

REPORT 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



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INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE FUNCTIONARIES OF THE STATE SECURITY AGENCY RELATING TO THE TERMINATION OF SERVICE OF MRS R HUMAN AND THE SUBSEQUENT UNDUE DELAY TO PROPERLY RE-INSTATE HER AFTER HER APPEAL WAS UPHeld BY THE FORMER MINISTER OF STATE SECURITY



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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYM / ABBREVIATION	DESCRIPTION
Constitution	Constitution of the Republic of South Africa, 1996
E-mail	Electronic mail correspondence
Intelligence Act	Intelligence Services Act, 2002
Intelligence Regulations	Intelligence Services Regulations, 2014
Investigation Team	Public Protector Investigation Team
Public Protector	Public Protector South Africa
Public Protector Act	Public Protector Act, 1994
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2020, as amended
SSA	State Security Agency



1. INTRODUCTION

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

1.2 The report is submitted in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant) for such persons to note the outcome of the investigation:

1.2.1 Ms Khumbudzo Ntshavheni, Minister in the Presidency; and

1.2.2 Ambassador Thembisile Majola, the Director General of the SSA.

1.3 A copy of the report is also provided to Ms R Human, the complainant.

1.4 The report relates to a complaint lodged regarding allegations of maladministration, by the functionaries of the State Security Agency in relation to the termination of service of the Complainant and the subsequent undue delay to properly re-instate her after her appeal was upheld by the former Minister of State Security.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector by Ms R Human (the Complainant) on 27 March 2020. The Complainant alleged that:

2.1.1 She was employed as an Office Manager in the office of the Director-General at the State Security Agency (SSA). Her contract of employment was unlawfully terminated by the then Acting Director-General of the SSA, Mr L Jafta (Mr Jafta).



- 2.1.2 She was unlawfully placed on suspension through a letter dated 30 April 2018, signed by Mr Jafta, which was received on 03 May 2018, for an inordinate period of nineteen (19) months. She was advised through a letter dated 22 July 2019, signed by the then Acting Director-General Mr SP Blose (Mr Blose) to attend a disciplinary investigation interview to enable the SSA's investigation team to take a statement from her in terms of Regulation 5 of Chapter XV111 of the Intelligence Services Regulations, 2014. This Regulation provides that an investigation team must conduct an interview with a member being investigated to obtain their version.
- 2.1.3 During the initial interview with the SSA's Investigation Team on 03 September 2019, she was unable to respond to various questions that they put to her due to the fact that she required access to documents that were in the office of the SSA and not at her disposal during the interview.
- 2.1.4 The person who was charged with the investigation at the SSA, Mr Blose, wrote to her attorneys, AM Vilakazi Attorneys (hereinafter referred to as Complainants' attorney) in a letter dated 14 October 2019, requesting him to arrange for her to view the said documents. The letter sent could not be opened and needed to be decoded on the part of the sender, being Mr R Haines (Mr Haines) the Labour Relations Consultant of the SSA. There was constant e-mail consultation between Mr Haines, and the Complainants' attorney.
- 2.1.5 On 04 November 2019, Mr Haines sent an email to the Complainants' attorney informing him that he is re-sending the e-mail as the attachment on the previous e-mail seemed to be faulty on his side. Furthermore, he requested confirmation that the letter could be opened.
- 2.1.6 She was informed on 05 November 2019, about the letter from Mr Haines, by her attorney who e-mailed Mr Haines on 06 November 2019, to request an



appointment to view the said documents. Notwithstanding the fact that her e-mail was not responded to by Mr Haines, she was advised by her attorney to report to the offices of the SSA the next day to present herself and furthermore, to personally request to view the documents in the possession of Mr Haines.

- 2.1.7 When she presented herself at the office on 07 November 2019, she was advised that since 08 October 2019, all reasonable attempts to secure her presence at the workplace were unsuccessful, including calls to her official cell phone and correspondence to her attorney. On 04 November 2019 she was informed through a letter that she had to report for duty on 06 November 2019 but failed to do so, which she denied.
- 2.1.8 In the letter dated 04 November 2019, it was also mentioned that her failure to report for duty falls within the ambit of section 15¹ of the Intelligence Services Act, 2002 (Intelligence Act) since she had been absent from work without authorisation for more than ten (10) consecutive days. She was informed in this correspondence that by operation of law, she had been discharged from the SSA with effect from 22 October 2019.
- 2.1.9 Whilst she was still on suspension she was irrationally and unlawfully dismissed from employment through a letter dated 07 November 2019, by Mr Jafta.
- 2.1.10 She was also informed in the dismissal letter dated 07 November 2019 that in terms of section 15(1) (b) of the Intelligence Act, she may request the Director-General to reinstate her.
- 2.1.11 Consequently, in line with section 15(1)(b) of the Intelligence Act, she sent correspondence dated 10 November 2019 to Mr Jafta requesting her

¹ *“Any member who absents himself or herself, whether voluntarily or involuntarily, from his or her official duties without the permission of the Director-General concerned or the Chief Executive Officer, as the case may be, for a period exceeding 10 consecutive working days is deemed to have been discharged from the Intelligence Services or the Academy as the case may be.”*



reinstatement, however, this request was declined in a letter dated 18 November 2019.

- 2.1.12 On 22 November 2019, she lodged an appeal, with Ms Ayanda Dlodlo, the then Minister of State Security (the former Minister) against her unlawful dismissal from employment. There was undue delay by the former Minister to finalise her appeal, which had the resultant effect of causing her to suffer severe financial, emotional and psychological prejudice.
- 2.1.13 On 08 April 2020, the former Minister sent correspondence to Mr Jafta, advising him that according to Section 15(c) of the Intelligence Act, she is entitled to appeal to the Minister stating reasons why she should be re-instated. According to chapter XV11 (Disciplinary Procedure) of the Ministerial Regulations appendix A, Regulation 39 states that if a member appeals a finding, then the sanction taken is not implemented until the appeal is finalised.
- 2.1.14 The former Minister did not attend to her appeal against the unlawful dismissal from the service of SSA issued by Mr Jafta within the prescribed timelines set in law (prescribed by both the Intelligence Act and the Intelligence Services Regulations).
- 2.1.15 The legal prescripts governing the SSA indicate that according to the Intelligence Services Regulations, the Minister of SSA ought to have taken a decision on her appeal or to constitute an appeals panel within ten (10) days from the receipt of the complaint, which was not done by the former Minister.
- 2.1.16 On 27 August 2020, the former Minister finalised her appeal and sent correspondence to Mr Jafta, advising him that her appeal has been upheld and that his decision had been overturned. Furthermore, Mr Jafta was requested to action her reinstatement with immediate effect.



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- 2.1.17 Notwithstanding receiving this instruction from the former Minister, Mr Jafta refused her return to work. She was informed by Human Resources Management of Mr Jafta's refusal to allow her to return to her position and to work in his office. She was offered an alternative place to work, which had the effect of causing her prejudice, since the position that was offered to her was a Programme Manager, which was at a lower level. She stated that she was unlawfully requested to stay at home, without being allocated tools of trade. Whilst being requested to stay at home, she earned a manager's salary.
- 2.1.18 She sent numerous correspondence to Corporate Services and the then Director-General Ambassador Msimanga (Ambassador Msimanga) requesting to be properly and effectively re-instated but to no avail. Instead, she was requested to occupy a position that was at a lower level than the position she occupied, which would impact her career advancement, thus prejudicing her.
- 2.1.19 An amount in excess of seven hundred thousand rand (R700 000) was allegedly deducted from the lump sum payment that was made to her. These deductions included the incorrect tax scales being used to calculate the tax deductible being that, the tax scales applied were for the 2020 tax year and not for the 2019 tax year, which was the applicable period in question.
- 2.1.20 Furthermore, there were deductions made in respect of her medical aid employee contributions, for her husband and her two (2) children, despite the fact that she did not receive any benefit from her medical aid, as it was cancelled during the period of her dismissal from employment. In respect of further unlawful deductions, she was responsible for and contributed wholly to (without any contribution from the employer) the medical aid benefit that was due for her parents and this too was deducted from the lump sum payable to her, despite not receiving any benefit from the medical aid due to cancellation on her dismissal.
- 2.1.21 She stated that death benefits were also unlawfully deducted, even though she had a listed beneficiary that passed away in January 2020.



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- 2.1.22 She further stated that she was receiving a salary whilst she was at home, not conducting any work for the SSA for a period exceeding one (1) year, from the date that the former Minister issued a pronouncement on her matter and ordered that she be immediately re-instated.
- 2.1.23 The SSA refused to re-instate her into the position that she occupied prior to her dismissal, being the Office Manager in the office of the Director General, Senior Management position, M3 level and rather offered her a different position on the P3, which is a Professional Band equivalent of a middle management level. She contended that the P3 post is positioned at a lower level, than the M3 post, thus having the effect of prejudicing her career prospects.
- 2.1.24 As a consequence, she approached the Public Protector and requested that an investigation be instituted with a view to determine whether the conduct of the Director General constituted maladministration, undue delay and improper conduct.
- 2.2 Public Protector issued a report, that is **Report 09 of 2021/22**, where the following issues were identified and addressed:
- 2.2.1 Whether or not the Acting Director General of the State Security Agency improperly failed to effect payment to the Complainant of her salary and benefits whilst her appeal was pending with the Minister of State Security, and if so whether such conduct amounts to maladministration;
- 2.2.2 Whether or not the former Minister of State Security unduly delayed to attend to the appeal against termination of employment that was raised by the Complainant and if so whether such conduct amounts to undue delay as contemplated in section 6(4)(a)(ii); and



- 2.2.3 Whether or not there were unlawful deductions made by the State Security Agency when the Complainant's benefits were re-instated and if so whether such conduct amounted to maladministration as contemplated in section 182 of the Constitution, 1996.
- 2.3 In paragraph 4.3.1.4 of the Public Protector's Report 09 of 2021/22 it was stated that: The Complainant raised an additional issue relating to whether the Acting Director-General State Security Agency, unduly delayed to properly and effectively re-instate the Complainant after her appeal was upheld by the Minister State Security on 27 August 2020. This matter is still under investigation and will be adjudicated separately. The Public Protector has conducted a comprehensive investigation into this issue and the outcome thereof is contained in this report.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 ("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".*



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- 3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation.
- 3.4 The Public Protector's powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.
- 3.5 The State Security Agency is an organ of state and its conduct amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls within her competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and sections 6(4)(a) of the Public Protector Act.

4. ISSUE IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
- 4.1.1 Whether the then Acting Director-General for the SSA, Mr Jafta unduly delayed to properly and effectively reinstate the Complainant after her appeal was upheld by the former Minister of State Security Ms Ayanda Dlodlo on 27 August 2020, if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to undue delay in terms of section 6(4)(a)(ii) of the Public Protector Act.



5. THE INVESTIGATION

5.1 The Investigation Process

5.1.1 The investigation included an exchange of documents between the Public Protector and the SSA, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2 Methodology

5.2.1 The investigation was conducted in terms of Section 182 of the Constitution and Sections 6 and 7 of the Public Protector Act.

5.2.2 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.

5.3 Approach to the investigation

5.3.1 The investigation was approached using an enquiry process that seeks to determine:

- (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, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?



5.3.2 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.

5.3.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by both parties in terms of the employment relationship.

5.4 **Key sources of information**

5.4.1 **Documents and correspondence**

5.4.1.1 Letter from SSA to Complainant, dated 30 April 2018;

5.4.1.2 Letter from Complainant to SSA, dated 10 May 2018;

5.4.1.3 Letter from SSA to Complainant, dated 16 May 2018;

5.4.1.4 Letter from SSA to Complainant, dated 21 September 2018;

5.4.1.5 Letter from Complainant to SSA, dated 19 October 2018;

5.4.1.6 Letter from SSA to Complainant, dated 22 January 2019;

5.4.1.7 Letter from SSA to Complainant dated, 03 May 2019;

5.4.1.8 Letter from Complainant to former Minister of State Security, , dated 03 June 2019;

5.4.1.9 Letter from Acting Director-General State Security Agency to Complainant, dated 22 July 2019;

5.4.1.10 E-mail from Mr Haines to Complainant's attorney, dated 23 July 2019;

5.4.1.11 E-mail from Complainant's attorney to Mr Haines, dated 25 July 2019;

5.4.1.12 Letter from SSA to Complainant's attorney, dated 14 October 2019;

5.4.1.13 Medical Certificates of Complainant, dated 21 October 2019, 25 October 2019 and 02 November 2019;

5.4.1.14 E-mail correspondence from Complainant's attorney to Mr Haines, correspondence dated 04 November 2019 and 06 November 2019;

5.4.1.15 Letter of discharge from the SSA to Complainant, dated 07 November 2019;



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- 5.4.1.16 Letter from Complainant to State Security Agency, dated 10 November 2019;
 - 5.4.1.17 Letter from State Security Agency to Complainant, dated 18 November 2019;
 - 5.4.1.18 Complainant's letter of appeal to the Minister of State Security, dated 22 November 2019;
 - 5.4.1.19 Complaint filed by Complainant with the office of the Public Protector, dated 27 February 2020;
 - 5.4.1.20 Letter from the former Minister of State Security to the Acting Director-General to Complainant, dated 08 April 2020;
 - 5.4.1.21 Letter from Public Protector to State Security Agency, raising allegations, dated 16 June 2020;
 - 5.4.1.22 Letter from Public Protector to Minister of State Security, raising allegations, dated 19 June 2020;
 - 5.4.1.23 Letter from Acting Director General SSA to Public Protector, dated 29 June 2020;
 - 5.4.1.24 Letter from Minister State Security to Public Protector, dated 30 June 2020;
 - 5.4.1.25 Letter from Public Protector to Minister of State Security, dated 24 August 2020.
 - 5.4.1.26 Letter from Minister State Security to Public Protector, dated 27 August 2020;
 - 5.4.1.27 Letter from Minister State Security to Complainant, dated 27 August 2020;
 - 5.4.1.28 Notice in terms of section 7(9)(a) of the Public Protector Act, 1994 to Minister of State Security, dated 14 January 2021;
 - 5.4.1.29 Notice in terms of section 7(9)(a) of the Public Protector Act, 1994 to the Acting Director-General SSA, dated 14 January 2021;
 - 5.4.1.30 Response letter to the notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from the acting Director General SSA, dated 08 April 2021;
 - 5.4.1.31 Response letter to the notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from former Minister of State Security, dated 6 April 2021;
 - 5.4.1.32 Letter from Minister State Security to the Public Protector, dated 29 July 2021;
 - 5.4.1.33 Legal opinion, from Minister State Security, sent to the Public Protector, dated 18 August 2021;
 - 5.4.1.34 Exchange of e-mail correspondences between the Complainant and the SSA, dated 21 October 2020, 26 October 2020, 29 October 2020, 10 May 2021, 01



April 2021, 8 April 2021, 11 May 2021, 21 May 2021, 23 May 2021, 29 September 2021, 10 September 2021;

- 5.4.1.35 Letter from SSA to Complainant, dated 14 September 2021;
- 5.4.1.36 Letter from SSA to Public Protector, dated 28 January 2022;
- 5.4.1.37 Letter from Complainant to the Public Protector in response to Notice in terms of Rule 41(1) of the Public Protector Rules, dated 09 June 2023;
- 5.4.1.38 E-mail from SSA to the Public Protector Investigation Team, dated 12 June 2023;
- 5.4.1.39 E-mail from SSA, to the Public Protector Investigation Team, dated 13 June 2023;
- 5.4.1.40 E-mail from the Complainant, to Public Protector Investigation Team, dated 15 June 2023; and
- 5.4.1.41 E-mail from Complainant to the Public Protector, further response to notice in terms of Rule 41(1) of the Public Protector Rules, dated 24 June 2023.

Meeting Held

- 5.4.1.42 A meeting was held between the officials of SSA, the Complainant and the Investigation Team on 09 December 2021 and on 11 February 2022.

5.5 Report in terms of section 8(1) of the Public Protector Act, 1994

- 5.5.1 A report in terms of section 8(1) of the Public Protector Act, 1994 with report number 09 of 2022/23 issued on 28 April 2022, to Ambassador T Majola the Director General SSA.

5.6 Legislation and other prescripts

- 5.6.1 Constitution of the Republic of South Africa, 1996;
- 5.6.2 Public Protector Act, 1994;
- 5.6.3 Public Protector Rules, 2020 as amended;
- 5.6.4 The Intelligence Services Act, 2002; and



5.6.5 The Intelligence Services Regulations, 2014 as amended.

5.7 **Notice issued in terms of Rule 41(1) of the Public Protector Rules**

5.7.1 A notice in terms of Rule 41(1) of the Public Protector Rules was issued to the Complainant on 28 May 2023.

5.7.2 The Complainant provided a response to the notice in terms of Rule 41(1) of the Public Protector Rules in a letter dated 09 June 2023, and also submitted further responses on 15 June 2023 and 24 June 2023.

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

6.1 **Whether the then Acting Director-General for the SSA Mr Jafta unduly delayed to properly and effectively reinstate the Complainant after her appeal was upheld by the former Minister of State Security Ms Ayanda Dlodlo on 27 August 2020, if so whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to undue delay in terms of section 6(4)(a)(ii) of the Public Protector Act**

Common cause

6.1.1 The Complainants' appeal to the former Minister State Security was upheld on 27 August 2020, resulting in her reinstatement.

6.1.2 Mr Jafta was instructed to action the reinstatement and to facilitate the Complainant's return to work with immediate effect.



Issue in dispute

- 6.1.3 The issue for determination is whether the then Acting Director-General of SSA Mr Jafta, unduly delayed to properly and effectively re-instate the Complainant after her appeal was upheld by the former Minister of SSA Ms Ayanda Dlodlo, on 27 August 2020.

Complainant's version

- 6.1.4 The Complainant contended that even though the Minister upheld her appeal on 27 August 2020, and ruled that she must be reinstatement with immediate effect, however, Mr Jafta failed to reinstate her and to facilitate her immediate return to work.
- 6.1.5 The Complainant further submitted that although her salary and benefits were re-instated by SSA, on 30 September 2020, however, she was offered a different position on post level P3 whilst she occupied a post on level M3 prior to her dismissal, which in her opinion was a post positioned at a lower level, causing prejudice to her career advancement.
- 6.1.6 Lastly, she alleged that, up until 22 March 2022, when the Public Protector's Investigation Team consulted with her, she remained at home earning a manager's salary, whilst not performing any work function.
- 6.1.7 She is of the opinion that she ought to have been reinstated to the position of Office Manager in the office of the Director General, which was the position that she occupied prior to her dismissal.



SSA's version

- 6.1.8 On 14 January 2022, the Investigation Team raised the Complainant's allegations with Mrs J Kandailal, the General Manager Human Resources at SSA regarding the alleged transfer of the Complainant to a different position which she viewed as a demotion.
- 6.1.9 In a response dated 28 January 2022, Ms Jennita Kandailal, stated that:
- 6.1.9.1 Chapter 1V of the Intelligence Services Regulations, dated 2014 requires that all jobs must be evaluated by means of a job evaluation system as contemplated in regulation 2(1) to determine benchmark ranges, with the exclusion of senior management, where only a benchmark post per level may be evaluated;
- 6.1.9.2 The SSA uses the Job Evaluation Manager/Decision Tree system to evaluate jobs. The following point grading systems are applicable: P3 - 166 – 205 grading; and M3 - 186 – 205 grading;
- 6.1.9.3 The next level of growth in the career path of the Complainant in the new Chief Directorate, is that of General Manager, which is equivalent to a Chief Director; and
- 6.1.9.4 The remuneration packages (Total Cost to Company) places the Complainant on the M3 range. The Complainant is still just before the pre – midpoint of the range and has significant opportunity for salary progression which is informed by the performance management system. She will also retain her current salary and benefits in the new position.



Further information received from the Complainant

- 6.1.10 On 12 May 2023, the Complainant advised the Investigation Team through an e-mail correspondence that, during February 2022, the Minister of State Security approved her placement as Programme Manager Intergovernmental Relations, within the Liaison and Protocol Chief Directorate, however, she was unhappy with this appointment and viewed this as a demotion.

Notice in terms of Rule 41(1) of the Public Protector's Rules

- 6.1.11 A Notice in terms of Rule 41(1) of the Public Protector Rules was issued to the Complainant on 28 May 2023. Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding a complaint by means of a closing report provided for in Rule 40(b), the Complainant shall be informed in writing accordingly and be given an opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notification.
- 6.1.12 In the Notice, the Complainant was advised that the evidence before the Public Protector indicated that the decision by the SSA not to reinstate the Complainant to the position she previously occupied in the office of the Director General, after her appeal was upheld by the former Minister, falls within the definition of unfair labour practice as defined in section 186 of the Labour Relations Act (LRA), which provides for amongst other things, unfair suspension, demotion, failure or refusal by an employer to reinstate an employee.
- 6.1.13 Accordingly, the Complainant was advised to refer her complaint relating to the alleged demotion and failure by the SSA to properly reinstate her to the position she held prior to her dismissal to the CCMA as required by section 191 of the LRA and the principle espoused in *Gcaba v Minister for Safety and Security and Others*



wherein it was emphasised that labour issues should be pursued through the mechanisms established by the LRA.

- 6.1.14 On 09 June 2023, the Complainant responded to the Notice indicating that the Labour Relations Act is not applicable to the National Intelligence Agency or SSA, and in the circumstances the Public Protector has jurisdiction to investigate her complaint of maladministration.
- 6.1.15 While acknowledging that the LRA is not applicable to National Intelligence Agency or SSA, the Investigation Team noted that similar provisions to section 186 of the LRA are contained in Chapter XV11 of the Intelligence Regulations which outlines the procedure for dealing with cases of unfair conduct relating to demotion and appointment, the Complainant was requested to indicate whether she had exercised her rights as set out in Chapter XV11 of the Intelligence Regulations, to address her dissatisfaction with the SSA for the failure to reinstate her to her previous position.
- 6.1.16 The Complainant responded through an e-mails dated 15 June 2023 and 24 June 2023 respectively, stating that:
- 6.1.16.1 She had meetings with both Director-General's Mr Jafta and Ambassador Msimanga;
- 6.1.16.2 In September/October 2020, Mr Mpame, the Acting Head of Human Resources informed her that she would be kept in an unplaced position in the Human



Resources structure as the Acting Director General, Mr Jafta did not want her to return to duty in the office of the Director General;

6.1.16.3 Meetings were conducted with different Heads in Human Resources, and various members of Labour Relations to no avail;

6.1.16.4 Ambassador Msimanga requested the Minister of State Security to demote her to a P3 position, which he did in February 2022; and

6.1.16.5 Since responding to the notice in terms of Rule 41(1) of the Public Protector Rules, she has not yet received a finding from the Public Protector.

Further response received from the SSA

6.1.17 On 12 June 2023, the SSA informed the Public Protector that, the Complainant was seconded to the post of Programme Manager (Intergovernmental Programmes) within the Chief Directorate Liaison and Protocol with effect from 01 December 2021, pending the approval of her transfer into the position. The former Minister in the Presidency, Mr M Gungubele approved her transfer on 01 February 2022, which is regarded as the date of implementation of the transfer. The Complainant did not file any formal grievance with the SSA, regarding her alternative placement, as is required by Chapter XVII of the Intelligence Service Regulations, 2014.

Applicable Legal Framework

The Constitution of the Republic of South Africa, 1996

6.1.18 Section 34 of the Constitution provides that “*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public*



hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

- 6.1.19 Section 23(1) of the Constitution provides that everyone has the right to fair labour practices.

The Intelligence Services Regulations, 2014

- 6.1.20 Chapter XVII of the Intelligence Service Regulations provides guidelines for how unfair conduct relating to promotion, demotion and appointment are to be dealt with. It also provides that an unresolved dispute be referred to the Minister for adjudication. The Public Protector has been made aware that this document is marked as restricted or classified. As such, its exact and elaborate contents cannot be made public, but may only be viewed remotely by authorised persons. In the circumstances, further content regarding this document cannot be imported into this report.

The Public Protector Act, 1994

- 6.1.21 Section 6(3)(b) of the Public Protector Act provides that *“the Public Protector may refuse to investigate a matter reported to her, if the person ostensibly prejudiced in the matter ... has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.”*

Analysis

- 6.1.22 The evidence before the Public Protector reveals that after the Complainant's appeal was upheld by the former Minister, the SSA opted not to reinstate her to the position she previously occupied prior to her discharge from its employment. However, the Complainant was seconded to the post of Programme Manager (Intergovernmental Programmes) within the Chief Directorate Liaison and



Protocol with effect from 01 December 2021, pending the approval of her transfer into the position. Furthermore, Mr M Gungubele approved the Complainant's transfer on 01 February 2022.

- 6.1.23 The Complainant's dispute arises from her employer, failing to reinstate her into the position she previously occupied prior to her discharge, which is an unfair demotion as provided for in Chapter XVII of the Intelligence Service Regulations, which outlines how amongst others, unfair conduct relating to promotion, demotion and appointment should be dealt with.
- 6.1.24 Therefore, the Complainant should have referred her complaint relating to her alleged demotion and failure by the SSA to reinstate her to her previous position, as prescribed in Chapter XVII of the Intelligence Services Regulations.
- 6.1.25 In the Complainant's response to the Notice in terms of Rule 41(1) of the Public Protector Rules and subsequent responses on 15 June 2023 and 24 June 2023, she did not expressly confirm whether she exercised her rights in terms of Chapter XV11 of the Intelligence Services Regulations. She, however, indicated that she had several engagements with the Director-Generals, the Heads of Human Resources and Labour Relations to no avail.
- 6.1.26 It is evident from the legislation discussed above that the Complainant should refer her dispute relating to an unfair labour practice, in this instance her alleged demotion, through the procedures established in Chapter XV11 of the Intelligence Services Regulations. Should the Complainant's dispute remain unresolved, she is at liberty to refer her dispute to the Minister as provided in the Intelligence Services Regulations for adjudication.
- 6.1.27 The Complainant also has at her disposal the remedy provided in Section 34 of the Constitution to have her dispute resolved, on application, by a competent



court having jurisdiction over her matter, should she still remain dissatisfied with the decision of the Minister.

- 6.1.28 It is apparent from the application of Section 6(3)(b) of the Public Protector Act, to the evidence, that the Complainant has not taken all reasonable steps to exhaust her internal legal remedies provided to her by Chapter XV11 of the Intelligence Services Regulations to resolve this matter.

Conclusion

- 6.1.29 Being subject to the Constitution and the law, the Public Protector is of the opinion that the most appropriate forum to provide a remedy for the Complainant's dispute relating to an unfair demotion, is the platform(s) provided for in Chapter XVII of the Intelligence Services Regulations.
- 6.1.30 Based on the applicable legislation discussed above, the Complainant should refer her dispute relating to unfair demotion, to the SSA fora indicated in Chapter XVII of the Intelligence Services Regulations. Should her dispute remain unresolved she should refer her dispute to the Minister for adjudication as per the process established in the Intelligence Services Regulations.
- 6.1.31 The nature of the complaint which relates to demotion meets the definition requirements of unfair labour conduct as provided for in Chapter XVII of the Intelligence Services Regulations.

7. FINDINGS

- 7.1 Having regard to the evidence and the regulatory framework determining the standard that should have been complied with, the Public Protector makes the following findings:

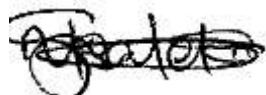


7.1.1 The Public Protector is of the view that Chapter XVII of the Intelligence Services Regulations provides a mechanism to the Complainant to deal with grievance, as it relates to an *unfair labour practice and/or* dispute between the parties relating to demotion.

7.1.2 In the circumstances, no determination could be made by the Public Protector in terms of section 182(1)(a) of the Constitution as well as in terms of section 6(4)(a)(ii) of the Public Protector Act on the grounds of lack of jurisdiction to entail the matter.

8. CONCLUSION

8.1 The Public Protector considers this matter as finalised and cannot take it further. Should any party be dissatisfied with this decision, they are at liberty to explore the legal remedies at their disposal.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 30 JUNE 2023

Assisted by: *Mr Vusumuzi Xolani Dlamini*
Acting Executive Manager: Investigations Branch