FAIR PAY

Report on an investigation into alleged unfair dismissal and subsequent deduction of a departmental debt by the Gauteng Department of Education

Report No: 11of 2013/14

TERMINATION OF EMPLOYMENT

PUBLIC PROTECTOR
SOUTH AFRICA
Accountability • Integrity • Responsiveness

Website: www.publicprotector.org - Tollfree: 0800 11 20 40 - Follow us: 🌐

PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO 11 OF 2013/2014

ISBN 978-1-920692-00-1

"Fair Pay"

REPORT ON AN INVESTIGATION INTO ALLEGED UNFAIR DISMISSAL AND SUBSEQUENT DEDUCTION OF A DEPARTMENTAL DEBT BY THE GAUTENG DEPARTMENT OF EDUCATION
INDEX

Executive summary 3

1. INTRODUCTION 6

2. THE COMPLAINT 6

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR 3

4. ISSUES CONSIDERED BY THE PUBLIC PROTECTOR 8

5. THE INVESTIGATION 9

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION 11

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION 15

8. THE LEGAL AND REGULATORY FRAMEWORK 16

9. ANALYSIS AND CONCLUSION 20

10. FINDINGS 23

11. REMEDIAL ACTION 23

12. MONITORING 24
Executive Summary

(i) "Fair Pay" is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates the Public Protector's findings and directives on appropriate remedial action following an investigation into a complaint lodged by Mr SW Chauke on 6 July 2011 alleging unfair dismissal and subsequent deduction of a departmental debt by the Gauteng Department of Education from his pension benefit. The allegation pertaining to unfair dismissal was not considered by the Public protector as it was previously adjudicated on by a court of law. The GPAA did not deny making the deduction, leaving the issue to be determined as being the propriety of the deduction. At the time that the investigation took place the capital amount had been refunded.

(iii) The Public Protector considered and investigated the following issues:

(a) Did the deduction of R7 317.81 from the Complainant's pension benefit, without his consent, amount to maladministration?

(b) Was the Complainant entitled to a refund of such deduction together with interest?

(iv) The investigation was conducted by way of telephonic and written correspondence with officials at the Gauteng Department of Education (the GDE) and the Government Pensions Administration Agency (the GPAA) and the perusal of documents received. Applicable legislation, policies and relevant prescripts were also analysed and applied. Subsequent to the provisional report being issued a meeting was held with the Complainant regarding the provisional findings made.
(v) The Public Protector makes the following findings:

(a) Did the deduction of R7 317.81 from the Complainant’s pension benefit without his consent amount to maladministration?

(aa) The GPAA’s conduct of deducting money from the Complainant’s pension benefit without complying with the provisions of paragraph 3.3.1 of the Procedure Manual for Interaction between Pensions Administration and Government Employers in terms of Section 21(3) of the Government Employees Pension Law, 1996 (GEP Law) was improper. The conduct of the GPAA accordingly constitutes maladministration.

(b) Was the Complainant entitled to a refund of such deduction together with interest?

(aa) The above act of maladministration has prejudiced the Complainant in that he was not paid interest to which he was entitled in respect of the amount of R7, 317.81 which was wrongfully deducted from his pension benefit and refunded after 36 months. The Complainant has suffered improper prejudice due to the undue delay by the GDE to pay interest on the sum of R7 317.81.

(vi) The appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution is that:

(a) The Head of Department should ensure that the GDE pay the Complainant interest in the amount of R5 000.00, as elaborated in the settlement agreement signed between the Complainant and the GDE on 30 May 2013.
(b) The Head of the Department should ensure that the Complainant is provided with a letter of apology for the prejudice he suffered as a result of the conduct of the Department in this matter.
REPORT ON AN INVESTIGATION INTO THE ALLEGED UNFAIR DISMISSAL AND SUBSEQUENT DEDUCTION OF A DEPARTMENTAL DEBT BY THE GAUTENG DEPARTMENT OF EDUCATION

1. INTRODUCTION

1.1 "Fair Pay" is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to the Head of the Gauteng Department of Education, Mr B Ngobeni, in terms of section 8(1) of the Public Protector Act.

1.3 A copy of the report is provided to the MEC of Education, Ms B Creecy, and Mr Chauke (the Complainant) in terms Section 8(1) of the Public Protector Act.

1.4 The report relates to an investigation into a complaint of alleged unfair dismissal and the subsequent deduction of a departmental debt from the Complainant's benefits by the Gauteng Department of Education (the GDE).

2. THE COMPLAINT

2.1 On 6 July 2011, the Complainant lodged a complaint with the Public Protector, in which he alleged that he was dismissed by the GDE who issued a dismissal letter to him prior to the receipt of the presiding officer's recommendations in a disciplinary hearing.

2.2 He also alleged that the Department dismissed him without following proper termination of employment procedures.
2.3 He alleged further that as a result of the abovementioned termination of employment, the GDE forwarded incorrect information to the Government Employees Pension Fund (now known as Government Pension Administration Agency (the GPAA) relating to the actual date of dismissal.

2.4 He alleged that as a result of the GDE’s error, the GPAA deducted an amount of R7 317.81 from his pension benefit as a departmental debt, owed to the GDE, without his consent.

2.5 The Complainant was appointed by the GDE as a Senior Educator on 15 January 1986 and was based at Ruabohlale Junior Secondary School.

2.6 On 28 February 2007, the Complainant allegedly assaulted the school principal, Mr AK Sono, and had referred to the principal as “stupid”.

2.7 On 2 March 2007, the Complainant was charged with intimidation and was immediately suspended.

2.8 A disciplinary enquiry was subsequently conducted and the Complainant was found guilty of the charges brought against him.

2.9 The Complainant referred the matter to the Education Labour Relations Council (ELRC). In terms of the referral, the Complainant challenged both the substantive and procedural fairness of his dismissal. The ELRC found that the dismissal was procedurally and substantively fair.

2.10 The Complainant referred the decision of the ELRC to the Labour Court for review. However, his application was dismissed and his subsequent leave to appeal was also dismissed.

2.11 He then lodged a complaint on 6 July 2011 in terms of the Public Protector Act.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector was established under section 181(1)(b) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that 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 take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.3 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4 The Gauteng Department of Education is an organ of state and its conduct amounts to conduct in state affairs, and as a result, this matter falls within the ambit of the Public Protector's mandate.

3.5 The jurisdiction of the Public Protector was not disputed by any of the parties.

4. **ISSUES CONSIDERED BY THE PUBLIC PROTECTOR**

4.1 The following are legal issues considered by the Public Protector:

4.1.1. Did the deduction of R7 317.81 from the Complainant's pension benefit without his consent amount to maladministration?
4.1.2 Was the Complainant entitled to a refund of such deduction together with interest?

5. THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

5.1 The Scope of the Investigation

5.1.1 The scope of the investigation was restricted to the period from February 2007, when the Complainant was appointed by the Department, to the conclusion of the investigation referred to in this report, in July 2012.

5.1.2 The investigation focussed on the alleged wrongfulness of the deduction and failure to pay interest with after the money was refunded.

5.2. Method of gathering evidence

5.2.1 Interviews were conducted with:

5.2.1.1 The Complainant on several dates;

5.2.1.2 The Director: Legal Services of Gauteng Department of Education, Adv. Q Zwane; and The Director: Labour Relations, Gauteng Department of Education, Mr P Selowa on 8 June 2012.

5.2.2 Analysis of documentation and information

5.2.2.1 The written complaint lodged with the Public Protector dated 6 July 2011;
5.2.2.2 A dismissal letter from the Gauteng Department of Education dated 13 July 2007;

5.2.2.3 Gauteng Department of Education Disciplinary hearing report date stamped 20 July 2007;

5.2.2.4 An Award from the Education Labour Relations Council dated 21 July 2008;

5.2.2.5 The Appeal judgment from the Labour Court dated 10 September 2009;

5.2.2.6 The Settlement Agreement between Mr SW Chauke and the Gauteng Department of Education signed on 30 May 2013;

5.2.2.7 Two Settlement Agreements signed by the Complainant, Mr SW Chauke, only and dated 13 June 2013; and

5.2.2.8 An electronic printout of payment details made on the Complainant's account and dated 13 July 2012.

5.2.3 Correspondence considered

5.2.3.1 Correspondence between the Public Protector and:

(i) Adv Q Zwane from the Department of Education dated 25 April 2012, 12 June 2013 and 22 July 2013;
(ii) Correspondence from Mr R Fourie of the Government Pension Administration Agency dated 2 November 2011; and

5.2.4 Legislation and other Prescripts
5.2.4.1 The Constitution, 1996;

5.2.4.2 The Public Protector Act 23, 1994;

5.2.4.3 The Government Employees Pension Law, 1996;

5.2.4.4 The Promotion of Administrative Justice Act 3, 2000;

5.2.4.5 The Prescribed Rate of Interest Act 55, 1975; and

5.2.4.6 Procedure Manual for Interaction between Pensions Administration and Government Employers.

5.2.5 Case law

5.2.5.1 *Margo v Gardner* 2010 (6) SA 385

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The Complainant's case

6.1.1 The Complainant alleged in a written complaint dated 6 July 2011 that the GDE deducted an amount of R7 317.81 from his pension benefit without his consent. According to him, he did not sign an acknowledgement of debt since he was not indebted to the GDE.

6.1.2 The Public Protector perused documentation pertaining to the issue of the alleged unfair dismissal and further interviewed the Directors of Legal Services and Labour Relations of the GDE on 8 June 2012 regarding the said issue.
6.1.3 In response to the provisional report, the Complainant indicated that he had read the contents thereof and fully supports the intended findings and remedial action contained therein.

6.1.4 The Complainant however argued that his dismissal from employment was unfair, based on the allegation that the GDE issued a letter of dismissal prior to them receiving recommendations from the presiding officer.

6.1.5 He highlighted that he was employed as a Senior Teacher at Ruabohlale Junior Secondary School since July 2000.

6.1.6 The Complainant admitted that he hit the principal; however, he submitted that he did this in self-defence.

6.2 The Department's response

6.2.1 Adv. Zwane indicated in an email dated 25 April 2012 that the Complainant owed the GDE an amount of R7 317.81 which was then deducted from his pension on 7 February 2008. The amount was repaid to him in March 2011, subsequent to his enquiry.

6.2.2 Adv. Zwane further mentioned that the Complainant's termination of service date was erroneously 2007, but he duly received a salary for the period August 2007 to 20 September 2007. The GDE's remuneration system records the payment of August 2007 to 20 September 2007 as reversed. The GDE submitted that payment was received by the Complainant in March 2011 and that the reversal of the salary was as a result of the correction of the precise date of termination based on the final decision on the appeal hearing.

6.2.3 In its response to the provisional report, the Department admitted liability to pay interest to the Complainant.
6.2.4 The GDE however argued that: "...the preliminary report does not pronounce a finding regarding the enforcement of the payment of interest in relation to the Proscription Act No.68 of 1969 as amended." The GDE further argued that: "...the law recognises, on the one hand, the protection of one’s legal right and on the other hand, that if a person has the legal right, then he or she must enforce that right and, if he or she delays doing so, he or she forfeits the right by effluxion of time".

6.2.5 The GDE highlighted that while there is no intention to unfairly prejudice the Complainant, weight should equally be given to the fact that the enforcement of the claim in question has prescribed in law.

6.2.6 The GDE also referred to the "in duplum" rule, which prevents the collection of more interest than double the unpaid capital amount.

6.2.7 The GDE also highlighted that they met with the complainant in Pretoria on 30 May 2013 to discuss the preliminary report, and particularly the aforementioned concerns.

6.2.8 The GDE also highlighted that during the said meeting, they did two calculations on interest and emphasised that this was conditional on the Head of Department agreeing to condone prescription. The first calculation was based on an annual calculation, while the second one was based on a monthly calculation. On the annual calculation they came to the amount of R3 402.78 as payable interest. On the monthly one they came to R40 833.32 and R11 614.00 respectively. The difference in the latter amounts was based on adding interest per month to the capital amount and calculating interest based on the capital amount plus accumulative interest while the other calculation was calculating the interest exclusively. The Complainant then signed a settlement agreement on the amount of R3 402.78. The said Settlement Agreement or a copy thereof was not provided to the Public Protector.
6.2.9 The GDE argued that they negotiated intensively with the Complainant and that on the monthly calculations the Complainant is entitled to the maximum amount of double the capital amount based on *in duplum* rule. Having been appraised of same, the Complainant decided that he would settle for R5 000 as a full and final amount. Subsequently the GDE and the Complainant then signed a settlement agreement on the same date, wherein the GDE undertook to pay the Complainant the sum of R5 000.00 (the settlement amount) in full and final settlement of all claims of whatever nature and however arising to the claim of interest on the sum of R7 317.81.

6.2.10 In a communique dated 22 July 2013 the GDE informed the Public Protector that the Complainant was provided with a letter signed by the HOD but that the Complainant rejected the letter and instead he presented two proposals for the settlement of his interest claim in the amount of R40 833.30 and R81 666.70 respectively.

6.2.11 In relation to the two draft settlement agreements submitted by the Complainant, the GDE acknowledged same, but rejected the new drafts.

6.3 The Government Pensions Administration Agency’s response

6.3.1 Mr Fourie, from the GPAA, confirmed in a correspondence dated 2 November 2011 that an amount of R7 317.81 was deducted as Departmental debt from the Complainant’s pension benefit.

6.3.2 On 13 July 2012 Ms A Naidoo provided an electronic print out indicating that an amount of R7 317.81 was deducted from the Complainant’s pension benefits.

6.3.3 On 13 February 2013 Ms A Naidoo confirmed that the date of dismissal was never amended, as it still appeared on their system as at 14 August 2007.
7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1. Did the deduction of R7 317.81 made from the Complainant’s pension benefit without his consent amount to maladministration?

7.1.1. It is undisputed that the Complainant was dismissed by the GDE on the basis of misconduct and subsequent to that, the GDE instructed the GPAA to deduct an amount of R7 317.81 from his pension benefit.

7.1.2. It is further undisputed that the GDE issued a termination of employment letter prior to the receipt of the outcome of the disciplinary hearing from the presiding officer.

7.1.3. The Complainant denied that he owed an amount of R7 317.81 to the GDE. It was established during the investigation that the reason for the deduction was due to the Complainant’s date of termination of service having been erroneously captured as 14 August 2007 instead of 5 September 2007. However, the money was repaid to the Complainant in March 2011.

7.2. Was the Complainant entitled to a refund of such deduction together with interest?

7.2.1. The GDE and the Complainant did not agree on the amount payable as interest. The GDE argued that in terms of the “in duplum” rule it was precluded from paying the Complainant a claim of interest which is more than the capital amount.

7.2.2. The GDE’s argument in this regard was based on the miscalculation of interest to be paid to the Complainant which it calculated on a monthly instead of an annual basis as R40 833.32 and R11 614 respectively and therefore was misconstrued.
7.2.3. The GDE contested that the interest claimed by the Complainant had prescribed.

7.2.4. Subsequent to the provisional report being issued, the GDE negotiated with the Complainant and signed a settlement agreement on 30 May 2013, wherein the GDE undertook to pay the Complainant the sum of R5 000.00 in full and final settlement of all claims regarding interest on the sum of R7 317.81.

7.2.5. The Complainant rejected the settlement agreement he entered into with the GDE and submitted two proposals for the settlement of his interest claim in the amount of R40 833.30 and R81 666.70 respectively. Both proposals were, however, rejected by the Department.

8. THE LEGAL AND REGULATORY FRAMEWORK

8.1 Government Employees Pension Law, 1996

8.1.1 Section 21(3) of the Government Employees Pension Law provides that any amount which has been paid to any member, pensioner or beneficiary in accordance with the provisions of this law and to which such member, pensioner or beneficiary was not entitled, may be deducted from the benefit payable to such member, pensioner or beneficiary under this Law in a lump sum or in such instalments as the Board may determine.

8.1.2 In terms of section 21(3), the GPAA would have been entitled to deduct an amount from the Complainant’s pension benefit, if such payment was paid to him in accordance with the provisions of the Government Employees Pension Law.

8.2.1 Paragraph 3.3.1 of the Procedure Manual for Interaction between Pensions Administration and Government Employers provides that “…the member must be informed of total financial liabilities and debt before an employer department representative submits the form to the Pensions Administration. Further that only debt according to the provisions of section 21(3) and (4) of the GEPF Act, 1996, and the provisions of Section 3(bis) 2 of the AIPF Act, 1 1963 (Act 41 of 1963) can be recovered from the pension benefits.” (emphasis added)

8.2.2 In terms of the said paragraph, the GDE had an obligation to inform the Complainant of his liability and debt before the GDE submitted information to the GPAA to deduct an amount.

8.3 The Prescribed Rate of Interest Act, 55 of 1975

8.3.1 Section 1 of the Prescribed Rate of Interest Act of 1975 as amended provides “…that if a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise”.

8.3.2 Section 1(2) of the aforementioned Act provides that “the Minister of Justice may from time to time prescribe a rate of interest\(^1\) for the purposes of subsection (1) by notice in the Gazette”.

\(^1\) GN R1814 determines the prescribed rate of interest at 15, 5% per annum in GG15143 of 1 October 1993.
8.3.3 The Complainant was entitled to be paid interest at 15.5% per annum calculated from the date on which an amount was deducted from his pension benefit until the amount was repaid to him.

8.4 The Constitution 1996

8.4.1 Section 182(3) of the Constitution provides that the Public Protector may not investigate court decisions.

8.4.2 Therefore once a matter which ordinarily would fall within the mandate of the Public Protector has been pronounced upon by a court of law, the Public Protector may not investigate the decision of the court in that regard.

8.5 The Promotion of Administrative Justice Act, 2000 (PAJA)

8.5.1 Administrative action is defined by PAJA, as:

“A decision taken, or any failure to take a decision, by an organ of the state when exercising power in terms of the Constitution or in terms of any legislation which adversely affects the rights of any person and which has a direct external legal effect.”

8.5.2 Section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

8.5.3 Section 2(b) of PAJA provides that “…in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice to the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable;
(v) adequate notice of the right to request reasons…”

8.6 Public Protector Act, 23 of 1994

8.6.1 Section 7(9) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

8.6.2 The Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act on 12 December 2012. The Provisional Report was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents.

8.6.3 The provisional report was submitted to the MEC of Education, Ms B Creecy, and the Head of the Gauteng Department of Education, Mr B Ngobeni. The Complainant was provided with a copy of the provisional report.

8.7 The Prescription Act, 68 of 1969

8.7.1 Section 11 of the Prescription Act of 1969 provides for the periods of prescription. In terms of section 11 (d) “…the prescription shall be save where an Act of Parliament provides otherwise, three years in respect of any other debt.”
8.8 The “Caveat Subscriptor”-rule

8.8.1 According to CJ Pretorius\(^2\) in his article titled “The basis and underpinnings of the Caveat Subscriptor Rule”, the rule “…entails that a person who signs a document which contains contractual terms may be bound thereto because of the impression of assent created by the signature.”

8.8.2 In terms of the said rule the parties to a contract is contractually bound to the terms and conditions stated therein.

8.9 The “In duplum”-rule

8.9.1 In Margo v Gardner 2010 (6) SA 385 the court stated “…that the in duplum rule prevents unpaid interest from accruing further, once it reaches the unpaid capital amount.”

9. ANALYSIS AND CONCLUSION

9.1 Section 182(3) of the Constitution provides that the Public Protector may not investigate court decisions. The Public Protector may not investigate a decision of a court on any matter which may ordinarily fall within her mandate once a court has made a ruling in that regard.

9.2 Therefore, the Public Protector cannot and did not investigate the allegations of dismissal based on procedural fairness since they were dealt with by the Labour Court after the decision of the ELRC was referred to it for review.

9.3 Did the deduction of R7 317.81 from the Complainant’s pension benefit without his consent amount to maladministration?

\(^2\) C J Pretorius The basis and underpinnings of the Caveat Subscriptor rule, 2008 (71) THRHR 660 and Burger v Central South African Railways 1903 TS 571 at 578.
9.3.1 The GDE had an obligation to inform the Complainant of his liability and debt before the GDE submitted information to the GPAA to deduct an amount of R7 317.81 from his pension.

9.3.2 The GDE submitted incorrect information relating to the actual date of dismissal to the GPAA. The GDE acknowledged that the date of dismissal was erroneously captured by its employees and as a result, the GPAA deducted an amount of R7 317.80 from the Complainant's pension. The failure by the GDE to ensure the submission of the correct information relating to the actual date of dismissal resulted in the GPAA deducting an amount of R7 317.81.

9.3.3 In the end it was settled that the Complainant did not owe the GDE the amount referred to above and it was refunded.

9.4 **Was the Complainant entitled to a refund of such deduction together with interest?**

9.4.1 In terms of section 21(3) of the Government Employees Pension Law the GDE were allowed to deduct from the Complainant’s pension benefit if the Complainant was not entitled to it. However, the Complainant was entitled to the deducted amount as the GDE erroneously captured the date of termination of service which made it appear that the Complainant was not entitled to the money.

9.4.2 According to the Procedure Manual for Interaction between Pensions Administration and Government Employers the GDE had to inform the Complainant of all liabilities before making any deductions from his pension benefits. The GDE failed to notify the Complainant before making any deductions and did not comply with paragraph 3.3.1 of the Procedure Manual.

9.4.3 The amount of R7 317.81 was paid to the GDE on 7 February 2008 by the GPAA. Subsequently, the GDE paid that amount to the Complainant but without
interest. The interest payable in that regard should have been calculated on an annual basis which was R4 103.09 as at the end of February 2011.

9.4.4 The interest payable is governed by the Prescribed Rate of Interest Act, 1955.

9.4.5 The GDE paid the amount of R7 317.81 to the Complainant in March 2011. The GDE’s contention that the interest claimed by the Complainant had prescribed is misconstrued. The Complainant is entitled to interest by virtue of the fact that his claim for interest did not prescribe in terms of Section 11(d) of the Prescription Act, 1969.

9.4.6 The GDE’s argument of the “in duplum” rule which prevents the collection of more interest than the unpaid capital amount is also misconstrued, since it was based on the miscalculation of interest to be paid to the Complainant.

9.4.7 The GDE signed a settlement agreement with the Complainant on 30 March 2013, wherein the GDE undertook to pay the Complainant the sum of R5 000.00 in full and final settlement of all claims arising regarding interest to the sum of R7 317.81. The interest payable should have been calculated on an annual basis of R4 103.09. The Complainant is therefore entitled to be paid the amount of R5 000.00 based on the “caveat subscriptor” rule.

9.4.8 The Complainant’s conduct, likewise, in attempting to disregard the Settlement Agreement signed with the GDE on 30 May 2013, is unlawful in that the general principles of the law of contract dictates that once he had signed a legal contract he is irrevocably bound thereto.

9.4.9 Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 2(b) and section 3(1) of PAJA provides that administrative actions which materially and adversely affect the rights or legitimate expectations of any person must be procedurally fair. The GPAA failed to provide the Complainant
with an opportunity to give reasons why the alleged debt should, or should not be paid. Therefore the GPAA failed to comply with the rules of fair administrative action.

10. FINDINGS

The Public Protector’s findings are the following:

10.1 Did the deduction of R7 317.81 from the Complainant’s pension benefit without his consent amount to maladministration?

10.1.1 The GPAA’s conduct of deducting money from the Complainant’s pension benefit without complying with the provisions of paragraph 3.3.1 of the Procedure Manual for Interaction between Pensions Administration and Government Employers in terms of Section 21(3) of the Government Employees Pension Law, 1996 (GEP Law) was improper. The conduct of the Department accordingly constitutes maladministration.

10.2 Was the Complainant entitled to a refund of such deduction together with interest?

10.2.1 The above act of maladministration have prejudiced the Complainant in that he was not paid interest to which he was entitled in respect of the amount of R7, 317.81 that was wrongfully deducted from his pension benefit and refunded after 36 months. The Complainant has suffered improper prejudice due to the undue delay by the GDE to pay interest on the sum of R7 317.81.

11. REMEDIAL ACTION

The appropriate remedial action to be taken in terms of section 182(1) (c) of the Constitution is as follows:
11.1 The Head of Department should ensure that the GDE pay the Complainant interest in the amount of R5 000.00, as elaborated on the settlement agreement signed between the Complainant and the GDE on 30 May 2013.

11.2 The Head of the Department should ensure that the Complainant is provided with a letter of apology for the prejudice he suffered as a result of the conduct of the Department in this matter.

12. MONITORING

12.1 The Public Protector will require the Head of the Department of the Department to:

12.1.1 Provide proof of payment within 30 days from the date of this report in terms of the remedial action to be taken at 11.1 above; and

12.1.2 A copy of the letter of apology addressed to the Complainant in terms of the remedial action to be taken at paragraph 11.2 above within 30 days from the date of this report.

12.1.3 The Public Protector will periodically monitor compliance with the remedial action to be taken.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 29/07/2013

Assisted by: Adv. P Lekgema
Senior Investigator: Service Delivery