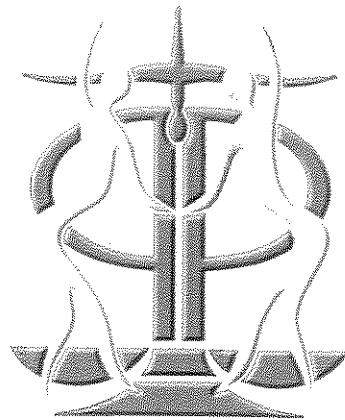


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION  
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH  
AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR  
ACT, 1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**REPORT NO. 41 OF 2010/2011**

***"Sheriff off the hook?"***

**REPORT ON AN INVESTIGATION INTO THE ALLEGED REFUSAL BY THE  
SOUTH AFRICAN BOARD FOR SHERIFFS TO INSTITUTE A DISCIPLINARY  
ENQUIRY INTO THE CONDUCT OF THE SHERIFF FOR WYNBERG NORTH**



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## INDEX

<b>Executive Summary</b>	<b>3</b>
1. INTRODUCTION	5
2. THE COMPLAINT	5
3. JURISDICTION OF THE PUBLIC PROTECTOR	7
4. THE INVESTIGATION	8
4.1 KEY SOURCES OF INFORMATION	8
4.2 SUMMARY OF THE INVESTIGATION PROCESS AND EVIDENCE	9
4.3 EVALUATION OF EVIDENCE	10
5. REGULATORY FRAMEWORK	11
6. CONCLUSION	13
7. FINDINGS	14
8. REMEDIAL ACTION	14
9. MONITORING	15

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## **Executive Summary**

- (i) The Public Protector conducted an investigation regarding the alleged refusal by the South African Board for Sheriffs (the Board) in Cape Town to institute disciplinary action against the Sheriff for Wynberg North (the Sheriff). The complaint can be summarised as follows:
- (a) Messrs Malcolm Gessler Incorporated Attorneys (the Complainant), on behalf of their client, Mr. R van den Berg (the Client), approached the Public Protector with a complaint pertaining to the refusal of the Board to institute disciplinary action against the Sheriff, Mr. J G Terblanche. The Complainant mentioned that his client was the plaintiff in a civil matter (interpleader proceedings) in which the Magistrate ruled on 24 November 2000 that the Sheriff had been negligent in his failure to set down the interpleader proceedings timeously as a result of which movable assets were released from attachment.
  - (b) On 15 July 2004 the Complainant lodged a formal complaint with the Board and requested for a disciplinary enquiry with regard to the Sheriff's failure to set down the interpleader proceedings timeously. Proof of the Client's claim and litigation taken at that stage, were also provided to the Board.
  - (c) After several months of having not heard from the Board, the Complainant again on 3 occasions submitted the same documents to the Board after the Complainant had been informed that the Board had misplaced/lost the documents.
  - (d) On 8 August 2007 the Board advised the Complainant that the Board had resolved not to take disciplinary action against the Sheriff on the basis that a disciplinary action against a Sheriff should be instituted within a reasonable period. To institute disciplinary action against the Sheriff after seven years, would not have been reasonable.

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- (ii) The Public Protector found that-
- (a) The Complainant's allegation that the Board had improperly failed to institute a disciplinary enquiry against the Sheriff for Wynberg North was substantiated.
  - (b) On its own admission the Board had lost the Complainant's initial complaint and claim despite its statutory duty of recordkeeping as stipulated in section 44 of the Sheriffs Act, 1986. This action is found to have been improper and constitutes maladministration. The Complainant's Client was prejudiced by the maladministration.
  - (c) The amount of time it took for the Board to decide on the Complainant's request for a disciplinary enquiry was unnecessarily long and accordingly constitutes maladministration. The Complainant and /or the Complainant's Client were prejudiced by the maladministration.
- (iii) Remedial action to be taken is that:
- (a) The Board must duly exercise its powers in terms of section 45 of the Sheriffs Act, 1986 and the Disciplinary Code and Procedures, within 2 months of the issue and receipt of the Public Protector's report by the Board and/or the Board's Executive Manager.
  - (b) The Board must apologise to the Complainant for the inconvenience caused as a result of not having properly dealt with the matter.

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**REPORT ON AN INVESTIGATION INTO THE ALLEGED REFUSAL BY THE SOUTH AFRICAN BOARD FOR SHERIFFS TO INSTITUTE A DISCIPLINARY ENQUIRY INTO THE CONDUCT OF THE SHERIFF FOR WYNBERG NORTH**

**1. INTRODUCTION**

- 1.1 This report is submitted to the Executive Manager of the South African Board for Sheriffs in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 A copy is provided to the Complainant in terms of section 8(3) of the Public Protector Act.
- 1.3 A further copy for information is presented to the Minister of Justice and Constitutional Development.
- 1.4 The report relates to an investigation undertaken by the Public Protector following allegations of the improper refusal by the Board to institute a disciplinary enquiry into the conduct of the Sheriff Wynberg North.

**2. THE COMPLAINT**

- 2.1 Messrs Malcolm Gessler Incorporated Attorneys (the Complainant) on behalf of a client, Mr R van den Berg (the Client), approached the Public Protector on 14 August 2009 with a complaint pertaining to the refusal of the South African Board for Sheriffs (the Board) to institute a disciplinary action against the Sheriff for Wynberg North, Mr J G Terrblance (the Sheriff). The Complainant mentioned that his Client was the plaintiff in a civil matter (interpleader proceedings) in which the Magistrate ruled on 24 November 2000 that the Sheriff had been negligent in his failure to set down the

interpleader proceedings timeously as a result of which movable assets were released from attachment.

- 2.2 Subsequently proceedings on a civil basis against the Sheriff have been instituted by the Client. Judgment was obtained against the Sheriff and a warrant of execution was issued. The Sheriff applied unsuccessfully for a rescission of judgment. The Complainant's client subsequently approached the Board for advice on dealing with the matter against the Sheriff.
- 2.3 On 15 July 2004 the Client met with a representative of the Board, Mr X A Ngesi, the latter who advised the Client that the best option in the circumstances would be to request the Board to commence with a disciplinary action against the Sheriff, where after, the Board would be in a better position to address the Client's claim against the Sheriff with a view of having his damages settled by the Fidelity Fund. The Client was furthermore advised to lodge a claim simultaneously with a third party insurer, as he would merely be running up unnecessary costs in the civil suit, due to the dismal failure of insurance companies to pay out in claims such as the one being dealt with. Subsequently, the Complainant on the same date lodged a formal complaint with the Board and requested for a disciplinary enquiry. Proof of the Client's claim and civil action taken at that stage, were also provided to the Board.
- 2.4 After several months of having not heard from the Board, the Complainant again contacted the Board and was informed that Mr Ngesi was no longer with the Board and that a Mr Phillips has taken over the matter. According to Mr Phillips the Board had lost its file relating to the Client's claim and requested the Complainant again to provide the Board with the relevant documents. Subsequently, the Complainant again submitted the documents to the Board on 21 June 2006.

- 2.5 On 8 August 2007 the Board informed the Complainant in writing that disciplinary action against a Sheriff in accordance with the provisions of section 46 of the Sheriff's Act, 1986 (Sheriffs Act) should be instituted within a reasonable time and consequently the Board refused to proceed with disciplinary action against the Sheriff. According to the Complainant he was now being blamed for the delay in the institution of the disciplinary enquiry, whereas the Complainant had on no less than four occasions submitted the relevant documentation to the Board.
- 2.6 According to the Complainant the costs occasioned by the matter, now outweighs any financial relief that the Client could possibly gain out of the pursuit of any civil claim. The failure on the part of the Board to institute a disciplinary enquiry, is in fact unacceptable on the basis that the request took too long.

### **3. JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1 The Public Protector was established in terms of Chapter 9 of the Constitution to strengthen the Constitution and its additional powers are conferred by the Public Protector Act and other statutes.
- 3.2 In terms of Section 182(1) of the Constitution the Public Protector has the power 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, to report on that conduct and to take appropriate remedial action.
- 3.3 Section 6(4)(a)(i) of the Public Protector Act states that the Public Protector shall, be competent-

*“ (a) To investigate, on his or her own initiative or on receipt of a complaint, any alleged-*

- (i) maladministration in connection with the affairs of government at any level;*
- (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;...*

*(b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by-*

- (i) mediation , conciliation or negotiation;*
- (ii) advising, where necessary any complainant regarding appropriate remedies;...”*

3.4 Section 6(4)(c) (iii) of the Public Protector Act states that the Public Protector shall be competent to make an appropriate recommendation, at any time prior to, during or after an investigation, if he or she deems it advisable, regarding the redress of the prejudice resulting there from or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

3.5 The complaint accordingly falls within the mandate of the Public Protector.

#### **4. THE INVESTIGATION**

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

##### **4.1 Key sources of information**

4.1.1 Various written and telephonic communications were exchanged between the Complainant, the Public Protector and the Board.

4.1.2 The Board's Disciplinary Code and Procedures and the Sheriffs Act were perused.

4.1.3 Meetings were held with the Complainant and the Executive Manager for the Board, Mr C America.

#### **4.2 Summary of the investigation process and evidence**

4.2.1 Mr. C America, Executive Manager for the Board firstly responded and admitted that the file relating to the complaint lodged with the Board on 15 July 2000, appeared to have been misplaced whilst the Board was capturing all complaints on a new electronic complaints system. According to Mr America he had met with the Client on several occasions regarding the complaint. The Executive Manager further explained that, based on the default judgment obtained against the Sheriff, the Client wanted to use the judgment as leverage against the Sheriff to have him pay the money as claimed in the Client's summons and subsequent judgment. Added to this, the Complainant insisted that the Sheriff be disciplined. According to the Board it appeared from the response received from the Sheriff, that the latter had successfully applied for rescission against the judgment on the basis that the claim was without merit.

4.2.2 The Executive Manager denied that the Board had indicated to the Complainant and/or the Client that the Board was considering disciplinary action against the Sheriff. However, the Board did undertake to re-visit the complaint and to take a decision based on the facts at its disposal at the time. In a follow up report the Board however indicated that it had not been provided with sufficient grounds in order to take action against the Sheriff.



The Board did not respond to the Public Protector's request for comments in respect of the preliminary findings of its investigation.

4.2.3 Section 46 of the Sheriffs Act provides for the Board to enquire into a complaint/charge at a time and place determined by the Board, unless an admission of guilt fine has been determined and paid in accordance with the provisions of section 45 of the Act. Section 47 of the Act provides that a Sheriff shall be guilty of improper conduct, *inter alia*, if he/she is negligent in the service, or execution of any process.

4.2.4 Annexure "A" of the Board's "Disciplinary Code and Procedures" categorizes negligent conduct in the service or execution of any process on the part of a Sheriff as a "Category A" (serious) improper conduct.

#### **4.3 Evaluation of evidence**

4.3.1 The Wynberg Magistrate Court under Case number 37348/98, in subsequent interpleader proceedings, ruled that the Sheriff had been negligent in his failure to set down interpleader proceedings timeously, as a result of which the movable assets were released from attachment.

4.3.2 It is common cause that the Client and subsequently, the Complainant lodged a complaint with the Board against the Sheriff based on the ruling of the above court and the advice given by a former employee of the Board, Mr Ngesi, following a meeting between the Complainant, the Client and Mr Ngesi.

4.3.3 On no less than four occasions, details of the complaint and supporting documents were provided to the Board with the request to institute a disciplinary enquiry into the conduct of the Sheriff. After the file had been misplaced/lost by the Board, the latter decided not to proceed with

disciplinary action against the Sheriff, due to the fact that a disciplinary action should have been instituted within a reasonable time in accordance with section 46 of the Sheriffs Act. However, at a later stage the Board indicated that it had not been provided with sufficient grounds to take action against the Sheriff.

4.3.4 From the information received from the Complainant, it appears that the Complainant's request to the Board to institute a disciplinary enquiry was reasonable in the circumstances, following the advice he received from a representative of the Board at the time. This information was put to the Board who failed to dispute or confirm the correctness or otherwise of this statement.

4.3.5 The matter was allowed to drag on for a considerable time to the prejudice of the Client due the Sheriff's negligence in setting down the interpleader proceedings.

## **5. REGULATORY FRAMEWORK**

5.1 The regulatory framework within which this matter is to be assessed is as follows:

### **5.1.1 Law**

#### **5.1.1.1 The Constitution**

Section 32(1) states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair

#### **5.1.1.2 The Sheriffs Act, 90 of 1986**

- (a) Section 43 of the Sheriffs Act provides that if a Sheriff is negligent in the execution of any process, the Sheriff shall be guilty of improper conduct. In terms of section 44 of the Act, any complaint, accusation or allegation against a Sheriff may be lodged with the Board in the prescribed manner and the Board is to keep record of each such complaint, accusation or allegation lodged with the Board.
- (b) Section 45 provides that the Board may, on its own initiative or upon the lodging of a complaint, accusation or allegation referred to in section 44(1), charge a Sheriff by a notice in writing with improper conduct.
- (c) Section 46 provides for the Board to enquire into a charge/complaint of improper conduct at a time and place determined by the Board, unless an admission of guilt fine has been determined and paid in accordance with the provisions of section 45 of the Act. No reference is made with regard to the period within which disciplinary action against a Sheriff should be instituted.
- 5.1.1.3 The Board's "Disciplinary Code and Procedures" categorizes negligent conduct in the service or execution of any process on the part of a Sheriff, as "Category A"(serious) improper conduct.
- 5.1.1.4 Rule 44(2)(a)(i) of the Magistrates Court Act, 1942 provides that :

*"Where any person other than the execution debtor (hereinafter in this rule referred to as the 'the claimant') makes any claim to or in respect of property attached by the sheriff in execution of any process of the court and the execution creditor has not admitted the claim within the period referred to in rule 39(6) or where any such claimant makes any claim to the proceeds of property so attached and sold in execution the sheriff shall forthwith prepare and sue out a summons in the form prescribed for the purpose in Annexure 1 of the rules calling upon the claimant and the*

*execution creditor to appear on the date specified in the summons to have the claim of the claimant adjudicated upon.”*

## 6. CONCLUSION

- 6.1 The Complainant requested the Board from 2004 until 2007 to institute a disciplinary enquiry into the conduct of the Sheriff's failure to institute interpleader proceedings timeously. This followed on advice that was given to the Complainant by a representative of the Board.
- 6.2 Having not received a reply from the Board for several months, the Complainant again contacted the Board on 21 June 2006 and was informed that the Board had lost its file relating to the Complainant's complaint and claim. The Complainant was requested to provide the Board again with copies of the relevant documents.
- 6.3 The Complainant was subsequently informed on 8 August 2007 that the Board has resolved not to institute a disciplinary enquiry against the Sheriff based on the fact that disciplinary action should have been instituted within a reasonable period of time in accordance with the provisions of section 46 of the Sheriffs Act. It is submitted that the Board's interpretation of section 46 is not correct and therefore cannot be regarded as legal basis for failure to take disciplinary action against the Sheriff.
- 6.4 Section 46 of the Sheriffs Act provides for the enquiry into a complaint of improper conduct on the part of a Sheriff by the Board if no admission of guilt fine had been determined and paid by a Sheriff. No mention is made with regard to the period within which disciplinary action should be instituted against a Sheriff following receipt of a complaint relating to improper conduct.

- 6.5 From the Disciplinary Code and Procedures applicable to Sheriffs, negligent conduct on the part of a Sheriff, is regarded as serious improper conduct.

## **7. FINDINGS**

- 7.1 The Complainant's allegation that the Board had improperly failed to institute a disciplinary enquiry against the Sheriff for Wynberg North was substantiated.
- 7.2 On its own admission the Board had lost the Complainant's initial complaint and claim despite its statutory duty of recordkeeping as stipulated in Section 44 of the Sheriffs Act, 1986. This action is found to have been improper and constitutes maladministration. The Complainant's Client was prejudiced by the maladministration.
- 7.3 The amount of time it took for the Board to decide on the Complainant's request for a disciplinary enquiry was unnecessarily long and accordingly constitutes maladministration. The Complainant and /or the Complainant's Client were prejudiced by the maladministration.

## **8. REMEDIAL ACTION**

- 8.1 Remedial action to be taken in terms of section 182(1)(c) of the Constitution is that:
- 8.1.1 The Board must duly exercise its powers in terms of section 45 of the Sheriffs Act and the Disciplinary Code and Procedures, within 2 months of the issue and receipt of the Public Protector's report by the Board and /or the Board's Executive Manager.

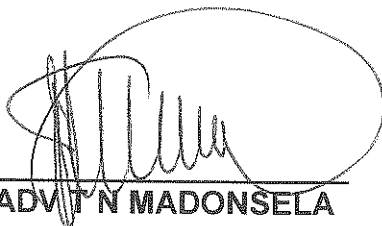
8.1.2 The Board must apologise to the Complainant for the inconvenience caused as a result of not having properly dealt with the matter.

## 9. MONITORING

9.1 The Executive Manager of the Board for Sheriffs is required to:

9.1.1 Acknowledge receipt and indicate whether or not the report is accepted, within 10 days of the date of the report; and

9.1.2 Provide the Public Protector with an action plan for the implementation of the report within 30 days of the date of the report.



ADV T N MADONSELA

PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

DATE: 8/03/2011

Assisted by: Adv G P J Landman, Investigator: Western Cape.