
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO: 61 2019/20

"Allegations of unlawful impoundment of a motor vehicle belonging to Mr Aaron Maepe by the Rustenburg Local Municipality”

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNLAWFUL IMPOUNDMENT OF A MOTOR VEHICLE BY THE RUSTENBURG LOCAL MUNICIPALITY
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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 (Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of unlawful impoundment of a motor vehicle belonging to Mr Aaron Maepe by the Rustenburg Local Municipality.

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

(iv) In the main, the Complainant alleged that on 6 April 2013, the Head of Security at the Municipality, Mr J R Makinita unlawfully impounded his motor vehicle, a white Nissan Almera, 2004 model with registration number FGK 704 NW, on the grounds that it was a stolen property.

(v) The Municipality disputed that the impoundment of the vehicle was unlawful and contended that there were justifiable reasons which led to the impoundment.

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

(a) Whether the Complainant’s vehicle was unlawfully impounded by the Municipality; and

(b) Whether the Complainant suffered prejudice as a result of the conduct of the Municipality.

(vii) Key laws and policies taken into account to determine if there had been maladministration by the Municipality and prejudice to the Complainant were
principally those imposing administrative standards that should have been complied with by the Municipality or its officials when dealing with this complaint.

These are the following:

(a) Section 195(1) of the Constitution, which provides the basic values and principles governing public administration, including the right for everyone to be treated impartially, fairly, equitably and without bias and set the standard by which public officials should conduct themselves was relied upon to affirm the Complainant’s rights and to determine whether he was prejudiced by the conduct of the Municipality.

(b) Section 334 of the Criminal Procedure Act 51 of 1977 which lays down the procedure as well as the grounds for impounding a vehicle was also relied upon to determine the lawfulness or otherwise of the impoundment.

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

(a) **Regarding whether the Complainant’s vehicle was unlawfully impounded by the Municipality:**

(aa) The allegation that the Complainant’s vehicle was unlawfully impounded by the Municipality is substantiated.

(bb) Although Mr Makinita was a Peace Officer at the time when he impounded the vehicle, he did not have justifiable grounds for doing so in that the vehicle had not committed any of the listed offences under the applicable legal prescript.

(cc) The conduct of the Municipality particularly that of Mr Makinita, violated the provisions of section 18 of the Criminal Procedure Act which requires that
a Peace Officer can only impound a vehicle if it has committed one of the offences listed under Schedule 3 of the Criminal Procedure Act.

(dd) My investigation further revealed that the Municipality has not developed by-laws to regulate the impoundment of vehicles within its jurisdiction.

(ee) The conduct of the Municipality to make and administer by-laws for the effective administration and promote and maintain a high standard of professional ethics is also in violation of sections 156(2) 195(1)(a) and (f) of the Constitution.

(ff) The conduct of the Municipality, particularly Mr Makinita also 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.

(b) **Whether the Complainant suffered prejudice as a result of the conduct of the Municipality.**

(aa) The allegation that the Complainant was prejudiced as a result of the conduct of the Municipality is partly substantiated.

(bb) Mr Makinita impounded the Complainant’s vehicle without any justifiable prescribed legal grounds. The vehicle had not been reported stolen by the rightful owner and had not committed any offence in terms of the law.

(cc) The conduct of the Municipality, particularly Mr Makinita 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.
(dd) However, the impounded vehicle was in fact a subject of a court judgement in which another person illegally sold the vehicle to the Complainant without the rightful owner's consent.

(ee) The rightful owner obtained a court order under the Rustenburg Magistrates Court no. 928/2012 in January 2013, for the return of his vehicle. The sheriff of the court confirmed that on 9 April 2013, having received a Warrant of Execution from the court, went to the offices of the Municipality and removed the vehicle.

(ff) Although there were no justifiable legal grounds on which Mr Makinita impounded the Complainant's vehicle, however, the subsequent attachment and removal of the vehicle by the sheriff of the court from the Municipality was legal and did not amount to improper prejudice to the Complainant.

(ix) In light of the above findings I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution.

(aa) The Municipal Manager should, within thirty (30) working days of this report, write a letter of apology to the Complainant for the unlawful impoundment of the vehicle.

(bb) The Municipal Manager must ensure that this report is submitted to the Council for consideration within thirty (30) working days from the date of issue.

(cc) The Municipal Manager must, within thirty (30) working days of this report, take disciplinary action against Mr Makinita.

(dd) The Council must, within one hundred and eighty (180) working days of publication of this report, ensure that the Municipality develops bylaws regulating the impoundment of motor vehicles within its jurisdiction.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNLAWFUL IMPOUNDMENT OF A MOTOR VEHICLE BY THE RUSTENBURG LOCAL MUNICIPALITY

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 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following officials:

1.2.1 The Executive Mayor of Rustenburg Local Municipality, Councillor Mpho Khunou.

1.2.2 The Speaker of the Rustenburg Local Municipality, Councillor Shila Mabale-Huma.

1.2.3 The Acting Municipal Manager of the Rustenburg Local Municipality, Mr Elias Komane.

1.3 A copy of the report is also submitted to the Complainant, Mr Aaron Maepe to inform him about the outcome of the investigation.

1.4 The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of unlawful impoundment of a motor vehicle belonging to Mr Aaron Maepe by the Rustenburg Local Municipality.
2. THE COMPLAINT

2.1 The Complainant alleged that he was the owner of a motor vehicle, a Nissan Almera, 2004 model with registration number FGK 704 NW which he bought from Mr Kabelo Selebo in November 2012 for R45 000.00;

2.2 He paid a deposit of R28 000.00 and agreed to pay the remaining balance of R17 000.00 in monthly instalments of R1 500.00. Mr Selebo did not provide him with the registration documents of the vehicle on the understanding that he would receive them once he had paid the balance in full. However, the Complainant never paid the balance resulting in the vehicle not being registered in his name;

2.3 On 6 April 2013, a group of people came to his house looking for the vehicle. The person leading the group introduced himself as Mr Makinita, Head of Security Department within the Public Safety Unit at the Municipality;

2.3.1 Mr Makinita indicated to the Complainant that they were there to impound the vehicle as it had been reported stolen. Mr Makinita, together with his companions and in the company of Complainant, took the said vehicle and drove it to Tlhabane Police Station;

2.3.2 At Tlhabane Police Station, Mr Makinita told the police that the motor vehicle was stolen. The police advised Mr Makinita that the vehicle was never reported stolen and as such they could not keep it at the Police Station. They however recorded the incident in their Occurrence Book (OB) no. 419/04/2013; and

2.3.3 Mr Makinita then took the motor vehicle to the Municipality’s Traffic Department Compound where it was impounded. He did not give the Complainant any document as proof of impoundment. The said motor vehicle was never released to the Complainant and when he enquired about it, he was taken from pillar to post.
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 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) of the Constitution states that the Public Protector has additional powers and functions prescribed by national legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 *In Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*¹ the Constitutional Court, per Mogoeng CJ, held that the remedial action taken by the Public Protector has a binding effect [at para 76]. The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might

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¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
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". The Court further confirmed the Public Protector's powers as follows:

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

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 (paragraph 67);

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 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 (paragraph 69);

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 (paragraph 70);

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2 at para [73].
3.5.6 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 (paragraph 71);

3.5.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in 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 (paragraph 71(a);

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

3.5.10 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.5.10.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);

3.5.10.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the
constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);

3.5.10.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101 of the judgment):

a) Conduct an investigation;
b) Report on that conduct; and
c) To take remedial action.

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

3.5.10.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105 of the judgment). [This was a finding on EEF judgment as well];

3.5.10.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector form taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paragraph 107 and 108 of the Judgment); and

3.5.10.7 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgment).

3.6 The Municipality is an organ of state and its conduct and that of its officials constitute conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.
3.7 The power and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of the parties.

3.8 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the 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, 1994.

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

4.1.3 The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory instruments, including constitutional provisions, legislation, regulations, relevant court decisions and applicable previous Public Protector Decisions or Touchstones.
4.2  **Approach to the investigation**

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?
4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the Municipality to prevent improper conduct and/or maladministration as well as prejudice.

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

4.3  **On analysis of the complaint and available information, the following were issues identified to inform and focus the investigation:**

4.3.1 Whether the Municipality, unlawfully impounded Complainant’s motor vehicle.
4.3.2 Whether the Complainant suffered prejudice as a result of the conduct of the Municipality.

4.4 **Key sources of information**

4.4.1 **Documents:**

4.4.1.1 A statement giving full particulars of the complaint and chronology of events received by my office per complaint form dated 02 July 2014;

4.4.1.2 Letter dated 24 July 2014 from my office addressed to Mr Lucky Molotsane, Director of Legal Services at the Municipality.

4.4.1.3 An email dated 24 July 2014 from Mr Molotsane addressed to my office.

4.4.1.4 An email from my office dated 20 March 2015 addressed to Mr Molotsane.

4.4.1.5 A fax dated 03 June 2015 from Van Rensburg Attorneys addressed to Mr J R Makinita.

4.4.1.6 Record of OB 419/04/2013 from Tlhabane SAPS.

4.4.1.7 An email dated 04 June 2015 from Mr SS Kotsedi, Director of Public Safety addressed to Mr Lucky Molotsane, Director of Legal Services.

4.4.1.8 An email dated 12 January 2016 from my office directed to the Municipal Manager, Mr Victor Makona.

4.4.1.9 An email dated 19 January 2019 from my office directed to Mr Jeff Rademeyer, Manager in the office of the Municipal Manager.

4.4.1.10 Letter dated 11 January 2019 from my office directed to the Clerk of the Civil Court, Rustenburg Magistrate court.

4.4.1.11 Letter dated 11 January 2019 from my office addressed to the Sheriff of the Rustenburg Magistrate court, Mr K H Tau.

4.4.1.12 Letter dated 15 January 2019 from the Sheriff addressed to my office.

4.4.1.13 My Preliminary report in terms of section 7(9) of the Public Protector Act dated 04 July 2019 addressed to the Acting Municipality Manager, Mr E Komane.
4.4.2 Meetings and Interviews

4.4.2.1. Meeting held with Mr Makinita and Mr Kotsedi on 31 March 2015;
4.4.2.2. Meeting held on 04 June 2015 with Ms Matlhodi of the Rustenburg Local Municipality.
4.4.2.3. ADR session in terms of section 7(4) notice held with the Municipality officials, represented by the Acting Municipal Manager Mr Victor Makona on 07 December 2015.
4.4.2.4. Meeting with Mr Jeff Rademeyer, Manager in the office of the Municipal Manager on 15 January 2016.
4.4.2.5. An ADR session in terms of section 7(4) notice held on 25 April 2016 with the Municipality officials represented by the Municipal Manager, Mr Victor Makona.

4.4.3 Legal and Regulatory Framework

4.4.3.1 The Constitution of the Republic of South Africa;
4.4.3.2 The Public Protector Act 23 of 1994
4.4.3.3 The Criminal Procedure Act 51 of 1977;
4.4.3.4 Government notice no R707 of 02 September 2011.
4.4.3.5 National Road Traffic Act 93 of 1996.

4.4.4 Case Law

4.4.4.1 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others[2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC);

4.4.4.2 The President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017).
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH THE APPLICABLE LAW AND PRESCRIPTS

5.1. Regarding whether the Complainant's motor vehicle was unlawfully impounded by the Municipality.

Common cause issues

5.1.1. The Complainant bought a motor vehicle, a white Nissan Almera, 2004 model with registration number FGK 704 NW in November 2012 from Mr Selelo.

5.1.2. On 6 April 2013, the afore-mentioned motor vehicle was impounded by Mr Makinita, an official from the Municipality.

5.1.3. On the same day, 6 April 2013, Mr Makinita took the motor vehicle to Tshabane Police Station but the police refused to keep it as it had not been reported stolen. The police, however, recorded the incident in the OB 419/04/2013.

5.1.4. Mr Makinita then took the motor vehicle on the same day to the Municipality's Public Safety Unit compound, situated near Tshabane Township. The vehicle was never released to the Complainant.

Issues in dispute

5.1.5. The Municipality disputed that the Complainant's vehicle was unlawfully impounded.

5.1.6. My office sent a letter dated 24 July 2014 to Mr Lucky Molotsane, the Director: Legal Services at the Municipality, regarding the complaint.
5.1.7. Mr Molotsane responded on the same date indicating that he had referred the complaint to the Director for Public Safety, Mr M Kotsedi and will revert to my office when he has received a response from him.

5.1.8. On 5 November 2014, when no response was forthcoming from the Municipality, my investigation team held a meeting with Mr D Khumalo, a Manager within the Law Enforcement Unit at the Municipality together with other Municipal officials. Mr Khumalo indicated that he did not have much information about the matter but undertook to investigate and revert to my office.

5.1.9. On 20 March 2015, another correspondence was directed to the Municipality for a response, Mr Molotsane called my office and indicated that he will arrange a meeting between my investigation team and Mr Makinita.

5.1.10. On 31 March 2015 Mr Makinita met with my investigation team and confirmed that he impounded the vehicle and later released it to the sheriff of the court. He undertook to provide my office with a detailed report, regarding the impoundment of the vehicle within a month.

5.1.11. On 4 June 2015, my office received a telephone call from Mr Ngoasheng who indicated that he was an attorney within the Municipality’s legal section and further advised that the matter had been referred to him. He also undertook to provide my office with the report.

5.1.12. On 11 November 2015, when no report was received from the Municipality, my office issued a notice in terms of section 7(4) of the Public Protector Act calling upon the Municipality to appear before my office in an attempt to resolve the matter through an ADR. The ADR session took place on 7 December 2015. The Municipality was represented by its Municipal Manager, Mr Victor Makona.
5.1.13. At the ADR, the Municipal Manager indicated to my investigation team that a report had been given to their legal section for checking and that once the legal section had finished, it would be sent to my office before the end of February 2016. However, the report was not submitted as undertaken.

5.1.14. When no response was forthcoming from Mr Makona, even after several reminders, my office issued a second notice in terms of section 7(4) of the Public Protector Act on 15 April 2016 calling upon the Municipality to appear before me on 25 April 2016, to provide reasons for not submitting the report as contemplated.

5.1.15. At the ADR session on 25 April 2016, Mr Makinita indicated that on 6 April 2013, he received a call from the Municipality’s Control Room stating that a motor vehicle, a Nissan Almera, had been stolen and was spotted at the Complainant’s house. The Radio Controller advised him to attend to the complaint.

5.1.16. Mr Makinita further stated that the radio message informed him that the owner of the motor vehicle was Mr Solly Mabelane, who had reported that he saw his vehicle being driven by the Complainant without his knowledge and consent. He then called the Boitekong police, who advised him to call the Municipality’s Public Safety Directorate since they (police) were unable to help him due to a shortage of police vehicles which were all out. As a result, Mr Mabelane called the Municipality’s Public Safety Directorate.

5.1.17. The Municipality furnished my office with a copy of a letter dated 4 June 2015 in support of Mr Makinita’s submission. The letter was written by Mr S S Kotsedi, Director: Public Safety, to Mr Lucky Molotsane, Head of Legal Services.

5.1.18. The letter was intended to clarify the circumstances surrounding the impounding of the Complainant’s motor vehicle. This was in response to a letter which my office sent to Mr Molotsane during July 2014.
5.1.19. The letter stated that “the owner of the vehicle was one Mr Solly Mabelane who went to the Boitekong police station and complained that his vehicle was being driven by a certain Mr Aaron Maepe without his knowledge. He had given his vehicle to a certain Ms Evelyn Modise and when he wanted it back, it was nowhere to be found”.

5.1.20. “He was advised by the Boitekong police that the vehicle cannot be reported stolen as he always sees it and that he rather call the police or the Municipality’s Public Safety whenever he sees the vehicle”.

5.1.21. “On 06 April 2013, he saw the vehicle at Boitekong Ext 23. He called the Boitekong police but was told that all police vehicles were out. He then called the Municipality’s Public Safety Directorate, which in turn called Mr Makinita through its Radio Control Room. Mr Makinita attended to the complaint and impounded the vehicle. He then kept it at the Municipality’s compound after issuing the Complainant with a section 341 notice”.

5.1.22. The said letter went further to state as follows: “Mr Mabelane consulted his lawyers who approached the court and applied for the release of the vehicle. The court instructed the sheriff to collect the vehicle from the Directorate of Public Safety. The vehicle was given to the sheriff on 09 April 2015”.

5.1.23. The letter corroborated almost every submission Mr Makinita had made at the ADR, including the fact that he issued the Complainant with a notice of impoundment before taking the vehicle into the Municipality’s Compound. However, the Complainant denied that he was issued with such a notice, and the Municipality could not produce a copy.

5.1.24. Mr Makinita further confirmed that the vehicle was not released to the Complainant because he could not produce the relevant documents for the vehicle. It was ultimately collected by the sheriff of the court from the Municipality’s compound.
Application of the relevant law

5.1.25. Section 195) of the Constitution provides, amongst others, that:

"Public Administration must be governed by democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained.
............
(f) Public administration must be accountable.

5.1.26. It was expected of Mr Makinita to exercise a high standard of professional ethical conduct when he impounded the vehicle and be able to account for his conduct when called upon to do so.

5.1.27. Section 156(2) of the Constitution which provides that:

"A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer".

5.1.28. The municipality was expected to make and administer its by-laws for the effective administration in dealing with the impoundment of vehicles within its area of jurisdiction. The municipality indicated that it has not made by-laws regulating the impoundment of vehicles.

5.1.29. Section 334(1)(a) of the Criminal Procedure Act, Act no 51 of 1977, provides that:

"A Minister may, by notice in the Gazette declare that any person who, by virtue of his office, falls within any category defined in the notice, shall within an area specified in the notice, be a peace officer for the purposes of exercising his power, with regard to any offence or class of offences, the powers defined in the notice".

5.1.30. Section 334(2) provides that "no person who is a peace officer by virtue of a notice issued under this Act, shall exercise any power conferred upon him under that subsection, unless he is at the time of exercising such power in
possession of a certificate of appointment issued by his employer, which
certificate shall be produced on demand”.

5.1.31. In terms of Government notice no R.707 issued on 02 September 2011, the
former Minister of Justice and Constitutional Development, Minister Jeff
Radebe, in terms of section 334 of the Criminal Procedure Act declared Traffic
Officers employed under section 3A(1) of the National Road Traffic Act ( Act
no 93 of 1996 ) as Peace Officers.

5.1.32. The Municipality indicated that Mr Makinita, before becoming the Head of
Security, was working as a Traffic Officer within the Municipality. He was then
promoted to the rank of Assistant Superintendent and later became the Head
of Security. The Municipality indicated that he became a Peace Officer while
he was still a Traffic Officer. The fact that he was promoted to the rank of Head
of Security does not mean that he relinquished his title as a Peace Officer.
Therefore Mr Makinita, who also served as a Traffic Officer was declared as
such by virtue of the above government notice.

5.1.33. Section 18 of The Criminal Procedure Act 56 of 1979 as amended, provides
that a Peace Officer may impound a vehicle which has committed any of the
offences listed under schedule 3 of the Act.

5.1.34. Schedule 3, as amended by section 18 of the Criminal Procedure Act, Act no
56 of 1979 provides that, “Any contravention of a by-law or regulation made
by or for any council, board or committee established in terms of any law for
the management of the affairs of any division, city, town, borough, village or
other similar community”.

5.1.35. The section further provides a list of other offences under which a vehicle may
be impounded. It further provides as follows:

“Any offence committed by

(a) Driving a vehicle at a speed exceeding a prescribed limit;
(b) Driving a vehicle which does not bear prescribed lights, or any prescribed means of identification;
(c) Leaving or stopping a vehicle at a place where it may not be left or stopped, or leaving a vehicle in a condition in which it may not be left;
(d) driving a vehicle at a place where and at a time when it may not be driven;
(e) driving a vehicle which is defective or any part whereof is not properly adjusted, or causing any undue noise by means of a motor vehicle;
(f) Owning or driving a vehicle for which no valid licence is held;
(g) Driving a motor vehicle without holding a licence to drive it”.

5.1.36. According to this schedule, a vehicle may be impounded if it has committed one of the offences that have been listed above. Although theft is not listed under this schedule, it is however, a common law offence. In this specific case, a Traffic Officer who has been declared a Peace Officer may be justified in impounding a vehicle. Traffic Officers perform functions that are close to those of the police. Therefore a Traffic Officer would be justified in impounding a vehicle if that vehicle is found to be stolen property.

Conclusion

5.1.37. Based on the evidence gathered, it can be concluded that the Municipality did not follow the relevant legal prescripts regulating the impoundment of vehicles. Furthermore, the Municipality acknowledged that it had not developed by-laws regulating the impoundment of vehicles in its area of jurisdiction.

5.2. Regarding whether the Complainant suffered prejudice as a result of the conduct of the Municipality.
Issues in dispute

5.2.1. The Complainant argued that the conduct of the Municipality in unlawfully impounding his vehicle caused him prejudice as he lost the right of use of his vehicle.

5.2.2. The Municipality indicated that the vehicle was removed from the Municipality's compound by the sheriff on 9 April 2013. A court order had already been obtained in January 2013 to the effect that the vehicle had to be returned to its lawful owner, Mr Solly Mabelane. The Complainant had allegedly purchased the vehicle from somebody who was not its lawful owner.

5.2.3. My investigation team also contacted the office of the Sheriff of the Rustenburg Magistrates Court. In his letter dated 17 January 2019, the sheriff confirmed that on 9 April 2013, after having received a Warrant of Execution from the court, he went to the offices of the Municipality where he attached and removed the said vehicle, and gave it to its owner, Mr Solly Mabelane.

5.2.4. Upon conclusion of my investigation, I provided the Municipality with a copy of my preliminary report with my findings which was signed on 4 July 2019. The preliminary report was hand delivered on 8 July 2019 to the offices of the Executive Mayor, Mr Mpho Khunou, the Municipal Manager Mr E Komane and the Speaker, Councillor Shila Mabale-Huma.

5.2.5. The purpose of the preliminary report was to afford the Municipality an opportunity to respond to my preliminary findings and to provide me with any evidence which might negate the evidence in my possession. The Municipality was asked to respond within ten working days which ended on 22 July 2019. The Municipality and / or its officials have not submitted a response to my preliminary report.
Conclusion

5.2.6. Based on the evidence in my possession it can be concluded that the complainant suffered prejudice as a result of the conduct of the Municipality and particularly Mr Makinita, in that he impounded the Complainant's motor vehicle even though the police at Tshabane police station had informed him that the vehicle was not reported stolen and had not infringed any laws. The Municipality (Mr Makinita) should have released the motor vehicle to the Complainant on receipt of the feedback from the police.

5.2.7. However, while the motor vehicle was still impounded at the Municipal compound, the rightful owner obtained a court order to have the vehicle returned to him.

5.2.8. As a result, the sheriff of the court legally removed the vehicle from the Municipality's compound. The release of the motor vehicle by the Municipality to the sheriff of the court, on presentation of a warrant of execution, did not amount to improper prejudice to the Complainant.

6. FINDINGS

6.1. Regarding whether the Complainant's vehicle was unlawfully impounded by the Municipality:

6.1.1. The allegation that the Complainant's vehicle was unlawfully impounded by the Municipality is substantiated.

6.1.2. Although Mr Makinita was a Peace Officer at the time when he impounded the vehicle, he did not have justifiable grounds for doing so in that the vehicle had not committed any of the listed offences in the applicable legal prescript.

6.1.3. The conduct of the Municipality, particularly that of Mr Makinita, violated the provisions of section 18 of the Criminal Procedure Act which requires that a
Peace Officer can only impound a vehicle if it has committed one of the offences listed under schedule 3 of the Criminal Procedure Act.

6.1.4. My investigation further revealed that the Municipality has not developed by-laws to regulate the impoundment of vehicles within its jurisdiction.

6.1.5. The conduct of the Municipality is in violation of sections 156(2) and 195(1)(a) and (f) of the Constitution.

6.1.6. The conduct of the Municipality, particularly Mr Makinita also constitute an 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. Regarding whether the Complainant suffered prejudice as a result of the conduct of the Municipality:

6.2.1. The allegation that the Complainant was prejudiced as a result of the Municipality’s conduct is substantiated.

6.2.2. The impounding of the Complainant’s motor vehicle by the Municipality when the police had confirmed that it had not been reported stolen resulted in improper prejudice to the Complainant.

6.2.3. The conduct of the Municipality, particularly Mr Makinita, constitute an 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.

6.2.4. The impounded vehicle was however a subject of a court judgement where the rightful owner obtained a court order under Rustenburg Magistrates Court no. 928/2012 in January 2013, for the return of his vehicle which was allegedly illegally sold to the Complainant without the owner’s knowledge and consent.
6.2.5. On 9 April 2013, the sheriff of the court, having received a warrant of execution from the court, went to the offices of the Municipality and removed the vehicle.

6.2.6. The release of the vehicle to the sheriff of the court by the Municipality, and its subsequent removal from the Municipal compound did not amount to improper prejudice to the Complainant and does not constitute an 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.

8. REMEDIAL ACTION

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

8.1 Municipal Manager must:

8.1.1 Within thirty (30) working days of this report, write a letter of apology to the Complainant for the unlawful impoundment of the vehicle.

8.1.2 Ensure that this report is submitted to the Council for consideration within thirty (30) working days from the date of issue.

8.1.3 Within thirty (30) working days of this report, take disciplinary action against Mr Makinita.

8.1.4 The Council must, within one hundred and eighty (180) working days of publication of this report, ensure that the Municipality develops bylaws regulating the impoundment of motor vehicles within its jurisdiction.
9. MONITORING

9.1 The Municipal Manager must, within fifteen (15) working days of this report, submit an Action Plan to my office indicating how the remedial action will be implemented.

9.2 The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 05/09/2019