

A FAIR CHANCE TO SERVE

*Report on an investigation into allegations of maladministration
by the south African Police Service (SAPS) in failing to re-enlist a
former member to its service*

Report No: 16 of 2014/15



PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness

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"In South Africa, like in many parts of the developing world, the substantive difference people seek to feel from the advent of democracy and political freedom, is the alleviation of poverty and material deprivation. We do the long-term future of democracy a profound disservice and we are unfaithful to the dreams we pursued in our liberation and democratic struggles, if we do not make the realisation of a better life for all the central objective of our new democracies"

Nelson Mandela

Executive Summary

- (i) *"A Fair Chance to Serve"* is my report as the Public Protector issued in terms of section 181(1)(b) of the Constitution of the Republic of South Africa, 1996 (The Constitution) and section 8(1) of the Public Protector Act No 23 of 1994 (Public Protector Act).
- (ii) The report communicates my findings and the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, pursuant to an investigation into the alleged improper failure by the South African Police Service (SAPS) to re-enlist its former member, Mr M C Maloba (the Complainant) to its service after he responded to an advertisement that sought to recruit former members of the SAPS back into the service and its failure to give him valid reasons in that regard.
- (iii) The Complainant, a 47 years old unemployed married father with three (3) dependants, a 23 year old girl, a 19 year old boy and 16 year old girl, who is a former member of the SAPS in Polokwane, allegedly responded to an advertisement that was issued by the SAPS in January 2010 inviting former members to submit their applications if they were still interested in returning to its service. He allegedly went through an assessment process in February 2010 after which he was shortlisted and passed the assessment. However, the SAPS failed to re-enlist him to its service.

- (iv) In the main the complaint was that: 1) The SAPS unduly failed to give him reasons regarding why he was not re-enlisted into its service after he made several attempts to solicit its reasons; 2) When the SAPS finally gave him the reason, it was factually incorrect and therefore could not be used to justify his exclusion. The reason allegedly given to him was that he had a civil case pending against him and that in terms of the SAPS policy if a former member has a pending civil case, he may not be re-enlisted.
- (v) The SAPS did not dispute that the Complainant applied for a permanent police officer position and was assessed as fit to serve. It further did not dispute that it delayed informing the Complainant of the reasons and when it did, it informed him that the reason it could not re-enlist him was because it had an outstanding civil case against him two (2) years and six (6) months after he applied to be re-enlisted. The SAPS alleged that the Minister of Safety and Security had a civil claim of an outstanding debt of R22 500 against him.
- (vi) On analysis of the complaint, the following issues were identified and investigated:
- (a) Did the SAPS unduly fail to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act?
- (b) Were the reasons subsequently provided by the SAPS in not re-enlisting the Complainant fair, just and reasonable in the circumstances of this case? and
- (c) Was the Complainant prejudiced by the conduct of the SAPS?

- (vii) The investigation process commenced with an attempt to mediate between the parties hoping they would reach a mutual agreement. After the parties could not agree, a formal investigation was conducted through meetings and interviews with the Complainant and the SAPS officials as well as through inspection of all relevant documents and correspondence received from the SAPS.
- (viii) The standard used to assess the propriety of the conduct of the SAPS involved laws regulating administrative action, policies and prescripts regulating recruitment at the SAPS and principles of natural justice developed over time. Section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) were relied on to assess whether the conduct of the SAPS was in compliance with the Complainant's right to just administrative action. The SAPS Regulations for appointment were applied to establish whether the reasons provided by the SAPS for not re-enlisting the Complainant to its service were justifiable.
- (ix) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:
 - (a) **Whether the SAPS unduly failed to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:**
 - (aa) The SAPS unduly failed to inform the Complainant about its decision on the outcome of his application to be re-

enlisted and also failed to give him a reasonable opportunity to make representation regarding its decision not to re-enlist him;

(bb) Such failure violated section 3(2)(b)(ii), (iii), (iv) and (v) of the Promotion of Administrative Justice Act No. 3 of 2000 and section 33(1) and (2) of the Constitution; and

(cc) The SAPS' 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 No. 23 of 1994.

(b) Whether the reason(s) subsequently provided by the SAPS in not re-enlisting the Complainant were fair, just and reasonable in the circumstances of this case:

(aa) The Complainant was advised that the reason he could not be re-enlisted was that the Minister of Safety and Security (now Minister of Police) had a pending civil case against him relating to a departmental debt of R22 500.00. He was later required to undergo a new assessment;

(bb) After perusing Regulation 11 of the SAPS relating to Application for Appointment and the SAPS Circular dated 7 January 2010 relating to Re-enlistment in the SAPS, I could not find any provision that excludes a person with a civil case pending against him or her from being appointed;

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- (cc) In the circumstances, the reason given to the Complainant by the SAPS for its failure to re-enlist him to its service is found to be unfair, unjust and unreasonable;
- (dd) It is disconcerting that the Complainant and my office were provided with contradictory reasons by the SAPS as to why he could not be re-enlisted to its service. Despite being informed that the reason he could not be re-enlisted was that the Minister of Safety and Security (now Minister of Police) had a pending civil case against him relating to a departmental debt of R22 500.00, in another instance he was informed that there was a moratorium on the placements or re-enlistments of former members.
- (ee) My office on the other hand was informed by a letter dated 12 September 2012 from the Provincial Commissioner of the SAPS in Limpopo that his office had confirmed with the National Head Office that the Complainant could be accommodated but still had to comply with all the previous requirements for re-enlistment as indicated in the advertisement of 17 January 2010.
- (ff) Requiring the Complainant to redo the assessments for the second time after more than two years was both unfair and unreasonable in the circumstances; and
- (gg) The Complainant's right to just administrative action enshrined in section 33 of the Constitution was violated.
- (c) **Whether the Complainant was prejudiced by the conduct of the SAPS:**

- (aa) The Complainant was prejudiced by the conduct of the SAPS as envisaged in section 182(1)(a) of the Constitution because a timely response by the SAPS would have afforded him an opportunity to take action to clear his name against the allegations of having a civil case which would have resulted in the SAPS re-enlisting him into its Service;
- (bb) Had he been re-enlisted in 2010 it would have placed him in a better financial position but failure to re-enlist him has meant that he lost on potential income which would have come in handy since to date he is not employed and is married with three dependent children; and
- (cc) In my view, had the Complainant been enlisted as a police officer when he was assessed as fit to serve, he would have been placed optimally in a position to pay the Minister of Police the alleged accumulated debt of R22 500.00;
- (dd) In that regard, I find the exclusion irrational and unfair because of the unfair and irrational exclusion, the Complainant was not only placed in a position of being unable to pay the alleged debt, he has been unduly plunged into poverty;
- (ee) I also find it disconcerting that the alleged debt was never substantiated by any legal process of recovery against the Complainant. Instead the Complainant was required to undergo a new assessment before being re-enlisted; and

- (ff) The Complainant had a legitimate expectation that once he had passed the interview and all other assessments, he would be re-enlisted to the SAPS.
- (x) The appropriate remedial action I am taking in pursuit of section 181(1)(c) with the view of placing the Complainant as close as possible to where he would have been had the maladministration not occurred, is the following:
- (a) The National Commissioner of the SAPS should **immediately** re-enlist the Complainant into the SAPS and provide him with a training programme to assist him to achieve the required physical fitness levels;
 - (b) The Provincial Commissioner of the SAPS should write a letter of apology to the Complainant for the prejudice caused to him and his family within 30 days from date of issuing of this report; and
 - (c) The National Commissioner should compensate the Complainant within 60 days from the date of issuing of this report a reasonable portion to be determined by an independent assessor, of what he would have earned had he been re-enlisted in 2010 when he was assessed as fit to serve.

REPORT ON AN INVESTIGATION INTO THE ALLEGED MALADMINISTRATION BY THE SOUTH AFRICAN POLICE SERVICE IN FAILING TO RE-ENLIST A FORMER MEMBER TO ITS SERVICE

1. INTRODUCTION

1.1 Overview

1.1.1 "*A Fair Chance to Serve*" is my report as the Public Protector issued in terms of section 181(1)(b) of the Constitution of the Republic of South Africa, 1996 (The Constitution) and section 8(1) of the Public Protector Act No 23 of 1994 (Public Protector Act).

1.1.2 The report is submitted to:

1.1.2.1 The National Commissioner, South African Police Service;

1.1.2.2 The Provincial Commissioner, South African Police Service (SAPS), Limpopo Province; and

1.1.2.3 The Divisional Commissioner, Personnel Services, SAPS, Pretoria (Head Office).

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

1.1.3.1 Mr M C Maloba, the Complainant;

1.1.3.2 Honourable N.P.T Nhleko, Minister of Police; and

1.1.3.3 Honourable B Mbete, Speaker of the National Assembly.

1.1.4 The report relates to an investigation into allegations of improper failure by SAPS Limpopo to re-enlist the Complainant, a former member of the SAPS, into its service. The main complaint lodged by Mr M C Maloba,

an unemployed father of three (3) dependent children and former police officer, being that the SAPS unduly failed to re-employ him as a police officer despite him having been assessed as fit to serve.

1.2 Background

1.2.1 During January 2010 the SAPS issued an advertisement inviting former police members to apply for re-enlistment. The aim was to tap into the rare skills that the former officers possessed.

1.2.2 The Complainant took advantage of the opportunity and tendered his application.

1.2.3 He was fortunate to be shortlisted and underwent the process of interview, medical, fitness, psychological and psychometric evaluation.

1.2.4 The problems allegedly started when he made enquiries as to the outcome of his application at the SAPS offices in Polokwane as some of the former members had been re-enlisted in the same year of 2010.

2. THE COMPLAINT

2.1 The Complainant approached the Public Protector on 13 July 2012 alleging that:

2.1.1 The SAPS had failed to give him reasons as to why he had not been re-enlisted into its service after he made several attempts to solicit the reasons.

2.1.2. When the SAPS finally gave him the reason, the allegation made against him was factually incorrect and therefore could not be used to justify his exclusion. Allegedly the reason that was given was that he

had a civil case pending against him and that in terms of the SAPS policy if a former member has a pending civil case he could not be re-enlisted.

- 2.1.3 This followed an application that he had made to the SAPS in response to an advertisement that sought to re-enlist former members of the SAPS into its service.

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

3.6 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 section 6 and 7 of the Public Protector Act, 1994.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. 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 complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act, 1994. However, after several fruitless attempts to conciliate the matter, it was escalated into an 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:

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 if there is a deviation does that deviation amount to improper conduct or maladministration?

4.2.1.4 In the event of improper conduct or 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 investigation relying on the evidence provided by the parties and independently sourced during the investigation and making a determination based on a balance of probabilities. In this particular case, the factual enquiry principally focused on whether or not the SAPS failed to inform the Complainant about the outcome of his application and assessments and whether or not the SAPS subsequently gave him unjustifiable reason(s) for not re-enlisting him.

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 correcting maladministration and redressing its consequences. 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 were the issues considered and investigated:

4.3.1 Did the SAPS unduly fail to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act?

4.3.2 Were the reasons subsequently provided by the SAPS in not re-enlisting the Complainant fair, just and reasonable in the circumstances of this case? and

4.3.3 Was the Complainant prejudiced by the conduct of the SAPS?

4.4 The Key Sources of information

4.4.1 Interviews conducted

4.4.1.1 A meeting was held with Lieutenant Colonel Kgadima on 28 August 2012.

4.4.1.2 ADR meeting held on 31 August 2012 at the SAPS offices in Polokwane

4.4.1.3 Meeting with Lieutenant Moleya on 28 September 2012

4.4.1.4 Meeting with the following SAPS officials at the Public Protector Offices in Pretoria on 20 February 2014 to try and resolve the matter through Alternative Dispute Resolution (ADR) mechanism:

- (a) Major General Mbhalati from SAPS Limpopo;
- (b) Colonel Olivier from SAPS Head Office;
- (c) Colonel Kgadima from SAPS Limpopo;
- (d) Colonel Mukwevho from SAPS Head Office;
- (e) Colonel Mashilo from SAPS Limpopo;
- (f) Brigadier Morakaladi from SAPS Limpopo; and
- (g) Brigadier De Kock from SAPS Head Office.

4.4.2 Correspondence sent and received

- 4.4.2.1 Letter written to the Limpopo Provincial Commissioner dated 14 November 2011;
- 4.4.2.2 Correspondence received from the Complainant dated 13 July 2012;
- 4.4.2.3 Letter issued by my office to the SAPS dated 4 September 2012;
- 4.4.2.4 Letter issued by my office to the SAPS dated 13 September 2012;
- 4.4.2.5 Letter issued by my office to the SAPS dated 20 September 2012;
- 4.4.2.6 Letter issued by my office to the SAPS dated 5 October 2012;
- 4.4.2.7 Letter issued by my office to the SAPS dated 11 January 2013;
- 4.4.2.8 Letter issued by my office to the SAPS dated 29 January 2013;
- 4.4.2.9 Correspondence received from the SAPS dated 12 September 2012;
- 4.4.2.10 Correspondence received from the SAPS dated 13 September 2012;
- 4.4.2.11 Correspondence received from the SAPS dated 3 October 2012;
- 4.4.2.12 Correspondence received from the SAPS dated 28 January 2013; and
- 4.4.2.13 Correspondence received from the SAPS dated 8 February 2013.

4.4.3 Documents

- 4.4.3.1 Correspondence from the Divisional Commissioner at the SAPS Head Office containing the advert dated 7 January 2010.
- 4.4.3.2 Correspondence to the Complainant from the SAPS dated 13 July 2012;
- 4.4.3.3 Letter written by the Office of the Divisional Commissioner: Personnel Management in Pretoria dated 29 August 2012; and
- 4.4.3.4 Letter dated 12 September 2012 from the Limpopo Provincial Commissioner's Office.

4.4.4 Legislation and other prescripts:

- 4.4.4.1 The Constitution of the Republic of South Africa, 1996;
- 4.4.4.2 Promotion of Administrative Justice Act No 3 of 2000;
- 4.4.4.3 Regulation 011: Application for Appointment of the Regulations for the South African Police Service issued in terms of the South African Police Service Act No 68 of 1995; and
- 4.4.4.4 Advertisement for Re-enlistment in the South African Police Service: South African Police Service Act, 1995 issued by the Divisional Commissioner: Personnel Services dated 7 January 2010.

4.4.5 Case law

- 4.4.5.1 *Sokhela & others v MEC, Agriculture & Environmental Affairs (KwaZulu – Natal) & others* ([2009] JOL 23782 (KZP) at para [52]).

5. THE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1 Whether the SAPS unduly failed to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:

5.1.1 The appointment of members of the South African Police Service as contemplated in the South African Police Service Act No 68 of 1995 (SAPS Act) constitutes administrative action. Administrative action is defined in section 1 of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) among others as follows:

"any decision taken or any failure to take a decision, by an organ of state, when... exercising a public power... in terms of any legislation,... which adversely affects the rights of any person and which has a direct, external legal effect.."

5.1.2 Similarly the re-appointment or re-enlistment of former members of the South African Police Service in terms of the SAPS Act also constitutes administrative action.

5.1.3 The SAPS when appointing persons as members, exercises a public power in terms of legislation and that legislation is the SAPS Act.

5.1.4 It then follows that the provisions of just administrative action as outlined in section 33 of the Constitution applies. Section 33 provides that everyone has a right to administrative action that is lawful, reasonable, and procedurally fair. It further provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

5.1.5 The requirement for administrative action that is lawful, reasonable and procedurally fair is further emphasised in section 3(1) of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

5.1.6 Section 3(2)(b) of PAJA provides that in order to give effect to the right to procedurally fair administration action, an administrator must give the person whose rights and legitimate expectations have been adversely affected the following:

5.1.6.1 Adequate notice of the nature and purpose of the proposed administrative action; however, this provision does not apply in the present case.

5.1.6.2 A reasonable opportunity to make representations;

5.1.6.3 A clear statement of the administrative action;

5.1.6.4 Adequate notice of any right of review or internal appeal, where applicable; and

5.1.6.5 Adequate notice of any right to request reasons in terms of section 5.

5.1.6 In *Sokhela & others v MEC, Agriculture & Environmental Affairs (KwaZulu – Natal) & others* ([2009] JOL 23782 (KZP) at para [52]), the court held per Wallis J that:

"As section 3(2)(a) of PAJA makes clear what will constitute a fair administrative procedure depends upon circumstances of each case. However in general in order to give effect to the right to procedurally fair administrative action the person affected must be given adequate

notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations and a clear statement of the administrative action. Ordinarily the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. That is hardly surprising bearing in mind that one of the grounds upon which the decision of an administrator may be set aside is because irrelevant considerations were taken into account or relevant considerations were not considered."

5.1.7 The SAPS had a constitutional and statutory duty to observe the provisions of just administrative action as encapsulated in section 33 of the Constitution and section 3 of PAJA once it had made a decision regarding the Complainant's application.

5.2 Whether the reason(s) subsequently provided by the SAPS in not re-enlisting the Complainant were fair, just and reasonable in the circumstances of this case:

5.2.1 The requirements for appointment of a person who applies to be appointed as a member of the SAPS are provided for in Regulation 11 of the Regulations for the South African Police Service issued in terms of the SAPS Act.

5.2.2 In terms of Regulation 11, the only prohibitions to be appointed to the SAPS as a member is in relation to tattoo marks which will be visible and irreconcilable with the objectives of the Service and a previous criminal conviction.

5.2.3 It then follows that for as long as a person complies with all other requirements and does not fall within a category of the prohibitions

referred to above, that person is suitable to be appointed as a member of the SAPS.

5.2.4 It is noted that no reference is made in Regulation 11 to a pending civil case against an applicant as a prohibition to be appointed as a member of the SAPS.

5.2.5 It is also noted that whereas Regulation 11(1)(a)(x) provides that a person who applies to be appointed as a member must be prepared to undergo such training as determined by the National Commissioner, it nowhere provides that a person who applied as member must be prepared to undergo such training as determined by the National Commissioner even if he previously underwent and passed that training.

5.2.6 It then follows that there was no legal basis in terms of Regulation 11 that a person who previously underwent and passed physical assessments should be required to undergo them again.

5.3 Whether the Complainant was prejudiced by the conduct of the SAPS:

5.3.1 The issue of prejudice will be determined once it can be established whether or not the conduct of the SAPS infringed the Complainant's constitutional rights or legitimate expectations.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Whether the SAPS failed to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:

Common cause issues

6.1.1 It is common cause that the Complainant applied for re-enlistment into the SAPS before 31 January 2010 as advertised by the SAPS on 7 January 2010.

Issues not disputed

6.1.2 It is not disputed that the Complainant was not informed by the SAPS about the outcome of his application and assessment until he approached Colonel Mukwevho in 2010, after he had established that other former members who had been interviewed with him had been re-enlisted. It is also not disputed that Colonel Mukwevho informed him that the SAPS Head Office could not re-enlist him because there was an alleged pending civil case against him. It is further not disputed that Colonel Mukwevho did not provide the Complainant with a written confirmation of the alleged pending civil case despite his request in that regard.

6.1.3 It is also not disputed that the Complainant wrote a letter dated 14 November 2011 which he personally delivered to the SAPS, wherein he requested the Provincial Commissioner to provide him with

feedback regarding his application. It is further not disputed that the SAPS did not respond to the aforesaid letter.

6.1.4 It is not disputed that on 9 March 2012, the Complainant went to the SAPS offices and met with Brigadier Morakaladi who allegedly pleaded ignorance about having received or seen the Complainant's letter. It is further not disputed that Brigadier Morakaladi ordered an investigation by Colonel Mukwevho and Lieutenant Colonel Kgadima into the Complainant's application and to report to the Complainant about progress.

6.1.5 It is also not disputed that on 12 July 2012, the Complainant made further enquiries with General Moloko and Colonel Mukwevho whereupon he was informed about the civil case but was not supplied with the particulars of the case.

Evidence obtained independently

6.1.6 The SAPS provided my office with a copy of a letter dated 13 July 2012 addressed to the Complainant, informing him of its decision not to re-enlist him. It is noted that the reason mentioned in the letter was that the Minister of Safety and Security had an outstanding civil claim of R22 500.00 against the Complainant. It is further noted that from the time the Complainant applied before 31 January 2010 (Complainant not sure of the exact date) to the date of the aforementioned letter, a period of 2 (two) years and 6 (six) months had lapsed from the date of his application before he was provided with a written response regarding the outcome of his application

Conclusion

6.1.7 The evidence traversed above indicates that the SAPS failed to inform the Complainant about the outcome of his application and assessment until he took it upon himself to enquire in that regard. The only available evidence of any formal correspondence addressed to the Complainant is the letter dated 13 July 2012 alluded to above. It is noted that such correspondence was 2 (two) years and 6 (six) months after the Complainant had applied for re-enlistment in the SAPS. The SAPS has not produced any other evidence to indicate that it had informed the Complainant about the outcome of his application and assessments any time soon after it decided to make the appointments.

6.2 Whether the reason(s) subsequently provided by the SAPS in not re-enlisting the Complainant were fair, just and reasonable in the circumstances of this case:

Common cause issues

6.2.1 It is common cause that the Complainant was informed that the reason he could not be re-enlisted in the SAPS was that the Minister of Safety and Security had a civil claim of R22 500.00 pending against him.

6.2.2 It is also common cause that despite the alleged civil claim pending against the Complainant, he did not have any previous criminal convictions or criminal case pending against him.

Issues not disputed

6.2.3 It is not disputed that on 11 February 2010, after the Complainant underwent the evaluation process which comprised of an interview, medical evaluation, fitness assessment and psychological evaluation,

he was made to complete the banking details form, which created an expectation to him that he was going to be appointed.

6.2.4 It is also not disputed that the SAPS did not provide the Complainant with the particulars of the pending civil claim against him when he requested such. It only emerged in the National Commissioner's letter dated 3 December 2013 (correct date should be 2014) in response to my section 7(9) notice, wherein she indicated that the civil case emanated from a debt the Complainant owed the State, as he withdrew from a course a week before he completed the course after he was marked negatively since it was found that he and another candidate copied each other's projects. However, the National Commissioner did not indicate what action had been taken against the Complainant and the other candidate with regard to the alleged dishonesty.

6.2.5 In the National Commissioner's response referred to above, she also argued that based on the civil case that was pending against the Complainant, her office was still of the opinion that there was a need to determine suitability as the intention was to recruit the best suitable personnel for the SAPS and that in the instance a decision on suitability could not be made without all relevant facts on the table. However, it is noted that the National Commissioner has not indicated what those relevant facts were which needed to be considered to make a decision on suitability. The National Commissioner has also failed to justify why an alleged pending civil case against the Complainant would negate against his suitability or would negatively affect the integrity of the SAPS.

6.2.6 It is not disputed that the Complainant and my office were provided with contradictory reasons by the SAPS as to why he could not be re-enlisted to its service. It is noted that in one instance the Complainant was informed that there was a moratorium on the placements or re-

enlistments of former members. It is also noted that in a correspondence received by my office on 12 September 2012, the Provincial Commissioner of the SAPS in Limpopo indicated that his office had confirmed to the National Head Office that the Complainant could be accommodated but he still had to comply with all the previous requirements for re-enlistment as indicated in the advertisement of 17 January 2010.

Issue(s) in dispute

- 6.2.7 The Complainant has admitted that he once had such a civil claim as alleged by the SAPS, but indicated that he had paid the debt in question when he resigned in 2006. It is noted that in his Application for Discharge from the SAPS dated 20 December 2006, the Complainant acknowledged that he was indebted to the SAPS in the amount of R22 500.00. The Complainant indicated that by so acknowledging he gave the SAPS permission to deduct the debt from his pension benefits. However, the SAPS indicated that the matter was before the court and was provided with a Reference no. 0490413-3/8 (145/03) in that regard. The Complainant submitted a copy of correspondence that he received from Government Employees Pension Fund (GEPF) dated 24 April 2007, which indicated that upon his resignation an amount of R8 434.36 was deducted from his pension benefits and paid to the SAPS.
- 6.2.8 It is in dispute as to whether the debt existed at the time when the Complainant applied for re-enlistment in 2010. The SAPS did not submit any evidence as to why the alleged money owed could not be recovered from the Complainant since at the time of his resignation until when he applied for re-enlistment in 2010.

6.2.9 In her response to my section 7(9) notice as alluded to above, the National Commissioner alleged that the Complainant declared in the application submitted in 2010 that he had a civil case pending with the former Minister of Safety and Security. However, the National Commissioner did not submit any evidence of such declaration to my office.

6.2.10 In the absence of evidence of such declaration of indebtedness, I am persuaded to conclude that no such civil claim existed at the time the Complainant applied for re-enlistment in 2010. I have further noted that in her response to my section 7(9) notice, the National Commissioner also indicated that the Complainant was granted an opportunity for re-enlistment in 2012 but failed to complete all the selection steps (physical assessment) successfully and that he refused to attend a remedial that was scheduled for him.

6.2.11 Once again the National Commissioner failed to indicate whether at that stage in 2012 the civil claim had been settled or not. The question that arises is why the SAPS would grant the Complainant an opportunity for re-enlistment in 2012 whilst the civil claim remains pending if that was the reason for not re-enlisting him in 2010. The only logical conclusion that can be reached in the circumstances is that no such civil claim was pending in the first place. At least the National Commissioner would have indicated in her response to my section 7(9) notice that the SAPS granted the Complainant another opportunity for re-enlistment after he had settled the civil claim. However, no such explanation was forthcoming from the National Commissioner.

Conclusion

6.2.12 The SAPS provided the Complainant with contradictory reasons as to why he was not re-enlisted. The SAPS also failed to prove that at the

time the Complainant applied for re-enlistment in 2010, there was a civil claim of R22 500.00 pending against him. The National Commissioner also failed in her response to my section 7(9) notice to explain why the SAPS would grant the Complainant another opportunity for re-enlistment in 2012 if he had a civil claim pending against him if that was the reason for not re-enlisting him in 2010. It is also noted that in a meeting with my office on 28 September 2012, the SAPS indicated that the Complainant will have to undergo the process of re-evaluation as the post had been created for him. However, in her response to my section 7(9) notice, the National Commissioner indicated that currently Limpopo Province has no funded vacancies and that the Complainant may still apply for any position which is advertised in the media if he complies with the requirements for the post.

6.3 Whether the Complainant was prejudiced by the conduct of the SAPS:

Common cause issues

- 6.3.1 It is common cause that the Complainant underwent and passed all the assessments required to be re-enlisted when he applied in 2010. It is also common cause that after my office intervened in the matter, the SAPS wanted the Complainant to re-do all the assessment in 2012 in order to be re-enlisted, two years after he had passed them.
- 6.3.2 It is also common cause that the Complainant failed the physical assessment in 2012 when he was re-evaluated for re-enlistment, whereas he had passed it in 2010.
- 6.3.3 It has been established in the evidence above that the SAPS failed to communicate the outcome of the Complainant's application to him until he approached it.

6.3.4 It has also been established in the evidence above that the Complainant was provided with contradictory reasons by the SAPS for not re-enlisting him. It has further been established that there was no civil claim pending against the Complainant at the time he applied for re-enlistment in 2010.

Conclusion

6.3.5 The Complainant was in 2012 required to re-do the assessments which he had passed in 2010. It is noted that the Complainant failed the physical re-assessment this time around. The Complainant was provided with contradictory reasons for not re-enlisting him which denied him an opportunity to remedy whatever defect which could have been evident in his application process within the three (3) months as alleged by the SAPS in order to avoid having to do the re-assessments. The alleged civil claim against the Complainant at the time he applied for re-enlistment in 2010 could not be proved.

7. MEASURING CONDUCT AGAINST THE RULES

7.1 Whether the SAPS failed to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:

7.1.1 Section 33 of the Constitution of the Republic of South Africa, 1996 provides that "*Everyone has a right to administrative action that is lawful, reasonable, and procedurally fair.* It further states that "*everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.* The Constitution places a duty on

the SAPS to ensure that any administrative action that is taken against any person should be procedurally fair, lawful and reasonable.

- 7.1.2 Section 1 of the Promotion of Administrative Justice Act No. 3 of 2000 defines administrative action among others as *"any decision taken, or any failure to take a decision, by an organ of state when exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person..."* The SAPS's decision not to re-enlist the Complainant constitutes a decision taken by an organ of state when exercising a public power to appoint members in terms of the South African Police Service Act No. 68 of 1995, which has adversely affected the right and legitimate expectation of the Complainant to be re-enlisted after he had successfully completed the requirements of the recruitment process in 2010.
- 7.1.3 Section 3(1) of the Promotion of Administrative Justice Act No. 3 of 2000 provides that *"administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."* Procedural fairness in terms of section 3(2)(b) of PAJA provides therefore that the SAPS had a duty to inform the Complainant among others of its decision on the outcome of his application for re-enlistment, to give him reasonable opportunity to make representations regarding its decision not to re-enlist him and adequate notice of any right of review or internal appeal in that regard where applicable.
- 7.1.4 The SAPS failed to communicate its decision not to re-enlist the Complainant to him despite his repeated enquiries. In essence the SAPS failed to give the Complainant a clear statement of the administrative action it had embarked on. The SAPS only managed to respond to him on the 13 July 2012, two years after his first enquiry.

The decision not to re-enlist the Complainant constituted an administrative action within the meaning of section 1 of PAJA.

- 7.1.5 The fact that the SAPS only managed to provide the Complainant with a formal response regarding the outcome of his application on 13 July 2012, denied him a reasonable opportunity to make representations regarding its decision not to re-enlist him. The Complainant's representations would have included an opportunity for him to clear his name regarding the alleged civil claim pending against him. Similarly in *Sokhela & others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & others*, the court held at para [52] that ordinarily the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. Had the Complainant been afforded a reasonable opportunity to make representations, he would have also been able to be informed of his right of review or internal appeal if his representations were not accepted.
- 7.1.6 It is clear that the National Commissioner's decision not to re-enlist the Complainant was based on irrelevant considerations. The court similarly held in *Sokhela & others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & others* that one of the grounds upon which the decision of an administrator may be set aside is because irrelevant considerations were taken into account or relevant considerations were not considered as it is the case in this particular case.
- 7.1.7 The Complainant had a legitimate expectation that once he had passed the interview and all other assessments, he would be re-enlisted as that was the criteria used to appoint other former members of the SAPS who applied at the same time with him.

7.1.8 The conduct of the SAPS in the circumstances was in violation of section 33 of the Constitution and section 3(2)(b) of PAJA.

7.2 Whether the reason(s) subsequently provided by the SAPS in not re-enlisting the Complainant were fair, just and reasonable in the circumstances of this case:

7.2.1 The requirements for appointment of a person who applies to be appointed as a member of the SAPS are provided for in Regulation 11 of the Regulations for the South African Police Service issued in terms of the SAPS Act.

7.2.2 In terms of Regulation 11, the only prohibitions to be appointed to the SAPS as a member is in relation to tattoo marks which will be visible and irreconcilable with the objectives of the Service and a previous criminal conviction.

7.2.3 The requirements referred to above are also repeated verbatim in the advertisement for re-enlistment in the South African Police Service issued in terms the Divisional Commissioner: Personnel Services' Circular dated 7 January 2010.

7.2.4 It is noted that neither in the Regulations nor in the advertisement is there a prohibition based on a pending civil case against a job applicant. The SAPS also failed to prove that such a civil claim existed against the Complainant at the time he applied in 2010. The evidence of the GEPF letter addressed to the Complainant indicates that an amount of R8 434.36 was deducted from his pension benefits and paid to the SAPS. If such a claim was valid, the SAPS could have easily instructed GEPF to deduct the amount owed from the Complainant's pension benefits since the Complainant had acknowledge such in his Application for Discharge from the SAPS.

7.2.5 Whilst I acknowledge that the SAPS has a legal duty in terms of Regulation 11, to assess a candidate's integrity before enlisting him or her to its service, which assessment may include an enquiry regarding previous criminal convictions, the taking of fingerprints and background checks, this case is distinguishable in that a pending civil claim is not expressly provided for as a prohibition for appointment to the SAPS in the Regulations. My view is that had it been intended that a pending civil claim be a prohibition for appointment to the SAPS, the legislature would have expressly provided for that in the Regulations.

7.2.6 It then follows that the reason of a pending civil case against the Complainant provided by the SAPS for not re-enlisting the Complainant is misconstrued.

7.2.7 The conduct of the SAPS in excluding the Complainant on the basis of a pending civil claim which could not be proved constitutes unfair, unjust and unreasonable treatment of the Complainant.

7.3 Whether the Complainant was prejudiced by the conduct of the SAPS:

7.3.1 The SAPS violated the Complainant's right to just administrative action guaranteed in section 33 of the Constitution by failing to provide him with information regarding the outcome of his application and also providing him with a reasonable opportunity to make representations regarding its decision not to re-enlist him.

7.3.2 The Complainant was prejudiced by not being re-enlisted based on a requirement which he was not legally obliged to comply with.

7.3.3 The Complainant was further prejudiced by being compelled to undergo physical assessment in 2012, which he had already passed in 2010. As a consequence the Complainant failed the physical assessment in 2012 resulting in him not being considered for re-enlistment.

8. FINDINGS

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

8.1 Whether the SAPS unduly failed to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:

8.1.1 The SAPS unduly failed to inform the Complainant about its decision on the outcome of his application to be re-enlisted and also failed to give him a reasonable opportunity to make representation regarding its decision not to re-enlist him;

8.1.2 Such failure violated section 3(2)(b)(ii),(iii)(iv) and (v) of the Promotion of Administrative Justice Act No. 3 of 2000 and section 33(1) and (2) of the Constitution; and

8.1.3 The conduct of the SAPS 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 No. 23 of 1994.

8.2 Whether the reason(s) subsequently provided by the SAPS in not re-enlisting the Complainant were fair, just and reasonable in the circumstances of this case:

- 8.2.1 The Complainant was advised that the reason he could not be re-enlisted was that the Minister of Safety and Security (now Minister of Police) had a pending civil case against him relating to a departmental debt of R22 500.00. He was later required to undergo a new assessment;
- 8.2.2 After perusing the Regulation 11 of the SAPS relating to Application for Appointment and the SAPS Circular dated 7 January 2010 relating to Re-enlistment in the SAPS, I could not find any provision that excludes a person with a civil case pending against him or her from being appointed;
- 8.2.3 In the circumstances, the reason given to the Complainant by the SAPS for its failure to re-enlist him to its service is found to be unfair, unjust and unreasonable;
- 8.2.4 It is disconcerting that the Complainant and my office were provided with contradictory reasons by the SAPS as to why he could not be re-enlisted to its service. Despite being informed that reason he could not be re-enlisted was that the Minister of Safety and Security (now Minister of Police) had a pending civil case against him relating to a departmental debt of R22 500.00, in another instance he was informed that there was a moratorium on the placements or re-enlistments of former members.
- 8.2.5 My office on the other hand was informed by a letter dated 12 September 2012 from the Provincial Commissioner of the SAPS in Limpopo that his office had confirmed with the National Head Office

that the Complainant could be accommodated but still had to comply with all the previous requirements for re-enlistment as indicated in the advertisement of 17 January 2010.

8.2.6 Requiring the Complainant to redo the assessments for the second time after more than two years was both unfair and unreasonable in the circumstances; and

8.2.7 The Complainant's right to just administrative action enshrined in section 33 of the Constitution was violated.

8.3 Whether the Complainant was prejudiced by the conduct of the SAPS:

8.3.1 The Complainant was prejudiced by the conduct of the SAPS as envisaged in section 182(1)(a) of the Constitution because a timely response by the SAPS would have afforded him an opportunity to take action to clear his name against the allegations of having a civil case which would have resulted in the SAPS re-enlisting him into its Service;

8.3.2 Had he been re-enlisted in 2010 it would have placed him in a better financial position but failure to re-enlist him has meant that he lost on potential income which would have come in handy since to date he is not employed and is married with three dependent children; and

8.3.3 In my view, had the Complainant been enlisted as a police officer when he was assessed as fit to serve, he would have been placed optimally in a position to pay the Minister of Police the alleged accumulated debt of R22 500.00;

8.3.4 In that regard I find the exclusion irrational. Because of the unfair and irrational exclusion, the Complainant was not only placed in a position

of being unable to pay the alleged debt, he has been unduly plunged into poverty;

8.3.5 I also find it disconcerting that the alleged debt was never substantiated by any legal process of recovery against the Complainant. Instead the Complainant was required to undergo a new assessment before being re-enlisted; and

8.3.6 The Complainant had a legitimate expectation that once he had passed the interview and all other assessments, he would be re-enlisted to the SAPS.

9. REMEDIAL ACTION

9.1 The appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution is that:

9.1.1 The National Commissioner of the SAPS should **immediately** re-enlist the Complainant into the SAPS and provide him with a training programme to assist him to achieve the required physical fitness levels;

9.1.2 The Provincial Commissioner of the SAPS should write a letter of apology to the Complainant for the prejudice caused to him and his family within 30 days from date of issuing of this report; and

9.1.3 The National Commissioner should compensate the Complainant within 60 days from the date of issuing of this report, a reasonable portion to be determined by an independent assessor of what he would have earned had he been re-enlisted in 2010 when he was assessed as fit to serve.

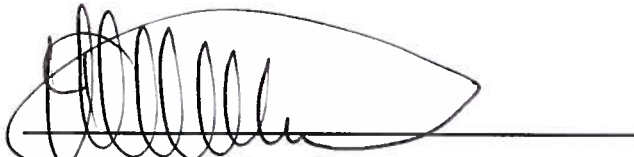
9.2 The National Commissioner of the SAPS must:

9.2.1 Henceforth submit to the Public Protector:

- (a) The copy of a letter referred to in paragraph 9.1.2 above and a program of action on how she intends implementing the rest of the of the remedial action envisaged in paragraph 9 above within 30 days of receipt of this final report in this matter.

10. MONITORING

10.1 The Public Protector will monitor the implementation of this report on a quarterly basis.



ADV THULI N. MADONSELA

**PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA**

DATE 30/03/2015

Assisted by: Mr S I Mhinga and Mr L Khosa