REPORT NO 27 OF 2017/18


Allegations of maladministration by the South African Police Service with regard to its handling of an appeal lodged by Constable R J Thomas

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE SOUTH AFRICAN POLICE SERVICE WITH REGARD TO ITS HANDLING OF AN APPEAL OF CONSTABLE RATSHIAMO JOHN THOMAS
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Executive Summary

(i) This is a report by 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 the remedial action she is taking in terms of section 182(1)(c) of the Constitution, following an investigation into the allegations of maladministration by the South African Police Service (the SAPS) with regard to its handling of an appeal lodged by Constable R J Thomas (herein referred to as the Complainant).

(iii) The Public Protector received a complaint from the Complainant on 27 August 2014 in which he alleged that: - (a) He was employed by the SAPS as a Constable from 01 July 2004 to 01 August 2014; (b) On 01 August 2014, he was dismissed from service and he proceeded to lodge an appeal against his dismissal on 12 August 2014; (c) In terms of the SAPS Disciplinary Regulation 17(9), an appeal must be finalised within thirty (30) working days from date of receipt of the appeal; (d) By the time of lodging his complaint with the Public Protector, he had not received the outcome of his appeal; (e) He was placed on precautionary suspension prior to the finalisation of the disciplinary hearing, and that in terms of Regulation 17(9) of the Disciplinary Code, an employee on precautionary suspension must be allowed to resume his duties pending the outcome of the appeal, should the employer fail to finalise the appeal within thirty (30) working days; and (f) All his attempts to be allowed to resume his duties pending the finalisation of his appeal had been fruitless.

(iv) The main allegations were that the Complainant lodged his appeal with the Appeals Authority, and that his appeal was not finalised within thirty (30) working days, and further that he was not allowed to resume his duties when his appeal was not finalised within the thirty (30) day period.
(v) The SAPS in essence disputed when the thirty (30) day period for the finalisation of an appeal commenced. It contended that the thirty (30) day period within which an appeal must be finalised commences only upon receipt of what it described as a complete appeal, which includes the transcripts of the disciplinary hearing. To this end, it further contended that the Appeals Authority finalised the appeal within thirty (30) working days after it received a complete appeal.

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

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

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

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

(vii) The investigation process was conducted through meetings and interviews with the Complainant and relevant officials of the SAPS, as well as an inspection of all relevant documents and an analysis and application of all relevant laws and related prescripts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(aa) The allegation that the Complainant suffered improper prejudice as a result of the alleged improper conduct of the SAPS, is substantiated;
(bb) The SAPS took 17 months to finalise the Complainant’s appeal. During this period, the Complainant did not have an income. The Complainant also could not apply for any other position because the disciplinary process was not complete;

(cc) The SAPS’s conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and improper prejudice as envisaged in section 8(4)(v) of the Public Protector Act.

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

The National Police Commissioner to:

(aa) Within thirty (30) working days from date of this Report, pay to the Complainant his full salary and benefits, for the period starting 24 September 2014 [thirty (30) working days after the date on which he lodged his appeal] to 15 January 2016 (date on which the Appeals Authority finalised his appeal);

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

(cc) The SAPS has already proceeded to promulgate new Discipline Regulations,\(^2\) and in these Regulations, the SAPS addressed the issue which gave rise to this Report. In terms of the new Regulations, the National Police Commissioner has an automatic right to review a decision to dismiss, and the timeframes within which the Commissioner has to do so, have been drastically reduced.

\(^2\) GG40389, RN1361, 01 November 2016.
(dd) To ensure that it provides training and workshops on the new Discipline Regulations to all SAPS staff, and thereafter, to ensure that it provides training and workshops to all staff when a need arises to do so, in instances where the Safety and Security Sectoral Bargaining Council (SSSBC) and / or the courts pronounce itself on certain aspects of the Discipline Regulations.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE SOUTH AFRICAN POLICE SERVICE WITH REGARD TO ITS HANDLING OF AN APPEAL OF CONSTABLE RATSHIAMO JOHN THOMAS

1. INTRODUCTION

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

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

1.2.1 The Minister of Police, the Honourable Minister F A Mbalula;
1.2.2 The National Police Commissioner, General K J Sitle.

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

1.4 A notice in terms of section 7(9) letter was issued to the Acting National Police Commissioner on 29 September 2017, to enable him to respond to the Public Protector’s provisional findings and intended remedial action. In this regard, the Public Protector notes that, in response to the section 7(9) letter, the SAPS conceded to maladministration and undertook to implement the remedial action of the Public Protector.

1.5 The report relates to an investigation into the alleged maladministration by the SAPS with regard to its handing of an appeal of Constable R J Thomas.
2. THE COMPLAINT

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

2.2. The Complainant approached the Public Protector on 27 August 2014. In his complaint, he alleged that:

2.2.1 He was employed by the SAPS as a Constable from 01 July 2004 to 01 August 2014;

2.2.2 On 01 August 2014, he was dismissed from service and he proceeded to lodge an appeal against his dismissal on 12 August 2014;

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

2.2.4 By the time of lodging his complaint with the Public Protector, he had not received the outcome of his appeal;

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

2.2.6 All his attempts to be allowed to resume his duties pending the finalisation of his appeal had been fruitless.
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

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

3.4 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 Others³ the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

³ CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.
3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;⁴

3.5.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced;⁵

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;⁶

3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow;⁷

3.5.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to;⁸

⁴ Para [65].
⁵ Para [67].
⁶ Para [68].
⁷ Para [69].
⁸ Para [70].
3.5.6 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of the investigation and the type of findings made;\textsuperscript{9}

3.5.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;\textsuperscript{10}

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation;\textsuperscript{11}

3.5.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case.\textsuperscript{12}

3.5.10 The remedial action taken by the Public Protector has a binding effect.\textsuperscript{13} The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”\textsuperscript{14}

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

\textsuperscript{9} Para [71].
\textsuperscript{10} Para [71(a)].
\textsuperscript{11} Para [71(d)].
\textsuperscript{12} Para [71(e)].
\textsuperscript{13} Para [76].
\textsuperscript{14} Para [73].
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 was conducted in terms of section 182 of the Constitution and 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.

4.1.3. This complaint was classified as an Administrative Justice and Service Delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

4.2. Approach to the investigation

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

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 or to place the Complainant as close as possible to where he 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 there was maladministration by the SAPS with regard to its handling of an appeal lodged by Constable R J Thomas, and whether such conduct caused improper prejudice to the Complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the 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 the undue delay and maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

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

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

4.3.2. Whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty (30) working days appeal period, and whether the SAPS improperly failed to reinstate the Complainant's benefits pending the finalisation of the appeal, if the appeal was not finalised within thirty (30) working days; and
4.3.3. Whether the Complainant suffered any improper prejudice as a result of the alleged improper conduct of the SAPS.

4.4. The Key Sources of Information

4.4.1. Documentation

4.4.1.1. Complaint received from the Complainant on 27 August 2015;
4.4.1.2. Document confirming outcome of appeal lodged by the Complainant received from the Complainant on 26 January 2016;
4.4.1.3. SSSBC Ruling in the matter between the SAPS and Popcru obo Cst. R J Thomas, case number PSSS479-14/15, undated.

4.4.2. Correspondence sent and received

4.2.2.1 Enquiry sent to Secretary of the North West Provincial Commissioner dated 28 October 2015;
4.2.2.2 Email sent to the Secretary of the North West Provincial Commissioner dated 25 November 2015;
4.2.2.3 Email received from Lieutenant – Colonel Kekae, Staff Officer in the office of the Provincial Commissioner: North West, dated 26 November 2015;
4.2.2.4 Fax received from Major – General N J Mabula, Provincial Head: Directorate for Priority Crime Investigation, North West, dated 30 November 2015;
4.2.2.5 Email to Captain De Klerk of Legal Services: Directorate for Priority Crime Investigation, dated 09 December 2015;
4.2.2.6 Email to Captain De Klerk dated 25 January 2016;
4.2.2.7 Email received from Captain De Klerk dated 27 January 2016;
4.2.2.8 Email to Captain De Klerk dated 28 January 2016;

4.2.2.9 Email received from Captain De Klerk dated 29 January 2016;

4.2.2.10 Email with attached appeal documents received from Mr T Poo, Personnel Officer: HRM of the Directorate for Priority Crime Investigation dated 03 February 2016;

4.2.2.11 Email to Lieutenant – General Ntshiea, Divisional Commissioner: HRM, dated 08 March 2016;

4.2.2.12 Email to Lieutenant – General Ntshiea dated 07 April 2016;

4.2.2.13 Email to Lieutenant – General Ntshiea dated 06 May 2016;

4.2.2.14 Notice in terms of section 6(4)(b)(i) of the Public Protector Act sent to Lieutenant – General Ntshiea on 18 May 2016;

4.2.2.15 Email to meeting attendees on 25 May 2016 to confirm the Resolutions of the meeting;

4.2.2.16 Letter received from Lieutenant – General B C Mgwenya, Deputy National Commissioner: HRM dated 29 June 2016;

4.2.2.17 Notice issued in terms of section 7(9) of the Public Protector Act to Acting Commissioner of SAPS Lieutenant – General L Mothiba dated 29 September 2017

4.2.2.18 Response to the section 7(9) notice from SAPS dated 30 October 2017

4.4.3 Interviews and Meetings

4.4.3.1 Meeting held with officials from SAPS on 25 May 2016, during which meeting the following officials were in attendance:
(a) Adv. J Raubenheimer (Chief Investigator: PPSA);
(b) Ms. C van Eeden (Investigator: PPSA);
(c) Col. M J Mampa (SAPS);
(d) Brig. X A Mpeta (SAPS);

4.4.4 Legislation and other prescripts

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

4.4.5 Case Law

4.4.5.1 Natal Joint Municipal Pension Fund v Endumeni Municipality (920/10) [2012]
ZASCA 13 (15 March 2012);
4.4.5.2 Provincial Commissioner: North West South African Police Service and Another
v Safety and Security Sectoral Bargaining Council & Others (JS787/14) [2017]
ZALCJHB 69 (22 February 2017);
4.4.5.3 Economic Freedom Fighters v Speaker of the National Assembly & Others;
Democratic Alliance v Speaker of the National Assembly & Others [2016] ZACC
11; 31 March 2016;
4.4.5.4 CUSA v Tao Ying Metal Industries & Others CCT 40/07 [2008] ZACC 15;
4.4.5.5 POPCRU obo Kgope v Minister for Safety and Security (J1536/12) [2014]
ZALCJHB 352;
4.4.5.6 Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others
5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

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

Common cause facts

5.1.1 The Complainant was employed as a Constable at the SAPS from 01 July 2004 to 01 August 2014. On 01 August 2014, he was dismissed for serious misconduct following a disciplinary hearing. The Complainant was charged and dismissed because he accepted money and gifts from a certain person instead of arresting him. He lodged an appeal against the finding and sanction of the disciplinary hearing on 12 August 2014. The appeal was finalised on 15 January 2016, when the Appeal Board confirmed the conviction and sanction of the disciplinary hearing.

Issues in dispute

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

5.1.3 At the time of lodgement of his complaint with the Public Protector in August 2015, the outcome of his appeal had been outstanding for more than a year;

5.1.4 In its response dated 03 February 2016, the SAPS indicated that the delay in the finalisation of the Complainant’s appeal was caused by a delay to obtain the transcripts of the disciplinary hearing. It further indicated that the transcripts were
forwarded to the Appeals Authority immediately upon receipt, and that the appeal of the Complainant has since been finalised;

5.1.5 During a meeting held at the Public Protector South Africa’s office on 25 May 2016, SAPS indicated that transcripts were the most important documents before the Appeals Authority and there was a delay in the submission of the transcripts to the Appeals Authority. The SAPS explained that the Appeals Authority was situated at Head Office, and it would request the outstanding information from the relevant province;

5.1.6 The SAPS further indicated that the thirty (30) day period mentioned in Regulation 17(9) only commences upon receipt of a complete appeal, which includes the transcripts of the disciplinary proceedings. In the instance of the Complainant, the transcripts were only received by Head Office in November 2015, and the outcome of the appeal was communicated to the Complainant in January 2016. The SAPS thus contended that, upon receipt of a complete appeal, the Appeals Authority made its decision within the thirty (30) day period prescribed by the Regulations;

5.1.7 It has been established in the evidence discussed above that the SAPS did not finalise the Complainant’s appeal within thirty (30) days after receipt. The SAPS conceded that it took them 15 months to produce the transcripts of the disciplinary hearing;

5.1.8 The argument submitted by the SAPS in relation to the interpretation of Regulation 17(9) is a matter of law which will be resolved once the standard that has to be complied with, is discussed.

Application of the relevant legal framework
5.1.9 The issue regarding whether the SAPS unduly delayed the finalisation of the Complainant’s appeal, is regulated by the SAPS Disciplinary Regulations.\(^{15}\)

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

5.1.11 The SAPS was obliged to comply with Regulation 17(9) by finalising the Complainant’s appeal within thirty (30) working days of receipt. The SAPS did not dispute that the Complainant submitted his appeal on 12 August 2014. In essence, the SAPS did not dispute that the Complainant’s appeal was received on that date. It is therefore disingenuous to suggest that what was received on 12 August 2014 did not constitute an appeal within the meaning of Regulation 17(9). In the contrary, the SAPS would have argued that no appeal was received if it did not regard what was submitted on 12 August 2014 as an appeal.

5.1.12 The interpretation of the text of Regulation 17(9) should be given its ordinary meaning. Similarly, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*\(^{16}\) the court held that "[w]hatever the nature of the document, consideration must be given to the language used in the light of ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighted in the light of these factors. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document.” (sic)

\(^{15}\) RN643, GG 28985, 03 July 2006.

5.1.13 The Public Protector’s interpretation above is further endorsed by the decision of the Labour Court in *Provincial Commissioner: North West South African Police Service and Another v Safety and Security Sectoral Bargaining Council & Others.*\(^{17}\) The court held that “[w]hat is clear from the reading of Regulation…17(9) is that they seek to cure the mischief of prolonged disciplinary processes and appeal processes. Regulation 17(9) in particular requires a speedy appeal process in order to ensure that the employer does not prejudice the employee by keeping that away from their duties for a protracted period and also to avoid the prejudice to the employer of paying an employee for long periods pending the finalization of the process. […] In this context and the clear reading of regulation 17(9) it is envisaged that if the employer does not conclude appeal processes within 30 working days it does so at the pain of reinstating the employee pending the outcome.” (sic)

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

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

5.1.16 Similarly, in *CUSA v Tao Ying Metal Industries & Others*\(^{18}\) the court held as follows: “These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to workers who may be without an income pending the resolution of the dispute, but it may, in the long run,

\(^{17}\) (JS787/14) [2017] ZALCJHB 69 (22 February 2017).

\(^{18}\) [2008] ZACC 15 para 63. Also reported as (2009) (2) SA 204 (CC); 2009 (1) BCLR 1 (CC).
have a detrimental effect on an employer who may have to reinstate workers after a number of years.”.

5.1.17 Furthermore, in POPCRU obo Kgope v Minister for Safety and Security\textsuperscript{19} the Labour Court considered a nine – month period to finalise an appeal as unconscionable.

5.1.18 In addition to the above, the court in Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others\textsuperscript{20} held that: - "The rules relating to procedural fairness [...] recognize that for workers, true justice lies in a right to an expeditious and independent review of an employer's decision to dismiss, [...]”.

5.1.18 SAPS conceded in its response to the notice issued in terms of section 7(9) of the Public Protector Act that is has indeed delayed the finalisation of the Complainant’s appeal.

Conclusion

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

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

Issues in dispute

\textsuperscript{19} (J1538/12) [2014] ZALCJHB 362 para [24]. Also reported as 36 ILJ 760 (LC) (16 September 2014).

\textsuperscript{20} (JR782/05) [2006] ZALC 44; [2006] 9 BLLR 833 (LC) (14 March 2006).
5.2.1 The Complainant alleged that all his attempts to be reinstated pending the finalisation of the appeal were fruitless;

5.2.2 In a written report to the Public Protector dated 30 June 2016, the SAPS contended that the Complainant’s suspension did not entitle him to be remunerated as the outcome of the appeal did not change the Complainant’s situation as his dismissal was confirmed by the Appeals Authority;

5.2.3 In addition, the SAPS argued that reinstating the Complainant would have been contrary to the interests of the public as the circumstances surrounding the misconduct he committed were such that he was not entitled to remuneration or reinstatement;

5.2.4 The SAPS further contended that section 205 of the Constitution requires the SAPS to deliver services designed to enhance prevention of crime and the general safety of the public, and as such, the SAPS had a legal duty to remove from its ranks perpetrators of crime and cannot be blamed from complying with this requirement. There was also no obligation on the SAPS to re-instate the Complainant prior to the commencement of the consideration of the Appeals Authority;

5.2.5 The SAPS would only have been compelled to reinstate the Complainant in the event that the Appeals Authority failed to finalise the appeal within the prescribed timeframe of thirty (30) working days calculated from the date on which the member of the Appeals Authority received the appeal;

5.2.6 The evidence outlined above indicates that the SAPS, neither allowed the Complainant to resume his duties pending the finalisation of his appeal, nor reinstated his benefits pending the finalisation of his appeal when the thirty (30) working days appeal period lapsed;
5.2.7 The issue whether the Complainant was entitled to be allowed to resume his duties, or to have his benefits reinstated pending the finalisation of his appeal, is a legal issue regulated by Regulation 17(9), which will be determined when the standard that had to be complied with, is discussed below.

Application of the relevant legal framework

5.2.8 The issue regarding whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty day appeal period, and reinstate his benefits pending the finalisation of the appeal, if the appeal was not finalised within thirty (30) working days, is also regulated by the SAPS Disciplinary Regulations.\footnote{RN643, GG 28985, 03 July 2006.}

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

5.2.10 Annexure A among others, lists the offences of bribery and corruption. The Complainant was dismissed on allegations of accepting bribes which is one of the offences listed in Annexure A. The Complainant was suspended without remuneration prior to his dismissal.

5.2.11 It has been noted in the evidence discussed that the Complainant lodged an appeal on 12 August 2014. Regulation 16(4)(b) provides that, if an employee is dismissed and he appeals, he is deemed to be suspended until the conclusion of the appeal.
proceedings. The suspension in this regard shall be the same as the one imposed before the sanction was imposed.

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

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

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

5.2.15 SAPS conceded in its response to the notice issued in terms of section 7(9) of the Public Protector Act that the Complainant should have been reinstated to await the outcome of the appeal while working as stipulated by Regulation 17(9) of the SAPS Discipline Regulations.

Conclusion

5.2.16 The SAPS failed to adhere to Regulation 17(9) of the SAPS Disciplinary Regulations as it failed to allow the Complainant to resume his duties, and to reinstate his benefits when the appeal of the Complainant was not finalised within thirty (30) days, as required by the same Regulation.
5.2.17 The presumption of innocence, sometimes referred to by the Latin expression *ei incumbit probation qui dicit, non qui negat* (the burden of proof is on the one who declares, not on the one who denies), is the principle that one is considered innocent unless proven guilty.

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

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

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

5.3.3 The Complainant further contended that his youngest child has a serious medical condition, and as a result, they were required to visit the child’s specialist at least once every three (3) months. This had a negative impact on the child’s performance at school, and he was called in by the school and required to take the child to see a psychologist;

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

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

5.3.6 The SAPS contended that the Complainant’s suspension did not entitle him to be remunerated as the outcome of the appeal did not change the Complainant’s situation as the dismissal was confirmed by the Appeals Authority;
5.3.7 The issue of prejudice will be determined once improper conduct or maladministration have been determined.

**Application of the relevant legal framework**

5.3.8 Section 182(1)(c) of the Constitution\(^{22}\) requires the Public Protector to consider whether any of her findings of maladministration or improper conduct in state affairs resulted in prejudice to a Complainant, and to take appropriate remedial action.

5.3.9 In this respect, the Public Protector has identified the following consequences arising from the conduct of the SAPS: - The Complainant was not earning a salary for a period between 24 September 2014 [thirty (30) working days after the date on which the Complainant’s appeal was lodged] and 15 January 2016 (date on which Appeals Authority finalised the Complainant’s appeal). In addition, the Complainant was left in limbo, he could not apply for other employment, and he suffered injustice as a result of the uncertainty regarding his future.

5.3.10 SAPS stated in its response to the notice issued in terms of section 7(9) of the Public Protector Act that a decision has been taken to reimburse the Complainant’s salary calculated from the date of the expiry of the thirty (30) working days within which the appeal was supposed to have been finalised until the actual date of finalisation of the appeal.

**Conclusion**

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

6. FINDINGS

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the SAPS, the Public Protector finds as follows:

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

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

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

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

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

6.2 Whether the SAPS improperly failed to allow the Complainant to resume his duties at the end of the thirty (30) working days appeal period, and whether the SAPS improperly failed to reinstate the Complainant’s benefits pending the finalisation of the appeal, of the appeal was not finalised within thirty (30) working days:
6.2.1 The allegation that the Complainant should have been allowed to resume his duties pending the finalisation of the appeal, if the appeal was not finalised within thirty (30) working days, is substantiated;

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

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

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

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

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

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

6.3.2 The SAPS took 17 months to finalise the Complainant’s appeal. During this period, the Complainant did not have an income. The Complainant also could not apply for any other position because the disciplinary process was not complete;
6.3.3 The SAPS's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and improper prejudice as envisaged in section 6(4)(v) of the Public Protector Act.

7. REMEDIAL ACTION

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

7.1. The National Police Commissioner to:

7.1.1 Within thirty (30) days from date of this Report, pay to the Complainant his full salary and benefits, for the period starting 24 September 2014 [thirty (30) days after the date on which he lodged his appeal] to 15 January 2016 (date on which the Appeals Authority finalised his appeal);

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

7.1.3 The SAPS has already proceeded to promulgate new Discipline Regulations,\textsuperscript{23} and in these Regulations, the SAPS addressed the issue which gave rise to this Report. In terms of the new Regulations, the National Police Commissioner has an automatic

\textsuperscript{23} GG40389, RN1361, 01 November 2016.
right to review a decision to dismiss, and the timeframes within which the Commissioner has to do so, have been drastically reduced.

7.1.4 To ensure that it provides training and workshops on the new Discipline Regulations to all SAPS staff, and thereafter, to ensure that it provides training and workshops to all staff when a need arises to do so, in instances where the Safety and Security Sectoral Bargaining Council (SSSBC) and / or the courts pronounce itself on certain aspects of the Discipline Regulations.

8. MONITORING

8.1 The Public Protector will monitor compliance with her remedial action contained in this report on two weekly basis until such time as her remedial action has been complied with in full.

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

Assisted by: Ms C van Eeden (Investigator: AJSD)