

**PREPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND
SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO: 15 of 2021/22

ISBN NO: 978-77630-040-2

“Allegations of undue delay by the Department of Correctional Services relating to a failure to investigate and issue a report following a grievance lodged by Mr Francis Tomeng”

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF AN UNDUE DELAY
BY THE DEPARTMENT OF CORRECTIONAL SERVICES TO INVESTIGATE
AND ISSUE A REPORT FOLLOWING A GRIEVANCE LODGED BY MR
FRANCIS TOMENG**



TABLE OF CONTENTS

Executive summary.....3

1. INTRODUCTION.....6

2. THE COMPLAINT.....7

3. POWERS AND JURISDICTION.....9

4. THE INVESTIGATION.....14

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSION MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.....18

6. FINDINGS.....25

7. REMEDIAL ACTION.....26

8. MONITORING.....27

Executive Summary

- (i) This is the report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- (ii) The report communicates the Public Protector’s findings and appropriate remedial action being taken in terms of the provisions of section 182(1)(c) of the Constitution, following an investigation into allegations of an undue delay by the Department of Correctional Services (Department) to investigate and issue a report following a grievance lodged by Mr Francis Tomeng (Complainant).
- (iii) **On analysis of the complaint the following issue was identified to inform and focus the investigation:**
 - (a) Whether the Department of Correctional Services unduly delayed to investigate and issue a report to the Complainant following his grievance of unfair labour practice against the Area Commissioner, Mr M.J. Mbele in compliance with its applicable legal prescripts. If so, whether such conduct constitutes maladministration and improper conduct.
- (iv) The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the powers to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act 23 of 1994 (the Public Protector Act), which regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.

Tomeng v DCS Report

- (v) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:
- (a) **Regarding whether the Department of Correctional Services unduly delayed to investigate and issue a report to the Complainant following his grievance of unfair labour practice against the Area Commissioner, Mr M.J. Mbele in compliance with its applicable legal prescripts. If so, whether such conduct constitutes maladministration and improper conduct:**
- (aa) The allegation that the Department unduly delayed to investigate and issue a report to the Complainant following his grievance of unfair labour practice against the Area Commissioner, Mr M.J. Mbele in compliance with its applicable legal prescripts is substantiated.
- (bb) The investigation revealed that the Complainant lodged his unfair labour practice grievance with the Department on in October 2017, and it started to investigate it from May 2018 only after the Complainant had sought the intervention of former Minister Michael Masutha. The investigation was only completed by the Department in September 2018, way outside its grievance procedure manual.
- (cc) There were no reasons advanced by the Department on its delay to deal with the Complainant's grievance within thirty (30) days in line with the departmental Grievance Procedure Manual.
- (dd) The Department further conceded that due to miscommunication within its staff, the outcome of the Complainant's grievance could not be communicated to him on time. The investigation report into the Complainant's unfair labour practice grievance was only delivered to him in June 2020.

Tomeng v DCS Report

- (ee) The conduct of the Department clearly violated section 195(1)(a) and (f) of the Constitution and all 7 (seven) grievance process stages as outlined in the Departmental Grievance Procedure, 2013.
- (ff) The conduct of the Department also constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(i) &(ii) of the Public Protector Act.
- (vi) The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:**

The National Commissioner and Chief Operating Officer of the Department must:

- (aa) Take cognisance of the findings of improper conduct and undue delay mentioned in the report; and
- (bb) Ensure that the Department's employees, including those on the Department's internship programmes, are regularly trained on the Department's Grievance Procedure Manual to avoid a recurrence of similar incidents.

The Regional Commissioner of Correctional Services Free State/Northern Cape must:

- (aa) Within thirty (30) days from the date of this report, apologise, in writing, to the Complainant for the Department's undue delay to attend to his grievance within the prescribed timeframes and to communicate the outcome to him.

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FRANCIS TOMENG**

1. INTRODUCTION

1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

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

1.2.1 The Minister of Justice and Correctional Services, Mr Ronald Lamola;

1.2.2 The National Commissioner of Correctional Services: Mr Arthur Fraser;

1.2.3 The Chief Operations Officer of the Department of Correctional Services, Mr Mandla Mkhabela; and

1.2.4 The Regional Manager of the Department of Correctional Services, Ms Subashini Moodley.

1.3 A copy of the report is also provided to the Complainant, Mr Francis Tomeng, to inform him about the outcome of the investigation;

1.4 The report communicates the Public Protector's findings and appropriate remedial action being taken in terms of the provisions of section 182(1)(c) of the Constitution, following an investigation into allegations of an undue delay

Tomeng v DCS Report

by the Department of Correctional Services (Department) to investigate and issue a report following a grievance lodged by Mr Francis Tomeng.

2. THE COMPLAINT

2.1 The investigation originates from a complaint lodged with the Public Protector by Mr Francis Tomeng (the Complainant) on 17 January 2019 relating to the allegations of an undue delay by the Department to investigate and issue a report following a grievance lodged by him.

2.2 In essence, the Complainant alleged that:

2.2.1 In 2014, he submitted his application to the Department for transfer from Hoopstad Centre to the Hoopstad Community Corrections (the Community Corrections Centre). The application was declined due to a shortage of staff. He pursued the application until it was verbally granted during 2017 by the Head of Hoopstad Community Corrections, Ms PF Mareka (Ms Mareka);

2.2.2 Subsequently, on 02 May 2017, he reported to the Community Corrections Centre. However, on 09 May 2017, he received correspondence from Mr MJ Mbele (Mr Mbele), the Area Commissioner: Bizzah Makhathe, instructing him to report back to his work station at the Hoopstad Centre;

2.2.3 Following the above, the Complainant submitted an incapacity leave application for the period 10 May 2017 until 12 May 2017, which was declined by the Human Resource Division of the Hoopstad Centre without providing him with valid reasons. Consequently, under duress, he signed an Acknowledgement of Debt for seven (7) unpaid working days taken, including the days on which he reported for duty at the Hoopstad

Tomeng v DCS Report

Community Corrections. The Department considered these days as days on which he was absent from work;

- 2.2.4 He thereafter lodged a grievance with the Human Resource Division regarding the manner in which his application for transfer was handled by Mr Mbele;
- 2.2.5 On 10 October 2017, whilst on duty and driving a state vehicle to the Grootvlei Centre Regional Office, he stopped there with a view to obtaining the status update regarding his grievance against Mr Mbele;
- 2.2.6 As a result, the Acting Head of the Centre, Mr G Taeli (Mr Taeli), acting on the instructions of Mr Mbele, suspended his permit/authorisation to operate state vehicles. Consequently, in October 2017, he lodged a formal grievance with the Department, however, his grievance was not addressed;
- 2.2.7 He then escalated his grievance to the former Minister of Justice and Constitutional Development, Mr Michael Masutha (former Minister Masutha). He subsequently received a letter from the Department Acting Deputy Regional Commissioner, Mr NB Nyapotse, dated May 2018, addressed to Mr D Hamman (position not stated) who was instructed to investigate the allegations raised by the Complainant and submit an investigation report by 30 May 2018; and
- 2.2.8 Although Mr Nyapotse had given instructions for an investigation to be conducted into his allegations, he was not provided with the outcome thereof.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent institution established in terms of section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conducting 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 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 prescribed by national legislation.

3.4 The Public Protector’s powers are amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers powers to resolve the dispute through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena person and information from any person in the Republic for purposes of an investigation.

3.5 In the matter of *Economic Freedom Fighter v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that

Tomeng v DCS Report

remedial action taken by the Public Protector has a binding effect.¹The Constitutional Court further held that:

*“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason the remedial action taken against those under investigation cannot be ignored without any legal consequences”.*²

- 3.6 In the above mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);
- 3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaint as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implication of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);
- 3.6.4 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

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

² Supra at para [73].

Tomeng v DCS Report

their nature, context and language, to determine what course to follow (paragraph 69);

- 3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.6.6 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, would be informed by the subject-matter of the investigation and the type of findings made (paragraph 71);
- 3.6.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine appropriate remedial measures. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggest that she has to leave the exercise of the power to take remedial action to other institutions or that is the power that is by its nature of no consequences (paragraph 71 (a));
- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implication (paragraph 71 (d)); and
- 3.6.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).

Tomeng v DCS Report

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- 3.8 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others*, case no 9113939/2016(13 December 2017), the Court held as follows:
- 3.8.1 The Public Protector, in appropriate circumstances, has the power to direct the President to appoint a Commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will renders the power to take remedial action meaningless or ineffective. (Paragraph 85 and 152);
- 3.8.2 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section (1) afford the Public Protector with the following three separate powers (paragraph 100 and 101);
- (a) Conduct investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 3.8.3 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (Paragraph 104);
- 3.8.4 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105);
- 3.8.5 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observation constitutes *prima facie* findings that point to serious misconduct (Paragraph 107 and 108);

Tomeng v DCS Report

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- 3.8.6 *Prima facie* evidence which points to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action. (Paragraph 112);
- 3.9 The Department of Correctional Services is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector's mandate.
- 3.10 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.
- 3.11 Regarding the exercise of the discretion in terms of section 6(9) of the Public Protector Act to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute '*special circumstances*', some of the special circumstances that the Public Protector took into account to exercise her discretion favourably to accept this complaint, include the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether she would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether the Public Protector's refusal to investigate perpetuates the violation of section 195 of the Constitution; whether her remedial action will redress the imbalances of the past. What constitutes '*special circumstances*' depends on the merits of the each case.
- 3.12 In terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two years from the date of an incident unless special circumstances exist. However, the mere fact

Tomeng v DCS Report

that the incident occurred more than two years before being reported to her office does not, in itself, bar her from investigating. Instead, it is mainly both the interests of justice and public interests that dictate whether she should investigate the matter or not. It is axiomatic that the Public Protector has to identify special circumstances using her discretion should she decide to entertain such a complaint.

- 3.13 Realising the importance of promoting accountability and openness which lie at the core of the founding provisions of our Constitution. Mindful of the need to strengthen constitutional democracy and driven by an inclination towards promoting basic values and principles governing public administration as envisaged in section 195 of our Constitution. Appreciating the importance of advancing Promotion of Administrative Justice Act³ (PAJA) and its corresponding section 33 of our Constitution, the Public Protector duly decided to exercise her discretion in favour of this complaint. Alive to all these reasons, she concluded that it was in the interests of justice to investigate and determine the merits or demerits of this complaint.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act gives the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conductor maladministration.

³ Act 3 of 2000.

Tomeng v DCS Report

4.1.3 The investigation process included correspondence with the Department and the Complainant, analysis of the relevant documentation and consideration and application of the relevant laws and regulatory framework.

4.2 Approach to the investigation

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

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?
- (d) In the event of maladministration or improper conduct, 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 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeals⁴ (SCA) made it clear that the Public Protector's duty to actively search for the truth and not to wait for parties to provide all the evidence as judicial officers do.

4.2.3 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been

⁴ *Public Protector versus Mail and Guardian* 2011 (4) SA 420 (SCA).

Tomeng v DCS Report

met or complied with by the Department to prevent improper conduct and/or maladministration.

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

4.3 On analysis of the complaint the following issue was identified to inform and focus the investigation:

4.3.1 Whether the Department of Correctional Services unduly delayed to investigate and issue a report to the Complainant following his grievance of unfair labour practice against the Area Commissioner, Mr M.J. Mbele in compliance with its applicable legal prescripts. If so, whether such conduct constitutes maladministration and improper conduct.

4.4 THE KEY SOURCE OF INFORMATION

4.4.1 Documents

4.4.1.1 A copy of the complaint documents dated 17 January 2019;

4.4.1.2 A copy of notification of debt dated 25 May 2019;

4.4.1.3 A copy of the memorandum relating to self-placement at Hoopstad Community Corrections: Mr Tomeng dated 08 May 2019;

4.4.1.4 A copy of the Complainant's formal grievance form dated 12 October 2017;

4.4.1.5 A copy of the withdrawal permit to drive departmental vehicles: official Mr Tomeng dated 11 October 2017;

Tomeng v DCS Report

- 4.4.1.6 A copy of the incident report for harassment by the Complainant dated 31 May 2017; and
- 4.4.1.7 A copy of the letter dated 22 May 2018 from Mr NB Nyapotse addressed to Mr D Hamman, appointing him as the Investigator into the Complainant's matter.

4.4.2 Correspondence sent and received

- 4.4.2.1 A copy of the Public Protector's letter dated 13 August 2019 addressed to the Department Regional Commissioner, Free State and Northern Cape, Ms S Moodley;
- 4.4.2.2 A copy of the Public Protector's reminder dated 11 October 2019 addressed to Mr Sello Finger, the Department Regional Coordinator: Legal Services (Mr Finger);
- 4.4.2.3 A copy of the response from Mr Finger dated 30 October 2019;
- 4.4.2.4 A copy of the supplementary response from Mr Finger dated 06 March 2020;
- 4.4.2.5 A copy of the Public Protector's notice in terms of section 7(9) (a) of the Public Protector Act, 1994 dated 15 March 2021 , addressed to the Chief Operating Officer of the Department, Mr Mandla Mkhabela;
- 4.4.2.6 A copy of the response to the Public Protector's notice dated 14 July 2021 from Ms Moodley.

4.4.3 Legislation and other prescripts

- 4.4.3.1 The Constitution of the Republic of South Africa, 1996.
- 4.4.3.2 The Public Protector Act, 1994.
- 4.4.3.3 The Labour Relations Act, 1995.
- 4.4.3.4 The Department of Correctional Services' Grievance Procedure of 1997 adopted in terms of the DBC Resolution 108/ 1996.

4.4.4 Case Law

4.4.4.1 *Economic Freedom Fighter v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others.*

4.4.4.2 *President of the Republic of South Africa v Office of the Public Protector and Others, case no 9113939/2016(13 December 2017).*

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Department of Correctional Services unduly delayed to investigate and issue a report to the Complainant following his grievance of unfair labour practice against the Area Commissioner, Mr M.J. Mbele in compliance with its applicable legal prescripts. If so, whether such conduct constitutes maladministration and improper conduct:

Common Cause issues

5.1.1 It was not disputed that the Complainant is employed as a Grade 1 Correctional Officer, stationed at Hoopstad Correctional Centre since 2009.

5.1.2 In 2014, his application for transfer to the Hoopstad Community Corrections Centre (the Community Corrections Centre) was declined by Mr Mbele, the Area Commissioner of the Centre, due to a shortage of personnel at the Centre.

Tomeng v DCS Report

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- 5.1.3 Nonetheless, the application for transfer was verbally granted by Ms Mareka in 2017. Subsequently, the Complainant reported to the Community Corrections Centre from 2 May 2017 to 9 May 2017, without having received a letter confirming his transfer. He was then instructed to return to his station by Mr Mbele. Subsequently, on 14 July 2017, he was charged with misconduct based on his absence from work without authorisation.
- 5.1.4 The Complainant's application for incapacity leave for the period 10 May 2017 to 12 May 2017 was declined. He signed an Acknowledgement of Debt for seven (7) days unpaid leave taken, including the days he had reported for duty at the Community Corrections Centre.
- 5.1.5 Further to the above, the Complainant was charged with misconduct on the ground that he deviated from the authorised route using a state vehicle.
- 5.1.6 On **12 October 2017**, he lodged a formal grievance of unfair labour practice against Mr Mbele.

Issues in dispute

- 5.1.7 The Complainant alleged that in October 2017, he lodged a formal grievance of unfair labour practice against Mr Mbele. However, his grievance was not addressed.
- 5.1.8 Further to that, he averred that he verbally made a follow-up on the matter with the Department, however he did not receive feedback from the Department.
- 5.1.9 On 13 August 2019, The Public Protector's investigation team wrote an allegations letter dated 13 August 2019 to Ms Moodley relating to the

Tomeng v DCS Report

alleged undue delay to investigate and communicate the outcome to him. Mr Finger responded as per letter dated 30 October 2019 as follows, amongst others:

“5. FINDINGS

5.7 Yes, there was a delay in finalizing the grievance of Mr Tomeng and there was also failure from Management to communicate same to Mr Tomeng...

5.1.10 The Investigation team followed up with a letter to Mr Finger dated 25 February 2020, seeking clarity on the reasons for the delay to finalise the matter and whether the Complainant was finally informed of the outcome of the Department’s investigation into his grievance.

5.1.11 Mr Finger submitted to the Investigation team a written letter dated 06 March 2020. He reported, amongst others, as follows:

“2(a) This office found that the investigation report was handed to HR office on 28.06.2019 by the office of the Deputy Regional Commissioner.

(b) The investigation report was received by the intern Ms Dimakatso Mokhothu, who was relieving the secretary of Ms Bikane who was on maternity leave by then.

(c) The then intern also handed the file to the office of Employee Relations without checking with the Regional Head Human Resources first.

(d) As there was also an intern in Employee Relations, there was no person who could give direction as to what needs to happen with the investigation report.

Tomeng v DCS Report

3. The outcome of the investigation was not brought to the attention of Mr Tomeng by either Regional Office or Bizzah Makhathe Management Area. It is clear that there was communication break-down between these offices as there was no clear instructions [sic] as what needs to be done in this case...

9. The office undertakes to provide Mr Tomeng with a copy of the investigation report on or before the 13th March 2020.”

5.1.12 It must be reported that as at 13 March 2020, the Department had not provided the Complainant with a copy of the investigation report.

5.1.13 Based on the information and evidence gathered, a notice in terms of section 7(9)(a) of the Public Protector Act on 12 March 2021 was issued to the Chief Operating Officer of the Department.

5.1.14 Ms Moodley responded to the section 7(9)(a) notice as per the letter dated 14 July 2021. The response to a section 7(9) notice stated, amongst others, the following:

“...An investigation was instituted by the then Acting Deputy Regional Commissioner Mr Nyaptse during May 2018 after Mr Tomeng escalated his complaint to the office of the then Minister of Correctional Service, Mr Michael Masutha.

The investigation was signed off by the Regional Commissioner on 2018.09.27. Mr Tomeng requested the copy of the investigation outcome and a copy was hand delivered by Regional Coordinator Legal Services Mr. Finger to Hoopstad Correctional Centre on 2020.05.29...whereby Mr. Tomeng was handed the investigation report. Unfortunately, Mr Tomeng was not at the Centre, doing escort duty at Hertzogville Magistrate court...

Tomeng v DCS Report

On the 1st June 2020, Mr Tomeng was served with the investigation report by the Head of the Centre and acknowledged the receipt thereof...”

5.1.15 The Complainant confirmed with the Investigation team that the investigation report was indeed delivered to him on 01 June 2020, almost three (3) years after lodging his grievance with the Department on 12 October 2017.

Application of the relevant laws and prescripts

The Constitution

5.1.16 Section 195 of the Constitution provides that:

- (1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
- (a) *A high standard of professional ethics must be promoted and maintained.*
 - (b) *.....*
 - (c) *.....*
 - (d) *.....*
 - (e) *.....*
 - (f) *Public administration must be accountable.*

5.1.17 The above principles enjoin the Department and its officials to exercise a high level of professionalism and ethics including accountability in the performance of their duties and strive to be above reproach. It was expected of the Department, upon receipt of the grievance from the Complainant, to have investigated and provided the Complainant with outcome. Delaying or

Tomeng v DCS Report

failing to provide the outcome of the investigation of the complaint, would amount to contravention of the above constitutional principles.

5.1.18 The Department’s Grievance Procedure of 1997 adopted in terms of the DBC Resolution 108/96, is the key applicable legal prescript regulating the grievance process within the Department.

5.1.19 In terms of the grievance procedure, the Department outlines a seven (7) stage or step grievance process as follows:

“Management of Grievances: Steps to Follow: Departmental Grievance Procedure

Stages of the grievance process

Stage	Description	Authorised line manager & timelines
STEP 1	(a) An employee raises a grievance verbally or in writing with the first level of authority (direct supervisor) (b) The first level of authority must endeavour to resolve the grievance within two days (c) If the employee accepts the supervisor’s reaction to the complaint/grievance, the matter is finalised (d) The agreement must then be registered and filed appropriately	1 st level of authority (Direct Supervisor e.g. Unit Manager) Resolve within 2 days
STEP 2	(a) If the grievance cannot be resolved at the first level of authority, a grievance form must be completed by the employee, and (b) The first level of authority must submit the form to the second level of authority (c) The second level of authority must endeavour to resolve the grievance within three working days (d) If the grievance cannot be resolved it must be referred to the third level of authority.	Direct Supervisor cannot resolve- 2 nd level Resolve within 3 days
STEP 3	Note: In the event the grievance not being resolved at stage 2, the second level of authority submits the form to the third level of authority (a) The third level of authority must endeavour to resolve the grievance within three working days	3 rd level of authority Resolve within 3 days
STEP 4	Note: In the event the grievance not being resolved at stage 3, the third level of authority submits the form to the fourth level of authority (a) The fourth level of authority must endeavour to resolve the grievance within five working days	4 th level of authority Resolve within 5 days
STEP 5	Note: In the event the grievance not being resolved at stage 4, the fourth level of authority submits the form to the fifth level of authority (a) The fifth level of authority must endeavour to resolve the grievance within seven working days	5 th level of authority Resolve within 7 days
STEP 6	This stage provides for grievances concerning matters where the decision-making competence/delegation level resides at Head Office. A decision cannot be taken at a lower level.	5 th level of authority

Tomeng v DCS Report

	(a) (a) The fifth level of authority must endeavour to resolve the grievance within ten working days	Resolve within 10 days
STEP 7	If the grievance remains unresolved, the employee may pursue any lawful course of action (external remedies)	

5.1.20 It is not in dispute that the Complainant lodged his formal grievance of unfair labour practice on 12 October 2017. It was expected of the Department to address the grievance in compliance with its grievance procedure manual. It is also not in dispute that the Department only commenced in dealing with the grievance in May 2018 when the Complainant sought the former Minister’s intervention when nothing was being done to address the grievance.

Conclusion

5.1.21 The evidence and information gathered indicate that the Department did not address the Complainant’s grievance in line with the applicable legal prescripts.

5.1.21 It is further apposite to conclude that customarily, organs of state or departments operate within certain regulatory Policy Framework which guides their day to day procedural operations and administrative activities. Of particular note is that, although departmental policies cannot be exalted to a strict legal code such as an Act of parliament or legislation, these policies are invariably crafted to mirror the objects of the main legislation.

5.1.22 Policies are duly adopted by departments as guiding documents and are binding on its employees. The Public Protector is therefore highly inclined to apply and consider departmental policies during the course of my investigation to determine the extent to which policies have been complied with by government officials in execution of their official administrative duties, as was the case in this matter.

6. FINDINGS

Tomeng v DCS Report

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

6.1 Regarding whether the Department of Correctional Services unduly delayed to investigate and issue a report to the Complainant following his grievance of unfair labour practice against the Area Commissioner, Mr M.J. Mbele in compliance with its applicable legal prescripts. If so, whether such conduct constitutes maladministration and improper conduct:

6.1.1 The allegation that the Department unduly delayed to investigate and issue a report to the Complainant following his grievance of unfair labour practice against the Area Commissioner, Mr M.J. Mbele in compliance with its applicable legal prescripts is substantiated.

6.1.2 The investigation revealed that the Complainant lodged his unfair labour practice grievance with the Department on in October 2017, and it started to investigate it from May 2018 only after the Complainant had sought the intervention of former Minister Michael Masutha. The investigation was only completed by the Department in September 2018, way outside its grievance procedure manual.

6.1.3 There were no reasons advanced by the Department on its delay to deal with the Complainant's grievance within thirty (30) days in line with the departmental Grievance Procedure Manual.

6.1.4 The Department further conceded that due to miscommunication within its staff, the outcome of the Complainant's grievance could not be communicated to him on time. The investigation report into the

Tomeng v DCS Report

Complainant's unfair labour practice grievance was only delivered to him in June 2020.

- 6.1.5 The conduct of the Department clearly violated section 195(1)(a) and (f) of the Constitution and all 7 (seven) grievance process stages as outlined in the Departmental Grievance Procedure of 1997.
- 6.1.6 The conduct of the Department also constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(i) &(ii) of the Public Protector Act.

7. THE REMEDIAL ACTION

- 7.1 **The appropriate action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution and section 6(4) (c)(ii) of the Public Protector Act is as follows:**

The National Commissioner and Chief Operating Officer of the Department must:

- 7.1.1 Take cognisance of the findings of improper conduct and undue delay mentioned in the report;
- 7.1.2 Ensure that the Department's employees, including those on the Department's internship programmes, are regularly trained on the Department's Grievance Procedure Manual to avoid a recurrence of similar incidents.

The Regional Commissioner of Correctional Services Free State/Northern Cape must:

Tomeng v DCS Report

7.1.3 Within thirty (30) days from the date of this report, apologise, in writing, to the Complainant for the Department's undue delay to attend to his grievance within the prescribed timeframes and to communicate the outcome to him.

8. MONITORING

8.1 The National Commissioner, Chief Operations Officer and Regional Commissioner of the Department of Correctional Services: Free State/Northern Cape Provinces must, within fifteen (15) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7 of this Report will be implemented.

8.2 In line with the Constitutional Court decision in ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** [2016] ZACC 11, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the National Commissioner of Correctional Services and the Regional Commissioner of Correctional Services, Free State Province, unless a Court Order directs otherwise.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 22/10/2021