Allegations of maladministration by the South Africa Police Service with regard to its handling of an appeal lodged by Constable Boitumelo Godfrey Molehabangoe

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Executive Summary

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

(ii) The report communicates my findings and the remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration by the South Africa Police Service (the SAPS) with regard to its handling of an appeal against the dismissal lodged by Constable BG Molehabangoe (herein referred to as the Complainant).

(iii) I have received a complaint from the Complainant, in which he alleged that: -

(a) He was employed by the SAPS as a Constable from 31 July 2004 and he was suspended on 07 November 2014 pending a disciplinary hearing;

(b) On 28 January 2015, he was dismissed from service and he proceeded to lodge an appeal against his dismissal on 06 February 2015;

(c) In terms of SAPS Disciplinary Regulation 17(9), an appeal must be finalised within thirty (30) days from date of receipt of the appeal;

(d) He was placed on precautionary suspension prior to the finalisation of the disciplinary hearing, and that in terms of Regulation 17(9) of the Disciplinary Code, an employee on precautionary suspension must be allowed to resume his duties pending the outcome of the appeal, should the employer fail to finalise the appeal within thirty (30) days; and

(e) All his attempts to be allowed to resume his duties pending the finalisation of his appeal had been fruitless.
(iv) The main allegations were that the Complainant lodged his appeal with the Appeals Authority, and that his appeal was not finalised within thirty (30) days, and further that he was not allowed to resume his duties when his appeal was not finalised within the thirty (30) day period.

(v) The SAPS in essence did not dispute when the period for calculation of the thirty (30) day period for the finalisation of an appeal commences

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

(a) Whether the SAPS unduly delayed the finalisation of the Complainant's appeal, and if so, whether the conduct of the SAPS constitute improper conduct or maladministration;

(b) Whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty (30) days appeal period, and whether the SAPS improperly failed to reinstate the Complainant's benefits pending the finalisation of the appeal, which was not finalised within thirty (30) days; and

(c) Whether the Complainant suffered any improper prejudice as a result of the alleged improper conduct of the SAPS.

(vii) The investigation process was conducted through written communication with relevant officials of the SAPS, as well the application of all relevant laws and related prescripts.

(viii) Key laws taken into account to assist me to determine if there had been maladministration by the SAPS and prejudice to the Complainant were principally those imposing administrative standards that should have been upheld by the SAPS. Those are the following:
a. The SAPS Disciplinary Regulations\(^1\) which requires that the Appeals Authority finalises an appeal within thirty (30) working days from date of receipt of the appeal, failing which, in cases where the employee is on precautionary suspension or temporarily transferred, the employee must be allowed to resume duties immediately pending the outcome of the appeal.

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

(a) **Whether the SAPS unduly delayed the finalisation of the Complainant’s appeal, and if so, whether the conduct of the SAPS constitutes improper conduct or maladministration:** -

(aa) The allegation that the SAPS unduly delayed the finalisation of the Complainant’s appeal, is substantiated;

(bb) The SAPS failed to finalise the Complainant’s appeal within thirty (30) days after the appeal was received by the Appeals Authority;

(cc) The SAPS acted contrary to Regulation 17(9) of the SAPS Disciplinary Regulations. The SAPS failed to adhere to case law which requires firstly, that a challenge to an employer’s decision to dismiss must take place expeditiously and secondly, that the Regulation should be given its ordinary grammatical meaning;

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

\(^1\) RN643, GG28985, 03 July 2006.
(b) Whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty (30) days appeal period, and whether the SAPS improperly failed to reinstate the Complainant's benefits pending the finalisation of the appeal, if the appeal which was not finalised within thirty (30) days: -

(aa) The allegation that the Complainant should have been allowed to resume his duties pending the finalisation of the appeal, if the appeal was not finalised within thirty (30) days, is substantiated;

(bb) The SAPS failed to allow the Complainant to resume his duties and reinstate his benefits when his appeal was not finalised within thirty (30) days from the date on which he lodged it;

(cc) The SAPS acted contrary to Regulation 17(9) of the SAPS Disciplinary Regulations;

(dd) The SAPS contravened the doctrine of presumption of innocence, which is the principle that one is considered innocent unless proven guilty.

(ee) The SAPS’s conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(c) Whether the Complainant suffered any improper prejudice as a result of the alleged improper conduct of the SAPS: -

(aa) The allegation that the Complainant suffered improper prejudice as a result of the alleged improper conduct of the SAPS, is substantiated;
(bb) The SAPS took more than two years to finalise the Complainant’s appeal. During this period, the Complainant did not have an income. The Complainant also could not apply for any other position because the disciplinary process was not completed and finalised;

(cc) The SAPS conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and improper prejudice as envisaged in section 6(4)(v) of the Public Protector Act.

(dd) Of concern is that the matter of Constable Molehabangoe is similar to the case of Constable Thomas published by me in an earlier report (number 27 of 2017/18 dated 27 November 2017), a copy of which was submitted to the National Commissioner of SAPS.

(x) The appropriate remedial action that I am is taking in terms of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct and maladministration not occurred, is the following: -

The National Police Commissioner to:

(aa) Pay to the Complainant his full salary and benefits, for the period December 2014, (the date on which his salary was stopped) to 16 March 2017, (the date on which the Appeals Authority finalised his appeal). The South African Police Service has accepted this remedial action and made payment to the Complainant on 11 February 2019 an amount that was in lieu of his salary for the period December 2014, (the date on which his salary was stopped) to 16 March 2017, (the date on which the Appeals Authority finalised his appeal);
(bb) Within thirty (30) days from date of this report, pay to the Complainant interest at the prescribed rate of interest in terms of the Prescribed Rate of Interest Act 55 of 1975 to the Complainant from the date the salaries were due until date of payment, that is, pay interest on the amount paid in lieu of his salary for the undue delay to pay his full salary and benefits, for the period December 2014, (the date on which his salary was stopped) to 16 March 2017, (the date on which the Appeals Authority finalised his appeal);

(cc) Within ten (10) working days from date of this Report, issue to the Complainant a letter of apology, apologising for the inconvenience and prejudice that the Complainant suffered as a result of the fact that his appeal was not finalised within thirty (30) days;

(dd) I have taken cognisance that the SAPS has already proceeded to promulgate new Discipline Regulations, and in these Regulations, the SAPS addressed the issue which gave rise to this Report. In terms of the new Regulations, the National Police Commissioner has an automatic right to review a decision to dismiss, and the timeframes within which the Commissioner has to do so, have been drastically reduced. In this regard officials of the SAPS should heed against any re-occurrence of not adhering to the set legal principles.

(ee) To ensure that it provides training and workshops on the new Discipline Regulations to all SAPS staff, including instances where the Safety and Security Sectoral Bargaining Council (SSSBC) and / or the courts pronounce itself on certain aspects of the Discipline Regulations.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE SOUTH AFRICAN POLICE SERVICE WITH REGARD TO ITS HANDLING OF AN APPEAL OF CONSTABLE BOITUMELO GODFREY MOLEHABANGOE

1. **INTRODUCTION**

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

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

1.2.1 The National Police Commissioner, Lieutenant – General KJ Sitole.

1.3 A copy of the report is also provided to Mr BG Molehabagoe, the Complainant, to inform him about the outcome of this investigation.

1.4 The report relates to an investigation into the alleged maladministration by the SAPS with regard to its handing of an appeal against the dismissal of Constable BG Molehabangoe.

2. **THE COMPLAINT**

2.1. The Complainant is a former Constable in the SAPS. He has a wife and three dependants.

2.2. The Complainant approached me on 09 January 2018. In his complaint, he alleged that: -
2.2.1 He was employed by the SAPS as a Constable from 31 July 2004 and was suspended on 07 November 2014 pending a disciplinary hearing;

2.2.2 On 28 January 2015, he was dismissed from service and lodged an appeal against his dismissal on 06 February 2015;

2.2.3 In terms of SAPS Disciplinary Regulation 17(9), an appeal must be finalised within thirty (30) days from date of receipt of the appeal;

2.2.4 He was placed on precautionary suspension prior to the finalisation of the disciplinary hearing, and that in terms of Regulation 17(9) of the Disciplinary Code, an employee on precautionary suspension must be allowed to resume his duties pending the outcome of the appeal, should the employer fail to finalise the appeal within thirty (30) days;

2.2.5 All his attempts to be allowed to resume his duties pending the finalisation of his appeal had been fruitless.

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 I am further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. I am also given the 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 Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;³

3.5.2 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;⁴

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most I could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, I am constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;⁵

² CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.
³ Para [65].
⁴ Para [67].
⁵ Para [68].
3.5.4 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;\(^6\)

3.5.5 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;\(^7\)

3.5.6 My 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 the investigation and the type of findings made;\(^8\)

3.5.7 Implicit in the words “take action” is that I am 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 I am necessarily have 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;\(^9\)

3.5.8 I have the power to determine the appropriate remedy and prescribe the manner of its implementation;\(^{10}\)

\(^6\) Para [69].
\(^7\) Para [70].
\(^8\) Para [71].
\(^9\) Para [71(a)].
\(^{10}\) Para [71(d)].
3.5.9 "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.\textsuperscript{11}

3.5.10 The remedial action taken by me has a binding effect.\textsuperscript{12} The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."\textsuperscript{13}

3.6 The SAPS is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within my mandate to investigate.

3.7 I have the power and jurisdiction to investigate and take appropriate remedial action which was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

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

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

\textsuperscript{11} Para [71(e)].
\textsuperscript{12} Para [76].
\textsuperscript{13} Para [73].
4.1.3. This complaint was classified as an Administrative Justice and Service Delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

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:

a) What happened?
b) What should have happened?
c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?
d) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where he would have been had the maladministration or improper conduct not taken place?

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 there was maladministration by the SAPS with regard to its handling of an appeal lodged by Constable B G Molehabangoe, and whether such conduct caused improper prejudice to the Complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act.

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 SAPS or an 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 the undue delay and maladministration. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the SAPS or organ of state complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1. Whether the SAPS unduly delayed the finalisation of the Complainant’s appeal, and if so, whether the conduct of the SAPS constitutes improper conduct or maladministration;

4.3.2. Whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty (30) days appeal period, and whether the SAPS improperly failed to reinstate the Complainant’s benefits pending the finalisation of the appeal, which I was not finalised within thirty (30) days; and

4.3.3. Whether the Complainant suffered any improper prejudice as a result of the alleged improper conduct of the SAPS.

4.3.4. A notice in terms of section 7(9) of the Public Protector Act was issued against the National Police Commissioner on 27 September 2018 affording him an opportunity to respond to the Public Protector’s provisional findings and intended remedial action. The South African Police Service accepted this remedial action and made payment to the Complainant on 11 February 2019 an amount that was *in lieu* of his salary for the period December 2014, (the date on which his salary was stopped) to 16 March 2017, (the date on which the Appeals Authority finalised his appeal);
4.4. The Key Sources of Information

4.4.1. Documentation

4.4.1.1. Complaint received from the Complainant on 09 January 2018;

4.4.1.2. Document confirming the outcome of an appeal lodged by the Complainant received from the Complainant on 16 March 2017;

4.4.2. Correspondence Sent and Received

4.4.2.1 An e-mail from the Subsection Head: Discipline Management: Employee Relations Head Office dated 05 April 2018;
4.4.2.2 An e-mail from the Subsection Head: Discipline Management: Employee Relations Head Office dated 07 June 2018;
4.4.2.3 An e-mail from the Subsection Head: Discipline Management: Employee Relations Head Office dated 03 August 2018;
4.4.2.4 An e-mail from the Section Head: Employee Relations: Personnel Management dated 14 November 2018.

4.4.3 Legislation and other prescripts

4.4.3.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
4.4.3.2 Public Protector Act, 23 of 1994 (PPA);
4.4.3.3 The SAPS Disciplinary Regulations, RN643, GG28985, 03 July 2006.

4.4.4 Case Law
4.4.4.1 Natal Joint Municipal Pension Fund v Endumeni Municipality (920/10) [2012] ZASCA 13 (15 March 2012);

4.4.4.2 Provincial Commissioner: North West South African Police Service and Another v Safety and Security Sectoral Bargaining Council & Others (JS787/14) [2017] ZALCJHB 69 (22 February 2017);

4.4.4.3 Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others [2016] ZACC 11; 31 March 2016;

4.4.4.4 CUSA v Tao Ying Metal Industries & Others CCT 40/07 [2008] ZACC 15;

4.4.4.5 POPCRU obo Kgope v Minister for Safety and Security (J1536/12) [2014] ZALCJHB 352;

4.4.4.6 Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others (JR782/05) [2006] ZALC 44; [2006] 9 BLLR 833 (LC) (14 March 2006).

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

5.1 Regarding whether the SAPS unduly delayed the finalisation of the Complainant’s appeal, and if so, whether the conduct of the SAPS constitute improper conduct or maladministration: -

Common cause facts

5.1.1 The Complainant was employed as a Constable at the SAPS from 31 July 2004 and was suspended on 07 November 2014 pending a disciplinary hearing. On 28 January 2015, he was dismissed for serious misconduct following a disciplinary hearing. The
Complainant was charged and dismissed because he is alleged to have tempered with evidence by disposing a Samsung laptop containing incriminating evidence seized from the accused Nomsa Mavusa and replacing the same with a Lenovo laptop thereby destroying evidence against the aforesaid accused. He was also alleged to have demanded and accepted a total amount of R46 000.00 from the suspect for his benefit. He lodged an appeal against the finding and sanction of the disciplinary hearing on 06 February 2015. The appeal was finalised on 16 March 2017, when the Appeal Board confirmed the conviction and sanction of the disciplinary hearing.

*Issues in dispute*

5.1.2 The Complainant alleged that the Appeals Authority was obliged to finalise his appeal within thirty (30) days after it was lodged, failure of which, he should have been allowed to resume his duties pending the finalisation of his appeal;

5.1.3 At the time of lodgement of his complaint with me in January 2018, the outcome of his appeal had been outstanding for more than two years;

5.1.4 In its response dated 03 August 2018, the SAPS indicated that the delay in the finalisation of the Complainant’s payment was that the matter must first be considered by Legal and Policy Services for a legal advice prior to considering approval to reimburse the salary of the member.

*Application of the relevant legal framework*

5.1.5 The issue regarding whether the SAPS unduly delayed the finalisation of the Complainant’s appeal, is regulated by the SAPS Disciplinary Regulations.14

14 RN643, GG 28985, 03 July 2006.
5.1.6 In terms of Regulation 17(9) of the SAPS Disciplinary Regulations, an Appeals Authority must finalise an appeal within thirty (30) working days from date of receipt of the appeal, failing which, in cases where the employee is on precautionary suspension or temporarily transferred, s/he must resume duties immediately and await the outcome of the appeal.

5.1.7 The SAPS was obliged to comply with Regulation 17(9) by finalising the Complainant's appeal within thirty (30) working days of receipt. The SAPS did not dispute that the Complainant submitted his appeal on 06 February 2015.

5.1.8 The interpretation of the text of Regulation 17(9) should be given its ordinary meaning. Similarly, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*\(^\text{15}\) the court held that "[w]hatever the nature of the document, consideration must be given to the language used in the light of ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."

*Where more than one meaning is possible each possibility must be weighted in the light of these factors. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document*. (sic)

5.1.9 My interpretation above is further endorsed by the decision of the Labour Court in *Provincial Commissioner: North West South African Police Service and Another v Safety and Security Sectoral Bargaining Council & Others*.\(^\text{16}\) The court held that "[w]hat is clear from the reading of Regulation...17(9) is that they seek to cure the mischief of prolonged disciplinary and appeal processes. Regulation 17(9) in

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\(^{16}\)(JS787/14) [2017] ZALCJHB 69 (22 February 2017).
particular requires a speedy appeal process in order to ensure that the employer does not prejudice the employee by keeping them away from their duties for a protracted period and also to avoid the prejudice to the employer of paying an employee for long periods pending the finalisation of the process. […] In this context and the clear reading of regulation 17(9) it is envisaged that if the employer does not conclude appeal processes within 30 working days it does so at the pain of reinstating the employee pending the outcome." (sic)

5.1.10 It should be further noted that Regulation 17(9) does not make mention of the receipt of transcripts as the date upon which an appeal shall be deemed to have been received. Therefore, the argument of the SAPS that the thirty (30) days period is calculated from the date on which the transcripts are received by the Appeals Authority stand to be rejected as having no legal basis.

5.1.11 In the circumstances, the SAPS had an obligation to finalise the Complainant’s appeal within thirty (30) days in terms of Regulation 17(9), thereby ensuring that there is a speedy resolution of the matter.

5.1.12 Similarly, in CUSA v Tao Ying Metal Industries & Others, 17 the court held as follows: “These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to workers who may be without an income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years.”

5.1.13 Furthermore, in POPCRU obo Kgope v Minister for Safety and Security18 the Labour Court considered a nine – month period to finalise an appeal as unconscionable.

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17 [2008] ZACC 15 para 63. Also reported as (2009) (2) SA 204 (CC); 2009 (1) BCLR 1 (CC).
18 (J1536/12) [2014] ZALCJHB 352 para [24]. Also reported as 36 ILJ 760 (LC) (16 September 2014).
5.1.14 In addition to the above, the court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others*<sup>19</sup> held that: - "The rules relating to procedural fairness [...] recognise that for workers, true justice lies in a right to an expeditious and independent review of an employer’s decision to dismiss, [...]."

**Conclusion**

5.1.15 The SAPS unduly delayed the finalisation of the Complainant’s appeal as it did not finalise the Complainant’s appeal within thirty (30) days from the date of receipt as required by Regulation 17(9) of the SAPS Disciplinary Regulations.

5.2 Regarding whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty (30) days appeal period; and whether the SAPS improperly failed to reinstate the Complainant’s benefits pending the finalisation of the appeal, which was not finalised within thirty (30) days:

**Common cause issues**

It is common cause that the complainant was put on suspension on the 07<sup>th</sup> of November 2014. On 28 January 2015 he was dismissed from his employment and lodged an appeal on the 06<sup>th</sup> February 2015. Constable Molehabangoe’s appeal was finally heard 16 March 2017.

**Issues in dispute**

5.2.1 The Complainant alleged that all his attempts to be reinstated pending the finalisation of the appeal were fruitless;

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<sup>19</sup> (JR782/05) [2006] ZALC 44; [2006] 9 BLLR 833 (LC) (14 March 2006).
5.2.2 The SAPS would have been compelled to reinstate the Complainant in the event that the Appeals Authority failed to finalise the appeal within the prescribed timeframe of thirty (30) working days calculated from the date on which the member of the Appeals Authority received the appeal;

5.2.3 The evidence outlined above indicates that the SAPS, neither allowed the Complainant to resume his duties pending the finalisation of his appeal, nor reinstated his benefits pending the finalisation of his appeal when the thirty (30) days appeal period lapsed;

5.2.4 The issue on whether the Complainant was entitled to be allowed to resume his duties, or to have his benefits reinstated pending the finalisation of his appeal, is a legal issue regulated by Regulation 17(9), which will be determined when the standard that had to be complied with, is discussed below.

*Application of the relevant legal framework*

5.2.5 The issue regarding whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty day appeal period, and reinstate his benefits pending the finalisation of the appeal, which was not finalised within thirty (30) days, is also regulated by the SAPS Disciplinary Regulations.\(^\text{20}\)

5.2.6 Regulation 13(2) allows the Commissioner to suspend an employee without remuneration, if the Commissioner, on reasonable grounds, is satisfied that the misconduct which was committed is misconduct described in Annexure A and that the case against the said employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed.

\(^\text{20}\) RN643, GG 28985, 03 July 2006.
5.2.7 Annexure A among others, lists the offences of bribery and corruption. The Complainant was dismissed on allegations of accepting bribes which is one of the offences listed in Annexure A. The Complainant was suspended without remuneration prior to his dismissal.

5.2.8 It has been noted in the evidence received that the Complainant lodged an appeal on 06 February 2015. Regulation 16(4)(b) provides that, if an employee is dismissed and he appeals, he is deemed to be suspended until the conclusion of the appeal proceedings. The suspension in this regard shall be the same as the one imposed before the sanction was imposed.

5.2.9 Regulation 15(2) further prohibits the SAPS from implementing a sanction during an appeal by an employee.

5.2.10 In terms of Regulation 17(9), an Appeals Authority must finalise an appeal within thirty (30) working days from date of receipt of the appeal, failing which, in cases where the employee is on precautionary suspension or temporarily transferred, s/he must resume duties immediately and await the outcome of the appeal.

5.2.11 It has been established in the evidence that the SAPS did not finalise the Complainant’s appeal within the thirty (30) day period prescribed by Regulation 17(9). Therefore, despite the fact that Regulation 16(4)(b) provides that the Complainant’s suspension shall be deemed to be one without remuneration, the SAPS by virtue of having failed to finalise the appeal within the thirty (30) day period, were obliged to allow the Complainant to resume his duties and consequently reinstate his benefits.

Conclusion

5.2.12 The SAPS failed to adhere to Regulation 17(9) of the SAPS Disciplinary Regulations as it failed to allow the Complainant to resume his duties, and to reinstate his benefits.
when his appeal was not finalised within thirty (30) days, as required by the same Regulation.

5.2.13 The presumption of innocence, sometimes referred to by the Latin expression *ei incumbit probation qui dicit, non qui negat* (the burden of proof is on the one who declares, not on the one who denies), is the principle that one is considered innocent unless proven guilty.

5.3 **Regarding whether the Complainant suffered any improper prejudice as a result of the alleged improper conduct of the SAPS:**

*Issues in dispute*

5.3.1 The Complainant indicated that he has a wife and three dependents;

5.3.2 When the Complainant lodged his complaint with the Public Protector in August 2015, he was without a salary for a period of more than two years;

5.3.3 The Complainant further contended that his financial situation is dire and he has three kids to take care of;

5.3.4 The Complainant also had to pay legal fees to an attorney as he had a criminal case pending as a result of the same conduct which led to his dismissal;

5.3.5 In addition, the Complainant was left in limbo – he could not look for alternative employment as the disciplinary proceedings against him by the SAPS had not been concluded;

5.3.6 The issue of prejudice will be determined once improper conduct or maladministration have been determined.
Application of the relevant legal framework

5.3.7 Section 182(1)(c) of the Constitution\(^{21}\) requires me to consider whether any of my findings of maladministration or improper conduct in state affairs resulted in prejudice to a Complainant, and to take appropriate remedial action.

5.3.8 In this respect, I have identified the following consequences arising from the conduct of the SAPS: - The Complainant was not earning a salary for a period of two years, that is, (thirty (30) days after the date on which the Complainant’s appeal was lodged) and 16 March 2017 (date on which Appeals Authority finalised the Complainant’s appeal). In addition, the Complainant was left in limbo, he could not apply for other employment, and he suffered injustice as a result of the uncertainty regarding his future.

Conclusion

5.3.9 The Complainant was improperly prejudiced as a result of the SAPS’s failure to adhere to its Disciplinary Regulations in its handling of the Complainant’s appeal which resulted in prejudice to the Complainant.

6. FINDINGS
After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the SAPS, I find as follows: -

6.1 Whether the SAPS unduly delayed the finalisation of the Complainant’s appeal, and if so, whether the conduct of the SAPS constitutes improper conduct or maladministration: -

6.1.1 The allegation that the SAPS unduly delayed the finalisation of the Complainant’s appeal, is substantiated;

6.1.2 The SAPS failed to finalise the Complainant’s appeal within thirty (30) days after the appeal was received by the Appeals Authority;

6.1.3 The SAPS acted contrary to Regulation 17(9) of the SAPS Disciplinary Regulations. The SAPS further failed to adhere to case law which requires firstly, that challenges to an employer’s decision to dismiss must take place expeditiously and secondly, that the Regulation should be given its ordinary grammatical meaning;

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

6.2 Whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty (30) days appeal period, and whether the SAPS improperly failed to reinstate the Complainant’s benefits pending the finalisation of the appeal, which was not finalised within thirty (30) days: -

6.2.1 The allegation that the Complainant should have been allowed to resume his duties pending the finalisation of the appeal, if the appeal was not finalised within thirty (30) days, is substantiated;

6.2.2 The SAPS failed to allow the Complainant to resume his duties and to reinstate his benefits when his appeal was not finalised within thirty (30) days from the date on which he lodged it;

6.2.3 The SAPS acted contrary to Regulation 17(9) of the SAPS Disciplinary Regulations;
6.2.4 The SAPS contravened the doctrine of presumption of innocence, which is the principle that one is considered innocent unless proven guilty.

6.2.5 The SAPS's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Whether the Complainant suffered any improper prejudice as a result of the alleged improper conduct of the SAPS: -

6.3.1 The allegation that the Complainant suffered improper prejudice as a result of the alleged improper conduct of the SAPS, is substantiated;

6.3.2 The SAPS took more than two years to finalise the Complainant's appeal. During this period, the Complainant did not have an income. The Complainant also could not apply for any other position because the disciplinary process was not finalised;

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

6.3.4 Of concern is that the matter of Constable Molehabangoe is similar to the case of Constable Thomas which I dealt with in my earlier report (number 27 of 2017/18 dated 27 November 2017) to the National Commissioner of SAPS.

7. REMEDIAL ACTION

I have taken note that the SAPS has accepted the remedial action in my section 7(9) letter which was earlier addressed to the Commissioner of Police. I have also noted
that the legal opinion obtained directs that the Official should be paid his salaries for
the period of twenty-six (26) months and that a letter will be forwarded to the Finance
Department requesting that the Official be paid his monies.

The appropriate remedial action I am taking in terms of section 182(1) (c) of the
Constitution, with the view to placing the Complainant as close as possible to where
he would have been had the improper conduct and maladministration not occurred,
is the following:

7.1. **The National Police Commissioner to:**

(aa) Pay to the Complainant his full salary and benefits, for the period December 2014,
(the date on which his salary was stopped) to 16 March 2017, (the date on which the
Appeals Authority finalised his appeal). The South African Police Service has
accepted this remedial action and made payment to the Complainant on 11 February
2019 an amount that was *in lieu* of his salary for the period December 2014, (the date
on which his salary was stopped) to 16 March 2017, ( the date on which the Appeals
Authority finalised his appeal);

(bb) Within thirty (30) days from date of this report, pay to the Complainant interest at the
prescribed rate of interest in terms of the Prescribed Rate of Interest Act 55 of 1975
to the Complainant from the date the salaries were due until date of payment, that is,
pay interest on the amount of R353 734-58 for the undue delay to pay his full salary
and benefits, for the period December 2014, (the date on which his salary was
stopped) to 16 March 2017, ( the date on which the Appeals Authority finalised his
appeal);

(cc) Within ten (10) days from date of this Report, issue a letter of apology to the
Complainant, for the inconvenience and prejudice that the Complainant suffered as
a result of the fact that his appeal was not finalised within thirty (30) days;
(dd) I have taken cognisance that the SAPS has already proceeded to promulgate new Discipline Regulations, and in these Regulations, the SAPS addressed the issue which gave rise to this Report. In terms of the new Regulations, the National Police Commissioner has a right to review a decision to dismiss, and the timeframes within which the Commissioner has to do so, have been drastically reduced. In this regard officials of the SAPS should heed against any re-occurrence of not adhering to the set legal principles.

(ee) SAPS TO provide training and workshops to all staff on the new Discipline Regulations to all SAPS staff, including instances where the Safety and Security Sectoral Bargaining Council (SSSBC) and / or the courts pronounce itself on certain aspects of the Discipline Regulations.

8. MONITORING

8.1 I will monitor compliance with remedial action contained in this report on a monthly basis until such time that the remedial action has been complied with in full.

8.2 I wish to bring to your attention that in line with the Constitutional Court judgement in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11*, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding, unless a Court order is obtained directing otherwise.

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

22 GG40389, RN1361, 01 November 2016.