
PUBLIC PROTECTOR
SOUTH AFRICA

Report No 27 of 2019/20

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE DEPARTMENT OF HOME AFFAIRS IN RESPECT OF THE ALLEGED IMPROPER REVOCATION OF A MINOR CHILD'S BIRTH CERTIFICATE AND CONSEQUENTLY HIS SOUTH AFRICAN CITIZENSHIP
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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, (the Constitution) and section 8(1) of the Public Protector Act, 23 1994 (Public Protector Act).

(ii) This report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into a complaint lodged by Mr K Letswalo, the father of a minor child whose birth certificate was revoked by the Department of Home Affairs Lebowakgomo Office (the Department) without providing any reason for the revocation.

(iii) The Complainant is a South African citizen who had a child with a Zimbabwean national who held a Permanent Residence Permit in the Republic at the time when the child was born on 11 December 2014.

(iv) In the main, the complaint was that his child was born on 11 December 2014 and on 5 January 2015 a birth certificate was issued for the child by the Department.

(v) The Complainant approached the South African Social Security Agency (SASSA) to apply for a child support grant and he was referred back to the Department to confirm the validity of the birth certificate.

(vi) When he visited the Lebowakgomo Home Affairs offices an official from the said office allegedly defaced the birth certificate of the child by writing the words "cancelled" across the certificate. The said official advised the Complainant that she was cancelling the birth certificate of the child on the Department’s system.
(vii) The Complainant alleged that this revocation was improper and no due process was followed, whilst the Department alleges that they acted within the prescripts of their policies.

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

(a) Whether the Department improperly revoked the child's birth certificate and consequently the child's citizenship and did this amount to maladministration?

(b) Whether the Department failed to follow due process in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) when it revoked the child's birth certificate and does this amounts to maladministration?

(c) Whether the Complainant and his child were improperly prejudiced by the conduct of the Department in the circumstances, as envisaged by section 6(4) (a) (v) of the Public Protector Act?

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

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

(a) Regarding whether the Department improperly revoke the child's birth certificate and consequently the child's citizenship and did this amount to maladministration?

(aa) The allegation the Department improperly revoked the child's birth certificate and consequently the child's citizenship is substantiated.
In terms of the Citizenship Act, the child had citizenship by virtue of his father (The Complainant) being a South African citizen. Furthermore, in terms of the Births Act, there was no requirement that the Complainant first undergo a paternity test to prove that he is the child’s father. The revocation of the child’s birth certificate was therefore improper and unlawful.

The conduct of the Department therefore constitutes improper conduct in terms of section 182(1) (a) of the Constitution and amounted to maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.

Regarding whether the Department fail to follow due process in terms of PAJA when it revoked the child’s birth certificate and does this amount to maladministration?

The allegation that the Department failed to follow due process when it revoked the child’s birth certificate is substantiated.

The Department failed to adhere to the prescripts of PAJA and section 195 of the Constitution when it revoked the child’s birth certificate without first conducting a formal investigation thus giving the Complainant an opportunity to make representations and for failing to provide reasons for its decision.

The conduct of the Department therefore constitutes improper conduct in terms of section 182(1) (a) of the Constitution and amounts to maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.
Whether the Complainant and his child improperly prejudiced by the conduct of the Department in the circumstances, as envisaged by section 6(4) (a) (v) of the Public Protector Act?

(aa) The allegation that the conduct of the Department caused the Complainant’s minor child to suffer prejudice is substantiated.

(bb) The cancellation of the child’s birth certificate accompanied by the request that the Complainant undertake a paternity test were improper and had no basis in law. The Department infringed the child’s constitutional right to citizenship. Furthermore the Department’s conduct contravened the constitutional injunction to treat the child’s best interests with paramount importance in every matter concerning a child.

(cc) The conduct of the Department therefore amounts to improper prejudice as envisaged in section 6(4) (a) (v) of the Public Protector Act.

(xi) The remedial action I considered appropriate in terms of section 182(1)(c) of the Constitution is that:

(a) The Acting Director-General of the Department of Home Affairs to:

(aa) Take urgent steps to ensure that the identity number of the Complainant’s child is reinstated and a birth certificate is issued to the child within fourteen (14) working days from the date of this report. I have noted that the Department has in response to my notice issued in terms of section 7(9) of the Public Protector Act accepted that the Department did not follow due processes when revoking the birth registration and made an undertaking to reinstate the identity number of the child and a birth certificate is issued to the child;
(bb) Within fourteen (14) working days from date of this report, issue a letter of apology to the Complainant, for the inconvenience and prejudice that the Complainant and his family suffered as a result of the Department's failure to follow due process when revoking the child's birth registration;

(cc) Ensure that an internal investigation is conducted to ascertain the identity of the official who destroyed the child's birth certificate and take appropriate action within sixty (60) working days of issuing this report; and

(dd) Ensure that staff at the Lebowakgomo DHA office are trained on the DHA prescripts and the provisions of PAJA within ninety (90) working days of this report to avoid recurrence of this matter.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE DEPARTMENT OF HOME AFFAIRS IN RESPECT OF THE ALLEGED IMPROPER REVOCATION OF A MINOR CHILD’S BIRTH CERTIFICATE AND CONSEQUENTLY HIS SOUTH AFRICAN CITIZENSHIP

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (Public Protector Act).

1.2. This report is submitted to:

1.2.1. The Acting Director-General of the Department of Home Affairs, Mr Thulani Mavuso; and

1.2.2. The Complainant, Mr K Letswalo.

1.3. A section 7(9) notice was sent to the Department on 11 March 2019, affording it and opportunity to respond to my intended findings, the response of the Department is incorporated in this report.

1.4. This report relates to my investigation into allegations of maladministration by the Department in respect of the alleged improper revocation of a minor child’s birth certificate and consequently his South African citizenship.

2. THE COMPLAINT

2.1 The Complainant is Mr Kgaogelo Patrick Letswalo, an adult male, who made the following allegations:
2.1.1 He is the biological father of Moledi Jaden Letswalo, a male minor child born in the Republic of South Africa, (the child);

2.1.2 He approached the Department after his child's birth certificate was destroyed by an official at the Department's Lebowakgomo offices in Limpopo;

2.1.3 The above mentioned child's mother is a Zimbabwean national who had a valid permit to be in South Africa at the time of the child's birth;

2.1.4 The Department issued the child with a birth certificate on the basis that the (Complainant) is a South African citizen, and it was later revoked by an official from the Lebowakgomo office without providing valid reasons, save for stating that the mother is not a South African citizen; and

2.1.5 The child was born in South Africa and that he is the biological father of the said child; and he advised the Department of this at all relevant times.

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 affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

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

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

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

3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);
3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

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

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

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

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

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));
“Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

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

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

3.6.2 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 (para 100 and 101):

(a) Conduct an investigation;

(b) Report on that conduct; and

(c)To take remedial action.

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

3.6.4 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 (para105).

3.6.5 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (para 107 and 108);
3.6.6 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);

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

3.8 The institutions mentioned in this report are organs of state and their conduct amounts to conduct in state affairs, as a result the complaints fall within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

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

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The complaint was classified as a service delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act.

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

4.1.4 The investigation process included an exchange of correspondence with the Complainant and the Department, as well as an analysis of relevant
documentation, research conducted, and the consideration and application of relevant laws, regulatory framework and jurisprudence.

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:

(i) What happened?
(ii) What should have happened?
(iii) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?
(iv) In the event of maladministration or impropriety 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 had the right to revoke the birth certificate of the child after it was issued and if so, whether due process was followed in the manner in which it was revoked.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the Department.

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

4.2.5 During the investigation process, I issued notices in terms of section 7(9)(a) of the Public Protector Act (section 7(9) Notice) to the Department on 11 March 2019 to afford them an opportunity to respond to my provisional findings. The response from the Department is incorporated in this report.

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

4.3.1 Whether the Department improperly revoked the child’s birth certificate and consequently the child’s citizenship and did this amount to maladministration?

4.3.2 Whether the Department failed to follow due process in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) when it revoked the child’s birth certificate and does this amounts to maladministration?

4.3.3 Whether the Complainant and his child were improperly prejudiced by the conduct of the Department in the circumstances as envisaged by section 6(4) (a) (v) of the Public Protector Act by the conduct of the Department in the circumstances?

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 The written complaint lodged by the Complainant, dated 18 August 2016;

4.4.1.2 Correspondence between the Complainant and the Department;
4.4.1.3 Copies of the application for Notice of Birth to the Department;

4.4.1.4 Copies of the Identity Documents submitted to the Department in support of the application for the Notice of Birth of the minor child;

4.4.1.5 Copy of the birth certificate cancelled by the Department;

4.4.1.6 Minutes of the meeting held on 30 November 2017 between officials of the Public Protector and the Department;

4.4.1.7 Report submitted by the Department, dated 22 March 2017;

4.4.1.8 Report submitted by the Department, dated 22 September 2017.

4.4.2 **Correspondence sent and received**

4.4.2.1 Email correspondence to the Department raising the complaint, dated 6 December 2016;

4.4.2.2 Email correspondence from the Complainant to the Department, dated 15 February 2017;

4.4.2.3 Email correspondence from the Department to the Public Protector team dated 23 March 2017 where initial report was provided;

4.4.2.4 Letter from the Public Protector team to the Senior Manager: Customer Complaints; dated the 7 September 2017.

4.4.2.5 Notice in terms of section 7(9) of the Public Protector Act to the Department; and

4.4.2.6 Email correspondence from the Department in reply to the section 7(9) notice.

4.4.3 **Legislation and other prescripts**

4.4.3.2 The Public Protector Act, 23 of 1994; (Public Protector Act).

4.4.3.3 The Births and Deaths Registration Act, 51 of 1992; (The Births Act).

4.4.3.4 South African Citizenship Act, Act 88 of 1995; (The Citizenship Act).

4.4.3.5 Promotion of Administrative Justice Act, 3 of 2000; (PAJA).


4.4.3.7 Standard Operating Procedure, Departmental Circular Number 5 of 2014; (SOP).
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 revoked the child’s birth certificate and consequently the child’s citizenship and did this amount to maladministration?

*Common cause issues*

5.1.1 The Complainant is a South African citizen and he has declared that he is the biological father of the child who was born in Lebowakgomo, Limpopo Province on 11 December 2014. Ms Agnes Chitiki is a Zimbabwean national and is the biological mother of the child who held a valid permit at the time of the child’s birth in South Africa.

5.1.2 The birth was registered at the Lebowakgomo Home Affairs office on 5 January 2015 and a birth certificate was issued to the parents on the same day. The Complainant subsequently visited the South Africa Social Security Agency (SASSA) to apply for a child support grant for the child and was referred back to the Department to confirm the validity of the birth certificate.

5.1.3 It was upon this instruction that the Complainant visited the Lebowakgomo Home Affairs offices once more where an official from the said office defaced the birth certificate of the child by writing the words “cancelled” across the certificate. The said official advised the Complainant that she was cancelling the birth certificate of the child on the Department’s system.
5.1.4 That the child’s birth was subsequently registered in Zimbabwe by the child’s mother. The parents have since been married under South African law and are residing with the child in South Africa.

*Issues in dispute*

5.1.5 The issue for my determination is whether or not it was improper for the Department to revoke the child’s birth certificate on 2 February 2015, after the birth was registered and further if the revocation was justified, whether due process was followed in the manner in which the certificate was revoked.

5.1.6 In addition, the Complainant alleges that the only reason provided to him at the time of the revocation of the birth certificate, was that the mother of the child was a foreigner.

5.1.7 In an internal report, dated 22 March 2017, the Department submitted that the initial registration of the child’s birth was improper because his mother is a foreign national and therefore a paternity test had to be submitted to, by the father. The Department, in its response to the Public Protector placed its reliance on a Standard Operating Procedure (SOP) which was an internal document circulated within the Department.

5.1.8 According to this SOP, the birth certificate should not have been issued without the Complainant first undergoing a paternity test. Furthermore, the Department submitted an additional report on 22 September 2017 reiterating the point that the initial birth registration was improper because a paternity test was not conducted. In addition, the Department alleges that the Complainant failed to submit the following documents which are required when a birth is registered:

(i) DHA 24/PB which is (Annexure 1D) proof of the birth attested to by the medical practitioner who attended to the birth and examined the mother or the child after birth;

(ii) Biometrics in the form of a palm or foot/fingerprint of the child; and
(iii) DHA/288C - An affidavit from the father of the child stating that he is the father of the child and his relationship with the mother.

5.1.9 At a meeting held on 30 November 2017 at the Department's Offices the Complainant's matter was discussed. The Department again confirmed its position that the submission of paternity test results is a requirement for a birth certificate to be issued.

5.1.10 In support of this contention the Department relied on sections 5 and 7(1) read with section 11 of the Births and Deaths Registration Act, 51 of 1992 (The Births Act). A detailed outline of these sections will be provided below. Furthermore, the Department submitted that in terms of its current SOPs, an official who registers the birth may request a paternity test if they have a suspicion regarding the legitimacy of the paternity of the child (my emphasis). According to the Department these provisions give the official who registers the birth the discretion to request additional evidence beyond that which is formally stated in the Act and its Regulations. The Department stated that the officials requested a paternity test because of suspicions arising from the fact that one of the parents of the child was a foreign national.

5.1.11 The Complainant submitted that the initial birth certificate was valid because he and Ms Chitiki submitted all the documents as per the instructions of the officials of the Department on the day of application. The Complainant maintains that the revocation of the child's birth certificate was improper and that the Department did not provide him with any valid reasons in this respect even after he raised the matter formally.

*Application of the relevant law:*

5.1.12 According to Section 2(1) (b) of the South African Citizenship Act, Act 88 of 1995, (The Citizenship Act) any person who is born in South Africa and whose parent at the time of their birth is a South African citizen, shall be a South African citizen by birth.
5.1.13 Section 9(1) of the Births Act requires the parents of any child who is born alive to give notice of birth to the Director-General within thirty (30) days of the child’s birth.

5.1.14 Section 9(5) of the Births Act provides that a person who has given notice of birth shall be issued with a birth certificate for that child or an acknowledgement of receipt in respect of the notice of birth in the prescribed form.

5.1.15 Regulation 3 of the Regulations to the Births Act, which regulates the registration of births for children born of South African citizens, provides that a notice of birth must be completed in the prescribed form and accompanied by a number of documents including:

(i) Fingerprints of the parents, which shall be verified online against the national population register;

(ii) A certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;

(iii) A certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen;

5.1.16 In terms of sub-regulation 3(5), a notice of birth which does not meet the above mentioned requirements shall not be accepted.

5.1.17 Regulation 12 which regulates the notice of birth of children born out of wedlock, provides the following with regard to a notice of birth of an extra-marital child:

“(1) A notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.

(2) The person who acknowledges that he is the father of the child born out of wedlock must—

(a) enter his particulars and sign on Part D of Form DHA-24 illustrated in Annexure 1A or on Part D of Form DHA-24/LRB illustrated in Annexure 1B, as the case
may be, at the offices of the Department and in the presence of an official of
the Department as contemplated in section 10 (1) (b) of the Act;

(b) submit an affidavit on Form DHA-288/G illustrated in Annexure 2D in which he—
   (i) states his relationship to the mother; and
   (ii) acknowledges paternity of the child; and

(c) have his fingerprints verified online against the national population register:
   Provided that in the event of the father being a non-South African citizen, he
   must submit a certified copy of his valid passport and visa or permit,
   permanent residents identity document or refugee identity document.

5.1.18 The Department relied on a number of provisions which in its opinion form the
basis for requesting a paternity test. Reference was first made to Section 5 of the
Births Act. The section reads as follows:

“5. Custody of records and registration of births and deaths.—

(1) The Director-General shall be the custodian of all—

(a) documents relating to births and deaths required to be furnished under this Act
   or any other law; and

(b) records of any births and deaths preserved, prior to the commencement of this
   Act, in terms of the Acts repealed by this Act.

(2) Particulars obtained from the documents referred to in subsection (1) (a) shall be
   included in the population register and such inclusion is the registration of the births
   and deaths concerned.

(3) In the case of a non-South African citizen who sojourns temporarily in the Republic,
   particulars obtained from documents mentioned in subsection (1) (a) shall not be
   included in the population register and the issuing of a certificate in respect of such
   particulars is the registration thereof”.

5.1.19 The Department furthermore placed reliance on section 7(1) of the Births Act. This
section provides that the Director-General may require the person who has
furnished any particulars in terms of the Act to furnish him with proof of the
correctness of such particulars; and investigate or cause to be investigated any matter in respect of which particulars are to be used for the registration thereof in terms of section 5.

5.1.20 Lastly, the Department placed reliance on section 11. This section provides that “An amendment of the particulars of a person who has acknowledged himself as a father of a child as contemplated in subsection (4) and section 10 (1) (b) of the Act shall be supported by the prescribed conclusive proof of that person being the father of the child.” [my emphasis]

5.1.21 It must be noted that the only document which the Department referred me to that expressly refers to the requirement of a paternity test was in its SOPs; the relevant section of the SOP reads as follows:

“1(b) Where one of the parents is a non-South African citizen (father/mother)

Where a Notice of Birth is given within 30 days of the birth of the child NO paternity test is required UNLESS where an official of the Department has reasonable suspicion regarding the paternity of the child (based on the information provided in support of the Notice of Birth). In this event, the official may request the parents to provide conclusive proof of paternity in the form of paternity tests not older than 3 months and issue them with a Referral Letter (see Annexure “A” for template) to visit any Centre of National Health Laboratory Services, as the designated institution to conduct paternity tests (see Annexure “B” for list nearest Centre)”[our emphasis].

5.1.22 In terms of this SOP, it would appear that there are two avenues which can be followed when the registration of the birth of a child born to a foreign parent is registered namely: that the Department can within 30 days issue the birth certificate without requesting a paternity test or secondly in the event that there is a “reasonable suspicion regarding the paternity of the child”, the official can request that a paternity test be undertaken by the father of the child and provide a referral letter to the applicants.
5.1.23 In my view, these options are provided in the alternative and cannot be read to mean that both options can be exercised in any given situation. It thus follows that a birth certificate can validly be issued to a child with a foreign parent even in the event that there was no paternity test taken which was the case in this instance.

5.1.24 In addition, it is clear that the SOP does not make provision for the revocation of a birth certificate where one has already been issued upon exercising one’s discretion. Furthermore it clearly states that where you exercise your discretion and decide that a paternity test is necessary, a referral letter has to be issued to the applicants.

5.1.25 The Act does not expressly mention the requirement of a paternity test. As such, it is only the SOP which expresses this requirement and to that end the Department’s reliance on this requirement is questionable to say the least.

5.1.26 The Department contended however, that the reference in section 7(1) to furnishing the Department with “proof” includes this requirement by necessary implication. Whatever the reference to “proof” in section 7(1) means it surely cannot include additional requirements not expressly provided for elsewhere in the Act or its regulations.

5.1.27 In *S v Zuma* [1995] ZACC 1, the Constitutional Court held that when interpreting legislative provisions, one cannot allow them to mean whatever one wants. As such one must engage in “interpretation not divination.” Furthermore, it is a general principle of statutory interpretation that legislative provisions must be interpreted in a manner that does not unduly strain the language used. It is submitted therefore that the reading of the Act advanced by the Department unduly strains the language of the Act and amounts to “reading in.”

5.1.28 There is a stronger reason why this interpretation must be rejected. In terms of section 39(2) of the Constitution, when interpreting legislation one must promote the spirit, purport and objects of the Bill of Rights. Important considerations in this regard are the child’s rights to *inter alia*, dignity, citizenship and the right not to be
unfairly discriminated on the grounds of birth. Furthermore, there are the constitutional values of the rule of law, transparency, accountability and openness.

5.1.29 According to the Department, the official who registers the birth has the discretion to request a paternity test if he or she has a *reasonable suspicion* regarding the legitimacy of the child’s birth. Several things must be said about this:

5.1.29.1 First, this requirement that an official exercises such a discretion is based on the SOPs and not the Act. It is trite law however that the SOPs gain their validity from the Act and not the other way around.

5.1.29.2 Secondly, there appears to be no basis or guidelines upon which this “suspicion” is entertained. It would appear that the official has *carte blanche* in deciding what a “reasonable suspicion” is in any given situation. This would have the effect that personal opinion and/or prejudice can result in arbitrary decisions being taken.

5.1.29.3 Arbitrariness is contrary to the rule of law and the proper rational exercise of discretion. Furthermore the broad and unfettered discretion which the Department contends for, ultimately results in unfair discrimination. In the present case, the Department conceded that the only basis upon which the official had a “reasonable suspicion” in this case was the fact that one of the child’s parents was a foreign national.

5.1.29.4 It should be pointed out that I accept that there may well be good reason for the legislature to impose additional safeguards when the birth of a child born of a foreign national is registered. However, such requirements must be rational and uniform in their application. They must furthermore be expressly and not implicitly provided for in the legislation.

5.1.29.5 The argument advanced by the Department results in unfair discrimination on the grounds of birth. It enables arbitrariness which harms the dignity and the right to citizenship of children placed in the Complainant’s child’s position. The
Department’s interpretation, self-evidently undermines important constitutional rights and values; and to that end must be rejected as bad in law.

5.1.29.6 Lastly, it is submitted that it is not clear whether the official who revoked the birth certificate entertained any suspicion at all. To the contrary, it appears that the Department is now relying on these sections after the fact in attempting to find an explanation for an otherwise improper action.

5.1.30 The Department’s reliance on s 11 should also be rejected insofar as that section relates to instances in which a document had been amended. However in this matter it was not contended that there was any amendment of particulars. As such the reliance on the reference to “conclusive proof” in section 11 as a basis for requiring a paternity test must also be rejected for this reason alone.

5.1.31 Evidently from the abovementioned provisions, as long as one of the child’s parents was a South African citizen at the time of his birth, the child became a South African citizen and was entitled to be issued with a birth certificate to this effect.

5.1.32 The fact that the child’s mother was a foreigner was only relevant insofar as she was required to submit a copy of her passport and/or permit along with the notice of birth in the prescribed form.

5.1.33 As far as issues of paternity are concerned, the Births Act read with the Regulations only require an affidavit from the father of the child acknowledging his paternity and stating his relationship to the child’s mother. Furthermore, the Regulations require the father’s fingerprints to be verified in the national population register.

5.1.34 To this end, it is clear that sufficient safeguards already exist in the legislative framework to prevent people who are not the _bona fide_ offspring of South Africans from fraudulently having birth certificates issued to them granting them South African citizenship.
The Department’s contention that the child could only have been issued with a birth certificate if the Complainant had undertaken a paternity test therefore has no basis in law and must consequently be rejected.

Furthermore, the SOP upon which the Department places its reliance, a birth certificate can be issued without a paternity test having been conducted. It is clear that the official who issued the birth certificate on 5 January 2015 exercised his discretion and found that there was no need for a paternity test to be issued and consequently issued the birth certificate. If this was not the case, he should have declined to register the birth and issued a referral letter in order for the Complainant to undergo a paternity test.

The Department’s official at Lebowakgomo was therefore obliged to follow the abovementioned legislative prescripts. Had the legislative prescripts been complied with, the official would have found no lawful or legitimate reason to destroy the child’s birth certificate.

**Conclusion:**

Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that the revocation of the child’s birth certificate was improper and had no basis in law.

**5.2.** Did the Department fail to follow due process in terms of PAJA when it revoked the child’s birth certificate and does this amount to maladministration?

**Common Cause Issues:**
5.2.1 It is common cause that when the Complainant returned to the Department’s offices at Lebowakgomo, an official of the Department defaced the child’s birth certificate by writing the words “cancelled” across it, thereby revoking the said birth certificate the child’s birth certificate.

*Issues in Dispute:*

5.2.2 The issue for my determination is whether the Department followed due process in terms of PAJA when it revoked the child’s birth certificate.

5.2.3 The Complainant submitted that at the time of the revocation no reasons whatsoever were provided to him or the child’s mother by the Department.

5.2.4 In an internal report, dated 22 March 2017, the Department submitted that the reason for the revocation was the fact that the child’s mother was a foreign national and consequently a paternity test should have been submitted. This was also confirmed in the report dated, 22 September 2017, however both reports were only provided after I had already intervened in the matter.

5.2.5 The Complainant submitted furthermore that the child’s birth certificate was revoked then and there without any formal process or investigation being undertaken first. The Department submitted as stated above, that the official revoked the birth certificate on the basis of a suspicion regarding the legitimacy of the paternity of the child. This was due to the fact that one of the child’s parents was a foreign national. The Department did not submit that any formal process or investigation beyond this was conducted prior to the revocation.

*Application of the relevant law:*

5.2.6 In terms of my reading of the Births Act and its regulations, no provision is made for the revocation of a birth certificate after one has been issued. One is consequently required to look further into legislation to ascertain what is relied upon when revoking a birth certificate.
5.2.7 In terms of Section 33 of the Constitution of the Republic of South Africa, 1996 (The Constitution) everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It furthermore provides that every person whose rights have been adversely affected by administrative action has the right to be given written reasons.

5.2.8 In terms of section 1 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) administrative action is defined as any decision taken or any failure to take a decision by an organ of state when exercising 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.

5.2.9 Section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

5.2.10 Section 3(2) of PAJA furthermore provides the following:

"(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)—
(l) 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".

5.2.11 Section 195 of the Constitution requires public administration to promote and maintain a high standard of professional ethics and requires that services be
provided impartially, fairly, equitably and without bias. It further requires public administration to be accountable and transparent.

5.2.12 Evidently, the decision to arbitrarily revoke the child's birth certificate is one that adversely affects his rights *inter alia*, to not to be deprived of his citizenship.

5.2.13 There is no doubt that the issuing and revocation of a birth certificate is essentially administrative in nature and constitutes an exercise of public power sourced in legislation such as the Births Act and its accompanying regulations.

5.2.14 In light of the fact that the revocation of the child’s birth certificate constituted administrative action, the Department was obliged to undertake a formal investigation prior to revoking/destroying the birth certificate.

5.2.15 This would furthermore entail providing the Complainant with the opportunity to make representations. Once an investigation had been concluded and a decision had been taken that the birth certificate should be revoked, the reasons thereto should have been communicated to the Complainant. This is essential because it would give the Complainant the opportunity to challenge the decision through the Department’s internal appeal processes or alternatively take it on judicial review.

5.2.16 According to the evidence in my possession however the birth certificate was revoked there and then without any of the above steps being taken first. It was only revoked on the basis of an alleged “suspicion” on the part of the official.

5.2.17 To this end, the conduct of the Department not only violated the Complainant’s right to just administrative action as envisaged in section 33 of the Constitution, read with the prescripts of PAJA but also failed to uphold the high standard of professional ethics and transparency envisaged by s 195 of the Constitution.

*Conclusion:*
5.2.18 Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that the decision to revoke a birth certificate constitutes administrative action and therefore requires compliance with PAJA and the values of an ethical and professional public administration in section 195 of the Constitution.

5.2.19 The Department failed to follow due process when officials revoked the child’s birth certificate and did not provide any reasons thereto.

5.2.20 Any investigation and report issued by the Department should have been conducted prior to and not after the revocation of the birth certificate. To this end the Department failed to adhere to PAJA and the constitutional values enshrined therein.

5.3. Regarding whether the Complainant and his child were improperly prejudiced by the conduct of the Department in the circumstances as envisaged by s 6(4) (a) (v) of the Public Protector Act?

Common Cause Issues

5.3.1 It is common cause that the Complainant visited the Lebowakgomo Home Affairs offices for a second time after receiving a birth certificate for his child. An official from the said office defaced the birth certificate of the child by writing the words “cancelled” across the certificate. The said official advised the Complainant that he was cancelling the birth certificate of the child on the Department’s system.

Issues in dispute

5.3.2 The issue for my determination is whether the Complainant was improperly prejudiced by the conduct of the Department.

5.3.3 The Complainant contends that his child has a constitutional right to citizenship by virtue of the fact that as the father, he is a South African citizen and the conduct of
the Department is depriving his child the right to citizenship thereby improperly prejudicing him.

5.3.4 Furthermore, the Department’s insistence that the Complainant undertakes a paternity test because the child’s mother is a foreign national unfairly discriminates against the child and will also cause him financial prejudice as he has to pay for the paternity test.

*Application of relevant law*

5.3.5 Section 182(1) (c) of the Constitution requires me to consider whether any of my findings of maladministration or improper conduct in state affairs resulted in prejudice to the Complainant, and to take appropriate remedial action.

5.3.6 In terms of section 20 of the Constitution, no citizen may be deprived of their citizenship. Section 28(2) of the Constitution provides that a child’s best interests are of paramount importance in every matter concerning the child.

5.3.7 In terms of s 9(3) of the Constitution, the state may not unfairly discriminate against any person on *inter alia*, the grounds of birth.

5.3.8 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 dependents, appropriate social assistance.

*Conclusion:*

5.3.9 The conduct of the official of the Department in writing the words “cancelled” on the birth certificate, amounts to defacing and/or altering and tempering with the authenticity of the birth certificate which in essence rendered it worthless. This implies that the father and the child were intentionally denied the opportunity to apply for social assistance as the birth certificate was the only enabling document
that is required in the application for social assistance. In so doing, the Department, through the official denied the Complainant and his minor child the right to access to appropriate social assistance, as envisaged in section 27(1)(c) of the Constitution.

5.3.10 Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that the Complainant and his child were improperly prejudiced by the Department’s conduct.

5.3.11 The conduct of the Department in general was not consistent with an approach that gives paramount importance to the best interests of the child at all times by ensuring that the child obtained a birth certificate as he was lawfully entitled to one. To this end, the Department violated the child’s abovementioned constitutional rights.

6. FINDINGS

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

6.1 Regarding whether the Department improperly revoke the child’s birth certificate and consequently the child’s citizenship and did this amount to maladministration?

6.1.1 The allegation the Department improperly revoked the child’s birth certificate and consequently the child’s citizenship is substantiated.

6.1.2 In terms of the Citizenship Act, the child had citizenship by virtue of his father (The Complainant) being a South African citizen. Furthermore, in terms of the Births Act,
there was no requirement that the Complainant first undergo a paternity test to prove that he is the child’s father. The revocation of the child’s birth certificate was therefore improper and unlawful.

6.1.3 The conduct of the Department therefore constitutes improper conduct in terms of section 182(1) (a) of the Constitution and amounted to maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.

6.2 Regarding whether the Department fail to follow due process in terms of PAJA when it revoked the child’s birth certificate and does this amount to maladministration?

6.3.1 The allegation that the Department failed to follow due process when it revoked the child’s birth certificate is substantiated.

6.3.2 The Department failed to adhere to the prescripts of PAJA and section 195 of the Constitution when it revoked the child’s birth certificate without first conducting a formal investigation thus giving the Complainant an opportunity to make representations and for failing to provide reasons for its decision.

6.3.3 The conduct of the Department therefore constituted improper conduct in terms of section 182(1) (a) of the Constitution and amounted to maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.

6.3 Regarding whether the Complainant and his child were improperly prejudiced by the conduct of the Department in the circumstances, as envisaged by section 6(4) (a) (v) of the Public Protector Act?

6.3.1 The allegation that the conduct of the Department caused the Complainant’s child to suffer prejudice is substantiated.
6.3.2 The cancellation of the child's birth certificate accompanied by the request that the Complainant undertake a paternity test were improper and had no basis in law. The Department infringed the child's constitutional right to citizenship. Furthermore the Department's conduct contravened the constitutional injunction to treat the child's best interests with paramount importance in every matter concerning a child.

6.3.3 The conduct of the Department therefore amounts to improper prejudice as envisaged in section 6(4) (a) (v) of the Public Protector Act.

7. **REMEDIAL ACTION**

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

The Acting Director-General of the Department of Home Affairs to:

7.1.1 Take urgent steps to ensure that the identity number of the Complainant's child is reinstated and a birth certificate is issued to the child within fourteen (14) working days from the date of this report. I have noted that the Department has in response to my notice, issued in terms of section 7(9) of the Public Protector Act accepted that the Department did not follow due processes when revoking the birth registration and made an undertaking to reinstate the identity number of the child and a birth certificate is issued to the child;

7.1.2 Within fourteen (14) working days from date of this report, issue a letter of apology to the Complainant, for the inconvenience and prejudice that the Complainant and his family suffered as a result of the Department's failure to follow due process when revoking the child's birth registration;
7.1.3 Ensure that an internal investigation is conducted to ascertain the identity of the official who destroyed the child’s birth certificate and take appropriate action within sixty (60) working days of issuing this report; and

7.1.4 Ensure that staff at the Lebowakgomo DHA office are trained on the DHA prescripts and the provisions of PAJA within ninety (90) working days of this report to avoid recurrence of this matter.

8. MONITORING

8.1 The Acting Director General of the Department must within twenty (20) working days from the date of this report, furnish a report to the Public Protector on the implementation of the remedial action referred to in paragraph 7 of this report.

8.2 Unless the remedial actions taken by the Public Protector are reviewed and set aside by a Court of law, compliance is not optional and same must be complied with within the stated period.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 06/06/2019