
PUBLIC PROTECTOR SOUTH AFRICA

REPORT NO. 1 OF 2017/2018

"Allegations of maladministration against the Eastern Cape Provincial Department of Social Development by Ms Z Malanda"

REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION BY THE EASTERN CAPE PROVINCIAL DEPARTMENT OF SOCIAL DEVELOPMENT REGARDING UNDUE DELAY IN SUBMISSION OF EXIT DOCUMENTS, NON PAYMENT OF LEAVE GRATUITY AND INTEREST THEREON
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Executive Summary

"The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath."

Economic Freedom Fighters v Speaker of the National Assembly & others: Democratic Alliance v Speaker of the National Assembly & others [2016] ZACC 11 at paragraph 52

(i) This is the Public Protector's report 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 Act No. 23 of 1994.

(ii) The report communicates the Public Protector's findings and appropriate remedial action taken in terms of section 182(1) (c) of the Constitution, following an investigation into the alleged delay by the Eastern Cape Provincial Department of Social Development (ECDSD) in paying the Complainant's pension benefits along with interest thereon and failure to pay out her leave gratuity upon her exiting the Eastern Cape Provincial Department of Social Development's (ECDSD) employ.

(iii) Ms Zanele Malanda lodged the complaint, alleging that ECDSD stopped her salary; delayed to pay her pension fund with interest thereon; failed to pay leave gratuity and whilst in service with the Department of Justice she was placed on an incorrect notch.

(iv) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in
state affairs, to report on that conduct and to take appropriate remedial action, and section 6(4) of the Public Protector Act regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(v) The ECDSD did not dispute that it had failed to pay the Complainant's leave gratuity, but disputed all other allegations.

(vi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the ECDSD unduly delayed in the payment of the Complainant's pension benefits held with the Government Employees' Pension Fund (the GEPF) and therefore liable for payment of interest thereon;

(b) Whether the ECDSD improperly failed to pay the Complainant's leave gratuity and interest thereon;

(c) Whether whilst still in its employ, the Department of Justice (the DoJ) placed the Complainant at an incorrect salary notch resulting in her suffering prejudice when her benefits were calculated upon her exit from the ECDSD;

(d) Whether the ECDSD improperly and unfairly dismissed the Complainant from its employment. Based on the ECDSD's response to the Public Protector's Provisional Report and consideration of the Public Health and Welfare Sectorial Bargaining Council (PHWSBC)'s arbitration award, case number 160-03/04, this issue was not pursued any further; and

(e) Whether the Complainant suffered prejudice as a result of the conduct of the ECDSD and if so what it would take to place the Complainant as close as possible to where she would have been had there been no impropriety.
(vii) The investigation process included an analysis of applicable laws, perusal of documents in the ECDSD's Human Resources section and correspondence.

(viii) Following the investigation the ECDSD was given an opportunity to respond to the provisional findings and proposed remedial action in terms of section 7(9) of the Public Protector Act to which it responded.

(ix) In arriving at the findings, the Public Protector was guided by the standard approach adopted by the office, which simply asks: What Happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

(x) As it is customary, the “what happened” enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. The question regarding what should have happened on the other hand relates to the standard that the conduct in question should have complied with.

(xi) In determining the standard that the Department and its functionaries should have complied with to avoid improper conduct or maladministration, the Public Protector was guided, as it is customary, by the Constitution, national legislation, applicable policies and guidelines. Key among these prescripts was the Central Bargaining Council Resolutions of 1996; Government Employees Pension Law and Rules and the Public Service Bargaining Council Resolution 7 of 2000.

(xii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
(a) Regarding whether the ECDSD unduly delayed in the payment of the Complainant’s pension benefits held with the GEPF and therefore liable for payment of interest thereon:

(aa) The allegation that the ECDSD unduly delayed in the payment of the Complainant’s pension benefits held with the GEPF and therefore liable for payment of interest thereon is substantiated;

(bb) The ECDSD delayed in authorising the necessary exit documents for the Complainant by nearly 14 months after the Complainant’s discharge from service;

(cc) The ECDSD provided the GEPF with an incorrect appointment date of the Complainant. It reflected 1997 instead of 1992 and only rectified this on or about 2010;

(dd) The ECDSD acted in contravention of section 195(1)(g) of the Constitution which requires that the Public Service should keep accurate records;

(ee) This delay is contrary to the provisions of section 26(1) of the Government Employees Pension Law; and

(ff) The conduct of the ECDSD in not keeping accurate records pertaining to the Complainant’s appointment date and the undue delay to pay his pension benefits amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act.
(b) Regarding whether the ECDSD improperly failed to pay the Complainant's leave gratuity and interest thereon:

(aa) The allegation that the ECDSD improperly failed to pay the Complainant's leave gratuity and interest thereon is substantiated;

(bb) The ECDSD failed to pay the Complainant her leave gratuity;

(cc) The ECDSD acted in contravention of section 195(1)(g) of the Constitution which requires the Public Service to act timely when dealing with the public;

(dd) The conduct of the ECDSD was also in contravention of Resolution 7 of 2000 when it failed to pay the Complainant her leave gratuity upon her exit;

(ee) The debt, being the leave gratuity due to the Complainant on her exiting the ECDSD, should have had interest factored into it as envisaged by section 1(1) of the Prescribed Rate of Interest Act, 1975; and

(ff) The ECDSD's conduct in this regard is improper as envisaged in section 182(1) of the Constitution and constitutes maladministration as envisaged 6(4)(a)(i) of the Public Protector Act.

(c) Regarding whether whilst still in its employ, the DoJ placed the Complainant at an incorrect salary notch resulting in her suffering prejudice when her benefits were calculated upon her exit from government employment:

(aa) The allegation that the DoJ placed the Complainant at an incorrect salary notch is not substantiated;
(bb) Despite the fact that the Complainant had in fact been placed at an incorrect salary notch upon her employment with the DoJ in 1992, this was rectified in 1996, and she was correctly placed at the notch of an official with a Senior Certificate (Grade 12/ Matric);

(cc) The Complainant’s salary notch was accordingly in line with the salaries as provided for by the Central Bargaining Council Resolutions of 1996, which created bands for the payment of salaries; and

(dd) There was no evidence found to support the allegation that the Complainant suffered prejudice as a result of being placed on the incorrect notch by the DoJ.

(d) Regarding whether the Complainant suffered prejudice as a result of the conduct of the ECDSD and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct:

(aa) The allegation whether the Complainant suffered prejudice as a result of the conduct of the ECDSD is substantiated;

(bb) The Complainant was without income since July 2002 when her salary was stopped by the ECDSD;

(cc) The conduct of the ECDSD placed both her and her family at great disadvantage in exercising the remedies available in terms of the law. The Complainant was not in a position to pursue the issue of the delays through the normal legal channels as she had been without income for an extended period of time. This is the position that has since been
confirmed by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly & others: Democratic Alliance v Speaker of the National Assembly & others* when the Judge President of the Constitutional Court stated that "The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen";

(dd) She had to travel from Johannesburg to Bhisho on numerous occasions in an attempt to resolve the issue;

(ee) Due to the delay in payment of monies owed to her the Complainant has been unable to provide an education she would have liked to give to her children; and

(ff) The failure by the ECDSD resulted in improper prejudice against the Complainant as envisaged by section 6(4) (a) (v) of the Public Protector Act and constitutes improper conduct as envisaged in section 182(1) of the Constitution.

(xiii) The appropriate remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution, is the following:

(a) The Head of ECDSD:

(aa) The Head of ECDSD must write an apology letter to the Complainant for the delay in the payment of her leave gratuity and interest thereon as well as the delay in processing her exit documents within 30 (thirty) days of receipt of this report;
(bb) The Head of the ECDSD must ensure that the Complainant is paid interest for the delayed payment by the GEPF of the Complainant’s pension benefits at the same rate as prescribed (as at that time) by the Minister of Justice and Constitutional Development in terms of section 1(2) of the Prescribed Rate of Interest Act within 30 (thirty) days of receipt of this report; and

(cc) The Head of the ECDSD must ensure that the Complainant is paid the leave gratuity due to her and interest thereon at the same rate as prescribed (as at that time) by the Minister of Justice and Constitutional Development in terms of section 1(2) of the Prescribed Rate of Interest Act within 30 (thirty) days of receipt of this report.
REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION BY THE EASTERN CAPE PROVINCIAL DEPARTMENT OF SOCIAL DEVELOPMENT REGARDING THE UNFAIR DISMISSAL, UNDUE DELAY IN SUBMISSION OF EXIT DOCUMENTS, NON PAYMENT OF LEAVE GRATUITY AND INTEREST THEREON

1. INTRODUCTION

1.1. This is the Public Protector's report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).

1.2. The report is submitted in terms of Section 8(1) of the Public Protector Act to:

1.2.1 The Member of the Executive Council for Social Development in the Eastern Cape Provincial Government; Mrs N N Sihlwayi (the MEC); and

1.2.2 The Head of Department for the Eastern Cape Provincial Department of Social Development; Adv S Khanyile (the HOD).

1.3 A copy of the report is also provided to Ms Malanda (the Complainant) to inform her about the outcome of the investigation.

1.4 The report relates to an investigation into the alleged undue delay in the submission of the Complainant's exit documents to the Government Employees Pension Fund upon her leaving the employ of government and non-payment of leave gratuity by the Eastern Cape Provincial Department of Social Development (the ECDSD).
2 THE COMPLAINT

2.1 The Complainant, a 54 year-old unemployed mother of four children; the youngest of whom is 17 years old, was employed by the erstwhile Transkei Department of Justice as an Administrative Assistant on 01 June 1992 until her transfer to the Department of Health and Welfare due to rationalisation in 1996.

2.1 The Department of Health and Welfare later split into two separate departments, the Department of Health and the Department of Social Development. The Complainant was placed within the ECDSD. She commenced service with the ECDSD on 01 February 1997 and was discharged from employment with effect from 16 April 2002 on 27 May 2004 and has since been unemployed. The Complainant alleged that:

2.1.1 The ECDSD had stopped her salary;

2.1.2 The ECDSD had unduly delayed the payment by the Government Employees' Pension Fund (the GEPF) of the Complainant's pension benefits and therefore liable for payment of interest thereon;

2.1.3 The ECDSD reflected an incorrect appointment date of 1997 instead of 1992;

2.1.4 The ECDSD had not paid her leave gratuity upon exiting the employ of the ECDSD; and

2.1.5 Whilst she was still in its service the Department of Justice (DoJ) put her at an incorrect salary notch.
3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) 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;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

3.3 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.\(^1\) The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."\(^2\)

3.4 Section 182(2) directs that the Public Protector has additional powers and functions prescribed in legislation.

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\(^1\) [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 818 (CC) at para [76].
\(^2\) Supra at para [73].
3.5 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6 The ECDSD is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the jurisdiction of the Public Protector.

3.7 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4 THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act, 1994. However, the conciliation process failed to reach a settlement and the Public Protector decided to adjudicate on the matter.
4.1.4 Upon conclusion of the investigation, the ECDSD was provided with the provisional report in terms of Section 7(9) of the Public Protector Act to enable it to reply to the provisional findings and intended remedial action.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
4.2.1.4 In the event of maladministration or improper conduct what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The enquiry regarding what happened was answered through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the ECDSD acted improperly or unduly delayed in the processing of the Complainant’s exit documents and failed to pay her leave gratuity.

4.2.3 The enquiry regarding what should have happened, focused on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration/improper conduct and prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered prejudice the idea is to place him or her as close as
possible to where they would have been had a department or organ of state
complied with the regulatory framework setting the applicable standards for good
administration.

4.3 On analysis of the complaint, the following issues were considered and
investigated:

4.3.1 Whether the ECDSD unduly delayed in the payment of the Complainant’s pension
benefits held with GEPF and therefore liable for payment of interest thereon;

4.3.2 Whether the ECDSD improperly failed to pay the Complainant’s leave gratuity and
interest thereon;

4.3.3 Whether whilst still in its employ the Department of Justice (DoJ) placed the
Complainant at an incorrect salary notch resulting in her suffering prejudice when
her benefits were calculated upon her exit from the ECDSD;

4.3.4 Whether the ECDSD improperly and unfairly dismissed the Complainant from its
employment, which was investigated on own initiative. Based on the ECDSD’s
response to the Public Protector’s Provisional Report and consideration of the
Public Health and Welfare Sectorial Bargaining Council (PHWSBC)’s arbitration
award, case number 160-03/04 in the matter, this issue was not pursued any
further. The PHWSBC found that the Complainant was unfairly dismissed and the
remedy of compensation, namely four months’ salary, was granted by the
Arbitrator. The decision brought an end to the matter as the Complainant did not
pursue it further in terms of the remedies available to her by virtue of the Labour
Relations Act; and

4.3.5 Whether the Complainant suffered prejudice as a result of the conduct of the
ECDSD and if so what it would take the Complainant as close as possible to where
she would have been had there been no impropriety.
4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 An e-mail dated 22 June 2010 sent from Mr J Bobbert to Mr P Voss.
4.4.1.2 A memo issued by the Head of Labour Relations, ECDSD dated 15 July 2005.
4.4.1.3 The Complainant’s Persal file marked 53220161 and the relevant contents thereof.

4.4.2 Correspondence sent and received

4.4.2.1 A letter from the Public Protector’s office to the ECDSD dated 25 January 2011.
4.4.2.2 A letter from the ECDSD addressed to the Public Protector and dated 20 October 2011.
4.4.2.3 Letter to the Head of Department, Adv S Khanyile dated 23 August 2016 in terms of Section 7(9) of the Public Protector Act.
4.4.2.4 Response in terms of Section 7(9) of the Act dated 30 September 2016.

4.4.3 Legislation and other prescripts

4.4.3.2 The Government Employees Pension Law and Rules 1996.
4.4.3.3 Public Service Co-ordinating Bargaining Council Resolution No. 7 of 2000
4.4.3.4 Central Bargaining Council Resolution of 1996
4.4.3.5 The Public Service Act No. 103 of 1994.
4.4.3.6 Prescribed Rate of Interest Act No. 55 of 1975.
4.4.4 Case Law

4.4.4.1 Economic Freedom Fighters v Speaker of the National Assembly & others: Democratic Alliance v Speaker of the National Assembly & others [2016] ZACC 11.

4.4.5 Public Protector’s touchstones considered

4.4.5.1 Report no.38 of 2009/2010: Report on an investigation into allegations of maladministration and undue delay relating to the submission of pension documents of a former employee of the Provincial Department of Education, Ms C Bredell, to the Government Employee Pension Fund

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1. Whether the ECDSD unduly delayed in the payment of the Complainant’s pension benefits held with GEPF and therefore liable for payment of interest thereon:

Common Cause issues

5.1.1. It is common cause that the Complainant was discharged from service by the ECDSD on 27 May 2004 with effect from April 2002.

5.1.2. It is also common cause that upon her discharge the ECDSD did not process her exit documents within the prescribed period.
Issues in dispute

5.1.3. It is in dispute why the Complainant was not paid her pension benefits within the prescribed time.

5.1.4. The Complainant alleged that the ECDSD incorrectly reflected her commencement date as 1997 instead of 1992. She demanded that the error be rectified before she could sign any documents.

5.1.5. During the Public Protector's inspection of the ECDSD file, marked SP 53220161, in 2012 the following information was found:

5.1.5.1. A copy of the Complainant's membership certificate dated 15 October 2001 which reflected her service appointment date as 01 October 1997;

5.1.5.2. In a letter by the Public Service Association to the Head of Department dated 08 March 2005 the Provincial Manager stated that a complaint/grievance had been submitted by the Complainant due to the failure by the ECDSD "to correct her date of appointment until her services were terminated on grounds of abscondment on 30 June 2004. She claims that she originally commenced her duties in the Department of Justice on 01 June 1992 and was transferred to your Department with effect from 01/10/1997. Her date of appointment needs to be corrected from 01/10/1997 to read 01/06/1992."

5.1.5.3. On 15 July 2005 the Head of Labour Relations at the ECDSD wrote a memorandum which authorised the payment of the Complainant's pension benefits.

5.1.5.4. There was also a letter dated 24 August 2005 from the Complainant's attorney, Charmain Webb, demanding payment of Complainant pension benefits.

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5.1.5.5. No responses to both letters could be found in the Complainant’s file.

5.1.5.6. A memorandum was sent by the Assistant Manager Human Resources Administration to Pensions Administration dated 01 June 2010 stating that the Complainant had been discharged with effect from 16 April 2002. The Complainant had however requested the Department not to proceed with the processes regarding her withdrawal from the fund “as she was still fighting her underpayment with the Department of Justice from where she was transferred.”

5.1.5.7. Also in the file was a copy of an e-mail dated 22 June 2010, from Mr John Bobbert to Mr Peter Voss, both employees of GEPF the e-mail read as follows:

"Hi Peter,

I have received an external enquiry from the above mentioned member in person.
The member mentioned that she has been struggling since 2002 for the payment of her pension benefits.
Could you kindly indicate the following please:

1. Has pension been paid to her as yet.
2. The pension date was recently amended from 01 October 1997 to 01 June 1992, please confirm whether payment will be made from 1 June 1992
3. Will the member be entitled to interest as their [sic] was a delay from her employer (Dept. Social Development Eastern Cape, Bisho) to submit documents timeously to rectify the pension date from 01 October 1997 to that of 01 June 1992."
4. From which date will interest be paid (2002!!)

Thank you for your assistance.

Kind regards

John

5.1.5.8. There was no response to Mr Bobbert's email according to the records in the file.

5.1.6. In its response to the letter from the Public Protector dated 20 October 2011, the ECDSD advised that the Complainant had flatly refused to sign her exit documents without giving reasons for her refusal.

Application of relevant law

5.1.7. Section 195(1) of the Constitution provides for the constitutional principles governing Public Administration, amongst other things, to promote and maintain a high standard of professional ethics and accountability. The ECDSD failed to meet this standard in that it was not accountable and failed to provide timely, accessible and accurate information as provided for in the Constitution.

5.1.8. The Complainant exited the employ of the ECDSD with effect from April 2002. It was acknowledged that exit documents were not submitted to GEPF on time as provided for in section 26(1) of the Government Employees Pension Law which states that "pension benefits shall be paid to a beneficiary within a period of 60 days after the date on which the benefit becomes payable to the member."

5.1.9. In a Report by the Public Protector, No. 39 of 2009/10, regarding an investigation into allegations of maladministration and undue delay in the submission of pension
documents to the GEPF by the Department of Education in Limpopo, the same conclusion was reached.

**Conclusion**

5.1.10. The evidence revealed that the ECDSD delayed by nearly 14 months in authorising the necessary exit documents of the Complainant and failed to pay interest on the amount paid to the Complainant with a further delay of 5 years and 3 months before payment was made.

5.1.11. In order to avoid liability for interest the Department stated that the Complainant had instructed them not to proceed with processing of her exit.

5.1.12. The Department’s contention holds no water as the Complainant had approached the PSA and Attorneys in an attempt to have her commencement date rectified in 2005.

5.1.13. The e-mail between Mr Bobbert and Mr Voss shows that the Department had only rectified Complainant’s commencement date in 2010.

5.1.14. The Complainant would have been grossly prejudiced had she signed the exit documents reflecting the incorrect commencement date.

5.1.15. The ECDSD in its response to the Provisional Report and Notice in terms of Section 7(9) of the Public Protector Act, did not dispute the evidence or its liability to the Complainant.
5.2. Regarding whether the ECDSD improperly failed to pay the Complainant’s leave gratuity and interest thereon

Common cause issues

5.2.1 It is common cause that the ECDSD failed to pay the Complainant her leave gratuity upon her exiting its employ.

5.2.2 The ECDSD in a letter dated 20 October 2011, confirmed that the Complainant’s leave gratuity had not been paid as it had just “discovered that she was entitled to such payments”. The letter further indicted that Human Resources would begin processing payments.

5.2.3 The ECDSD was contacted by telephone on 07 May 2012 through its Customer Care Manager, Mr Dyonana, and the Public Protector was advised that payment would be effected in the new financial year, 2012/13, as its budget was depleted.

5.2.4 On 9 May 2012, the ECDSD was contacted and Mr Gcwni, the Human Resources Manager, advised that he needed the Complainant to complete Z894 forms for payment of her leave gratuity to be processed through its BAS payment system.

5.2.5 The forms were sent to the Complainant by fax on 10 May 2012. The Complainant however refused to complete the forms as they are GEPF forms for banking details. The ECDSD explained to the Complainant that there were no other forms that they could use when an employee had left the ECDSD, but the Complainant could not be convinced.

5.2.6 The amount that the ECDSD would pay the Complainant was calculated to be R4889.09. This was confirmed in a memorandum by Mr Dyonana dated 31 May 2012, no interest had been factored into the said amount.
Application of the relevant law

5.2.7 The issue regarding the payment of leave gratuity is regulated by Public Service Coordinating Bargaining Council (PSCBC) Resolution No. 7 of 2000.

5.2.8 In terms of Section 7.2(a) of the PSCBC Resolution 7 of 2000, the cash value in respect of unused annual leave credits shall be payable at termination of service.

5.2.9 The Complainant exited ECDSD on 27 May 2004 and in terms of Section 14.22 of DPSA Guidelines 2012: Policy and Procedure on Employees Exiting the Department her leave gratuity should have been paid within 30 days upon exiting the employ of ECDSD.

5.2.10 In terms of section 1(2) of the Prescribed Rate of Interest Act, if a debt bears interest and the rate at which 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.

Conclusion

5.2.11 The ECDSD’s admission of the delay in processing the Complainant’s pension benefits is a debt owed to the Complainant as provided for in the Prescribed Rate of Interest Act.

5.2.12 The ECDSD did not dispute its indebtedness to the Complainant in its response to the Provisional Report and Notice in terms of Section 7(9).
5.3 Regarding whether the DoJ had placed the Complainant at an incorrect salary notch resulting in her suffering prejudice when her benefits were calculated upon exiting the employ of government.

*Common Cause*

5.3.1. The Complainant was employed by the erstwhile Transkei government administration in 1992.

5.3.2. During rationalisation of erstwhile homeland administration, the DoJ promoted the Complainant to the rank of a Senior Administration Clerk on 1 June 1995.

5.3.3. The Complainant was subsequently transferred to ECDSD with effect from 01 October 1997 at the salary notch of a Senior Administration Clerk.

*Issues in dispute*

5.3.4. The Complainant contended that the DoJ placed her at an incorrect salary notch until she was transferred to ECDSD, and that would affect the calculation of her pension benefits when exiting the government employ. The Department of Public Service and Administration (the DPSA) indicated that the Complainant was placed on the correct salary scale in terms of the applicable salary bands.

*Application of the relevant law*

5.3.5. Section 195(1) of the Constitution provides that Public Administration must be accountable and transparency must be fostered by providing the public with timely, accessible and accurate information.

5.3.6. The salary bands of various positions in the public service are regulated and determined by the DPSA in consultation with the Central Bargaining Council.
5.3.7. The DPSA in consultation with the Central Bargaining Council resolved to create bands for the payment of salaries as illustrated in the table below (the information was obtained from the DPSA):

<table>
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<tr>
<th>Category</th>
<th>Salary Level</th>
<th>Salary ranges with effect from 01 July 1996</th>
<th>Transverse Commencing Salaries</th>
</tr>
</thead>
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<td>Lower skilled</td>
<td>1</td>
<td>17100 – 17697 – 18294</td>
<td>Unskilled</td>
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<td>2</td>
<td>20079 – 20943 – 21807</td>
<td>Standard 8</td>
</tr>
<tr>
<td>Skilled</td>
<td>3</td>
<td>23526 – 24615 – 25704</td>
<td>Standard 10</td>
</tr>
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<td>5</td>
<td>32988 – 34296 – 35608</td>
<td>Artisans</td>
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<tr>
<td>Highly skilled production</td>
<td>6</td>
<td>40835 – 43344 – 45852</td>
<td>Degrees/National Diplomas/ ordained preachers (Chaplains)</td>
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<td>7</td>
<td>50868 – 53487 – 56106</td>
<td>Certain disciplines/occupations/ LLB</td>
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<tr>
<td></td>
<td>8</td>
<td>63963 – 67905 – 71055</td>
<td>Advocates/pilots (ATP/multi gradings)</td>
</tr>
</tbody>
</table>

5.3.8. The evidence revealed that the Complainant’s salary level was corrected from salary level 2 to 4 a year before she was transferred to the ECDSD.
5.3.9. The grading for Senior Administrative Clerks was from 1–6. The Complainant was placed on grade 4 calculated from 1 June 1995.

5.3.10. The Complainant did not dispute this position in the Provisional Report.

Conclusion

5.3.11. The Complainant was placed on the correct salary band, being that of persons in possession of a Matric Certificate prior to 1996.

5.3.12. It then follows that the DoJ had discharged its obligations in compliance with the Resolution and the constitutional responsibility in terms of section 195 of the Constitution of providing accurate information because the Complainant’s salary notch was correct at the time she was transferred to the ECDSD.

5.3.13. The Complainant’s allegation can therefore not be sustained.

5.3.14. Therefore the calculation of the Complainant’s pension benefits cannot be affected by the salary notch when she was transferred from the DoJ to the ECDSD.

5.3.15. In her response through her attorneys the Complainant did not dispute the provisional findings of the Public Protector that her notches were correct when she exited from the employ of the DoJ.
5.4 Regarding whether the Complainant suffered prejudice as a result of the conduct of the ECDSD and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct

*Common Cause*

5.4.1. It is common cause that both the pension benefits and leave gratuity due to the Complainant were not paid within the prescribed periods.

*Issues in dispute*

5.4.2. The Complainant argued that she suffered prejudice as a result of the conduct of the ECDSD as her pensions were only paid in 2010 without factoring interest on the amount. She had to approach attorneys to intervene and ensure that her pensions were paid.

5.4.3. The ECDSD, on the other hand, argued that the Complainant was the author of her own misfortune as she had refused to sign her exit documents.

*Conclusion*

5.4.4. The ECDSD’s contention that the delay was caused by the Complainant does not hold water as the Complainant’s correct appointment date was only amended in 2010, supporting her argument that the date had been incorrectly recorded as 1997 instead of 1992. She would have been prejudiced had she signed incorrect forms.

5.4.5. The ECDSD conceded in writing that it had not paid the Complainant’s leave gratuity and failed to factor in interest. The ECDSD’s conduct caused prejudice to the Complainant.
6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1 Whether the ECDSD unduly delayed in the payment by of the Complainant’s pension benefits held with the GEPF and therefore liable for payment of interest thereon

6.1.1 The allegation that the ECDSD unduly delayed in the payment of the Complainant’s pension benefits held with the GEPF and therefore liable for payment of interest thereon is substantiated.

6.1.2 The ECDSD delayed in authorising the necessary exit documents for the Complainant by nearly 14 months after the Complainant’s discharge from service.

6.1.3 The ECDSD provided the GEPF with an incorrect appointment date of the Complainant. It reflected 1997 instead of 1992 and only rectified this on or about 2010.

6.1.4 The ECDSD acted in contravention of section 195(1)(g) of the Constitution which requires that the Public Service should keep accurate records.

6.1.5 This delay is contrary to the provisions of section 26(1) of the Government Employees Pension Law.

6.1.6 The conduct of the ECDSD in not keeping accurate records pertaining to the Complainant’s appointment date and the undue delay to pay his pension benefits amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act.
6.2 Regarding whether the ECDSD improperly failed to pay the Complainant's leave gratuity and interest thereon:

6.2.1. The allegation that the ECDSD improperly failed to pay the Complainant's leave gratuity and interest thereon is substantiated.

6.2.2. The ECDSD failed to pay the Complainant her leave gratuity.

6.2.3. The ECDSD acted in contravention of section 195(1) (g) of the Constitution which requires the Public Service to act timely when dealing with the public.

6.2.4. The conduct of the ECDSD was also in contravention of Resolution 7 of 2000 when it failed to pay the Complainant leave gratuity upon her exit.

6.2.5. The debt, being the leave gratuity due to the Complainant on her exiting the ECDSD, should have had interest factored into it as envisaged by section 1(1) of the Prescribed Rate of Interest Act.

6.2.6. The ECDSD's conduct in this regard is improper as envisaged in section 182(1) of the Constitution and constitutes maladministration as envisaged 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether whilst still in its employ the DoJ placed the Complainant at an incorrect salary notch resulting in her suffering prejudice when her benefits were being calculated upon her exit from government employment

6.3.1. The allegation that the DoJ placed the Complainant at an incorrect salary notch is not substantiated.
6.3.2. Despite the fact that the Complainant had in fact been placed at an incorrect salary notch by the DoJ in 1992, this was rectified in 1996, and she was correctly placed at the notch of an official with a Senior Certificate (Grade 12/ Matric).

6.3.3. The Complainant's salary notch was accordingly in line with the salaries as provided for by the Central Bargaining Council Resolutions of 1996, which created bands for the payment of salaries, and

6.3.4. There was no evidence found to support the allegation that the Complainant suffered prejudice as a result if being placed on the incorrect notch by the DoJ.

6.4 Regarding whether the Complainant suffered prejudice as a result of the conduct of the ECDSD and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct

6.4.1. The allegation whether the Complainant suffered prejudice as a result of the conduct of the ECDSD is substantiated.

6.4.2. The Complainant was without income since July 2002 when her salary was stopped by the ECDSD.

6.4.3. The conduct of the ECDSD placed both her and her family at great disadvantage in exercising the remedies available in terms of the law. The Complainant was not in a position to pursue the issue of the delays through the normal legal channels as she had been without income for an extended period of time. This is the position that has since been confirmed by the Constitutional Court in Economic Freedom Fighters v Speaker of the National Assembly & others: Democratic Alliance v Speaker of the National Assembly & others when the Judge President of the Constitutional Court stated that "The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen".
6.4.4. She had to travel from Johannesburg to Bhisho on numerous occasions in an attempt to resolve the issue.

6.4.5. Due to the delay in payment of monies owed to her the Complainant has been unable to provide an education she would have liked to give to her children.

6.4.6. The failure by the ECDSD resulted in improper prejudice against the Complainant as envisaged by section 6(4)(a)(v) of the Public Protector Act and constitutes improper conduct as envisaged in section 182(1) of the Constitution.

7. REMEDIAL ACTION

The appropriate remedial action the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where she would have been had the improper conduct or maladministration by ECDSD is the following:

7.1 The Head of ECDSD:

7.1.1 The Head of ECDSD must write an apology letter to the Complainant for the delay in the payment of her leave gratuity and interest thereon as well as the delay in processing her exit documents within 30 (thirty) days of receipt of this report;

7.1.2 The Head of ECDSD must ensure that the Complainant is paid interest for the delayed payment by the GEPF of the Complainant’s pension benefits at the same rate as prescribed (as at that time) by the Minister of Justice and Constitutional Development in terms of section 1(2) of the Prescribed Rate of Interest Act within 30 (thirty) days of receipt of this report; and
7.1.3 The Head of ECDSD must ensure that the Complainant is paid the leave gratuity due to her and interest thereon at the same rate as prescribed (as at that time) by the Minister of Justice and Constitutional Development in terms of section 1(2) of the Prescribed Rate of Interest Act within 30 (thirty) days of receipt of this report.

8 MONITORING

8.1. The Head of the ECDSD must submit an action plan to the Public Protector regarding implementation of the remedial action referred to in paragraphs 7.1.1; 7.1.2 and 7.1.3 above within thirty (30) days of the date of this report.

8.2. A progress report from the Head of Department is required within thirty (30) days of submission of the implementation plan referred to above.

8.3. The Public Protector will monitor the implementation of the remedial action taken in this report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 12/04/2017
Assisted by: Adv M Thomas and Ms S. Jika