REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE SOUTH AFRICAN NATIONAL DEFENCE FORCE TO PROPERLY IMPLEMENT THE RECOMMENDATIONS OF THE MILITARY OMBUD IN THE CASE OF LT COLONEL B MVITHI.
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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, and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates the Public Protector’s findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into alleged failure by the South African National Defence Force (hereinafter referred to as SANDF) to properly implement the recommendations of the Military Ombud (hereinafter referred to as MO) in the case of Lieutenant Colonel B Mvithi.

(iii) The complaint was lodged with the Office of the Public Protector on 28 February 2014 by the complainant following the alleged failure by the SANDF to properly implement the recommendations of the MO which is dated 19 October 2012 and also as the result of him having been served with the Notice of Administrative Dismissal under section 59 (3) of the Defence Act 42 of 2002 by the SANDF on 10 April 2014. According to this notice the complainant was given until 29 April 2014 to furnish reasons to his employer as to why he should not be discharged from the Defence Force.

(iv) The Complainant is an adult male by the name of Mr Babalo Mvithi. The complainant was a member of the SANDF and held the rank of Lieutenant Colonel before he was dismissed by the SANDF for allegations contained in the complainant’s complaint to MO, which allegations are not relevant for the purposes of this investigation.

(v) In essence, the complaint under investigation was that the SANDF failed to properly implement the recommendations of the MO, dated 19 October 2012.
(vi) The complainant lodged the complaint with the office of the MO on 18 May 2012 after he was dismissed by the SANDF in terms of 59 (3) of the Defence Act 42 of 2002, following a labour dispute with his employer (SANDF) regarding his transfer to AFB Hoedspruit in Mpumalanga from his original post which was S01 Personnel Inspector General Air Force at Pretoria in Gauteng.

(vii) It is alleged that during a 2011, Succession Planning process a decision was taken to transfer Lt Colonel Mvithi (9707112PE) to AFB Hoedspruit. Mvithi allegedly neglected to comply with numerous appeals and instructions to resume his official duties at AFB Hoedspruit, thereafter South African Air Force (SAAF) was compelled in terms of section 59 (3) Defence Act 42 of 2002, to regard the member as being discharged from SANDF due to being Absent Without Permission (AWOP). On 10 February 2012, Human Resources Management provided administrative authority (DSEP/107/2/206) with the last date of service being 10 February 2012.

1.1. The MO launched an investigation into the allegations raised by the Complainant and the following findings were made:

(a) "The MO found that the complainant was not consulted before a unilateral decision to transfer him to AFB Hoedspruit was made by Brigadier General Masters and that such was contrary to SAAF Instruction MRI: 017691.

(b) He was charged in 2009 for 2008 MDC offences as well as in 2010 for a serious offence like mutiny but up to date, those charges have not yet been adjudicated in a Military Court.

(c) His biometric finger print access was de-activated on instructions of Brig Gen Masters.
(d) He was declared persona non-grata and denied access to the Unit with his photo displayed at the reception.

(e) After he was denied access to the Unit, his salary was stopped.

(f) He was served with the letter of Administrative Dismissal in terms of section 59(3) of the Defence Act 42 of 2002, which is not applicable under the circumstances of the member as his Director made it impossible for him to report at his work place.

(g) He was victimised in that his vacation and study leave were cancelled by the Director who later confirmed that he is not responsible for marking in the work attendance register.

(h) He was chased out of the office by the Director.

(i) On the complaint of assault by Lieutenant Colonel Meyer, the MO advised that such a case is of pure criminal nature and therefore the complainant should make a follow up with the Military Police where that matter was reported.

(j) On allegations of report changed by Brig Gen Masters, MO advised that, such complaint be escalated to the office of the Chief of the South African National Defence Force (C SANDF).

1.2 The MO upheld the complaint lodged by the Complainant in terms section 6(8) of the Military Ombud Act 4 of 2012, and recommended the following:

a) Lt Colonel Mvithi should be reinstated back to his post as if he has never been served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002.
b) His salary should be reinstated and backdated from April 2012.

c) SAAF should comply with its own policy, SAAF Instruction MRI: 017691 which demands that a member must be consulted when he is going to be transferred.

d) SAAF should stop displaying photos of friendly forces as if they are criminals.

e) Denial of access to the Unit and locking out members should be done when a member poses a threat, matter must have been reported to the Military Police and the C SANDF should have authorised the denial of access.

f) When a member has been charged, he is entitled to a speedy trial in terms of the Constitution, SAAF must observe this principle or Legal Services Division.

g) Provisions of Section 59(3) of the Defence Act 42 of 2002 should not be misapplied where they are not applicable.

h) Reasons should be forwarded to the member for denial of leave which should be operational requirements or organisational requirements and nothing else.

(viii) Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

(a) Did the SANDF improperly fail to reinstate the Complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59 (3) of the Defence Act 42 of 2002 as per the recommendations of the MO?

(b) Did the SANDF improperly fail to reinstate and backdate the Complainant’s salary from April 2012?
(c) Did the SANDF improperly fail to comply with its own policy, SAAF Instruction MRI: 01769, which demands that a member must be consulted when he is going to be transferred?

(d) Did the SANDF improperly deny the Complainant access to the Unit and lock him out when he did not pose a threat without reporting the matter to the Military Police and without the Chief of the South African Defence Force (C SANDF) having authorised the denial of access?

(ix) Key laws and policies taken into account to determine if there had been maladministration by the SANDF and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the SANDF or its officials when processing this complaint. Those are the following:


Section 200(1) prescribes that the Defence Force must be structured and managed as a disciplined military force.

(b) The South African National Defence Force Act, Act 42 of 2002

Section 14(c) and (d) of the Defence Act, Act 42 of 2002, prescribes that the Chief of the Defence Force:

a. Must execute his command by issuing orders, directives and instructions.

b. Is responsible for the direct management and administration of the Defence Force in an efficient way, including the effective utilization and education, training and development of all members of the Defence Force.
Section 50(5)(b) of the Defence Act (supra), prescribes that members of the Defence Force may, while in service, be required and ordered to serve, move or reside anywhere in the republic and the rest of the world.

Section 59(3) of the Defence Act (supra) provides that a member of the Regular Force who absents himself or herself from official duty without the permission of his or her commanding officer for a period exceeding 30 days must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank, on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of duty or the last day of his or her official leave, but the Chief of the Defence Force may on good cause shown, authorise the reinstatement of such member on such conditions as he or she may determine.

(c) Military Ombud Act, 4 of 2012

Section 4(1) (a) provides that the mandate of the Military Ombud is to investigate complaints lodged in writing by a member regarding his or her conditions of service.

Section 6(8) provides that “if the Ombud upholds the complaint, the Ombud must recommend the appropriate relief for implementation to the Minister of Defence Force.

Section 7(2)(d) provides that the Ombud may refuse to investigate a complaint if: a member has not first used the mechanisms available under the Individual Grievance Resolution, 2010, unless the complaint relates to problems inherent in the system which bring about an adverse result to the complainant.

Section 13 provides that any person aggrieved by a decision of the Ombud may apply to the High Court for review against the decision within 180 days of the decision of the Ombudsman.
(d) SAAF Instruction MRI: 017691

Provides that a member must be consulted when he is going to be transferred.

(e) Recommendations of the Military Ombud: MILOMBUD/R/0004/5/12

MO upheld the complaint lodged by the complainant and recommended the appropriate relief for implementation to the Minister, in terms of section 6 (8) of Military Ombud Act, 4 of 2012

(x) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Whether the SANDF improperly failed to reinstate the Complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002 as per recommendations of the MO:

(aa) The allegation that the SANDF improperly failed to reinstate the Complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002 as per the recommendations of the MO is substantiated.

(bb) The SANDF failed to implement Paragraph 4.a. of the recommendations of the MO which directed that the Complainant be re-instated back to his post (i.e. Air Command S01 Personnel Inspector General Air Force at Pretoria in Gauteng) as if he was never served with a letter of administrative dismissal in terms of section 59(3) of the Defence Act 42, of 2002. Although the Complainant was reinstated by the SANDF following the recommendations of the MO, SANDF failure to reinstate
the Complainant was not in line with the recommendations of the MO and merely amounted to malicious compliance with the recommendations of the Military Ombud. The SANDF sought to transfer the Complainant to AFB Hoedspruit instead of reinstating the Complainant to his original post.

The SANDF failed to implement Paragraph 4.a. of the recommendations of the MO and such failure 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 SANDF improperly failed to backdate the payment of the Complainant’s salary from April 2012:

(aa) The allegation that the SANDF improperly failed to backdate the payment of the Complainant’s salary from April 2012 is not substantiated.

(bb) The evidence of pay schedules from SANDF’s Pay Centre, indicate that the Complainant was paid an amount of R86 608.98 on 31 May 2013 as well as an amount of R75 000.00 on the same day.

(cc) The Complainant’s salary was reinstated and backdated in accordance with the MO recommendations.

(dd) In the circumstances, the Public Protector is unable to find improper conduct or maladministration on the part of the SANDF in this regard.

(c) Whether the SANDF improperly failed to comply with its own policy, SAAF Instruction MRI: 017691 which demands that a member must be consulted when he is going to be transferred:
(aa) The allegation that the SANDF improperly failed to comply with its own policy, SAAF Instruction MRI: 017691 which demands that a member must be consulted when he is going to be transferred is substantiated.

(bb) The SANDF sought to transfer the Complainant to AFB Hoedspruit without consulting with him.

(cc) The SANDF’s failure to consult with the Complainant was in violation of SAAF Instruction MRI: 017691.

(dd) Such failure 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.

(d) Whether the SANDF improperly denied the Complainant access to the SAAF Head Quarters and locked him out when he did not pose a threat without reporting the matter to the Military Police and without the C SANDF having authorised the denial of access:

(aa) The allegation that the SANDF improperly denied the Complainant access to the SAAF Head Quarters and locked him out when he did not pose a threat without reporting the matter to the Military Police and without the C SANDF having authorised the denial of access is substantiated.

(bb) The SANDF denied the Complainant access to the SAAF Head Quarters and in the process prevented him from going to work as found by the Military Ombudsman. The SANDF’s response in this regard stands to be rejected as the purported threat as alleged could have been reported to the Military Police and appropriate action could have been taken in that regard.
The SANDF’s denial of access to the Complainant was an abuse of power and 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.

The remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution is the following:

1. The Chief of the National Defence Force (C SANDF)

(a) The C SANDF should reinstate the Complainant (Lieutenant Colonel B. Mvithi :97071112PE) back to his post of SO1 Personnel at Inspector Air Force as reflected on his employee clock history as per the recommendation by the Military Ombud within 30 days of the issue of this report.

(b) The C SANDF should reinstate the Complainant’s salary, having taken into account all the increases from the date of termination and backdate payments of his salary from the date on which his pay was terminated (i.e. 15 November 2013) to date of payment, within 30 days of the issue of this report.

(c) Should the SANDF decide to transfer the Complainant in terms of section 50(5)(b) of the Defence Act 42, of 2002 after his reinstatement as directed above, the South African Air Force must comply with its own policy, SAAF Instruction MRI: 017691 which requires that the member be consulted through command channels to get an understanding on the member’s social, financial commitments and career aspirations in relation to the pending placement. The minutes of such a consultation should be captured for record purposes and future references.

The Minister of Defence and Military Veterans
7.1.2 The Minister must within 60(sixty) days of the issue of this report institute disciplinary steps against all the officials/members of the SANDF that were involved in the subversion of the recommendations of the MO which are dated 19 October 2012.

7.1.3 The Minister must further ensure that compliance with the recommendations of the MO dated 19 October 2012 is fully implemented by SANDF and closely monitored in order to avoid any subsequent subversion therewith.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE SOUTH AFRICAN NATIONAL DEFENCE FORCE TO PROPERLY IMPLEMENT THE RECOMMENDATIONS OF THE MILITARY OMBUD IN THE CASE OF LT COLONEL B.MVITHI

1. INTRODUCTION

1.1. 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, 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 people to note the outcome of the investigation:

1.2.1. The Minister of Defence and Military Veterans ;( N Mapisa-Nqakula)
1.2.2. The Chief of the South African National Defence Force ;( General SZ Shoke)
1.2.3. The Military Ombud (Retired General TT Matanzima); and
1.3. A copy of the report is also provided to Mr Babalo Mvithi, the Complainant to inform them about the outcome of my investigation.
1.4. The report relates to an investigation into the alleged failure by the South African National Defence Force to properly implement the recommendations of the Military Ombudsman in the case of Lt Colonel B Mvithi.
2. **THE COMPLAINT**

2.1 The Complainant is an adult male by the name of Mr Babalo Mvithi. The complainant was a member of the SANDF and held the rank of the Lieutenant Colonel before he was dismissed by the SANDF for allegations relating to this case.

2.2 In essence, the complaint was that the SANDF failed to properly implement the recommendations of the MO, dated 19 October 2012.

2.3 The complainant initially lodged the complaint with the office of the MO on 18 May 2012 after he was dismissed by the SANDF in terms of 59(3) of the Defence Act, 42 of 2002 following a labour dispute with his employer (SANDF) regarding his transfer to AFB Hoedspruit in Mpumalanga from his original post which was S01 Personnel Inspector General Air Force at Pretoria in Gauteng.

2.4 It is alleged that during a 2011 Succession Planning process a decision was taken to transfer Lt Colonel Mvithi (9707112PE) to AFB Hoedspruit. Mvithi allegedly neglected to comply with numerous appeals and instructions to resume his official duties at AFB Hoedspruit, thereafter SAAF was compelled in terms of Defence Act 42, of 2002, section 59(3) to regard the member as being discharged from SAND due to being Absent Without Permission (AWOP). On 10 February 2012, Human Resources Management provided administrative authority (DSEP/107/2/206) with the last date of service being 10 February 2012.

2.5 The MO launched an investigation on allegations raised by the complainant and upheld this complaint by finding and recommending in favour of the complainant as per its report to SANDF, dated 19 October 2012.

2.6 The complaint was lodged with the Office of the Public Protector on 28 February 2014 by the complainant following the alleged failure by the SANDF to properly
implement the recommendations of the MO which is dated 19 October 2012 and also as the result of him having been served with the Notice of Administrative Dismissal under section 59 (3) of the Defence Act 42 of 2002 by the SANDF on 10 April 2014. According to this notice the complainant was given until 29 April 2014 to furnish reasons to his employer as to why he should not be discharged from the Defence Force.

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 as prescribed by legislation.

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

3.5 In the *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 Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. 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.

3.6 The SANDF 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.

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

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation of the Complaint by the Public Protector was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 8(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 818 (CC) at para [76].
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 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The investigation process commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act, 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. The investigation process proceeded with an attempt to resolve the dispute by means of Alternative Dispute Resolution sessions with the aim of finding an amicable solution to the matter. When ADR sessions failed and when no amicable solution could be reached by the parties, the evidence and information gathered were used to launch a formal investigation.

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 amount 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 they would have been but for the maladministration or improper conduct?
4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the SANDF acted improperly in implementing the recommendations of the MO dated 19 October 2012.

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 Department or 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 SANDF 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 Did the SANDF improperly fail to reinstate the Complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act, 42 of 2002 as per the recommendations of the MO?

4.3.2 Did the SANDF improperly fail to reinstate and backdate the Complainant's salary from April 2012?

4.3.3 Did the SANDF improperly fail to comply with its own policy, SAAF Instruction MRI: 01769, which demands that a member must be consulted when he is going to be transferred?
4.3.4 Did the SANDF improperly deny the Complainant access to the Unit and lock him out when he did not pose a threat without reporting the matter to the Military Police and without the C SANDF having authorised the denial of access?

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 A copy of the Complainant’s complaint documents.
4.4.1.2 Copy of the Recommendations of the Military Ombud: MILOMBUD/R/0004/5/12
4.4.1.3 Copy of the full Report of the Military Ombud to the SANDF.
4.4.1.4 SAAF Instruction MRI: 017691 which provides that a member must be consulted when he is going to be transferred
4.4.1.5 The minutes of the meeting held at Public Protector’s Head Office with the officials of the MO, SAAF, Complainant and Public Protector on 01 June 2016.
4.4.1.6 The minutes of the meeting held at SANDF’s Head Quarters with the officials of the SANDF and the Public Protector on 28 October 2016.

4.4.2 Correspondence sent and received

4.4.2.1 Letter from SANDF with reference number CAF/R/107/2 dated 30 April 2013.
4.4.2.2 Letter from SANDF with reference number AIR COMD DHRS/R/302/1 dated 22 May 2013.
4.4.2.3 Letter to SANDF with reference number 7/2-005455/14 dated 03 June 2016.
4.4.2.4 Letter from SANDF with reference number CSANDF/R/509/1 dated 21 July 2016.
4.4.2.5 Letter to SANDF with reference number 7/2-005455/14 dated 18 November 2016.
4.4.2.6 Letter to SANDF with reference number 7/2-005455/14 dated 05 December 2016.
4.4.2.7 Letter dated 19 January 2017 from SANDF with full submissions and annexures.
4.4.2.8 Letter to SAND with reference number 7/2-005455/14 dated 22 February 2017.
4.4.2.9 Letter dated 28 March 2017 from SANDF confirming the signature of the CSANDF on the letter with reference number CD HRM/HR SEP/R/107/2 dated 19 March 2013.

4.4.3 Legislation and other prescripts
4.4.3.1 Constitution of the Republic of South Africa
4.4.3.2 Defence Act 42 of 2002.
4.4.3.3 Military Ombud Act 4 of 2012.
4.4.3.4 Public Protector Act 23 of 1994.

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 the Constitutional Court. [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC).
THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS:

5.1 Whether the SANDF improperly failed to reinstate the Complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002 as per the recommendations of the MO:

Common cause

5.1.1 The Minister of Defence and Military Veterans accepted the recommendations of the MO and duly instructed SANDF to implement them.

5.1.2 The SANDF failed to reinstate the complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59 (3) of the Defence Act 42 of 2002 as per the recommendations of the MO.

5.1.3 The evidence of the MO report clearly indicates that the post of the Complainant was Air Command S01 Personnel Inspector General Air Force at Pretoria in Gauteng before his unilateral transfer and dismissal under section 59(3) of the Defence Act 42 of 2002. According to the recommendations of the MO, the complainant should be reinstated back to his post as if he was never served with the letter of administrative dismissal.

5.1.4 Clarity sought from the full report of MO in this regard indicates that the recommendation for re-instatement of the Complainant was to his original post namely, Air Command S01 Personnel Inspector General Air Force at Pretoria in Gauteng before the impugned transfer to Hoedspruit.
5.1.5 It is clear from the letter with reference CSANDF/R509/1, dated 27 December 2012 that the Chief of SANDF (General S Z Shoke) also endorsed the implementation of the recommendations of the MO. In this letter the Chief of SANDF directs the Chief of the Air Force to implement the recommendations of the MO as reflected in the letter of the MO (MILOMBUD/R/0004/5/12) dated 19 October 2012, viz paragraph 4, a – h with immediate effect.

Issues in dispute

5.1.6 It is in dispute whether the Complainant was properly reinstated in accordance with the MO’s recommendations.

5.1.7 The evidence at the Public Protector’s disposal indicates that an instruction from Chief of the Air Force (CAF), Lieutenant General F Z Msimang followed on 30 April 2013, four months later after the Chief of SANDF directed him to implement the recommendation of the MO with reference number (CAF/R/107/2) informing the Complainant to resume his duties as a Staff Services to the OC AFB Hoedspruit (Division 379625 Usage 2068) with immediate effect.

5.1.8 This instruction from the CAF is manifestly in direct conflict and in violation of recommendation “4a.” of the MO which clearly stated that Lt Colonel Mvithi should be reinstated back to his post as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002. The MO has made it clear that the post they were referring to before his unlawful transfer and dismissal was Air Command, S01 Personnel Inspector General Air Force at Pretoria in Gauteng.

5.1.9 This instruction by CAF is also contrary to the instruction given by CSANDF in his letter dated 27 December 2012. The CSANDF in this letter does not say that the
Complainant must be reinstated to AFB Hoedspruit but he is merely directing that the recommendations of the MO be urgently implemented as reflected in the letter from the Office of Military Ombud (MILOMBUD/R/0004/5/12) dated 19 October 2012, viz paragraph 4, a – h.

5.1.10 Evidence further reveals that a submission dated 19 March 2013 with reference number (CD HRM/D HRSEP/R/107/2) was made by Chief Human Resources, Lieutenant General TM Nkabinde in which an approval of a reinstatement of the Complainant was sought from CSANDF. In this, submission the CSANDF (General Shoke) approved the reinstatement on the 25 March 2013 by signing and further inserted a hand-written proviso that the complainant must report at the unit where he had been appointed to. It is noted that upon further enquiry by the Public Protector in this regard to get clarity on who signed the approval with the hand-written proviso, the CSANDF (General SZ Shoke) confirmed in a letter dated 28 March 2017 that he had signed the submission and that he unequivocally meant that the Complainant must report to AFB Hoedspruit.

5.1.11 In response to the Public Protector’s section 7(9) notice regarding this issue, the SANDF submitted its submission dated 18 July 2017 and argued that it retains its previous position in that Lt Colonel Mvithi was absent without leave and as a result thereof he was administratively discharged in terms of section 59(3) of the Defence Act 42 of 2002. SANDF further indicated in its response that upon reinstatement Lt Colonel Mvithi was instructed to report to AFB Hoedspruit and that he adhered to this instruction without ever airing or voicing any dissatisfaction about his reporting to Hoedspruit.

5.1.12 This response by SANDF does not take this matter forward since the reinstatement was not done in accordance with the recommendations of the MO. According to paragraph 4.a. of the recommendations of the MO, the SANDF was supposed to reinstate the complainant back to his post at Air Command, S01 Personnel
Inspector General Air Force at Pretoria in Gauteng as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002. The submission that the Complainant did not voice any dissatisfaction about his transfer to Hoedspruit is unfounded as his lawyer (Van Wyk Attorneys) raised this dissatisfaction in a letter dated 26 June 2013 addressed to CSANDF. The SANDF instead sought to transfer the Complainant to Hoedspruit in Mpumalanga without consulting with him as required by SAAF policy MRI: O17691 and thereby failed to comply with this recommendation of the MO.

Application of the relevant legal framework

5.1.13 The legal framework regulating this issue is the MO Report (MILOMBUG/R/0004/5/12) dated 19 October 2012, viz paragraph 4, a – h. In terms of paragraph 4.a. of the MO Report, Lt Col Mvithi should be reinstated back to his post as if he was never served with a letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002.

5.1.14 Section 13 of the Military Ombud Act 4 of 2012 provides that:

*Any person aggrieved by a decision of the Ombud may apply to the High Court for review against that decision within 180 days of the decision of the Ombudsman*

5.1.15 It is noted that the SANDF never applied to the High Court for the review of the decision of the Ombudsman in terms of section 13 of Military Ombud Act 4 of 2012. It then follows that in the absence of such an application for the review of such decision, the SANDF was obliged to fully implement the recommendations of the Ombudsman.

5.1.16 It is clear from the evidence traversed above that the SANDF failed to reinstate the Complainant as recommended by the MO. The Public Protector further noted that the
SANDF’s submission in response to the section 7(9) notice does not raise any valid legal or factual grounds which justifies a departure from the Public Protector’s proposed finding in this regard.

**Conclusion**

5.1.17 It therefore follows that the SANDF improperly disregarded the MO’s recommendation to reinstate the Complainant to his original position and its submission in response to the Public Protector’s section 7(9) notice regarding this issue stands to be rejected.

5.2 Whether the SANDF improperly failed to backdate the payment of the Complainant’s salary from April 2012:

**Common cause**

5.2.1 The Public Protector is in possession of the record submitted by SANDF’s Pay Centre, which indicates that the Complainant was paid an amount of R 86608.98 on 31 May 2013 as well as an amount of R75000.00 on the same date. The SANDF on its submission dated 19 January 2017 confirmed that this was indeed proof and confirmation that the complainant’s salary was backdated to the date of his administrative discharge and that the calculations were done correctly.

**Issues in dispute**

5.2.2 The Complainant alleged that although he was paid the backdated salary, he was not paid everything that was all due to him.

5.2.3 The Complainant did not provide any evidence that could prove that his salary was incorrectly backdated in this regard.
5.2.4 In the circumstances the Public Protector is persuaded that the Complainant’s salary was correctly backdated in the absence of any evidence to the contrary.

*Application of the relevant legal framework*

5.2.5 The issue regarding the backdated salary is regulated by paragraph 4.b. of the MO Report which provides that the Complainant’s salary should be reinstated and backdated from April 2012.

5.2.6 The evidence of pay schedules from SANDF’s Pay Centre, indicate that the Complainant was paid an amount of R 86608.98 on 31 May 2013 as well as an amount of R75000.00 on the same day.

*Conclusion*

5.2.7 The Complainant’s salary was reinstated and backdated in accordance with the MO’s recommendations.

5.3 Whether the SANDF improperly failed to comply with its own policy, SAAF Instruction MRI: 017691 which demands that a member must be consulted when he is going to be transferred:

*Common cause*

5.3.1 It is noted that instead of reinstating the Complainant to S01 Personnel Inspector General Air Force at Pretoria in Gauteng as per the MO’s recommendation, the SANDF sought to transfer the Complainant to AFB Hoedspruit in Mpumalanga.

5.3.2 It is also common cause that there was no consultation with the Complainant regarding the transfer to AFB Hoedspruit in Mpumalanga.
5.3.3 In his statement made to the MO dated 20 July 2012, Brigadier General Masters argued that there is no DOD/SANDF Policy which required him to consult with the Complainant. He indicated however that, in the Air Force they have a Policy which says that they must consult the member and the supervisor so that they can make the best decision. Brigadier General Masters’ argument in this regard is self-contradictory. It is disingenuous for him to argue that there is no DOD/SANDF Policy which required him to consult with the Complainant yet in the same line he indicates that Air Force has a Policy which says that they must consult with the member and supervisor so that they can make the best decision. In retrospect it is clear that Brigadier General Masters was referring to SAAF Instruction MRI: 017691.

5.3.4 It is equally disingenuous why the SANDF did not consider the Air Force Policy in that regard since at all material times the Complainant was a member of the Air Force.

5.3.5 In response to the Public Protector’s section 7(9) notice regarding this issue, the SANDF submitted in its submission dated 18 July 2017 and argued that the Complainant was consulted by General CA Masters in line with SAAF Policy MRI: 017691 and that the consultation preceded Succession Planning in 2011. This argument does not take this matter further since by his own testimony (paragraph 2 of an affidavit/statement dated 20 July 2012) submitted to MO, General Masters in his own testimony said “There is no DOD/SANDF policy which requires me to consult him before I can transfer him”. By implication this was an admission by General Masters that he did not consult with the Complainant and the MO accordingly found that the Complainant was not consulted in line with the said policy. Even after reinstatement the SANDF did not take the opportunity to consult with the Complainant. The SANDF failed to provide the Public Protector with the confirmatory minutes of any such consultation.
5.3.6 In the circumstances there is no doubt that the SANDF has a policy which it had to take into account when contemplating the transfer of the Complainant to AFB Hoedspruit in Mpumalanga which the SANDF failed to observe.

Application of the relevant legal framework

5.3.7 The issue regarding the SANDF’s duty to consult with the Complainant when contemplating to transfer him to AFB Hoedspruit in Mpumalanga is regulated by SAAF Instruction MRI: 017691 which demands that a member must be consulted when he is going to be transferred.

5.3.8 It has been established in the evidence that the SANDF did not consult with the Complainant in this regard which was contrary to SAAF Instruction MRI: 017691. The SANDF’s submission in its response to the Public Protector’s section 7(9) notice regarding this issue does not rebut the evidence already traversed in this regard.

Conclusion

5.3.9 The SANDF failed to comply with its own policy which demands that a member must be consulted when he is going to be transferred.

5.4 Whether the SANDF improperly denied the Complainant access to the SAAF Head Quarters and locked him out when he did not pose a threat without reporting the matter to the Military Police and without the C SANDF having authorised the denial of access:

Common Cause

5.4.1 The Acting Officer Commanding SAAF HQ Unit, Lt Col AG Meyer addressed a Memorandum dated 10 February 2012 to Officer Commanding 516 Squadron
referring to a meeting between himself and Brig Gen Masters (DHRS) on 10 February 2012. In the same Memorandum Lt Col AG Meyer indicated that on instruction from (Department of Human Resources Services) DHRS, 516 Squadron is requested to cancel Lt Col Mvithi fingerprint access to SAAF HQ Corporate and SAAF HQ Unit as a whole. He further indicated that on instruction from DHRS the Complainant must report to 516 Squadron and sign in the visitors’ book. Further that 516 personnel must escort the Complainant to Brig Gen Masters office (room A 117) for further action by him.

5.4.2 The evidence of the MO’s Report further confirms that the SANDF denied the Complainant access to the SAAF Head Quarters and locked him out when he did not pose a threat without reporting the matter to the Military Police and without the C SANDF having authorised the denial of access.

Issues in dispute

5.4.3 The Complainant alleged that on 27 September 2013, he was again denied access (biometric fingerprint deactivated) to report on duty at SAAF Head Quarters and no explanation was given to him by the guards on duty or by Colonel Moshoeshoe who was in charge at the time.

5.4.4 The Complainant further alleged that no explanation for denial of access was given to him until 04 November 2013 when he was told via his lawyer (Anton Rudman Attorneys) to report at AFB Hoedspruit. It also evident that such denial of access was again not authorised by C SANDF as the MO advised and recommended to SANDF. It was also not reported to the Military Police. It also evident that the complainant did not pose a threat to anyone to justify his denial of access.

5.4.5 The Complainant’s lawyer tried to engage with the SANDF on his behalf by disputing the legality of the transfer. At the same time his lawyer made a request that the
Complainant be given access to SAAF HQ Unit so that he would be able to clear out through the proper documentation and the relevant route forms but the communication collapsed as the SANDF considered it unacceptable that the Complainant was communicating with them through a lawyer.

5.4.6 In his response dated 19 January 2017, Lt Gen V R Masono, Chief of Staff of the SANDF submitted that the Complainant was denied access because he had the tendency to abuse it. It should also be noted that previously in a letter dated 11 November 2016 addressed to the Public Protector, Lt Gen Masono denied that the Complainant was ever denied access to the premises at SAAF HQ. He further, submitted that a decision was taken to revoke the Complainant’s biometric access as he abused his fingerprint access to threaten other members at the Directorate Human Resources Services (DHRS). However, Lt Gen Masono did not explain why such threats were not reported to the Military Police.

5.4.7 MO indicated that the instruction of Brig Gen Masters to deactivate the biometric finger print access of the complainant to the Unit made it impossible for him to report at his work place and hence the MO found that dismissal under section 59 (3) of the Defence Act 42 of 2002 was not applicable in the circumstances.

5.4.8 In response to the Public Protector’s section 7(9) notice regarding this issue, the SANDF submitted its submission dated 18 July 2017 and argued that the Complainant was denied access to SAAF Head Quarters (HQ) because he physically manhandled a female member and as such posed a threat to personnel at HQ. This submission was already adjudicated upon by MO in its findings in paragraph (i) of the MO’s letter dated 19 October 2012. The MO made a finding that this complaint of assault on Lt Colonel Meyer is of a criminal nature and that Meyer should make a follow up with the Military Police where it was reported.
5.4.9 This response by SANDF therefore stands to be rejected as the SANDF never reviewed or challenged the findings of the MO in court as required by Military Ombud Act. It is not the Public Protector’s view or proposal that the permission of the CSANDF be sought before denial of access to the unit is authorised but it is the MO’s recommendations to SANDF as an institution having statutory oversight over SANDF. The Public Protector is merely requesting the SANDF to comply with the recommendations of the MO.

5.4.10 The Public Protector’s enquiry in relation to the denial of access of the Complainant for the second time after the recommendations were made by MO has not been adequately explained and it was not authorised by CSANDF nor reported to Military Police as MO advised and recommended. It is clear from the evidence discussed above that the Complainant was denied access to the SAAF HQ despite denials by Lt Gen Mabongo.

Conclusion

5.4.10 The SAAF in defiance of the recommendations of the MO denied the Complainant access to SAAF HQ without authorisation by CSANDF, without reporting the same to Military Police and without him posing a threat to anybody.

5.4.11 A mere conjecture by the SANDF in its submission dated 19 January 2017 that access was denied to the Complainant because he had a tendency of abusing it could not be sustained by a reasonable explanation as to why such conduct was not reported to the Military Police.
6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1 Whether the SANDF improperly failed to reinstate the Complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002 as per the recommendations of the MO:

6.1.1 The allegation that the SANDF improperly failed to reinstate the Complainant back to his post as if he was never served with the letter of administrative dismissal in terms of section 59(3) of the Defence Act 42 of 2002 per recommendations of the MO is substantiated.

6.1.2 The SANDF failed to fully implement Paragraph 4.a. of the recommendations of the MO which directed that the Complainant be re-instated back to his post (i.e. Air Command S01 Personnel Inspector General Air Force at Pretoria in Gauteng) as if he was never served with a letter of administrative dismissal in terms of section 59 (3) of the Defence Act 42 of 2002. Although the Complainant was reinstated by the SANDF following the recommendations of the MO, however such reinstatement of the Complainant by SANDF was not in line with recommendations of the MO and merely amounted to malicious compliance with the recommendations of the Military Ombud. The SANDF sought to transfer the Complainant to AFB Hoedspruit instead of reinstating the Complainant to his original post.

6.1.3 The SANDF’s failure to fully implement Paragraph 4.a. of the recommendations of the MO and its failure to review such recommendations was in violation of section 13 of the Military Ombud Act 4 of 2012.
6.1.4 Such failure 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 SANDF improperly failed to backdate the payment of the Complainant’s salary from April 2012:

6.2.1 The allegation that the SANDF improperly failed to reinstate and backdate the Complainant’s salary from April 2012 is not substantiated.

6.2.2 The evidence of pay schedules from SANDF’s Pay Centre, indicate that the Complainant was paid an amount of R 86608.98 on 31 May 2013 as well as an amount of R75000.00 on the same day.

6.2.3 The Complainant’s salary was reinstated and backdated in accordance with the MO’s recommendations.

6.2.4 In the circumstances the public Protector is unable to find improper conduct or maladministration on the part of the SANDF in this regard.

6.3 Whether the SANDF improperly failed to comply with its own policy, SAAF Instruction MRI: 017691 which demands that a member must be consulted when he is going to be transferred:

6.3.1 The allegation that the SANDF improperly failed to comply with its own policy, SAAF Instruction MRI: 017691 which demands that a member must be consulted when he is going to be transferred is substantiated.

6.3.2 The SANDF sought to transfer the Complainant to AFB Hoedspruit without consulting with him.
6.3.3 The SANDF’s failure to consult with the Complainant was in violation of SAAF Instruction MRI: 017691.

6.3.4 Such failure 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.

6.4 Whether the SANDF improperly denied the Complainant access to the SAAF Head Quarters and locked him out when he did not pose a threat without reporting the matter to the Military Police and without the C SANDF having authorised the denial of access:

6.4.1 The allegation that the SANDF improperly denied the Complainant access to the SAAF Head Quarters and locked him out when he did not pose a threat without reporting the matter to the Military Police and without the C SANDF having authorised the denial of access is substantiated.

6.4.2 The SANDF denied the Complainant access to the SAAF Head Quarters an in the process prevented him from going to work as found by the Military Ombudsman. The SANDF’s response in this regard stands to be rejected as the purported threat alleged could have been reported to the Military Police and appropriate action could have been taken in that regard.

6.4.3 The SANDF’s denial of access to the Complainant was an abuse of power and 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.
7. REMEDIAL ACTION

7.1 The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

The Chief of the National Defence Force (C SANDF)

7.1.1 The C SANDF should reinstate the Complainant (Lieutenant Colonel B Mvithi: 97071112PE) back to his post of SO1 Personnel at Inspector Air Force as reflected on his employee clock history as per the recommendation by the Military Ombud within 30 days of the issue of this report.

7.1.4 The C SANDF should reinstate the Complainant’s salary, having taken into account all the annual increases from the date of termination and backdate payments of his salary from the date on which his pay was terminated (i.e. 15 November 2013) to date of payment, within 30 (thirty) days of the issue of this report.

7.1.5 Should the SANDF decide to transfer the Complainant in terms of section 50(5)(b) of the Defence Act 42 of 2002 after his reinstatement as directed above, the South African Air Force must comply with its own policy, SAAF Instruction MRI: 017691 which requires that the member be consulted through command channels to get an understanding on the member’s social, financial commitments and career aspirations in relation to the pending placement. The minutes of such a consultation should be captured for record purposes and future references.

The Minister of Defence and Military Veterans

7.1.6 The Minister must within 60 (sixty) days of the issue of this report institute disciplinary steps against all the officials/members of the SANDF that were involved in the subversion of the recommendations of the MO which are dated 19 October 2012.
7.1.7 The Minister must further ensure that compliance with the recommendations of the MO dated 19 October 2012 is fully implemented by SANDF and closely monitored in order to avoid any subversion therewith.

8. MONITORING

8.1 The C SANDF must submit an implementation plan to the Public Protector within 30 (thirty) days of receipt of this report on how the remedial action outlined above will be implemented with specific timelines.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 27/07/2017

Assisted by: Vusumuzi Xolani Dlamini and
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