
REPORT OF THE PUBLIC PROTECTOR ON AN INVESTIGATION INTO ALLEGATIONS OF UNLAWFUL SEIZURE AND DESTRUCTION OF LIQUOR

REPORT NO 13 OF 2007/2008
INDEX

Executive Summary 4

1. INTRODUCTION 7

2. BACKGROUND 7

3. THE POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR 8

4. INVESTIGATION 9

4.1 Methodology 9

4.2 Legislation considered 10

5. LEGISLATIVE AND OTHER FRAMEWORK 11

5.1 The Constitution, 1996 11

5.2 The Liquor Act, 1989 11

5.3 The Criminal Procedure Act, 1977 12

5.4 Standing Order (General) 333 15

6. EVALUATION OF FACTS AND FINDINGS 18
6.1 The seizing and destroying of the liquor 18

6.2 The procedure followed in destroying the liquor 20

6.3 The return of the liquor 20

7. KEY FINDINGS 20

8. RECOMMENDATIONS 21
EXECUTIVE SUMMARY

The Office of the Public Protector investigated allegations of unlawful seizure and retention of property by the Galeshewe Community Service Centre (GCSC).

From the investigation it appeared that the members of the South African Police Service (SAPS) from the GCSC seized liquor and charged the suspect in terms of section 167(c) of the Liquor Act, No. 27 of 1989, which makes it unlawful for a person to possess more liquor than he/she can reasonably consume. The State decided to withdraw the charge against the said suspect. However, despite the withdrawal of charges and a written request by a Senior Public Prosecutor at Kimberley Magistrate’s Court to the GCSC to return the liquor, the SAPS refused to return the said liquor to the suspect.

The Public Protector found that:

- The GCSC’s refusal to return the liquor was based on initial instructions from the Office of the Provincial Commissioner that confiscated liquor should not be returned to suspects without approval from Legal Services in the Office of the Provincial Commissioner.
- The Liquor was seized on 16 July 2004 from premises situated at no.15253 Hutshe Segolodi Street, Tuslana, Mankurwane, Kimberley, Northern Cape Province.
- On 16 August 2004, the Senior Public Prosecutor at Kimberley Magistrate’s Court withdrew the charges against the suspect.
- In support of the above decision the Senior Public Prosecutor noted the following in the Investigation Diary of the Police Case Docket:

  “1. Saak word teruggetrek.

  2. Daar was oorgenoeg tyd om aansoek te doen vir lasbrief !!”
3. There is no testimony that liquor is being sold

4. See Section B for birthday party card

5. Accused does not stay there

6. The case was not handled properly by A1 and his mates

7. Give liquor back and file docket

8. The J534 is completed pathetically and does not disclose an offence of dealing in alcoholic liquor.

("1. Case being withdrawn.

2. There was over enough time to apply for warrant !!

3. There is no testimony that liquor is being sold

4. See Section B for birthday party card

5. Accused does not stay there

6. The case was not handled properly by A1 and his mates

7. Give liquor back and file docket

8. The J534 is completed pathetically and does not disclose an offence of dealing in alcoholic liquor.")

- On 9 September 2004, Director D.C. Pistorius gave the following written instruction on the Exhibits section of the Police Case Docket:

  “Drank word nie teruggegee nie

  vernietig SAP 13A/528/04”

  (Liquor must not be given back…destroy SAP 13A/528/04)
On 8 August 2005 the liquor was destroyed in the presence of Captain Mothobie and the containers sold. The revenue from the sale of the containers was deposited with receipt no: CP 247959 with GCSC Financial Services.

The procedure for spillage of liquor as prescribed in the relevant Standing Order was not complied with and this was attributed to ignorance of the relevant officials.

The liquor was for a 21st birthday party on 4 September 2004 at no. 15253 Hutshe Street, Segolodi Street, Thusano, Kimberley.

Finally, the possession of the accused became lawful once the State declined to prosecute and the liquor should have been returned to the accused.

It is recommended that the Provincial Commissioner of the SAPS, Northern Cape:

1. In light of the improper prejudice suffered by the lawful owner of the said liquor, refer the matter to the appropriate claims section within the SAPS (the Loss Management Unit), to consider compensating the aforementioned lawful owner for the loss suffered as a result of the wrongful failure to return the liquor in question.

2. Investigate the decision of Director Pistorius to retain and destroy the liquor in question, to establish whether or not it was regular and proper in the circumstances.
1. INTRODUCTION

1.1 This report is submitted to the Northern Cape Provincial Member of the Executive Council for Safety and Liaison and the Provincial Commissioner of the Police Service, Northern Cape in terms of section 182(1)(b) of the Constitution, 1996 and section 8(1) of the Public Protector Act, 1994. It relates to an investigation by the Office of the Public Protector into allegations of unlawful seizure and destruction of property by the GCSC in the Northern Cape Province.

2. BACKGROUND

2.1 Mr W Seleko approached the Office of the Public Protector on 14 November 2004 with a complaint that the South African Police Service seized liquor from premises situated at no. 15253 Hutshe Segolodi Street, Tuslana, Mankurwane.

2.2 On 18 August 2004, the State withdrew the case against the accused and the complainant was given a letter from the Prosecutor informing the Investigating Officer to return the liquor.
2.3  Captain Dikgetsi did not believe that the liquor was for a 21st birthday party and decided to conduct an investigation and found that it was in fact a 21st birthday party and informed the complainant to collect the liquor the next day. When they arrived at the GCSC, Mrs Desai informed them that the liquor could not be returned, as it was too much. Mrs Desai then took the file to Senior Superintendent A.C. Basson.

2.4  The complainants then opted to consult Desmond Appie Attorneys and Mr. Appie furnished them with a letter instructing the South African Police Service to return the liquor. The letter was handed to GCSC, Station Commissioner, Superintendent Nguni who referred them back to Captain Dikgetsi who in turn referred them back to Senior Superintendent Basson. The latter informed them that the liquor could not be handed back.

3  THE POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR

3.1  The Public Protector was established in terms of section 181(1) of the Constitution as one of the institutions established in terms of Chapter 9 of the Constitution to strengthen constitutional democracy.

3.2  In terms of section 182 of the Constitution and section 6(4) of the Public Protector Act, the Public Protector is empowered 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 an
impropriety or prejudice, and to report on that conduct and to take
appropriate remedial action.

3.3 Improper conduct includes allegations of mal-administration, the abuse or
unjustifiable exercise of power, an improper or dishonest act with respect
to public monies, improper or unlawful enrichment, improper prejudice or
complaints of undue delay.

3.4 Appropriate remedial action includes resolving disputes and/or rectifying
acts or omissions by mediation, conciliation, negotiation and making
appropriate recommendation.

4. THE INVESTIGATION

The investigation of allegations against the GCSC was conducted in terms of
section 7 of the Public Protector Act, 1994.

4.1 Methodology

The investigation mainly comprised:

4.1.1 An assessment of the complaint and relevant allegations.

4.1.2 Consultation with the following officials:
4.1.2.1 The Provincial Commissioner for the Northern Cape Province;
4.1.2.2 First Legal Officer for the Office of the Provincial Commissioner, Director D C Pistorius;
4.1.2.3 Legal Officer for the Office of the Provincial Commissioner, Senior Superintendent A S Basson;
4.1.2.4 Mr. J. Shai from the Northern Cape Province Liquor Board;
4.1.2.5 Senior Public Prosecutor at the Kimberley Magistrate’s Court, Mr N Benson;
4.1.2.6 Captain G Peters of the Liquor and Firearm Unit;
4.1.2.7 Inspector S D Chinculi of the Liquor and Firearm Unit;
4.1.2.8 Inspector Kopeledi of the Liquor and Firearm Unit.
4.1.3 Correspondence with:
4.1.2.1 Legal Services at the Office of the Provincial Commissioner; and
4.1.2.2 Office of the Director of Public Prosecutions for the Northern Cape Province.

4.2 Legislation considered

The relevant provisions of the following legislation were considered:
4.2.1 The Constitution, 1996;
4.2.2 The Liquor Act, 1989;
4.2.3 The Criminal Procedure Act, 1977; and
4.2.4 Standing Order (General) 333.
5. LEGISLATIVE AND OTHER FRAMEWORK

5.1 The Constitution, 1996

5.1.1 Supremacy of the Constitution

Section 2 provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

5.1.2 Police Service

Section 205(3) provides that:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

5.2 The Liquor Act, 1989

5.2.1 Proof of sale of liquor by non-holders
Section 167(c) provides that:

“Evidence in any criminal proceedings that any person who is not the holder of a licence-…
(c) had on his premises more liquor than was reasonably required for his personal use and for the use of any person residing thereon;…
shall be prima facie proof of the sale of liquor by the first-mentioned person.”

5.3 The Criminal Procedure Act, 1977

5.3.1. State may seize certain articles

Section 20 provides in this regard that:

“The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”

5.3.2 **Circumstances in which article may be seized without search warrant**

Section 22 provides that:

“A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.”

5.3.3 **Wrongful search an offence, and award of damages**

Section 28(1) provides that:
“A police official-

(a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25(1); or

(b) who, without being authorised thereto under this Chapter-

(i) searches any person or container or premises or seizes or detains any article; or

(ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25(1),

shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award under subsection (2).

5.3.4 Disposal by police official of article after seizure

In this regard section 30(a) provides that:

“A police official who seizes any article referred to in section 20 or to whom any such article is under the provisions of this Chapter delivered-

(a) may, if the article is perishable, with due regard to the interest of persons concerned, dispose of the article in such a manner as the circumstances may require;…”
5.3.5 Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

Section 31(1)(a) provides that:

“If no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.”

5.4 Standing Order (General) 333

The relevant standing orders of the SAPS provide as follows:

333.47.1:

“All confiscated liquor shall be destroyed on the authority of an officer within the relevant region (regional-, district-, and station level). Destruction shall take place in the presence of an officer.”

333.47.2:
“The officer in whose presence the liquor is destroyed, and the member who destroys it, shall both sign the destruction certificate in the appropriate column of the Property Register.”

333.47.3:

“The bottles or other containers are to be sold and the proceeds thereof deposited in the usual manner.”

333.48.1.1:

“The spilling of liquor or any other matter in a storm water conduit, or even on the ground, is an undesirable practice, because it promotes water pollution. This is also a contravention of Section 23 of the Water Act, 1956.”

333.48.1.2:

“The local authority shall be consulted beforehand, in order to obtain a spill point in the sewerage system where disposal can take place.”

333.48.1.3:
“If a local authority or a sewerage system does not exist, the relevant regional representative of the Directorate, Pollution Control of the Department of Water Affairs must be contacted beforehand.”

333.54.1:

“If an exhibit is not required for purposes of evidence or a court order, or if criminal proceedings are not instituted, it shall be returned to the person from whom it was seized, if he or she may lawfully possess it, or to the person who may lawfully possess it. Such a person shall be notified by registered post at his or her last known address by means of a form SAPS 290 completed in duplicate, that he or she may take delivery of the exhibit. The receipt of the registered post shall be filed with the duplicate of the form SAPS 290 in the file prescribed in SO 334.9. This manner of disposing of an exhibit may take place on the instructions of the Station Commissioner.”

333.56.2.1:

Should the exhibit be of such a nature that it cannot be sold to the advantage of the State it may be destroyed on the direction of the officer or inspectors who have been appointed station commissioners and/or commanders of branches or units attached to the Divisional Commissioner: Crime Prevention declaring it forfeited to the State. A suitable instruction to that effect shall be
made in the appropriate column of the SAPS 13 by the officer concerned. The
destruction shall be carried out in the presence of an officer. The officer in
whose presence the exhibit is destroyed, as well as the member who
destroys the exhibit, shall both sign the destruction certificate in the Property
Register.

6. EVALUATION OF FACTS AND FINDINGS

6.1 The seizing and destroying of the liquor

6.1.1 On 16 July 2004 liquor was seized from premises situated at no. 15353
Hutshe Segolodi Street. The liquor was confiscated in terms of section
167(c) of the Liquor Act, 1989. Galeshewe Cas: 610/07/2004 was then
opened and a Written Notice to Appear in Court (J 534) was issued to Mr
Serame Riet. On 16 August 2004, the Senior Public Prosecutor withdrew
the charges against the accused in the matter and also noted an instruction
in the Investigation Diary section of the police case docket that the liquor
should be returned. On 9 September 2004, Director Pistorius gave
instruction that the liquor should not be given back, but rather that it must be
destroyed.

6.1.2 The justification for these actions as determined during the investigation
was as follows:
i. “Section 154 read with section 167 of the Liquor Act, no. 27 of 1989, read with Schedule 2 of the National Liquor Act, no 59 of 2003, creates an offence if a person possess more liquor, than that what he can reasonable consume.

ii. Therefore it would create a position where any person who is placed in possession of the liquor in question will be deemed to be committing an offence.

iii. Given the Provisions of Section 31 of the Criminal Procedure Act, no. 51 of 1977, the liquor can not be returned.”

iv. The instruction to return the liquor was given by the prosecution and not by a magistrate making an order.

6.1.3 On 8 August 2005, the liquor was destroyed by spilling it on an old mine heap at Tiptoe (where there was no risk of the spillage running into a water system or effecting humans as the area is deserted, according to Captain G. Peters).

6.1.4 The reason furnished by Captain P. Dikgetsi for the delay in destroying the liquor was that the case docket was at their Provincial Office awaiting instruction as to how the liquor should be disposed of.
6.2 The procedure followed in destroying the liquor

6.2.1 Provisions 333.47.1- 333.47.3 as found in the SAPS Standing Order (General) 333, from the documents perused seem to have been complied with.

6.2.2 As to provisions 333.48.1.1- 333.48.1.3, this office found that not only were these provisions not complied with but, the relevant four officers whom were interviewed, had not even been aware of the aforementioned provisions to the extent that they made copies of the provisions for future purposes.

6.3 The return of the liquor

6.3.1 After the Senior Public Prosecutor had withdrawn the charges and instructed the Investigating Officer to return the liquor, the provisions of section 167(c) of the Liquor Act, 1989, were no longer applicable. The possession of the suspect became lawful as there were no criminal proceedings and the issue of \textit{prima facie} evidence of the sale of liquor was no longer relevant. In fact, section 31(1)(a) of the Criminal Procedure Act, 1977, underpins the return of articles to the person from whom it was seized in such circumstances.

4. KEY FINDINGS

The following key findings were made:
4.1 The seizure of the liquor can be justified having regard to the provisions of section 167(c) of the Liquor Act, 1989.

4.2 The destruction of the liquor of the liquor was flawed in two respects, firstly the liquor should have been returned to the accused and secondly the abovementioned provisions of the Standing Order with regard to the spillage of the liquor was not adhered to. The SAPS should have adhered to the prosecutor’s instruction.

5. RECOMMENDATIONS

In terms of the provisions of Section 182(1)(c) of the Constitution and Section 6(4)(c)(ii) of the Public Protector Act, 1994, it is recommended that the Provincial Commissioner of the SAPS, Northern Cape:

5.1 In light of the improper prejudice suffered by the lawful owner of the said liquor, refer the matter to the appropriate claims section within the SAPS (the Loss Management Unit), to consider compensating the aforementioned lawful owner for the loss suffered as a result of the wrongful failure to return the liquor in question.
5.2 Investigate the decision of Director Pistorius to retain and destroy the liquor in question, to establish whether or not it was regular and proper in the circumstances.

ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA

DATE: ______________

Assisted by:

B G Sithole, Provincial Representative: Northern Cape and
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