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"Allegation of undue delay by the South African Police Service to release re-enlistment results"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY THE SOUTH AFRICAN POLICE SERVICE TO INFORM MR L A MOLOMANYAMA OF THE OUTCOME OF HIS APPLICATION FOR RE-ENLISTMENT IN THE POLICE SERVICE DURING 2010
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Executive Summary

(i) This is a report of the Public Protector 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).

(ii) The report communicates the Public Protector’s findings and the appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of undue delay by the South African Police Service (SAPS) to process Mr L A Mokonyama’s (Complainant) application for re-enlistment in the SAPS during 2010. The re-enlistment was advertised internally and in print media for purposes of recruiting former members of the SAPS.

(iii) The Complainant is a 42 year old former SAPS Warrant Officer who served in the SAPS from 12 August 1994 to 31 July 2009 when he resigned, while stationed at Sandton Police Station in Johannesburg.

(iv) In the complaint, it was alleged that the SAPS unduly delayed to process the Complainant’s application for re-enlistment in the SAPS and to release his results, after the SAPS invited former members of the SAPS to apply for re-enlistment through an advertisement in a national newspaper dated 17 January 2010. The advertisement indicated that it was not subject to a closing date and applications were to be received and evaluated on a continuous basis. The positions were to be filled with effect from 2010 in all nine (9) Provinces. The advertisement further indicated that applications received on or before 31 January 2010 would receive preference, in that appointments were to be made during the 2009/2010 financial year.

(v) While the SAPS did not dispute that it unduly delayed to process the Complainant’s application for re-enlistment during 2010, as per its Circular, *Re-enlistment in the South African Police Service: South African Police Act,*
1995: Band A (Constable) to MMS (Senior Superintendent) with reference number 5/5/2 dated 07 January 2010 and the advertisement of 17 January 2010, it contended that the National Commissioner was not obliged to re-enlist former members of the SAPS such as the Complainant as they had no right to be re-enlisted. The National Commissioner further contended that the re-enlistment process was discontinued and that in future former officers with scarce skills would be recruited.

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

(a) Whether the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment in the police service during 2010;

(b) Whether the reasons provided by the SAPS for not re-enlisting the Complainant were fair, just and reasonable in the circumstances; and

(c) Whether the Complainant was prejudiced by the conduct of the SAPS in the circumstances.

(vii) The standard used to measure the conduct of the SAPS involved laws regulating administrative action, policies and prescripts regulating recruitment at the SAPS and the values of reasonableness, fairness and justice. Section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) were relied on to assess whether the conduct of the SAPS was in compliance with the Complainant's right to just administrative action. The SAPS Regulations for appointment were applied to establish whether the reasons provided by the SAPS for not re-enlisting the Complainant were justifiable.
(viii) The investigation process commenced with a meeting between the SAPS and the officials of the Public Protector Limpopo Provincial Office on 19 March 2012 in Polokwane, subsequent meetings, interviews with the Complainant and relevant officials in the SAPS, followed by letters, an Alternative Dispute Resolution (ADR) meeting between the Complainant and the SAPS chaired by the Deputy Public Protector Advocate K Malunga on 27 January 2014, as well as the inspection of all relevant documents and the analysis and application of all relevant laws, policies and related prescripts.

(ix) The Public Protector issued a section 7(9) notice to the office of the National Commissioner of Police dated 19 September 2017. The Acting National Commissioner of Police, Lt Gen Mothiba, in his letter of 09 November 2017, accepted the Public Protector's proposed findings and remedial action.

(x) Key laws, policies, prescripts and relevant documents considered to help the Public Protector determine if there has been maladministration by the SAPS in processing the Complainant's application for re-enlistment are as follows:

(a) **Circular, Re-enlistment in the South African Police Service: South African Police Act, 1995: Band A (Constable) to MMS (Senior Superintendent)** with reference number 5/5/2 dated 07 January 2010, which invited applications for re-enlistment from former SAPS members and undertook to place an advertisement of the invitation for former members of the SAPS in the national newspapers on 17 January 2010. It outlined the requirements for re-enlistment of former members of the SAPS. The advertisement was not subject to a closing date and the target appointment date was 31 March 2010 for applications received on or before 31 January 2010;

(b) The SAPS's national advertisement of the positions for the re-enlistment of former SAPS members who were on levels of Constable (Band A) to Senior Superintendent (MMS) issued on 17 January 2010;
(c) Section 33 of the Constitution to test the administrative compliance level of the SAPS in relation to the Complainant, when his application was processed; and

(d) The SAPS Employment Regulations, 2008 and the National Instruction 6/2005, Selection and Appointment of Employees on Post Levels 1 to 12 to establish whether the SAPS applied its prescripts when it took a final decision on the Complainant’s application.

(xi) Having considered the evidence uncovered during the investigation against the applicable laws and related prescripts, the Public Protector makes the following findings:

(a) Whether the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment in the police service during 2010:

(aa) The allegation that the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment in the SAPS during 2010 and also failed to give him a reasonable opportunity to make representation regarding its decision not to re-enlist him is substantiated.

(bb) The Complainant’s application for re-enlistment was submitted during January 2010, but the SAPS issued the first outcome of his application on 14 August 2013, which is more than 3 years after he was interviewed.

(cc) In terms of the Circular: Re-enlistment in the South African Police Service: South African Police Act, 1995: Band A (Constable) to MS (Senior Superintendent) with reference number 5/5/2 dated 07 January
2010, the SAPS had a duty to process and finalise applications for appointment in the 2009/2010 financial year, subject to the availability of posts and/or funds.

(dd) The SAPS' conduct was in violation of section 33(1) and (2) of the Constitution and section 3(2)(b)(ii), (iii), (iv) and (v) of the PAJA.

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

(b) Whether the reasons provided by the SAPS for not re-enlisting the Complainant were fair, just and reasonable in the circumstances:

(aa) The reasons provided by the SAPS for not re-enlisting the Complainant were found to be fair, just and reasonable in the circumstances.

(bb) The Complainant was given reasons why he was not re-enlisted. The reason not to re-enlist the Complainant was due to his previous poor conduct in the SAPS.

(cc) In terms of Regulation 38(1)(c) and 45(7) of the SAPS Employment Regulations, 2008 and Instruction 9(1) to 9(3) of the SAPS National Instruction 6/2005, Selection and Appointment of Employees on Post level 1 to 12, previous disciplinary proceedings against the applicants were to be considered during the recruitment process.

(dd) The contradictory reasons given to the Complainant by SAPS for not re-enlisting him is however a concern. At the first instance he was told that there was a shortage of posts in Limpopo Provincial SAPS thereby creating the impression that had it not been for the shortage, he could
have be re-enlisted and later told that due to his previous in-service record he could not be re-enlisted.

(c) Regarding whether the Complainant was prejudiced by the conduct of the SAPS in the circumstances:

(aa) The allegation that the Complainant was prejudiced by the conduct of the SAPS in the circumstances is substantiated.

(bb) The conduct of the SAPS in delaying to inform the Complainant about the outcome of his application for re-enlistment is prejudicial in that it took the SAPS more than three years to inform him of the outcome of his application.

(cc) Had the SAPS requested further information relating to the Complainant’s previous in-service conduct within a reasonable time, as required by Instructions 9(1) to 9(3) of the SAPS National Instruction 6/2005, Selection and Appointment of Employees on Post Level 1 to 12; the Complainant would have been informed of the outcome of his application much earlier and he could have started working on an alternative career plan.

(dd) Though the decision not to re-enlist him was rational, fair and reasonable, the Complainant suffered financial loss in that he spent his valuable resources, time and money pursuing the SAPS to release the outcome of his application for re-enlistment.

(ee) The conduct of the SAPS prejudiced the Complainant, as envisaged in section 182(1)(a) of the Constitution and as such constitutes maladministration in terms of section 6(4)(a) of the Public Protector Act and resulted in prejudice to the Complainant.
In his response to the Public Protector’s notice in terms of section 7(9) of the Public Protector Act, dated 19 September 2017, the Acting National Commissioner agreed to the proposal for the payment of an *ex gratia* payment to the Complainant.

The remedial action that the Public Protector takes, in pursuit of section 182(1) (c) of the Constitution, having taken into account the prejudice the Complainant has suffered and also the Acting National Commissioner’s response to the Public Protector notice in terms of section 7(9) of the Public Protector Act, is the following:

(a) The National Commissioner must develop a standard operating procedure manual or guidelines on the re-enlistment of former members;

(b) The National Commissioner must ensure that the outcome of applications for both new recruits and re-enlistment is provided to applicants timeously;

(c) The National Commissioner must, within thirty (30) working days from the date of this report, consider an *ex gratia* payment, a reasonable portion thereof to be determined by an independent assessor; for distress caused to the Complainant due to the delay to inform him of the outcome of his application for re-enlistment; and all his determinable travelling and incidental costs incurred in pursuing this matter for a period of more than three (3) years; and

(d) The National Commissioner must apologise to the Complainant in writing for the inconvenience caused to him and his family, within thirty (30) working days from the date of publication of this report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY THE SOUTH AFRICAN POLICE SERVICE TO INFORM MR L A MOKEYANA OF THE OUTCOME OF HIS APPLICATION FOR RE-ENLISTMENT IN THE POLICE SERVICE DURING 2010

1. INTRODUCTION

1.1 Overview

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

1.1.2 The report is submitted in terms of section 8(1) of the Public Protector Act, to the following persons:

1.1.2.1 Minister of Police, Honourable FA Mbalula (MP);

1.1.2.2 Gen KJ Sitole, the South African Police Service (SAPS) National Commissioner; and

1.1.2.3 Lt Gen NJ Ledwaba, the Limpopo SAPS Provincial Commissioner.

1.1.3 A copy of the report is also provided to the following:

1.1.3.1 Lt. Gen L Ntshiea, the Divisional Commissioner, Personnel Services, SAPS, Pretoria; and

1.1.3.2 Mr Lesetja Andries Mokonyama (Complainant) in terms of section 8(3) of the Public Protector Act.
1.1.4 The report relates to an investigation into the alleged undue delay by the SAPS to release the interview results of the Complainant’s application for re-enlistment for a position of Warrant Officer in the police service during 2010.

1.2 Background

1.2.1 On 17 January 2010 the SAPS issued an advertisement inviting former police members of the SAPS to apply for re-enlistment in the SAPS. The purpose was to bring back the experienced former police officers into the system.

1.2.2 The Complainant applied, was shortlisted for the interview and underwent all the SAPS recruitment processes which included medical, fitness, psychological and psychometric evaluation.

1.2.3 The Complainant did not receive the outcome of his application during 2010 and kept enquiring at the SAPS offices in Polokwane. He was allegedly informed that his application was being processed. The Complainant also made enquiries at the SAPS head office in Pretoria, where he was allegedly informed that his application had not been received.

1.2.4 Some of the former SAPS police members who were interviewed with the Complainant were appointed through a memorandum dated 05 July 2010 and in the same memorandum it was indicated that the Complainant did not take up his position due to his outstanding profile.

1.2.5 The Complainant’s profile was outstanding because the Polokwane SAPS failed to request it from Sandton Police Station in Johannesburg during 2010.

2. THE COMPLAINT

2.1 The Limpopo Provincial Office of the Public Protector received the complaint from the Complainant on 10 January 2012.
2.2 In the main the Complainant alleged the following:

2.2.1 The SAPS, Limpopo Provincial Office, unduly delayed to process his application for re-enlistment in the SAPS after he applied for the position, which was advertised in a national newspaper on 17 January 2010. The interviews were conducted in Polokwane on 23 February 2010; and

2.2.2 The SAPS failed to release the outcome of his application whereas the results other applicants who were interviewed with him were released.

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 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, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.3 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 and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
3.4 The SAPS is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

3.5 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

3.6 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, held that the remedial action taken by the Public Protector has a binding effect.\(^1\) 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.”\(^2\)

3.7 In the above-mentioned Constitutional Court matter, the Chief Justice, Mogoeng, stated the following, when confirming the powers the Public Protector:

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

3.7.2 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 (para 67);

3.7.3 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

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\(^1\) [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

\(^2\) *Supra* at para [73].
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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);

3.7.4 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 (para 69);

3.7.5 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 (para 70);

3.7.6 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 (para 71);

3.7.7 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; (para 71(a));

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

3.7.9 “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 (para 71(e)).
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 the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to, on his/her own initiative, or on receipt of a complaint or an allegation, or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of the Public Protector Act, conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.

4.1.3 The complaint was initially classified as a matter, with an expectation of being resolved as a simple enquiry. Enquiries were made and it turned out to be a complex matter which could not be resolved by simple enquiries. The process was thereafter escalated to an alternative dispute resolution (ADR) process, but could not resolve the matter. A full investigation necessitating the preparation of a report proved to be the only solution under the circumstances.

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?
4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

4.2.1.4 In the event of maladministration what would it take to remedy the wrong and/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 focussed on whether or not the SAPS unduly delayed to process the Complainant’s application for re-enlistment and to release the results of his application for re-enlistment in the SAPS, as a Warrant Officer.

4.2.3 The enquiry regarding what should have happened, focuses on the law and rules that regulate the standard that should have been met by the organ of state to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. 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 organ of state complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment in the police service during 2010?
4.3.2 Whether the reasons provided by the SAPS in not re-enlisting the Complainant were fair, just and reasonable in the circumstances?

4.3.3 Whether the Complainant was prejudiced by the conduct of the SAPS in the circumstances?

4.4 The key sources of information

4.4.1 Documents

4.4.1.1 An advertisement of 17 January 2010 for the positions of former members of the SAPS, who were interested to be re-enlisted in the SAPS and the internal directive dated 07 January 2010 with reference number 5/5/2 for re-enlistment of former members of the SAPS.

4.4.1.2 A copy of the Complainant's application form.

4.4.1.3 A memorandum from the Provincial Head: Personnel Services, Limpopo dated 05 July 2010 addressed to the Section: Head SAPS Recruitment and Staffing, Pretoria.

4.4.1.4 The re-enlistment interview score sheet of the Complainant dated 23 February 2010.

4.4.1.5 Minutes of the meeting of the interview panel on the Complainant's application dated 04 March 2014.

4.4.2 Correspondences sent and received

4.4.2.1 Letter received from the Provincial Commissioner dated 24 May 2012.
4.4.2.2 Letter sent to the Provincial Commissioner dated 30 July 2012.

4.4.2.3 Letter sent to the Provincial Commissioner dated 03 August 2012.

4.4.2.4 Letter sent to the Provincial Commissioner dated 13 August 2012.

4.4.2.5 Letter sent from the Provincial Commissioner dated 27 September 2013.

4.4.2.6 Email sent to the Brigadier Morakaladi dated 03 March 2014.

4.4.2.7 Letter received from the Provincial Commissioner dated 04 March 2014.

4.4.2.8 Letter sent to Provincial Commissioner dated 14 April 2014.

4.4.2.9 Letter from the Limpopo Deputy Provincial Commissioner: HRM, Maj General K C Moloko dated 17 April 2014.

4.4.2.10 Letter sent to the Provincial Commissioner dated 15 July 2014.

4.4.2.11 Letter received from the SAPS dated 27 September 2014, with an attachment being a letter addressed to the Complainant, giving him the outcome of his application.

4.4.2.12 Letter sent to the National Commissioner, dated 07 October 2014.

4.4.2.13 Letter received from the National Commissioner dated 12 November 2014.
4.4.2.14 Email sent to the SAPS dated 16 March 2015.

4.4.2.15 Letter sent to the SAPS dated 23 March 2015.

4.4.2.16 Letter received from the SAPS dated 09 April 2015.

4.4.2.17 Letter received from the SAPS dated 15 January 2016.

4.4.2.18 Public Protector’s section 7(9) notice to SAPS dated 19 September 2017.

4.4.2.19 Letter received from the SAPS dated 09 November 2017 in response to the section 7(9) notice.

4.4.3 Meetings

4.4.3.1 ADR meeting chaired by the Deputy Public Protector Adv K Malunga in Pretoria at the Office of the Public Protector on 20 February 2014 to try and resolve the matter with the SAPS officials.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution

4.4.4.2 The Public Protector Act

4.4.4.3 SAPS Act 68 of 1995

4.4.4.4 Promotion of Administrative Justice Act 3 of 2000 (PAJA)

4.4.4.5 SAPS Employment Regulations, 2008
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4.4.4.6 The National Instructions 6/2005, Selection and Appointment of Employees on Post Levels 1 to 12.

4.4.5 The SAPS' response to the Public Protector's section 7(9) notice

4.4.5.1 The Public Protector issued a section 7(9) notice to the National Commissioner of Police dated 19 September 2017.

4.4.5.2 The office of the National Commissioner of Police responded to the notice as per the letter dated 09 November 2017 as follows:

"The South African Police Service accepts the proposed finding and remedial action as follows:

- The National Commissioner must develop a standard operating procedure manual or guidelines on the re-enlistment of former members;

- The National Commissioner must ensure that the outcome of the applications for both new recruits and re-enlistment is provided to applicants timeously;

- The National Commissioner must, within thirty (30) days from the date of the final report, consider consolatory payment, a reasonable portion thereof to be determined by an independent assessor; for distress to the Complainant due to the delay to inform him of the outcome of his application for re-enlistment; and all his determinable travelling and incidental costs incurred in the pursuing this matter for a period of more than three (3) years; and

- The National Commissioner must apologise to the Complainant in writing for the inconvenience caused to him and his family, within thirty (30) days from the date of the final report."
5. DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment in the police service during 2010:

Common cause issues

5.1.1 The Complainant reported that his application for re-enlistment was submitted during January 2010, but the SAPS issued the first outcome of his application on 14 August 2013, which is more than 3 years after he was interviewed. In terms of the Circular: Re-enlistment in the South African Police Service: South African Police Act, 1995: Band A (Constable) to MS (Senior Superintendent) with reference number 5/5/2 dated 07 January 2010, the SAPS had a duty to process and finalise the appointment in the 2009/2010 financial year, subject to the availability of posts and or funds.

5.1.2 The interview panel members could not take a decision on the re-enlistment of the Complainant on 23 February 2010 as the panel was not convinced about the recommendations made by the former Commander of the Complainant, Superintendent Khosa, who indicated that he never experienced any difficulties or problems with the Complainant in terms of late coming and even absenteeism in a letter dated 03 September 2014, a recommendation which favoured the Complainant, but was later withdrawn as Superintendent Khosa indicated that the recommendation was based on his general knowledge and not as contained in SAP 96, a document used for a person’s criminal status. The panel adjourned and a detailed background check of the Complainant was conducted.
5.1.3 The panel members re-convened on 04 March 2014 and considered the report from SAPS Sandton Police Station, signed by Colonel RM Griessel, the ex-Commander of the Complainant who did not recommend the re-enlistment of the applicant.

5.1.4 It is common cause that the panel then unanimously agreed that the Complainant could not be recommended due to the following:

(a) From December 2005 until he resigned, 77 days leave days without pay was captured against his name, and he did not show any indication of complying with the disciplinary code in a matter which is acceptable in the SAPS; and

(b) The previous station commander, in his recommendation indicated that the applicant was not suitable for re-enlistment due to his previous poor conduct in the SAPS.

5.1.5 The SAPS conceded in a letter dated 07 January 2017, that “a decision on his re-appointment was not communicated earlier by the Province in view of the fact that the application was still under review.”

**Issues in dispute**

5.1.6 The Complainant submitted that the undue delay created a legitimate expectation on his part and that his matter should be dealt with in line with the Public Protector’s Maloba report, titled “A Fair Chance to Serve”.

5.1.7 For the Complainant to succeed on the doctrine of legitimate expectation, he had to prove that the SAPS made a promise to re-enlist him, that he relied on the promise and that the reliance is reasonable.
5.1.8 The doctrine of legitimate expectation was developed as a ground for judicial review in administrative law to protect a procedure or substantive interest when a public authority retracts a promise made to a person.

5.1.9 In the "A Fair Chance to Serve" report, failure to re-enlist Mr Maloba was based on a pending civil case, a provision which is not in Regulation 11 of the SAPS relating to Application for Appointment and the SAPS circular dated 01 January 2010 relating to Re-enlistment in the SAPS. The Complainant's case is distinguishable from the Maloba's case in that in this regard the issue is about poor service conduct and not a pending civil case.

5.1.10 The Complainant was not re-enlisted because of his poor service record, which gave the panel members the authority to consider the previous convictions or pending criminal cases of disciplinary proceedings against the applicant in determining the suitability of a candidate in line with the National Instruction 6/2005 on selection and appointments of employees in SAPS.

5.1.11 Section 3 of the PAJA makes provision for procedurally fair administrative action affecting any person. Subsection (1) prescribes that administrative action which materially affects the rights or legitimate expectations of any person must be procedurally fair.

5.1.12 In terms of subsection 2(b), in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) must give the person referred to in subsection (1) - (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action and (v) adequate notice of the right to request reasons in terms of section 5.

5.1.13 It is thus evident under the circumstances that the procedure undertaken by the SAPS in handling the Complainant’s application for re-enlistment was in
contravention of the provisions of PAJA in that all other applications were adequately dealt with and finalised in the 2009/2010 financial year, subject to availability of posts per the SAPS’s own policy, except that of the Complainant.

5.1.14 In the circumstances and on account of the delays, the Complainant was not informed of the SAPS’s decision and on finding out the outcome of his application was not given an opportunity to make representations in support of his case or afforded notice of his right to request for the adverse decision taken against him in not re-enlisting him.

Conclusion

5.1.15 The SAPS unduly delayed to inform the Complainant about its decision on his application for re-enlistment and also failed to afford him an opportunity to make representations regarding the decision not to re-enlist him. The SAPS took more than three (3) years to issue the outcome of the Complainant’s application for re-enlistment.

5.1.16 The Complainant’s claim that he had a legitimate expectation cannot be substantiated.

5.1.17 The SAPS accordingly had a duty to observe the provisions of just administrative action, as encapsulated in section 3(2)(b)(ii), (iii) and (v) of PAJA when taking a decision on Complainant’s application for re-enlistment, however, it failed to do so.

5.1.18 Further to the above the SAPS failed to comply with its constitutional duty to comply with the provisions of section 33 of the Constitution which dictates that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
5.2 Regarding whether the reasons provided by the SAPS for not re-enlisting the Complainant were fair, just and reasonable in the circumstances:

Common cause issues

5.2.1 It is common cause that the Complainant was given reasons why the SAPS could not re-enlist him. One reason was that there was a shortage of posts and the other was his previous poor in-service record. Although the reasons given were different, on a balance of probabilities, the Public Protector is inclined to believe that the cumulative effect is that the reasons for not re-enlisting the Complainant were fair, just, and reasonable in the circumstances.

Issues in dispute

5.2.2 In responding to the discretionary letter, the Complainant submitted that it was not a requirement that the applicant should have a clean in-service record.

5.2.3 The advert clearly spelt out that former members who were dishonourably discharged or dismissed should not respond to the advert as they were excluded for consideration; or those who resigned to avoid a dishonourable charge (own emphasis).

5.2.4 National Instruction 6/2005 regulates the selection and appointment of employees in SAPS to post levels 1 to 12.

5.2.5 In evaluating the applications the panel members had to be guided by, amongst others, whether the applicant indicated in writing that he or she will be terminating his or her services by purchasing his or her discharge, retiring on pension or on account of medical unfitness; previous convictions or pending criminal cases or disciplinary proceedings against the applicant.
5.2.6 The Complainant submitted that he bought his discharge/resigned from the service and that there were no pending cases against him.

5.2.7 The SAPS submitted that the Complainant was not re-enlisted because of his poor in service record, which is in line with the National Instruction 6/2005 on selection and appointments of employees in SAPS.

**Conclusion**

5.2.8 In line with National Instruction 6/2005, the reasons given to the Complainant in not re-enlisting him are fair, just and reasonable under the circumstances.

5.2.9 Though the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment, the procedure followed in adjudicating his application was fair. The SAPS complied with the National Instruction on selection and appointments of SAPS employees.

5.3 Regarding whether the Complainant was prejudiced by the conduct of the SAPS in the circumstances:

**Common cause issues**

5.3.1 It is common cause that all applications received on or before 31 January 2010 were supposed to have been finalised during the 2009/2010 financial year, subject to the availability of posts and or funds as per the directive with reference number 5/5/2 dated 07 January 2010 addressed to all offices and branches in the SAPS, countrywide.

5.3.2 Had SAPS requested further information relating to the Complainant's previous in-service conduct within a reasonable time as required by Instructions 9(1) to 9(3) of the SAPS National Instruction 6/2005, Selection and Appointment of Employees on Post Level 1 to 12 and timeously informed
him of the outcome, the Complainant would have not used his resources, money and time in pursuing the outcome of his application for re-enlistment.

**Conclusion**

5.3.3 The Complainant was prejudiced by the conduct of SAPS because a timely response to his application for re-enlistment would have afforded him an opportunity to consider other employment opportunities.

6. **FINDINGS**

Having considered the evidence uncovered during the investigation against the relevant regulatory framework determining the standard the SAPS should have complied with and the impact on the Complainant, the Public Protector makes the following findings:

6.1 **Regarding whether the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment in the police service during 2010:**

6.1.1 The allegation that the SAPS unduly delayed to inform the Complainant of the outcome of his application for re-enlistment in the police service during 2010 and also failed to give him a reasonable opportunity to make a representation regarding its decision not to re-enlist him is substantiated.

6.1.2 The Complainant’s application for re-enlistment was submitted during January 2010, but the SAPS issued the first outcome of his application on 14 August 2013, which is more than 3 years after he was interviewed.

6.1.3 In terms of the Circular: Re-enlistment in the SAPS: SAPS Act, 1995: Band A (Constable) to MS (Senior Superintendent) with reference number 5/5/2 dated
07 January 2010, the SAPS had a duty to process and finalise applications for appointment in the 2009/2010 financial year, subject to the availability of posts and/or funds.

6.1.4 The SAPS's conduct was in violation of section 23(1); 33(1) and (2) of the Constitution and section 3(2)(b)(ii), (iii), (iv) and (v) of the PAJA.

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

6.2 Regarding whether the reasons provided by the SAPS for not re-enlisting the Complainant were fair, just and reasonable in the circumstances:

6.2.1 The reasons provided by the SAPS for not re-enlisting the Complainant were found to be fair, just and reasonable in the circumstances.

6.2.2 The Complainant was given reasons why he was not re-enlisted. The reason not to re-enlist the Complainant was due to his previous poor conduct in the SAPS.

6.2.3 In terms of Regulation 38(1)(c) and 45(7) of the SAPS Employment Regulations, 2008 and Instruction 9(1) to 9(3) of the SAPS National Instruction 6/2005, Selection and Appointment of Employees on Post level 1 to 12, previous disciplinary proceedings against the applicants were to be considered during the recruitment process.

6.2.4 The contradictory reasons given to the Complainant by SAPS for not re-enlisting him is however a concern. At the first instance he was told that there was a shortage of posts in Limpopo Provincial SAPS thereby creating the impression that had it not been for the shortage, he could have be re-enlisted
and later told that due to his previous in-service record he could not be re-enlisted.

6.3 Regarding whether the Complainant was prejudiced by the conduct of the SAPS in the circumstances:

6.3.1 The allegation that the Complainant was prejudiced by the conduct of the SAPS in the circumstances is substantiated.

6.3.2 The conduct of the SAPS in delaying to inform the Complainant about the outcome of his application for re-enlistment is prejudicial in that it took the SAPS more than three years to inform him of the outcome of his application.

6.3.3 Had the SAPS requested further information relating to the Complainant's previous in-service conduct within a reasonable time, as required by Instructions 9(1) to 9(3) of the SAPS National Instruction 6/2005, Selection and Appointment of Employees on Post Level 1 to 12; the Complainant would have been informed of the outcome of his application much earlier and he could have started working on an alternative career plan.

6.3.4 Though the decision not to re-enlist him was rational, fair and reasonable, the Complainant suffered financial loss in that he spent his valuable resources, time and money pursuing the SAPS to release the outcome of his application for re-enlistment.

6.3.5 The conduct of the SAPS prejudiced the Complainant, as envisaged in section 182(1)(a) of the Constitution and as such constitutes maladministration in terms of section 6(4)(a) of the Public Protector Act and resulted in prejudice to the Complainant.
6.3.6 In his response to the Public Protector’s notice in terms of section 7(9) of the Public Protector Act, dated 19 September 2017, the Acting National Commissioner agreed to the proposal for the payment of an *ex gratia* payment to the Complainant.

7. **REMEDIAL ACTION**

The remedial action that the Public Protector takes, in pursuit of section 182(1) (c) of the Constitution, having taken into account the prejudice the Complainant has suffered and also the Acting National Commissioner’s response to the Public Protector notice in terms of section 7(9) of the Public Protector Act, is the following:

7.1 The National Commissioner must develop a standard operating procedure manual or guidelines on the re-enlistment of former members;

7.2 The National Commissioner must ensure that the outcome of applications for both new recruits and re-enlistment is provided to applicants timeously;

7.3 The National Commissioner must, within thirty (30) working days from the date of this report, consider an *ex gratia* payment, a reasonable portion thereof to be determined by an independent assessor; for distress caused to the Complainant due to the delay to inform him of the outcome of his application for re-enlistment; and all his determinable travelling and incidental costs incurred in pursuing this matter for a period of more than three (3) years; and

7.4 The National Commissioner must apologise to the Complainant in writing for the inconvenience caused to him and his family, within thirty (30) working days from the date of publication of this report.
8. MONITORING

8.1 The SAPS National Commissioner must submit an implementation plan to the Public Protector within (fifteen) 15 working days of receipt of this report on how the remedial action under paragraph 7 will be implemented.

8.2 The Public Protector shall monitor progress made in this regard monthly.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 04/12/2017
Assisted by: Limpopo Provincial Office