
PUBLIC PROTECTOR
SOUTH AFRICA

A Costly Promise
REPORT No. 5 of 2012/13

REPORT ON AN INVESTIGATION INTO A COMPLAINT BY A RETIRED MEMBER OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE AND FORMER MEMBER OF THE NON STATUTORY FORCES RELATING TO ALLEGATIONS OF UNDUE DELAY BY THE DEPARTMENT OF DEFENCE AND MILITARY VETERANS IN THE IMPLEMENTATION OF THE REVISED NON-STATUTORY FORCES PENSION DISPENSATION
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EXECUTIVE SUMMARY

i) The Complainant is Mr M, a former member of the South African National Defence Force and former member of Umkhonto we Sizwe (MK). He retired in 2003 as a result of ill health, caused by an injury that he incurred when he was a member of MK. He approached the Public Protector in July 2010 with a complaint relating to allegations of undue delay by the then Department of Defence (the Department) in the implementation of a Revised Non-Statutory Forces Pension Dispensation that was approved by Cabinet in April 2009.

ii) From 2009 he had been approaching all the institutions involved, including the Department, National Treasury as well as the Government Pension Administration Agency (GPAA) to obtain information on the status of the implementation process as he stood to benefit financially in terms of a recalculation of his pension benefits as well as the stopping of deductions from his monthly pension. In desperation he approached the then Minister of Defence and Military Veterans to advise her that he was in serious financial trouble as result of the deductions from his pension benefits and that the bank, FNB, was in the process of repossessing his house because of arrears in his mortgage payments. The cancellation of the monthly deductions, as well as the delay in the payment of the benefits owed to him, was therefore causing him severe prejudice.

iii) The Department intervened and made certain commitments relating to the payment of the outstanding benefits by certain dates. When the Department repeatedly failed to honour their commitments, he approached the Public Protector for assistance.

iv) Pursuant to a meeting with the Public Protector, the then Minister of Defence and Military Veterans and her Department undertook to take certain steps to assist the Complainant, including-

a) Approaching the Bondholder, First National Bank (FNB) to prevent or reverse any action threatening the sale of his property;
b) Providing interim financial assistance to the Complainant pending the payment of the outstanding benefits;

c) The expedition of the payment process to finalise payment of the benefits by 5 October 2010; and

d) Making arrangements for accommodation for the Complainant if the attempts to prevent the sale of house proved unsuccessful.

v) By February 2011, the revised dispensation had not yet been implemented and the Complainant’s benefits had not been paid as promised. Even after the intervention of the GPAA to explain the process and the reason for the delay to FNB, the bank advised that it had repeatedly cancelled the sale of the property based on the Department’s undertakings to expedite the payment of the Complainant’s proceeds, which did not materialise and it was no longer prepared to accept any further undertakings taking into consideration the indulgences that were already afforded.

vi) The Complainant’s house was subsequently sold on 16 February 2011 and despite commitments that the benefits would be paid during April 2011 at the latest, the Complainant only started receiving the benefits in August 2011.

vii) A provisional report was issued by the Public Protector to the Minister of Defence and Military Veterans as well as the Chief of the South African National Defence Force on 21 December 2011. The Provisional report was subsequently diverted to the Department of Military Veterans for the consideration of the Public Protector’s proposed remedial action.

viii) The Public Protector’s findings are that:

a) The Department and the National Treasury did not fulfil its responsibilities in relation to implementation of the revised NSF Pension Dispensation approved by Cabinet, without undue delay or with the maximum effort to ensure compliance with their constitutional obligations, including the provisions of sections 26, 27, 33, 195 and 237 of the Constitution.
b) The manner in which the Department responded to and committed itself to the Complainant individually, as well as to FNB and the Public Protector cannot be characterised as mere acts of grace, courtesy or compassion. The Department accepted responsibility to protect the Complainant's private interests from the consequences of the challenges experienced with the implementation of the revised NSF Dispensation. This created a situation where the complainant's ability to meet his obligation, or to take alternative steps to protect his assets, was ancillary and derivative from the Department's guarantees for payment on specific dates, which it communicated directly to the Bank.

c) The Department did not discharge its obligations and duties towards the Complainant with due diligence and fairness and in good faith as required by the common law as well as fairness and reasonableness in terms the right to just administrative action envisaged in section 33 of the Constitution, PAJA and the duty to be responsive as envisaged in section 195 of the Constitution, in so far as it -

aa) Made commitments to the Complainant, FNB and the Public Protector that were not rationally connected to the facts at hand and which it did not honour;

bb) Did not provide the Complainant with, clear, complete, consistent or accurate information;

cc) Prevented FNB from properly understanding and assessing the risks and reasonable timeframe for payment of the Complainant's pension benefits; and

dd) Carelessly mislead the Complainant into a false sense of security and denying him an opportunity to protect his property and the chance to consider other courses of action.
d) The actions of the Department constitute maladministration and improper conduct as envisaged in section 182 of the Constitution.

e) Due to the maladministration by the Department, the Complainant suffered prejudice in the form of financial loss, loss of shelter, and distress. His human dignity also suffered.

ix) The appropriate remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution is the following:

a) The Department of Defence, in collaboration with the GPAA, is to take urgent steps to ensure that any outstanding issues, including the cancellation of the monthly deductions from the Complainant's pension, and a proper reconciliation of the debt that was recovered from and repaid to the Complainant, is attended to immediately.

b) The Minister of Defence and Military Veterans, together with both the Department of Defence and the Department of Military Veterans, is to take immediate action to honour the commitments made to the Public Protector on 6 October 2010 by the previous Minister and the Department, regarding the alternate accommodation for the Complainant since the attempts to prevent the sale of the house proved unsuccessful. The steps should include the following:

   aa) Reimburse the Complainant with the expenditure that he incurred since the loss of his house to rent alternative accommodation; and

   bb) Assist the Complainant to obtain alternative accommodation that, as far as reasonably possible, matches the accommodation that he occupied prior to the repossession of his house.

c) The Department of Military Veterans must provide the Complainant with a remedy, including consolatory compensation, to address the distress and
trauma experienced by him and his family as a result of the manner in which the matter has been handled.

d) The Department of Military Veterans is to take urgent steps to deal with the plight of the military veterans and NSF members in a collective manner and to urgently identify and address systemic impediments to the Department’s meeting of its obligations to these veterans.
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DELAY BY THE DEPARTMENT OF DEFENCE IN THE IMPLEMENTATION OF THE
REVISED NON-STATUTORY FORCES PENSION DISPENSATION

1. INTRODUCTION

1.1 "A costly promise", is a provisional report of the Public Protector 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 It is submitted to the Minister of Defence and Military Veterans, The Director-
General, Department of Defence and Military Veterans, the Chief of the SA
National Defence Force (SANDF), the Chief Executive Officer of the
Government Pensions Administration Agency (GPAA), as well as the Acting
Principal Officer of the GGPAAPAA.

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

1.4 The report relates to an investigation by the Public Protector into allegations
received from a retired member of the SANDF and member of the former Non-
Statutory Forces (NSF), regarding undue delay by the (then) Department of
Defence, which is now referred to as the Department of Defence and Military
Veterans, to implement the extension of a revised pension dispensation to
include all members of the NSF.
2. THE COMPLAINT

2.1 Mr M (the Complainant), a former member of the SANDF and former member of Umkhonto we Sizwe (MK). He retired in 2003 as a result of ill health caused by an injury that he incurred when he was a member of MK.

2.2 During 2009 it came to the Complainant’s knowledge that a decision was approved by Parliament in April 2009 (however, it was approved by Cabinet), which had the effect of reversing the condition which required former NSF members to pay a contribution of 5% of their final salary if they wanted to buy back the period that they had served in the NSF, as pensionable service.

2.3 In 2006 the Complainant’s pension benefits were recalculated by the GPAA and a portion, including the 5% members’ contribution, was retained in exchange for the recognition of the years of service as a member of MK prior to 1994. This resulted in a situation where the monies that were deducted from his gratuity for the contribution, as well as earlier benefits, were more than the amount of the gratuity and the difference was deducted from his monthly pension.

2.4 The effect of the Cabinet decision of April 2009 was that that the monthly deductions from his pension had to stop and that he was entitled to a recalculation of his pension benefits to reimburse him for the contribution that had been deducted from his benefits.

2.5 The Complainant pursued the matter with the GPAA from November 2009 to February 2010, and was informed that the process was in the hands of the then Department of Defence (the Department) but was not yet been finalised.

2.6 After unsuccessful attempts to establish from the Department what the status of the recalculation and repayments was, and having been informed by the Ministry of Finance that the matter was being dealt with by the then Minister of Defence and Military Veterans (the previous Minister), the Complainant approached the previous Minister on 19 April 2010.
2.7 He advised the previous Minister that he was in serious financial trouble as result of the deductions from his pension benefits and that the bank, FNB, was in the process of repossessing his house because of arrears in his mortgage payments. The cancellation of his monthly deductions, as well as the delay in the payment of the benefits owed to him, therefore caused him severe prejudice:

"I find it difficult to understand that I should lose my house whilst the government owes me money and at the same time has an objective to ensure that as a South African citizen I do have a shelter".

2.8 Following public announcements by the previous Minister that the improved NSF pension dispensation or some aspects thereof would have been implemented on 15 May 2010, the Complainant approached the Public Protector in July 2010 with a complaint that he was being treated unfairly by the Department.

3. BACKGROUND

3.1 "... military veterans are men and women who have been prepared to lay down their lives for the establishment of democracy in our country. The Government and communities therefore have to be the principal advocates in ensuring that they receive the care, support and recognition which they have earned in the service of their country." 

3.2 10 years after this call was made to take care of the physical, psychological and welfare needs of former members of the NSF, the Joint Standing Committee on Defense held public hearings on the plight of military veterans and members of

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the NSF. The Committee heard evidence regarding the challenges faced by military veterans such as the problem of HIV/AIDS, unemployment, decent accommodation, and lack of medical assistance, stark poverty and the loss of dignity.

3.3 The Committee noted the disparities that existed in terms of the pay-out between the non-statutory forces and the former South African Defense Force personnel and that the majority of serving SANDF veterans and other ex-combatants in the service of the public sector could not afford to buy back their pension as it was too expensive, nor could they compromise and forfeit their years of service and settle for a reduced amount as a result. The Committee recommended that the NSF Pension be reviewed.

3.4 The administration of this process and the tardiness of the bureaucracy to deliver on the promises made to the very people, who have laid the foundation of a democratic South Africa, is the subject of the complaint at hand.

3.5 The reality is that even after decisions were taken at the highest level in Parliament and in the Cabinet to take action to address the urgent and dire needs of the military veterans and members of the NSF, it is 5 years later, and a person such as the Complainant is left homeless and destitute.

3.6 It is incidents such as these that prompted the Public Protector to advise the previous Minister to establish a Military Ombudsman.

3.7 This is only one of the cases that were brought to the Public Protector's attention. The experience of dealing with this matter has, however, emphasised a need to deal with the plight of the military veterans and NSF members in a collective manner and to urgently identify and address systemic impediments to the Department's fulfilment of its obligations to these veterans.
4. **POWER AND JURISDICTION OF THE PUBLIC PROTECTOR**

4.1 The Public Protector was established in terms of Chapter 9 of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

4.2 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. It further directs that the Public Protector has additional powers prescribed in legislation.

4.3 The Public Protector's operations are regulated by the Public Protector Act which mandates the Public Protector to investigate and redress maladministration and related improprieties in the conduct of state affairs and further mandates the Public Protector to resolve the disputes through conciliation.

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

5. **THE INVESTIGATION**

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

5.1 **Key Sources of Information**

5.1.1 Letter of complaint, subsequent correspondence and supporting documentation submitted by the Complainant.
5.1.2 Written Correspondence

Written correspondence was exchanged between the Public Protector and the Department, the Ministry of Defence and Military Veterans, FNB, the Government Pension Administration Agency, the GPAA and recently, with the Department of Military Veterans.

5.1.3 Meetings:

5.1.3.1 The Public Protector initially discussed the matter with General GN Ngwenya, Chief of the SANDF.

5.1.3.2 The matter was also the subject of discussion at a meeting between the Honourable Ms L N Sisulu, previous Minister of Defence and Military Veterans and the Public Protector on 6 October 2010.

5.1.3.3 During and after the investigation the Investigator of the Public Protector consulted with senior members of the Department as well as the Department of Military Veterans.

5.1.3.4 The Complainant had individual discussions with the members of the Department, the Department of Military matters, as well as a number of consultations with the Investigator of the Public Protector.

5.2 Summary of the investigation process and evidence

5.2.1 Initial communication with the Chief of the SANDF and meeting with the previous Minister.

5.2.1.1 The Public Protector initially discussed the matter with General GN Ngwenya, Chief of the SANDF and requested a State Guarantee in the name of the complainant as well as timelines for the re-payment of the 5% contribution to NSF pension of the Complainant. With a State Guarantee and timelines for payment, the Public Protector wanted to negotiate with the bondholder to stay execution of the property of the Complainant.
5.2.1.2 When the Public Protector met the previous Minister of Defence and Military Veterans and Professor Seepe on 6 October 2010 the matter of the Complainant was also discussed and the Public Protector reiterated her concerns and the need for urgent intervention to avoid him losing his house.

5.2.1.3 The previous Minister briefed the Public Protector on the challenges that the Department of Defence and Military Veterans was experiencing to finalise this process, but undertook to take certain steps in the interim to assist the Complainant, including-

a) Approaching the Bondholder (FNB) to prevent or reverse any action threatening the sale of his property;
b) Providing interim financial assistance to the Complainant pending the payment of the outstanding benefits;
c) The expedition of the payment process to finalise payment of the benefits by 5 October 2010; and

d) Making arrangements for accommodation for the Complainant if the attempts to prevent the sale of house proved unsuccessful.

5.2.1.4 The previous Minister's commitment included a firm undertaking that the Complainant would, in the interim, be considered for urgent financial assistance from the Secretary of Defence's Discretionary Fund while the processing of the pension payout was being finalised.

5.2.2 Communications and commitments by the SANDF to FNB

5.2.2.1 After the meeting between the previous Minister and the Public Protector, the SANDF communicated with FNB on a number of occasions and committed itself to the payment of monies to the Complainant by certain dates, the last of which was the 15 December 2010.
5.2.2.2 However, these payments did not take place on any of the dates indicated to FNB and there was little or no communication to explain the delay or the process and arrange for the deadlines to be extended.

5.2.2.3 The Public Protector's team communicated with the Ministry of Defence and Military Veterans, as well as with Professor Seepe and the SANDF to advise that the Complainant was under tremendous pressure, as his risk increased since FNB was no longer willing to accommodate any further extension of the sale for his property in view of the previous failures by the SANDF to honour the commitments that have been made.

5.2.2.4 Lt Gen Mgwebi, Chief Human Resources of the SANDF responded in December 2010 and advised that several initiatives had been undertaken by the Department and himself to assist the Complainant with his pension payout to alleviate his financial burden and also various consultations and written requests were submitted to FNB for a reprieve not to place his property on auction. General Mgwebi advised that he had previously solicited concessions from and made reassurances to FNB regarding the payment of the outstanding monies.

5.2.2.5 The Public Protector was furthermore, advised that the Department was treating the matter with extreme urgency. The Department had to wait for the approval of the Non Statutory Forces Pension Cabinet Memorandum, which was approved in October 2010 and subsequently embarked on a process to consolidate the name list of all deserving members, including the Complainant. However, the process was also dependent on certain actions by the GPAA, which required a change of the GPAA Rules.

5.2.2.6 The matter was followed up with the Ministry of Defence and Military Veterans and the SANDF on a regular basis to confirm whether or not payment was going to be made on 15 December 2010 in accordance with the commitments towards FNB. When the payment did not take place the Ministry and the Department also reminded of the previous Minister's undertaking during the
meeting with the Public Protector that arrangements were to be made for interim financial relief to the Complainant. Unfortunately, these communications were not responded to.

5.2.2.7 The urgency of the matter was reiterated after the Complainant had been notified by FNB that his house was going to be auctioned on 16 February 2011.

5.2.3 Efforts by the GPAA and the Public Protector to prevent the sale of the Complainant's property

5.2.3.1 The GPAA, through one of its Trustees, Brigadier General Dries de Wit, was in the meanwhile also communicating with FNB to try and prevent the sale of the property. A further letter was sent to FNB on 3 February 2011, providing additional information and pleading for a delay in the sale of the property, including the following:

"The Minister of Defence already announced in Public that Cabinet approved the Former Non Statutory Force pension Dispensation of the Government Employees Pension Fund.

The pension fund rules to provide for such a dispensation is an advanced stage of the approval process as well as the required Legislation. As you know such rule and rule and Legislation amendments must go through formal approval processes and is currently receiving the highest possible priority from the Board of Trustees of the Fund.

Mr M… is currently a pensioner of the fund and will also benefit from the revised pension dispensation as approved by Cabinet.

The Pension Fund indicated that (an) amount of at least R…… before interest will be due to the member in the form of arrear annuities and gratuities on approval of the rules and legislation. It is difficult to put a timeframe to this, but current indications are that this will take place within the current month or two."
In light of the above facts you are again requested to reconsider the sale of the member’s property on 16 February 2011 and give him the opportunity to settle the arrears amount on his bond on payment of his arrear benefits from the Government Employees Pension Fund.”

5.2.3.2 Furthermore, the Acting Chief Principal Officer of the GPAA addressed a letter to FNB on 15 February 2011, requesting the Chief Executive Officer of Public Sector Banking of FNB to help with this process.

5.2.3.3 The Public Protector was also doing everything within her power to prevent the Complainant from losing his house as a result of circumstances beyond his control. The Public Protector approached the Chief Executive Officer of FNB and emphasised that the commitment towards the payment of the outstanding monies came from the GPAA, who were the fund administrators and who were directly responsible for the payment, and it should therefore, provide a more secure and reliable undertaking that the payment would be made from April 2011.

5.2.3.4 FNB proceeded with the sale of the property on 16 February 2011 and the Head: Legal, Risk and Compliance provided the following reasons for its decision on 17 February 2011:

"We confirm that the complaint has been investigated and the position is as follows. The writer has been personally involved in the matter since August 2010. The customer’s account was in arrears and the customer contacted our offices wherein he requested a consultation with a senior manager. The writer consulted with the customer and the customer advised that was retired and was awaiting his payout from the Pension Fund.

The writer agreed to cancel the first sale in execution based on the fact that the customer was expected to receive a payout. There were various communications sent to our office in this regard..."
The payment of the payout was not made as per the undertaking of the Department of Defence and a second sale date was obtained. The Department via its representatives again requested an indulgence of an extension which was duly granted … and a second sale was cancelled. In the interim, no payments were made on the account and the arrears escalated to the point where a third sale date was obtained... The writer had issued the instruction to continue with the sale based on the fact that the undertaking to expedite the payment of the customer’s proceeds did not materialise and we could no longer accept any further undertakings taking into consideration the indulgences that were already afforded.

The reason why the property has been sold is due primarily to the fact that the Department of Defence were unable to honor the undertaking provided since August 2010, the arrears had increased and we could not hold the account over for a further two months as requested by the Department.”

5.2.4 Subsequent response from the previous Minister

5.2.4.1 The Public Protector wrote to the previous Minister after the events that led to the sale of Mr M’s house to seek a response to some of the issues that had been raised and addressed during the earlier communications.

5.2.4.2 The previous Minister confirmed that the Department engaged FNB and numerous meetings and consultations were held with FNB dating back to October 2010, including correspondence between the Department and FNB, as well as lawyers acting on behalf of FNB, Messrs Hack, Stupel and Ross.

5.2.4.3 As an alternative to the discussions with FNB and the GPAA, the previous Minister requested the Department to allow a loan to the Complainant from the SANDF Fund. This is a private fund, governed by a Board, assisting bereaved soldiers. The request was as a last resort and fell completely outside the
scope of the SANDF Fund and outside the authority of any Member of the Executive.

5.2.4.4 The SANDF considered the case and was very sympathetic to the previous Minister's request for assistance. It commenced with a procedural process as prescribed by the Fund's Rules, one of which is that the funds can only be accessed after a recommendation by a social worker.

5.2.4.5 This process was not successful as the Complainant allegedly refused to cooperate with the Board of the SANDF Fund. The Chairperson of the SANDF Fund provided the following information to the previous Minister:

"The member was indebted to the bank, in respect of bond to an undisclosed amount due to confidentiality practice, but said to be higher than that which the department owed him, an amount of .... before interest, keeping in mind that the member was already in arrears.

The department, having explored all avenues to its avail to speed up the release of the payouts and having been afforded concessions to that effect by the bank and its attorneys, resorted to the option of a loan from the SANDF Fund. The board was tasked as such to assist the member within the prescripts of the rules and legislation of the fund. This failed, mainly due to the following considerations:

Lack of co-operation by the member, in that he denied the social worker of the fund access to visit his house and wife in order that his circumstantial situation (financial) could be assessed as required by the board and a report tabled to the board to finalise the request.

The board could not finalise or do risk analysis to determine whether the member qualifies or not owing to the absence of a confidential report by the social worker addressing and making recommendations to the fund wrt the member's financial status..."
It must further be noted that the department did all within its power to rescue the situation but failed owing to factors outside its mandate and/or influence (GPAA, rules and amendment of regulations, National Treasury, funding the proposal/dispensation, etc.).

5.2.4.6 The previous Minister concluded that they were unable to assist the Complainant because the final decision to sell the property laid with FNB, and they were unable to secure the Complainant’s assistance to process an application for financial relief with the Board of the SANDF Fund.

5.2.5 Replying statement by the Complainant

5.2.5.1 The Complainant responded as follows, inter alia, to the statements by the SANDF that he has failed to co-operate with their efforts to assist him:

“My house was under threat of being auctioned because of arrears in the bond and I was going to be able to pay my arrears and address challenges linked to difficulty in the payment of my monthly bond instalment if I were to receive my pension.

In all my communication with the Department of Defence and Military Veterans there is no stage where I had indicated that I intended to settle the total bond I have with FNB. As the Department of Defence and Military Veterans continued not to pay my pension as promised in various communication processes with FNB, it deprived me of any an opportunity to deal with my situation as outlined above.

ALLEGATION OF LACK OF CO-OPERATION AGAINST (MR M) BY THE DEPARTMENT OF DEFENCE MILITARY VETERANS.

The telephonic conversations between me and General Mgwebi towards the end of August 2010 resulted into a meeting between me and him shortly after. The meeting took place in his office. In this meeting he confirmed to me that
he was the chairperson of the SANDF Fund and that he would sooner
arrange a meeting of the board to discuss the issue of a loan from that fund in
order for me to be able to settle the arrears. In preparation for this, a
communication by General Mgwebi’s secretary was sent to me informing me
that I was required to write a letter (see attached letter).

In a telephonic conversation between me and General Mgwebi in early
September 2010, General Mgwebi told me that, the board had not approved
the loan because the amount of money they had in the SANDF Fund was
insufficient to address my bond arrears. This information was further
confirmed by one of the SANDF Fund board official that I had been referred to
in the process of enquiring about the decisions of the SANDF Fund board.

From henceforth, I considered the issue of a loan from SANDF Fund to
be a closed chapter.

It was in September 2010 when I was again contacted by officials of SANDF
identifying themselves as “Social workers” of the Department of Defence and
Military Veterans in Lyteltton on the instructions of General Mgwebi. Knowing
that General Mgwebi was dealing with my pension, I totally could not
connect my pension and the Social Workers. The SANDF officials who
had identified themselves as “Social Workers” contacted me because they
wanted to arrange to visit my house. Being surprised by the involvement (of)
Social Workers in my issue of Pension I then arrange an immediate meeting
to establish the real purpose of the visit. We then had a meeting in their
offices where they explained their involvement as a process of looking into my
conditions as a whole and propose other interventions that could be made to
resolve my situation. During our discussion, we I also discussed with them the
unsuccessful efforts by General Mgwebi to get a loan from SANDF Fund. The
“Social Workers” expressed a view of disapproval of loan in resolving
my problem basing their reasoning on the bases of unemployment by
both me and my wife. Their view was that the loan would be expensive in
terms of interest.
CONCLUSION

It is incorrect to say that the failure to visit my house by the "Social Workers" had something to do with the decision for a loan from SANDF FUND because at that time it had already been communicated to me that the board did not have sufficient money, which is why it did not approve the loan. No other reason was provided to me." (Emphasis added)

6. LEGAL AND REGULATORY FRAMEWORK

6.1 The Implementation of a Non Statutory forces Pension Dispensation

6.1.1 The NSF pension dispensation was approved and implemented to recognize former NSF service for the provisioning of pension benefits. The SANDF was formed through the integration of seven former forces on 27 April 1994. Five of these forces were Statutory Forces whereas the other two, namely MK and the Azanian People's Liberation Army (APLA) were NSF's.

6.1.2 Before the integration of the forces, the Statutory Force members were contributing to the GPAA and stood to receive pension benefits on termination of their service. The former NSF members on the other hand did not have the opportunity to contribute to any pension fund. This created a disparity between the former NSF members and the former Statutory Forces members in as far as pension benefits were concerned.

6.1.3 The Public Service Coordinating Bargaining Council (PSCBC) passed a resolution no 7 of 1998. Among other things, this resolution provided for the pensionable service of members of the public service who were previously disadvantaged by the past policies, to be increased.

6.1.4 The Policy on Recognition of former NSF Service for the Provisioning of pension benefits (commonly referred to as NSF Pension Dispensation), was developed in line with this resolution. The intention of this dispensation was to
address the disparity between former Statutory Force and NSF members in as far as pension benefits are concerned. The Cabinet approved the Policy on the NSF Pension Dispensation in November 2000, whereby the service of former NSF members who entered into an employment agreement to serve in the public service (including those who entered into employment agreement with the Department), were recognised for pension purposes.

6.1.5 NSF pension dispensation was formulated in terms of PSCBC Resolution 8/98, Cabinet Approval (9/2000), PSCBC Resolution 12/2002 and the recommendations of the Portfolio Committee on Finance (2003).

6.1.6 The final dispensation was approved in 2003 and implemented through the following changes in the legal framework:


6.1.6.3 GPAA Rule amendments and funding were negotiated as part of PSCBC resolution 7/2003

6.1.6.4 Amendment of the Income Tax Act (Tax free service before 1998)

6.1.7 The Dispensation provided for the following:

6.1.7.1 Members who qualified were those who joined the respective former NSF and who entered into an employment agreement with the Department, the South African Police Service, the South African Secret Service and the National Intelligence Agency through integration, the attestation process or normal employment processes, or who are employed in the rest of the public service. The recognition is subject to the cut-off dates provided for in the end of the Integrations Intake Act, 2001, unless another arrangement is approved.
6.1.7.2 NSF service was recognised on a sliding scale as follows: 50% thereof for members with less than 10 years NFS service, 100% thereof for members with 10 years and more NSF service.

6.1.7.3 Members were required to contribute at a rate of 5% in respect of the recognised service while the balance will be funded from the funds set aside.

6.1.7.4 For members who were unable or who chose not to pay the employee’s contribution, pensionable service was reduced accordingly.

6.1.7.5 Members who benefited from this agreement were excluded from any benefits payable under the Special Pensions Act, 1996. Any and all amounts paid to eligible persons as a Special Pension or demobilisation benefit under the Demobilisation Act, 1996 at the date of recognition of NSF service were taken into account in the computation of additional service under these provisions unless members opted to repay these benefits.

6.1.8 On 10 and 11 May 2007, the Joint Standing Committee on Defence held public hearings on the improvement and well-being of military veterans. Written submissions were received, and oral submissions were made. In its Report the Committee, inter alia stated as follows:

The Committee supports the concern raised during the hearings that members who want to join the NSF Pension Fund need to pay back both their SPF allocations and make member contributions to the fund, before they are eligible to join. The costs of this buy-in are causing extreme hardship, especially for less well-off military veterans. While the Committee acknowledges national and international norms, which dictate that employees contribute to their pension funds, there is a concern in making this applicable to this particular category. The Committee also supports the concern about the increased tax implications where SPF allocations are combined with salaries.
The Committee recommends that the linkages between the Special Pension Fund and the NSF Pension Fund be revisited. There should be an easier and less expensive way to ensure that veterans from the non-statutory forces, who are employed by the SANDF, can transfer to the NSF pension fund, without financial hardship. The National Treasury will be requested to identify alternatives in this regard. In addition, the Minister of Defence must report to the Committee on policy direction in terms of former non-statutory members who cannot afford

6.1.9 On 15 April 2009, Cabinet approved a Cabinet Memorandum for a revised NSF pension dispensation. In order to further eliminate the disparity between the pension dispensations for members of the Statutory Forces and NSF, and to align the pension dispensation for all forces, Cabinet approved the revision of the Non-Statutory Forces (NSF) pension dispensation by:

6.1.9.1 Abolishing the need for former NSF members to contribute (5%) to the funding of the recognition of NSF service;

6.1.9.2 Recognising the full period of NSF service by all former NSF members who entered into an employment contract with the Department;

6.1.9.3 Allowing former NSF members whose service is recognized for purposes to receive such benefits and retain their Special Pension benefits to the extent that such benefits do not exceed the benefits that they are entitled to in terms of the GPAA and;

6.1.9.4 That the Ministers of Finance, Defence and the Government Employees Pension Fund consult to consider implementation details.

6.1.10 It was also announced that the modalities of the revised NSF Pension dispensation had not yet been finalised at the time and would be communicated to affected members as soon as the implementation details were known and the GPAA legislation has been amended.
6.1.11 On 25 October 2010 a further statement was issued that -

"Cabinet approved the extension of the revised Non-Statutory Forces pension dispensation to cover all former Non-Statutory Forces members who entered into an employment contract with other government departments and institutions that contribute to the Government Employees Pension Fund. Cabinet further approved the alignment of the current Special Pension Act and Government Employees Pension Law to enable recognition of Non-Statutory Forces service of affected current and past employees."

6.2 **Undue delay and the right to just administrative action**

6.2.1 In terms of section 33 of the Constitution:

1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons*

3) *National legislation must be enacted to give effect to these rights, and must –*

   a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*

   b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.*

6.2.2 Section 33 essentially embraces the concept of administrative justice, aiming to, *inter alia,* ensure good governance and administration, ensure fair dealing in administrative context, enhance protection of the individual against abuse of state power, promote public participation in decision-making, and strengthen the notion that public officials are answerable and accountable to the public they are meant to serve.²

² Devenish, Govender and Hulme *Administrative Law* 14-16.
6.2.3 The courts have found that a failure by an organ of state to take action or make a decision where there is a duty to do so, or to take such action or decision within a reasonable time, would constitute an unlawful and unreasonable infringement of the fundamental right to just administrative action as set out in s 33(1) of the Constitution.³

6.2.4 It may furthermore be deduced that there is a relationship between the enforcement of the right to a decision or action within the framework of just administrative action, and administrative implementation thereof. Implementation in this context is a very broad term which arguably includes the enforcement of legislation, making of subsidiary rules, and formulation of policy.⁴ Various actors are involved with the implementation of decisions of the Executive, including public authorities, employees of public authorities and government departments. The public service is under a constitutional duty loyally to execute 'the lawful policies of the government of the day', and it does this chiefly by implementing legislation. It is incumbent on the administrative authorities to take every necessary measure to ensure that administrative implementation is done comprehensively, adequately and without undue delay, to give effect to, and realise the aims of administrative action that is lawful, reasonable and procedurally fair.

6.3 The basic values and principles governing public administration

6.3.1 The statutory provisions on administrative justice should be read together with the provisions of section 195(1) and section 195(2) of the 1996 Constitution that establish basic values and principles according to which the public administration must be executed. It is stated in this regard that the public

³ Mahambehlala v Member of the Executive Council for Welfare and Another [2004] 1 BPLR 5962 (SE); 2002 (1) SA 342 (SE); Mbanga v Member of the Executive Council for Welfare [2001] 8 BPLR 2334 (SE); 2002 (1) SA 359 (SE); Member of the Executive Council for the Department of Welfare v Kate [2006] 1 BPLR 11 (SCA)

⁴ Hoexter and Lyster Constitutional and Administrative Law 7
administration must be governed by the general democratic values and principles enshrined in the 1996 Constitution, including:

a) a high standard of professional ethics must be promoted and maintained;
b) efficient economic and effective use of resources must be promoted;
c) ...;
d) ...;
e) people’s needs must be responded to, and the public must be encouraged to participate in policy-making;
f) public administration must be accountable; transparency must be fostered by providing the public with timely, accessible and accurate information...

7. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

7.1 Introduction

7.1.1 This chapter sets out the Public Protector’s assessment of the evidence that the investigation has disclosed and a determination of whether the actions and/or omissions of the bodies complained about constitute maladministration which resulted in injustice to the Complainant and/or any other persons.

7.1.2 The assessment focused on two aspects of the complaint, namely:

7.1.2.1 Was there a delay with the implementation of the revised NSF Pension Dispensation? and

7.1.2.2 Did the manner in which the Complainant’s matter was handled by the Department and the previous Minister amount to maladministration?
7.2 Was there a delay with the implementation of the revised NSF Pension Dispensation?

7.2.1 The Public Protector’s approach to the determination of whether maladministration has occurred with the implementation of the revised NSF Pension Dispensation is broadly structured around consideration of the question whether the relevant institutions exercised its responsibilities in relation to implementation of the revised NSF Pension Dispensation without undue delay or other administrative error.

7.2.2 The matter can be traced back even further to at least May 2007 when the Joint Standing Committee on Defence held public hearings on the improvement and well-being of military veterans, acknowledged that the current pension dispensation was causing financial hardship to members of the NSF, and recommended that the matter be revisited. Even though the Committee stressed that the situation was causing “extreme hardship, especially for less well-off military veterans” it took the Department almost two years to attend to these issues and come up with a revised pension dispensation.

7.2.3 It is disconcerting that it took a further 19 months after the initial Cabinet decision, for the institutions involved to obtain Cabinet Approval for the alignment of the Special Pension Act and Government Employees Pension Law to enable recognition of Non-Statutory Forces service of affected current and past employees.

7.2.4 In its response to the complaint, the Department maintained that the delays were attributed to the nature of the process. The Department advised that the implementation of the revised NSF Pension Dispensation required a change in the legislative framework, which is a time consuming process. The Department had to wait for the approval of the NSF Pension Cabinet Memorandum, which was approved in October 2010 and subsequently embarked on a process to consolidate the name list of all deserving members, including the Complainant.
The process was also dependent on certain actions by National Treasury and the GPAA, which required a change of the legal framework, including.

7.2.4.1 The Government Employees Pension Law, 1996
7.2.4.2 The GPAA Rules; and
7.2.4.3 The Income Tax Act, 1962.

7.2.5 The Government Employees Pension Law Amendment Bill, 2011 – which contains the amendments to inter alia, enable the implementation of the Revised NSF Pension Dispensation, was only gazetted in the Government Gazette on 24 June 2011.\(^5\)

7.2.6 The Constitution requires all organs of state to take all reasonable steps to ensure maximum compliance with their constitutional obligations.\(^6\) Section 237 of the Constitution specifically requires that all constitutional obligations must be performed diligently and without delay. Social security is a constitutional guarantee entrenched in section 27 of the Constitution. The right to adequate housing is another Constitutional guarantee entrenched in section 26 of the Constitution.

7.2.7 The courts have noted that where an organ of State delays compliance or fails to comply with its constitutional obligations, it would not be sufficient to adduce that such a delay or failure was not attributed to a deliberate or premeditated strategy on the part of the organ of State, but may be due to capacity and resource constraints.

"It is evident that South Africa's constitutional framework and the legislation that has been enacted to support such a constitutional framework have created the expectation of high and exacting standards in particular insofar as it is relevant to the protection and promotion of the human rights. The maintenance of such standards often requires

\(^5\) Notice 417 Of 2011
\(^6\) S v Jaipal [2005] ZACC 1; 2005 4 SA 581 (CC) 56
considerable public resources and it is incumbent upon organs of State to use the resources they have to their maximum capacity in order to ensure compliance with their constitutional obligations."\(^7\)

(own emphasis)

7.2.8 This begs the question of whether the Department and National Treasury took all reasonable steps to ensure that the implementation of the revised NSF Pension Dispensation signified maximum compliance with their constitutional obligations. Another key aspect of that inquiry hinges on the question what is a reasonable period for the required amendment of the legislative framework?

7.2.9 To avoid the risk of speculating on the latter issue the Public Protector considered the periods that are normally regarded as reasonable to affect a change in legalisation when the Constitutional Court considers an order suspending the declaration of invalidity of legislation to allow the competent authority to correct the defect through Parliament. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*\(^8\) such a declaration of invalidity was suspended for 24 months to enable Parliament to correct the defects or enact new legislation. In the more recent matter of *Mvumvu and Others v Minister for Transport and Another*\(^9\) the declaration of invalidity was suspended for 18 months.

7.2.10 The Public Protector also took into account that in the matters before the Constitutional Court, the legislative changes basically had to start from scratch, while in the matter at hand the relevant Departments were well aware of the required changes to the legislative framework for the implementation of the Revised NSF Pension Dispensation when Cabinet approval was granted in April 2009.

\(^7\) Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others (27294/2008) [2011] ZAGPPHC 29 (17 February 2011)

\(^8\) (CCT89/09) ZACC 11; 2010 (6) SA 182 (CC) ; 2010 (9) BCLR 859 (CC) (18 June 2010)

\(^9\) Case CCT 67/10, [2011] ZACC 01
7.2.11 When the matter served before the Standing Committee of Defence and in subsequent discussions in Parliamentary and public forums, the plight of the military veterans and members of the NSF was highlighted as an area of priority to Parliament and the Executive. On every level it was acknowledged that the contribution as well as sacrifices that they have made for the transition of our Country to a democratic society, is invaluable. While the political and public commitments have created the expectation that the protection of their rights and the improvement of the situation of the NSF military veterans is an issue of the highest priority for Government, sadly, however, these priorities are not reflected in the manner in which the process has been dealt with by the relevant Government Administrations.

7.2.12 The balance of the evidence considered by the Public Protector favours a conclusion that the Departments involved did not undertake their responsibilities in relation to implementation of the revised NSF Pension Dispensation without undue delay or with the maximum effort to ensure compliance with their constitutional obligations. In other words, section 237 of the Constitution was not complied with.

7.2.13 In the initial announcement it was explained that “the modalities of the revised NSF Pension dispensation had not yet been finalised at the time” and a commitment was made that it would be communicated to affected members as soon as the implementation details were known. However, there is no indication that the Department subsequently provided the affected members with clear, consistent and accurate information on the implementation process and timeframes.
7.3 Did the manner in which the Complainant’s matter was handled by the Department and the previous Minister amount to maladministration?

7.3.1 General

7.3.1.1 It is not in dispute that the Complainant approached the previous Minister for assistance in April 2010. He advised the previous Minister that he was in serious financial trouble as result of the deductions from his pension benefits and that the Bank was in the process of repossessing his house because of arrears in his mortgage payments. He emphasised that the delay in the stopping of the monthly deductions, as well as the payment of the benefits owed to him in terms of the revised NSF pension dispensation, was causing him severe prejudice.

7.3.1.2 It is also common cause that the Department and the previous Minister responded to the Complainant and FNB, and later to the Public Protector, with a range of undertakings to address the Complainant’s personal circumstances, including commitments to -

a) Expedite the process for the implementation of the revised NSF Pension Dispensation;

b) Pay the pension benefits on specific dates; or

c) Provide alternative financial relief; and

d) Provide alternative housing if the efforts to save the Complainant’s house, were to be unsuccessful.

7.3.1.3 More than a year later none of these undertakings have materialised, he had not received the pension benefits owed to him, he did not receive any financial assistance from the Department, and he has lost his house.

7.3.1.4 The Department and the previous Minister denied any wrongdoing or responsibility for the current situation by creating the impression that any
efforts or undertakings made by the Department and the previous Minister to assist the Complainant were of their/her accord and that they were not in breach of any obligation towards the Complainant. In addition, the issue was raised that the implementation of the revised NSF Pension Dispensation affected the beneficiaries of the dispensation collectively and the Department cannot accept responsibility for the individual personal circumstances of the Complainant.

7.3.2 The nature of the Department and previous Minister’s duties and responsibilities towards the complainant

7.3.2.1 The issue under consideration is to determine to what extent the previous Minister and the Department are accountable for their responses and commitments towards the Complainant, FNB and the Public Protector, based on considerations in law, equity and fairness.

7.3.2.2 The previous Minister’s submission to the Public Protector intimated that the offers and undertakings to assist the Complainant were not made in compliance with legal obligations, but rather as acts of grace or compassion.¹⁰

7.3.2.3 It is important to note that the Complainant did not approach the previous Minister and the Department in a representative capacity on behalf of the beneficiaries of the revised NSF Pension Dispensation, but as an individual who was claiming prejudice as result of the delay in the implementation of the Cabinet decision of 2009.

7.3.2.4 The previous Minister and the Department did not limit their responses and undertakings to addressing the general collective issues that were delaying the implementation of the revised NSF Pension Dispensation but specifically, resolved to address the impact of these processes on the personal circumstances of the Complainant.

¹⁰ Refer to the arguments of the State in Masetha v President of the Republic of South Africa 2006 (1) SA 566 (CC)
7.3.2.5 The Complainant was furthermore, not trying to access state resources or compelling the State to comply with its duties or obligations on the basis of socio-economic rights or constitutional responsibilities. This would have implied that the Complainant was seeking protection and enforcement in terms of common law remedies or relief in terms of section 38 of the Constitution. Such relief would not have necessarily catered for his personal circumstances and would have been subject to certain barriers and limitations as interpreted by the courts\(^\text{11}\), such as the duty to take appropriate measures within available resources.

7.3.2.6 The Complainant approached the previous Minister and the Department in his capacity as a retired employee, a member of a pension scheme towards which the Department contributed, as well as a beneficiary of the revised NSF Pension Dispensation that was implemented by the Department and its partner Departments.

7.3.2.7 The courts have confirmed that while the contract of service is terminated when an employee retires, the employment relationship does not end. The employer retains certain obligations and duties towards the former employee to act with “care, skill and diligence and in good faith”.\(^\text{12}\) In confirming the duty of good faith owed by an employer, both Judge Navsa\(^\text{13}\) and the Pension Fund Adjudicator Adjudicator\(^\text{14}\) have echoed the views of Nicholas-Browne V C Nicholas-Browne V C \(^\text{15}\) in which he said:

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11 Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) ; Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/87) [1997] ZACC 17; 1998 (1) SA 785 (CC); 1997 (12) BCLR 1696 (27 November 1997) ; Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

12 In Robinson v Randfontein Estates Gold Mining Co. Ltd 1921 AD 168 at 177

13 Tek Corporation Provident Fund and Others v Lorentz (480/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) (3 September 1999).

14 In his determination in the SAPREF Pension Fund matter. Case No: Pfa/We/673/99/Sm, 15 January 2002

15 In Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597 (ChD) at 606.
"In every contract of employment there is an implied term ...that the employers will not, without reasonable and just cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I will call this implied term 'the implied obligation of good faith'. In my judgement, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to other rights and powers of an employer . . . . The duty of good faith requires the employer to preserve its employees' rights in the pension fund, not to destroy them ..."
duty to act fairly - within the law and in a manner consistent with the Constitution. She therefore, must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.\footnote{17}

7.3.2.11 The Public Protector subscribes to the view expressed by some writers and the courts that the public power element can therefore not be ignored simply because a decision is being taken in an employment context. Equity principles (such as reasonableness and fairness) are part of the principles of substantive justice. The Constitutional Court emphasized that “the rights enshrined in ... [the Bill of Rights] give expression to the most profound commitments of our society”. Both the right to fair labour practices in terms of section 23 of the Constitution as well as the right to fair and just administrative action in terms of section 33 of the Constitution would therefore find application.\footnote{18}

7.3.2.12 Jurisprudence pre-dating the Constitution confirmed that lawful conduct does not necessarily amount to fair conduct. Consequently, administrative as well as labour practices can only be regarded as fair, from a constitutional perspective if they are both lawful and reasonable. The Courts have emphasized that “it is not strictly a question of law, but also calls for a moral or value judgment”\footnote{19}

7.3.2.13 The right to just administrative action in terms of section 33 of the Constitution and the applicability of the Promotion of Just Administrative Action Act, 2000 (PAJA) gives expression to the “basic principles or

\footnote{17} Masetha v President of the Republic of South Africa 2006 (1) SA 566 (CC)

\footnote{18} For a full discussion and analysis of the interdependence between the two rights see Barbara Evelyn Loots. Public Employment and the Relationship between Labour and Administrative Law. Dissertation presented for the degree of Doctor of Laws at the University of Stellenbosch, March 2011

\footnote{19} See SACCAWU v Irvin & Johnson Ltd 1999 (8) BLLR 741 (LAC) at 751; Sidumo v Rustenburg Platinum Mines Ltd 2007 (12) BLLR 1097 (CC)
conceptual trilogy of administrative justice: lawfulness, reasonableness and fairness.  

7.3.2.14 In the matter of Maseitha v President of the Republic of South Africa the Court dealt with the enforceability of an offer made to the applicant at the termination of his services to pay him out for the balance of the period of his appointment, and observed as follows:

"Under the Constitution the President had a duty to act fairly and that duty precluded the President from unilaterally altering the term of office of the head of the NIA. This was a requirement of the rule of law which was one of the foundational values of the RSA's constitutional democracy.... Fair dealing could not be separated from civility, which, in a constitutional sense, involved more than just courtesy or good manners, and was one of the binding elements of a constitutional democracy... Fairness meant that the offer to pay him out for the balance of the period of his appointment should not be characterised as an act of grace or compassion, but as compliance with a legal obligation."

7.3.2.15 Finally, the actions of the previous Minister and the Department are also governed by section 195 of the Constitution. It provides that public administration should be governed by the democratic values and principles enshrined in the Constitution, including the maintenance of a high standard of professional ethics, the provision of services impartially, fairly, equitably and without bias, and the necessity to respond to the needs of the people.


21 2008 (1) SA 566 (CC)
7.3.2.16 The relationship between the Department and the Complainant, as well as the requirements of administrative justice in section 33 of the Constitution, PAJA and section 195 of the Constitution, dictate that the previous Minister and the Department had a duty to act in good faith and fairly towards the Complainant. To echo the Constitutional Court in the *Masethla*\textsuperscript{22} matter, good faith as well as the principles of fairness and reasonableness meant that their subsequent responses and commitments towards the complainant individually, as well as to FNB and the Public Protector cannot be characterised as acts of grace or compassion, which would at the most have translated to a moral liability at the discretion of the State.

7.3.2.17 At the same time, these considerations would only apply to the specific circumstances of the matter, relating to and based on the specific interaction between the Complainant, the previous Minister, Department, FNB, and the Public Protector, and does not mean that the Department incurred the same commitment or obligations to all the beneficiaries of the revised NSF Pension Dispensation.

7.3.3 Did the Department and the previous Minister discharge their obligations and duties with due diligence and fairness and in good faith?

7.3.3.1 The Department and the previous Minister advised that they assisted the Complainant within the confines of their duties and obligations and that several issues were beyond their control, including:

a) The actions required by National Treasury and the GPAA to effect the changes to the legal framework required for the implementation of the revised NSF Pension Dispensation;

\textsuperscript{22} Supra

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b) The refusal of the Bondholder (FNB) to (further) suspend the debt collection action against the Complainant pending the payment of his pension benefits and the final decisions by FNB to proceed with the sale of the property; and

c) The lack of co-operation from the Complainant to process an application to the SANDF Fund to provide interim financial assistance to the Complainant pending the payment of the outstanding benefits.

7.3.3.2 The Public Protector noted earlier that she was not satisfied that the Department and National Treasury took all reasonable steps to ensure that the implementation of the revised NSF Pension Dispensation signified maximum compliance with their constitutional obligations.

7.3.3.3 As far as the application for funding from the SANDF Fund is concerned, there are disputing versions from the Department and the Complainant as to the reason for the lack of the required report from the social workers. It would appear that there was a breakdown in the communication between the Department and the Complainant and that this issue was not properly clarified. It is regrettable that neither party reverted to the Public Protector despite several enquiries relating to this issue, in an effort to resolve the impediment – particularly in view of the previous Minister’s earlier commitment to the Public Protector.

7.3.3.4 It is not in dispute that several initiatives had been undertaken by the Department, including various consultations and written requests to FNB for a reprieve not to place his property on auction. According to the evidence submitted by the Department they “had previously solicited concessions from FNB and made reassurances to FNB regarding the payment of the outstanding monies”.

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7.3.3.5 It should however, be emphasised that reassurances made by the Department to FNB were very specific and took the form of commitments that the benefits would be paid by specific dates.

7.3.3.6 When the dates passed without the said payments being made, FNB proceeded with action against the Complainant, who had to go return to the Department for progress and further intervention to stop the proceedings. This went on to the point that the GPAA had to approach FNB to explain the process of implementation and provided an estimated timeframe for the payment of the benefits.

7.3.3.7 When the Public Protector communicated with FNB in an attempt to stop the sale of the Complainant’s house, FNB advised that they were not prepared to grant a further extension based on commitments by the State as all the previous commitments were not honoured.

7.3.3.8 It is evident from the available evidence that at the time when the Department committed itself to certain dates for the payment of the benefits, that the payments actually had to come from the GPAA, that the process of implementation had not been finalised and that the indicated dates had not been verified or confirmed with the GPAA prior to communication to FNB. Furthermore, FNB had not been fully advised of the implementation process, the steps that were still required to effect payment of the benefits, the parties involved, or the anticipated or expected timeframes.

7.3.3.9 The communications from the Department did not only create a misleading expectation of payment on the part of FNB and the Complainant. If the information that was communicated to FNB and the Complainant was clear, complete, consistent or accurate, FNB would have been able to properly assess the risks involved and taken an informed decision, which would have allowed the Complainant to properly and timeously assess his options in terms if the remedies at his disposal. The Department has carelessly ‘ lulled’ the Complainant into a false sense of security. The Complainant had thereby
been denied any opportunity to protect his property and had no chance to consider other courses of action, including steps in terms of the National Credit Act, 2005 which may have otherwise secured his house.

7.3.3.10 The Constitution contains clear guidelines within which government has to determine its policies and how the administration of the public sector has to be conducted. Chapter 10 of the Constitution require public administration to be governed by democratic values and principles as contained in the Constitution including inter alia:

a) promoting and maintaining professional ethics;

b) promoting the efficient and effective utilisation of resources;

c) development-oriented public administration;

d) providing services impartially, fairly and equitably;

e) responding to people’s needs by encouraging participation in policymaking;

f) obtaining accountable public administration; and

g) promoting transparency by proving the public with timely, accessible and accurate information.

7.3.3.11 The Department was careless in its communication with FNB and the Complainant in making commitments for the payment of benefits on certain dates, which it did not and probably could not honour. This had a direct influence on the decision by FNB to refuse the pleas of both the GPAA and the Public Protector for the suspension of the actions against the Complaint pending the finalisation of the implementation of the revised NSF Pension Dispensation, to the detriment of the Complainant. The conduct of the Department cannot pass the test of discharging their Constitutional duties and obligations towards the Complainant with due diligence, fairness and in good faith.
8. RESPONSE TO THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR ISSUED ON 21 DECEMBER 2011

8.1 Purpose

8.1.1 Section 7(9) of the Public Protector Act, 1994, provides that:

“If it appears to the Public Protector during the course of an 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 person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

8.1.2 The Public Protector therefore resolved to issue this provisional report on the investigation to the previous Minister and the Department, as well as other relevant parties involved. The Provisional Report was distributed as a confidential document to provide the recipients thereof and the individuals implicated therein an opportunity to respond to its contents.

8.1.3 The Department did not respond immediately because of changes in the Management who were initially involved in the matter and a reassignment of fiduciary responsibilities. The Department of Military Veterans became involved in terms of the envisaged remedial action since it started to operate as a standalone department with its own budget under the political responsibility of the Minister of Defence and Military Veterans.

8.1.4 In addition, the Honourable LN Sisulu was replaced as Minister of Defence and Military Veterans by the Honourable N Mapisa-Nqakula, the previous Minister of Correctional Services.

8.1.5 The Ministry of Defence and Military Veterans escalated the Public Protector’s report to the Director General: Military Veterans, whose response is encapsulated hereunder.
8.2 Responses from the Government Pension Administration Agency

8.2.1 The GEP Law and Rules were amended and the new NSF dispensation was implemented. Therefore none of the debts to be repaid under the old dispensation were applicable anymore.

8.2.2 The 5% member contribution debt recovered, was refunded to the Complainant with interest on 17 August 2011.

8.2.3 The amount of the Special Pension debt recovered was refunded to the Complainant on 24 January 2012. Interest was paid on 28 January 2012.

8.2.4 The debt was cancelled and the Complainant is currently receiving an amended annuity.

8.3 Response from the Department of Military Veterans

8.3.1 Introduction

8.3.1.1 It is indeed part of the Department of Military Veterans’ legal mandate to ensure that qualifying military veterans and their dependants acquire housing. This is done in conjunction with the Department of Human Settlements and the two departments are currently in the process of concluding a Memorandum of Understanding (MOU) to ensure the realisation of this objective as provided for in the Military Veterans Act, Act 18 of 2011. All military veterans who qualify for housing benefits in accordance to the means test are put in the departmental housing list so that they can receive houses once all processes are concluded.

8.3.1.2 Military veterans who receive military pension do have access to counselling services on trauma and emotional distress. The Department of Military Veterans is in the process of arranging for those military veterans who do not receive military pension to be able to access these services. To ensure that this comes to effect as envisaged the Department of Military Veterans is currently
busy with a memorandum of understanding (MOU) with its sister department, the Department of Defence and the National Department of Health respectively to ensure that military veterans can access the much needed health services, including counselling.

8.3.2 Current activities by the Department of Military Veterans to ensure the operationalisation of section 5 of the Military Veterans Act, 18 of 2011

8.3.2.1 The Department of Military Veterans is working closely with all line function departments that render services to military veterans. These include the GPAA, the Department of Health, Human Settlement, Social Development, Defence, Provinces and municipalities. The Department of Military Veterans is doing all in its power to ensure that all necessary steps are undertaken to ensure that veterans access their benefits as provided in Section 5, Military Veterans Act 18 of 2011.

8.3.2.2 As a way of dealing with problems around military pensions in their different forms currently not managed by the department, a workshop between Government Employees Pension Fund (GPAA) and the Department to facilitate the processing and payments of Special Pensions to military veterans took place in June 2012. A process of streamlining and rationalising the military pension sector is also being set in motion to help alleviate delays in the payments to military veterans.

8.3.3 How to give effect to paragraphs 11.1.2 and 11.1.3 (the Public Protector’s remedial action)

8.3.3.1 HOUSING

a) The Department of Military Veterans is to engage with the Department of Human Settlements to give effect to some commitments made by their
Deputy Minister during the meeting that took place on 11 July 2012. The Deputy Minister of Defence and Military Veterans and the Deputy Minister of Human Settlements met together with Officials from both departments to discuss contents of the MOU.

b) Aspects discussed

i) In order to assist military veterans in distress the policy for those who are in distress or earning above the RDP rates but less for a bond will be utilised. The Deputy Minister of Human Settlements committed itself to talk to banks to reduce the bond owed and the Finance Linked Individual Subsidy Programme (FLISP) would kick in.

ii) The National Housing Finance Corporation (NHFC) an entity of the Department of Human Settlements would be opened up to allow the Department of Military Veterans a seat therein.

iii) The Department of Military Veterans must indicate areas of high concentration so as to ensure veterans built human settlement and obtain the land. The model to be followed is integration of military veterans in each province must set targets for housing jointly with the Department of Military Veterans and the Department of Human Settlements nationally.

iv) Examine the modalities of payment to someone with an existing house to receive the RDP monies to close the gap. The meeting suggested that it is best to make it a flat rate disbursement. Work with the banks too on this and couple with an intervention. Banks must be engaged to ensure this is a special dispensation to the military veterans. Need to have FLISP integrated to this as well and must ensure also employment opportunity programme, economic empowerment and sustainability.
c) DMV will engage DHS to come up with plan on how to assist the complainant based on what was discussed during the meeting of the 11 July 2012. The office of the Minister of Defence and Military Veterans will be provided with a progress report.

8.3.3.2 DISTRESS AND TRAUMA

The Complainant is the recipient of Military Pension and has access to dedicated counselling. DMV will facilitate the process and secure an appointment through South African Military Health Services (SAMHS).

8.3.3.3 EDUCATION

The dependant will be included in the list of those who require bursaries.

8.3.3.4 FACILITATION OF BUSINESS OPPORTUNITIES

The Department is currently assisting the complainant and a letter of support is issued.

9. ANALYSIS OF RESPONSES AND DEVELOPMENTS

9.1 Pension Benefits

9.1.1 The Complainant confirmed that he received an amount from the GPAA in terms of a refund for both the deduction of an amount for Special pension as well as an amount for the 5% member contribution.

9.1.2 However, some of the amounts differed from the amounts that were provided to him by the Department and the GPAA when the shortfall between the recalculated benefits and amounts received, was originally determined.
9.1.3 The matter was raised with the GPAA, who recalculated the amounts recovered from the Complainant, as well as the amounts refunded to him.

9.1.4 The complainant maintains that there is a discrepancy between the original debt quoted by the GPAA and the Department, and that the GPAA has not yet fully refunded him for the amounts that had been recovered.

<table>
<thead>
<tr>
<th></th>
<th>Recovered</th>
<th>Refunded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Amount</td>
<td>R 353 336.16</td>
<td></td>
</tr>
<tr>
<td>Special Pension</td>
<td>R 234 009.20</td>
<td>R 234 009.20</td>
</tr>
<tr>
<td>5% contribution</td>
<td>R 103 056.58</td>
<td>R 103 056.58</td>
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<tr>
<td>Total amount refunded</td>
<td>R 337 065.78</td>
<td>R 337 065.78</td>
</tr>
<tr>
<td>Possible difference</td>
<td></td>
<td>R 16 270.38</td>
</tr>
</tbody>
</table>

9.2 Interim relief

9.2.1 Part of the remedial action envisaged in terms of the Public Protector’s provisional report was to enable the Department and Minister of Defence and Military Veterans, and the Department of Military Veterans to take steps to honour the commitment made to the Public Protector on 6 October 2010 that the Department/previous Minister would make arrangements for accommodation for the Complainant if the attempts to prevent the sale of house proved unsuccessful.

9.2.2 It is common cause that the efforts to prevent the sale of house were indeed unsuccessful and that the Complainant lost his house in February 2011.

9.2.3 However, since the loss of his house, no steps have been taken by the Department or the Ministry to make arrangements for alternative accommodation to him.
9.2.4 The Complainant has been forced to find alternative rental accommodation and carry the costs out of his own pocket, whereas the Department had promised to take care of this.

<table>
<thead>
<tr>
<th>Period</th>
<th>Months</th>
<th>Place</th>
<th>Rental</th>
<th>Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb 2011 to April 2011</td>
<td>2 (1/2)</td>
<td>10 Prina Street</td>
<td>R6000 (whole period)</td>
<td>Verbal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rooihuiskraal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>May to June 2011</td>
<td>3 Months</td>
<td>Wierdapark</td>
<td>R3000 per month</td>
<td>Verbal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mr J Musindiwa</td>
<td></td>
<td></td>
</tr>
<tr>
<td>July to September 2011</td>
<td>3 Months</td>
<td>345 Wilhisina</td>
<td>R5300 per month</td>
<td>Lease agreement (July to November 2011)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wierdapark</td>
<td></td>
<td></td>
</tr>
<tr>
<td>October 2011 30 September 2012</td>
<td>12 Months</td>
<td>43 Mimosa Park, Mimosa Street, Wierda Park</td>
<td>R 5800 per month</td>
<td>Lease agreement (October 2011 to September 2012)</td>
</tr>
</tbody>
</table>

9.3 Alternative accommodation

9.3.1 One of the options discussed by the Department of Military Veterans was the new Finance Linked Individual Subsidy Programme (FLISP), first announced by South African President Zuma in his State of the Nation Address in February this year. In terms of the programme households earning R3501-R3600 per month are eligible to apply for an R87 000 subsidy. For every R100 more earned, an additional R675 subsidy is offered, all the way up to households earning R14901-R15000 per month, who are eligible to apply for a R10050 subsidy.

9.3.2 The Complainant would, however, not be able to access the benefits of the FLISP as he has owned a fixed residential property before and would probably not be able to apply for a home loan as the repossession of his house negatively affected his credit record.
9.3.3 The Department of Military Veterans advised that in terms of its negotiations with the Department of Human Settlements, efforts are being made to assist the Complainant to access housing in terms of the Government Subsidised Housing Scheme (so-called “RDP House”). He was reportedly informed that he might be eligible for an RDP house in November 2012.

9.3.4 It is common cause that the Complainant was the owner of a bonded property situated at 10 Prina Street, Rooihuiskraal, Pretoria. The description of the property included:

9.3.4.1 Three (3) Bedrooms,
9.3.4.2 Two (2) Bathrooms
9.3.4.3 A lounge
9.3.4.4 A TV Room
9.3.4.5 A Dining Room
9.3.4.6 Kitchen
9.3.4.7 Garage
9.3.4.8 Double Carport, and
9.3.4.9 A swimming pool

9.3.5 The approach adopted by the majority of Ombudsmen all over the world is that “remedial action” involves restoring the complainant or person who has suffered injustice as a result of the improper performance of an administrative function to the position they would have been in if the maladministration or poor service had not occurred. In the context of administrative justice the concept of “redress” includes the activities required to exact reparation for the consequences of the unfair or improper administrative conduct for the affected individual or individuals.

9.3.6 In the matter at hand the remedial action is required to address the injustice that has been caused to the complainant in consequence of -
9.3.6.1 The improper conduct of the Department relating to the misrepresentations made to FNB and the Complainant, which adversely affected his ability to properly protect his assets; and

9.3.6.2 The Department's failure to honour the then Minister's undertaking that the Complainant would be provided with alternative accommodations, should the efforts of the Department to secure the possession of his house, would fail.

9.3.7 The background to the then Minister's undertaking was the meeting between the Minister and the Public Protector where the Minister's urgent intervention was sought to ensure that the Complainant would not lose his property. The context within which the Minister responded to provide the assurance that the matter was being attended to and that and a contingency option was available to ensure that the Complainant would not be prejudiced in the process.

9.3.8 In these circumstances it was not the understanding that such alternative accommodation would mean suitable and comparable accommodation and the Public Protector would not have accepted the undertaking (as she did) if the Minister intended to state that the Complainant would be provided with an RDP House. The discussion did not go into that direction and it was never discussed as a suitable option.

9.3.9 In fact, the Department is compounding the impact of the injustice to the Complainant by relegating him to the Government Subsidised Housing Programme that is intended to provide access to entry-level housing to low income earners.

9.3.10 There is no indication that any of the options considered by the Department of Military Veterans, are offered as viable redress in recognition of or in response to the specific circumstances of the Complainant and the prejudice suffered by him and his family as a direct consequence of the actions of the Department.
9.4 Remedy for distress and trauma

9.4.1 The response that the Complainant would have access to certain therapeutic services falls far short of the principles and objectives of restorative justice.

9.4.2 A comprehensive response requires that the full range of redress options be considered. The range of options considered in terms of international best practice have been grouped into the following categories:

a) Communication
b) Rectification
c) Mitigation
d) Satisfaction, and
e) Compensation.

9.4.3 These are not firm or fixed categories and various options for redress will fit into more than one category. Whether other options are relevant or appropriate would be dependent on the circumstances and seriousness of the maladministration and the nature and degree of detriment. However, it is clear that the Public Protector intended to request the Department to consider financial compensation on a consolatory basis for distress and trauma.

10. CONCLUSION

10.1 The Joint Standing Committee on Defence heard evidence and reported in 2007 that former members of the NSF suffered financial hardship to buy into the previous NSF Pension Dispensation that was replaced by the dispensation under discussion. In the case of the complainant an amount was deducted from his monthly pension in order to pay back both SPF allocations and make member contributions to the GPAA.
10.2 The revised NSF Pension Dispensation held financial benefits for the Complainant to the extent that the monthly deductions would be stopped and repaid, as well as the payment of a lump sum that was owed to him in respect of additional pension benefits.

10.3 The Complainant's financial position deteriorated the longer the implementation of the revised NSF Pension Dispensation was delayed.

10.4 The Complainant bought a property while he was still employed and qualified for a bond based on his income and good credit record. When he experienced problems and realised that the implementation of the revised NSF Dispensation would assist to alleviate some of his problems, he duly approached the Department, and later the previous Minister, who responded by creating the impression that the relief would realise in time to save his house.

10.5 The previous Minister and the Department accepted that their relationship with the Complainant in his instance, created a situation where the Complainant's private interests required protection from the consequences of the challenges experienced with the implementation of the revised NSF Dispensation. This created a situation where the complainant's ability to meet his obligation, or to take alternative steps to protect his assets, was ancillary and derivative from the Department's guarantees for payment on specific dates, which it communicated directly to the Bank. The previous Minister's undertakings went even further to promise to address the Complainant's concerns about the loss of accommodation, should the efforts fail to protect the Complainant's interests.

10.6 The impropriety in this matter is directly related to the fact that the Department made these commitments in circumstances where it could in fact not guarantee delivery and indeed failed to perform on the specified dates, which caused the Bank to reflect on the Complainant's ability to perform his obligations and proceeded to sell his house.
10.7 When the Complainant subsequently lost the house, he did not only lose the financial investment that he has been making since the purchase of the house in 2006, but he also lost the opportunity to own another property. His access to financial assistance to purchase any other property is severely limited as a result of the fact that he is now a pensioner, and his credit record is ruined.

10.8 A house is not only providing a roof over one’s head, it is also a social and an economic asset, “providing legal and secure access to urban spaces, are passed on as inheritance, provide a social safety net for extended family members in need and a critical demonstration of the post-apartheid government, securing its legitimacy and building citizenship”, in other words, for many the tangible realisation of our new democracy and the rights enshrined in the Constitution.

10.9 This experience has been extremely traumatic on the Complainant. He approached the institutions concerned believing in the democratic values and justice enshrined in the Constitution and in full confidence that by taking proactive steps as he did, the Government would not allow any harm to come to him. To be homeless at his age despite his best efforts is causing distress to him and those dependent on him, including his immediate family.

11. KEY FINDINGS

11.1 The Department and National Treasury did not fulfil its responsibilities in relation to implementation of the revised NSF Pension Dispensation approved by Cabinet, without undue delay or with the maximum effort to ensure compliance with their constitutional obligations, including the provisions of section 26, 27, 33, 195 and 237 of the Constitution.

11.2 The manner in which the Department responded to and committed itself to the Complainant individually, as well as to FNB and the Public Protector cannot be

23 Kecia Rust, FinMark Trust, ibid
characterised as mere acts of grace, courtesy or compassion. The Department accepted responsibility to protect the Complainant’s private interests from the consequences of the challenges experienced with the implementation of the revised NSF Dispensation. This created a situation where the complainant’s ability to meet his obligation, or to take alternative steps to protect his assets, was ancillary and derivative from the Department’s guarantees for payment on specific dates, which it communicated directly to the Bank.

11.3 The Department did not discharge its obligations and duties towards the Complainant with due diligence, fairness and in good faith as required by the common law as well as fairness and reasonableness in terms the right to just administrative action envisaged in section 33 of the Constitution, PAJA and the duty to be responsive as envisaged in section 195 of the Constitution, in so far as it -

11.3.1 Made commitments to the Complainant, FNB and the Public Protector which were not rationally connected to the facts at hand and which it did not honour;

11.3.2 Did not provide the Complainant with, clear, complete, consistent or accurate information;

11.3.3 Prevented FNB from properly understanding and assessing the risks and reasonable timeframe for payment of the Complainant’s pension benefits; and

11.3.4 Carelessly mislead the Complainant into a false sense of security and denying him an opportunity to protect his property and the chance to consider other courses of action.

11.4 The actions of the Department constitute maladministration and improper conduct as envisaged in section 182 of the Constitution.
11.5 Due to the maladministration by the Department, the Complainant suffered prejudice in the form of financial loss, loss of shelter, and distress. His human dignity also suffered. His human dignity also suffered.

12. REMEDIAL ACTION

The appropriate remedial action that is to be taken, as envisaged in section 182(1) (c) of the Constitution is the following:

12.1 The Department of Defence, in collaboration with the GPAA, is to take urgent steps to ensure that any outstanding issues, including the cancellation of the monthly deductions from the Complainants pension, and a proper reconciliation of the debt that was recovered from and repaid to the Complainant, is attended to immediately.

12.2 The Minister of Defence and Military Veterans, together with both the Department of Defence and the Department of Military Veterans, is to take immediate action to honour the commitments made to the Public Protector on 6 October 2010 by the previous Minister and the Department, regarding the alternate accommodation for the Complainant since the attempts to prevent the sale of the house proved unsuccessful. The steps should include the following:

12.2.1 Reimburse the Complainant with the expenditure that he has incurred since the loss of his house to rent alternative accommodation; and

12.2.2 Assist the Complainant to obtain alternative accommodation that as far as reasonably possible matches the accommodation that he occupied prior to the repossession of his house.

12.3 The Department of Military Veterans must provide the Complainant with a remedy, including consolatory compensation, to address the distress and trauma experienced by him and his family as a result of the manner in which the matter has been handled.
12.4 The Department of Military Veterans is to take steps to deal with the plight of the military veterans and NSF members in a collective manner and to urgently identify and address systemic impediments to the Department’s meeting of its obligations to these veterans.

13. MONITORING

The Public Protector will require the Minister of Defence and Military Veterans to:

13.1 Submit an action plan in respect of the implementation of the remedial action for interim relief referred to in paragraph 12.2.1 above, within 20 days from the date of this report;

13.2 Submit an action plan in respect of the implementation of the balance of the remedial action referred to in paragraph 12 above, within 30 days of the date of this report; and

13.3 Submit a report within 60 days from the date of this report on the progress made with the implementation of the remedial action referred to in paragraph 12 above.

[Signature]

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 01/09/2012

Assisted by Adv N vd Merwe: Manager: Knowledge Management and Research