

**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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“Allegations of undue delay by the Free State Department of Police, Roads and Transport”

**REPORT ON AN INVESTIGATION OF UNDUE DELAY BY THE FREE STATE
DEPARTMENT OF POLICE, ROADS AND TRANSPORT TO ADJUDICATE ON THE
APPLICATION FOR A PRIVATE MOTOR VEHICLE TESTING STATION IN BOTSHABELO
RESULTING IN PREJUDICE TO MR MJ MOKOENA**

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Executive Summary

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, [Act No. 108 of 1996] (the Constitution), and published in terms section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act).
- (ii) The report communicates the Public Protector's findings and appropriate remedial action taken in terms of Section 182(1)(c) of the Constitution, following an investigation into the alleged undue delay by the Free State Department of Police, Roads and Transport (Department) to adjudicate on the application for a Private Motor Vehicle Testing Station in Botshabelo, resulting in prejudice to Mr MJ Mokoena (the Complainant).
- (iii) The complaint was lodged on 18 September 2018 at the Free State Provincial Office of the Public Protector South Africa (PPSA).
- (iv) In the main, the Complainant alleged *inter alia* that:
 - (a) In January 2018, he applied for a licence to operate a Private Vehicle Testing Station in Botshabelo and that by September 2018, he had not received a written response from the Department in respect of his application;
 - (b) He previously made enquiries regarding his application to Ms L Marumo, Provincial Inspector of the Department, who in turn referred him to Mr N G Ramotsoto, Chief Director: Traffic Management. The latter office further referred him to Mr S S Mtakati the Head of Department (HOD), who in turn referred him to the Office of the Member of the Executive Council (MEC), Mr SM Mashinini. The Office of the MEC eventually referred him back to Ms L Marumo for further assistance;

- (c) Upon making enquiries to Ms L Marumo about his application, he was informed that the Department had received other applications in respect of the Botshabelo Private Vehicle Testing Station; and
- (d) There was an undue delay by the Department to process his application, hence he approached the Public Protector for assistance.
- (v) The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Department, analysis of all relevant documents and information obtained and application of all relevant laws, policies and related prescripts.
- (vi) **ISSUES IDENTIFIED AND INVESTIGATED**
 - (a) Whether the Department unduly delayed to adjudicate on the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to him, and if so, whether such conduct was improper and amounts to maladministration.
- (vii) A Notice in terms of section 7(9)(a) of the Public Protector Act, was served on 22 December 2021 to:
 - a. Mr SH Ntombela, the Premier of the Free State,
 - b. Mr KW Bulwane, the MEC;
 - c. Mr SS Mtakati, the Head of Department,
 - d. Mr R Thekiso, the Acting Head of Department;
 - e. Mr M Monyane, the Acting Director: Legal Services of the Department,
 - f. Mr NG Ramotsoto, the Chief Director: Traffic Management of the Department
and
 - g. Mr K Motsamai, the Control Provincial Inspector of the Department.

- (viii) With the exception of Mr R Thekiso, the Acting HoD, who responded in letters dated 17 January 2022 and 8 February 2022, to date, no responses to the notices in terms of section 7(9) were received from any of the other respondents.
- (ix) All relevant documents and correspondence were obtained and analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the preliminary investigation.
- (x) Key laws and prescripts taken into account to determine if there had been maladministration or improper conduct by the Department that unduly delayed to adjudicate on the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to him, are the following:
- (a) **The Constitution, 1996** [Act. No. 108 of 1996], which is the supreme law of the Republic
 - (b) **The Public Protector Act, 1994 [Act No. 23 of 1994]** which the key legislation giving effect to the provisions of section 182(1)(a) to (c) of the Constitution, 1996
 - (c) **The Promotion of Administrative Justice Act 3 of 2000 (PAJA)**
 - (d) **The National Road Traffic Act 93 of 1996 (NRTA);**
 - (e) **The National Road Traffic Regulations, 2000 (Regulations).**
- (xi) Having considered the evidence obtained during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- (a) **Regarding whether the Department unduly delayed to adjudicate on the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to him, and if so, whether such conduct was improper and amounts to maladministration.**

- (aa) The allegation that the Department unduly delayed to consider and adjudicate the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to the Complainant, is substantiated.
- (bb) This conduct was in contravention of Section 33(1) of the Constitution which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (cc) The conduct of the Department was in contravention of Section 195(1)(a), and (f) of the Constitution that requires of the public administration to promote and maintain a high standard of professional ethics and that it must be accountable, which was not the case in this matter.
- (dd) The conduct of the Department was in contravention of Section 38 of the National Road Traffic Act, 1996 read with Regulation 128 of the National Road Traffic Regulations, 2000 as no prescribed fee has been determined by the MEC.
- (ee) The conduct of the Department constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration and undue delay as contemplated in terms of 6(4)(a)(i) and 6(4)(a)(ii) of the Public Protector Act, 1994.
- (ff) The allegation that the Complainant was prejudiced by the conduct of the Department, is substantiated. The conduct of the Department amounted to improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.

(xii) It should be noted that subsequent to the issuing of a notice in terms of section 7(9) of the Public Protector Act, the Department complied with the proposed remedial action as follows :

(aa) The MEC responded to Mr M J Mokoena pertaining to the outcome of his application in a letter addressed to him dated 3 February 2022;

(bb) The Department sent a letter of apology to Mr MJ Mokoena, dated 2 February 2022;

(cc) The Department indicated that on 2 February 2022, Mr N Selai, Chief Director: Corporate Services has been instructed to conduct an investigation against officials involved in causing the delay of the processing of Mr Mokoena's application since 22 October 2020 and report to the HOD by 21 February 2022;

(xiii) The following proposed remedial action was partially complied with subsequent to the issuing of the Section 7(9) notice :

(aa) The Department is implementing a process of developing a Standard Operating Procedure in handling and dealing with such applications through a legislated process before the end of this financial year (31st March 2022) and in the interim a moratorium will be placed against the application for establishing Private Testing Stations by the MEC.

(xiv) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

(a) The Acting Head of the Department to:

(aa) Ensure that Standard Operating Procedures (SOP) regarding the adjudication of applications for Vehicle Testing Stations (VTS) are developed

with appropriate time lines and implemented **within one hundred and twenty (120) working days** from the date of the report to enable it to conform to the requirements of sections 33 and 195 of the Constitution, section 38 of the National Road Traffic Act and the National Road Traffic Regulations;

- (bb) Improve the Service Charter of the Department to incorporate applications for Vehicle Testing Stations.
- (cc) Ensure that all the officials of the Department dealing with applications for Vehicle Testing Stations receive appropriate training on the SOP **within one hundred and eighty (180) working days** of the date of the report.
- (dd) Report to the MEC on the implementation of the remedial action referred to in paragraphs (aa) to (cc) above from the date of the report and provide the Public Protector with a copy thereof.

REPORT ON AN INVESTIGATION OF UNDUE DELAY BY THE FREE STATE DEPARTMENT OF POLICE, ROADS AND TRANSPORT TO ADJUDICATE ON THE APPLICATION OF A PRIVATE MOTOR VEHICLE TESTING STATION IN BOTSHABELO RESULTING IN PREJUDICE TO MR MJ MOKOENA

1. INTRODUCTION

- 1.1 This is the Public Protector's report, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following persons, to inform them of the outcome of the investigation:
 - 1.2.1 Mr SH Ntombela, the Premier of the Free State Province;
 - 1.2.2 Mr KW Bulwane, the MEC for Police, Roads and Transport;
 - 1.2.3 Mr SS Mtakati, the Head of the Free State Department of Police, Roads and Transport (Department);
 - 1.2.4 Mr R Thekiso, Acting Head of the Department;
 - 1.2.5 Mr M Monyane, the Acting Director: Legal Services of the Department;
 - 1.2.6 Mr NG Ramotsoto, Chief Director: Traffic Management of the Department; and
 - 1.2.7 Mr K Motsamai, Control Provincial Inspector, of the Department.
- 1.2.8 A copy of the report is also provided to Mr Mokoena, who lodged the complaint (Complainant).

2. THE COMPLAINT

2.1 The complaint was lodged with the Free State Provincial Office of the Public Protector South Africa (PPSA), on 18 September 2018.

2.2 In the main, the Complainant alleged that:

2.2.1 In January 2018, he applied for a licence to operate a Private Vehicle Testing Station in Botshabelo and that by September 2018, he had not received a written response from the Department in respect of his application;

2.2.2 He previously made telephonic enquiries regarding his application with Ms L Marumo, Provincial Inspector of the Department, who in turn referred him to Mr NG Ramotsoto, Chief Director: Traffic Management. The latter office further telephonically referred him to Mr SS Mtakati, the Head of Department (HOD), who in turn referred him to the Office of the Member of the Executive Council (MEC), Mr SM Mashinini. The Office of the MEC eventually referred him back to Ms L Marumo for further assistance;

2.2.3 Upon making enquiries with Ms L Marumo regarding his application, he was informed that the Department had received other applications in respect of the Botshabelo Private Vehicle Testing Station; and

2.2.4 The Complainant submitted that there was an undue delay by the Department to process his application hence he approached the Public Protector for assistance.

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:

“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 the additional powers and functions prescribed by national legislation.

3.4 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;2016(3) SA 580 (CC) and (5) BCLR 618 the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect [at para 76]. The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*

- 3.5 In the above-mentioned Constitutional matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*, Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:
- 3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.5.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);
- 3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);
- 3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.5.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal

effect it has on the person, body or institution it is addressed to (paragraph 70);

3.5.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);

3.5.7 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)). "*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)).

3.6 In the matter of *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71);

- 3.6.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question (paragraph 82);
- 3.6.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(10) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.6.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (Paragraph 104);
- 3.6.5 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).
- 3.6.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector`s observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and *prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).
- 3.7 The Department 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.
- 3.8 The Public Protector`s power and jurisdiction to investigate this matter 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 sections 6 and 7 of the Public Protector Act.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where he would have been, but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Department unduly delayed to adjudicate on the Complainant's

application to operate a Private Vehicle Testing Station in Botshabelo, resulting in prejudice to the Complainant and if so, whether such conduct amounts to maladministration as contemplated by section 6(4) of the Public Protector Act, 1994.

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 to prevent undue delay, improper conduct and maladministration.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration.

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

4.3.1 Whether the Department unduly delayed to adjudicate on the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to him, and if so, whether such conduct was improper and amounts to maladministration.

4.4 **The Key Sources of information**

4.4.1 **Documents**

4.4.1.1 Letter of complaint from Mr Mokoena dated 18 September 2018;

4.4.1.2 The Complainant's Affidavit dated 24 January 2018;

4.4.1.3 Copy of the Complainant's application (TS 1 Form) dated 30 January 2018;

4.4.1.4 Copy of the Application letter addressed to the MEC dated 30 January 2018;

4.4.1.5 Copy of the affidavit addressed to the MEC dated 11 February 2021; and

4.4.1.6 Copy of Proof of Payment dated 11 February 2021.

4.4.2 **Meetings conducted**

4.4.2.1 Meeting between the PPSA Investigation team and officials of the Department on 15 September 2020; and

4.4.2.2 Meeting between the PPSA Investigation team and the Acting HOD, held on 2 February 2022.

4.4.3 **Correspondence sent and received**

4.4.3.1 Email from the Complainant to the Personal Assistant (PA) of the MEC dated 27 July 2018;

4.4.3.2 Allegations letter from the Public Protector South Africa to the MEC dated 11 December 2018;

4.4.3.3 Email from the PPSA to the PA of the MEC, dated 09 February 2019;

4.4.3.4 Email from the PA of the MEC to the PPSA dated, 11 February 2019;

4.4.3.5 Email to the PA of the MEC dated, 29 April 2019;

4.4.3.6 Email to the Manager in the HoD's Office, dated 04 November 2019;

4.4.3.7 Email from the PPSA to the HoD, dated 13 August 2020;

4.4.3.8 Letter from the HoD to the PPSA, dated 14 August 2020;

4.4.3.9 Response letter from the HoD to the PPSA, dated 07 September 2020;

4.4.3.10 Request for a meeting email from HoD and confirmation of same from the Investigator ,dated 11 September 2020;

4.4.3.11 Letter from the MEC to the Complainant advising on the outcome of his application, dated 15 September 2020;

4.4.3.12 Letter from the HoD to the PPSA on the outcome of the Complainant's application dated 15 September 2020;

4.4.3.13 Letter from the MEC addressed to the Complainant on the reasons for declining his application dated 20 October 2020; and

4.4.3.14 Letter addressed to the MEC after the application was declined dated 22 October 2020.

4.4.3.15 Letter of Apology to the Complainant from the Department dated 2 February 2022;

4.4.4 **Legislation and other prescripts**

4.4.4.1 The Constitution of the Republic of South Africa, 1996;

4.4.4.2 The Public Protector Act, No 23 of 1994;

4.4.4.3 The Promotion of Administrative Justice Act 3 of 2000 (PAJA);

4.4.4.4 National Road Traffic Act 93 of 1996 (NRTA); and

4.4.4.5 National Road Traffic Regulations, 2000 (Regulations).

4.4.5 **Case Law considered**

4.4.5.1 *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) All SA 269 (A);

4.4.5.2 *Vumazonke and Others v MEC for Social Development and Welfare for Eastern Cape Province*, EC [050]/2004 [2004] ZAECHC 40 (25 November 2004):39;

4.4.5.3 *Mbanga v MEC for Welfare, Eastern Cape and Another*, [2002] (1) SA 359 (SE) 269B-G; and

4.4.6 **Notices issued in terms of section 7(9) of the Public Protector Act**

4.4.6.1 A Notice in terms of section 7(9)(a) of the Public Protector Act, was served on 22 December 2021 to:

4.4.6.1.1 Mr SH Ntombela, the Premier of the Free State,

4.4.6.1.2 Mr KW Bulwane, the MEC;

4.4.6.1.3 Mr SS Mtakati, the Head of Department,

4.4.6.1.4 Mr R Thekiso, the Acting Head of Department,

4.4.6.1.5 Mr M Monyane, the Acting Director: Legal Services of the Department,

4.4.6.1.6 Mr NG Ramotsoto, the Chief Director: Traffic Management of the Department
and

4.4.6.1.7 Mr K Motsamai, the Control Provincial Inspector of the Department.

4.4.6.2 With the exception of Mr R Thekiso, the Acting HoD, who responded in letters dated 17 January 2022 and 8 February 2022, to date, no responses to the notices in terms of section 7(9) were received from any of the other respondents.

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 unduly delayed to adjudicate on the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to him, and if so, whether such conduct was improper and amounts to maladministration.

Common cause issues

5.1.1 On 30 January 2018, the Complainant lodged an application with the Department to operate a Private Vehicle Testing Station in Botshabelo.

5.1.2 On 7 July 2018, the Complainant made enquiries regarding the status of his application with the Personal Assistant (PA) to the MEC, Ms S Ngwenyana, who requested him to send email correspondence to Ms L Marumo in order to trace the whereabouts of his documents, which he did on 02 August 2018.

5.1.3 The Department provided the Complainant with an outcome on 15 September 2020, approximately 31 months after his initial application.

Issues in dispute

- 5.1.4 The Complainant submitted that he lodged an application with the Department to operate a Private Vehicle Testing Station in Botshabelo on 30 January 2018, however the Department unduly delayed to adjudicate on his application and timeously provide him with an outcome.
- 5.1.5 On 11 December 2018, the allegations made by Complainant was raised with then MEC, Police, Roads and Transport, Mr MS Mashinini.
- 5.1.6 Despite follow up correspondence between the Investigation Team and the office of the MEC to respond to the allegations letter dated 11 December 2018, no response was forthcoming.
- 5.1.7 On 4 November 2019, the allegations were raised with Mr Mtakati, the Head of the Department (the HoD), and again despite several communications and commitments made by the Department to provide a response in respect of the matter, no submission was made by the Department.
- 5.1.8 On 10 September 2020 a letter was sent to the HoD of the Department to respond to the allegations by 15 September 2020, and informing the HoD that failure to respond to the allegations will result in a subpoena being issued against the Department.
- 5.1.9 Subsequently a meeting was convened between the Investigation Team and the HoD of the Department on 15 September 2020. In the meeting the HoD conceded that there was an undue delay by the Department to adjudicate the application of the Complainant and he further apologised on behalf of the Department for the delay in adjudicating and providing an outcome of the application.
- 5.1.10 He further indicated that there was no valid excuse for the cause of the delay especially when it is provided for in legislation that matters must be dealt with expeditiously.

- 5.1.11 During the meeting, the HoD committed to respond and provide the Complainant with a response to his application by 15 September 2020 and thus to fully cooperate with the Public Protector.
- 5.1.12 In an email dated 15 September 2020, Mr T Nogabe, the Manager in the Office the HoD, stated that the determination had been made by the MEC on the outcome of the Complainant's application and a letter dated 15 September 2020 was issued to the Complainant stating that the application did not comply with section 38 of the National Road Traffic Act, 1996, read with Regulation 128 and 129 of the National Road Traffic Regulations, 2000, as the application was not accompanied by a prescribed affidavit and the required fee.
- 5.1.13 On 22 October 2020, the Complainant addressed a letter to the MEC whereupon he objected to the outcome of his application based on the following reasons:
- 5.1.13.1 That he submitted an affidavit on 30 January 2018 and that he met all the requirements; and
- 5.1.13.2 He further stated that in terms of the Regulations, the fee is determined by the MEC and that since the submission of his application, the MEC had not determined same.
- 5.1.13.3 That in 2015 when he initially applied for a Private Vehicle Testing Station in Kroonstad, which was approved after the Public Protector's intervention, there was no requirement that he should pay a prescribed fee in advance. He further indicated that when his Kroonstad application was adjudicated on by the Department, a provisional registration certificate was issued which was followed by a letter determining the amount, which amount he accordingly paid. The Department thereafter issued a final certificate of registration.

- 5.1.14 On 26 May 2021, the Complainant informed the PPSA Investigation Team that he held a meeting with Mr Monyane, the Acting Director: Legal Services of the Department whereupon he was informed that he must pay the amount R20 218.00 as the prescribed fee of the application and that upon receipt of the payment, the Department will reconsider his application. The Complainant further submitted proof of payment dated 11 February 2021 thereof.
- 5.1.15 On the 21 September 2021, the Complainant informed the Investigation Team that despite having being promised by Mr Monyane in the meeting referred to above that once the prescribed fee has been paid, the Department would adjudicate and respond to his application within three(3) months, to date he has not received a response from the Department.

Response by the Acting HOD to the Section 7(9) Notice dated 21 December 2021

- 5.1.16 Only the Acting HoD of the Department responded to the Section 7(9) Notice on 18 January 2022 bringing to the Public Protector's attention changes within the Department's administration. The Acting HoD further indicated that the Accounting Officer Mr SS Mtakati who was handling the matter had since been suspended. The matter was subsequently handled by the then HoD and MEC Qabathe, which resulted in a new report being generated which was received by Mr T Nogabe who subsequently passed away on the 03 December 2021.
- 5.1.17 The Acting HoD further submitted that a report was compiled and received by the Manager in the Office of the Acting HoD, (late Mr TG Nogabe). The Department tried to establish what had occurred to the report, however same could not be traced.
- 5.1.18 The Acting HoD submitted that the information gathered through the respective Directorate indicates the following:

“On the 25th of February 2021 the Inspectorate conducted a site visit at Botshabelo to determine the sustainability of the proposed Private Vehicle Testing Station site as prescribed by the National Road Traffic Act, 93 of 1996.

Subsequently, the Inspectorate visited and conducted an interview with Mr MJ Mokoena in Kroonstad on 29th of March at Kroonstad Testing Centre at 12h00.

After an interview was conducted, a submission was generated to obtain a preliminary approval for registration of a private vehicle testing station at Botshabelo”.

- 5.1.19 The Acting HoD further submitted that the Departmental Unit at a primary level responsible for making recommendations submitted that the application was never favoured to be recommended for approval and that the Department would contact Mr Mokoena to resubmit all relevant documents, so that the MEC could advise on the outcome of his application.
- 5.1.20 The Acting HoD substantiated his submission with a report from Mr KI Motsamai, Inspectorate Sub-Directorate, Lengau Testing Centre and proof of submission of the report sent on the 30 August 2021 to the late Mr Nogabe.
- 5.1.21 Subsequent to the response received from the Acting HoD, a meeting was held between the Acting HoD and the PPSA Investigation Team on 2 February 2022 to further engage on the Section 7(9) Notice and to discuss the intended remedial action.
- 5.1.22 It was in this meeting that the Acting HoD confirmed that the Department accepted the proposed findings of the Public Protector and that it would comply with the intended remedial action.
- 5.1.23 Subsequent to the meeting, in a letter dated 8 February 2022, the Acting HoD

responded as follows in respect of the intended remedial action of the Public Protector as contained in the Section 7(9) Notice that:

- 5.1.23.1 The Acting HoD had sent a letter of apology to Mr MJ Mokoena dated 2 February 2022;
- 5.1.23.2 The MEC has responded to Mr MJ Mokoena pertaining to the outcome of his application in a letter addressed to him dated 3 February 2022;
- 5.1.23.3 On 2 February 2022, Mr N Selai, Chief Director: Corporate Services had been instructed to conduct an investigation against officials involved in causing the delay in the processing of Mr Mokoena's application since 22 October 2020 and to report to the Accounting Officer by the 21 February 2022;
- 5.1.23.4 In a letter addressed to the Complainant by the former MEC (Hon S Mashinini) dated 20 October 2020, the Complainant was informed about that his application did not comply with the peremptory provisions of Regulation 128(1) and (2) of the National Road Traffic Regulations of 2000.
- 5.1.23.5 The Department is implementing a process of developing a Standard Operating Procedure in handling and dealing with such applications, and in the interim a moratorium will be placed on applications for establishing a private testing station by the MEC through a legislated process before the end of this financial year (31 March 2022).
- 5.1.24 The response from the Acting HOD is noted and has been considered in this report.

Application of the relevant law

- 5.1.25 Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

5.1.26 Section 195(1) of the Constitution, provided amongst other things that:

“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) Services must be provided impartially, fairly, equitably and without bias;

(e);

(f) Public Administration must be accountable.

5.1.27 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

5.1.28 Section 38 of the NRTA provides that:

“Any person, department of State or registering authority desiring to operate a testing station shall apply in the prescribed manner to the MEC concerned for the registration of such testing station.”

5.1.29 Regulation 128 of the Regulations stipulates the manner of application to be approved as a suitable person or body of persons to apply for registration of a testing station as follows:

“(1) A person or body of persons desiring to operate a testing station as contemplated in section 38, shall declare such intention in writing in an affidavit or an affirmation and submit such affidavit or affirmation and the fee as determined by the MEC concerned

*(2) The affidavit or affirmation contemplated in sub regulation (1) shall contain—
a) the particulars of every person, or the members or directors of every juristic*

person in whose name such testing station shall be registered in the event that such application is approved;

- b) the exact location of the proposed testing station;*
- c) the grade of testing station to be operated; and*
- d) all matters relevant to the consideration of the suitability of such application, addressed in the agreement to be concluded between the MEC and a testing station proprietor as proposed in Schedule 3.”*

5.1.30 The MEC shall, in terms of Regulation 129 consider the application and make a determination accordingly. No time period within which the determination has to be made is stipulated in the regulations.

5.1.31 Our courts have also emphasized that administrative decision-making should reach finality without delay. In *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*¹ the court held that “[i]t is desirable and important that finality be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after unreasonable long period of time has elapsed-[...]²

5.1.32 In *Vumazonke and Others v MEC for Social Development and Welfare for Eastern Cape Province*, EC [050]/2004 [2004] ZAECHC 40 (25 November 2004):39, it was held that there was no law that prescribed the time period within which a social grant had to be finalised by the Department. The Department had delayed to take a

¹ 1978 (1) All SA 269 (A). This case was reported in Afrikaans and the translation of the relevant portion of the judgment was taken from *Gqwetha v Transkei Development Corporations Ltd & Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) paragraph [22], in which the relevant portion was quoted by Nugent JA in delivering the majority judgment. In his judgment the court dealt with the question whether the court should grant an application to set aside a decision by an administrator if the application was brought three and a half years after the Administrator gave permission for the subdivision of a property, upon certain conditions.

² Page 386

decision and the judge held that in the absence of special circumstances, a delay beyond three months was unreasonable.

5.1.33 Similarly, in the decided case of *Mbanga v MEC for Welfare, Eastern Cape and Another*, [2002] (1) SA 359 (SE) 269B-G, the court held that three months was a reasonable time for which the social grant recipient should wait. Judge Leah stated that while *“patience is a virtue, I venture to suggest that even the patience of Job would have tested the inefficiency of the officialdom in this case, as notwithstanding regular enquiries being made to the Department in Port Elizabeth, time passed without any indication whether the applicant’s application had been granted or refused.”*

Conclusion

5.1.34 The Public Protector is persuaded by the evidence and legislative prescripts, to conclude that the decision by the Department to adjudicate on the Complainant’s application for operating a Private Vehicle Testing Station in Botshabelo accordingly amounted to administrative action in terms of the PAJA.

5.1.35 The Department, however unduly delayed to adjudicate on the Complainant’s application for operating a Private Vehicle Testing Station in Botshabelo as envisaged by Section 237 of the Constitution.

5.1.36 The Complainant lodged an application for a Private Vehicle Testing Station in Botshabelo with the Department on 30 January 2018 and the outcome thereof was only communicated to him on 15 September 2020, 31 months later.

5.1.37 The HoD admitted that there was no reasonable explanation by the Department for having taken more than two years to adjudicate on the Complainant’s application.

5.1.38 The reasons advanced by the MEC for the non-approval of the application were that

the application did not comply with the requirements of Section 38 of the National Road Traffic Act, 1996 in that it was not accompanied by the prescribed affidavit and the required fee.

- 5.1.39 It should further be mentioned that the Department does not have a policy or Standing Operating Procedure (SOP) in place, regulating applications regarding Private Vehicle Testing Stations, nor is there any gazetted determination by the MEC regarding the prescribed fee payable for the application.

6. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that should have been complied with by the Municipality and the impact on the Complainant, the Public Protector makes the following findings:

- 6.1 Regarding whether the Department unduly delayed to adjudicate on the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to him, and if so, whether such conduct was improper and amounts to maladministration.**

- 6.1.1 The allegation that the Department unduly delayed to consider and adjudicate on the Complainant's application to operate a Private Vehicle Testing Station in Botshabelo resulting in prejudice to the Complainant, is substantiated.

- 6.1.2 This conduct was in contravention of Section 33(1) of the Constitution which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

- 6.1.3 The conduct of the Department was in contravention of Section 195(1)(a), and (f) of the Constitution that requires of the public administration to promote and maintain a

high standard of professional ethics and that it must be accountable, which was not the case in this matter.

- 6.1.4 The conduct of the Department was in contravention of Section 38 of the National Road Traffic Act, 1996 read with Regulation 128 of the National Road Traffic Regulations, 2000 as no prescribed fee has been determined by the MEC.
- 6.1.5 The conduct of the Department constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration and undue delay as contemplated in terms of 6(4)(a)(i) and 6(4)(a)(ii) of the Public Protector Act, 1994.
- 6.1.6 The allegation that the Complainant was prejudiced by the conduct of the Department, is substantiated. The conduct of the Department amounted to improper prejudice as envisaged in section 6(4) (a) (v) of the Public Protector Act.

7. REMEDIAL ACTION

- 7.1 It should be noted that subsequent to the issuing of a notice in terms of section 7(9) of the Public Protector Act, the Department has complied with the proposed remedial action as follows :
 - 7.1.1 The MEC responded to Mr MJ Mokoena pertaining to the outcome of his application in a letter addressed to him dated 3 February 2022;
 - 7.1.2 The Department sent a letter of apology to Mr MJ Mokoena, dated 2 February 2022;
 - 7.1.3 The Department indicated that on 2 February 2022, Mr N Selai, Chief Director: Corporate Services has been instructed to conduct an investigation against officials involved in causing the delay of the processing of Mr Mokoena's application since 22 October 2020 and report to the HOD by 21 February 2022;

7.2 The following proposed remedial action was partially complied with subsequent to the issuing of the Section 7(9) notice :

7.2.1 The Department is implementing a process of developing a Standard Operating Procedure in handling and dealing with such applications through a legislated process before the end of this financial year (31st March 2022) and in the interim a moratorium will be placed against the application for establishing Private Testing Stations by the MEC.

7.3 **The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:**

The Acting Head of the Department to:

7.3.1 Ensure that Standard Operating Procedures (SOP) regarding the adjudication of applications for Vehicle Testing Stations (VTS) are developed with appropriate time lines and implemented **within one hundred and twenty (120) days** from the date of the report to enable it to conform to the requirements of sections 33 and 195 of the Constitution, section 38 of the National Road Traffic Act and the National Road Traffic Regulations;


7.3.2 Improve the Service Charter of the Department to incorporate applications for Vehicle Testing Stations.

7.3.3 Ensure that all the officials of the Department dealing with applications for Vehicle Testing Stations receive appropriate training on the SOP **within one hundred and eighty (180) days** from the date of the report.

7.3.4 Report to the MEC on the implementation of the remedial action referred to in paragraphs 7.2.1 to 7.2.3 from the date of the report and provide the Public Protector with a copy thereof.

8. MONITORING

- 8.1 The Acting Head of Department of the Free State Department of Police, Roads and Transport, Mr Robison Thekiso, must **within thirty (30) working days** from the date of this Report, submit an implementation Plan to the Public Protector indicating how the remedial action will be implemented.
- 8.2 In line with the Constitutional Court judgment in the matter of *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 Public Protector South Africa, the remedial action taken in this Report is legally binding unless a Court order directs otherwise.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30/03/2022

Assisted by: Mr MJ Seitsang, Senior Investigator
Free State Provincial Office