SOMBRE RECORDS FROM OUR PAST

Report of the Public Protector on an investigation into the alleged incorrect calculation of the pension benefits against the Eastern Cape Department of Education
Report No: 3 of 2013/14
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Executive summary

(i) "Sombre records from our past" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector’s Act, 1994.

(ii) The complaint communicates the findings and directives on appropriate remedial action following an investigation conducted in response to a complaint made by Mrs NP Mdaka, alleging maladministration by the Government Pension Administration Agency (GPAA) involving incorrect calculation of her pension benefits on her retirement in 2002.

(iii) The following were issues considered by the Public Protector:

(a) Did the Eastern Cape Department of Education fail to attend to the Complainant’s pension calculations grievance as instructed by the internal memorandum of 25 March 2008 by the MEC and the Chairperson of the Portfolio Committee on Education of the Eastern Cape Provincial Government and was such conduct improper and an Act of maladministration?

(b) Did the GPAA fail to properly investigate the periods of service of the Complainant with the Transkei Education Department as it was required to do in terms of section 14 of the GEP Law and did such conduct constitute maladministration; and

(c) If the above conduct constitutes maladministration, was the Complainant prejudiced by such maladministration and if so what would it take to redress the injustice suffered by the complainant?

(iv) The investigation was conducted by way of correspondence, interviews with the relevant parties, the perusal of documents received. Applicable
legislation, relevant case law, prescripts and research on the amalgamation process of the various pension funds were also considered and applied.

(v) The Public Protector makes the following findings:

(a) The Eastern Cape Education Department failed to attend to the Complainant’s pension calculations as instructed by the internal memorandum of 25 March 2008 by the MEC and the Chairperson of the Portfolio Committee on Education of the Eastern Cape Provincial Government. This conduct was improper and amounted to maladministration;

(b) The GPAA failed to properly investigate the periods of service of the Complainant with the Transkei Education Department, in the light of the problems experienced with the data captured during the amalgamation process, as it was required to do in terms of section 14 of the GEP Law. The GPAA’s conduct was improper and amounted to maladministration; and

(c) The Complainant was prejudiced by the above acts of maladministration in that she did not receive her correctly calculated pension benefits in accordance with her years of service and has been pursuing this matter for the last five years and incurring administrative and logistical costs in the process.

(ii) Appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is the following:

(a) The Chief Executive Officer of the GPAA must take the necessary steps to re-calculate the pension benefits of the Complainant and her years of service from 1973 when she was admitted to the fund and must ensure
that the Complainant’s years of service and contribution to the Transkei Pension Fund during 1974 to 1978 are included in the calculation;

(b) The Director-General of the Eastern Cape Education Department must take the necessary steps to ensure that the amounts paid to the then Transkei Education Department for the periods of service from 1973 – 1974 and 1978 – 1983 are repaid to the GPAA with interest in terms of the Rules of the GEP Law;

(c) The Director-General of the Eastern Cape Education Department must pay interest on the difference between the amount the Complainant will receive after recalculation of her pension benefit and the amount she received during 2002 calculated in terms of the Prescribed Rate of Interest Act; and

d) The Director-General of the Eastern Cape Education Department must apologise, in writing, to the Complainant within 30 days from the date of this report for the prejudice caused due to the undue delay to accurately calculate her pension benefits.
REPORT ON AN INVESTIGATION INTO THE ALLEGED INCORRECT CALCULATION OF PENSION BENEFITS

1. INTRODUCTION

1.1. "Sombre records from our past" is report of the Public Protector in terms of section 182 of the Constitution and Section 8(1) of the Public Protector Act, 1994.

1.2. It is submitted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act) to the:

1.2.1 Director-General of the Department of Public Service and Administration, Mr D Mashwahle;

1.2.2 Member of the Executive Council for Education of the Eastern Cape Provincial Government, Mr M Makupula;

1.2.3 Chairman of the Board of Trustees of the Government Employees Pension Fund, Mr A Moloto; and

1.2.4 Chief Executive Officer of the Government Pension Administration Agency, Mr P Tjie;

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

1.3.1 Speaker of the National Assembly, Mr MV Sisulu;

1.3.2 Chairperson of the Justice and Constitutional Development Portfolio Committee, Mr LT Landers; and
1.3.3 The Complainant.

1.4 It deals with an investigation into an allegation of prejudice by the Eastern Cape Department of Education (the Department) regarding the incorrect calculation of pension benefits.

2. THE COMPLAINT

2.1 Mrs NP Mdaka (the Complainant) complained about alleged incorrect calculation of her pension benefits when she retired due to ill health in 2002.

2.2 The Complainant alleged that she was employed as a teacher on 15 January 1973 in the Transkei Education Department.

2.3 The Complainant further alleged that she transferred from the Transkei Education Department to the Department of Education and Training during 1984.

2.4 During 1990, the Complainant was transferred to the Northern Cape Education Department. When she retired her pension benefits were calculated by the Government Pension Administration Agency (the GPAA) from 1990 until her retirement in 2002.

3. BACKGROUND

3.1 The Apartheid Government introduced the Promotion of Black Self-Government Act No. 46 of 1959. The main objective of this Act was to create self-governing territories.
3.2 The Black population was arranged and categorised into national units based on language and culture. There was the North-Sotho unit, the South-Sotho unit, the Swazi unit, the Tsonga unit, the Tswana unit, the Venda unit, the Xhosa unit and the Zulu unit.

3.3 The administrative authorities in these national units were to be based on the tribal system.

3.4 The state of Transkei opted for independence from the Government of the Republic of South Africa on 26 October 1976.

3.5 The Transkei Public Service Act, Act 43 of 1978, determined that every public servant becomes a member of the Transkei Government Employees Pensions Fund. The territory of Transkei however had a Government Service Pension Fund since 1970 in terms of the Transkeian Government Service Pension Act, Act 4 of 1970.

4. POWERS 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. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

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

4.4 The GPAA and the Eastern Cape Education Department are organs of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.

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

5. **ISSUES TO BE CONSIDERED BY THE PUBLIC PROTECTOR**

5.1 The following were issues considered by the Public Protector:

5.1.1 The Eastern Cape Education Department’s failure to attend to the Complainant’s pension calculations as instructed by the internal memorandum of 25 March 2008 by the MEC and the Chairperson of the Portfolio Committee on Education of the Eastern Cape Provincial Government;

5.1.2 The GPAA’s failure to properly investigate the periods of service of the Complainant with the Transkei Education Department as it was required to do in terms of section 14 of the GEP Law.

5.1.3 Whether the above conduct constituted maladministration, and if so was the Complainant prejudiced by such maladministration.

6. **THE INVESTIGATION**

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

6.1.1 Correspondence

Correspondence between the Public Protector and:

6.1.1.1 The Complainant;

6.1.1.2 The Government Pension Administration Agency;

6.1.1.3 The Northern Cape Education Department; and

6.1.1.4 The Director-General Department of Public Service and Administration.

6.1.2 Research on the amalgamation process of Pension Funds

6.1.2.1 The history of the amalgamation process

6.1.3 Legislation and other prescripts:

The relevant provisions of the following legislation were considered and applied, where appropriate:

6.1.3.1 The Constitution of the Republic of South Africa, 1996;

6.1.3.2 The Republic of Transkei Constitution Act, No. 15 of 1976;

6.1.3.3 The Transkeian Government Service Pension and Gratuity Fund No. 4 of 1970;

6.1.3.4 The Government Employees Pensions Act, No. 15 of 1978 (Transkei);
6.1.3.5 The Government Service Pension Act, No. 57 of 1973; and

6.1.3.6 The Government Employees Pension Law, 1996.

6.1.3.7 The Prescribed Rate of Interest Act, No 7 of 1997

6.1.4 Applicable Jurisprudence

The following relevant jurisprudence was considered:

6.1.4.1 *Government Employees Pension Fund & another v Buitendag & others*¹;

6.1.4.2 *Welch v Golden Pension Fund*² and

6.1.4.3 *National Tertiary Retirement Fund v Registrar of Pension Funds*.³

7. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

7.1 Correspondence between the Public Protector and the Complainant

7.1.1 The Complainant submitted that she was employed at Nyanisweni Primary School in the Tsomo Circuit, Transkei on 15 January 1973. She was admitted to the Transkeian Government Service Pension and Gratuity Fund with immediate effect.

7.1.2 During her employment period in Transkei, she transferred to other schools and in 1984 was transferred to the then Department of Education and Training.

¹[2006] JOL 18360 (SCA)
²PFA/GA/1160/01 23/08/2001
³[2009] 3 All SA 254 (SCA)
7.1.3 The Complainant transferred to the Northern Cape Education Department during 1990. She retired due to ill health during 2002 and received pension benefits calculated by the GPAA for 14 years of service from 1990 to 2002.

7.1.4 The Complainant requested Coordinator Pensions Association, Queenstown and Districts, Mr WS Tshangana, to address the non-payment of 17 years of service with the GPAA. He addressed a letter during 2002 and indicated that he was aware of the practice in Transkei to indicate resignation on the system where a public servant was transferred.

7.1.5 Mr WS Tshangana indicated in his letter to the GPAA that he was aware of a number of cases where the cheques received by the Transkei Education Department were fraudulently paid into other accounts.

7.1.6 He referred to an incident involving a cheque in the amount of R45 000.00 and a clerk in the pensions department in Umtata who was convicted for using this cheque which was made out to a certain Miss Nancy Nombulelo Ngwayi.

7.1.7 During February 2008, a delegation of retired teachers of the former Transkei met with the Member of the Executive Council for Education of the Eastern Cape Provincial Government and the Chairperson of the Portfolio Committee on Education of the Eastern Cape Provincial Government.

7.1.8 The District Directors of the Eastern Cape Education Department were instructed per internal memorandum on 25 March 2008 to investigate the individual cases reported during the meeting in February.

7.1.9 The individual cases were never investigated and the Complainant's matter was not resolved.
7.2 Correspondence between the Public Protector and the Government Pension Administration Agency

7.2.1 The GPAA reported that the Complainant was paid benefits for the period 1990 to 2002 during the year 2002.

7.2.2 The GPAA also indicated that no proof of contribution for the period of 1974 to 1978 was submitted and these periods were not recognised by the GPAA as pensionable service.

7.2.3 The GPAA confirmed that proof of payment for the periods 1973 – 1974 and 1978 – 1983 were on the system. The GPAA however conceded that in terms of the Government Service Pension Act⁴ and the rules thereto, payment was made to the employer at the time.

7.2.4 No confirmation could be found that the Complainant in fact did receive the payments for the two periods mentioned above.

7.3 Correspondence between the Public Protector and the Northern Cape Education Department

7.3.1 After consultation with the Northern Cape Education Department a revised Z102 withdrawal form was submitted to the GPAA indicating the correct years of service during 2010.

7.3.2 An affidavit from the Complainant was attached stating that the amounts for the periods of 1973 – 1974 and 1978 – 1983 were never received by her. She further submitted her certificates of service indicating her years of service with the Transkei Education Department and the Department of

⁴ Act No. 57 of 1973
Education and Training. Proof of the admission to the fund by the Complainant in 1973 was attached.

7.3.3 The benefits of the Complainant were not recalculated by the GPAA.

7.4 Correspondence between the Public Protector and the Director-General Department of Public Service and Administration

7.4.1 The Public Protector addressed a letter to the Acting Director-General of the Department of Public Service and Administration on 31 August 2010.

7.4.2 The Public Protector requested the Acting Director-General of the Department of Public Service and Administration to intervene in respect of the Complainant as well as other members of the ex-TBVC state pension funds.

7.4.3 No response was received from the Department of Public Service and Administration.

7.5 The amalgamation process of the Pension Funds

7.5.1 The Government Service Pensions Fund (The GSPF) in South Africa pre-1994 was a pay-as-you-go system. Contributions of current members funded the pension benefits of retired members. During the 1980’s the funding level collapsed. The system after 1994 was a fully funded pension fund. The assets of the GPAA grew from R31 billion in 1989 to R136 billion in 1996.

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

7.5.3 The Interim Constitution (1993) provided certain guarantees protecting accrued benefits and retirement ages of public servants and stipulated that provision should be made by law for a pension for members of the public service.

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

7.5.5 A Special Task Team was appointed and had to investigate and make proposals on the rationalisation of the funds. The focus of the pension task team was to provide homogeneous benefits to all civil servants as the benefits previously offered differed between the various constitutional entities as well as between permanent and temporary employees.

7.5.6 Actuaries were appointed for each of the funds and the rest of the special task team consisted of representatives of the Department of Public Service and Administration, the South African National Defence Force, the South African Police Service, as well as Education and Labour Unions.

7.5.7 At the end of the process each fund submitted an actuarial report, member rolls were reconciled and transfer amounts were determined. Each report created a “data reserve” for possible defective data.

7.5.8 The Government Employees Pension Law (the GEP Law) was promulgated and the commencement date of the law was proclaimed as 1 May 1996.
With the amalgamation of the funds, the benefit structure was standardised and all discriminatory practices scrapped. The GPAA is classified as a defined benefit pension fund established by Law in terms of section 1 of the Income Tax Act. The fund allows for pension benefits on resignation, death or retirement.

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

7.6 Response to the Public Protector’s provisional report

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

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

7.6.2 The Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act on 24 August 2012. The Provisional Report

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5 Act No. 58 of 1962
6Kuit and Others v Transnet Pension Fund and Another [2006] 2 BPLR 120 (W)
was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents.

7.6.3 The provisional report was submitted to the Director-General of the Department of Public Service and Administration, the Member of the Executive Council for Education of the Eastern Cape Provincial Government, the Chairman of the Board of Trustees of the Government Employees Pension Fund and the Chief Executive Officer of the Government Pension Administration Agency. No responses were received on 31 January 2013.

7.6.4 Response from the Complainant

7.6.4.1 In response to the Provisional Report, the Complainant submitted that the remedial action to be taken should include the payment of the difference between the benefit she is currently receiving and what she should have received on retirement.

8. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

8.1 During the existence of the Public Protector South Africa numerous complaints have been received and resolved from ex-members of the TBVC states pension funds. In most cases the complainants could at least find one pay sheet indicating their contribution to one of these funds.

8.2 The Northern Cape Education Department submitted proof of the Complainant’s admission to the Transkei Pension Fund as well as her service record to the GPAA when the amended Z102 withdrawal form was submitted.
8.3 The records of the GPAA confirmed proof of payment for the periods 1973 – 1974 and 1978 – 1983 on the system. The GPAA, however, conceded that in terms of the Government Service Pension Act\(^7\) and the rules thereto, payment was made to the employer at the time. No confirmation could be found that the Complainant did, in fact, receive the payments for the two periods mentioned above.

8.4 The Complainant submitted an affidavit stating that the amounts for the periods of 1973 – 1974 and 1978 – 1983 were never received by her. The address stated by the GPAA as the address that the cheques were posted to is unknown to her.

8.5 A defined benefit fund is a fund where members’ contributions are fixed and they are guaranteed benefits defined in the rules of the fund. If the fund does not have sufficient funds to meet its obligations to its members, Government has to ensure that it is properly funded by either increasing its contributions or by making such lump sum payment or payments as are from time to time necessary.

8.6 There is a statutory obligation on Government to ensure that the fund is able to meet its obligations to its members. The fund is governed by its rules. The manner in which it is to be administered and managed and the benefits payable to its members are determined by such rules.\(^8\)

8.7 During the amalgamation process each fund, to be amalgamated into the GPAA submitted an actuarial report. Member rolls were reconciled and transfer amounts were determined. Each report created a “data reserve” for possible defective data.

\(^7\) Act No. 57 of 1973
\(^8\) Kut and Others v Transnet Pension Fund and Another [2006] 2 BPLR 120 (W)
8.8 The provisions of the GEP law clearly indicate that an obligation was placed on the GPAA to fulfil obligations of previous funds as defined in the law. The obligations passed and vested in the GPAA with the acquiring of the assets of the previous funds. The same obligation is on the employer in this case the Government.

8.9 The Supreme Court of Appeal in the matter of Government Employees Pension Fund & another v Buitendag & others\(^9\), remarked that “The employer and the Fund were part of the same decision-making mechanism. The quality of a decision by the Fund depended as much on the diligence of the employer's officials who, at the behest of the Fund, gathered the information on which the latter made its decision, as on the astuteness of its own officials. In blaming each other for what went wrong they are misguided.”

8.10 The Pension Funds Adjudicator remarked in the matter of Welch v Golden Pension Fund,\(^10\) in respect of defined benefit funds that “Be that as it may, the fund's liability to the Complainant remains unaltered and there is no rule or legislative provision allowing the fund to escape such liability by virtue of receiving no contributions.”

8.11 All persons employed by the Republic of Transkei as public servants, including educators became members of the GPAA after the promulgation of the GEP Law.

8.12 At the conclusion of this investigation, the Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act on 24 August 2012.

\(^9\) [2006] JOL 18360 (SCA)
\(^10\) PFA/GA/1160/0123/08/2001
8.13 No responses were received from the Director-General of the Department of Public Service and Administration, the Member of the Executive Council for Education of the Eastern Cape Provincial Government, the Chairman of the Board of Trustees of the Government Employees Pension Fund and the Chief Executive Officer of the Government Pension Administration Agency.

8.14 The response from the Complainant is captured in the remedial action, as a re-calculation will determine the difference between what she received and what she should have received. The difference would then be paid in a lump sum to the Complainant.

9. LEGAL AND REGULATORY FRAMEWORK


9.1.1 Section 197 of the Constitution of the Republic of South Africa, 1996 regulates the public service.

9.1.2 Section 197(2) of the 1996 Constitution prescribes that “The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.”

9.2 The Republic of Transkei Constitution Act No. 15 of 1976

9.2.1 Section 65 of the Republic of Transkei Constitution, Act 15 of 1976, provides as follows:

"(1) All persons who immediately prior to the commencement of this Act are in the service of the Government of Transkei shall become public servants of Transkei".

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9.3 The Transkeian Government Service Pension and Gratuity Fund Act 1970

9.3.1 The Transkeian Government Service Pension and Gratuity Fund Act, defines who would be members of the fund and their contributions.

9.3.2 The Act further allows for the publishing of regulations and prescribes the retirement age of members.

9.3.3 Employees of the Transkei Government were members of the fund.

9.4 The Government Employees Pensions Act 1978 (Transkei)

9.4.1 The Government Employees Pensions Act was promulgated after the independence of the Republic of Transkei and was brought in line with the departments created after independence.

9.4.2 The Transkeian Government Service Pension and Gratuity Fund Act and The Government Employees Pensions Act are similar.

9.4.3 All persons employed by the Republic of Transkei as public servants, including educators became members of the fund.

9.5 The Government Service Pension Act No. 57 of 1973

9.5.1 The Government Service Pension Act created the Government Services Pension Fund (GSPF) on 1 July 1973.

9.5.2 The Act was promulgated to provide for pensions and other financial benefits for employees of the Government and the Provincial Administration.
9.5.3 The Provincial and Territory Service Pension fund was amalgamated in the GSPF.

9.5.4 Regulation 8 of the Regulations in terms of Section 17 of the Act allows for the transfer between funds. It states that “…any person who was a member of another fund and who, immediately after termination of his membership of that other fund or after such break in his service as the Director-General in his discretion may condone, becomes a member of the Fund shall, with effect from the date on which he so becomes a member, contribute to the Fund in terms of regulation 3 (1) and his pensionable service with such other fund shall be reckoned for the purposes of these regulations as pensionable service…”

9.6 The Government Employees Pension Law 1996

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

9.6.2 Subsection (5) of section 14 includes the Government Employees Pension Fund of the Transkei, established in terms of the Transkei Government Employees Pensions Act\(^{11}\) and the Transkeian Government Service Pension Fund, referred to in section 2 of the Transkeian Government Service Pension Fund Act\(^{12}\) as funds to be amalgamated.

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

\(^{11}\) Act No. 15 of 876
\(^{12}\) Act No 4 of 1970
9.6.4 Section 20 (1) of the GEP Law determines “that no award of a benefit or any increase thereof and no alteration of any condition or condonation of a breach of any condition upon which such benefit is by law earned or to be earned in respect of a pensioner of the Fund, the Temporary Employees Pension Fund or a previous fund, shall be lawful unless the award, increase, alteration or condonation is authorized by an Act of Parliament.”

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

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

9.7 Prescribed Rate of Interest Act No 7 of 1997

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

9.7.2 In terms of Section 1(2) of this Act the Minister of Justice and Constitutional Development prescribes the interest rate from time to time by publication in the Government Gazette. The current rate is 15.5% prescribed by the Minister in 1993.
9.8 Jurisprudence and other authorities/case law considered

9.8.1 The Supreme Court of Appeal in the matter of Government Employees Pension Fund & another v Buitendag & others\(^{13}\) remarked that “The employer and the Fund were part of the same decision-making mechanism. The quality of a decision by the Fund depended as much on the diligence of the employer’s officials who, at the behest of the Fund, gathered the information on which the latter made its decision, as on the astuteness of its own officials. In blaming each other for what went wrong they are misguided.”

9.8.2 The Pension Funds Adjudicator remarked in the matter of Welch v Golden Pension Fund,\(^{14}\) in respect do defined benefit funds that “In terms of the rules of the fund, benefits are payable to members or their beneficiaries on the happening of certain events. Therefore, a member of a fund at any given time has a contingent right to a pension benefit. The nature and quantum of this benefit is dependent on the happening of the specified event and the rule regulating the pension consequences upon the happening of the said event.”

9.8.3 He further remarked that “Be that as it may, the fund’s liability to the Complainant remains unaltered and there is no rule or legislative provision allowing the fund to escape such liability by virtue of receiving no contributions.”

9.8.4 The Supreme Court of Appeal found in National Tertiary Retirement Fund v Registrar of Pension Funds\(^{15}\) that amendments to the rules of pension funds that reduce benefits payable to members in the future will not be

\(^{13}\)[2006] JOL 18360 (SCA)
\(^{14}\)PPGA/1180/0123/08/2001
\(^{15}\)[2009] 3 All SA 254 (SCA)
inconsistent with the law if the right to those benefits has not yet accrued to
the members at the time that the amendment is made.

10. ANALYSIS AND CONCLUSION

10.1 The Complainant submitted her certificates of service indicating her years
of service with the Transkei Education Department and the Department of
Education and Training. Proof of the admission to the fund by the
Complainant in 1973 was also submitted.

10.2 The periods of 1974 to 1978 were not recognised by the GPAA as
pensionable service. During this period the Complainant was contributing to
the Transkei Pension Fund.

10.3 The GPAA is, in terms of subsection (2) of section 14 of the GEP Law,
responsible for all liabilities of the Transkei Pension Fund. The provisions
clearly indicate that an obligation was placed on the GPAA to fulfil
obligations of previous funds as defined in the law. The obligations passed
and vested in the GPAA with the acquiring of the assets of the previous
funds.

10.4 The GPAA confirmed that proof of payment for the periods 1973 – 1974
and 1978 – 1983 were on the system. The GPAA, however, conceded that
in terms of the GSPF and the rules thereto, payment was made to the
employer at the time. The cheques were submitted to the Eastern Cape
Department of Education. No confirmation could be found that the
Complainant did receive the payments. The ME’s letter in 2008 confirms
that government conceded at that stage that the years of service had not
been correctly calculated. It is also unclear why separate cheques would
have been issued when the complainant retired in 2002.
10.5 It is the duty of a pension fund to direct, control and oversees the running of the retirement/defined benefit fund in the best interest of the members. The fund is responsible for managing the monies paid to fund members (and/or their dependants) when they retire, become disabled or die. These payments are funded by the contributions that employees and employers make during their working lives. For many employees this will be their sole source of income during retirement, and trustees therefore have to act responsibly when it comes to the payment of contributions into the fund.

11. FINDINGS

The Public Protector makes the following findings:

11.1 The Eastern Cape Education Department failed to attend to the Complainant’s pension calculations as instructed by the internal memorandum of 25 March 2008 by the MEC and the Chairperson of the Portfolio Committee on Education of the Eastern Cape Provincial Government. This conduct was improper and amounted to maladministration;

11.2 The GPAA failed to properly investigate the periods of service of the Complainant with the Transkei Education Department, in the light of the problems experienced with the data captured during the amalgamation process, as it was required to do in terms of section 14 of the GEP Law. The GPAA’s conduct was improper and amounted to maladministration; and

11.3 The Complainant was prejudiced by the above acts of maladministration in that she did not receive her correctly calculated pension benefits in accordance with her years of service and has been pursuing this matter for the last five years and incurring administrative and logistical costs in the process.
12. REMEDIAL ACTION

12.1 Appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is the following:

12.2 The Chief Executive Officer of the GPAA must take the necessary steps to re-calculate the pension benefits of the Complainant and her years of service from 1973 when she was admitted to the fund and must ensure that the Complainant’s years of service and contribution to the Transkei Pension Fund during 1974 to 1978 are included in the calculation;

12.3 The Director-General of the Eastern Cape Education Department must take the necessary steps to ensure that the amounts paid to the then Transkei Education Department for the periods of service from 1973 – 1974 and 1978 – 1983 are repaid to the GPAA with interest in terms of the Rules of the GEP Law;

12.4 The Director-General of the Eastern Cape Education Department must pay interest on the difference between the amount the Complainant will receive after recalculation of her pension benefit and the amount she received during 2002 calculated in terms of the Prescribed Rate of Interest Act; and

12.5 The Director-General of the Eastern Cape Education Department must apologise, in writing, to the Complainant within 30 days from the date of this report for the prejudice caused due to the undue delay to accurately calculate her pension benefits.
13. **MONITORING**

The Public Protector will require:

13.1 An implementation plan from the Chief Executive Officer of the GPAA regarding the remedial action to be taken at paragraph 13.1 above within 30 days from the date of this report;

13.2 An implementation plan from the Director General of the Eastern Cape Education Department regarding the remedial action to be taken at paragraphs 13.2 and 13.3 above; and

13.3 Progress reports from both the Chief Executive Officer and the Director-General on the progress made in respect of the implementation plans referred to above within 60 days from the date of this report.

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ADV T N MADONSELA  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA  

DATE: 24/04/2013

Assisted by: Erika Cilliers and Phuti Dibete