUNERAL PARLOUR & FLORIST.**

<table>
<thead>
<tr>
<th>ITEM</th>
<th>DESCRIPTION</th>
<th>AMOUNT</th>
</tr>
</thead>
</table>

42
5.8.7 The Department requested the Complainant to provide it with all the expenses related to the medical and funeral costs that she has personally incurred in relation to this case so that it can consider settling them off in a form of a once off ex gratia payment to her without accepting any civil liability for the death of her son.

5.8.8 The Complainant rejected the ex gratia payment/offer relating to medical as well as funeral costs incurred by her as regards this case.

**Issues in dispute**

5.8.9 The Department disputed any liability for any damages that may result from this case and contended that if the deceased was cleared by the medical doctor to play rugby while still medically unfit to do so, then the Department of Health should be liable for his death.
5.8.10 The Department further contended that this matter has in law prescribed and that the delictual claim of the Complainant should not be sneaked through the Office of the Public Protector.

Application of the relevant law

5.8.11 Section 3(1)(a) and (2)(a) of Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 provides that no legal proceedings for the recovery of any debt may be instituted against an organ of the state unless the creditor has given the organ of the state in question a notice in writing of his/her intention to institute the legal proceedings in question. A notice must within six months from the date on which the debt became due, be served on the organ of state. There is no evidence that the Complainant has done that in this matter.

5.8.12 Section 11(d) of the Prescription Act 68 of 1969, provides that a period of prescription of any debt (debt means any debt arising from any cause of action such as delictual, contractual or any other liability), save where an Act of Parliament provides otherwise shall be three years.

5.8.13 There is no evidence in this case which shows that the Complainant has ever at any stage engaged in the delictual or any other form of litigation against the Department within three years since this incident took place in 2002. As a result of this failure by the complainant, this matter has in terms of section 11(d) of the Prescription Act prescribed save where an Act of Parliament provides otherwise.

5.8.14 While there is no evidence to show the expenses personally incurred by the Complainant with regard to medical and funeral costs of her son, available evidence on the other side reveals that the Potchefstroom Boys High School, Petro Jackson and Chris Burgher Foundation as well as by South African Rugby Union (which are a
'Allegations of maladministration against the North West Department of Education and Sport Development.'

Report of the Public Protector July 2017

non-governmental organisations) contributed to the medical costs as well as funeral costs of the deceased in this case. Records of alleged contributions by the Union could no longer be found.

Conclusion

5.8.15 The Public Protector accordingly could not find any improper conduct, or maladministration on the part of the Department in relation to its alleged failure to compensate the Complainant as there was no claim lodged by the Complainant against the Department within the prescribed legal time frames.

5.8.16 However, despite the legal framework articulated above, the Public Protector further made factual and legal findings, through her inquisitorial and investigatory mandate as explained by the Supreme Court of Appeal (SCA) in seminal case of "The Public Protector v Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1 June 2011)" , where the court held that the Public Protector is not a passive adjudicator between the citizens and the state, relying only upon evidence which is placed before her by the parties. The SCA held that the Public Protector should not be bound or be limited to the issues raised for consideration and determination by the parties but should investigate further and discover the truth and also inspire confidence that the truth has been discovered.

5.8.17 Through her inquisitorial and investigatory role as explained by the SCA in the above cited decided case, the Public Protector has found that the Department of Education and Sport Development in North West Province has set the precedent in the recent past in which similar cases involving school related deaths in its province were settled by it in a particular way, namely by making an ex gratia payment to the affected parents or families, based purely on humanitarian grounds.
Examples of such similar cases which the Department has settled through ex gratia payments include following:

(i) The Christiana School for the Blind

Four learners at Christiana School for the Blind died as the result of a fire which broke out at the hostel room. The legal opinion sought by the Department in this matter indicated that the Department incurred vicarious liability. The legal opinion further cited the matter of Obotseng vs Lebone and Others 1994 (4) SA 88, where the Court recommended that the State makes an ex gratia payment, when it was legally not obliged to do so, on grounds of the disgraceful conduct of its employees. The Department subsequently entered into a settlement agreement with the parents of the deceased, who were represented by Legal Aid, in which an ex gratia payment in the sum of R150 000.00 was processed in respect of each family. This incident happened on 28 November 2010.

(ii) Drowning of Learners in Camps Bay

In this case, it was established that the drowning of learners was caused by the rip currents which is a vis major, which cannot attract any form of liability as it is known to be an act of God. The legal opinion provided in this matter indicated there is no tangible delictual damage which a Court would be inclined to order that it be redressed by any form of compensation. The Department subsequently facilitated counselling support and processed an ex gratia payment to each family in the sum of R150 000.00, purely as a humanitarian act. This incident happened on 25 September 2013.
The investigations conducted at the school in this case could not conclusively point to the actual cause of fire. The investigation conducted by the South African Police Service also remains inconclusive. In the absence of conclusive evidence regarding the responsibility for the fire, the Department, on humanitarian basis, processed payments in the sum of R300 000.00 per family. The incident happened on 24 August 2015. This matter is still the subject of an ongoing investigation by the Office of the Public Protector.

5.8.19 The Public Protector is of the view that the Complainant is being grossly prejudiced by the failure of the Department to process an ex gratia payment in her favour based on humanitarian grounds and on the improper conduct of its employees.

5.8.20 The Public Protector is further of the view that the Complainant is being unfairly discriminated by the Department in the sense that cases of a similar nature as cited above have been compensated by way of an ex gratia payment. Such an unfair discrimination by the Department cannot be reconciled with section 9(1) and (3) of the Constitution. It is trite law that people in similar situations should be treated similar. Similarly in this case the Complainant has lost a child while in the custody of the school.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
6.1 Whether the Department improperly failed to inform the Complainant of the school trip that her son undertook in order to play rugby for the school at Johannesburg:

6.1.1 The allegation that the school improperly failed to inform the Complainant of the school trip that her son undertook in order to play rugby for the school at Johannesburg is substantiated.

6.1.2 Although the Department contends that all parents were issued with a schedule of game or sport activities at the beginning of the year, no documentary evidence of such was furnished by the school or the Department to the Public Protector as the proof to substantiate this claim.

6.1.3 Testimony given by the current Deputy School Principal Mr J Swanepoel and two other teachers namely, MJ Van Vuuren, D Schmidt and Mr Swanepoe, does not confirm if the school had the system in place of informing parents beforehand of any trips to sporting activities or matches except a mere general conjecture that all parents are given a schedule of matches or tournaments for the year at the beginning of each school year.

6.1.4 The School and the Department failed to furnish the Public Protector with the records or copies of such schedule of matches and tournaments that were allegedly provided to the parents in 2002.

6.1.5 Accordingly, the conduct of the Department in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.2 Whether the Department improperly failed to allow the Complainant access to information relating to the death of her son:

6.2.1 The allegation that the Department improperly failed to enable the Complainant access to information relating to the death of her son is substantiated.

6.2.2 The Department failed to provide the Complainant with the requested information and upon request for such information by the Public Protector, it indicated that records relating to the death of Thabang M'Belle could not be traced due to the change of staff in both the Office of the MEC and Superintendent General since 2002.

6.2.3 The Department's failure to provide the Complainant with the requested information was in violation of section 32(1) of the Constitution and section 11 of Promotion of Access to Information Act 2 of 2000.

6.2.4 Such conduct by the Department amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

6.3 Whether the Department as the governmental body improperly failed to keep a proper management, preservation and care of the records relating to the death of the Complainant's son:

6.3.1 The allegation that the Department improperly failed to keep a proper management, preservation and care of the records relating to the death of the Complainant's son is substantiated;
6.3.2 The School Principal and the Department itself failed to keep a proper management, preservation, custody and care of the records relating to the death of the Complainant’s son. The record surrounding the death of a human being should be construed as a record with enduring value which should have been kept and preserved by the Department or duly transferred to the national archive repository for future access.

6.3.3 The failure by the school and the Department to keep a proper management, preservation, custody and care of the records relating to the death of the Complainant’s son was in violation of section 13(2)(a) of the National Archives and Record Service of South Africa Act 43 of 1996 and section 16A(2) of South African School Act 84 of 1996,

6.3.4 The conduct of the Department in the circumstances amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

6.4 Whether the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died:

6.4.1 The allegation that the Department improperly failed to inform the Complainant about the outcome of any investigation conducted by it and the reasons why her son died is substantiated.

6.4.2 The Department failed to inform the Complainant about the outcome of investigation conducted by it and the reasons why her son died. The Department had a duty to provide the Complainant with accurate information relating to the death of her son in
"Allegations of maladministration against the North West Department of Education and Sport Development."

Report of the Public Protector July 2017

terms of section 195(1)(g) of the Constitution, which provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution including that transparency must be fostered by providing the public with timely, accessible and accurate information.

6.4.3 The Department's failure to inform the Complainant about the outcome of investigation conducted by it and the reasons why her son died was in violation of section 195(1)(g) of the Constitution.

6.4.4 Such conduct by the Department amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

6.5 Whether the Department improperly failed to report the death of the Complainant's son to the South African Police Service for criminal investigation to be instituted:

6.5.1 The allegation that the Department improperly failed to report the death of the Complainant's son to the South African Police Service for criminal investigations to be instituted is substantiated.

6.5.2 The Department failed to report the death of Thabang M'Belle to the South African Police Service for criminal investigations to be instituted. The Department had the legal duty to report the death to the South African Police Service as the deceased was a border at its subsidiary (Potchefstroom Boys High School) and his death is largely related to the school sporting activities. Section 2 of the Inquest Act 58 of 1959 provides that any person who has reason to believe that any other person has died and that death was due to other than natural causes, shall as soon as possible report.
"Allegations of maladministration against the North West Department of Education and Sport Development."

Report of the Public Protector July 2017

accordingly to a policeman, unless he has reason to believe that a report has been or will be made by any other person.

6.5.3 The Department’s failure to report the death of Thabang M’Belle to the South African Police Service for criminal investigations to be instituted was in violation of section 2 of the Inquest Act 58 of 1959.

6.5.4 Such conduct by the department amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

6.6 Whether the school negligently forced the Complainant’s son to play rugby on the day of this incident despite her son having been declared unfit to play rugby while he was still recovering from previous head injury:

6.6.1 The allegation that the School negligently forced the Complainant’s son to play rugby on the day of this incident despite her son having been declared unfit to play rugby while he was still recovering from previous injury of brain concussion is not substantiated.

6.6.2 This allegation is not supported by any form of evidence from the Complainant. It is further not corroborated by any independent witness in the form of testimony in this regard. On the other hand the school coach, Mr D Schmidt gave the affidavit dated 15 August 2016 in which he states that the deceased had a medical certificate declaring him fit to play on the day. Such medical certificate is part of the medical records that the department has improperly failed to keep, preserve or destroyed.
6.6.3 The conduct of the Department in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

6.7 Whether the Department improperly failed to inform the Complainant about the subsequent secondary injury that her son suffered which led to his hospitalisation and death:

6.7.1 The allegation that the Department improperly failed to inform the Complainant about the subsequent secondary injury that her son suffered while playing rugby for the school in Johannesburg and which led to his hospitalisation and death at Milpark Hospital due to brain concussion is not substantiated.

6.7.2 The Department gave an adequate and reasonable explanation as to why the Complainant was not informed of the injury and hospitalisation of her son, which is based on the advice of the medical doctor that such should be done by the grief counsellor.

6.7.3 The grief counsellor did in fact contact the Complainant and the family arrived at the hospital at 22:30 pm on the same day of the incident. They were again met by the grief counsellor employed by Milpark Hospital.

6.7.4 The conduct of the Department in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.

6.8 Whether the Department improperly failed to compensate the Complainant for the loss of her son, pain and suffering either delictually or in a form of ex gratia payment:
6.8.1 The allegation that the Department improperly failed to compensate the Complainant for the loss of her son, pain and suffering either delictually or in a form of an ex gratia payment is not substantiated to the extent that she did not lodge any legal processes to claim such. However, the issue of compensation in the form of ex-gratia payment is considered in the remedial action taken by the Public Protector on compassionate and humanitarian grounds based on precedent.

6.8.2 Section 3(1)(a) and (2) (a) of Institutions of Legal Proceedings Against Certain Organs of State Act 40 of 2002 provides that no legal proceedings for the recovery of any debt may be instituted against an organ of state unless the creditor has given the organ of the state in question a notice in writing of his her intention to institute the legal proceedings in question. A notice must within six months from the date on which the debt became due, be served on the organ of state. There is no evidence that the complainant has done that in this matter.

6.8.3 Section 11(d) of the Prescription Act 68 of 1969, provides that a period of prescription of any debt (debt means any debt arising from any cause of action such as delictual, contractual or any other liability), save where an Act of Parliament provides otherwise shall be three years. There is no evidence in this case which shows that the Complainant has ever at any stage engaged in the delictual or any other form of litigation against the Department within three (3) years since this incident took place in 2002. As the result of this failure by the Complainant, this matter has in terms of section 11(d) of the Prescription Act prescribed save where an Act of Parliament provides otherwise.

6.8.4 The conduct of the Department in the circumstances does not amount to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (v) of the Public Protector Act.
6.9 Whether the Complainant was prejudiced by the conduct of the Department in the circumstances:

6.9.1 The conclusion that the Complainant was prejudiced by the conduct of the Department in the circumstances is substantiated as follows:

6.9.2 The Department improperly failed to allow the Complainant access to such information and record as it relates to the death of her son. Such record and information could have enabled the Complainant to know why and how her son died, however this conduct failure by the Department unfairly placed her in the precarious position of being unable to exercise her rights as enshrined in section 32 of the Constitution.

6.9.3 The Complainant suffered severe emotional and psychological stress as the result of the loss of her biological son, from 2002 up to date. The Complainant incurred financial expenses while making follow ups with the Department without getting any answers, and she suffered the pain, disappointment and distress. She suffered as a result of the improper conduct of the school which she had entrusted with the care of her child.

6.9.4 Had the Department acted properly by assisting the Complainant with all the necessary information, reasons, counselling and other professional support relating to the death of her son, the Complainant would have found closure to this matter.

6.9.5 The Department failed to keep a proper management, preservation, custody and care of the records relating to the death of the complainant’s son. The record surrounding the death of a human being should be construed as a record with enduring value which should have been kept and preserved by the Department or duly transferred to
"Allegations of maladministration against the North West Department of Education and Sport Development."

Report of the Public Protector July 2017

the national archive repository for future access. The Department also failed to assist the Complainant with professional support that was necessary for her in order to find closure on this matter.

6.9.6 The conduct of the Department in the circumstances resulted in prejudice to the Complainant as envisaged in section 182(1)(a) of the Constitution.

7. REMEDIAL ACTION

The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

(a) The MEC of Education and Sport Development in North West Province –

7.1.1 Must ensure that the HOD implement the remedial action taken within the time frames specified.

(b) The HOD for the North West Department of Education and Sport Development

7.1.2 Must within 90 days of the issue of this report, pay an Ex Gratia payment (out of good will and/or humanitarian ground) to the complainant, having taken into account the circumstances under which the complainant’s child died and the trauma which the complaint suffered as a result of the death of her son. The Ex Gratia payment should be based on the previous settlement made by the Department in the similar cases as experienced by the Department in the recent past.

7.1.3 Must within 90 days of the issue this report, arrange the requisite support in the form of professional counselling for the Complainant regarding the death of her son.

56
7.1.4 Must within 90 days of the issue of this report establish contact with the National Archivist within the Department of Arts and Culture and ensure that the National Archivist assists and trains the Department's officials to draft and conclude its own internal Policy and Regulations relating to the management, keeping, preserving and transfer of public records to the National Archivist. All officials of the Department responsible for records keeping must receive training in this regard.

7.1.5 Must within 30 days of the issue of this report ensure that the death of Thabang M'Belle is reported to the South African Police Service for a criminal investigation of an Inquest docket to be conducted.

7.1.6 Must within 90 days of the issue of this report in consultation with the National Department of Basic Education create, review and implement a policy on the safety of learners engaged in school sporting activities. Such policy must encapsulate clear provisions on the Department's liability in such cases including but not limited to negligence by officials.
8. MONITORING

8.1 The MEC of the Department of Education and Sports Development in North West Province must submit an implementation plan to the Public Protector within 30 (thirty) days of receipt of this report on how remedial action outlined above will be implanted with specific timelines.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 10/07/2017

Assisted by: Vusumuzi Dlamini