
PUBLIC PROTECTOR SOUTH AFRICA

REPORT NO. 12 OF 2019/2020

"Allegations of maladministration and an undue delay in the matter between Messrs ML Kolobe; BP Nevondo; TM Makhuga and the Department of Military Veterans"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND AN UNDUE DELAY BY THE DEPARTMENT OF MILITARY VETERANS IN THE REGISTRATION OF MESSRS ML KOLOBE; BP NEVONDO AND TM MAKHUGA ON ITS DATABASE
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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(2A)(a) of the Public Protector Act, 1994.

(ii) The report relates to an investigation into allegations of maladministration and undue delay by the Department of Military Veterans (the DMV) in the registration of Messrs ML Kolobe; BP Nevondo and TM Makhuga on its database.

(iii) The complaint was lodged with my office on 21 April 2017 as per email dated 20 April 2017.

(iv) The Complainants are former members of the South African National Defence Force who completed their military training between 2006 and 2007.

(v) In the main, the Complainants alleged that they qualify as military veterans in terms of section 1c of the Military Veterans Act (MVA) and with that understanding in May 2016 they applied with the DMV to be registered on the military veteran’s database. As at 21 April 2017 when they lodged their complaint with my office, they had still not been registered on the database without any reasons provided.

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

(a) Whether the Department of Military Veterans has unduly delayed to register the Complainants on its database; and

(b) Whether the Complainants were improperly prejudiced by the Department of Military Veterans’ conduct under the circumstances.
(vii) Key laws and policies taken into account to determine if there had been maladministration by the DMV were principally those imposing administrative standards that should have been complied with by the DMV. Those are the following:

(a) Section 33 of the Constitution which enshrines the right to administrative action which is in accordance with the law, standard of reasonableness and follows fair procedure, and further guarantees the right of persons adversely affected by administrative action to be provided written reason. The provisions of the Promotion of Administrative Justice Act which aims to give effect to this human right were also considered and applied to measure the standards which the DMV was supposed to adhere to.

(b) Section 1 of the MVA which provides for the definition of "military veteran" was also instrumental in the affirmation of the status of the Complainants in the matter in as far as the rights attached to such definition are concerned. Consideration was also given to section 6 of the MVA which provides the standard to be complied with by the DMV in the administration of its database; and section 5 which confirms the various benefits which the Complainants may be eligible for upon registration in the database.

(c) A key provision from Regulation 21 of the Military Veterans Benefits Regulations was also considered and applied in measuring the standard which was expected of the DMV with regards to compliance with its timelines when providing feedback on benefit application outcomes, there was non-compliance by the DMV in this regard.

(viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:
(a) **Regarding whether the Department of Military Veterans unduly delayed to register the Complainants on its database:**

(aa) The allegation that the DMV unduly delayed to register the Complainants on its database is substantiated.

(bb) The Complainants applied for registration of their names on the DMV’s database in May 2016, however, their registration was only effected on 30 November 2018, two (2) years following registration. On the facts, their registration outcome was supposed to have been provided thirty (30) days following their application but this was not the case.

(cc) The DMV has, *inter alia*, violated the Complainants’ right to fair and just administrative action guaranteed in section 33(1) and (2) of the Constitution and section 3(2)(ii), (iii), (iv) and (v) of the PAJA. The DMV has further flouted the provisions of section 195(1)(d)-(g) of the Constitution which sets out the principles of good public administration and has neglected to observe the *Batho Pele* Principles relating to access, courtesy, information and redress. In unduly delaying to register the Complainants on its database, the DMV has failed to observe the provisions of sections 1, 5 and 6 of the MVA, read together with regulation 2(1) of the Military Veterans Benefits Regulations.

(dd) Such conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) **Regarding whether the Complainants were improperly prejudiced by the DMV’s conduct under the circumstances:**

(aa) The allegation that the Complainants were improperly prejudiced by the DMV’s conduct is substantiated.
(bb) The undue delay in registration of the Complainants has had a prejudicial impact on the Complainants in that by virtue of their exclusion from the database, they were unjustifiably denied eligibility from applying for military veterans' benefits for which they may qualify.

(cc) The unjustifiable failure by the DMV to register the Complainants on the database is a violation of their rights in terms of section 27(1)(c) and neglect of the constitutional responsibility imposed in terms of section 7 of the Constitution and Regulation 21 of the Military Veterans Benefits Regulations.

(dd) Such conduct by the DMV also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(ix) In light of the above findings, I am directing the following appropriate remedial action as contemplated in section 182(1)(c) of the Constitution:

(aa) The Acting Director General, Lt Gen Mgwebi, must within 30 working days from the date of this report, issue an apology to the Complainants for the DMV's undue delay in registering them on the database; and

(bb) The Acting Director General, Lt Gen Mgwebi, must within 30 working days from the date of this report, conduct an investigation into whether there are any other military veterans who meet the registration criteria, but find themselves in the same circumstances which the Complainants were in and have not yet been registered despite having lodged applications for registration on the DMV database. Such military veterans should be duly registered, within 30 working days from the date of their identification.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND AN UNDUE DELAY BY THE DEPARTMENT OF MILITARY VETERANS IN THE REGISTRATION OF MESSRS ML KOLOBE; BP NEVONDO AND TM MAKHUGA ON ITS DATABASE

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(2A)(a) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8 of the Public Protector Act to the following people to note the outcome of my investigation and implementation of the remedial action:

1.2.1. The Minister of Defence and Military Veterans, Ms Nosiviwe Mapisa-Nqakula; and

1.2.2. The Acting Director General of the Department of Military Veterans, Lt Gen DM Mgwebi.

1.3. A copy of the report is also provided to Messrs Matsobae Lordwick Kolobe; Bongani Prince Nevondo; and Thivhulawi Melton Makhuga (the Complainants) to inform them about the outcome of my investigation.

1.4. The report relates to an investigation into the alleged maladministration and an undue delay by the Department of Military Veterans (the DMV) to register the Complainants on its database.
2. **THE COMPLAINT**

2.1 The complaint was lodged with my office by Mr Matsobane in his personal capacity and on behalf of Messrs Nevondo and Makuga on 21 April 2017.

*Background of the complaint*

2.2 In the main, the Complainants alleged the following:

2.2.1 They were in the South African National Defence Force (SANDF) for a period of two (2) years between 2006 and 2007 and have duly completed their basic military training;

2.2.2 Following completion of their training, they were not absorbed into the permanent employ of the SANDF, however, they qualified for classification as military veterans in terms of the definition set out in the Military Veterans Act 18 of 2011 (MVA);

2.2.3 In accordance with this classification, they applied to be registered on the DMV database to enable them to apply for statutory benefits during the course of May 2016, but they never received a response to their application even after the lapse of the ninety (90) day waiting period;

2.2.4 Despite several follow-ups with the DMV, they were sent from pillar to post without being given any conclusive answers and at some point were verbally advised that they did not qualify to be registered on the database without any reasons provided; and

2.2.5 As such the DMV has, as at date of lodgement of the complaint, without any valid reason, unduly delayed to register them on the database.
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:

"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) provides that the Public Protector has additional powers and functions prescribed by national 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 *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. 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

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."

3.6 In the above-mentioned Constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

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

3.6.2 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 (paragraph 67);

3.6.3 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 the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.6.4 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 (paragraph 69);

3.6.5 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 (paragraph 70);

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2 Supra at para [73].
3.6.6 The Public Protector's power to take 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 (paragraph 71);

3.6.7 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 the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and

3.6.9 "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 (paragraph 71(e)).

3.7 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 2013), the Court held as follows:

a) "The Public Protector, in appropriate circumstances, have 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" (paragraphs 85 and 152);

b) There is nothing in the Public Protector Act that prohibits 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 (paragraphs 91 and 92);
c) Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):

I. Conduct an investigation;
II. Report on that conduct; and
III. To take remedial action

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

e) 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 (paragraph 105).

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

g) Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112)."

3.8 The DMV 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.

3.9 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(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.

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 or improper conduct?
4.2.1.4. In the event of maladministration what would it take to remedy the wrong or to place the Complainants 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 DMV unduly delayed to register the Complainants on its database and if answered in the affirmative whether the Complainants suffered any prejudice as a result thereof.

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 DMV 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.

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

4.3.1 Whether the Department of Military Veterans unduly delayed to register the Complainants on its database; and

4.3.2 Whether the Complainants were improperly prejudiced by the Department of Military Veterans’ conduct under the circumstances.

4.4 **The Key Sources of information**

4.4.1 **Documents**

4.4.1.1 The complaint letter dated 21 April 2017;

4.4.1.2 A *subpoena* from my office to the then DMV’s Acting Director General, Ozinsky dated 01 March 2018;

4.4.1.3 A *subpoena* from my office to the DMV’s Acting Deputy Director General Musi dated 01 March 2018;

4.4.1.4 The Military Veterans Act Draft Amendment Bill and Memorandum dated 24 April 2017;

4.4.1.5 A notice in terms of section 7(9)(a) of the Public Protector Act from my office to the DMV’s Acting Director General Mgwebi dated 16 November 2018; and

4.4.1.6 A section 7(9)(a) notice from my office to Minister Mapisa-Nqakula dated 16 November 2018;
4.4.2 Interviews conducted

4.4.2.1 A subpoena hearing of 22 March 2018 held between my office and a delegation of the Department of Military Veterans.

4.4.3 Correspondence sent and received

4.4.3.1 A letter from my office to the then Deputy Minister Kebby Maphatsoe dated 25 October 2017;
4.4.3.2 A letter from Mr Ozinsky to my office dated 28 November 2017;
4.4.3.3 A letter from my office to Mr Ozinsky dated 28 March 2018;
4.4.3.4 A letter from Mr Ozinsky to my office dated 11 April 2018;
4.4.3.5 A letter from my office to the DMV's Acting Director-General Mgwebi dated 16 July 2018;
4.4.3.6 A letter from the DMV's Acting Director-General Mgwebi to my office dated 30 July 2018;
4.4.3.7 A letter from Minister Mapisa-Nqakula to my office dated 27 November 2018;
4.4.3.8 An email of 03 December 2018 from Ms Celeste Jordaan, the DMV's Deputy Director: Legal Services to my office enclosing registration confirmatory letters dated 30 November 2018; and
4.4.3.9 A letter from my office to Acting Director-General Mgwebi dated 04 January 2019

4.4.4 Legislation and other legal prescripts

4.4.4.1 The Constitution;
4.4.4.2 The Public Protector Act;
4.4.4.3 The MVA;
4.4.4.4 The Promotion of Administrative Justice Act, 2000 (the PAJA);
4.4.4.5 Military Veterans Benefits Regulations, Government Gazette No. 37355 dated 19 February 2014; and
4.4.4.6 White Paper on Transforming Public Service (Batho Pele White Paper), Government Gazette No. 18340 of 01 October 1997.

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 of Military Veterans unduly delayed to register the Complainants on its database:

Common cause issues

5.1.1 It is common cause that the Complainants were part of the two (2) year Military Skills Development System (MSDS) training programme of the SANDF between 2006 and 2007.

5.1.2 On 15 May 2016, the Complainants lodged their applications to be registered on the DMV database and were advised that their applications would be considered and an outcome provided within ninety (90) days.

5.1.3 When the ninety (90) day period lapsed and a response was not forthcoming, they followed up with the DMV, without any success. They then approached my office for intervention.

5.1.4 On 27 October 2017, my investigation team forwarded a comprehensive letter to the office of the then Deputy Minister of Defence and Military Veterans, Mr Maphatsoe, wherein the allegations of an undue delay made by the Complainants were set out. The letter further detailed the Complainants' identity and force numbers, together with a request that the DMV provide the reasons for the delay in communicating the outcome of their applications and registering them on its database.
5.1.5 On 28 November 2017, a letter of response under signature of Mr Ozinsky was received by my office wherein he confirmed that the Complainants were part of the MSDS training programme. He further advised as follows:

"Whether someone who served 2 years in the MSDS, but was not taken further as a member of the SANDF, should be considered a military veteran in terms of the Military Veterans Act 18 of 2011 is a legal matter which DMV is still considering. DMV will obtain legal advice on this matter and consult with its stakeholders to reach a conclusion."

5.1.6 Having studied the response, I found this to be inadequate in resolving the issues raised by the Complainants, neither proposing a solution nor indicating a timeline of finalisation of the process. This necessitated my office to subpoena the DMV’s officials to a hearing, with a view of resolving and bringing to finality the issues raised by the Complainants.

Concession by the DMV

5.1.7 The DMV attended the subpoena hearing on 22 March 2018, with a delegation comprised of several key officials led by Mr Ozinsky. At the hearing, the DMV submitted that it experienced challenges relating to, amongst others, the definition of “military veteran” as set out in the MVA. The main difficulty being that the definition is too wide and all-encompassing of various individuals, creating the expectation that a plethora of people by definition of the MVA qualify for registration on the DMV database and thus are eligible to receive statutory benefits prescribed by the MVA. This, in effect, placed a heavy burden on the DMV and created expectations which the DMV had difficulties meeting.

5.1.8 The DMV further submitted at the hearing that steps were already underway to amend certain provisions of the MVA, including the definition of “military veteran”, in order to impose restrictions on who actually qualifies for such classification. A
draft amendment bill, together with a memorandum dated 24 April 2017, were submitted to my investigation team for noting.

5.1.9 While it was appreciated that the DMV was taking steps to remedy the challenges experienced with the MVA, the investigation team cautioned that by operation of law, any amendments proposed and effected in accordance with the draft bill would not have retrospective application. Therefore, any argument that the Complainants could not be registered on the DMV’s database due to the pending legislative review, would not be valid in law because they, or any other person in the same circumstance as the Complainants, who made their applications under the prevailing dispensation, would be bound by the law which applied at the time.

5.1.10 It was further submitted by my investigation team that as the facts and the law stood, the Complainants indeed qualified for classification as military veterans and were, therefore, eligible for registration on the DMV’s database. The DMV delegation conceded this fact and it was resolved that the DMV would attend to the registration of the Complainants on its database within 3 months from the date of the hearing, which was 29 June 2018.

5.1.11 On 28 March 2018, a letter confirming this resolution taken at the hearing was sent to Mr Ozinsky. Under reply per a letter dated 11 April 2018, Mr Ozinsky acknowledged that the letter fairly reflected the resolutions taken at the engagement of 22 March 2018, accepting the DMV’s commitment as undertaken.

5.1.12 As at 29 June 2018, the Complainants had not been registered on the DMV’s database.

5.1.13 On 16 July 2018, my investigation team wrote to the Acting Director-General’s office requesting the DMV’s policy documents relating to the registration of military veterans on its database, including but not limited to any document setting out the procedures followed by the DMV in attending to the registration of this nature.
5.1.14 In response, through a letter under signature of the Acting Director-General Mgwebi dated 30 July 2018, the DMV responded to the request for the abovementioned records by merely noting the request, without providing the documents and further indicating that it was engaged in a process of scrutinising the legal framework regarding MSDS members and had embarked on an investigation into the MSDS system and training undergone by such members.

5.1.15 Owing to the lack of co-operation and failure to rectify the situation as undertaken by the Department, I proceeded to issue a notice in terms of section 7(9)(a) of the Public Protector Act dated 16 November 2018, wherein I communicated the evidence of wrong doing by the Department which I uncovered during the investigation and my intention to make adverse findings and impose appropriate remedial action against it. The notice was delivered to the Acting Director-General Mgwebi and Minister Mapisa-Nqakula.

5.1.16 In response, I received a letter from Minister Mapisa-Nqakula dated 27 November 2018, which provided as follows:

"I am in agreement with your findings and upon request to the Department could not be provided with a valid reason as to why these complainants have not been registered on the database as agreed to by the then Acting DG and DMV team.

I have received written confirmation from Lt. Gen Mgwebi (ret), the current Acting DG at the Department, to confirm that the complainants will be registered on the database as a matter of urgency and that proof will be provided shortly to your Office. Your investigator can contact Ms. Celeste Jordaan from DMV legal services should proof not be forthcoming within the next week…

In Addition, the Department has now formulated an approach to the registration of MSDS members in general going forward, namely:
a) MSDS members whose service terminates after two years and who do not join the Reserve Force may be registered on the database;"

b) MSDS members whose service terminates after two years and who opts to join the Reserve Force must firstly complete the Reserve Force period before they qualify to be registered as military veterans on the database. Proof of the completed Reserve Force period must be presented to the DMV before registration can be done.

The files of the complaints have been evaluated and it was found that all three joined the Reserve Force upon completion of their 2 year MSDS contracts and their 2 year MSDS contracts and their service in the reserve force has now come to an end. Thus they will be registered on the database as a matter of urgency." [sic]

5.1.17 Following receipt of the Minister’s submission, I subsequently received three (3) confirmatory letters dated 30 November 2018 from the DMV indicating that the Complainants had finally been registered on the database.

5.1.18 In a follow up correspondence from my office to the DMV dated 04 January 2019, my investigation team requested information relating to particulars of other military veterans who to the knowledge of the DMV find themselves in the same circumstances as the Complainants in question. Unfortunately, this information has as at date of issuance of this report not been provided to my office.

Application of the relevant law

5.1.19 Section 33 of the Constitution provides as follows:

"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration”.

5.1.20 The Constitution enshrines the right to administrative action which is in accordance with the law, the standard of reasonableness and follows fair procedure. Where one’s right is adversely affected by administrative action, one has a right to be provided written reasons. National legislation through the PAJA gives effect to this human right.

5.1.21 Section 1 of the PAJA defines “administrative action” as follows:

“...any decision taken, or any failure to take a decision by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution;

or

(ii) exercising a public power or performing a public function in terms of any legislation... which adversely affects the rights of any person and which has a direct, external legal effect...”

5.1.22 The conduct of the DMV, in classifying relevant individuals as military veterans, constitutes administrative action for the following reasons:
a) The DMV is an organ of state;

b) When classifying relevant individuals as military veterans it exercises a public power in terms of the MVA;

c) The failure to classify people who qualify as military veterans as such adversely affects the rights of such people and has a direct external legal effect in that they are deprived of eligibility for all the benefits which accrue to people in the same circumstance;

d) Accordingly, the undue delay by the DMV to process the Complainants' applications for registration and to register them on the database, thus preventing them from being eligible to apply for statutory benefits, amounts to administrative action which negatively affected them in that they were prevented by the DMV from meeting the basic requirements for eligibility to apply for military veterans' benefits.

5.1.23 Section 3 of the PAJA further provides for procedurally fair administrative action affecting any person as follows:

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

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) —
(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations

(iii) a clear statement of the administrative action;

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

(v) adequate notice of the right to request reasons in terms of section 5.

5.1.24 On the facts, the handling of the Complainants' applications by the DMV did not meet the standard of procedural fairness required when an administrator takes administrative action. In failing to register the Complainants on the database and to provide feedback on the outcome of their applications timeously, the DMV, in fact, neglected to give effect to the provisions of section 3(2)(b)(a)-(e) of the PAJA.

5.1.25 Section 195 of the Constitution sets out the values and principles governing good public administration, providing as follows:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

..."

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to ...

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information..."
(1) The above principles apply to —

(a) administration in every sphere of government;
(b) organs of state; and
(c) public enterprises. “

5.1.26 In conducting its affairs, the DMV has an obligation to comply with the values and principles of public administration prescribed by the Constitution. In delaying to attend to and register the Complainants’ applications on its database without providing any reason thereto, the DMV would be flouting the provisions of section 195(1)(d)-(g) which require of the DMV to provide services impartially, fairly and without bias; to be responsive to the Complainants’ needs; to be transparent and provide them with timely, accessible and accurate information relating to their applications.

5.1.27 The White Paper on Transforming Public Service Delivery (Batho Pele White Paper) as set out in Government Gazette No. 18340 of 01 October 1997 also seeks to entrench the standards to be complied with in public administration with the following principles:

“...
3 Access -  
All citizens should have equal access to the services to which they are entitled.
4 Courtesy -  
Citizens should be treated with courtesy and consideration
5 Information -  
Citizens should be given full, accurate information about the public services they are entitled to receive...
7 Redress -  

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If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response. ...” (own emphasis).

5.1.28 On the facts, by unduly delaying to register the Complainants on its database, the DMV would be contravening the Batho Pele principle relating to providing citizens access to services which they are entitled to. By delaying to register the Complainants and provide them with appropriate feedback, the DMV would be failing to treat the Complainants with the requisite courtesy expected of any state department in dealing with the public. The Complainants would be denied access to full and accurate information relating to their applications. Once the DMV became aware of its wanting conduct, it also carried a responsibility to redress the situation by offering the Complainants an apology.

5.1.29 Section 1 of the MVA defines a military veteran as follows:

“Military veteran” means any South African citizen who –
(a) Rendered military service to any of the military organisations, statutory and non-statutory, which were involved on all sides of South Africa’s Liberation War from 1960 to 1994;
(b) Served in the Union Defence Force before 1961; or
(c) Became a member of the new South African National Defence Force after 1994, and has completed his or her military training and no longer performs military service, and has not been dishonourable discharged from that military organisation or force; Provided that this definition does not exclude any person referred to in paragraph (a), (b) or (c) who could not complete his or her military training due to an injury sustained during military training or a disease contracted or associated with military training” (own emphasis)
5.1.30 On the facts as set out above, the Complainants complied with the criteria as set out in section 1(c) of the MVA. They duly completed military training and are no longer in service. Furthermore, they were not dishonourably discharged from the SANDF. Accordingly, the Complainants can, by definition, be classified as military veterans.

5.1.31 Section 6 of the MVA provides as follows:

"Without derogating from its general powers and duties as a national department of state, the Department-
...
(c) must collect data and information regarding all existing benefits of military veterans and their dependants and establish a database on military veterans and military veterans affairs, which must be updated regularly

(d) must include, in the database contemplated in paragraph (g) [sic]3, information collected and compiled as provided for in that paragraph and data regarding persons qualifying as military veterans or dependants."

5.1.32 As per the directive of section 6(c), a database was indeed established by the DMV and the latter had a responsibility to see to it that it was updated regularly. In accordance with section 6(d), the DMV had a further responsibility to see to it that data included in the database related to persons qualifying as military veterans. By delaying to register the Complainants on its database following their application in May 2016, the DMV would not be in compliance with section 6(c) and (d) requiring that the database be updated regularly. By virtue of the delay in registration and consequent exclusion of the Complainants from its database without providing proper reasons, the DMV would be failing to uphold its statutory obligations.

3 The Public Protector notes the erroneous reference to "paragraph g" in the text of the Act which should rather read "paragraph c". It is further noted that this error has been addressed or rectified in the of the draft amendment bill at section 7 to have the text read "paragraph c".
5.1.33 Section 5 of the MVA provides as follows:

"(1) The benefits relating to military veterans are the following:

(a) Compensation to military veterans who sustained disabling injuries or severe psychological and neuro-psychiatric trauma or who suffer from a terminal disease resulting from their participation in military activities;
(b) Dedicated counselling and treatment to military veterans who suffer from serious mental illness, post-traumatic stress disorder or related conditions;
(c) Honouring and memorialising fallen military veterans;
(d) Education, training and skills development;
(e) Facilitation of employment placement;
(f) Facilitation of or advice on business opportunities;
(g) Subsidisation or provisioning of public transport;
(h) Pension;
(i) Access to health care,
(j) Housing; and
(k) Burial support.

(1) Subsection (1) (b), (d) and (h) also applies to a dependant of a military veteran.

(2) (a) The Minister has the responsibility, subject to available resources and any regulation that may be prescribed in this regard, to ensure that benefits are paid or provided to military veterans, either through the Department or through other organs of state."

5.1.34 In addition to the above, Regulation 2(1) of the Military Veterans Benefits Regulations as published in Government Gazette No. 37355 dated 19 February 2014 provides as follows:
“A military veteran qualifies for one or more benefits provided for in the Act and these regulations if he or she —

(a) meets the criteria prescribed in these regulations for the benefit applied for; and

(b) is listed in the national military veterans database.”

5.1.35 In accordance with the set out provisions, the Complainants in effect sought to apply for the military veterans benefits as set out above when they made applications to be registered on the database. In terms of the regulations as mentioned above, a precondition for one to be eligible to apply for the statutory benefits is enlistment on the database. By delaying to register the Complainants on the database, the DMV would be precluding them from making applications and from being considered for allocation of military veteran’s benefits.

Conclusion

5.1.36 In the circumstances, the DMV despite repeated undertakings to register the Complainants on its database failed to do so until receipt of my section 7(9)(a) notice advising of my intention to make adverse findings against it. While I acknowledge and appreciate that as at 30 November 2018, approximately two (2) years since receipt of applications, the DMV implemented corrective steps and effected the Complainants’ registration, it can be concluded that the DMV unduly delayed to register them on its database as prescribed by law.
5.2 Regarding whether the Complainants were improperly prejudiced by the Department of military Veterans' conduct under the circumstances:

Common cause issues

5.2.1 The Complainants are military veterans in accordance with the definition set out in the MVA.

5.2.2 The Complainants applied for registration onto the national military veterans' database in May 2016, however despite undertakings from the DMV to have them registered, they were only registered in November 2018. No justifiable reason has been proffered by the DMV for the delay to register them as required.

5.2.3 Non-registration of the Complainants has had a prejudicial impact on them in that by virtue of their exclusion from the database, they were unjustifiably denied eligibility from applying for military veterans' benefits for which they may qualify.

Application of the relevant law

5.2.4 Section 7 of the Constitution provides that:

"The state must respect, protect, promote and fulfil the rights in the Bill of Rights".

5.2.5 The Constitution imposes an obligation on the state at all levels, including the DMV, to respect, protect, promote and fulfil the rights enshrined in the Constitution.

5.2.6 Section 27(1)(c) of the Constitution provides that:
“Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance”.

5.2.7 The right to have access to social security in the context of section 27(1) of the Constitution includes the right to have access to social assistance through the military veterans benefits, which the MVA and Regulations seek to provide to the military veterans. Therefore, any unjustified failure by the DMV to register the Complainants on its database denied them access to military benefits, consequently prejudicing them and denying them the fulfilment of their rights protected by section 27(1).

5.2.8 Regulation 21 of the Military Veterans Benefits Regulations provides as follows:

“(1) The Department must, within 30 working days from the date of the application for a benefit, notify the applicant in writing of the outcome of the application”.

5.2.9 In the circumstances, the Complainants lodged their applications in May 2016 and they were only registered on the database on 30 November 2018. In contravention with the above regulation, there has been an approximate two year delay for which the Department could not adequately account.

5.2.10 The evidence discussed and the application of the relevant legal principles to the established facts as set out above, indicate that the DMV caused the Complainants to suffer prejudice. It further indicates that the DMV failed to execute its constitutional obligations in terms of sections 27(1)(c) and 7 of the Constitution and also contravened the provisions of Regulation 21 of the Military Veterans Benefits Regulations.
Conclusion

5.2.11 In the circumstances, it can be concluded that the Complainants were prejudiced by the DMV’s undue delay to register them on the military veterans’ database.

6 FINDINGS

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

6.1 Regarding whether the Department of Military Veterans unduly delayed to register the Complainants on its database:

6.1.1 The allegation that the DMV unduly delayed to register the Complainants on its database is substantiated.

6.1.2 The Complainants applied for registration of their names on the DMV’s database in May 2016, however, their registration was only effected on 30 November 2018, two (2) years following registration. On the facts, their registration outcome was supposed to have been provided thirty (30) days following their application, but this was not the case.

6.1.3 The DMV has, inter alia, violated the Complainants’ right to fair and just administrative action guaranteed in section 33(1) and (2) of the Constitution and section 3(2)(ii), (iii), (iv) and (v) of the PAJA. The DMV has further flouted the provisions of section 195(1)(d)-(g) of the Constitution which set out principles of good public administration and has neglected to observe the Batho Pele Principles relating to access, courtesy, information and redress. In unduly delaying to register the Complainants on its database, the DMV has failed to observe the provisions of sections 1, 5 and 6 of the MVA, read with regulation 2(1) of the Military Veterans Benefits Regulations.

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6.1.4 Such conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Complainants were improperly prejudiced by the DMV’s conduct under the circumstances:

6.2.1 The allegation that the Complainants were improperly prejudiced by the DMV’s conduct is substantiated.

6.2.2 The undue delay in the registration of the Complainants has had a prejudicial impact on the Complainants in that by virtue of their exclusion from the database, they were unjustifiably denied eligibility from applying for military veterans’ benefits for which they may qualify.

6.2.3 The unjustifiable failure by the DMV to register the Complainants on the database is a violation of their rights in terms of section 27(1)(c) and neglect of the constitutional responsibility imposed in terms of section 7 of the Constitution and Regulation 21 of the Military Veterans Benefits Regulations.

6.2.4 Such conduct by the DMV also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 In light of the above findings I am directing the following appropriate remedial actions as contemplated in section 182(1)(c) of the Constitution:
7.1.1 The Acting Director-General, Lt Gen Mgwebi, must within 30 working days from the date of this report, issue an apology to the Complainants for the DMV's undue delay in registering them on the database; and

7.1.2 The Acting Director-General, Lt Gen Mgwebi, must within 30 working days from the date of this report, conduct an investigation into whether there are any other military veterans who meet the registration criteria, but find themselves in the same circumstances which the Complainants here in and have not yet been registered despite having lodged applications for registration on the DMV database. Such military veterans should be duly registered, within 30 working days from the date of their identification.

8 MONITORING

8.1 The Acting Director-General must within 15 working days from the date of the report, submit an Action Plan to my office indicating how the remedial action in paragraph 7 will be implemented.

8.2 The submission of the Action 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.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30/04/2019