



**PUBLIC SERVICE COMMISSION
REPUBLIC OF SOUTH AFRICA**

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Commission House, Cnr Hamilton & Ziervogel Streets, Arcadia, Pretoria, 0083

Mr Z Mbhele, MP
Shadow Minister of Police
Democratic Alliance
PO Box 15
CAPE TOWN
8000

Dear Mr Mbhele

RE: INVESTIGATION INTO THE SAPS DISCIPLINARY PROCEEDINGS AGAINST MR RICHARD MDLULI

The Honourable Member's letter dated 04 July 2017, refers.

The Public Service Commission (PSC) has finalised its investigation into the delay in the finalization of the disciplinary process against Mr Mdluli and the reasons for the continued precautionary suspension, in terms of the provisions of section 196(4)(f)(i) of the *Constitution of the Republic of South Africa*, 1996. The final report containing findings and recommendations, is attached.

The final report has also been forwarded to the Minister of Police, who has been requested to provide the PSC with feedback on the implementation of its recommendations.

Kind regards

**RK SIZANI
CHAIRPERSON**

DATE: 17/01/2018



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Custodian of Good Governance

**REPORT ON AN INVESTIGATION INTO THE
DELAY OF THE FINALISATION OF THE
DISCIPLINARY PROCESS IN RESPECT OF
MR RICHARD MDLULI: SOUTH AFRICAN
POLICE SERVICES**

JANUARY 2018

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GLOSSARY OF TERMS

FUL	Freedom under Law
NPA	National Prosecuting Authority
PSC	Public Service Commission
MP	Member of Parliament
SAPS	South African Police Service
SCA	Supreme Court of Appeal

LIST OF TAGS

(All tags are available in the attached CD)

Document	Tag
Letter dated 04 July 2017 from Mr Z Mbhele MP, Shadow Minister of Police of the Democratic Alliance	A
Letter dated 05 July 2017 from the PSC, acknowledging receipt of Mr Mbhele's letter	B
Letter dated 06 July 2017 from the PSC addressed to the Minister of Police	C
Letter dated 10 August 2017 from the Acting National Commissioner	D
Notice of intended suspension in terms of Regulation 13(2) of the South African Police Service Discipline Regulations, 2006, dated 04 April 2011	E
Notice of suspension in terms of Regulation 13(1) of the South African Police Service Discipline Regulations, 2006, dated 29 April 2011	E1
Notice of intended suspension in terms of Regulation 13(2) of the South African Police Service Discipline Regulations, 2006, dated 02 November 2011	F
Letter dated 21 November 2011 from Maluleke Seriti Makume Matlala Inc, Attorneys	G
Letter dated 14 December 2011 from Acting National Commissioner Mkhwanazi	H
Undated report by Mr Mtshali	I
Notice to appear at a disciplinary hearing dated 03 February 2012	J
Letter dated 27 March 2012 uplifting the suspension	K
Letter dated 04 April 2012 re withdrawal of disciplinary charges	L
Notice of intended suspension in terms of Regulation 13(2) of the South African Police Service Discipline Regulations, 2006, dated 13 May 2012	M
Notice of suspension in terms of Regulation 13(1) of the South African Police Service Discipline Regulations, 2006, dated 25 May 2012	M1
Notice to appear at a disciplinary hearing dated 12 June 2012	N
Judgment dated 06 June 2012 re interdict against Mr Mdluli	O
Undated and unsigned Information Note to General MV Phiyega	O1
Legal Opinion dated 04 October 2012 by Senior Counsel	P
Letter dated 23 October 2012 to Mr Mdluli	P1
High Court application brought by FUL	Q

REPORT ON THE INVESTIGATION INTO THE DELAY IN FINALISING THE DISCIPLINARY PROCESS AND REASONS FOR CONTINUED PRECAUTIONARY SUSPENSION OF MR RN MDLULI

Document	Tag
Supreme Court of Appeal judgment	R
Appointment of Adv W Mokhari as employer representative	S
Memorandum dated 22 July 2016 by Adv Mokhari	S1
Memorandum dated 15 February 2017 from Adv Maenetje	T
Notice to appear at a disciplinary hearing dated 07 July 2017	U
Email dated 25 July 2017	V
Email dated 04 September 2017 to SAPS	W
Letter dated 04 September 2017 to Mr Mdluli	W1
Email dated 05 September 2017 from Mr Motloung	W2
Letter dated 07 September 2017 from Mr Motloung	X
E-mail dated 11 September 2017 from SAPS	Y
Letter to Minister of Police dated 26 September 2017 re draft report	Z
E-mail dated 10 October 2017 to Brigadier Odendaal	AA
Letter dated 17 October 2017 from the Minister of Police	BB
Letter dated 19 October 2017 to the Minister of Police	CC
Letter dated 02 November 2017 from the Minister of Police re draft report	DD
Biographical details of Mr Mdluli	EE
Letter dated 16 November 2017 to the Acting Chief State Law Adviser	FF
Legal Opinion dated 22 December 2017	GG

INTRODUCTION

1. In a letter dated 04 July 2017 (**Tag A**) Mr Z Mbhele MP, the Shadow Minister of Police of the Democratic Alliance, requested the Public Service Commission (PSC) to conduct an investigation into the delayed disciplinary proceedings against Mr RN Mdluli, employed at the South African Police Service (SAPS) as Head of Crime Intelligence. The Minister indicated in his letter that the suspension of Mr Mdluli has been dragging on for more than six years and has cost the tax payer more than R8 307 860. According to the Minister, the Minister of Police has not provided any useful updates on the status of the disciplinary process. Minister Mbhele therefore, requests that the reasons for the delay in the disciplinary process be investigated and action be taken to remedy this situation.
2. Subsequently, in a letter dated 05 July 2017 (**Tag B**), the Chairperson of the PSC acknowledged receipt of the Minister's letter and confirmed that the terms of reference for the investigation are to investigate –
 - 2.1 the delay in the finalisation of the disciplinary process against Mr Mdluli; and
 - 2.2 the reasons for the continued precautionary suspension of Mr Mdluli.
3. In a letter dated 06 July 2017 (**Tag C**), the PSC informed the Minister of Police of the investigation into the finalization of the disciplinary process against Mr Mdluli and the reasons for his continued precautionary suspension. The Minister was further requested to provide the PSC with the following documentation:
 - 3.1 The Disciplinary Code and Procedures and/or any regulations and guidelines followed by the SAPS in handling discipline and precautionary suspension.
 - 3.2 All letters of intention to suspend, representations by Mr Mdluli as well as letters for suspension issued by SAPS from 2011 to June 2017.
 - 3.3 Charge sheet(s) and written notices of hearing(s).
 - 3.4 Decision(s) of the Chairperson of the disciplinary hearing for the continuation of the precautionary suspension of Mr Mdluli from 2011 to June 2017.
 - 3.5 Documentation regarding the reasons why the precautionary suspension was not uplifted.
 - 3.6 Comprehensive reasons (including supporting documents such as submission) for the delay in finalizing the disciplinary process.
4. In a letter dated 10 August 2017 (**Tag D**) Lieutenant General Khan, Acting National Commissioner of the SAPS responded to the PSC's letter of 06 July 2017, providing a detailed explanation of the events up until July 2017 with supporting documentation. The information provided in the said letter with supporting documents, are discussed under Facts below.

FACTS

5. In a "Notice of intended suspension in terms of Regulation 13(2) of the South African Police Service Discipline Regulations, 2006" dated 04 April 2011 (**Tag E**) the former

National Commissioner, General BH Cele, informed Mr Mdluli of the intention to place him on suspension on the grounds that he had committed serious misconduct after he was implicated in murder and related charges. Mr Mdluli signed acknowledgment of receipt of the Notice on the same day.

- 29 April 2011 6. In a "Notice of suspension in terms of Regulation 13(1) of the South African Police Service Discipline Regulations, 2006", dated 29 April 2011 (Tag E1), the National Commissioner retrospectively informed Mr Mdluli of his precautionary suspension as from 20 April 2011.
7. According to Lieutenant General Khan's letter at Tag D, the State Attorney was requested to appoint Mr M Mtshali as investigator in the disciplinary proceedings against Mr Mdluli. However, the investigation did not proceed due to the fact that the National Prosecuting Authority (NPA) advised that the criminal case should first be finalized. In accordance with the advice of the NPA, the departmental investigation was stopped to allow the criminal case to be finalized first. It needs to be considered that this advice was not recorded formally. MB
- 22 Sept 2011 8. On 22 September 2011, Mr Mdluli was arrested and appeared in the Commercial Court on charges of fraud and corruption. Subsequently, in a "Notice of intended suspension in terms of Regulation 13(1) of the South African Police Service Discipline Regulations, 2006" (Tag F), dated 02 November 2011, Lt General NS Mkhwanazi, Acting National Commissioner at the time, notified Mr Mdluli of the intention to place him on suspension based on allegations of serious misconduct relating to allegations of fraud.
- 2 November 2011
- 21 Nov. 2011 9. In a letter dated 21 November 2011 (Tag G), Maluleke Seriti Makume Matlala Inc, Attorneys submitted representations against the intention to suspend Mr Mdluli. It is noted from the said letter that –
- 9.1 with regard to the notice to suspend of 04 April 2011, the 60 day period in terms of which a disciplinary hearing should be held, expired in June/July 2011. No such hearing was held and it is alleged that "The suspension was unilaterally and unlawfully extended by conduct" (paragraph 7);
- 20 Aug 2011 9.2 on 20 August 2011, General Cele in his capacity as National Commissioner, served Mr Mdluli with a notice of contemplated discharge;
- 9.3 following representations by Mr Mdluli's attorneys, General Cele decided not to proceed with the envisaged process and stated an intention to institute disciplinary proceedings in the light of new fraud and corruption charges;
- 2 Nov 2011 9.4 when Mr Mdluli received the notice of 02 November 2011, his suspension had not been revoked. The current notice of suspension does not make any reference to the previous suspension; and
- 9.5 Mr Mdluli could not be placed on suspension considering that his previous suspension had not been lifted.
- 16 Dec 2011 10. In a letter dated 14 December 2011 (Tag H) Mr Mdluli was informed by Acting National Commissioner Mkhwanazi, that he had decided to keep Mr Mdluli on suspension following his arrest for fraud and corruption.

PO's letter asking for reasons

11. Mr Mtshali was once again appointed as investigator in the disciplinary proceedings. In an undated report (**Tag I**) (a date in the top left hand corner of the document reflects **02 February 2012**), Mr Mtshali recommended that the allegations against Mr Mdluli should be referred to the appointed employer representative with a view to charge Mr Mdluli with misconduct and initiate the requisite disciplinary enquiry. In a "Notice to appear at a disciplinary hearing" dated **03 February 2012**, (**Tag J**) Mr Mdluli was notified to appear at a disciplinary hearing to be held on 13 February 2012. However, the notice could not be served on Mr Mdluli which meant that the hearing could not proceed.
- 27 March 2012. In a letter dated **27 March 2012** (**Tag K**) Mr Mdluli's suspension was uplifted by Acting National Commissioner Mkhwanazi and he was informed to resume his duties. In a letter dated 4 April 2012 (**Tag L**) Mr Mdluli was informed by the Acting National Commissioner that the departmental charges against him were withdrawn and the envisaged disciplinary hearing would not be conducted.
- 13 May 2012. In a "Notice of intended suspension in terms of Regulation 13(1) of the South African Police Service Disciplinary Regulations, 2006" (**Tag M**) dated **13 May 2012**, Acting National Commissioner Mkhwanazi informed Mr Mdluli of the intention to place him on suspension, based on new information relating to murder and mismanagement of finances of the state. On **25 May 2012** (**Tag M1**), Mr Mdluli was informed by Acting National Commissioner Mkhwanazi that he was suspended from duty. A Notice to appear at a Disciplinary Hearing dated 12 June 2012 (**Tag N**), was issued by the Employer Representative indicating that Mr Mdluli had to appear at the disciplinary hearing on 02 July 2012.
14. During June 2012, Freedom under Law (FUL), a public interest organization, brought an application before the North Gauteng High Court seeking an order interdicting Mr Mdluli from carrying out any duties as a member of the SAPS and against the SAPS, interdicting the employer from assigning any function or duty to Mr Mdluli. In a judgment dated **06 June 2012** (**Tag O**), the Court granted an interdict against Mr Mdluli not to discharge any function or duty as a member and senior officer of the SAPS, and against SAPS from assigning any function or duty to Mr Mdluli.
15. According to an undated and unsigned "Information Note" to General MV Phiyega, National Commissioner (**Tag O1**), the departmental disciplinary hearing of Mr Mdluli convened on **02 July 2012**. At the hearing, Mr I Motloutse, the attorney representing Mr Mdluli, requested a postponement of the hearing on the basis that a request for state funding of the legal costs by Mr Mdluli was submitted to General Phiyega. According to a legal opinion by Senior Counsel (**Tag P**), Mr Mdluli was not entitled to any legal representation at the state's expense during the internal disciplinary process. In a letter dated **23 October 2012** (**Tag P1**), Mr Mdluli was informed that his request had been declined.
16. According to Lieutenant General Khan's letter at **Tag D**, the chairperson appointed for the disciplinary hearing indicated during **December 2012**, that he withdrew from the hearing

ⓧ
-PWS
on the
legal
opinion
received

due to his involvement in the Marikana inquiry. General Phiyega was requested to appoint a new chairperson, but no formal instruction was received from her.

- Sept 2013 17. During September 2013, a High Court application was brought by FUL seeking an order by the Court directing the NPA to reinstate several withdrawn criminal charges against Mr Mdluli¹. The application also sought orders directing the National Commissioner of SAPS to reinstate withdrawn disciplinary charges against Mr Mdluli arising from the same alleged misconduct (Tag Q). In paragraph 6 of the Application, it is stated that –

"These review proceedings, brought in terms of Part B of the Notice of Motion, challenge the decisions of the first, second and third respondents to withdraw the criminal and disciplinary charges that were pending against Mdluli, who, though currently interdicted by this court from performing his duties, remains the Head of Crime Intelligence within SAPS; and, as stated, are aimed at reinstating the criminal and disciplinary charges forthwith. The present proceedings were preceded by an urgent application, in terms of Part A of the Notice of Motion, for an interim order interdicting Mdluli from carrying out his functions and the Commissioner from assigning any tasks to him pending the finalisation of the review proceedings. The interim order was granted by Makgoba J on 6 June 2012."

23 September 2013 On 23 September 2013, the High Court ordered amongst others, that –

- a) *"The decision made on 29 February 2012 by or on behalf of the second respondent in terms whereof the disciplinary proceedings instituted by the second respondent against the fifth respondent were withdrawn, is hereby reviewed and set aside."*(paragraph 241(c))
- b) *"The decision made on 31 March 2013 by or on behalf of the second respondent in terms whereof the fifth respondent was reinstated as Head of Criminal Intelligence in the South African Police Services with effect from 31 March 2012 is hereby reviewed and set aside."* (paragraph 241(d))
- c) *"The second respondent is ordered to reinstate disciplinary charges which had been instituted against the fifth respondent but were subsequently withdrawn on 29 February 2012, and to take such steps as are necessary to institute or reinstate disciplinary proceedings that are necessary for the prosecution and finalization of the aforesaid disciplinary charges, diligently and without delay."* (paragraph 241(f))

- 17 April 2014 18. During 17 April 2014 (Tag R) the National Director of Public Prosecutions, the Head: Specialised Commercial Crime Unit, the National Commissioner: South African Police Service and Mr Mdluli brought an application to the Supreme Court of Appeal² to review the decision of the High Court based on section 6 of the *Promotion of Administrative Justice Act*, 2000. The Supreme Court of Appeal indicated in paragraph [51] the following in respect of the institution of disciplinary proceedings:

¹ *Freedom Under Law v National Director of Public Prosecutions and Others* (26912/12) [2013] ZAGPPHC 271; [2013] 4 All SA 657 (GNP); 2014 (1) SA 254 (GNP); 2014 (1) SACR 111 (GNP) (23 September 2013)

² *National Director of Public Prosecutions v Freedom Under Law* (67/14)[2014] ZASCA 58 (17 April 2014)

"....Both the NDPP and the Commissioner contented that these mandatory interdicts were inappropriate transgressions of the separation of powers doctrine. I agree with these contentions. That doctrine precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way....".

19. According to Lieutenant General Khan's letter at **Tag D**, the chairperson in the initial hearing (Advocate Tip SC), did not extend the suspension of Mr Mdluli. Such suspension lapsed by operation of law. The reason why Mr Mdluli remained at home was due to the FUL judgement. It is further indicated that Mr Mdluli is no longer under suspension in terms of the SAPS Discipline Regulations, but *"released from duty, pending the finalization of his departmental matter in terms of a verbal agreement between General Phiyega and Lieutenant General Mdluli's legal representative, Mr Motlounq."*

ii April 20.
2016
22 July
2016

On 11 April 2016 Adv WR Mokhari was appointed as employer representative in the disciplinary matter against Mr Mdluli (**Tag S**). According to a Memorandum dated 22 July 2016 (**Tag S1**), Adv Mokhari indicated that subsequent to the SCA judgment, no disciplinary charges were preferred against Mr Mdluli relating to the murder and other related charges. He further indicated in paragraph 28 that –

".... Indeed such charges are so old that preferring disciplinary proceedings against an employee more than 10 years later would constitute an unfair labour practice."

In paragraph 29 of the Memorandum, he advised that the Department should negotiate with Mr Mdluli for purposes of settling the disputes with the ultimate result that he does not return to SAPS. Adv Mokhari proposed that the SAPS should consider Mr Mdluli's early retirement in terms of section 45(2) of the SAPS Act. If Mr Mdluli does not consent to early retirement, the National Commissioner should invoke his powers in terms of section 35(b) of the SAPS Act, to discharge Mr Mdluli on grounds of incompatibility and in the interest of the Service.

- 15 Feb
2017
21. According to a second Memorandum dated 15 February 2017 by Adv NH Maenetje (**Tag T**), he was appointed by the former acting National Commissioner, General JK Phahlane, as the employer representative to proceed with the disciplinary process against Mr Mdluli. Adv Maenetje also highlighted the difficulties in proceeding with the disciplinary case against Mr Mdluli after such a lengthy period of delay. However, if the instruction was to continue with the disciplinary matter, the SAPS would have to prepare a full explanation for the delay in proceeding against Mr Mdluli, either in Labour Court proceedings on affidavit, or before Motau SC through a witness testifying orally.

6 July 2017
25 July 2017

22. In a Notice to appear at a Disciplinary Hearing dated 06 July 2017 (Tag U), Mr Mdluli was notified to appear at a disciplinary hearing scheduled for 25 July 2017. In terms of an email dated 25 July 2017 between Mr B Minnaar, Senior State Attorney and Brigadier Odendaal (Tag V) it was agreed between the parties that –

- a) Mr Mdluli must deliver request for further particulars by 14 August 2017.
- b) The SAPS must answer by 28 August 2017.
- c) Points in limine must be raised by Mr Mdluli by 11 September 2017.
- d) The SAPS must answer by 25 September 2017.
- e) Heads of argument must be exchanged by 30 September 2017.
- f) Points in limine will be argued on 07 October 2017.
- g) The Hearing will proceed on 1, 2 and 3 November 2017.

4 Sept 2017

23. Additional information was requested from SAPS on 04 September 2017 (Tag W) with emphasis on the continued suspension of Mr Mdluli. In line with the *audi alteram partem* rule, Mr Mdluli was requested in a letter dated 04 September 2017 (Tag W1), to provide the PSC with any documentation that he has relating to the disciplinary process. As the SAPS did not have a contact number for Mr Mdluli, the letter was forwarded to his attorney, Mr Motloun. On 05 September 2017 (Tag W2), Mr Motloun requested that the envisaged procedure for the investigation of the disciplinary process is intended to unfold and the process involving all stakeholders, should be provided to him. In response, he was informed of the provisions of section 10 of the PSC Act, 1997 governing the process undertaken by the PSC in the investigation of complaints.

5 Sept 2017

7 Sept 2017

24. In a letter dated 07 September 2017 (Tag X), received via e-mail on 09 September 2017, Mr Motloun responded to the PSC's request for information. In the said letter, Mr Motloun raised a concern about the fact that Mr Mdluli had requested information from the State Attorney appointed as employer representative, but to date, had not received any information. Regarding the suspension of Mr Mdluli, the attorney indicates that –

"Lt Gen Mdluli is the Employee and did not suspend himself – the Employer did."

He further indicated that, after Mr Mdluli had submitted representations as to why he should not be suspended, the SAPS nevertheless went on to suspend him. According to Mr Motloun's letter, Mr Mdluli had challenged his suspension in the bargaining council, but the SAPS obtained a *"judgment by default"*. Subsequently, the attorney communicated with the State Attorney on the judgment, but no response was received to date.

In paragraph 15 of the letter, the attorney commented the following:

"It is just a strange coincidence that MP Mbhele seems to have directed enquiries to the PSC approximately 6 years after the suspension of Lt Gen Mdluli, and only after the Employer decided to reinstate the disciplinary process, and only after the Employer failed to furnish us with the requested further particulars on the same issues. Does it mean that MP Mbhele wants Lt Gen Mdluli's suspension (which is obviously unlawful in our view) to be uplifted, so that Lt Gen Mdluli may go back to work?..."

25. Brigadier D Odendaal, Section Head: Legal Support: Human Resource Management from SAPS, responded to the PSC's request for additional information regarding the continued suspension of Mr Mdluli, on 11 September 2017 (Tag Y). According to the said e-mail, Mr Mdluli did not return for duty in terms of any of the court judgement. Furthermore, the "release from duty" of Mr Mdluli is not informed by any legislative framework, but in terms of an arrangement between General Phiyega and Mr Motloun. This arrangement is not recorded in any written communiqué.

26. The Draft Report in respect of the PSC's Investigation into the Disciplinary Proceedings against Mr Mdluli, without recommendations, was forwarded to the Minister of Police for his comments, on 26 September 2017 (Tag Z). The Minister was requested to respond to the findings of the PSC by 06 October 2017. As the Minister did not respond by the due date of 06 October 2017, telephonic enquiries were made with the Office of the Minister on 10 October 2017. The draft report was also forwarded to Brigadier Odendaal on the same day (Tag AA). Subsequently, in a letter dated 17 October 2017 (Tag BB), the Minister responded to the PSC's letter of 26 September 2017, requesting extension to respond in detail to the PSC's report. The Minister's request was acceded to and in a letter dated 19 October 2017 (Tag CC), the Minister was requested to respond to the PSC's report by 27 October 2017. In a letter dated 02 November 2017 (Tag DD), received via e-mail on 07 November 2017, the Minister indicated that he had sought legal counsel on the PSC's report and accepted the report as factually correct. The Minister also accepted that the findings are negative against the SAPS, but that it is justifiable based on the evidence before the PSC. The Minister therefore, accepted the PSC's report.

27. The PSC concluded its report on the Investigation into the Disciplinary Proceedings against Mr Mdluli, but thought it prudent to obtain a legal opinion from the Chief State Law Adviser on its findings and recommendations before submitting the report to the Minister of Police and the Shadow Minister of Police of the Democratic Alliance. Subsequently, in a letter dated 16 November 2017 (Tag EE), Ms S Masupa, Acting Chief State Law Adviser was requested to provide the PSC with a legal opinion on the matter.

28. The Office of the Chief State Law Adviser provided the PSC with a legal opinion on 22 December 2017 (Tag FF). According to the legal opinion, the Office of the Chief State Law Adviser agreed with the findings of the PSC. However, in paragraph 12 of the legal opinion, the Office of the Chief State Law Adviser considered the scenario should the outcome of the disciplinary hearing be in the favour of Mr Mdluli. In such case, it is advised that the SAPS should, taking into account the charges against Mr Mdluli and the length of time that he has been away from his employment, consider discharging him from service in terms of the section 35(b) of the *South African Police Service Act*, 1995. In the event that the SAPS is not successful in discharging Mr Mdluli from the service in terms of section 35(b) of the Act, the SAPS may allow Mr Mdluli to go on retirement in terms of section 45(1) of the Act or on early retirement in terms of section 45(2) of the Act.

REGULATORY FRAMEWORK AND CASE LAW

29. The regulatory framework relating to the disciplinary procedure and precautionary

suspension, is as follows:

Section	Provision
Section 195(1)(i) of the Constitution of the Republic of South Africa, 1996	<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."</i>
Section 23 and 33 of the Constitution of the Republic of South Africa, 1996	<p>Section 23: Every employee has a right to fair labour practices.</p> <p>Section 33: Everyone has the right to administrative action that is lawful, reasonable and procedurally fair</p>
South African Police Service Act, 68 of 1995	<p>Discharge of members on account of redundancy, interest of Service or appointment to public office.</p> <p><i>"35. The National Commissioner may, subject to the provisions of the Government Pensions Act, 19973 (Act 57 of 1973), discharge a member-</i></p> <ul style="list-style-type: none"> <i>(a) Because of the abolition of his or her post, or the reduction in the numerical strength, re reorganization or the readjustment of the Service;</i> <i>(b) If, for reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the Service, or will otherwise be in the interest of the Service; or</i> <i>(c) If the President or a Premier appoints him or her in the public interest under any law to an office to which the provisions of his Act or the Public Service Act, 1994 (promulgated under Proclamation 103 of 1994), do not apply."</i> <p>Disciplinary Proceedings</p> <p><i>"40. Disciplinary proceedings may be instituted in the prescribed manner against a member on account of misconduct, whether such misconduct was committed within or outside the borders of the Republic."</i></p> <p>Retirement</p> <p><i>"45(1) (a) Subject to subsection (7), a member may retire from the Service, and shall be so retired on the date when he or she attains the age of 60 years.</i></p> <ul style="list-style-type: none"> <i>(b) If a member attains the age of 60 years after the first day of the month, he or she shall be deemed to have attained it on the first day of the following month.</i> <p><i>(2) A member who is at least 50 years of age may, at any time before attaining the age of 60 years, give written notification to the Minister of his or her wish to retire from the Service, and shall be allowed so to retire if a sufficient reason therefore exists and the retirement will be to the advantage of the Service.</i></p>

Section	Provision
	<p>(3) (a) <i>Subject to paragraph (b), a member who in terms of section 212(7)(b) of the Constitution or any other law has the right to retire at an earlier age than that contemplated in subsection (1)(a), shall give written notification to the National Commissioner of his or her wish to be so retired and he or she shall-</i></p> <p>(i) <i>if that notification is given to the National Commissioner at least three calendar months prior to the date on which he or she attains the retirement age applicable to him or her, be so retired on the date on which he or she attains that age or, if he or she attains it after the first day of the month, on the first day of the following month; or</i></p> <p>(ii) <i>if that notification is not given to the National Commissioner at least three calendar months prior to the date on which he or she attains the said age, be so retired on the first day of the fourth month after the month in which the notification is received."</i></p> <p>"45(7) (a) <i>Notwithstanding the provisions of subsection (1)(a), a member may be retained, with his or her consent, in his or her post beyond the age of 60 years with the approval of the Minister or member of the Executive Council for further periods which shall not, except with the approval by resolution of Parliament, exceed the aggregate of five years.</i></p> <p>(b) <i>A member shall only be retained under paragraph (a) if it is-</i></p> <p>(i) <i>reasonable; and</i></p> <p>(ii) <i>in the interest of the Service; or</i></p> <p>(iii) <i>generally in the public interest.</i></p>
South African Police Service Discipline Regulations, 2006	<p>4 Principles</p> <p>"(a) <i>discipline is a corrective and not a punitive measure;</i></p> <p>(b) <i>discipline must be applied in a prompt, fair, consistent and progressive manner;</i></p> <p>(c) <i>discipline is a line management function;</i></p> <p>(d) <i>the fair treatment of employees by ensuring that they-</i></p> <p>(i) <i>enjoy a fair hearing in both the formal and informal proceedings;</i></p> <p>(ii) <i>are timeously informed of allegations of misconduct made against them;</i></p> <p>(iii) <i>received written reasons explaining the rationale for any decision taken; and</i></p> <p>(iv) <i>have the right to a recourse against any finding of misconduct or sanction imposed at a disciplinary hearing;</i></p> <p>(e) <i>an employee who is impartial and not in any way connected to the alleged misconduct may represent the employer at, preside over the disciplinary hearing or investigate alleged misconduct against an employee;</i></p>

Section	Provision
	<p>(f) <i>as far as possible, the disciplinary proceedings must take place in the workplace and must be understandable to all employees;</i></p> <p>(g) <i>the disciplinary proceedings will be instituted and finalized notwithstanding the fact that the act of misconduct is also a criminal offence;</i></p> <p>(h) <i>disciplinary proceedings should not emulate court proceedings;</i></p> <p>(i) <i>the employee appointed to investigate the alleged misconduct must be of higher rank than the employee being investigated;</i></p> <p>(j) <i>in all disciplinary proceedings the employee has the right to be represented by a union representative or a fellow employee; and</i></p> <p>(k) <i>in the event that the employee denies an allegation of less serious misconduct, a formal disciplinary hearing must be instituted."</i></p>
	<p>"12. Serious misconduct</p> <p>(1) <i>Subject to regulation 6(2), a supervisor who is satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, must ensure that the investigation into the alleged misconduct is completed as soon as reasonably possible and refer the documentation to the employer representative to initiate a disciplinary enquiry.</i></p> <p>(2) <i>The employer representative, if satisfied that the employee has committed misconduct, must charge the employee with misconduct as soon as reasonably possible by having a written notice to attend the disciplinary hearing, in the form determined by the National Commissioner, served on him or her.</i></p> <p>(3) <i>The written notice of the disciplinary hearing must provide for -</i></p> <p>(a) <i>a description of the allegations of misconduct and the main evidence (including statements if available) upon which the employer will rely;</i></p> <p>(b) <i>details of the date, time and venue of the hearing;</i></p> <p>(c) <i>information stating the rights of the employee to representation by a fellow employee or a union representative or union official, and the right to bring witnesses to the hearing; and</i></p> <p>(d) <i>the place where, the period during which and the circumstances and conditions in terms of which an employee shall be given an opportunity to examine any physical or documentary evidence or any report that will be produced in evidence and may, free of charge, obtain one copy of any</i></p>

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	<p><i>statement or report relating to the subject matter of the hearing and one copy of any document that will be presented as evidence during the hearing.</i></p> <p>(4) (a) <i>The notice to appear at the hearing must be served on the employee at least ten (10) calendar days before the date of the hearing.</i></p> <p>(b) <i>The notice must be served by delivering a copy thereof to the employee referred to therein or, if he or she cannot be found, by delivering it at his or her residence or place of employment to a person who is apparently over the age of 16 years and is apparently residing or employed there.</i></p> <p>(c) <i>A return of service of a notice by the employee serving the notice to the effect that it took place as mentioned in paragraph (b) may be handed in at the hearing and shall on its mere production be proof of the service thereof.</i></p> <p>(d) <i>An employee is obliged to accept delivery of any notice served on him or her.</i></p> <p>(5) <i>The employee must acknowledge receipt of the notice if handed to him or her personally. Should the employee refuse to acknowledge receipt, the notice must be handed over to the employee in the presence of another employee, and both the employee handing over the notice and another employee must sign in confirmation that the notice was served on the employee."</i></p>
	<p>"13. Precautionary suspension</p> <p>(1) <i>The employer may suspend with full remuneration or temporarily transfer an employee on conditions, if any, determined by the National Commissioner.</i></p> <p>(2) <i>The National or the Provincial or Divisional Commissioner (the Commissioner) may suspend the employee without remuneration, if the Commissioner on reasonable grounds, is satisfied that the misconduct which the employee is alleged to have committed, is misconduct as described in Annexure A and that the case against the employee is so strong that it is likely that the employee will be convicted of a crime and be dismissed: Provided that -</i></p> <p>(a) <i>before suspending an employee without remuneration, the employee is afforded a reasonable opportunity to make written representations;</i></p> <p>(b) <i>the Commissioner considers the representations and inform the employee of the outcome of the representations;</i></p> <p>(c) <i>the disciplinary process must be initiated within fourteen (14) calendar days of the date of the decision to suspend the</i></p>

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	<p>employee without remuneration; and if the disciplinary process is not completed within sixty (60) calendar days from the commencement of the suspension, the question of continued suspension without remuneration must be considered by the Commissioner and the employee may again make written representations which the Commissioner must consider. The Commissioner must take any decision on continued suspension within seven (7) calendar days of receiving written representations on continued suspension and inform the employee of the outcome of the representations. A decision that the suspension continues, may only be for a further period of thirty (30) calendar days.</p> <p>(3) A suspension is a precautionary measure.</p> <p>(4) If an employee is suspended with full remuneration or transferred as a precautionary measure, the employer must hold a disciplinary hearing within sixty (60) calendar days from the commencement of the suspension or transfer. Upon the expiry of the sixty (60) days, the chairperson of the hearing must take a decision on whether the suspension or temporary transfer should continue or be terminated."</p>
Labour Relations Act, 66 of 1995	<p>Section 186: Meaning of unfair labour practice</p> <p>(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and employee involving-</p> <p>(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;"</p>
Precautionary suspensions Guide	<p>Par. 3: Suspended employees are entitled to speedy and effective finalization of the disciplinary process. Employees must return to work should the hearing not be concluded within 60 days.</p> <p>Par. 9: Part of the procedure to follow prior to suspending an employee is scheduling and conducting a meeting with the employee. Furthermore, written confirmation of the suspension of an employee shall be served on an employee and take effect from a current date.</p> <p>Par 10: The suspension shall be lifted after the lapse of 60 days unless otherwise ordered by the chairperson of the disciplinary hearing.</p> <p>Par 11: Action to take when an official is accused of serious misconduct that warrants precautionary suspension includes handing a letter of suspension to the official, the formulation of charges and informing the official of the disciplinary hearing (5 days before the hearing).</p>

30. The following case law applicable to the matter at hand applies:

A disciplinary hearing must be convened as soon as possible after the incident which led to the disciplinary action so that the facts are still fresh in the minds of the parties and their witnesses.

In ECCAWUSA obo JAFTA v Russells Furnishers [1998] 4 BALR 391 (CCMA) it was held that "the mere

fact of a delay cannot in itself be fatal to the fairness of the employer's actions, in the absence of any indication as to how and why that delay unfairly prejudiced an employee. In the present matter no evidence was led in respect of prejudice to the employee as a result of the delay. Hence there is no justification for finding the dismissal of the employee unfair on this basis."

In the matter of *Mohlala v South African Post Office and Others* (JR 737/10) [2013] ZALCJHB 244 (10 June 2013), the court indicated that the delay by the employer to commence disciplinary action against the employee was unfair. In this case, the applicant was charged with misconduct more than two years and six months after the incident and about a year after the criminal charges were withdrawn for a second time. The disciplinary procedures expressly state that discipline may be taken against employees even where a criminal case is pending.

In the matter of *Van Eyk v Minister of Correctional Services & Others* (ECJ 023/2005) [2005] ZAECHC 13 (20 April 2005) the Court ordered that the disciplinary action against the employee fall away. In this case, the court considered, amongst others, the delay by the department in finalising the disciplinary process against the employee based on the fact that a criminal investigation was underway. The court indicated that –

"... a delay of more than 32 months after the occurrence of the first alleged offence, a delay of more than 22 months after the occurrence of the second, and a delay of more than 18 months after the conclusion of the investigation is on the face of it excessive, and in the absence of good cause, unreasonable. It makes nonsense of the principle which makes promptness an element of fair labour practice in taking disciplinary action against an employee."

The court further indicated that –

"....an internal departmental investigation is entirely different and separate from a police investigation. To confuse the two is against principle. It results in a failure to appreciate that a criminal investigation and hearing has a different emphasis and a different purpose from an internal or domestic investigation and hearing. The one has to do with proof of criminal offences, and with guilt, punishment and the legal policies which underscore them. The other is a civil matter with a civil standard of proof, and its chief concern is with damage to the relationship between employer and employee and whether or not that relationship can be maintained. It is generally accepted therefore that a departmental disciplinary hearing may be held even though criminal proceedings are pending."

In *Lekabe v Minister: Dept of Justice and Constitutional Development* (2009) 30 ILJ 2444 (LC), Molahlehi J held that the suspension of the applicant fell away after the expiry of the 60 day period, unless the chairperson of the disciplinary hearing had extended that period. Referring to clause 2.7(2)(c) of Chapter 4 of the SMS Handbook, the court noted that the purpose of precautionary suspension of SMS member was to address the *"problem of protracted suspensions which demoralise and unfairly prejudice suspended employees, and specifically to curb the power of employers in the public service by using protracted suspension as a means of marginalising employees who may have fallen out of favour"*. The Court ordered that the period of precautionary suspension beyond 60 days, was invalid.

In the case of *Dlamini and Others v Independent Police Investigative Directorate and Another* (J1782/15) [2016] ZALCJHB 452 (29 April 2016), the Labour Court, referring to the judgement in the Lekabe case, indicated that the employer has no right unilaterally to extend any period of transfer or suspension; this is a power reserved for the chairperson of a disciplinary enquiry.

In *Heyneke v Umhlathuze Municipality* (2010) 31 ILJ 2608 (LC) the court indicated that –

"Protracted leave or suspension on full pay pending investigations or disciplinary actions is a prevalent practice, especially in publicly funded entities. This practice is a sign of weak, indecisive management that cannot diagnose problems and find solutions efficiently. These inefficiencies impact on both taxpayers and shareholders alike, and not on the private pockets of the management of public organizations,

consequently, the incentive to finalize investigations and disciplinary procedures is weak. This practice has to stop."

FINDINGS

31. Based on the analysis of the documentation submitted to the PSC, the following findings are made:

31.1 Delay in the finalization of the disciplinary process against Mr Mduli

- 31.1.1 In terms of the principles of the SAPS Discipline Regulations, 2006, discipline must be applied in a prompt, fair, consistent and progressive manner. The Regulations further require that employees are treated fairly by ensuring that they are timeously informed of allegations against them; receive written reasons explaining the rationale for any decision taken and have the right to a recourse against any finding of misconduct or sanction imposed at a disciplinary hearing.

- 31.1.2 From the trail of documentation, it is clear that the disciplinary process has been delayed for a period of 7 years. From the first notice provided to Mr Mduli informing him of the intention to place him on suspension based on allegations of misconduct on 04 April 2011, the disciplinary inquiry was postponed for several reasons. During 2011, subsequent to Mr Mduli's placement on suspension, the disciplinary investigation did not proceed as the SAPS was allegedly advised by the NPA that the criminal case should first be finalized. The lack of supporting documentation to this effect is disconcerting as there is no substantive proof that the disciplinary proceedings were delayed as a result of advice from the NPA. This is further contrary to the SAPS Disciplinary Regulations which provide for the disciplinary proceedings to be instituted and finalized notwithstanding the fact that the act of misconduct is also a criminal offence. As highlighted in the case law at paragraph 28 above, the court supports the principle that a disciplinary case against an employee should continue even if an employee faces criminal charges against him/her.

- 31.1.3 A second attempt was made to embark on the disciplinary process with the Notice to appear at a disciplinary hearing to be held on 13 February 2012. However, as the charges could not be served on Mr Mduli, the process was abandoned. About one year after the suspension of Mr Mduli, on 18 May 2012, the disciplinary charges against Mr Mduli were withdrawn, just to be reinstituted a month later on 12 June 2012. Although a disciplinary hearing was held on 02 July 2012, the matter was postponed on request of Mr Mduli's attorney. From this point onwards, there is no documentary evidence that the SAPS had proceeded with the disciplinary process until 06 July 2017 when a Notice to appear at a Disciplinary Hearing was issued to Mr Mduli (vide paragraph 22 above).

- 31.1.4 In the Van Eyk case mentioned above in paragraph 30, the court highlighted the fact that the purpose of a disciplinary process is to consider the damage to the employment relationship, and whether the relationship could still be maintained. The onus was on the previous National Commissioners to institute a disciplinary process against Mr Mduli and complete the process. The axiom "justice delayed is justice denied" comes to mind.

Caselaw dictates that the protracted delay by the employer to finalise the disciplinary process without good reason, is unreasonable. In the Mohlala and Van Eyck cases quoted in paragraph 28 above, the Court ordered that the disciplinary action against employees fall away, based on the protracted delay by the employer to finalise the disciplinary process against the employees. In the absence of sound reasons for the delay in finalising the disciplinary process against Mr Mdluli subsequent to the SCA judgment, the SAPS would have to consider that the institution of a disciplinary process after such a long time, could constitute an unfair labour practice. Cognisance should be taken of the fact that Mr Mdluli has a right to challenge the disciplinary proceedings on the grounds that proceeding with or reinstituting disciplinary action against him after such a long delay, constitutes an unfair labour practice.

31.2 Reasons for the continued precautionary suspension of Mr Mdluli

31.2.1 Mr Mdluli was first placed on precautionary suspension on 29 April 2011. It is common cause that as a result of the advice by the NPA, the disciplinary proceedings against Mr Mdluli did not continue. In terms of the provisions of the Disciplinary Regulations of the SAPS, a disciplinary hearing should have taken place on 28 June 2011 that is within 60 calendar days from the commencement of the precautionary suspension. Furthermore, the Chairperson of the disciplinary hearing is the only person mandated to extend the precautionary suspension. In this case, instead of the Chairperson extending the precautionary suspension of Mr Mdluli, the Acting National Commissioner on 14 December 2011, extended the suspension. In the absence of proof that Mr Mdluli's suspension was extended by the Chairperson of a disciplinary hearing, the decision of the Acting National Commissioner to keep him on suspension was irregular.

31.2.2 Thereafter, Mr Mdluli's suspension was uplifted on 27 March 2012 by the National Commissioner, only to be instituted again on 25 May 2012. No documentary evidence is provided that Mr Mdluli's suspension was extended or uplifted by the Chairperson of a disciplinary hearing.

31.2.3 It is however noted that in paragraph 6.13 of the High Court judgement of 06 June 2012 (vide **Tag O**), the Court indicated that Mr Mdluli's suspension was uplifted by an order of the Labour Court on 01 June 2012. However, on 03 June 2012, the same Court set aside the order of 1 June 2012 (**Tag O**). In paragraph 16 of the High Court judgement it is indicated that the applicant in the matter, FUL, did not seek the suspension of Mr Mdluli by SAPS. The Court in fact, set the notion that the applicant had requested the suspension of Mr Mdluli, aside. As discussed in paragraph 17 above, the interdict by the High Court was that Mr Mdluli was prohibited from discharging any function or duty as a member of SAPS, nor could the SAPS assign any function or duty to him.

31.2.4 In line with the Court's comment made in the *Heyneke* case, the impression created in the handling of the disciplinary case against Mr Mdluli is of indecisiveness and inefficiency, which has had a financial impact on state resources and is in contravention of section 195(1)(b) of the Constitution, 1996, i.e the promotion of the efficient, economic and effective use of resources.

31.2.5 In paragraph 233 of the High Court decision at **Tag R**, the Court noted that –

“... Indeed, but for the order of Makgoba J, Mdluli would have been within his rights to return to work in late July 2012. In terms of the Discipline Regulations, if an employee is suspended with full remuneration, the employer must hold a disciplinary hearing within sixty calendar days from the commencement of the suspension. Upon expiry of the sixty days, the chairperson of the hearing must take a decision on whether the suspension should continue or be terminated. It follows that a failure to convene disciplinary proceedings will result in the suspension automatically lapsing. Mr Mokhari was unable to give the court an assurance that a hearing had been convened at which the chairperson had taken a decision on whether the suspension should continue or be terminated. The suspension in terms of the regulations has accordingly probably lapsed. That fact alone disposes of the claim of mootness.”

31.2.6 The SAPS acknowledged in their letter of 10 August 2017 (*vide Tag D*), that the suspension of Mr Mdluli had lapsed, but that he was “*released from duty*”. Scrutiny of the legislative framework of the SAPS does not indicate that provision is made for an employee to be released from duty and still receive remuneration. The SAPS confirmed in the email of 11 September 2017 that no provision is made in the legislative framework for a person to be released from duty. The concept of releasing someone from duty, is to exempt that person from performing any duties, which effectively means the person is not allowed to perform his or her job, in other words, suspended from duty. In the absence of any provision in the legislative framework for an employee to be “*released from duty*”, the fact that Mr Mdluli is regarded as “*released from duty*”, is irregular. Taking into consideration the judgment of the Supreme Court of Appeal of 14 April 2014, the SAPS was obliged to institute the disciplinary process anew. The fact that no action was taken to ensure that Mr Mdluli was back at work and the disciplinary process was instituted, is regarded as gross negligence on the part of the SAPS.

31.2.7 It should be noted that although Mr Mdluli, through his attorney, was requested to provide the PSC with any documentation relating to the disciplinary process, providing him with an opportunity to state his case, no supporting documentation was provided, but for the e-mail correspondence between the attorney and the state attorney regarding the disciplinary process that was instituted in July 2017. It is however, apparent from the correspondence of the attorney, that in his opinion, the precautionary suspension has not been lifted. This is disconcerting to note, especially as the attorney has been representing Mr Mdluli from the beginning and it would have been expected of him to be aware of the SCA’s decision in 2014.

31.2.8 A further concern is that in terms of section 45(1) of the SAPS Act, 1995, an employee is regarded as retired from the services of the SAPS, upon attainment of the age of 60. Mr Mdluli will be turning 60 in May 2018 (**Tag EE**). If the SAPS fail to finalise the current disciplinary process before the date of his retirement, he would be able to retire with a clean service record.

RECOMMENDATIONS

32. Contrary to the provisions of the SAPS Discipline Regulations, 2006, the disciplinary process in respect of Mr Mdluli, has been delayed for a period of 7 years. Case law dictates that as a result of the protracted delay by the employer to finalise the disciplinary process without good reasons, the disciplinary action against the employee should fall away. However, in view of the fact that the SAPS had started disciplinary action against Mr Mdluli in July 2017, and the fact that both parties have agreed to the process, it is accepted that the disciplinary action against Mr Mdluli is continuing. It is **recommended** that the SAPS should ensure that the disciplinary process is concluded within the agreed timeframe.
33. In view of the fact that the precautionary suspension of Mr Mdluli has effectively lapsed in 2012 and Mr Mdluli should have returned to work at the time and his "release from duty" is irregular, it is **recommended** that Mr Mdluli reports for duty with immediate effect. Considering the seriousness of the misconduct Mr Mdluli is being charged with, the National Commissioner may upon his return to work, consider placing him on suspension-
 - 33.1. with full remuneration on conditions determined by the National Commissioner as provided for in terms of paragraph 13(1) of the SAPS Discipline Regulations, 2006; or
 - 33.2. without remuneration as provided for in terms of paragraph 13 (2) of the SAPS Discipline Regulations, 2006.
34. The SAPS may also consider the discharge of Mr Mdluli in terms of section 35(b) of the SAPS Act, in which case, the SAPS will have to determine whether his discharge will be in the interest of the Service. Considering the protracted period for which Mr Mdluli was away from work and the criminal charges against him, it may be in the interest of SAPS to apply the provisions of section 35(b) of the Act in this case. In the event that the SAPS is not successful in discharging Mr Mdluli from the service in terms of section 35(b) of the Act, the SAPS may allow Mr Mdluli to go on retirement in terms of section 45(1) of the Act or on early retirement in terms of section 45(2) of the Act.



DR TB LUTHULI
COMMISSIONER

DATE: 17/01/2018