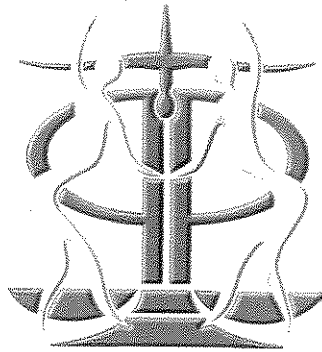


REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO. 32 of 2010/2011

Justice delayed

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF AN UNDUE DELAY IN THE PROCESSING OF AN APPEAL APPLICATION BY MORETELE MAGISTRATES COURT, DUE TO MISSING CASE RECORDS

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Executive Summary

- (i) The Public Protector received and investigated a complaint from Mr Siphon Makgatho (the Complainant) regarding an alleged undue delay by Moretele Magistrates Court to process his appeal application and its failure to reconstruct his case records. He applied for legal aid on two occasions, but he received no response to the first application, and his second application was refused.
- (ii) From the investigation it was found that:
 - (a) It is the responsibility of the Department of Justice and Constitutional Development (the Department), as the custodian of the information of all cases that are brought before court, to ensure that records of such information are kept secured, which the Department has failed to do.
 - (b) The Moretele Magistrates Court is responsible for the loss of the case records.
 - (c) The Clerk of the Court failed to reconstruct the case records.
 - (d) The Complainant was not afforded an opportunity to apply to the court for condonation of late filing of his notice of appeal in terms of section 309B (1) (a) of Criminal Procedure Act, 1977 (the CPA)
 - (e) The Complainant's right to a fair hearing as envisaged in section 35 of the Constitution was undermined.

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- (f) The actions of the Department constituted improper conduct as envisaged in section 182 of the Constitution and the Public Protector Act, 1994.
- (iii) The following remedial action was taken:
- (a) Currently the Department has completed a project to renovate the court building of the Moretele Magistrates Court, and further inspection was conducted to assess the state of affairs.
 - (b) From what was found during this visit it was clear that the management of the court has taken reasonable steps to upgrade the filing system. Files are now kept safely in a separate room and orderly placed in filing cabinets.
 - (c) The improvement of the filing system means that future recurrences of similar matters are curbed and that the appeals office functions efficiently. This will also ensure that all information filed can be accounted for.
 - (d) The Complainant, has been released from prison on parole and therefore will no longer be pursuing the appeal process.
 - (e) In addition, the Director General of the Department must apologise to the Complainant for the prejudice suffered as a result of the loss of records and the failure to remedy the situation expeditiously.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF AN UNDUE DELAY IN THE PROCESSING OF AN APPEAL APPLICATION BY MORETELE MAGISTRATES COURT, DUE TO MISSING CASE RECORDS.

1. INTRODUCTION

- 1.1 This report is submitted 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), to the Director General of the Department of Justice and Constitutional Development, the Court Manager and the Area Court Manager, Moretele Magistrates Court.
- 1.2 A copy is provided to Mr S Makgatho (the Complainant) in terms of section 8(3) of the Public Protector Act.
- 1.3 It relates to an investigation by the Public Protector of a complaint received from the Complainant regarding an alleged failure by Moretele Magistrates Court to process his appeal, the failure of the Clerk of the Court to reconstruct the case records, and the alleged failure of the Legal Aid Board (LAB) to provide him with legal aid.
- 1.4 This report is submitted subsequent to submission of the Public Protector's Report Number 10 of 2008/9 which is a report on an investigation into the causes of delays in the administration of criminal appeals lodged by prisoners. The nature of the complaint, in general, in this matter is similar to some of the issues raised in the report. However the investigation herein was restricted to Moretele Magistrates Court and to this particular complaint.

2. THE COMPLAINT

- 2.1 On 24 January 2006 the Complainant approached the Public Protector alleging that:
- 2.2 He is serving a sentence of 18 years imprisonment after he was convicted and sentenced for illegal possession of a fire-arm and ammunition. He was sentenced by Temba Regional Court on 23 September 2001.
- 2.3 He submitted his notice of appeal immediately after he was sentenced but did not receive an acknowledgement of receipt.
- 2.4 Upon enquiry, with the Clerk of the Court regarding the matter, he was informed that his case could not be dealt with as his case records were missing and he was advised to submit an application for assistance to the LAB.
- 2.5 He submitted his application for legal aid in February 2003 and reference number 096841/03 was allocated to him. However, he advised that he received no further communication from the LAB on the matter.
- 2.6 He continued to make enquiries with the Clerk of the Court and in 2005 the Clerk of Court requested him to submit a warrant of committal to enable the Clerk of the Court to reconstruct the case records and advised him to submit an application for legal aid with the LAB.
- 2.7 He submitted the warrant of committal on 5 April 2005, and receipt thereof was acknowledged by the Clerk of the Court but the records were not reconstructed.

2.8 The Complainant approached several institutions for assistance until he was advised by the Independent Complaints Directorate to approach the Public Protector for assistance in the matter.

3. JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector, as mandated by section 182 of the Constitution, has the power to investigate any conduct in state affairs, or in public administration in any sphere of government, that is alleged or is suspected to be improper or to result in any impropriety or prejudice.
- 3.2 Section 182(1)(b) and (c) provides that the Public Protector has the power to also report on the conduct which is subject to investigation and to take appropriate remedial action.
- 3.3 In terms of section 181(2) of the Constitution, the Public Protector is an independent institution that must be impartial and must exercise its powers without fear, favour or prejudice.
- 3.4 Section 6(4) (a) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.
- 3.5 Section 6(9) of Public Protector Act provides for the investigation of a complaint or matter reported more than two years from the date of occurrence of the incident or the matter, where exceptional circumstances exist. Considerations such as the prolonged communication between the Complainant and the Clerk of Court, failure to finalise the matter, failure to reconstruct case records after an

undertaking to do so was made, the continued prejudice suffered by the Complainant, as well as his constitutional right to appeal, were viewed as enough grounds to justify investigation of the matter.

4. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act, and comprised:

4.1 Key sources of information

4.1.1 A meeting with the Complainant;

4.1.2 A meeting with the Clerk of Court.

4.1.3 Inspection of the filing system on several occasions; and

4.1.4 Consideration of the relevant legislation.

4.2 Summary of the investigation process and evidence

4.2.1 A brief interview was held with the Complainant on 9 June 2006 where he reiterated most of the facts contained in the letter of complaint and he submitted further documentation to support his case.

4.2.2 He submitted proof of submission of a warrant of committal.

4.2.3 He indicated that he submitted his appeal within 14 days from the date of sentence, but could not provide any proof as to the date for the filing of the alleged notice of appeal.

- 4.2.4 On 9 June 2006 a meeting was held with the Clerk of Court where he indicated that he was aware of the Complainant's matter and that he was communicating with the Complainant regularly.
- 4.2.5 He reported that the Complainant submitted his notice of appeal after he was convicted and sentenced, and that the only application he was aware of was the one that the Complainant submitted in 2003.
- 4.2.6 He then advised the Complainant to apply for legal aid as there was no record of the initial application but this application was refused because of late submission.
- 4.2.7 After realising that the case records were missing, he requested the Complainant to submit a warrant of committal to enable him to reconstruct the case records, which the Complainant did. However, he could not reconstruct the records as the presiding officer had since been transferred to another court.
- 4.2.8 During the visit to the court, an inspection of the records office was conducted and the following was observed:
- 4.2.8.1 The filing system was in disarray;
 - 4.2.8.2 Some files were kept in broken filing cabinets and others were lying on the floor; and
 - 4.2.8.3 There was no proper file management system in place.

4.3 Evaluation of evidence

- 4.3.1 The Complainant submitted a written notice of appeal after he was sentenced.

- 4.3.2 The Clerk of Court could not locate the case records as the charge sheet and the transcripts were missing from the case file.
- 4.3.4 The Complainant submitted another application in 2005 and the Legal Aid Board refused to assist him due to late submission of the application.
- 4.3.5 After realising that the case records were missing the clerk of the court did not take necessary and appropriate steps to ensure that the case records were reconstructed, except to inform the Complainant that the case records were missing from the case file.
- 4.3.6 The Complainant submitted a warrant of committal to the clerk of the court on 5 April 2005 after he was requested to do so by the latter, and an acknowledgement of receipt dated 14 April 2005 was sent to him. However the clerk of court failed to reconstruct the case records.
- 4.3.7 The case records were lost because the filing system was in a shocking state as the filing cabinets are old, not properly placed and maintained.
- 4.3.8 Some of the court records and loose papers were lying everywhere on the ground in the filing room. Under the circumstances it would be difficult for the clerk of court to trace any document with ease.

5. REGULATORY FRAMEWORK

5.1 The Constitution

5.1.1 Section 35(3)(o) of The Constitution provides that every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court.

5.1.2 Chapter 8 of the Constitution provides for the administration of courts and constitutional development as the responsibility of the Department assisted by Judges, Magistrates, and the Prosecuting Authority.

5.2 Criminal Procedure Act, 1977

5.2.1 Section 309B (1)(a) of Criminal Procedure Act, 1977 (the CPA) provides that any accused person who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.

5.2.2 In terms of section 309B (1)(b) an application in terms of section 309B (1) (a) must be made within 14 days after the passing of the sentence or order following on the conviction or within such extended period as the court on application and for good cause shown, allows.

5.2.3 The duties of the Clerk of Court relating to applications for leave to appeal in Magistrates Courts are provided for in section 309B of the CPA as amended. Amongst others, the duty of the Clerk of Court is to submit proper court records in all appeal cases to the court hearing the appeal, give notice of the date of the hearing to the accused and the Director of Public Prosecutions.

6. CONCLUSION

- 6.1 The on site inspection revealed that the Department did not take the necessary steps to ensure that the filing system was in order and that the files were kept safely.
- 6.2 The Clerk of the Court could not process the Complainant's appeal as required by law, despite having engaged with the Complainant for a considerable period as well as the receipt of a warrant of committal from the Complainant.
- 6.3 The Complainant could not exercise his constitutional right to appeal against his sentence because the Department lost his case records and no reasonable steps were taken to reconstruct these records.
- 6.4 The Complainant's application for legal aid was unsuccessful due to the late submission thereof to the LAB.

7. FINDINGS

- 7.1 It is the responsibility of the Department, as the custodian of the information of all cases that are brought before court, to ensure that records of such information are kept secured, which the Department has failed to do.
- 7.2 The Moretele Magistrates Court is responsible for loss of the case records.
- 7.3 The Clerk of Court failed to reconstruct the case records.

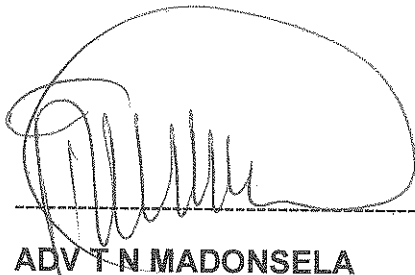
- 7.4 The Complainant was not afforded an opportunity to apply to the court for condonation of late filing of his notice of appeal in terms of section 309B (1)(a) of the CPA.
- 7.5 The Complainant's right to a fair hearing as envisaged in section 35 of the Constitution was undermined.
- 7.6 The actions of the Department constituted improper conduct as envisaged in section 182 of the Constitution and the Public Protector Act.

8. REMEDIAL ACTION

- 8.1 Currently the Department has completed a project to renovate the court building of the Moretele Magistrates Court and further inspection was conducted to assess the state of affairs.
- 8.2 From what was found during this visit it was clear that the management of the court has taken reasonable steps to upgrade the filing system. Files are now kept safely in a separate room and orderly placed in filing cabinets.
- 8.3 The improvement of the filing system means that future recurrences of similar matters are curbed and that the appeals office functions efficiently. This will also ensure that all information filed can be accounted for.
- 8.4 The Complainant has been released from prison on parole and therefore will no longer be pursuing the appeal process.
- 8.5 In addition, the Director General of the Department must apologise to the Complainant for the prejudice suffered as a result of the loss of records and the failure to remedy the situation expeditiously.

9. MONITORING

- 9.1 The Director General of the Department should submit a report regarding action to be taken in response to this report by 15 February 2011.



ADV T.N. MADONSELA

**PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA**

DATE: 29/03/2011

Assisted by: C V Motshoene: Investigator and G R Mataboge: Regional
Manager