EQUITABLE ACCESS TO SOCIAL SECURITY

Report No. 18 of 2011/12 of the Public Protector on an Investigation into an allegation of improper conduct by the Department of Public Service and Administration and the Government Employees Pension Fund during the privatisation of the Venda Pension Fund
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Executive Summary

(i) The Complainants, Messrs T J Tshioholi, L J Rambau and M P Ramavhale are former members of the Venda Pension Fund. They approached the Public Protector on behalf of the Vhembe Concerned Pensioners Group (the Complainants) on 19 November 2008 alleging that the State, in particular the Government Employees Pension Fund (GEPF) and National Treasury have acted improperly as envisaged in section 182(1)(a) of the Constitution during the privatisation of the Venda Pension Fund. This resulted in the Complainants and other members of the Venda Pension Fund being improperly prejudiced by the actions or omissions of the State.

(ii) The Complainants submitted that, had it not been for the privatisation, the members of the Venda Pension Fund would have been entitled to their full defined benefits in terms of the Government Employees Pension Law today, 1996 (GEP Law). They contend that no sufficient reason existed for denying individuals their right to a full pension just because they were, during 1992, influenced to accept the privatisation scheme of the then Venda Government, which amounts to a partial advance payment of the members’ pension entitlement. They further argue that the process was, from the beginning, not conducted properly and was as a result, defective.

(iii) According to the Complainants a number of members who participated in the First Privatisation Scheme repaid, under pressure and protest, the amount which they had received in excess of the amount payable in terms of the revised formula. Subsequently, some members of the Dabalorivhuwa Patriotic Front instituted legal action against the Government for payment of the amount so repaid, and succeeded. Both the court of first instance and the Supreme Court of Appeal (SCA) held that in terms of the First Privatisation Scheme the funding level of the funds was irrelevant and that the members who elected to privatise in terms of the scheme were entitled to 100% of their accrued benefits\(^1\). A second claim by the plaintiffs in this case was dismissed by the court of first instance. The second claim was for an order declaring Proclamation R56 of 1995, which, inter alia, provided a formula for the calculation of an actuarial share, unconstitutional and of no force and effect. On appeal to the SCA it was held that the appellants (Members of the Dabalorivhuwa

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\(^1\) Dali v Government of the Republic of South Africa [2000] 3 All SA 206 (SCA)
(iv) FINDINGS

The Protector’s key findings are the following:

a) Findings on Maladministration

aa) The management of the Venda Pension Fund prior to amalgamation led to a situation where there was a different dispensation for members who participated in the First Privatisation Scheme, the Second Privatisation Scheme, and members who elected not to transfer their interests or share.

bb) This amounted to unequal treatment of the members of the Fund in terms of which certain members were worse off than others even though they contributed equally to the Fund.

cc) The Venda Pension Fund, as well as the Government and its predecessors who managed the Fund prior to and directly after amalgamation, did not exercise a sufficient duty of care and due diligence towards the affected members of the Venda Pension Fund to ensure that their pension interests were fully protected and secured. This amounted to maladministration.

dd) The acts of the Venda Pension Fund in relation to the calculation of the benefits of the members who privatised resulted in maladministration as the members were entitled to 100% of their accrued benefits.

e) The acts and omissions of the South African Government and in particular the failure by the DPSA and the GEPF to address the complaints about the First Privatisation Scheme and to enquire as to how the transfers to SANLAM were calculated for each member, constitutes maladministration.

ff) The acts and omissions of the South African Government and in particular the failure by the DPSA and the GEPF to address the complaints of the six complainants regarding the purchasing of pensionable service that have been bought back, constitutes maladministration.
gg) The omission of the South African Government, and in particular the GEPF’s failure, to implement the recommendations of the Public Protector in Report No. 18 of 2002 amounts to maladministration and a violation of the section 181(3) of the Constitution.

b) Findings on prejudice

aa) The Complainants suffered prejudice as they were influenced to privatised their pension benefits but were not properly informed about the consequences of the privatisation.

bb) The Complainants suffered prejudice when they were influenced to privatised their pension benefits as they forfeited all the benefits of a defined benefit fund such as a spouse’s pension, funeral benefits and orphans benefits as well as a medical aid subsidy after retirement.

c) The Complainants suffered prejudice when their complaints and problems were ignored by the different Government institutions which they complained to.

d) The Complainants suffered prejudice when they had to apply for an old age grant despite having accumulated numerous years of service, and they lost the status that they had during their period of employment with the Government.

v) REMEDIAL ACTION

Remedial action to be taken in compliance with Section 182(1) (c) of the Constitution is the following:

a) Remedial Action in respect of the three Complainants:

aa) The GEPF should recalculate the pension benefits of Mr T J Tshiololi as if he retired with all his years of service as a member of the GEPF including the Venda Pension
bb) The GEPF should recalculate the pension benefits of Mr M P Ramavhale as if he retired with all his years of service as a member of the GEPF including the Venda Pension Fund and afford him the opportunity to repay any benefits he might have received, excluding the amounts repaid by him to the Venda Government.

c) The DPSA and Treasury should address the complaint of Mr L J Rambau and order a forensic audit of the list of the First Privatisation Scheme of the Venda Pension Fund to determine the accuracy of the transferred amounts in respect of each member.

b) Remedial Action in respect of all members of the former Venda Pension Funds

aa) The Ministers of Public Service and Administration and of Finance should appoint a task team, including members of the Government Pensions Administration, in collaboration with the Public Protector to -

bb) Review the implementation of the Privatisations Schemes of the former Venda Pension Fund;

c) Consider changes to the GEP Law and Rules, if required, to enable members who participated in the privatisation schemes the opportunity to repay the benefits received and to recalculate their pension benefits in terms of the rules regulating normal retirement; and

dd) Determine whether or not the service periods that have been bought back before the privatisation schemes of the Venda Pension Fund should be included when recalculating the benefits of the members.

e) The Government should apologise to the members of the Venda Pension Funds who suffered prejudice as a result of maladministration by the different Government institutions.
vi). MONITORING

a) The Public Protector is to be advised on the State's response to this report, including planned action, indicating time lines, within 30 days from the date this report.

b) The implementation of the remedial action should be finalised within six months from the date of this report.

c) Bi-monthly reports are to be submitted to the Public Protector from the date of this report. A final report should be submitted by 30 May 2012.
REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT BY THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION AND THE GOVERNMENT EMPLOYEES PENSION FUND DURING PRIVATISATION OF THE VENDA PENSION FUND.

1. INTRODUCTION

1.1 EQUITABLE ACCESS TO SOCIAL SECURITY is Report no 18 of 2011/12 of the Public Protector in terms of section 182 of the Constitution and Section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

1.2 It is submitted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, 1996 (Constitution) and section 8(1) of the Public Protector Act to the

1.2.1 Minister of Finance;
1.2.2 Minister of Public Service and Administration;
1.2.3 Chairperson of the Board of Trustees of the Government Employees Pension; and
1.2.4 Chief Executive Officer of the Government Employees Pension Fund.

1.3 A copy is provided, in terms of section 8(3) of the Public Protector Act, to the

1.3.1 Complainants;
1.3.2 Speaker of the National Assembly and
1.3.3 Chairperson of the Justice and Constitutional Development Portfolio Committee.

1.4 The Report deals with an investigation into allegations of maladministration and prejudice to members of the former Venda Pension Fund as a result of the conduct and/or failure to act by Government and the Government Employees Pension Fund (GEPF) and their predecessors in law, during the amalgamation period of the different government pension funds in the former Transkei, Bophuthatswana, Venda and Ciskei (the so-called TBVC states).
1.5 The complaint specifically relates to the conduct of the South African Government during the transfer of the members of the Venda Pension Fund to a private scheme.

2. THE COMPLAINT

2.1 The Complaint was lodged by Messrs T J Tshiololi, L J Rambau and M P Ramavhale who are former members of the Venda Pension Fund. They approached the Public Protector on behalf of the Vhembe Concerned Pensioners Group (the Complainants) on 19 November 2008 alleging that the State, in particular the GEPF and National Treasury acted improperly as envisaged in section 182(1)(a) of the Constitution, during privatisation of the Venda Pension Fund. This resulted in prejudice to the Complainants and other members of the Venda Pension Fund.

2.2 Mr Tshiololi joined the Venda Government and the Venda Pension Fund during 1979. He was employed as a manager by the Venda Department of Information and Broadcasting. During 1996 when he was allegedly forced to retire as a result of “rationalisation”, he was at the level of Deputy Director General earning in excess of R183000 per year. During 1992 he had no option but to privatise his pension benefits and later had to repay a substantial amount as overpayment received. His current income consists of a SASSA old age pension.

2.3 Mr Rambau joined the South African Government as an educator during 1963. He was not allowed to join the Government Services Pension Fund (GSPF) until approximately three or four years later. He was transferred to the Venda Government in 1979. During 1991, he was forced to retire and was the Deputy Director General of the Department at that stage. He alleges that he had no option but to transfer his pension benefits to SANLAM. He submitted the list of the members who were transferred to SANLAM in 1991 and stated that no explanation was given to them as to the amounts transferred on their behalf and how their pension amount was calculated. He currently receives a pension benefit from SANLAM but is not certain whether it is correct and despite numerous efforts since 1994, he was unable to determine the accuracy of the amount transferred or the annuity.

2.4 Mr M P Ramavhale was employed by the South African Government in 1969 as an educator. He was only allowed to join the GSPF after a waiting period. During 1982 he was transferred to the Venda Government. Thereafter, in 1992 he had no option but to
privatise his pension and was later required to repay a substantial amount. He bought back a significant number of pensionable service years, which were allegedly not calculated by the Venda Pension Fund when his benefits were privatised. He was also forced to repay an amount received as overpayment. His current income consists of a SASSA old age pension.

2.5 The Complainants argued that, had it not been for the privatisation, the members of the Venda Pension Fund would have been entitled to their full defined benefits in terms of the GEP Law today. They contended that no sufficient reason existed for denying individuals their right to a full pension just because they were, during 1992, influenced to accept the privatisation scheme of the then Venda Government, which amounted to a partial advance payment of the members’ pension entitlement. They further argued that the process was, from the beginning, not conducted properly and was, as a result, defective.

2.6 The Complainants also relied on the finding of the Court in *MP Dali & 47 Others (Dali case)*\(^2\) that the members of the then Venda Pension Fund accepted the privatisation scheme under circumstances where it could rightly be said that they were misled by the State. According to the Court, a person can only be held bound to an election where he or she was fully informed of the advantages and disadvantages of such election. It cannot be assumed that an individual has abandoned rights if he/she was not aware of the extent of the rights when he or she is alleged to have abandoned same.

2.7 The Complainants raised the example of an educator and member of the Venda Pension Fund who, in a letter dated 7 March 1994, was informed that he received an amount of R446 292.00 in terms of the First Privatisation Scheme and that according to the revised formula, an amount of R225 019.53 must be repaid, for an overpayment.

2.8 The Complainants further allege that the formula used in the calculation of pension benefits during the two privatisation schemes were not determined in terms of the original rules of the fund. The formula is as follows:

\[ \text{Reserve} = N \times S \times F \]

\( N \) is years of service: e.g. 6 years and 3 months is 6, 25.

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\(^2\) *MP Dali & 47 Others v The Government of the Republic of South Africa and the President of the Republic of South Africa [2001] 8 BPLR 2233 (A)*
S is the monthly salary in March 1992.

F is the factor set out in appendix VI for the member’s age, sex, retirement date and fund. The factor allows for the value of the members’ annuity and gratuity, for the interest that could be earned before retirement, for the under-funding and for the interest earned by the assets between April 1992 and June 1993.

2.9 A further allegation is that, except for the 47 members in the Dali case, the other members of the fund who repaid the “overpayments” were not compensated in terms of the Public Protector’s Special Report No. 18 of 2002, signed on 9 April 2002 and the GEPF did not implement the recommendations of the Public Protector.

2.10 It is further alleged that members did not receive compensation for the pensionable service that have been bought back and paid for. The complaint contains the names of six members who bought back service and were not compensated. Documents containing evidence were obtained and will be addressed in this report.

3. BACKGROUND: HISTORY OF THE VENDA PENSION FUND

3.1 The Venda Pension Fund was established on 17 August 1979 in terms of the Venda Government Service Pension Act, 1979 (the Pension Fund Act), passed by the Venda Legislature by virtue of its status as a so-called self-governing state in terms of the National States Constitution Act, 1971. It provided for the establishment, control and administration of a Pension Fund (for permanent employees) and of a Superannuation Fund (for temporary employees and married women) for persons in the service of the Venda Government. During 1990 a Council of National Unity took control of the government and administration of the Republic of Venda. The Council assumed the power to legislate for the Republic of Venda by way of proclamation in the Republic of Venda Government Gazette. Civil Servants of the Republic of South Africa were detached to different departments within the Venda Government.

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3 As captured by the Supreme Court of Appeal in Dali and others v Government of the Republic of South Africa and another [2000] 3 All SA 206 (A), as well as Dabalarivhuwa Patriotic Front and Another v Government Employees Pension Fund and Another [2006] 1 BPLR 1 (SCA)
3.2 On 14 February 1992, by way of Proclamation 2 of 1992 (V), the Pension Fund Act was amended by the insertion of section 10A. In terms of the section, a member of either fund whose annual pensionable emoluments exceeded an amount from time to time determined by the Director General, had the right to elect that his accrued benefit be transferred, for his benefit and in his name, to an investment plan providing retirement benefits. The scheme is generally known as the First Privatisation Scheme. The reason for the amendment was a concern that the pension funds of the Republic of South Africa were under-funded as a consequence of which members of the Venda funds could be prejudiced when Venda was re-incorporated into the Republic of South Africa. At the time of the First Privatisation Scheme, the Venda Government stated: "The Venda Pension Funds are well funded, but the funds in the Republic of South Africa, into which the Venda funds may be incorporated in future, are not well funded. In order to protect existing rights the Venda Civil Servants are afforded the opportunity to withdraw from the Fund and to "privatise" their accrued benefits by the transfer of the individual member's accrued benefit into an approved investment in the member's own name and which investment will then in future provide for the member's old age".

3.3 Prior to the implementation of the First Privatisation Scheme the funding level of the funds was determined to be 91%. By reason of the determination, the members who elected to privatise were paid an amount calculated at 91% of their actuarial interest in the funds. During the period February to July 1992, some 700 members of the Pension Fund transferred their benefits out of that Fund. These transfers resulted in widespread fears that the scheme was proceeding on a basis which would irregularly deplete the assets of the funds at the expense of members who would only later participate in the scheme and those who elected not to participate. As a result a coalition of civil servant trade unions petitioned the Venda Government to suspend the scheme.

3.4 On 24 August 1992 the Venda Government and the Coalition of Civil Servants signed an accord in terms of which the Venda Government undertook to suspend, with immediate effect, all pension transfers in terms of the First Privatisation Scheme and undertook to agree with this Coalition on a body to be given the responsibility "of resolving the present deadlocked pension matter." Pursuant to the accord the Venda Government promulgated Proclamation 20 of 1992 on 17 September 1992. In terms of the Proclamation a committee
known as the Venda Pension Fund Crisis Committee (VPFCC) was established and the application of section 10A of the Act was suspended until a date which was to be proclaimed. Eight members nominated by the Government and eight members nominated by the Coalition were appointed to the VPFCC.

3.5 The VPFCC appointed a firm of independent actuaries to value the funds as at 31 March 1992 for the purposes of the privatisation scheme. It recommended that the future implementation of the privatisation scheme be done in terms of a revised actuarial formula based on parameters that were consistent with the valuation which was to be performed by the independent actuaries.

3.6 The independent actuaries completed their valuation of the funds during the course of June 1993. They reported that it was not possible to distinguish between the assets and liabilities of the two funds because the administrators had not properly separated the accounts for the two funds and that the funding level of the combined two funds, as at 31 March 1992, was 70%. The formula to be used to determine the benefit payable to members of the funds who elected to privatise, was revised. The revised formula was based on the determination of the independent actuaries that the funding level of the combined funds was 70% and a recommendation by the actuarial subcommittee, with the support of the independent actuaries, that the funding level be raised to 75% to allow for the performance of the funds from April 1992 to June 1993. The actuarial sub-committee recorded the valuation of the funds by the independent actuaries and the revised formula in its final report dated 25 June 1993.

3.7 On 29 June 1993 the Venda Government attempted to facilitate the implementation of the agreements reached in the VPFCC by promulgating Proclamation 9 of 1993. The proclamation amended section 10A of the Act. The amended section provided that any active member of either of the funds had the right to elect that his or her actuarial share of the fund concerned be transferred to an investment plan or paid to him or her direct; that active members who had exercised the option to withdraw, automatically joined the existing Pension Fund as new members; that any overpayment made to an active member, arising out of the privatisation scheme, could be recovered by the Government from the member;
and that active members of the Superannuation Fund be transferred to the Pension Fund. Subsection 7 provided as follows:

"7 (1) Payments of benefits shall be made in accordance with the revised actuarial formula which shall be based on parameters that are consistent with the valuation to be performed by an independent actuary.

(2) The revised formula shall be published in the Government Gazette on the date it is received from the independent actuary."

The amended scheme is generally known as the Second Privatisation Scheme.

3.8 Although section 10A(7) speaks of a valuation "to be performed" and a revised formula which "is (to be) received", the intention could not have been that another valuation be obtained and that another formula be devised. The wording of the subsection was nevertheless considered to be a problem and in an attempt to cure this problem, Proclamation 1 of 1994 and Government Notice 3 of 1994 was promulgated on 23 February 1994. Section 4 of Proclamation 1 of 1994 purported to insert a new section 13A into Proclamation 9 of 1993 to the effect that the Councillor of Finance and Economic Affairs could in his "pure administrative discretion" at any time, by notice in the Gazette, publish a revised formula and that such formula could be published with retrospective effect. Such a revised formula was published in Government Notice 3 of 1994. In addition, Proclamation 9 of 1993 provided that a member who failed to repay an overpayment could be placed on leave without pay and that no court would be competent to set aside an order to that effect.

3.9 During June 1994, each of the members who privatised in terms of the First Privatisation Scheme received a second payment from the Venda Pension Fund. The amounts of these payments were calculated by the actuaries of the pension fund. They had been instructed to determine an equitable final distribution amount for all the members of the fund.

3.10 The Second Privatisation Scheme proceeded on the basis of the revised formula. In March 1994 several members of the funds, who had participated in the Second Privatisation Scheme and who were dissatisfied with the 75% funding level, launched an application challenging the validity of Proclamation 1 of 1994 and Government Notice 3 of 1994 in the
Venda Supreme Court. The court in *Mulaudzi*⁴ declared both the Proclamation and the Government Notice to be invalid and of no force and effect by reason of the non-compliance with procedural requirements.

3.11 Between the launching of the *Mulaudzi*-application and the handing down of judgment in that application, the Interim Constitution of the Republic of South Africa, 1993 (the Interim Constitution) came into effect and Venda was reincorporated into the Republic of South Africa. By the time the judgment was handed down thousands of public servants in Venda had participated in the Second Privatisation Scheme and millions of rands had been paid out to these members or to the investment schemes designated by them. In the complicated circumstances attendant on the 1994 constitutional transition, the effect of the *Mulaudzi*-judgement was not immediately apparent to the South African authorities. When, in the course of 1995, the full implications of the judgment became clear to them, Proclamation R56 of 1995 was promulgated on 5 June 1995 to regularise the situation.

3.12 On 5 June 1995 the President of the Republic of South Africa, the second respondent in the *Mulaudzi* case, issued Proclamation R56 of 1995 in terms of which he purported to make regulations under section 11 of the Pension Fund Act (Venda). He stated that he was acting under powers vested in him under section 235(7) of the interim Constitution. Sections 2 and 3 of this proclamation read as follows:

> "2 Any member of the fund, who made an election in terms of section 10A (1) of the Act, shall be paid from the Fund, an amount equal to his or her accrued benefit in the Fund.

> 3 The payment of any amount in terms of regulation 2, shall be subject to -

> (1) the premise that the funding level of the Fund is, and at all times was 75%.”

3.13 According to the Complainants, a number of members who participated in the First Privatisation Scheme repaid under pressure and under protest, the amount which they had received in excess of the amount payable in terms of the revised formula. Subsequently, some members of the Dabalarivhuwa Patriotic Front instituted legal action against the Government for payment of the amount so repaid, and succeeded. Both the court of first

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⁴ *Mulaudzi v Chairman, Implementation Committee 1995 (1) SA 513 (VSC)*
instance and the Supreme Court of Appeal (SCA) held that in terms of the First Privatisation Scheme the funding level of the funds was irrelevant and that the members who elected to privatise in terms of the scheme were entitled to 100% of their accrued benefits\(^5\). A second claim by the plaintiffs in this case was dismissed by the court of first instance. The second claim was for an order declaring Proclamation R56 of 1995 unconstitutional and of no force and effect. On appeal to the SCA it was held that the appellants (Members of the Dabalarivhuwa Patriotic Front) had not made out a case that they were in any way affected by the Proclamation, as they were, in terms of Proc 2 of 1992, entitled to 100% of their benefits. The appeal in respect of the second claim was consequently, likewise dismissed.

3.14 On 19 April 1996 and in terms of Proclamation 21 of 1996 the GEP Law was promulgated. It is common cause that in terms thereof the Venda Pension Fund was discontinued as from 1 May 1996; that all the members of the Venda Pension Fund immediately before its discontinuance became members of the GEPF previously known as the Government Service Pension Fund (GSPF) established as such in terms of section 3 of the Government Service Pension Act, 1973; and that all assets and liabilities of the Venda Pension Fund passed to the GEPF.

3.15 The Complainants allege that they are being prejudiced and discriminated against vis-à-vis public servants who remained in the Venda Pension Fund and who did not participate in the privatisation of the fund and because it did not make provision for the payment of a fair pension to them. They were allegedly prejudiced because they had not been warned that they would receive only 91% of their accrued benefits and could even, presumably in terms of the subsequent proclamations referred to, have to repay some of what they received.

3.16 The amounts paid to the Complainants during 1992 were calculated on the basis that they were only entitled to 91% of the present value of the benefits which they expected to become entitled to in respect of their period of service i.e. 91% of their accrued benefits or actuarial interest. That was done because the funding level of the pension fund was considered to be relevant and because the funding level of the fund was assumed to be 91%.

\(^5\) Dalie v Government of the Republic of South Africa [2000] 3 All SA 208 (SCA)
3.17 The court finding that the members of the fund were entitled to 100% of their accrued benefits was clearly correct. A member’s interest in the fund at a given time was the present value of the benefits which he or she expected to become entitled to in respect of his or her period of service. The SCA however further found that “In any event, if appellants find themselves in a worse position than civil servants who had not elected to take part in the privatisation schemes…”

4. JURISDICTION OF THE PUBLIC PROTECTOR

4.1 The Public Protector was established in terms of Chapter 9 of the Constitution to support constitutional democracy. The operational requirements of the Public Protector are provided for by the Public Protector Act.

4.2 Section 6(4) of the Public Protector Act empowers the Public Protector to investigate any alleged-

4.2.1 Maladministration in connection with the affairs of government at any level;

4.2.2 Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function which results in unlawful or improper prejudice to any other person;

4.2.3 Improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

4.2.4 Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.
4.3 The findings of an investigation by the Public Protector may, when he/she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.

4.4 The allegation regarding improper conduct and/or omissions by the Government in respect of the members of the Venda Pension Fund falls within the jurisdiction of the Public Protector.

5. THE INVESTIGATION

5.1 Key Sources of Information

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

5.1.2 Meetings and or interviews were conducted with the following persons or authorities:

5.1.2.1 The Complainants, Messrs T J Tshiololi, L J Rambau and M P Ramavhale;

5.1.2.2 The Vhembe Concerned Pensioners Group;

5.1.2.3 Officials of the GEPF; and

5.1.2.4 The Minister of Public Service and Administration;

5.1.3 The following documents were scrutinised and analysed:

5.1.3.1 Correspondence with the GEPF;

5.1.3.2 Records of the amalgamation of the Pension Funds;

5.1.3.3 Response by the GEPF\(^6\);

5.1.3.4 The Transfer of Funds: Quotation for single premium policies;

5.1.3.5 Records of the actions of the Government in relation to the complaint since 1994\(^7\);

5.1.3.6 Records of the buy-back service of four members\(^8\); and

5.1.3.7 Relevant newspaper articles

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\(^6\) VENDA GOVERNMENT PENSION FUND dated 9 June 2009

\(^7\) Restructuring of Pension Provisioning for Public Service Employees 19 August 2003 Minister of Public Service and Administration to the Public Service and Administration Portfolio Committee of Parliament

\(^8\) Department of Economic Affairs, Republic of Venda
5.1.4 The legislation, policies, case law and literature reflected in paragraph 6 of this report, were considered and applied;

5.2 The Government Services Pension Fund (GSPF)

5.2.1Shortly after 27 April 1994, a Voluntary Severance Package (VSP) was offered to public servants in order to rationalise the public sector. Members of the GSPF who opted for the VSP, as well as other members were actively encouraged to buy back service periods before the promulgation of the GEP Law on 1 May 1996. The buy-back option in terms of the GSPF was much more affordable than the option that would be implemented when the GEP Law would be promulgated.

5.2.2 Numerous complaints, relating to the buy-back of pension, were received at the time of the institution of the VSP’s. This meant that employees who wanted to apply for buy-back service had to do so simultaneously with the application for a VSP. The Western Cape Health and Education Departments indicated that, of the 7000 applications for VSP’s received, 4500 applicants also applied for buy-back of service. At the time, the Western Cape Department of Health indicated that they were involved in negotiations with the Minister of Finance to condone the late filing of approximately 350 applications. This request was, however, refused. The Western Cape Department of Education had two meetings with certain functionaries of the Department of Finance who also indicated that no late applications would be condoned.

5.2.3 No evidence could be found that members of the other funds that were to be amalgamated informed their members and/or the employers of these members as vigorously as was done by the GSPF.

5.3 The Amalgamation of the Pension Funds

5.3.1 The GSPF in South Africa, pre-1994, was a “pay-as-you-go system”. Contributions of current members funded the pension benefits of retired members. During the 1980’s the funding level collapsed. One of the reasons for this was apparently due to rules that, inter alia, provided that members could buy back service, to the age of 16, irrespective of their employment date and at ridiculously low rates. Pensions were also paid in terms of a
formula that took into account the member’s salary on the last working day. The system was regularly abused in that members received substantial increases towards the end of their employment. Government regularly had to make large contributions towards the GSPF. The system after 1994 was a fully funded pension fund. The assets of the GEPF grew from R31 billion in 1989 to R136 billion in 1996.

5.3.2 Prior to the amalgamation of the pension funds of the TBVC states and self-governing territories with the GSPF, the Republic of South Africa had two funds, the GSPF and the Temporary Employees Pension Fund for temporary employees. The former Transkei and Venda also had two funds for permanent and temporary employees. The former Bophuthatswana and Ciskei each had one fund. The six so-called self-governing territories were served by two combined funds, one for permanent and one for temporary employees.

5.3.3 The Interim Constitution provided certain guarantees protecting accrued benefits and retirement ages of public servants and stipulated that legislative provision should be made for a pension for members of the public service.

5.3.4 The Draft White Paper on the Transformation of the Public Service stated that the Government envisaged the rationalisation of all the existing funds into a single pension fund.

5.3.5 A Special Task Team was appointed which had to investigate and make proposals on the rationalisation of the funds. The focus of the pension task team was to provide homogeneous benefits to all civil servants as the benefits previously offered differed between the various constitutional entities as well as between permanent and temporary employees. Actuaries were appointed for each of the funds and the rest of the special task team consisted of representatives of the DPSA, the South African National Defence Force, the South African Police Service, as well as Education and Labour Unions. At the end of the process each fund submitted an actuarial report, member rolls were reconciled and transfer amounts were determined. Each report created a “data reserve” for possible defective data.

5.3.6 The GEP Law was promulgated and the commencement date of the law was proclaimed as 1 May 1996. With the amalgamation of the funds, the benefit structure was standardised
and all discriminatory practices scrapped. The GEPF is classified as a defined benefit pension fund established by Law in terms of section 1 of the Income Tax Act 58 of 1962). The GEPF allowed for pension benefits on resignation, death or retirement. It further allowed for spouse’s pension and funeral benefits and orphans benefits. The DPSA further paid a medical aid subsidy to a member of the fund on retirement if the member had more than 13 years of pensionable service.

5.3.7 A “defined benefit fund” is a fund where members’ contributions are fixed and they are guaranteed benefits defined in the rules of the fund. If the fund does not have sufficient funds to meet its obligations to its members, Government has to ensure that it is properly funded by either increasing its contributions or by making such lump sum payment or payments as are from time to time necessary. There is a statutory obligation on Government to ensure that the fund is able to meet its obligations to its members. The fund is governed by its rules. The manner in which it is to be administered and managed and the benefits payable to its members are determined by such rules.⁹

5.4 Response by the GEPF

5.4.1 The GEPF responded that Proclamation R56 of 1995 withstood all court challenges. Sections 2 and 3 of this proclamation read as follows:

“2 Any member of the fund, who made an election in terms of section 10A (1) of the Act, shall be paid from the Fund, an amount equal to his or her accrued benefit in the Fund.

3 The payment of any amount in terms of regulation 2, shall be subject to -

(1) the premise that the funding level of the Fund is, and at all times was 75%.”

5.4.2 It should be noted that in the Dali case¹⁰ the Court found that Proclamation R56 of 1995 was not applicable to members of the First Privatisation Scheme. In a subsequent matter the Court refused to condone late filing. The constitutionality of the Proclamation was thus never properly argued in court.

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⁹ Kurt and Others v Transnet Pension Fund and Another [2006] 2 BPLR 120 (W)
¹⁰ Dali v Government of the Republic of South Africa [2000] 3 All SA 206 (SCA)
5.4.3 The GEPF further indicated that a disparity would be created by the implementation of the Public Protector’s Special Report No. 18 of 2002 where it was recommended that only the members of the First Privatisation Scheme were entitled to 100% of their benefits. However, in the light of the discussion above a defined benefit fund pays benefits in terms of the rules of the fund and not the funding level of the fund.

5.5 The Transfer of Funds: Quotation for Single Premium Policies

5.5.1 In January 1994 a total of RM180 was transferred to a private pension fund in respect of 942 members of the Venda Pension Fund. The Complainant, Mr L J Rambau submitted the list of the members who were transferred to SANLAM in 1991.

5.5.2 Despite numerous enquiries, no explanation was ever given to him or the other members on this list as to the amounts transferred on their behalf and how their pensions were calculated. He indicated that numerous discrepancies exist on this list in respect of years of service and post levels of members on this list.

5.5.3 Mr Rambau alleged that some pensioners on lower post levels and with less years of service receive higher monthly pensions than members who retired with more years of service and higher final salaries.

5.6 Actions of the Government in respect of the complaint since 1994

5.6.1 A significant number of the members who participated in the First Privatisation Scheme repaid, under pressure and under protest, the amount which they had received in excess of the amount payable in terms of the revised formula. Subsequently, some of them instituted action against the Government for payment of the amount so repaid. They succeeded. Both the court of first instance and the SCA, as indicated above, instructed repayment of the amounts recovered.\textsuperscript{11}

\textsuperscript{11} Dali and Others v Government of Republic of South Africa and Another (623/98) [2000] ZASCA 30; [2000] 3 All SA 206 (A) (31 May 2000)
5.6.2 Mr T S Makhale, representing the Dabalarivhuwa Patriotic Front, lodged a complaint against the Department of Finance of the Republic of South Africa regarding the former Venda Pension Fund and the privatisation schemes and the consequences of these schemes for members of the fund.

5.6.3 In Report No. 18 of 2002, the Public Protector recommended to the Speaker of the National Assembly, Honourable Members of the National Assembly, the Chairperson and Honourable Members of the National Council of Provinces, “that the interpretation applied in Dali’s case be applied to all the members who privatised in terms of the First Privatisation Scheme. It was mentioned above that the court decided that members of this group were entitled to 100% of their actuarial interest. The National Treasury (Pensions Administration) is therefore urged to revisit these cases and adjust their benefits accordingly, including those who did not participate in the lawsuit.”

5.6.4 Public Protector Report No. 18 of 2002, were not was never implemented.

5.6.5 On 19 August 2003 the Minister of Public Service and Administration addressed the Public Service and Administration Portfolio Committee of Parliament on "the Restructuring of Pension Provisioning for Public Service Employees." The presentation contained a section on "Investigation into impact of former Venda Pension Fund dissolution." The following remark was recorded in the minutes of the meeting: “Mr Kgwele (ANC) asked about the impact of the Venda Pension Fund. He was under the impression that the process was finished.” The minutes reflect the reply as follows: “Mr Rapea replied that the issue about Venda is just one of verification that the process was finished.”

5.6.6 In the Annual Report of the Public Sector Co-Coordinating Bargaining Council, signed June 2006, it is said that during the year under review the Pensions Restructuring Task Team dealt with “the Action Plan for the verification of information regarding the Venda Pension Fund issue.”

5.6.7 Further to these pronouncements, nothing seems to have been done to bring the Venda Pension Fund matter to a conclusion.

12 Report in Terms of Section 8(1) and (2) of the Public Protector Act, 1994 (ACT 23 OF 1994). REPORT NO. 18 dated 9 April 2002
13 The Annual Report, 2005/2006 Public Sector Co-Coordinating Bargaining Council paragraph 3.4.4
5.7 Buy-Back Service of Six Members

5.7.1 On the list of names submitted by the Complainants, the following six members were not compensated for services bought. They are:

<table>
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<tr>
<th></th>
<th>Name</th>
<th>Province</th>
<th>ID Number</th>
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<tbody>
<tr>
<td>1</td>
<td>Madzaga</td>
<td>KA</td>
<td>320316 5290 088</td>
</tr>
<tr>
<td>2</td>
<td>Mushaphi</td>
<td>NI</td>
<td>320917 0093 085</td>
</tr>
<tr>
<td>3</td>
<td>Rabambi</td>
<td>MP</td>
<td>340712 5075 089</td>
</tr>
<tr>
<td>4</td>
<td>Ramavhale</td>
<td>MP</td>
<td>400119 5415 082</td>
</tr>
<tr>
<td>5</td>
<td>Tshamaano</td>
<td>MA</td>
<td>410604 5195 089</td>
</tr>
<tr>
<td>6</td>
<td>Sinoamadi</td>
<td>MM</td>
<td>450717 5505 080</td>
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5.7.2 Mr Sinoamadi submitted a document signed by NS Muruba of the Department of Economic Affairs, Republic of Venda clearly indicating that he bought back service, for the period 1 August 1961 to 24 May 1970, at monthly instalments of R26.49. Mr Ramavhale submitted a similar document indicating payment for the period 1 February 1956 to 20 January 1969 at monthly instalments of R77.20. He submitted a further document dated 11 March 1991 indicating that he has fully paid for the buy-back service.

5.7.3 They disputed their initial payments received from the Venda Pension Fund but could not access any records at the GEPF. However, they managed to obtain a copy of a letter from the GEPF dated 9 September 1996, addressed to the Director-General, Department of Finance, Northern Province (now Limpopo) clearly indicating that the GEPF has record of all information of members who privatised in 1992.

5.8 Evaluation of Evidence

5.8.1 Governments in all countries are expected to be guardians of the people and of the interests of the people over whom they govern. It is true, however, that governments which are managed or operated by human beings are as fallible as the human beings that constitute them.
5.8.2 The individual is confronted with the implementation of government policy. Generally he/she is far less knowledgeable and far less experienced than government. Government imposes restrictions on the individual that he/she has no choice but to observe. In some cases, the individual is dependent on the adequate functioning of government services when receiving benefits or grants. Usually the individual does not have an exit option in dealing with the executive branch of government. Consequently, the individual frequently feels totally impotent in the face of the bureaucratic might of government administration.

5.8.3 The Venda Pension Fund was not entitled to accept or follow the recommendation in respect of the new formula and/or the funding level of the fund, in that it was contrary to the rules of the fund and the spirit of a defined benefit fund. The benefits payable in a defined benefit fund are not dependent on the financial position of the fund which, if inadequate, has to be supplemented in accordance with the rules of the fund.

5.8.4 The Complainants, of whom the majority were employed before the promulgation of the Republic of Venda Constitution Act, 1979, indicated that at the time of the implementation of these schemes the then South African Government had seconded advisors to Venda. In terms of the rules of the GEP Law, when the years of pensionable service are calculated the factor for pensionable years of service contributing to the Government Pension Fund of Venda is 1.00, exactly the same as for the GSPF. It would appear from the actuary reports submitted in the period between the two privatisation schemes, that in fact the Venda fund was under funded. Ignorance in respect of the rules of the fund and the fact that the government was responsible for additional contributions further fuelled the fear of loss of pension benefits.

5.8.5 As mentioned above, an educator and member of the Venda Pension Fund, who, in a letter dated 7 March 1994, was informed that he received an amount of R446 292.00 in terms of the First Privatisation Scheme and that according to the revised formula he must repay R225 019.53, being an overpayment. The amount was repaid and at the end he only received an amount of R221 273.00. The educator was appointed to the public service on 29 July 1952. The educator finally retired on 1 January 1998 and received a further R101, 651.00 from the GEPF. For approximately 46 years of service the educator received a total amount of R322, 924.00.
5.8.6 The Public Protector has not been able to determine the final salary of the educator has not been determined, but if it is accepted that his final salary was approximately R70,000.00 per year and he had retired with full benefits at the end of his 46 years of service, he would have been entitled to an estimated gratuity of R216,384.00, and an annuity of approximately R4900.00 per month in 1998.

5.8.7 If the Special Task Team and in particular the representatives of the Venda Pension Fund, had vigorously encouraged the members that privatised their benefits to buy-back the service in question, the educator would have owed the fund an amount of approximately R5000.00. He would have qualified for a medical aid subsidy, funeral benefits and in the event of his death, his spouse would have received a spouse’s pension.

5.8.8 As the educator started his employment during 1952 he probably had no option but to transfer to the Venda Government as an employer during 1979. During those years he would most probably not have qualified for a position in what was then South Africa.

5.8.9 From the discussions above it is clear that different Government institutions dealt with the problem of the Venda Pension Fund Members at different times, but the problem was not effectively addressed.

6. LEGAL AND REGULATORY FRAMEWORK

6.1 The Constitution

6.1.1 Section 2 of the Constitution states: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." One of the rights enshrined in the Bill of Rights is the right to equality that all people have been promised. The effect of the equality clause is to remove unfair discrimination and to ensure that all people are treated with equal consideration and enjoy equal access to opportunities in every sphere of life.
6.1.2 In order to alleviate inequality in access to services, human income and asset poverty and to address the social exclusion characteristic of apartheid, many fundamental changes have been made through legislation and policy. Section 9(3) of our Constitution states that no one may be directly or indirectly discriminated against on the ground of social origin. Section 10 states that everyone has the right to have their dignity respected and protected.

6.1.3 Another factor that should be considered in assessing the unfairness of the discrimination is the extent to which the rights of the complainant have been impaired and whether there has been an impairment of the dignity of a concerned person.

6.1.4 In the context of South Africa, the right to equality includes a responsibility on the state and other appropriate authorities to implement positive measures to redress systemic disadvantages that are a result of injustices of the past.

6.1.5 In trying to establish whether the state acted properly in the case of the Vhembe pensioners, an assessment of whether or not the state’s conduct complied with the right to equality, is one of the key considerations.

6.1.6 Another key consideration is the state’s conduct considered against its obligations, as provided for in section 27 of the Constitution.

6.1.7 Section 27(1)(c) states that everyone has the right to have access to social security if they are unable to support themselves and their dependants, involving appropriate assistance.

6.1.8 The state’s responsibility in respect of the Vhembe Pensioners Group clearly indicated the duty to ensure that the persons concerned were not forced into a situation that deprives them of access to social security.

6.1.9 Section 197(2) of the Constitution provides that “The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.” The Supreme Court of Appeal noted on this section that, “All actions and/or decisions taken pursuant to the employment relationship

14 1996 Constitution, Chapter 10 - Public Administration
between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable public administration in accordance with sections 195 and 197 of the Constitution.\(^{45}\)

6.1.10 One of the aims of the South African Social Security policy is to repair damage (reparation). “Social security refers to a set of policy instruments that is set up to compensate for the financial consequences of a number of social contingencies or risks”\(^{16}\)

6.1.11 Laws, policies and even conduct need to comply with the minimum standard expected in the Bill of Rights and if, for whatever reason, the conduct of the State would fall short of this, the infringing law, policy or conduct will be unlawful unless there is good reason for it. This culture of justification is the product of a society committed to respecting the human rights of all people generally and the equality of all people in particular.

6.1.12 Section 181 of the Constitution establishes the institution of the Public Protector and subsection (3) provides that all State organs “through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.”

6.2 Promotion of Administrative Justice Act, 2000 (PAJA)

6.2.1 Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It also provides that national legislation must be enacted to give effect to this right.

“Administrative action” is defined by PAJA, as:

\(^{45}\) Ntshangase v MEC: Finance, KwaZulu Natal and another [2010] 2 All SA 150 (SCA) Para 18

A decision taken, or a failure to take a decision, by an organ of 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."

6.2.2 Section 3 provides that:

“(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”

6.2.3 On the facts before the Public Protector the conduct of the Government cannot be considered to have been procedurally fair.

6.3 The Government Employees Pension Law, 1996 (GEP Law)

6.3.1 Section 14 of the GEP Law describes the pension funds that will be discontinued, and amalgamated into the GEPF.

6.3.2 Subsection (5) of section 14 includes the Government Pension Fund of Venda, established by section 2 (1) of the Venda Government Service Pensions Act, 1979 (Act No. 4 of 1979), of the former Venda, and the Government and the Superannuation Fund of Venda, established by section 2 (1) of the Venda Government Service Pensions Act, 1979, of the former Venda as funds to be amalgamated.

6.3.3 Subsection (2) of section 14 determines that “All assets, including any right to claim any amount, and all liabilities, including any obligation to pay any pension, related benefit or any other amount in terms of any law, of a previous fund in respect of which a date is determined under subsection (1), shall with effect from that date pass to and vest in the Fund.”

6.3.4 Section 20 (1) of the GEP Law determines “that no award of a benefit or any increase thereof and no alteration of any condition or condonation of a breach of any condition upon which such benefit is by law earned or to be earned in respect of a pensioner of the Fund,
the Temporary Employees Pension Fund or a previous fund, shall be lawful unless the award, increase, alteration or condonation is authorized by an Act of Parliament.”

6.3.5 Subsection (2) of section 20 prescribes that where an Act of Parliament does award benefits, the employer of the person it was awarded to “shall immediately compensate the Fund in full for the liability incurred by the Fund as calculated by an actuary.”

6.3.6 The provisions clearly indicate that an obligation was placed on the GEPF to fulfill obligations of previous funds as defined in the law. The obligations passed and vested in the GEPF with the acquiring of the assets of the previous funds.

6.4 Case Law

6.4.1 In Kuit and Others v Transnet Pension Fund and Another17 the court found that “The fund was not entitled to accept or follow the recommendation in that it was contrary to the rules of the fund and the spirit of a defined benefit fund. The benefits payable in a defined benefit fund are not dependent on the financial position of the fund which, if inadequate, has to be supplemented in accordance with the rules of the fund.”

6.4.2 In Dali v Government of the Republic of South Africa18 the court found that “The finding by the judge a quo that the appellants were entitled to 100% of their accrued benefits was clearly correct. A member’s interest in the fund at a given time was the present value of the benefits which he or she expected to become entitled to in respect of his or her period of service. A member’s actuarial interest could not have been anything other than his or her aforesaid interest in the fund determined according to actuarial principles.”

6.4.3 In Moeng v John Abbot Garage Services19 the Pension Funds Adjudicator found the following:

“In terms of the fiduciary duties owed by the trustees of a pension fund to its members, the trustees are required to direct, control and oversee the operations of the fund in accordance with the applicable laws and the rules of the fund; to take all reasonable steps to ensure

17 [2006] 2 BPLR 120 (W)
18 [2000] 3 All SA 206 (SCA)
19 [2006] 2 BPLR 169 (PFA) per M Mohlala
that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times; and to act with due care, diligence, in good faith and avoid conflicts of interest. Because of the binding effect of the rules on the fund, it may only pay out to its members those benefits provided for in its rules."

6.4.4 From the case law above it is clear that the benefits payable in a defined benefit fund are not dependent on the financial position of the fund. It is further clear that trustees of pension funds should always act in the best interest of their members, which clearly did not happen when the benefits of the members of the Venda Pension Fund were transferred to a private fund. Further, the benefits that were transferred were not the benefits they were entitled to in terms of the rules of the fund.

6.5 Comparative Ombudsman Jurisprudence

6.5.1 On 16 July 2008, the United Kingdom Parliamentary and Health Service Ombudsman (the Ombudsman) submitted a report to both Houses of the United Kingdom Parliament. The report entitled, Equitable Life: A Decade of Regulatory Failure, addressed the failure of Government and the Regulatory Authorities to address problems with a private insurance company which resulted in financial losses to policy holders and pensioners.

6.5.2 The Ombudsman found that the Government and the Regulatory Authorities caused injustice to the complainants as a result of maladministration. It was also found that, as a result of the maladministration, the complainants lost an opportunity to make informed choices about saving for their retirement.

6.5.3 The Ombudsman was of the view that the Government, and in particular the Regulatory Authority:

6.5.3.1 Caused an injustice through maladministration;
6.5.3.2 Failed for considerably longer than a decade properly exercise their regulatory functions in respect of the company complained of;
6.5.3.3 Failed to responsibly exercise their discretionary powers;
6.5.3.4 Failed to liaise and to co-operate effectively with those responsible and failed to keep pace with developments regarding the pensions; and
6.5.3.5 Ignored or failed to act on information that might have led to formal or informal regulatory action.

6.5.4 The Ombudsman made determinations of maladministration and of injustice and recommended the following:

"My first recommendation is that, in recognition of the justifiable sense of outrage that those who have complained to me feel about the maladministration in the form of the serial regulatory failure that I have identified in this report, the public bodies should apologise to those people for that failure.

My second – and central – recommendation is that the Government should establish and fund a compensation scheme, with a view to assessing the individual cases of those who have been affected by the events covered in this report and providing appropriate compensation."

6.5.5 The Ombudsman explained her second recommendation as follows:

"The aim of such a scheme should be to put those people who have suffered a relative loss back into the position that they would have been in had maladministration not occurred.

I consider that addressing relative loss in this way would be the most appropriate remedy for the injustice that I have found resulted from maladministration. Such an approach would remedy any financial loss that has occurred and also the loss of opportunities to invest elsewhere than the Society."

6.5.6 There are parallels between the matter at hand and the Equitable Life Report. The South African Government equally has a duty to act in a manner that does not cause loss of access to social security or place a certain group in a less favourable position with regard to access to social security.

6.5.7 The duty of the South African Government is even stronger in the light of the Constitutional guarantee provided in section 27.
6.6 **Special Report Nr. 18 of the Public Protector**

6.6.1 Report on the Investigation into allegations of Underpayment of Beneficiaries of the Venda Pension Fund, Special Report Nr. 18 of the Public Protector was published on 9 April 2002.

6.6.2 The report was submitted to The Speaker, Honourable Members of the National Assembly, the Chairperson and Honourable Members of the National Council of Provinces.

6.6.3 The remedial action recommended in his report was not implemented.

6.7 **Prescripts of the Financial Services Board**

6.7.1 Due to their general nature, sections 7C and 7D of the Pension Funds Act, 1956 do not give crystal clear guidelines on the fiduciary duties of trustees. In order to assist trustees, the Financial Services Board issued Circular PF 98 to provide clearer guidelines in this regard.

6.7.2 It is the duty of trustees to direct, control and oversee the running of the retirement fund in the best interest of the members. The Court\(^20\) stated that the independent judgment that a trustee is required to exercise is the same as that of a company director, and that the legal principles that have evolved in relation to directors are equally applicable to fund trustees.

6.7.3 Trustees are responsible for managing the monies paid to fund members (and/or their dependants) when they retire, become disabled or die. These payments are funded by the contributions that employees make during their working lives. For many employees this will be their sole source of income during retirement, and trustees therefore have to act responsibly when it comes to the payment of contributions into the fund.

6.8 **Batho Pele principles**

6.8.1 Batho Pele is about giving good customer service to the users of government services. It means "People First" and was conceived with the intention of transforming service delivery
in the public sector. Good service delivery leads to happy customers and employee satisfaction for a job well done.

6.8.2 One of the principles of Batho Pele is that failures and mistakes should be remedied.

7. OBSERVATIONS

7.1 Since 1994, with the advent of the New South Africa, the position of the members of the Venda Pension Fund has not improved. They were prejudiced then, and continue to suffer prejudice. They did not receive the amount they were entitled to when their benefit in the Venda Pension Fund was privatised and they were not properly informed of options at their disposal to ensure a proper retirement. As gainfully employed human beings for, in some cases up to 46 years, they now visit SASSA pay points on a monthly basis. Not only do they suffer prejudice, but their human dignity is not respected. Their right to be treated equality as government employees is being undermined including their rights under section 27 of the Constitution, in that were not subjected to the same pressure to privatise.

7.2 The Venda privatisation schemes have been the subject matter of discussion at the Public Sector Co-Coordinating Bargaining Council and in the Portfolio Committee of Parliament on 19 August 2003 during a presentation by the DPSA on the restructuring of pension provisions for public service employees.

7.3 The Special Task Team appointed in 1994 during the deliberations on proposals on the rationalisation of the funds should have addressed the issue during this process. The representatives of the GSPF and the Managers of this fund ensured that members of the fund were fully informed of the process and implications in respect of previous years of service. Members were encouraged to buy-back service.

7.4 The representatives of the Venda Pension Funds and the Special Task Team did not address the issue of the privatisation. The representatives of the Venda Pension Fund and the members of the Task Team had a duty to evaluate every fund and the actions of every fund before amalgamation in order to ensure that the actions taken in respect of the different funds were in the best interest of the members.
7.5 The GEPF is, in terms of subsection (2) of section 14 of the GEP Law, responsible for all liabilities of the Venda Pension Funds.

8. THE GEPF’S RESPONSE TO THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

8.1 The GEPF submitted a comprehensive response to the provisional report and indicated their willingness to meet with the Public Protector to clarify any further issues.

8.2 The GEPF addressed the history of each complainant:

8.2.1 The GEPF indicated the following:

8.2.1 Mr. Rambau retired before the first privatisation scheme. His termination to the Venda Pension Fund was not as a result of the First Privatisation Scheme. Correspondence was received from Mr. Rambau requesting a recalculation of his benefits. The GEPF obtained confirmation from SANLAM that he was in receipt of a monthly pension in terms of the Venda Pension Fund. However, as no records existed on the Venda Pension Fund system, a recalculation could not be done.

8.2.2 The GEPF indicated that they have no documentary evidence showing that Mr. Tshiololi was requested to repay any amount or actually did repay an amount. Mr. Tshiololi is however, in possession of the receipt for the amount he repaid.

8.2.3 The GEPF does have proof that Mr. Ramavhale repaid an amount and indicated that “those persons who took part in the First Privatisation scheme were prima facie paid an accrued benefit calculated using actual and bought service.”

8.2.4 The GEPF submitted that in the Dali case\(^{21}\) the claim was only for repayment of claimed amounts and that the court only remarked that on proper interpretation of the proclamations

\(^{21}\) *MP Dali & 47 Others v The Government of the Republic of South Africa and the President of the Republic of South Africa* [2001] 8 BCLR 2293 (A)
8.2.4 The GE PF submitted that in the Dali case\textsuperscript{21} the claim was only for repayment of claimed amounts and that the court only remarked that on proper interpretation of the proclamations the claimants were entitled to receive their benefits without taking the fund level into account and this remark was not made an order of court.

8.2.5 The effect of the Mulaudzi case\textsuperscript{22} was that no formula existed in terms of which the calculations had to be made and to remedy this, the President of the Republic of South Africa issued Proclamation 56 of 1995. This proclamation fixed payment at the funding level of the Venda Pension Fund which was 75%.

8.2.6 The GE PF acknowledged that apart from the members who took part in the Dali case, the rest of the members who took part in the first privatisation scheme received their benefits calculated at a funding level of 75%. The members who took part in the second privatisation scheme also received their benefits calculated at a funding level of 75%. According to the GE PF the Venda Government prima facie paid members a further 8% after recalculation by the actuaries.

8.2.7 The Public Service Coordinating Bargaining Council, in respect of the restructuring of pension, issued Resolution 12 of 2002. Clause 6 provides for an investigation into the implication on affected employees of the Venda Pension Fund. Information had to be provided within six months on various matters such as the funding levels, verification of payments and repayments.

8.2.8 GE PF was requested to provide information but at that stage the matter was sub judice as court action was pending and the information available was unreliable and/or unavailable. The problem still exists as the pension files of a large number of Venda public servants are not in possession of the GE PF due to various reasons. The files that are in its possession do not contain any calculations or verification of payments made to civil servants.

\textsuperscript{21} MP Dali & Others v The Government of the Republic of South Africa and the President of the Republic of South Africa [2001] B 2293 (A)

\textsuperscript{22} Mulaudzi v Chairman, Implementation Committee 1995 (1) SA 513 (VSC)
8.2.9 GEPF also does not have access to the computer system used by the Venda Government to effect payments under the privatisation schemes. The system was administered by a private company which has since been liquidated. The system is also not compatible with current technology and a full report of payments cannot be produced.

8.2.10 The GEPF was of the opinion that the privatisation schemes were legal and withstood legal challenges and was therefore, not obliged to address concerns raised by the complainants.

8.2.11 The GEPF also raised the question of jurisdiction of the Public Protector in the light of the Public Protector Act\textsuperscript{23} and the Public Protector Report\textsuperscript{24} issued on 9 April 2002.

9 IMPACT ASSESSMENT

9.1 The GEPF in its response indicated that no evidence existed to show that the Complainants and other members who participated in the two privatisation schemes "had no other option." This is not agreed with. We are not all experts on economics and related fields. When an expert informs you that you could lose your entire social security build up through many years of labour some of us will believe the expert. This can be seen today that time and again people lose their life’s savings in the so-called "pyramid schemes."

9.2 The members of the funds were not properly informed of "what they will lose" if they privatised. The GEPF and public servants who are members benefit from subsidised medical contributions, funeral benefits, spouse’s pension, orphans benefits which they lost as a result of privatising.

9.3 The reason why some members did not privatise is not clear but one can only speculate that they were more informed on the matter of pension funds, or were not employed for many years and feared losing their social security.

9.4 As indicated in the report, the impact of the privatisation schemes were not only felt by the members but also by their families who lost all the benefits that a defined benefit fund brings.

\textsuperscript{23} Act nr 23 of 1994 (as amended)
\textsuperscript{24} Special Report Nr. 18
9.5 It is re-iterated that the representatives of the Venda Pension Funds and the Special Task Team did not address the issue of the privatisation. The representatives of the Venda Pension Fund and the members of the Task Team had a duty to evaluate every fund and the actions of every fund before amalgamation to ensure that the actions taken in respect of the different funds were in the best interest of the members of those funds.

9.6 The members of the Venda Pension Fund who opted to privatise due to “fear” of losing their social security net has indeed lost that net due to misinformation on what the future “would hold for them” if they did not privatise.

9.7 It should further be noted that Government was able to appropriate R440 million to the Closed Pension Fund for the payment of pension benefits to the members of the Tri-Cameral Parliament. The members of the fund consisted of 187 members of White electorate, 85 members of Coloured electorate and 25 members of Asian electorate.

9.8 A further R189 million was appropriated to the Closed Pension Fund in 1999.

10. FINDINGS

The Protector’s key findings are the following:

10.1 Findings on Maladministration

10.1.1 The management of the Venda Pension Fund prior to amalgamation led to a situation where there was a different dispensation for members who participated in the First Privatisation Scheme, the Second Privatisation Scheme, and members who elected not to transfer their interests or share.

10.1.2 This amounted to unequal treatment of the members of the Fund in terms of which certain members were worse off than others even though they contributed equally to the Fund.

10.1.3 The Venda Pension Fund, as well as the Government and its predecessors who managed the Fund prior to and directly after amalgamation, did not exercise a sufficient duty of care and due diligence towards the affected members of the Venda Pension Fund to ensure

25 Closed Pension Fund Act, No 197 of 1993
26 Closed Pension Fund Act, No 41 of 1999
that their pension interests were fully protected and secured. This amounted to maladministration.

10.1.4 The acts of the Venda Pension Fund in relation to the calculation of the benefits of the members who privatised resulted in maladministration as the members were entitled to 100% of their accrued benefits.

10.1.5 The acts and omissions of the South African Government and in particular the failure by the DPSA and the GEPF to address the complaints about the First Privatisation Scheme and to enquire as to how the transfers to SANLAM were calculated for each member, constitutes maladministration.

10.1.6 The acts and omissions of the South African Government and in particular the failure by the DPSA and the GEPF to address the complaints of the six complainants regarding the purchasing of pensionable service that have been bought back, constitutes maladministration.

10.1.7 The omission of the South African Government, and in particular the GEPF's failure, to implement the recommendations of the Public Protector in Report No. 18 of 2002 amounts to maladministration and a violation of the section 181(3) of the Constitution.

10.2 Findings on prejudice

10.2.1 The Complainants suffered prejudice as they were influenced to privatise their pension benefits but were not properly informed about the consequences of the privatisation.

10.2.2 The Complainants suffered prejudice when they were influenced to privatise their pension benefits as they forfeited all the benefits of a defined benefit fund such as a spouse's pension, funeral benefits and orphans benefits as well as a medical aid subsidy after retirement.

10.2.3 The Complainants suffered prejudice when their complaints and problems were ignored by the different Government institutions which they complained to.
10.2.4 The Complainants suffered prejudice when they had to apply for an old age grant despite having accumulated numerous years of service, and they lost the status that they had during their period of employment with the Government.

11. REMEDIAL ACTION

Remedial action to be taken in compliance with Section 182(1) (c) of the Constitution is the following:

11.1 Remedial Action in respect of the three Complainants:

11.1.1 The GEPF should recalculate the pension benefits of Mr T J Tshiololi as if he retired with all his years of service as a member of the GEPF including the Venda Pension Fund and afford him the opportunity to repay any benefits he might have received, excluding the amounts repaid by him to the Venda Government.

11.1.2 The GEPF should recalculate the pension benefits of Mr M P Ramavhale as if he retired with all his years of service as a member of the GEPF including the Venda Pension Fund and afford him the opportunity to repay any benefits he might have received, excluding the amounts repaid by him to the Venda Government.

11.1.3 The DPSA and Treasury should address the complaint of Mr L J Rambau and order a forensic audit of the list of the First Privatisation Scheme of the Venda Pension Fund to determine the accuracy of the transferred amounts in respect of each member.

11.2 Remedial Action in respect of all members of the former Venda Pension Funds

11.2.1 The Ministers of Public Service and Administration and of Finance should appoint a task team, including members of the Government Pensions Administration, in collaboration with the Public Protector to:

11.2.1.1 Review the implementation of the Privatisations Schemes of the former Venda Pension Fund;
11.2.1.2 Consider changes to the GEP Law and Rules to enable members who participated in the privatisation schemes the opportunity to repay the benefits received and to recalculate their pension benefits in terms of the rules regulating normal retirement; and

11.2.1.2 Determine whether or not the service periods that have been bought back before the privatisation schemes of the Venda Pension Fund should be included when recalculating the benefits of the members.

11.2.5 The Government should apologise to the members of the Venda Pension Funds who suffered prejudice as a result of maladministration by the different Government institutions.

12. MONITORING

12.1 The Public Protector is to be advised on the State’s response to this report, including planned action, indicating time lines, within 30 days from the date this report.

12.2 The implementation of the remedial action should be finalised within six months from the date of this report.

12.3 Bi-monthly reports are to be submitted to the Public Protector from the date of this report. A final report should be submitted by 30 May 2012.
Abraham Lincoln  - Let's have faith that right makes might, and in that faith let us, to the end, dare to do our duty as we understand it.