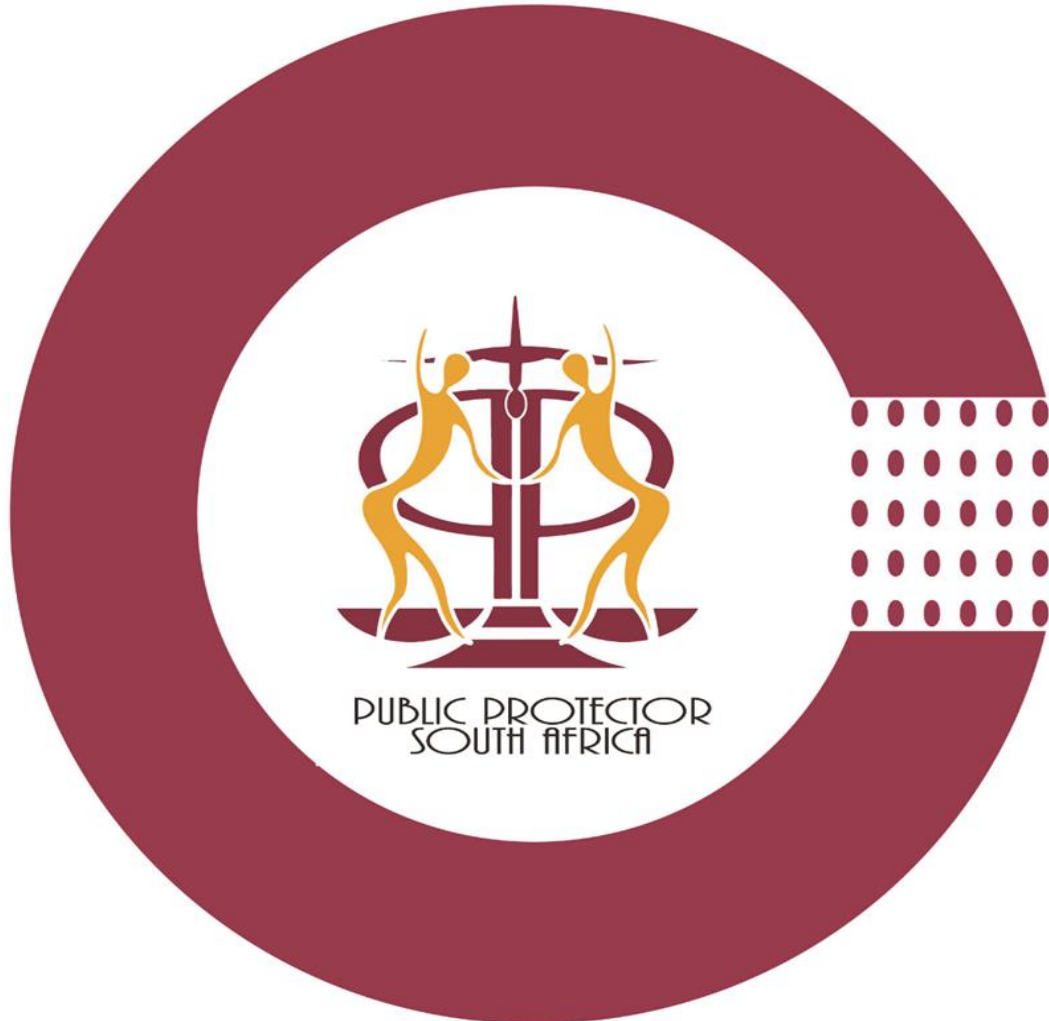


**REPORT IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE  
REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC  
PROTECTOR ACT, 1994**



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**REPORT NUMBER 19 OF 2023/24**

**ISBN: 978-1-7764603-2-8**

**INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT BY THE SOUTH  
AFRICAN POLICE SERVICE RELATING TO THE LOSS OF A POLICE  
INVESTIGATION DOCKET AND THE WITHDRAWAL OF FUNDING TO MR  
KGARIMETSA TO APPEAL AGAINST HIS CONVICTION AND SENTENCE**

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## LIST OF ACRONYMS AND ABBREVIATIONS

<b>ACRONYMS/ ABBREVIATIONS</b>	<b>DESCRIPTION</b>
<b>Assault GBH</b>	Assault with Intend to cause Grievous Bodily Harm
<b>Constitution</b>	Constitution of the Republic of South Africa Act, 1996
<b>CPA</b>	Criminal Procedure Act, 1977
<b>LASA</b>	Legal Aid Board of South Africa
<b>NDPP</b>	National Director of Public Prosecutions
<b>NPAA</b>	National Prosecuting Authority Act, 1998
<b>SAPS</b>	South African Police Services
<b>PAJA</b>	Promotion of Administrative Justice Act, 2000
<b>PFMA</b>	Public Finance Management Act, 1999.
<b>PPSA</b>	Public Protector of the Republic of South Africa

## 1. INTRODUCTION

- 1.1 This is a Closing Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) and Rule 40(b) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*, as amended (the Public Protector Rules) as promulgated in terms of section 7(11) of the Public Protector Act.
- 1.2 The report is submitted to the following people in terms of sections 8(1), read with section 8(3) of the Public Protector Act and Rule 40(b) of the Public Protector Rules, which empowers the Public Protector to make known the findings of an investigation, to affected parties, for such persons to note the outcome of the investigation:
- 1.2.1 Captain M Malatji, Station Commander of the Dube Police Station;
- 1.2.2 Captain E D Groenewald, Executive Legal Officer, Litigation and Administration Officer at SAPS; and
- 1.2.3 Mr Lawrence Kgarimetsa, the Complainant.
- 1.3 The report relates to an investigation into allegations that the South African Police Services (SAPS) at Dube Police Station in Winterveld, North West Province, lost docket number CR 27/06/1998, and that SAPS irregularly withdrew funding that had previously been granted to the Complainant to appeal against his conviction and sentence.

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## 2. THE COMPLAINT

2.1 The Public Protector received a complaint from Mr Kgarimetsa (the Complainant) in 2004. The Complainant, who was serving a prison sentence at the time, alleged that:

2.1.1 He was a Police Officer based at Dube Police Station near Winterveld in the North West Province. On or about June 2000, he was convicted of murder and sentenced to 15 years imprisonment, after he had fatally shot a suspect who had a pending case of Assault GBH which had been opened in 1998 at the said Dube police station, under docket number CR 27/6/1998;

2.1.2 During his trial, the docket was lost and a skeleton docket was reconstructed. The information contained in the reconstructed docket was used to convict him;

2.1.3 While in prison, he pursued the issue of the disappearance of the docket with the then Minister of Police, the late Mr Steve Tshwete. The original docket only reappeared in 2002, while he was in prison;

2.1.4 He obtained copies of the original docket from the office of the Minister of Police and used those copies to open a case of *Defeating the ends of Justice* in 2009, against the Dube police for the loss of the docket;

2.1.5 The case was opened under Cas 94/09/2009 and it was investigated by the police, but ultimately, the Director of Public Prosecutions declined to prosecute in respect of this matter;

2.1.6 After the reappearance of the original docket, the State Attorney compared the contents of the original docket and the reconstructed docket and found that there were some discrepancies between the two dockets;

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- 2.1.7 As a result of the discrepancies between the two dockets, the SAPS obtained a legal opinion from Advocate H de Vos in 2002. In his opinion, Adv de Vos stated the following .... *“from the afore-going, we came to the conclusion that the individual’s fundamental right to a fair trial of appeal; or review by a High Court is sacrosanct and should prevail above the procedure of the above said courts. Therefore, the individual should be accorded the leverage to appeal directly to the Constitutional Court”*;
- 2.1.8 After receiving Adv de Vos’ opinion, the SAPS apparently undertook to provide him with funding for legal representation so that he could appeal against his conviction, but that did not materialise. He was then advised by the SAPS to petition the Minister of Police for funding. On 16 August 2014, the then Minister of Police, Mr NPT Nhleko, declined approval for legal funding stating that it was not in the best interest of the SAPS to fund an appeal to the Constitutional Court on technical grounds;
- 2.1.9 As a result, the State Attorney withdrew the legal representation that had been provided to him to lodge an appeal against his conviction and sentence; and
- 2.1.10 After the withdrawal by the State Attorney, he approached the Legal Aid Board of South Africa, (now known as Legal Aid South Africa - LASA) to assist him in lodging an appeal against his conviction and sentence, but LASA also refused to assist him. He then approached the Public Protector for intervention.

### **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.

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- 3.2 Section 182(1) of the Constitution provides that: -  
*“The Public Protector has the power as regulated by national legislation –*
- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
  - (b) to report on that conduct; and*
  - (c) to take appropriate remedial action”*
- 3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions as prescribed by legislation.
- 3.4 The SAPS is an organ of state in terms of section 239 of the Constitution and its conduct amounts to conduct in state affairs, and 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) of the Public Protector Act.
- 3.5 Section 6(9) of the Public Protector Act grants the Public Protector the discretion to accept complaints which are lodged more than two years after the occurrence of the incident in special circumstances. Some of the special circumstances that the Public Protector took into consideration to exercise her discretion favourably to accept this complaint, includes the nature of this complaint and the seriousness of the allegations, as well as prejudice suffered by the Complainant.
- 3.6 In this specific case the Complainant alleged that he was wrongfully convicted for murder and sentenced to 15 years imprisonment due to the SAPS losing the original docket. The Public Protector concluded that the alleged failure on the part of the SAPS to safeguard the docket and to provide funding for his

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legal representation in respect of this matter was still continuing at the time the complaint was lodged with the Public Protector.

#### **4. ISSUES IDENTIFIED FOR INVESTIGATION**

4.1 Based on the analysis of the Complaint, the following issues were identified to inform and focus the Investigation:

4.1.1 Whether the SAPS at Dube police station lost docket number CR 27/06/1998, and if so, whether the conduct of the police officials were improper as envisaged in section 182 of the Constitution and amounted to maladministration in terms of section 6(4) of the Public Protector Act; and

4.1.2 Whether the withdrawal of the Complainant's funding by SAPS was improper, and if so, whether the conduct of SAPS was improper as envisaged in section 182 of the Constitution and amounted to maladministration in terms of section 6(4) of the Public Protector Act.

#### **5. THE INVESTIGATION**

##### **5.1 Methodology**

5.1.1 The Investigation is conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

##### **5.2 Approach to the Investigation**

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

5.2.1.1 What happened?



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- 5.2.1.2 What should have happened?
- 5.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?
- 5.2.2 In the event of maladministration or improper conduct, what would it take to remedy the wrong occasioned by the said maladministration or improper conduct?
- 5.2.3 The question regarding what happened is resolved through a factual enquiry 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. In this particular case, the factual enquiry principally focused on whether the alleged conduct by the SAPS was improper and constituted maladministration.
- 5.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the SAPS to prevent improper conduct and maladministration.
- 5.2.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration where possible and appropriate.

### **5.3 Key Sources of Information**

- 5.3.1 Letter from SAPS to Bonthuys Attorneys, dated 11 March 2009;
- 5.3.2 Letter from Bonthuys Attorneys to SAPS; dated 26 May 2009;
- 5.3.3 Letter from NPA to the Complainant, dated 31 May 2011;

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- 5.3.4 Letter from SAPS to Bonthuys Attorneys, dated 27 July 2011;
  - 5.3.5 Letter from Bonthuys Attorneys to SAPS, dated 31 January 2013;
  - 5.3.6 Letter from SAPS to Bonthuys Attorney, dated 09 April 2013;
  - 5.3.7 Letter from Bonthuys Attorneys to SAPS, dated 18 April 2013;
  - 5.3.8 Letter from Bonthuys Attorneys to SAPS, dated 23 April 2013;
  - 5.3.9 Letter from SAPS to Bonthuys Attorneys, dated 21 June 2013;
  - 5.3.10 Letter from SAPS to Bonthuys Attorneys, dated 03 December 2013;
  - 5.3.11 Letter from SAPS to Bonthuys Attorneys, dated 16 August 2014;
  - 5.3.12 Complaint letter to the Public Protector, dated 09 September 2015;
  - 5.3.13 Letter from PPSA to SAPS, dated 01 March 2018;
  - 5.3.14 Letter from SAPS to PPSA, dated 19 March 2018;
  - 5.3.15 Letter from PPSA to SAPS, dated 09 May 2018;
  - 5.3.16 Letter from PPSA to SAPS, dated 09 May 2019;
  - 5.3.17 Letter from SAPS to PPSA, dated 12 September 2019;
  - 5.3.18 Letter from PPSA to SAPS, dated 05 November 2021; and
  - 5.3.19 Letter from PPSA to Complainant, dated 18 August 2022.

#### **5.4 Legislation and other prescripts.**

- 5.4.1 Constitution of the Republic of South Africa, 1996;
- 5.4.2 Criminal Procedure Act, 1977
- 5.4.3 Public Protector Act, 1994;
- 5.4.4 Public Finance Management Act, 1999;
- 5.4.5 National Prosecution Authority Act, 1998; and
- 5.4.6 Promotion of Administrative Justice Act, 2000.

#### **5.5 Case law**

- 5.5.1 Legal Aid Board v the state 112 SCA 2010

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**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 SAPS at the Dube police station lost docket number CR 27/06/1998, and if so, whether the conduct of the police officials was improper as envisaged in section 182 of the Constitution and amounted to maladministration in terms of section 6(4) of the Public Protector Act**

*Common cause*

6.1.1 During the year 2000, the Complainant was a police officer based at Dube Police Station near Winterveld in the North West Province.

6.1.2 On or about 26 June 2000, he was charged and convicted of murder. During the trial, the SAPS could not produce the original docket, resulting in the reconstruction of the docket. The Complainant was convicted and sentenced to 15 years imprisonment by the Ga-Rankuwa Regional Court.

6.1.3 The original docket was found after the Complainant had been sentenced. The Complainant opened a case with the SAPS under Cas 94/09/2009 of *Defeating the ends of Justice*, however, the Director of Public Prosecutions declined to prosecute in respect of this matter.

6.1.4 The SAPS obtained a legal opinion from Advocate de Vos on the Complainant's request for funding to appeal his conviction and sentence after the original docket was found. The legal opinion by Advocate de Vos indicated that there were discrepancies between the original and reconstructed dockets.

6.1.5 The legal opinion further recommended that the Complainant should be afforded an opportunity to appeal directly to the Constitutional Court.

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*Issue in dispute*

- 6.1.6 The issue for determination by the Public Protector was whether the police at Dube Police Station caused the disappearance of docket No CR 27/06/1998.

*The Complainant's version*

- 6.1.7 The Complainant contended that the police at Dube Police Station caused the disappearance of the docket to prevent him from using it as evidence in his defence during his murder trial. As a result, he was found guilty of murder and sentenced to 15 years imprisonment.

- 6.1.8 He further averred that had the police not lost the original docket, the court would not have convicted and sentenced him for the offence. The Complainant argued that his contention is further supported by the legal opinion that was sought by the SAPS from Advocate de Vos to determine whether he should be provided with funding to appeal his conviction and sentence, which found that there were discrepancies between the original and reconstructed docket and recommended that he should be given an opportunity to appeal the court judgment.

*Response from the SAPS*

- 6.1.9 On 11 November 2021, the Investigation Team held a meeting with Detective Seshai (Detective Seshai) at Dube Police Station. Detective Seshai indicated that:

- 6.1.9.1 In 1998, the SAPS were still using a manual record system which caused difficulties in the recording and tracing of dockets;

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- 6.1.9.2 During the Complainant's trial in September 2000, the original docket could not be found even after a diligent search, hence a skeleton docket had to be reconstructed by the police;
- 6.1.9.3 In 2002, the original docket was eventually traced and the Complainant was furnished with copies of the said docket through the office of the then Minister of Police;
- 6.1.9.4 The Complainant opened a criminal case of *Defeating the ends of Justice* against members of the SAPS stationed at Dube Police Station in 2009 under CAS 94/09/2009, regarding the disappearance of the said docket, but the National Prosecuting Authority declined to prosecute;
- 6.1.9.5 In 2010, the Complainant made representations to the Provincial Director of Public Prosecutions in Mmabatho, appealing against the decision to decline to prosecute, but the Provincial Director of Public Prosecutions also upheld the decision; and
- 6.1.9.6 During March 2011, the Complainant appealed to the National Director of Public Prosecutions against the decision of the Provincial Director of Public Prosecutions who upheld the decision of the Provincial Director and also declined to prosecute, due to lack of evidence.

*Applicable law*

**Constitution of the Republic of South Africa, 1996**

- 6.1.10 Section 35(3) of the Constitution provides that, "Every accused person has a right to a fair trial, which includes the right:

(a) to be informed of the charge with sufficient detail to answer it;

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(b) to have adequate time and facilities to prepare a defence; and

.....

(i) to adduce and challenge evidence.

6.1.11 Section 195(1) provides, amongst others, that:

(a) *“A high standard of professional ethics must be promoted and maintained;*

(b) ...

(f) *Public administration must be accountable;*

6.1.12 Section 179(1) of the Constitution provides that:

(1) *“there shall be a single national prosecuting authority in the Republic structured in terms of an Act of Parliament and consisting of:*

(a) *National Director of Public Prosecutions who is the head of prosecution authority.*

(b) *Directors of Public Prosecution and Prosecutors.”*

6.1.13 Section 179(2) of the Constitution provides that:

*“the prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to the institution of criminal proceedings”.*

6.1.14 Section 33 of the Constitution provides that:

(1) *Everyone has a right to an administrative action that is lawful, reasonable and procedurally fair.*

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(2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*

(3) *National legislation must be enacted to give effect to these rights and must:*

(a) *provide for the review of administrative action by a court, or where appropriate an independent and impartial tribunal.*

### **National Prosecuting Authority Act, 1998**

6.1.15 Section 20(1) of the National Prosecuting Authority Act provides that:

(1) *“the powers contemplated in section 179(1) of the Constitution and all other relevant sections to:*

(a) *Institute and conduct criminal prosecutions on behalf of the state;*

(b) *carry out any necessary function incidental to instituting and conducting criminal proceedings, and*

(c) *discontinue criminal proceedings.*

6.1.16 Section 32 (1)(b) of the National Prosecuting Authority Act provides that:

*“Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions”*

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6.1.17 Section 35(1) of the National Prosecuting Authority Act provides that:

*(1) “The prosecuting authority shall be accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions.”*

### **Promotion of Administrative Justice Act, 2000**

6.1.18 Section 1 of the Promotion of Administrative Justice Act (PAJA) provides that:

*“In this Act, unless the context indicates otherwise-*

*Administrative action means any decision taken or any failure to take a decision by-*

*(a) an organ of state, when –*

*(i) exercising power in terms of the Constitution or a provincial constitution”;*

*(ii) exercising a public power or performing a public function in terms of any legislation;*

*....which adversely affects the rights of any person and which has a direct, external legal effect”*

6.1.19 Section 6 (1) of PAJA provides that:

*(1) “Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.*



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6.1.20 Section 8(1) of PAJA provides that:

*(1) “The court or tribunal, in proceedings for judicial review in terms of section 6(1) may grant any order that is just and equitable”*

*Analysis*

6.1.21 The values and principles espoused in section 195(1) (a) and (f) of the Constitution, apply to officials within all spheres of government, including executive authority, accounting officers and any other officials of government. Therefore, these principles enjoin the SAPS to exercise a high level of professionalism and ethics, including accountability in the performance of their duties.

6.1.22 Evidence before the Public Protector confirmed that the SAPS could not trace the original docket pertaining to the Complainant’s case, resulting in a skeleton docket being reconstructed by the police. Furthermore, the legal opinion that was sought by the SAPS from Advocate de Vos to determine whether he should be provided with funding to appeal his conviction and sentence, also found that there were discrepancies between the original and reconstructed docket which formed the basis of the recommendation by Adv Vos that the Complainant should be given an opportunity to appeal the court judgment.

6.1.23 The Public Protector notes that the Complainant was afforded an opportunity to present his defence before a court of law to challenge the evidence as provided in section 35 of the Constitution. However, the failure by the SAPS to maintain proper record management is contrary to the values and principles advocated in section 95 of the Constitution which requires the SAPS in this instance, to be accountable in the performance of their duties. The Complainant prepared his defence based on the reconstructed docket which

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was found to contain discrepancies that necessitated a possible reconsideration by the court on appeal.

6.1.24 Whereas the loss of a docket may constitute criminal conduct, the evidence before the Public Protector indicates that the Complainant opened a criminal case of *Defeating the ends of Justice* with the SAPS, regarding the disappearance of the said docket. Furthermore, the Complainant exercised his right to challenge the decision of the Provincial Public Prosecutor for declining to prosecute anyone, to the level of the National Director of Public Prosecutions but was not successful. In line with section 179(2) of the Constitution read with section 20(1) of the National Prosecuting Authority Act, which empowers the Prosecuting Authority to institute or conduct criminal prosecution on behalf of the state, the National Director of Public Prosecutions upheld the decision not to prosecute due to lack of evidence.

6.1.25 The law further affords the Complainant the right to approach a court to review the decision of the National Director of Public Prosecutions as prescribed in sections 6(1) and 8(1) of PAJA.

### *Conclusion*

6.1.26 Based on the evidence in the possession of the Public Protector, the SAPS conceded that the original docket pertaining to the investigation of the commission of a criminal offence by the Complainant could not be found during the trial. The SAPS further confirmed that a skeleton docket had to be reconstructed. Based on the evidence presented before the court, the Complainant was convicted and sentenced for the criminal offence committed.

6.1.27 Furthermore, the Complainant opened a case with the police, which was investigated and referred to the Director of Public Prosecutions for a decision.

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However, the Director of Public Prosecutions did not find evidence to prosecute any of the police for the alleged offence.

- 6.1.28 Therefore, the Complainant exercised his legal remedies to address the effects of the loss of the original docket on the outcome of his case. The only avenue that was still open to the Complainant after the decision of the NPA was to approach a court of law to review the decision of the National Prosecuting Authority. The Public Protector is not the appropriate institution to deal with the loss of the docket or to review the decision of the National Prosecuting Authority.

*Intervention by the Public Protector*

- 6.1.29 As indicated in paragraph 2 of the complaint above, when the Complainant requested the intervention of the Public Protector in 2004, he also raised allegations against SAPS for the refusal to provide him with legal funding to appeal the conviction and sentence. In 2005, the Public Protector attempted to assist the Complainant by requesting the Legal Aid Board to consider providing the Complainant with legal assistance to appeal his conviction and sentence. The Legal Aid Board appointed Mr Tshabalala to consult with the Complainant in respect of the merits of his appeal to determine the prospects of success. The Public Protector's file was then closed, as assistance was rendered to the Complainant and the Legal Aid Board was directly engaging with the Complainant.
- 6.1.30 In 2007, the Complainant once again approached the Public Protector, to lodge a complaint against the Legal Aid Board. In his complaint against the Legal Aid Board, the Complainant alleged that during his consultation with Mr Tshabalala, he was given the impression by the Legal Aid Board that legal representation would be provided but it subsequently reneged on this promise.

6.1.31 In 2008, Adv Neels van der Merwe, then a Senior Investigator in the Public Protector's office, mediated between the Complainant and the Legal Aid Board. During the mediation, the Legal Aid Board indicated that after studying the court record, they could not find any prospects of success in a possible appeal against his conviction. However, the Legal Aid Board was prepared to offer the Complainant legal representation to lodge an application for the reduction of sentence only, but the Complainant declined the offer. The file was again closed.

6.1.32 The Complainant thereafter lodged an application for an internal review with the Public Protector against the closure of his file. The application for internal review was upheld by the Review Panel, resulting in a further investigation as outlined in the second issue identified for investigation below.

**6.2 Whether the withdrawal of the Complainant's funding by SAPS was improper, and if so, whether the conduct of SAPS was improper as envisaged in section 182 of the Constitution and amounted to maladministration in terms of section 6(4) of the Public Protector Act**

*Common cause*

6.2.1 In 2008, the Complainant applied for legal funding from the SAPS in order to enable him to appeal against his conviction and sentence. On 11 March 2009, SAPS approved legal funding for the Complainant, on condition that it should be provided with an opinion on the prospects of success on appeal.

6.2.2 During March 2009, the Complainant appointed Mr Bonthuys Bezuidenhout Inc. Attorneys, in Rustenburg as his legal representatives.

6.2.3 During December 2013, SAPS withdrew the funding which it had granted to the Complainant.

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*Issue in dispute*

- 6.2.4 The issue for the Public Protector's determination is whether the withdrawal of the funding which had been provided to the Complainant was improper.

*Complainant's version*

- 6.2.5 The Complainant stated that after the Assault GBH docket number CR 27/06/1998 was located in 2002, the State Attorney compared the contents of the original docket against those of the reconstructed secondary docket and found some discrepancies between the two. SAPS then instructed Advocate H de Vos to provide an opinion on the way forward regarding the discrepancies between the two dockets.
- 6.2.6 During the year 2008, the Complainant applied for legal funding from SAPS to enable him to appeal against his conviction. His application was approved in 2009 by SAPS and the Complainant appointed Bonthuys Attorneys in Rustenburg as his legal representatives.
- 6.2.7 However in 2013, SAPS withdrew the funding it had granted to him after his legal representative, Mr Bonthuys, advised SAPS that he wanted to use the legal opinion of Adv de Vos as the basis for the appeal.

*Response from the SAPS*

- 6.2.8 In a letter dated 19 March 2018, addressed to the Investigation Team, Major-General E D Groenewald, the Head of Litigation and Administration at SAPS, submitted another letter dated 11 March 2009 which had also been signed by her, addressed to Bonthuys Attorneys of Rustenburg. The letter of 11 March

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2009 was a formal appointment of Mr Bonthuys by SAPS as the legal representative of the Complainant.

6.2.9 On 28 August 2019, Major-General Groenewald furnished the Investigation Team with further copies of correspondence between SAPS and Bonthuys Attorneys. Upon perusal of the said documents, the following information could be deduced:

6.2.9.1 On 11 March 2009, through a letter that was signed by the said Major-Gen Groenewald (who at that time was the Senior Legal Administrative Officer), SAPS formally appointed Mr Bonthuys as the legal representative of the Complainant. One of the conditions of the appointment was that Mr Bonthuys should provide SAPS with an opinion on the prospects of success regarding the appeal. The said letter of 11 March 2009 stated as follows “*we shall appreciate it if you could proceed to obtain the record and provide us with an opinion on the prospects of success regarding further appeal.*”

6.2.9.2 On 31 January 2013, Mr Bonthuys wrote to the SAPS and proposed that the Complainant’s matter should go to the Constitutional Court for appeal and requested SAPS to provide the cover for the fees of the Advocate.

6.2.9.3 On 09 April 2013, Major-Gen E D Groenewald (Major-Gen Groenewald), the then Executive Legal Officer at SAPS, sent a letter to Mr Bonthuys indicating that SAPS cannot cover the fees until he has provided an opinion based on the merits of the case regarding the prospects of success, as well as the grounds of appeal.

6.2.9.4 On 18 April 2013, Mr Bonthuys wrote back to SAPS indicating that he would provide SAPS with the said opinion as well as the motivation for his proposal that the Complainant should approach the Constitutional Court.

- 6.2.9.5 On 23 April 2013, Mr Bonthuys sent another letter to SAPS questioning the decision of the SAPS directing him to provide an opinion regarding the prospects of success. He referred them to an opinion by Adv de Vos in 2003. He indicated to SAPS that the opinion by Adv de Vos was sufficient and should be used as the legal basis of the appeal.
- 6.2.9.6 On 03 December 2013, in another letter signed by Major-Gen Groenewald, Mr Bonthuys was informed that SAPS was terminating its funding. It was indicated to him that there was no legal basis for SAPS to fund the appeal.
- 6.2.9.7 On 16 August 2014, SAPS sent another letter to Mr Bonthuys which was signed by the then Minister of Police, Mr NPT Nhleko (Minister Nhleko). The letter stated that the decision to provide funding to proceed with the appeal was dependent on the legal representative providing SAPS with an opinion on the prospects of success, based on the merits of the case.
- 6.2.9.8 Minister Nhleko further indicated that the opinion provided by Adv de Vos in 2003 dealt with procedural aspects and not the merits of the case. SAPS stated that *“it would not be in the best interest of SAPS to fund an appeal to the Constitutional Court based on technical grounds”*.

*Applicable law*

**Constitution of the Republic of South Africa, 1996**

- 6.2.10 Section 35(3) of the Constitution provides that:

*“Every accused person has a right to a fair trial, which includes the right-*

*(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; and*

*(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”*

### **Criminal Procedure Act, 1977**

6.2.11 Section 73 of the Criminal Procedure Act (CPA) provides that:

(1) An accused who is arrested, whether with or without warrant shall, subject to any law relating to the management or prison, be entitled to the assistance of his legal adviser as from the time of the arrest;

(2) An accused shall be entitled to be represented by his legal adviser at the criminal proceedings if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question;

(2A)(e) of the CPA provides that, Every person shall- at his or her first appearance in court, be informed of his or her with to be represented at his or her own expense by a legal adviser or his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

### **Public Finance Management Act, 1999**

6.2.12 Section 38(b) of the Public Finance Management Act provides that an *Accounting Officer of the Department is responsible for the effective, efficient, economical use of the resources of the department. Section 38(c) (ii) further provides that the Accounting Officer must prevent fruitless and wasteful expenditure.*



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Case Law

6.2.13 In the matter of the Legal Aid Board v The State, Ponnan JA held that:

*“The entitlement of a person charged to be represented, if necessary, by a legal practitioner at public expense is an important safeguard of fairness in the administration of criminal justice. An entitlement to legal aid is a measure which reduces the possibility of an injustice and enhances the prospects of a fair trial. Our Constitution recognises both the practical and logical nexus between legal representation and a fair trial. Thus section 35(3) of our Constitution guarantees to every accused person his or her right to a fair trial, which includes the right in subsection (g) to have a legal practitioner assigned, if substantial injustice would otherwise result.”<sup>1</sup>*

*Analysis*

6.2.14 In the above-mentioned case, Ponnan JA emphasised the importance of legal representation, especially in a case where a litigant is facing a serious criminal offence. As indicated in paragraph 6.2 above, in an effort to assist the Complainant in obtaining legal representation to appeal the conviction and sentence when he reported the matter to the Public Protector in 2004 and to advance the spirit of section 35(3)(f and(f) of the Constitution and section 73(1) and (2A)(e) of the CPA, the Public Protector sought the intervention of the Legal Aid Board (now Legal Aid South Africa) to consider providing the Complainant with legal assistance to appeal his conviction and sentence.

6.2.15 In this instance, the Legal Aid Board appointed Mr Tshabalala to consult with the Complainant in respect of the merits of his appeal to determine the prospects of success. The Legal Aid Board resolved that after studying the

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<sup>1</sup> Legal Aid Board v The state 112 SCA 2010 (par. 2)

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court record, they could not find any prospects of success in a possible appeal against the Complainant's conviction. However, the Legal Aid Board was prepared to offer the Complainant legal representation to lodge an application for the reduction of sentence only, but the Complainant declined the offer.

- 6.2.16 It is further evident from the evidence in the Public Protector's possession that the SAPS sought to assist the Complainant by obtaining a legal opinion from Advocate de Vos on the Complainant's request for funding to appeal his conviction and sentence after the original docket was found wherein he recommended that the Complainant should be afforded an opportunity to appeal directly to the Constitutional Court as a result of the discrepancies he had identified between the original and reconstructed dockets.
- 6.2.17 Furthermore, the SAPS appointed Mr Bonthuys as the legal representative of the Complainant with an instruction that he should obtain the record and provide the SAPS with an opinion on the prospects of success regarding further appeal. On 09 April 2013, the SAPS further requested Mr Bonthuys to provide the legal opinion, emphasising that the SAPS cannot cover the fees until he has provided an opinion based on the merits of the case regarding the prospects of success, as well as the grounds of appeal. However, Mr Bonthuys insisted that the opinion by Adv de Vos in 2003 was sufficient and should be used as the legal basis of the appeal.
- 6.2.18 As a result, on 03 December 2013 the SAPS through Major-Gen Groenewald, informed Mr Bonthuys that that there was no legal basis for SAPS to fund the appeal and it was terminating its funding. In a letter dated 16 August 2014, the then Minister of Police, Mr NPT Nhleko (Minister Nhleko) informed Mr Bonthuys that the decision to provide funding to proceed with the appeal was dependent on the legal representative providing SAPS with an opinion on the prospects of success, based on the merits of the case.

- 6.2.19 Minister Nhleko further stated that the opinion provided by Adv de Vos in 2003 dealt with procedural aspects and not the merits of the case, therefore, “*it would not be in the best interest of SAPS to fund an appeal to the Constitutional Court based on technical grounds*”.
- 6.2.20 Section 38(b) of the PFMA enjoins state officials to ensure that the resources of the state are used effectively, efficiently and economically. SAPS took a decision to seek a legal opinion on the prospects of success of the case on appeal to the Constitutional Court. The request for a legal opinion was done in compliance with the provisions of section 38 of the PFMA as a safeguard to ensure that any expenditure incurred towards the appeal of the Complainant’s conviction and sentence would not amount to wasteful expenditure. Therefore, the Complainant’s legal representative was expected to provide the legal opinion on the prospects of success as required by the SAPS, prior to funds being provided for the referral of the matter to the Constitutional Court.

### *Conclusion*

- 6.2.21 The Public Protector attempted to assist the Complainant by requesting the Legal Aid Board to provide legal assistance to the Complainant. However, the Complainant declined the assistance by the Legal Aid Board when they indicated that there were no prospects of success on appeal on the conviction.
- 6.2.22 Based on the evidence obtained during the investigation, it is clear that when legal funding was granted by the SAPS to the Complainant, it was done on the strict condition that his legal representative should provide SAPS with a legal opinion. However, the SAPS withdrew the funding when the legal opinion was not forthcoming from the Complainant’s legal representative.

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6.2.23 The Public Protector notes that the Complainant was convicted and sentence on or about June 2000 and has served his sentence. The Complainant may consider other legal remedies at his disposal to pursue the matter further.

## 7. FINDINGS

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

### 7.1 **Whether the Police officials at the Dube police station lost docket number CR 27/06/1998, and if so, whether the conduct of the SAPS was improper as envisaged in section 182 of the Constitution and amounted to maladministration in terms of section 6(4) of the Public Protector Act**

7.1.1 The allegations that the SAPS at Dube Police station lost the original docket number CR 27/06/1998 during June 2000, is substantiated. However, evidence before the Public Protector indicates that the Complainant exercised his legal remedies to address the irregularities relating to the loss of the docket by reporting the matter to the police for investigation. The police investigated the matter under CAS 94/09/2009, which was referred to the National Director of Public Prosecutions, but the National Director of Public Prosecutions declined to prosecute.

7.1.2 Therefore, the Complainant's matter was dealt with in terms of the applicable law by the appropriate authority with the relevant jurisdiction.

7.1.3 The Complainant may approach the court for further recourse to the challenge the decision of the National Director of Public Prosecutions.

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**7.2 Whether the withdrawal of the Complainant's funding by SAPS was improper, and if so, whether the conduct of SAPS was improper as envisaged in section 182 of the Constitution and amounted to maladministration in terms of section 6(4) of the Public Protector Act**

7.2.1 The allegation that the withdrawal of the Complainant's funding by SAPS was improper, is not substantiated.

7.2.2 The Public Protector attempted to assist the Complainant by referring the matter to the Legal Aid Board back in 2008. Although the Legal Aid Board resolved that on studying the records, there were no prospects of success on the conviction, but they offered to provide the Complainant with legal assistance to lodge an application for the reduction of sentence, an offer that was declined by the Complainant.

7.2.3 The Complaint continued to seek funding from the SAPS to appeal against the conviction and sentence, resulting in SAPS making an undertaking to provide such funding. However, legal funding to the Complainant was approved on condition that the Complainant, through his legal representative, Bonthuys Attorneys, would provide the SAPS with a legal opinion on the prospects of success on appeal. The Complainant's legal representative failed to provide the opinion but rather argued that the SAPS should rely on the legal opinion provided by Advocate de Vos. In the absence of the legal opinion, the SAPS was not placed in a position to determine whether there were prospects of success should the Complainant be granted funding to directly approach the Constitutional Court and resolved to withdraw the undertaking to fund the appeal.

7.2.4 The Public Finance Management Act places an obligation on Accounting Officers of all departments to ensure that state resources are spent efficiently and economically. Accounting Officers also have an obligation to prevent

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wasteful expenditure. The police could not risk their resources by funding an appeal to the Constitutional Court for which they did not have any opinion based on the merits as to whether or not it will succeed.

## **8. NOTICE IN TERMS OF RULE 41(1) OF THE PUBLIC PROTECTOR RULES**

8.1 On 18 August 2022, Rule 42(1) and Rule 41(1) Notices were issued to the Complainant inviting him to submit representations to the Public Protector on the intention to close the investigation into the matter as prescribed by the Rules relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018 (as amended), which provides that:

*“[W]hen the Public Protector intends concluding a complaint by means of a closing report [...] 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 14 days of delivery of the notification.”*

8.2 In terms of Rule 41(2), the Public Protector may, if the Complainant has not responded within the prescribed timeframe of fourteen (14) days, proceed with the closing of the investigation.

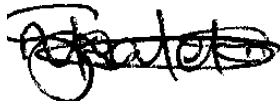
8.3 The Public Protector did not receive any evidence to the contrary of the Notices issued to him.

8.4 The Public Protector will not pursue this investigation any further on the basis that the allegations made by the Complainant were either not supported by evidence; had become moot or were the subject matter of a different investigation.

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9. **CONCLUSION**

- 9.1 The Public Protector considers this matter finalised and cannot take it further.
- 9.2 Should any party wish to challenge this decision, they are at liberty to explore legal remedies at their disposal.



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**ADV KHOLEKA GCALEKA**  
**ACTING PUBLIC PROTECTOR**  
**OF THE REPUBLIC OF SOUTH AFRICA**  
**DATE: 29 SEPTEMBER 2023**

*Assisted by: Ms Nthoriseng Motsitsi*  
*Executive Manager: PII Inland*