

**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**

Report No: 07 OF 2021/22

ISBN No: 978-1-77630-032-7

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION
AND IMPROPER CONDUCT IN CONNECTION WITH THE FAILURE BY THE SOUTH
AFRICAN POLICE SERVICE: LIMPOPO PROVINCE TO PROVIDE THE
COMPLAINANT WITH REASONS WHY HE HAD NOT BEEN RE-ENLISTED TO THE
POLICE SERVICE**

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List of acronyms

Brig	Brigadier
Complainant	Mr Lesetja Wilfred Leso
Constitution	The Constitution of the Republic of South Africa, 1996
Email	Electronic mail correspondence
Former Minister	The former Minister of Police, Mr Fikile Mbalula, MP
Gen Sitole	National Police Commissioner, General Khehla Sitole
Lt-Gen Ledwaba	Provincial Police Commissioner: Limpopo Province, Lieutenant General, Nneke Ledwaba
Maj-Gen	Major General
MMS	Middle Management Service
Notice	Notice in terms of section 7(9)(a) of the Public Protector Act, 23 of 1994
PAJA	Promotion of Administrative Justice Act No. 3 of 2000
PPSA	Public Protector South Africa
PSC	Public Service Commission
Public Protector Act	Public Protector Act No. 23 of 1994
SAPS	South African Police Service
SAPS Act	South African Police Service Act No. 68 of 1995
SCA	Supreme Court of Appeal
SITA	State Information Technology Agency
The President	His Excellency, President Matamela Cyril Ramaphosa

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, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act).
- (ii) The report communicates findings and appropriate remedial action that I am taking in terms of the provisions of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration and improper conduct relating to the failure by the South African Police Service: Limpopo Province (SAPS: Limpopo Province) to provide the Complainant with reasons why he had not been re-enlisted to the police service.
- (iii) The investigation originates from a complaint lodged by Mr Lesetja Wilfred Leso (the Complainant) on 9 January 2019, in connection with what he had considered to be maladministration and improper conduct relating to the failure by the SAPS: Limpopo Province to provide him with reasons why he had not been re-enlisted to the police service.
- (iv) In essence, the Complainant alleged that:
 - (a) In June 2016, the South African Police Service (SAPS) published an advertisement in various newspapers (local and national newspapers) inviting former members of the SAPS to apply for re-enlistment to the police service. Following the publication of the advertisement, the Complainant submitted an application for re-enlistment together with other former members of the police service, which was followed by a series of selection processes.

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- (b) Upon completion of the selection processes they (the Complainant and other former members of the SAPS) were informed to await communication from the SAPS: Limpopo Province on the outcome thereof.
- (c) However, after a year's lapse (ostensibly 2017), communication on the outcome of the selection and recruitment processes was never received from the SAPS: Limpopo Province as promised. As a corollary to this, the Complainant sent a letter to the former Minister of Police, Mr Fikile Mbalula (former Minister), in which he raised his concern and/or complaint regarding the failure by the SAPS: Limpopo Province to provide him with the outcome of the selection process and the reasons why he had not been re-enlisted to the police service.
- (d) According to the Complainant, on receipt of his complaint, the former Minister referred same to the National Police Commissioner, General Khehla Sitole (Gen. Sitole) for resolution, however, Gen. Sitole neither responded nor acknowledged his complaint.
- (e) As a consequence, the Complainant approached the Public Protector and requested that an investigation be instituted with a view to determine whether the conduct of the SAPS: Limpopo Province constituted maladministration and improper conduct.
- (v) **Based on the analysis of the complaint and the allegations contained therein, the following issues were identified to inform and focus the investigation:**
- (a) Whether the SAPS: Limpopo Province failed to provide the Complainant with reasons why he had not been re-enlisted to the police service, and if so, whether the conduct constituted maladministration and improper conduct.

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- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. The investigation process included the exchange of documentation between Public Protector and the Deputy National Police Commissioner: Management Intervention, Brigadier J Ramsookbhai (Brig Ramsookbhai), as well as senior personnel of the SAPS from Head Office and the Limpopo Province.
- (vii) Correspondence issued in terms of section 7(4)(a) of the Public Protector, 1994, calling for a response to the allegations, as well as documentation pertinent to the investigation was issued to the Deputy National Commissioner: Management Intervention, Brig Ramsookbhai.
- (viii) A notice in terms of section 7(9)(a) of the Public Protector Act, 1994, affording the SAPS: Limpopo Province the opportunity to respond and provide documentation and/or information confuting the preliminary findings made during the investigation was issued to, amongst others, the Provincial Commissioner: SAPS Limpopo Province, Lieutenant-General Nneke Ledwaba (Lt-Gen Ledwaba).
- (ix) All relevant documents and correspondence were obtained and analysed, and other information obtained were analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.
- (x) Key laws and policies taken into account to determine if there had been maladministration or improper conduct by the SAPS: Limpopo Province were principally those imposing administrative standards that should have been complied with by the SAPS: Limpopo Province and/or its employees when dealing with the re-enlistment of former members to the police service. Those are the following:

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- (a) **The Constitution, 1996** [Act. No. 108 of 1996], which is the supreme law of the Republic. Section 2 thereof provides that, *“The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”*.
- (b) **The Public Protector Act, 1994** [Act No. 23 of 1994] (PPA, 1994), which gives effect to the provisions of section 182(1)(a) to (c) of the Constitution, 1996. Section 6(4)(a)(i) of the Public Protector Act, 1994 provides that,
- “The Public Protector shall be competent to investigate on his or her own initiative or receipt of a complaint maladministration in connection with the affairs of government at any level”*.
- (c) **The South African Police Service Act, 1995** [Act No. 68 of 1995] (SAPS Act), which is the key legislation providing for the establishment, organisation and regulation of the South African Police Service;
- (d) **The Promotion of Administrative Justice Act, 2000** [Act No. 3 of 2000] (PAJA), which is the key legislation giving effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action.
- (xi) Having considered the evidence obtained during the investigation weighed against the relevant regulatory framework as well as the complaint received when weighed against the standard that was expected to be upheld by the SAPS: Limpopo Province and/or any other persons that were involved in the re-enlistment process, I now make the following findings:

- (a) **Regarding whether the SAPS: Limpopo Province failed to provide the Complainant with reasons why he had not been re-enlisted to the police service, and if so, whether the conduct constituted maladministration and improper conduct:**
- (aa) The allegation that the SAPS: Limpopo Province failed to provide the Complainant with reasons why he had not been re-enlisted to the police service, is substantiated.
- (bb) In terms of section 33 of the Constitution, 1996 read with section 3(2)(b) of PAJA, every person has a right to administrative action that is lawful, reasonable and procedurally fair.
- (cc) Furthermore, that everyone whose rights have been adversely affected by administrative action has a right to be provided with written reasons for the administrative action.
- (dd) Section 1 of PAJA defines administrative action as, *inter alia*, any decision taken or any failure to take a decision, by an organ of state, when exercising a public power in terms of the Constitution or Provincial constitution or exercising a public power or performing a public function in terms of any legislation,...which adversely affects the rights of any person and which is has a direct, external legal effect.
- (ee) The SAPS exercises a public function in terms of the South African Police Service Act, 1995, therefore, the re-enlistment of former members of the SAPS to the police service constitutes administrative action articulated in section 33 of the Constitution, 1996 read with section 3(2)(b) of PAJA, 2000, is applicable to it.

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- (ff) The SAPS has a constitutional and statutory duty to observe the provisions of just administrative action as expanded in section 33 of the Constitution, 1996 read with section 3 of the Promotion of Administrative Justice Act, 2000. Therefore, the SAPS has a duty to give the Complainant a clear statement of its decision of not re-enlisting him to the police service.
- (gg) Therefore, in line with PAJA, 2000 the Complainant was supposed to have been informed, at the time of him making inquiries regarding why he had not been re-enlisted to the police service, that the positions of Colonels were not approved by the SAPS' Head Office due to non-availability of posts. Instead, he was provided with various inadequate reasons which seemed evasive and dismissive and therefore contrary to the ethos espoused by PAJA, 2000.
- (hh) In the circumstances, I am persuaded to conclude that the failure by the SAPS: Limpopo Province to observe the constitutional and statutory duty of the provisions of just administrative action as expanded in section 33 of the Constitution, 1996 read with section 3 of the PAJA, 2000 constituted improper conduct as envisaged by section 182(1)(a) of the Constitution, 1996 and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994.
- (xii) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the maladministration and improper conduct referred to in this report is the following:
- (a) **The National Commissioner of the SAPS: General, Khehla Sitole, to;**
- (aa) Take cognisance of the findings of maladministration and improper conduct mentioned in the report;

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- (bb) Include in his oversight role over the SAPS: Limpopo Province, the monitoring of implementation of remedial action taken in pursuit of the findings in terms of the powers conferred under section 182(2)(c) of the Constitution, 1996.
- (b) **The Provincial Commissioner: SAPS Limpopo Province, Lieutenant-General Nneke Ledwaba to;**
- (aa) Take cognisance of the findings of maladministration and improper conduct mentioned in the report;
- (bb) Ensure that within thirty (30) days of receipt of this report, the Complainant is provided with a letter providing him with adequate reasons why he had not been re-enlisted to the police service.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT IN CONNECTION THE FAILURE BY THE SOUTH AFRICAN POLICE SERVICE TO PROVIDE THE COMPLAINANT WITH REASONS WHY HE HAD NOT BEEN RE-ENLISTED TO THE POLICE SERVICE

1. INTRODUCTION

- 1.1. This is my 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 of the Public Protector Act to:
 - 1.2.1. The National Commissioner of the SAPS, General Khehla Sitole;
 - 1.2.2. The Provincial Commissioner of the SAPS: Limpopo Province, Lieutenant-General Nneke Ledwaba;
 - 1.2.3. The Divisional Commissioner: Personnel Management, Lieutenant-General L Ntshiea.
- 1.3. A copy of the report is also provided to the Complainant, Mr Lesetja Wilfred Leso to inform him about the outcome of the investigation.
- 1.4. The report communicates findings and appropriate remedial action that I am taking in terms of the provisions of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration and improper conduct relating to the failure by the South African Police Service: Limpopo Province to provide the Complainant with reasons why he had not been re-enlisted to the police service.

- 1.5. The investigation originates from a complaint lodged by Mr Lesetja Wilfred Leso (hereinafter referred to as the Complainant) on 9 January 2019, in connection with what he had considered to be maladministration and improper conduct by the South African Police Service (hereinafter referred to as the SAPS: Limpopo Province).

2. In essence, the Complainant alleged that:
 - 2.1. In June 2016, the South African Police Service (SAPS) published an advertisement in various newspapers (local and national newspapers) inviting former members of the SAPS to apply for re-enlistment to the police service. Following the publication of the advertisement, the Complainant submitted an application for re-enlistment together with other former members of the police service, which was followed by a series of selection processes.

 - 2.2. Upon completion of the selection processes they (the Complainant and other former members of the SAPS) were informed to await communication from the SAPS: Limpopo Province on the outcome thereof. However, after a year's lapse (ostensibly 2017), communication on the outcome of the selection and recruitment processes was never received from the SAPS: Limpopo Province as promised.

 - 2.3. As a corollary to this, he (the Complainant) addressed a letter to the former Minister of Police, Mr Fikile Mbalula, in which he raised his concern and/or complaint on the failure by the SAPS: Limpopo Province to provide him with the outcome of the selection process and the reasons why he had not been re-enlisted to the police service.

- 2.4. According to the Complainant, on receipt of his complaint, the former Minister referred same to the National Police Commissioner, General Khehla Sitole (Gen. Sitole) for resolution, however, Gen. Sitole neither responded nor acknowledged his complaint. As a consequence, the Complainant approached the Public Protector and requested that an investigation be instituted with a view to determine whether the conduct of the SAPS: Limpopo Province constituted maladministration and improper conduct.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1. **The mandate of the Public Protector**

- 3.1.1. The Public Protector is an independent constitutional institution, established in terms of section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

- 3.1.2. 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.”

- 3.1.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

- 3.1.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.
- 3.1.5. In the matter of the ***Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*** the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ 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*”².
- 3.1.6. In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:
- 3.1.6.1. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.1.6.2. .An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (Paragraph 67);

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

² *Supra* at para [73].

- 3.1.6.3. 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);
- 3.1.6.4. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (Paragraph 69);
- 3.1.6.5. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (Paragraph 70);
- 3.1.6.6. The Public Protector’s power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (Paragraph 71);
- 3.1.6.7. 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)];
- 3.1.6.8. She has the power to determine the appropriate remedy and prescribe the manner of its implementation [Paragraph 71(d)]; and

3.1.6.9. “*Appropriate*” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case [Paragraph 71(e)].

3.1.7. In the matter of the ***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:

3.1.7.1. The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);

3.1.7.2. The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);

3.1.7.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):

- (a) Conduct an investigation;
- (b) Report on that conduct; and
- (c) To take remedial action.

3.1.7.4. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (Paragraph 104);

- 3.1.7.5. 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);
- 3.1.7.6. The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108); and
- 3.1.7.7. *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).
- 3.2. The SAPS is an organ of state established in terms of section 205 of the Constitution, 1996 read with section 5 of the SAPS Act, 1995 and its conduct amounts to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector's mandate. The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

4. THE INVESTIGATION

4.1. Methodology

- 4.1.1. The investigation process included the exchange of documentation between Public Protector and the Deputy National Police Commissioner: Management Intervention, Brigadier J Ramsookbhai, as well as senior personnel of the SAPS from Head Office and the Limpopo Province.

4.1.2. Correspondence issued in terms of the provisions of section 7(4)(b) of the Public Protector, 1994, calling for a response to the allegations, as well as documentation pertinent to the investigation was issued to the Deputy National Commissioner: Management Intervention, Brig Ramsookbhai.

4.1.3. All relevant documents and correspondence were obtained and analysed, and other information obtained were analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.

4.2. **Approach to the investigation**

4.2.1. The investigation was approached using an enquiry process that seeks to find out:

(a) What happened?

(b) What should have happened?

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

(d) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

4.2.3. In the case of ***The Public Protector v Mail and Guardian***³ the Supreme Court of Appeal (SCA) stated that, “*The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances*”⁴.

4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the SAPS: Limpopo Province to prevent maladministration and improper conduct.

4.2.5. The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the SAPS: Limpopo Province complied with the regulatory framework setting the applicable standards for good administration.

5. **Based on the analysis of the complaint and the allegations contained therein, the following issue was identified to inform and focus the investigation:**

5.1.1. Whether the SAPS: Limpopo Province failed to provide the Complainant with reasons why he had not been re-enlisted to the police service, and if so, whether the conduct constituted maladministration and improper conduct.

6. **The Key Sources of information**

6.1. **Documents**

³ (422/10 [2011] ZASCA 108 (1 June 2011))

⁴ Para 9 at page 6

- 6.1.1. A copy of the Complainant's complaint documents dated 09 January 2019;
- 6.1.2. A copy of the Circular on Re-Enlistment of Former Members in the South African Police Service (Band A: Constable to Band MMS: Colonel from the Divisional Commissioner: Personnel Management, Lieutenant-General L Ntshiea dated 3 June 2016;
- 6.1.3. A copy of Mr Lesetja Wilfred Leso's application form dated 7 June 2016, in response to the re-enlistment invitation;
- 6.1.4. A copy of Mr Lesetja Wilfred Leso' Interview Score Sheet dated 26 July 2016;
- 6.1.5. A copy of a letter from the Divisional Commissioner: Personnel Management, Lieutenant-General L Ntshiea dated 31 October 2016, addressed to the Limpopo Provincial Commissioner;
- 6.1.6. A copy of a list of members recommended for re-enlistment to the police service from the Divisional Commissioner: Personnel Management, Lieutenant-General L Ntshiea dated 31 October 2016;
- 6.1.7. A copy of the Public Service Commission's Call Case Report dated 11 April 2018, in connection with Mr Lesetja Wilfred Leso's complaint;
- 6.1.8. A copy of a letter from the Limpopo Deputy Provincial Commissioner: Human Resource Management, Major-General HC Morakaladi dated 8 August 2018, addressed to Major-General Govender;
- 6.1.9. A copy of a Complaint Acknowledgement Letter from the Head: Management Intervention Analysis Centre and Service Complaints, Brigadier P Senekal dated 23 November 2017, addressed to Mr Lesetja Wilfred Leso;

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- 6.1.10. A copy of the Complainant's complaint document dated 9 January 2019;
- 6.1.11. A copy of a Complaint Acknowledgement Letter from the Deputy National Commissioner: Management Intervention, Brigadier J Ramsookbhai dated 11 February 2019, addressed to Mr Lesetja Wilfred Leso;
- 6.1.12. A copy of a letter from the SAPS Divisional Commissioner: Personnel Management, Lieutenant-General L Ntshiea dated 1 June 2018, addressed to the Public Service Commission;
- 6.1.13. A copy of a letter from the Limpopo Acting Deputy Provincial Commissioner: Management Intervention, Brigadier FM Huma dated 12 February 2018, addressed to Mr Lesetja Wilfred Leso;
- 6.1.14. A copy of an undated advertisement inviting former SAPS members to submit applications for Re-Enlistment to the police service;
- 6.1.15. A copy a response from the Provincial Commissioner of the SAPS: Limpopo Province, Lt-Gen Nneke Ledwaba dated 20 March 2020, addressed to the Public Protector;
- 6.1.16. A copy of the Public Protector's notice in terms of section 7(9)(a) of the Public Protector Act, 1994 dated 9 April 2021, addressed to the Provincial Commissioner of the SAPS: Limpopo Province, Lieutenant-General Nneke Ledwaba;
- 6.1.17. A copy of a response to the Public Protector's notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from the National Commissioner of the SAPS: General Khehla Sitole dated 28 April 2021, addressed to the Public Protector.

6.2. Correspondence sent and received

- 6.2.1. A copy of the Public Protector's letter dated 11 March 2019, addressed to the Deputy National Commissioner: Management Intervention, Brigadier J Ramsookbhai;
- 6.2.2. A copy of email communication from the Public Protector dated 12 March 2019, addressed to the SAPS Complaint Response and Investigation, Warrant Officer Ramathetje Makgati;
- 6.2.3. A copy of email communication from the Public Protector dated 3 April 2019, addressed to the SAPS Complaint Response and Investigation, Warrant Officer Ramathetje Makgati;
- 6.2.4. A copy of email communication from the SAPS Complaint Response and Investigation, Warrant Officer Ramathetje Makgati dated 5 April 2019, addressed to the Public Protector;
- 6.2.5. A copy of email communication from the Public Protector dated 24 April 2019, addressed to the SAPS Complaint Response and Investigation, Warrant Officer Ramathetje Makgati;
- 6.2.6. A copy of email communication from the SAPS Complaint Response and Investigation, Warrant Officer Ramathetje Makgati dated 29 April 2019, addressed to the Public Protector;

6.3. Websites consulted/ electronic sources

- 6.3.1. www.saps.gov.za;
- 6.3.2. www.publicprotector.org;

6.4. Legislation and other prescripts

- 6.4.1. The Constitution of the Republic of South Africa, 1996;
- 6.4.2. The Public Protector Act, 1994 (Act No. 23 of 1994);
- 6.4.3. The South African Police Service Act, 1995 (Act No. 68 of 1995);
- 6.4.4. The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);

6.5. Case law

- 6.5.1. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT143/15; CCT171/15) [2016] ZACC 11; (2016) (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016);
- 6.5.2. *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);
- 6.5.3. *Sokhela & Others v MEC, Agriculture & Environmental Affairs (KwaZulu– Natal) & others* (12266/08) [2009] ZAKZPHC 30; 2010 (5) SA 574 (KZP) 2010 (5) SA 574 (KZP) (19 June 2009)
- 6.5.4. *The Public Protector v Mail and Guardian* (422/10 [2011] ZASCA 108 (1 June 2011);
- 6.5.5. *Mdwaba Mthunzi v Nonxuba Zuko* [2018] ZAGPJHC 44 (9 March 2018);

6.6. Public Protector's Touchstones

6.6.1. The Public Protector Report: Report No. 16 of 2014/2015 titled "*A fair chance to service*" issued on 30 March 2015, following an investigation into allegations of a maladministration by the South African Police Service in failing to re-enlist a former member to its service.

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

7.1. **Regarding whether the SAPS: Limpopo Province failed to provide the Complainant with reasons why he had not been re-enlisted to the police service, and if so, whether the conduct constituted maladministration and improper conduct:**

Common Cause Issues

7.1.1. It is not disputed that the Complainant is a former member of SAPS, who developed from the ranks of Constable through to the rank of Colonel until he elected to resign from the SAPS in pursuit of other opportunities in the public sector.

7.1.2. It is also not disputed that in June 2016, the SAPS embarked on a re-enlistment process of its former members to the police service at the levels ranging from Band A (Constable) to Band MMS (Colonel). Following the advertisement, the Complainant submitted his application to be considered for re-enlistment to the police service and he was subsequently shortlisted and interviewed, as well as vetted in accordance with the provisions of the Criminal Law Amendment Act, 2007 (Act No. 32 of 2007) and the Children's Act, 2005 (Act No. 38 of 2005).

- 7.1.3. It is further not disputed that, the advertisement for re-enlistment encompassed a clause indicating that correspondence will be conducted with successful candidates only. Further that, an applicant who had not been contacted within three (3) months of the closing date of the advertisement should accept that his/or application was unsuccessful.
- 7.1.4. In addition, it is not disputed that, the Complainant addressed letters to the President of the Republic of South Africa, His Excellency President Cyril Ramaphosa, the former Minister of Police, Mr Fikile Mbalula and the National Commissioner of the SAPS, General Khehla Sitole, in which he raised his concern and/or complaint on the failure by the SAPS: Limpopo Province to provide him with the outcome of the recruitment and selection processes, as well as the reasons why he had not been re-enlisted to the police service.

Issue in Dispute

- 7.1.5. The issue for determination was whether the SAPS: Limpopo Province failed to provide the Complainant with the final outcome of his application indicating adequate reasons why he had not been re-enlisted to the police service following the recruitment process.
- 7.1.6. In June 2016, the South African Police Service (SAPS) published an advertisement in various newspapers (local and national) inviting former members of the SAPS to apply for re-enlistment to the police service.
- 7.1.7. Following the publication of the advertisement referred to herein above, the Complainant submitted an application for re-enlistment together with other former members of the police service, which was followed by a series of selection processes. Upon completion of the selection processes they (re-enlistment applicants) were informed to await communication from the SAPS: Limpopo Province (SAPS: Limpopo Province) on the outcome thereof.

- 7.1.8. The Complainant also alleged that, after a year's lapse (ostensibly 2017), communication on the outcome of the selection and recruitment processes had not been received from the SAPS: Limpopo Province as promised. As a corollary to this, he addressed a letter to the former Minister of Police, Mr Fikile Mbalula, in which he raised his concern and/or complaint on the failure by the SAPS: Limpopo Province to provide him with the outcome of the selection process and the reasons why he had not been re-enlisted to the police service.
- 7.1.9. Further that, on receipt of his complaint, the former Minister of Police, Mr Fikile Mbalula referred same to the National Police Commissioner, General Sitole (Gen. Sitole) for resolution, however, Gen. Sitole neither responded nor acknowledged his complaint.
- 7.1.10. As a consequence, the Complainant approached the Public Protector and requested that an investigation be instituted with a view to determine whether the conduct of the SAPS: Limpopo Province constituted maladministration and improper conduct.
- 7.1.11. In accord with the principles enunciated in the case of the *Public Protector v Mail and Guardian*⁵, and in the case of *Mdwaba Mthunzi v Nonxuba Zuko*⁶, on 11 March 2019 a letter in terms of section 7(4)(b) of the Public Protector Act, 1994, was issued to Brig. J Ramsookbhai requesting him to respond to the allegations made by the Complainant, as well as to provide the Public Protector with documentation and information relevant to the issue under investigation.
- 7.1.12. On 14 June 2019, the SAPS responded to the request through the Deputy National Commissioner: Management Intervention, Maj-Gen. Hankel and submitted the information and documentation so requested.

⁵ (422/10 [2011] ZASCA 108 (1 June 2011)

⁶ [2018] ZAGPJHC 44 (9 March 2018)

7.1.13. It was noted from the information and documentation submitted that, on 3 June 2016, the SAPS Divisional Commissioner: Personnel Management, Lieutenant-General (Lt. Gen) Lineo Ntshiea issued a Circular with reference number 5/5/2, titled *“Re-Enlistment of Former Members in the South African Police Service: South African Police Service Act, 1995: Band A (Constable) to Band MMS (Colonel)”* which was addressed to the following personnel of SAPS and its sub-components:

7.1.13.1. The National Head: Directorate for Priority Crime Investigation;

7.1.13.2. All Divisional Commissioners;

7.1.13.3. All Provincial Commissioners;

7.1.13.4. The Head: Corporate Communication;

7.1.13.5. All Heads: Head Office;

7.1.13.6. All Commanders: SAPS Academy and Training Centres;

7.1.13.7. The Chief of Staff: Ministry of Police; and

7.1.13.8. All Deputy National Commissioners.

7.1.14. The purpose of the Circular was to advise of the approval by the Acting National Commissioner to re-enlist former members in the ranks of Constable to Colonel. It was also noted that the Circular contained a clause which stated that the successful candidates would be re-enlisted to the ranks they previously held in the service and that they would be remunerated on the minimum salary notch applicable to their relevant rank.

- 7.1.15. In terms of the circular, the Provincial/Divisional Commissioner was mandated to identify vacant posts on the Fixed Establishment for the Division of Province in collaboration with Organisational Development.
- 7.1.16. It was further noted that, following the circular, the SAPS published an advertisement in various national newspapers inviting former members from the ranks of Constable to Colonel who met the requirements set out in the advertisement to submit applications with a view to be considered for re-enlistment to the police service.
- 7.1.17. The information received during the investigation also indicates that, following the advertisement, on 23 June 2016, the Complainant submitted an application for re-enlistment to a position of Colonel and elected the SAPS: Mokopane Police Station as his first preferred station of placement followed by SAPS: Mahwelereng Police Station and lastly, the SAPS: Polokwane Police Station.
- 7.1.18. The information further indicates that, the Complainant was subsequently shortlisted and invited for an interview which was conducted by Maj-Gen Meetsi, Colonel Mashitisho and Colonel Mukwevho on 26 June 2016. According to the information received, the Complainant was scored as follows:

Panelist 1:

Criteria (National Instruction 2005)									Mark out of 10
Poor	0-2	Below Average	5-4	Average	5-6	Above Average	7-8	Excellent	9-10
1. Competence based on the inherent requirement of the job or the capacity to acquire within a reasonable time, the ability to do the job					The blend knowledge, skills, behaviour and aptitude of the candidate that she or he can apply in the work environment and which are indicative of her or his ability to meet the requirements of the post				5
2. Prior learning, training and development					Relevant prior learning, self-development, related training undergone and relevant qualifications of the candidate				7

3. Record of previous experience	Experience in the core functions related to the post (such as planning, organization, functional experience, administration, information processing, analysis, management and multi-functional orientation experience	2
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Score: = 1 5 + 2 7 + 3 2 = **14** Marks (Out of 30)

4. Employment equity in line with the Employment Equity Plan of the relevant business unit	Will the promotion of the candidate enhance representativity	Yes ✓	No		
5. Does he/she proof himself/herself to be a candidate for satisfactory performance		Yes ✓	No		
6. Suitability	Suitability of candidate to function effectively at the next higher position level	Yes ✓	No		
Record of conduct	Clear record ✓	Departmental sanction	Criminal conviction(s)	Pending departmental investigation(s)	Pending criminal investigation(s)
RECOMMENDED		YES ✓		NO	
Comments:					

Panelist 2:

Criteria (National Instruction 2005)									Mark out of 10
Poor	0-2	Below Average	5-4	Average	5-6	Above Average	7-8	Excellent	9-10
1. Competence based on the inherent requirement of the job or the capacity to acquire within a reasonable time, the ability to do the job									7
2. Prior learning, training and development									7
3. Record of previous experience									2

Score = 1 7 + 2 7 + 3 2 = **16** Marks (Out of 30)



4. Employment equity in line with the Employment Equity Plan of the relevant business unit			Will the promotion of the candidate enhance representativity	Yes ✓	No
5. Does he/she proof himself/herself to be a candidate for satisfactory performance				Yes ✓	No
6. Suitability			Suitability of candidate to function effectively at the next higher position level	Yes ✓	No
7. Record of conduct	Clear record ✓	Departmental sanction	Criminal conviction(s)	Pending departmental investigation(s)	Pending criminal investigation(s)
RECOMMENDED FOR PROMOTION				YES ✓	NO
Comments:					

Panelist 3:

Criteria (National Instruction 2005)									Mark out of 10
Poor	0-2	Below Average	5-4	Average	5-6	Above Average	7-8	Excellent	9-10
1. Competence based on the inherent requirement of the job or the capacity to acquire within a reasonable time, the ability to do the job				The blend knowledge, skills, behaviour and aptitude of the candidate that she or he can apply in the work environment and which are indicative of her or his ability to meet the requirements of the post				6	
2. Prior learning, training and development				Relevant prior learning, self-development, related training undergone and relevant qualifications of the candidate				7	
3. Record of previous experience				Experience in the core functions related to the post (such as planning, organization, functional experience, administration, information processing, analysis, management and multi-functional orientation experience				2	

Score = 1 6 + 2 7 + 3 2 = 15 Marks (Out of 30)

4. Employment equity in line with the Employment Equity Plan of the relevant business unit			Will the promotion of the candidate enhance representativity	Yes ✓	No
5. Does he/she proof himself/herself to be a candidate for satisfactory performance				Yes ✓	No
6. Suitability			Suitability of candidate to function effectively at the next higher position level	Yes ✓	No
7. Record of conduct	Clear record ✓	Departmental sanction	Criminal conviction(s)	Pending departmental investigation(s)	Pending criminal

					investigation(s)
RECOMMENDED FOR PROMOTION				YES <input checked="" type="checkbox"/>	NO
Comments:					

7.1.19. It was also noted that following the interview, the Complainant was recommended for re-enlistment by the interview panel comprising of Maj-Gen Meetsi, Colonel Mashitsho and Colonel Mukwevho on the basis of him having scored a combined total score of forty nine (49) points during the interview.

7.1.20. On 31 October 2016, Lt-Gen Lineo Ntshiea issued a further circular with reference number 5/3/1 titled “*Re-enlistment of former members in the South African Police Service: 2016/2017 financial year: Limpopo Province*” to the Provincial Commissioner: Limpopo Province advising that the Acting National Commissioner of the SAPS had provisionally approved the re-enlistment of former members in the SAPS. Further to advice of the conditions attached to the re-enlistment of former members.

7.1.21. On 23 October 2017, following the delay by the SAPS to provide feedback on the outcome of the re-enlistment process, the Complainant sent a letter, which was accompanied by an affidavit, to the former Minister, which reads as follows:

COMPLAINT IN RE: APPLICATION FOR RE-ENLISTMENT ON/ABOUT JUNE 2016.

“I herewith lodge a formal complaint against the SAPS Limpopo for failure to deal with my application in a professional manner as required in terms of sections 3 and 4 of the Promotion Of Access To Information Act 2 of 2000 & sections 3,4 & 5 of the Promotion of Administrative Justice Act 3 of 2000”. (sic)

- 7.1.22. On 23 November 2017, a similar letter was sent to the National Commissioner of the SAPS, Gen Sitole by the Complainant. On an even date, the Head: Management Intervention Analysis Centre and Service Complaints, Brig P Senekal sent a letter to the Complainant acknowledging receipt of a complaint he had lodged with the former Minister of Police.
- 7.1.23. In the letter referred to *supra*, Brig. Senekal also advised the Complainant that his complaint would be investigated by the Limpopo Provincial Commissioner in liaison with the Management Intervention Analysis Centre and Service Complaints office.
- 7.1.24. According to the information received, on 12 February 2018, following the finalisation of an investigation by the SAPS: Limpopo Province, the Acting Deputy Provincial Commissioner, Brig FM Huma sent a letter to the Complainant which reads as follows:

“COMPLAINT AGAINST THE SOUTH AFRICAN POLICE SERVICE PC LIMPOPO

The above complaint was investigated and finalized by this office.

You are informed that the advertisement of re-enlistment of the former members of the South African Police Service clearly stated the following:

- *Correspondence will be conducted with successful candidates only.*
- *If you have not been contacted within 3 months of the closing dates of this advertisement please accept that your application was unsuccessful.*
- *The South African Police Service is under no obligation to fill a post after the advertisement thereof.*

Regard this matter as finalized and expect no further correspondence from this office". (sic)

- 7.1.25. It was also noted that, on 8 March 2018, the Complainant sent a letter to the Minister of Police, Mr Bheki Cele requesting him to intervene in the matter, as well as advising that the matter was previously escalated to the former Minister of Police, however, it was not resolved.
- 7.1.26. On 14 March 2018, the Complainant sent a similar letter to the President of the Republic of South Africa, His Excellency, President Cyril Ramaphosa (the President), in which he sought the President's intervention on the issues that he had raised with the former Minister of Police, the incumbent Minister of Police, Mr Bheki Cele and the National Commissioner: SAPS, Gen Sitole (Gen Sitole).
- 7.1.27. It was noted that, on 11 February 2019, Brig J Ramsookbhai sent a letter to the Complainant advising that his complaint was forwarded to the Provincial Commissioner SAPS: Limpopo Province for further investigation and finalisation in liaison with the Management Intervention office.
- 7.1.28. In the letter referred to above, the Complainant was also reminded that the Deputy Provincial Commissioner: Limpopo Human Resource Management, Major-General Morakaladi(Maj-Gen Morakaladi), telephonically invited him to a meeting, which was scheduled for 29 December 2017, however, the Complainant instructed that the invitation be in writing, and as a consequence the appointment was not honoured.
- 7.1.29. It was also noted from the letter referred to above that, the Complainant was also reminded that, on 9 January 2018, he had confirmed and/or conceded to Colonel Mbhungele that he did not honour the appointment scheduled for 29 December 2017, with Maj-Gen Morakaladi, wherein feedback on the complaint lodged against the SAPS: Limpopo Province was expected to be provided.

7.1.30. Brig Ramsookbhai further reiterated in the letter referred to herein that, on 12 February 2018, the Complainant was provided with a clear feedback which included, *inter alia*, that;

7.1.30.1. The advertisement of the re-enlistment of the former members of the SAPS clearly stipulated that;

(a) *“Correspondence will be conducted with successful candidates only and if you are not contacted with 3 months, consider your application unsuccessful;*

(b) *And further that the SAPS is under no obligation to fill the post after the advertisement thereof”. (sic)*

7.1.31. In concluding the letter, Brig Ramsookbhai stated that, the office had exhausted all the avenues to provide the Complainant with feedback which he found unacceptable and advised him that even if his complaint was reported to a different office, the result would be the same. Lastly, Brig Ramsookbhai informed the Complainant that his complaint was considered to be finalised.

7.1.32. On 26 February 2020, a further letter in terms of section 7(4)(a) of the Public Protector Act, 1994 was issued to the Provincial Commissioner of the South African Police Service: Limpopo Province, Lt-Gen Nneke Ledwaba requesting for a response to the allegations made by the Complainant, as well as the submission of documentation and/or information pertinent to the investigation.

7.1.33. On 20 March 2020, the Provincial Commissioner of Police SAPS: Limpopo Province responded and stated as follows:

“Kindly be advised that the above ex-member participated in the re-enlistment process during Financial Year 2016/17 after responding to South African Police Service’s advert ran by the National Commissioner in 2016-06-05. Mr Leso was recommended by the Limpopo Provincial panel together with other 7 ex-Colonels and the recommendations to that effect were forwarded to Head Office for authorization on 2016-08-08.

Outcome of the selection process were received back from the National Commissioner as per Head Office letter, 5/3/1 dated 2016-10-31 and only lower levels ranging from Constable to Warrant Officer were approved by Head Office due to non-availability of posts. All Colonels who participated up to interview phase were not approved despite the fact that they too were recommended by the Province”. (sic)

7.1.34. Consistent with the response, it was noted that, the following former members were re-enlisted to the police service in the ranks of Constable to Warrant Officer with effect from 01 November 2016:

No.	Surname and Initial	Persal No.	Previous Rank	Proposed Re-enlistment Rank
1.	Seanego SE	0923734-8	Warrant Officer	Warrant Officer
2.	Mashila Ms	0484592-7	Warrant Officer	Warrant Officer
3.	Moela MA	0497613-4	Warrant Officer	Warrant Officer
4.	Khoza MS	0633892-5	Warrant Officer	Warrant Officer
5.	Mudau AC	0486552-9	Warrant Officer	Warrant Officer
6.	Mabukule ME	0481762-1	Warrant Officer	Warrant Officer
7.	Kutumela MN	0616335-1	Warrant Officer	Warrant Officer
8.	Mahlare AL	0478885-1	Warrant Officer	Warrant Officer
9.	Tsoka AV	0455328-4	Warrant Officer	Warrant Officer
10.	Mundalamo M	8249231-0	Warrant Officer	Warrant Officer
11.	Singo KR	0497482-4	Warrant Officer	Warrant Officer
12.	Nchabeleng KG	0514853-7	Warrant Officer	Warrant Officer
13.	Muthevhuli KM	0489892-3	Warrant Officer	Warrant Officer
14.	Singo HP	0497462-0	Warrant Officer	Warrant Officer
15.	Nagel PF	0455842-1	Warrant Officer	Warrant Officer

16.	Kwata MB	0171770-7	Warrant Officer	Warrant Officer
17.	Ramaramela MR	0615779-3	Warrant Officer	Warrant Officer
18.	Malathie TM	0515472-3	Warrant Officer	Warrant Officer
19.	Mogaila LS	0621206-9	Warrant Officer	Warrant Officer
20.	Siaga NP	0497182-5	Warrant Officer	Warrant Officer
21.	Malemela ME	0490143-6	Warrant Officer	Warrant Officer
22.	Pienaar JG	0460709-1	Warrant Officer	Warrant Officer
23.	Phoku MP	0516833-3	Warrant Officer	Warrant Officer
24.	Bethula NC	0479862-7	Warrant Officer	Warrant Officer
25.	Makhubedu EM	0488763-8	Warrant Officer	Warrant Officer
26.	Oosthuizen DG	0438478-4	Warrant Officer	Warrant Officer
27.	Breedt GH	0077058-2	Warrant Officer	Warrant Officer
28.	Horn HJ	0426643-9	Warrant Officer	Warrant Officer
29.	Sekhaolelo LD	0454589-3	Warrant Officer	Warrant Officer
30.	Madzhigili TL	0482122-0	Warrant Officer	Warrant Officer
31.	Ramarumo ED	0495252-9	Warrant Officer	Warrant Officer
32.	Keyter JM	0430494-2	Warrant Officer	Warrant Officer
33.	Kgwale LM	0487363-7	Warrant Officer	Warrant Officer
34.	Makwela MNO	7000475-7	Sergeant	Sergeant
35.	Kloppers HJ	7184601-8	Sergeant	Sergeant
36.	Mogorosi MA	7001241-5	Sergeant	Sergeant
37.	Van der Sandt J	0460200-5	Sergeant	Sergeant
38.	Nortje F	4455841-3	Sergeant	Sergeant
39.	Molomo RJ	8156019-2	Sergeant	Sergeant
40.	Mulaudzi TP	7043933-6	Constable	Constable
41.	Shongoane SSS	7053248-6	Constable	Constable
42.	Masingi RT	7162273-0	Constable	Constable
43.	Thobejane MA	7050518-7	Constable	Constable
44.	Mooka MS	0535161-8	Constable	Constable
45.	Mashele VM	7050738-4	Constable	Constable
46.	Ramonyai MD	7063148-4	Constable	Constable
47.	Sekhwela TS	8222099-9	Constable	Constable
48.	Matsembe LN	7062220-5	Constable	Constable
49.	Scheepers P	8192008-3	Constable	Constable
50.	Rakgotsoka WJ	7072846-1	Constable	Constable

7.1.35. Furthermore, the Provincial Commissioner of Police: Limpopo Province stated that;

“Mr Leso’s complaint was initially investigated by the National Management Intervention after receiving it from the Office of the Public Service Commission during 2018. The matter was dealt with by the Public Service Commission who, upon assessment of the facts, found no irregularities in the recruitment process. Mr Leso was given feedback by the office of the Public Service Commission and Management Intervention in this regard and matter was laid to rest”.(sic)

- 7.1.36. During the course of the investigation, evidence indicating possible wrongdoing on the part of the SAPS: Limpopo Province was established. As a corollary to this, on 09 April 2021, a notice in terms of section 7(9)(a) of the Public Protector Act, 1994, was issued to the Lt-Gen Nneke Ledwaba with a view to affording him the opportunity to furnish the Public Protector with further evidence confuting the preliminary findings made during the investigation.
- 7.1.37. In response to the section 7(9)(a) notice, the National Police Commissioner, Gen Sitole stated, in a letter dated 28 April 2021 that the SAPS regularly receives hundreds of thousands of application when posts are advertised (i.e. with the advertisement of posts for Police Trainees in 2019, more than Five Hundred and Thirty Six Thousand (536 000) applications were received).
- 7.1.38. Gen Sitole also stated that it would therefore be impossible for the SAPS to respond to each and every applicant individually and it is for this reason that all external advertisement for posts in the SAPS contain a provision that the SAPS will only correspond with successful applicants and those that have not received a response within three (3) months from the closing date of the respective advertisement should take note that their applications were unsuccessful.
- 7.1.39. In paragraph 2 of the response referred to above, Gen Sitole submits that the SAPS is however in the process of developing an e-Recruitment System in collaboration with the State Information Technology Agency (SITA) which, when implemented, provide automated feedback to applicants.

- 7.1.40. Gen Sitole concedes, in paragraph 3 of the response, that in the instance where an applicant formally submits written enquiries and requests reasons for not being appointed, such enquiries must be responded to and the relevant applicant should be provided with reasons for not being successful in his/her application.
- 7.1.41. In paragraph 4, Gen. Sitole asserted that, in view of the large number of applications received the SAPS holds the view that a general finding by the Public Protector which proposes remedial action which will prescribe that a response be provided to every applicant would place the SAPS in a position that it would not be practically possible to comply with.
- 7.1.42. Gen Sitole submitted that, the complainant in question, former Colonel LW Leso, approached various forums to raise his dissatisfaction i.e. in 2018 the Complainant lodged a complaint with the Public Service Commission (PSC). According to Gen Sitole, the SAPS had not been appraised with the outcome/findings of the PSC.
- 7.1.43. The National Police Commissioner continues to state that, Mr Leso also raised his dissatisfaction with Parliament in 2020 and 2021 respectively, whereafter the enquiry was referred to the SAPS by the Secretary of the Portfolio Committee of Police.
- 7.1.44. In closing, Gen Sitole stated that, the SAPS will comply if the Public Protector makes a finding that Mr Leso, within thirty (30) days of receipt of the final report, be provided with a letter containing adequate reasons why he had not been re-enlisted to the SAPS and, should it be necessary, apologise for the failure thereof in this specific instance.

7.1.45. Regarding the Public Protector's proposed remedial action, Gen Sitole stated that in respect of the prevention of a recurrence, all Divisions/Provinces, inclusive of the Limpopo Province, will once again be sensitised to ensure that all individual written enquiries received are adequately responded to. In addition, Gen Sitole stated that he trusted that the implementation of an e-Recruitment system as alluded to above, will contribute to limiting a recurrence of matters of this nature.

Application of the relevant law and prescripts

7.1.46. **The Constitution, 1996** [Act. No. 108 of 1996], which is the supreme law of the Republic. Section 2 of the Constitution, 1996 which provides that "*The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*".

7.1.46.1. Section 33 of the Constitution provides that, everyone has a right to administrative action that is lawful, reasonable, and procedurally fair. It further provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

7.1.46.2. Section 195 of the Constitution provides that public administration in every sphere of government must be underpinned by amongst others that, the following the democratic values and principles-

(1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

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

(b) *Efficient, economic and effective use of resources must be promoted.*

- (c) *Public administration must be development-oriented.*
 - (d) *Services must be provided impartially, fairly, equitably and without bias.*
 - (e) *People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
 - (f) *Public administration must be accountable.*
 - (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*
 - (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
 - (i) *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*
- (2) *The above principles apply to —*
- (a) *administration in every sphere of government;*
 - (b) *organs of state; and*
 - (c) *public enterprises.*

7.1.47. Failure by the SAPS: Limpopo Province to act in accordance with the above constitutional principles, does not match with the provisions of section 195 of the Constitution as stipulated above. The failure thereof goes against the objects of section 195, especially the requirements of ethical standards, transparency and accountability.

- 7.1.48. **The South African Police Service Act, 1995** [Act No. 68 of 1995], which is the key legislation providing for the establishment, organisation and regulation of the South African Police Service. Section 28(1) thereof provides that, “*The National Commissioner shall determine a uniform recruitment procedure for the Service*”.
- 7.1.49. Section 28(2) provides that, “*Subject to section 27, the National Commissioner may appoint a person to a post in the fixed establishment of the Service*”.
- 7.1.50. It is evident that the Provincial/Divisional Commissioner of the SAPS: Limpopo was mandated to identify vacant posts on the Fixed Establishment for the Division of Province in collaboration with Organisational Development in line with section 28(2) of the South African Police Service Act, 1995.
- 7.1.51. **The Promotion of Administrative Justice Act, 2000** [Act No. 3 of 2000], which emphasises the requirement for administrative action that is lawful, reasonable and procedurally fair.
- 7.1.51.1. Section 3(1) of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
- 7.1.51.2. Section 3(2)(b) of PAJA provides that in order to give effect to the right to procedurally fair administration action, an administrator must give the person whose rights and legitimate expectations have been adversely affected the following:
- 7.1.51.2.1. “*Adequate notice of the nature and purpose of the proposed administrative action;*

7.1.51.2.2. *A reasonable opportunity to make representations;*

7.1.51.2.3. *A clear statement of the administrative action;*

7.1.51.2.4. *Adequate notice of any right of review or internal appeal, where applicable;
and*

7.1.51.2.5. *Adequate notice of any right to request reasons in terms of section 5”.*

7.1.51.3. The principles enunciated in section 3(2)(b) of PAJA are further echoed in ***Sokhela & others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & others ([2009] JOL 23782 (KZP) at para [52])***, where the court held per Wallis J that:

“As section 3(2)(a) of PAJA makes clear what will constitute a fair administrative procedure depends upon circumstances of each case. However in general in order to give effect to the right to procedurally fair administrative action the person affected must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations and a clear statement of the administrative action.

Ordinarily the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. That is hardly surprising bearing in mind that one of the grounds upon which the decision of an administrator may be set aside is because irrelevant considerations were taken into account or relevant considerations were not considered”.

7.1.51.4. It is evident that the positions of Colonels which were identified by the SAPS: Limpopo Province were not approved by the SAPS' Head Office due to non-availability of posts. This development was not communicated to the Complainant as the reason why he had not been re-enlisted to the police force as espoused in section 33 of the Constitution read with sections 3(1) and (2) of the PAJA, as stipulated above.

7.1.51.5. The failure of SAPS in this regard goes against the objects of section 33 of the Constitution read with sections 3(1) and (2) of the PAJA, especially the right to a procedurally fair administrative action and providing a person whose rights and legitimate expectations have been adversely affected a clear written statement of the administrative action.

7.1.52. **Principles in previous findings of the Public Protector in a similar investigation (Touchstones)**

7.1.52.1. The Public Protector Report: Report No. 16 of 2014/2015 titled "**A fair chance to serve**" issued on 30 March 2015, following an investigation into allegations of a maladministration by the South African Police Service in failing to re-enlist a former member to its service.

7.1.52.2. The Complainant alleged that the SAPS unduly failed to give him reasons regarding why he was not re-enlisted into its service after he made several attempts to solicit its reasons.

7.1.52.3. Further that, when the SAPS finally gave him the reason, it was factually incorrect and therefore could not be used to justify his exclusion. The reason allegedly given to him was that he had a civil case pending against him and that in terms of the SAPS policy if a former member has a pending civil case, he may not be re-enlisted.

7.1.52.4. The Public Protector found, *inter alia* that, “*The SAPS unduly failed to inform the Complainant about its decision on the outcome of his application to be re-enlisted and also failed to give him a reasonable opportunity to make representation regarding its decision not to re-enlist him.*”

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

The SAPS’ conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

The Public Protector further found, inter alia, that, “The reason given to the Complainant by the SAPS for its failure to re-enlist him to its service is found to be unfair, unjust and unreasonable. Also that the Complainant’s right to just administrative action enshrined in section 33 of the Constitution was violated”.

7.1.53. The evidence discussed above indicates that, following the publication of an advertisement inviting former members of the SAPS to apply for re-instatement to the police service, the Complainant and other former members submitted applications with a view to be considered for re-enlistment to the ranks ranging from Constable to Colonel.

7.1.54. The evidence also indicates that, following enquiries made by the Complainant regarding the delay in the re-enlistment process, as well as providing the outcome thereof, the SAPS sent a letter to the Complainant dated 12 February 2018, advising that according to the advertisement correspondence was to be conducted with successful candidates only. Further to that, the SAPS was under no obligation to fill the post after the advertisement thereof.

- 7.1.55. In addition, the outcome of the re-enlistment and selection process received back from the National Commissioner indicates that, only lower levels ranging from Constable to Warrant Officer were approved by SAPS's Head Office due to non-availability of posts. Further that, all Colonels who participated up to interview phase were not approved despite the fact that they too were recommended by the SAPS: Limpopo Province.
- 7.1.56. It then follows that the Complainant, in line with PAJA, was supposed to have been informed that the positions of Colonels were not approved by the SAPS's Head Office due to non-availability of posts. Instead, he was provided with various inadequate reasons which seemed evasive and dismissive and therefore contrary to the ethos espoused by PAJA.

Conclusions that could be made based on the application of the law to the facts

- 7.1.57. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that, the SAPS has a constitutional and statutory duty to observe the provisions of just administrative action as espoused in section 33 of the Constitution, 1996 read with section 3 of the PAJA, 2000. Therefore, the SAPS has a duty to give the Complainant a clear statement of its decision of not re-enlisting him to the police service.

8. FINDINGS

Having considered the evidence obtained during the investigation weighed against the relevant regulatory framework as well as the complaint received when weighed against the standard that was expected to be upheld by the SAPS: Limpopo Province and/or any other persons that were involved in the re-enlistment process, I now make the following findings:

8.1. Regarding whether the SAPS: Limpopo Province failed to provide the Complainant with reasons why he had not been re-enlisted to the police service, and if so, whether their conduct constituted maladministration and improper conduct:

8.1.1. The allegation that the SAPS: Limpopo Province failed to provide the Complainant with reasons why he had not been re-enlisted to the police service, is substantiated.

8.1.2. In terms of section 33 of the Constitution, 1996 read with section 3(2)(b) of PAJA, every person has a right to administrative action that is lawful, reasonable and procedurally fair.

8.1.3. Furthermore, that everyone whose rights have been adversely affected by administrative action has a right to be provided with written reasons for the administrative action.

8.1.4. Section 1 of PAJA defines administrative action as, inter alia, any decision taken or any failure to take a decision, by an organ of state, when exercising a public power in terms of the Constitution or Provincial constitution or exercising a public power or performing a public function in terms of any legislation,...which adversely affects the rights of any person and which is has a direct, external legal effect.

8.1.5. The SAPS exercises a public function in terms of the Police Service Act, 1995, therefore, the re-enlistment of former members of the SAPS to the police service constitutes administrative action articulated in section 33 of the Constitution, 1996 read with section 3(2)(b) of PAJA, 2000, is applicable to it.

- 8.1.6. The SAPS has a constitutional and statutory duty to observe the provisions of just administrative action as expanded in section 33 of the Constitution, 1996 read with section 3 of the Promotion of Administrative Justice Act, 2000. Therefore, the SAPS has a duty to give the Complainant a clear statement of its decision of not re-enlisting him to the police service.
- 8.1.7. Therefore, in line with PAJA, 2000 the Complainant was supposed to have been informed, at the time of him making inquiries regarding why he had not been re-enlisted to the police service that the positions of Colonels were not approved by the SAPS' Head Office due to non-availability of posts. Instead, he was provided with various inadequate reasons which seemed evasive and dismissive and therefore contrary to the ethos espoused by PAJA, 2000.
- 8.1.8. In the circumstances, I am persuaded to conclude that the failure by the SAPS: Limpopo Province to observe the constitutional and statutory duty of the provisions of just administrative action as expanded in section 33 of the Constitution, 1996 read with section 3 of the PAJA, 2000 constituted improper conduct as envisaged by section 182(1)(a) of the Constitution, 1996 and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994.

9. **REMEDIAL ACTION**

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying maladministration, improper conduct and the abuse of power referred to in this report is the following:

9.1. **The National Commissioner of the SAPS, General, Khehla Sitole, to;**

9.1.1. Take cognisance of the findings of maladministration and improper conduct mentioned in the report;

9.1.2. Include in his oversight role over the SAPS: Limpopo Province, the monitoring of implementation of remedial action taken in pursuit of the findings in terms of the powers conferred under section 182(2)(c) of the Constitution, 1996.

9.2. **The Provincial Commissioner: SAPS Limpopo Province, Lieutenant-General Nneke Ledwaba to;**

9.2.1. Take cognisance of the findings of maladministration and improper conduct mentioned in the report and ensure that such action is not repeated in the future; and

9.2.2. Ensure that within thirty (30) days of receipt of this report, the Complainant is provided with the final outcome of his application providing adequate reasons why he had not been re-enlisted to the police service.

10. **MONITORING**

10.1. The National Commissioner of the SAPS must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraphs 9.1 of this Report will be implemented;

- 10.2. The Provincial Commissioner of the SAPS: Limpopo Province must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 9.2 of this Report will be implemented; and
- 10.3. All actions directed in this report as part of a remedial action taken in terms of the Public Protector's powers under section 182(2)(c) of the Constitution, 1996 must be finalised within six (6) months from date of the report.
11. In line with the Constitutional Court decision in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the National Commissioner of the SAPS and the Provincial Commissioner of the SAPS: Limpopo Province, unless a Court Order directs otherwise.



ADV BUSISIWE MKHWEBANE
THE PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA

DATE: 31/05/2021

Assisted by: Mr Masekela Maphosa, Senior Investigator: Investigations Branch