REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNFAIR AND IMPROPER CONDUCT BY THE STATE INFORMATION TECHNOLOGY AGENCY (SITA) RELATING TO THE STRUCTURING OF THE PENSIONABLE PORTION OF THE REMUNERATION PACKAGE OF MR G NORTON
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Executive Summary

(i) This is my report as the Public Protector issued 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, 1994.

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of unfair conduct by the State Information Technology Agency (SITA), relating to alleged discrepancies in the structuring of the pensionable portion of the remuneration package of an (now former) employee, Mr G Norton (the Complainant).

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

(iv) Based on an analysis of the allegations, I identified the following issues to inform and focus this investigation:

   a) Whether SITA unfairly or improperly failed to comply with its obligations in terms of the State Information Technology Agency (SITA) Act, No 88 of 1998, to allow the Complainant to withdraw from the Government Employee Pension Fund (GEPF) and become a member of the Alexander Forbes Retirement Fund (AFRF) after its establishment as an approved pension – or retirement fund for the institution?

   b) Whether SITA unfairly or improperly failed to comply with the conditions of employment of the Complainant by consistently and continuously failing or refusing since 1 September 2009, to adjust the pensionable portion of the total remuneration package (TGP) of the Complainant in accordance with the benefit value of at least 70% of the TGP as determined in the SITA Employment Conditions?

   c) Whether the conduct of SITA in respect of the Complainant’s request to restructure his TGP to increase the benefit value of the pensionable portion of
his remuneration package, with the view to increase his pension benefits with the GEPF, caused the Complainant to suffer any prejudice with the calculation of the pension benefits accruing to him since 2009 to his date of retirement?

(v) Key laws taken into account to help me determine if there had been undue delay, gross negligence and maladministration by SITA were principally those imposing administrative standards that should have been upheld by SITA in managing the pension interests of the Complainant, provided by the conditions of service and relevant legislation. Those are the following:

b) The Public Protector Act No 23 of 1994;
c) The State Information Technology Agency Act no 88 of 1998; and

(vi) Having considered the evidence uncovered during the investigation, as against the relevant regulatory framework, the complaint received as against the concomitant responses by SITA, I make the following findings.

a) Regarding whether SITA unfairly or improperly failed to comply with its obligations in terms of the SITA Act to allow the Complainant to transfer from the GEPF and become a member of the AFRF after its establishment as an approved pension – or retirement fund for the institution

   aa) The Complainant’s allegation that he was not allowed to transfer the actuarial value of his benefits in the GEPF when SITA established the SITA Retirement Fund (SRF) as a Defined Contribution Fund under the Alexander Forbes umbrella fund, is correct.
bb) The SITA Act as well as the GEPF Rules and GEP Law only afforded the Complainant a right to transfer his actuarial interest in the GEPF to the SFR, if he was compelled, through a change in his conditions of service, or by amendment of section 15 of the SITA Act, to join the AFRF.

c) However, the Complainant had a choice whether or not he wanted to join the SRF, in terms of his conditions of service as determined in his employment contract, informed by section 15 of the SITA Act, subject to the GEP Law, 1996, and the GEP Rules.

d) As SITA therefor did not have any discretion in this regard, the allegation that it unfairly or improperly failed to comply with its statutory or contractual obligations to allow the Complainant to transfer the actuarial value of his pension benefits in the GEPF to the SRF, is unsubstantiated.

b) Regarding whether SITA unfairly or improperly failed to comply with the conditions of employment of the Complainant, by consistently and continuously failing or refusing since 1 September 2009, to adjust the pensionable portion of the total remuneration package of the Complainant in accordance with the benefit value of at least 70% of the TGP as determined in the SITA Employment Conditions?

aa) The allegation that SITA did not allow the Complainant to increase the pensionable percentage of his TGP (total guaranteed remuneration package) with effect from 1 September 2009 from 56.61% to the minimum of 70% provided for in the amended 2008 SITA conditions of service, is substantiated.

bb) SITA's contention that the increase in his pensionable percentage of his TGP applied for by the Complainant was subject to limitations imposed by the GPAA or GEPF is not supported by any evidence or records of
instructions or communications from the GPAA, or by statutory authority in terms of the GPF Rules or the GEP Law, 1996.

cc) In terms of section 15 of the SITA Act, read with section 1 of the GEP Law and Rule 1 of the GEPF Rules, the pension rights of SITA employees were incorporated into their contract of employment and conditions of service and there is no indication that SITA employees who were members of the GEPF, were excluded from these conditions or any part thereof.

dd) The evidence at the disposal of the Public Protector favours a conclusion, on a balance of probabilities, that SITA unfairly imposed restrictions on the pensionable emoluments of the Complainant in the GEPF, contrary to the pensionable percentages (70%) recognised in terms of the SITA conditions of service.

ee) SITA failed to engage the Complainant meaningfully and in good faith, in line with previous commitments by SITA, and as required by the 2008 SITA conditions of service, on the Annual All-inclusive Total Package Structure Agreement submitted by the Complainant on 1 September 2009, providing for an increase in the pensionable portion of his TGP.

ff) Despite the fact that the post-2008 structuring of the Complainant's TGP was not the subject of mutual agreement between the parties and incorporated in the Complainant's service contract as prescribed by the SITA conditions of service, SITA unilaterally continued to impose the pre-2008 limitations on the composition of the pensionable portion of the Complainant's TGP at 56, 61% - below the 70% threshold prescribed by the said conditions of service.

gg) In the process, SITA failed to comply with its obligations as envisaged in section 15 of the SITA Act, and acted in breach of its contractual obligations in terms of the SITA contract of employment and conditions of service. SITA
was also in violation of the principles of fair labour practice as envisaged in section 186(2)(b) of the Labour Relations Act, section 23(1) of the Constitution and the values expected of an employer in terms of its duty of good faith towards its employees.

hh) SITA’s conduct in failing to adjust the Complainant’s pensionable percentage of his TGP to the minimum of 70% provided for in the 2008 amendments to the SITA conditions of service, is therefore improper and amounts to maladministration in terms of section 182(1)(a) of the Constitution read with section 6 of the Public Protector Act, 1994.

c) Regarding whether the conduct of SITA in respect of the Complainant’s request to restructure his TGP to increase the benefit value of the pensionable portion of his remuneration package, to increase his pension benefits with the GEPF, caused the Complainant to suffer any prejudice with the calculation of the pension benefits accruing to him since 2008 to his date of retirement.

aa) The allegation that the Complainant’s pensionable emoluments in the GEPF were computed at a lower pensionable salary of 56.61 % of his TGP instead of the 70% provided for in his conditions of service, is substantiated.

bb) SITA’s contention that the Complainant did not suffer any prejudice because he “benefitted” from a the higher “take home” salary, having contributed less to the GEPF than he would have contributed if the pensionable percentage of his TGP was determined at 70%, is flawed.

cc) SITA’s further submission that the Complainant only requested an amendment of the flexible portion of the TGP in 2009 to incorporate a change to his traveling allowance, is not borne from the facts as the Complainant’s Annual All-inclusive Total Package Structure Agreement dated 1 September 2009, clearly proposed an adjustment of the pensionable
portion of his TGP to the minimum of 70% as prescribed in the 2008 SITA Conditions of Service.

dd) Even if the Complainant did not propose the requested adjustment, SITA was obliged in terms of its duty of care and of good faith as employer, as well as by its contractual obligations in its amended conditions of service, to honour its 2004 commitment to review the TGP structure of those employees who were subjected to a limitation to the composition of the pensionable portion below the prescribed minimum of 70%.

ee) SITA’s further contention that it endeavoured to act in the best interest of the Complainant by avoiding a situation where he would have had to incur the financial liability of having to compensate the GEPF for a shortfall in contributions, is contradicted by the fact that –

i) The Complainant’s 2009 restructuring request indicated his willingness to accept a proportional increase in pension contributions; and to accept a lower “take home” salary in favour of higher pension benefits, as indicated in writing in his 2009 request for an adjustment of the pensionable portion of his TGP, in line with his conditions of service;

ii) The subsequent shortfall in contributions to the GEPF could have been avoided if SITA meaningfully and in good faith engaged the Complainant after 1 September 2009 with the view to reach a mutually acceptable Annual All-inclusive Total Package Structure Agreement as prescribed by the SITA conditions of service;

iii) Instead, SITA delayed until 2011, after the Complainant and other affected employees had lodged a collective grievance, to engage and clarify with the GPAA any reservations about the impact of its amended conditions of service of 2008 on the pensionable emoluments of its employees in the GEPF;
iv) The GEPF advised that both SITA and the Complainant shared the liability for any shortfall in the pension contributions that would have emanated from a retrospective adjustment of the Complainant’s pensionable emoluments.

ff) If the figures were audited by SITA as per its initial undertaking, it would have confirmed in my estimation that the amounts “saved” by the Complainant on the lesser pension contributions, are substantially less than the difference higher pensionable emoluments in the GEPF would have made to the actuarial value of the Complainant’s pension interests.

gg) The difference between the amount “saved” on contributions and the higher actuarial value of his pension interest in the GEPF based on the potential higher pensionable emoluments (final pensionable salary based on 70% of the TGP), constitutes a significant financial prejudice suffered by the Complainant in the final calculation of his pension interests.

hh) The estimated prejudice suffered by the Complainant is directly linked to the failure by SITA to comply with its duty of good faith and its contractual obligations towards the Complainant to preserve and protect his pension rights and benefits as employee, as found above.

ii) SITA’s conduct therefore resulted in unlawful or improper prejudice to the Complainant as envisaged in section 16(4)(a)(v) of the Public Protector Act, 1994 and section 182(1)(a) of the Constitution 1994.
vii) Remedial action

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

a) The Chief Executive Officer of SITA, must engage the Chief Executive Officer of the GPAA to facilitate the retrospective adjustment of the Complainant’s pensionable emoluments in the GEPF to 70% of his TGP with effect from 1 September 2009.

b) The Chief Executive Officer of SITA, in consultation with the Chief Executive Officer of the GPAA must commission a full audit to determine the financial shortfall in employer and employee contributions on behalf of the Complainant to the GEPF based on the retrospective adjustment of the Complainant’s pensionable emoluments in the GEPF to 70% of his TGP to 1 September 2009.

c) As a financial remedy to the prejudice caused to the Complainant, the SITA must contribute to the GEPF, 50% of the shortfall in pension contributions needed to adjust the Complainant’s pensionable emoluments retroactively to 1 September 2009, provided that the Complainant accepts liability for the balance of the shortfall in contributions, which may be deducted from any additional gratuity amount accruing to the Complainant.
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1. INTRODUCTION

1.1. This is my report as 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. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation: -

1.2.1. The Chief Executive Officer: The State Information Technology Agency (SITA CEO);

1.2.2. The Chief Executive Officer of the Government Pensions Administration Agency (GPAA); and

1.2.3. The Complainant, Mr G Norton.

1.3 This report relates to an investigation into allegations of unfair conduct by the State Information Technology Agency (SITA) relating to alleged discrepancies in the structuring of the pensionable portion of the remuneration package of a (now former) employee, Mr G Norton.

2. THE COMPLAINT

2.1 When the complaint was lodged with the Public Protector in 2013 the Complainant alleged that –

2.1.1 When SITA amended its remuneration structure in 2004 and converted the Complainant’s salary to a total guaranteed remuneration package (TGP), the Complainant and other employees were prejudiced because SITA incorrectly first applied the conversion to the TGP and then the restructuring of the packages;
2.1.2 When SITA established its own retirement fund in 2004, members of the Government Employees Pension Fund (GEPF) were excluded from the opportunity to join the Alexander Forbes Retirement Fund (AFRF);

2.1.3 When SITA reviewed its conditions of employment in 2008, which allowed staff members to structure the pensionable portion of the TGP to between 70% and 100%, the Complainant and other employees were not allowed to increase the pensionable portion of their TGP’s in accordance with the relevant provisions of SITA’s conditions of service, to their disadvantage;

2.2 The Complainant further alleged that in the process, SITA, *inter alia* –

2.2.1 Failed to fulfil its obligations as specified in the State Information Technology Agency (SITA) Act No 88 of 1998, to allow employees to have an option to exercise a choice between different pension funds;

2.2.2 Failed to apply best practices in administering the pension fund contributions in terms of the Rules of the GEPF by:

   a) Failing to inform, discuss or consult with employees to inform them of the actual percentage of their pensionable salary;

   b) Failing to inform employees of “unilateral and negative changes “ that had been made to the structuring of the pensionable portion of their TGP’s;

   c) Calculating the pensionable percentage of their TGP’s in an “irresponsible and unilateral” manner.

   d) Failing to comply with the SITA Act to ensure that employees’ vested rights were preserved at current levels;

   e) Failing to apply and abide by its own policies;

   f) Failing to comply with SITA conditions of employment by “administering” a pensionable percentage below the minimum of 70%; and
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent constitutional body 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. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4. 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. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5. In the constitutional court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the public protector:
3.5.1 The remedial action taken by the Public Protector has a binding effect, "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" (para 73);

3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

3.5.6 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);
3.5.7 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.5.8 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(c));

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.10 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

3.6.1 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);

3.6.2 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);

3.6.3 There is nothing in the Public Protector act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);
3.6.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):

(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

3.6.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

3.6.6 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105).

3.6.7 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108);

3.6.8 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);

3.7 The institutions mentioned in this report are organs of state and their conduct amounts to conduct in state affairs, as a result the complaints fall within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.8 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.

4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process which 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 improper conduct or to maladministration?

4.2.1.4. In the event of improper conduct or maladministration what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on whether and to what extent the SITA fulfilled its responsibilities towards the Complainant in terms of the SITA Act and his conditions of service and whether or not
SITA acted improperly in the manner that it dealt with the Complainant’s requests to adjust the pensionable portion of his total remuneration package.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration and prejudice. In this case, key reliance was placed on legislation, prescripts and policies that regulate the standard that should have been met by SITA to ensure that it acted fairly and responsibly to ensure that the Complainant was not improperly prejudiced.

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

4.3 Based on the analysis of the allegations contained in the media reports as well as information that came to my attention from various sources, I identified the following issues to inform and focus this investigation:

4.3.1 Whether SITA unfairly or improperly failed to comply with its obligations in terms of the SITA Act to allow the Complainant to withdraw from the GEPF and become a member of the AFRF after its establishment as an approved pension – or retirement fund for the institution?

4.3.2 Whether SITA unfairly or improperly failed to comply with the conditions of employment of the Complainant by consistently and continuously failing or refusing since 1 September 2009 to adjust the pensionable portion of the total remuneration package (TGP) of the Complainant in accordance with the benefit value of at least 70% of the TGP as determined in the SITA Employment Conditions?
4.3.3 Whether the conduct of SITA in respect of the Complainant’s request to restructure his TGP to increase the benefit value of the pensionable portion of his remuneration package with the view to increase his pension benefits with the GEPF, caused the Complainant to suffer any prejudice with the calculation of the pension benefits accruing to him since at least 2009 to the date of retirement?

4.3. The Key Sources of Information

4.3.1 Documents

a) Correspondence between the Complainant and SITA;

b) Various communications between the Public Protector (team) and the Complainant;

c) Minutes of Collective Grievance meetings (" Alleged Unfair Application of Pension Rights") held between SITA Human Resources officials and affected SITA employees between September and November 2012;

d) Correspondence with SITA dated 5 Aug 2013;

e) SITA’s response to the allegations dated 20 November 2013;

f) An Independent external legal opinion obtained from Messrs. Maserumule Incorporated Attorneys dated 18 July 2013;

g) A legal opinion sourced by the Public Servants Association of South Africa (PSA) from Dr (Adv) E M De La Rey dated 26 February 2014;

h) Correspondence (request for an opinion) addressed to the DPSA by the Public Protector dated 21 July 2015;

i) Correspondence (request for assistance addressed to the Government Pensions Administration Agency (GPAA) by the Public Protector dated 21 July 2015 and 4 May 2016, respectively;

j) Responses from the GPAA dated 23 and 27 July 2015;

k) SITA’s formal responses dated 17 September 2018 and 11 March 2019 to the Public Protector’s Notices in terms of section 7(9) of the Public Protector Act, 1994.
4.3.2 Interviews conducted:

a) The Complainant;

b) Meeting held by the Public Protector team with Officials of SITA and the Complainant jointly on 28 October 2014; and

c) Meeting held between the Public Protector and the SITA CEO on 8 March 2019.

4.3.3 Correspondence sent and received:

4.3.3.1 The Complainant provided me with the following documentary evidence of his communications with SITA:

a) Letter to the Complainant from the General Manager: Performance and Remuneration dated 11 July 2004: Conversion to total remuneration packages - confirming that the Complainant’s pensionable salary is 56,6 % of his Total Remuneration Package;

b) An "Annual All-inclusive Total Package Structure Agreement" dated 1 September 2009, signed and submitted by the Complainant to request a structuring of the Annual Pensionable amount of his total package at 70%.

c) Minutes of an internal SITA meeting on Collective Grievance: Alleged unfair allocation of pension rights: 13 September 2012;

d) Minutes of internal SITA Group Grievance meeting: Unfair application of Pension Benefits: 20 September 2012;

e) Minutes of internal SITA meeting on collective grievance: Pension fund- fact finding session: 22 October 2012;

f) Minutes of internal SITA GEPF Collective Grievance meeting: Alleged unfair allocation of pension rights: 26 November 2012;

g) Communication from the Complainant and two other employees to the Public Servants Association dated 6 November 2013 regarding grievance and legal opinion requested by SITA;
h) Letter from the Acting Head of the Department (HOD): Human Capital Management to the Complainant dated 24 October 2016.

4.3.4 I obtained and scrutinised amongst others, the following documentary evidence from SITA:

a) SITA Conditions of Service (Document SQSD/10-01-0001), dated 23 February 2000;

b) Internal Memorandum to “All Permanent SITA Staff” dated 12 October 2000 on “Package Restructuring” stating that the ratio’s in terms of allowances as part of the cash package will range between 28% and 15% (depending on the salary level), providing for a basic salary between 72% and 85%;

c) Internal Memorandum: “SITA Retirement fund Communique” dated 17 June 2004;

d) Internal Memorandum dated 11 January 2005 – update on status of the establishment of SITA’s Retirement Fund arrangements;

e) SITA Conditions of Service (Document N SISS -00046), dated 1 April 2008;

f) SITA Conditions of Service (Document N SISS -00046), dated 2 December 2011; and

g) Department of Public Service and Administration (DPSA) Circular 1 of 2012 – dated 9 February 2012, stating that “SMS members and other employees admitted to the GEPF … are afforded a once-off, irrevocable, choice to set their basic salary in the SMS package at 70% …”.

4.3.5 I also provided SITA with opportunities to take note of and provide additional information or evidence in respect of the issues that I identified in terms of section 7(9) of my Act.

4.3.6 Legislation and other prescripts.


f) The Public Protector Act No 23 of 1994;
g) The State Information Technology Agency (SiTA) Act no 88 of 1998.

4.3.7 Case Law and articles:

a) TEK Corporation Provident Fund and others v Lorentz [1999] 4 All SA 299 (A);

b) Resa Pension Fund v Pension Fund Adjudicator 2000 (3) SA 313 at 317J to 318 A. 2);

c) Hoppersa and another v Northern Cape Provincial Administration (2000) S1115 1066 (LAC);

d) Roestorf v Johannesburg Municipal Pension Fund (235/11) [2012] ZASCA 24 (23 March 2012);

e) Bekker NO v Total South Africa (Pty) Ltd 1990 (3) SA 159 (T) at 170G-H;

f) Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 (1) SA 641 (A) at 646B.;

g) NAPTOSA obo Willie J Engelbrecht v Department of Education and others Case No: PSES429-16/17GP;


i) Younghusband v. Decca Contractors (SA)Pension Fund and its Trustees (1999) 20 ILJ 1640 (PFA);

j) Section 23(1) of the Constitution as considered in National Education, Health and Allied Workers Union (NEHAWU) v University of Cape Town & other (2003) 24 ILJ 95 (CC) and National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another CCT 14/02 dated 13 December 2002;

k) Harris v AECI Pension & another [2000] 7 BPLR (PFA) and Woodroffe v Tongaat Hulett Pension Fund & onother [2000] 4 BPLR 454 (PFA);

l) H v Otis (South Africa) Pension Funds and Another [2002] 3 BPLR 3152 (PFA) at paragraph 32;
m) SA Beje v Private Security Sector Provident Fund and Archer Security Services PFA/WE/12591/2007/PGM-unreported;

n) TEK Corporation Provident Fund and others v Lorentz 1999] 4 All SA 299 (A);

o) IBM Pensioners' Action Group v IBM South Africa (Pty) Ltd & Another [2000] 3 BPLR 26 (PFA); and


q) AB and another v Pridwin Preparatory School and others (Equal Education as amicus curiae) [2019] 1 All SA 1 (SCA).

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

5.1. Regarding whether SITA unfairly or improperly failed to comply with its obligations in terms of the SITA Act to allow the Complainant to withdraw from the GEPF and become a member of the AFRF after its establishment as an approved pension – or retirement fund for the institution?

5.1.1. Common cause issues

5.1.1.1. It is common cause that after the establishment of SITA, the information technology services and functions of provincial governments and other Departments were incorporated into the agency and employees of the various government Departments were transferred to SITA with full retention of their service benefits payable or due to them by their previous employers.

5.1.1.2. Employees transferred from the Public Service remained members of the GEPF, while ex-Infoplan employees who transferred to SITA on 1 April 1999 remained - and newly appointed members became members of the Denel Retirement Fund (DRF).
5.1.1.3. In 2004 the Board of Directors (the Board) approved the establishment of the SITA Retirement Fund (SRF) under the Alexander Forbes umbrella fund. This is a defined contribution fund that commenced on 1 April 2005. New SITA conditions of service were promulgated in 2004, which allowed employees who were members of the DRF, the option of transferring to the SRF or remain with the DRF. This was due to the fact that the DRF Rules provided for the transfer of benefits to other funds or the withdrawal of benefits from the Fund.

5.1.1.4. It is not in dispute that employees who were members of the GEPF, were not afforded the opportunity to transfer individually to the AFRF because the “GEPF only provided for the move of all employees who were members without employees having the right to exercise such an option individually unless on termination of service at which time the benefits would be paid out.”

5.1.2. Issues in dispute

5.1.2.1. The Complainant submitted that with the introduction of the new AFRF in 2004, employees who were members of the GEPF were informed that the only way they could join the SRF was to resign from the GEPF. The Complainant further contends that this would have been to their disadvantage because -

a) A transfer to the SRF would have meant that an employee’s accrued pension benefits with the GEPF was protected for continued growth and further accrual in the SRF, while a resignation from the GEPF would have resulted in a break in pensionable service, losing the cumulative value of benefits accrued with the GEPF and the prospective benefits to be accrued at the SRF; and

b) It constituted a repudiation of their right to join a pension fund of their choice as provided in the SITA Act.

5.1.3. Application of the law
5.1.3.1. In terms of section 15 of the SITA Act, 1998, employees who were members of the GEFP, transferred to SITA from “participating departments”, were given a choice to -

a) Become a dormant member of the GEFP;

b) Remain a member of the GEFP; or

c) Withdraw from the GEFP and become a member of “any other approved pension fund” in accordance with the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996).

5.1.3.2. These provisions became part of the conditions of service of employees transferred from “participating departments” by virtue of an employment contract as envisaged in section 15(1) of the SITA Act.

5.1.3.3. When SITA subsequently established its own pension fund, the SRF as a “Defined Contribution Fund”¹ (DC Fund) and considered options for the transfer of its employees from the GEFP, which is a “Defined Benefit Fund” (DB Fund), it had be mindful of the employment law consequences of such a decision. In particular, where membership of a pension fund is a condition of employment, transferring employees from a DB to a DC Fund may constitute a variation of conditions of employment².

5.1.3.4. Section 197(4) of the Labour relations Act, No of 1996 (LRA) provides that transfer of employment “... does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund

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¹ A DB Fund is, “one which undertakes to provide its members with the benefits defined in its rules... a pension expressed as a percentage of final salary and based on years of service.]. TEK Corporation Provident Fund and others v Lorentz [1999] 4 All SA 296 (A) at para 4. 1] A DC Fund is, “a fund in which members are entitled ultimately to withdraw whatever the fruits of the investment of the defined contributions may realise.]. Resa Pension Fund v Pension Fund Adjudicator 2000 (3) SA 313 at 317J to 318 A. 2]
² Hospersa and another v Northern Cape Provincial Administration (2000) S1115 1066 (LAC)
to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 are satisfied.”

5.1.3.5. Section 14(1)(c) of the Pension Funds Act, 1956 (PFA) states that the scheme must be “reasonable and equitable” and must accord full recognition to the rights and reasonable benefit expectations of the persons concerned as well as any additional benefits that have become established practice.

5.1.3.6. Members of the GEPF who wished to join the SRF in 2004 therefore had to exercise their choice in accordance with section 15 of the SITA Act, as well as section 29 of the Government Employees Pension Law, 1996 (GEP Law). Section 29 of the GEP law in turn, provided that the Board of Trustees may in the Rules of the GEPF prescribe the circumstances in which and the basis and conditions on which the accrued benefits of a member of the Fund may be transferred to an approved retirement fund.

5.1.3.7. In terms of Rule 5, read with Rule 12 of the Rules of the GEPF, a member has the right to transfer his or her actuarial interest in the Fund to an approved retirement fund subject to certain conditions and the rules of the approved retirement fund, when he/she retires, resigns from the service of the employer, dies, or is obliged to join an approved retirement fund or a related fund as a result of a change in his or her conditions of service, whether in terms of legislation or for another reason.

5.1.3.8. In the matter at hand it is however, clear that SITA did not resolve to transfer employees who were members of the GEPF to the SRF in terms of section 197 (4) of the LRA when it was established in in 2004. There is further no indication that SITA wanted to compel members of the GEPF to join the SRF through a change in conditions of service or amendment of section 15 of the SITA Act. SITA confirmed that “the rationale for putting restrictions to such members was
purely due to the negative tax consequences that would befall such employees should they transfer."\(^3\)

5.1.4. Conclusion

5.1.4.1. In terms of the conditions of service of the Complainant as determined in his employment contract, as informed by section 15 of the SITA Act, the Complainant’s choice whether or not he wanted to join the AFRF in 2004, was subject to the GEP Law, 1996, and the GEP Rules. As he was still in service of SITA, the only way in which he could be afforded a right to transfer his actuarial interest in the GEPF to the SFR, was if he was compelled, through a change in his conditions of service, or by amendment of section 15 of the SITA Act, to join the AFRF.

5.2. Regarding whether SITA unfairly or improperly failed to comply with the conditions of employment of the Complainant by consistently and continuously failing or refusing since 1 September 2009 to adjust the pensionable portion of the total remuneration package of the Complainant in accordance with the benefit value of at least 70% of the TGP as determined in the SITA Employment Conditions?

5.2.1. Common cause issues

5.2.1.1. In 2004 the SITA conditions of service were revised and all employees were issued with letters of conversion to TGP dated 22 July 2004. The letters read as follows:

“You can restructure your package in line with the Remuneration Policy which will be explained to you during the roadshows to be held from 26 July 2004 to 10 August 2004”

5.2.1.2. In 2008 the SITA conditions of service were again reviewed. In its submission to the Public Protector, SITA conceded that there were “discrepancies relating to the pensionable portion of the remuneration packages that were applicable to different

\(^3\) SITA’s response dated 17 September 2018 to the Public Protector’s notice in terms of section 7(9) of the Public Protector Act, 1994

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employees". As a result, a provision was included in the reviewed conditions of service that the "benefits portion" (pensionable percentage) of the TGP was going to be 70%, and that "further changes will be implemented over time".

5.2.1.3. SITA furthermore conceded that the pensionable percentage was applied only to employees that were members of the AFRF and DENRET and excluded employees who were members of the GEPF as such members would have been required to top up the resultant shortfall arising from the adjustment.

5.2.1.4. It is therefore not in dispute that at the time when the complaint was lodged with the Public Protector, the pensionable percentage of the Complainant's remuneration package was still at 56.61% of the TGP.

5.2.2. Issues in dispute

5.2.2.1. The Complainant's main contention is that SITA failed to allow the pensionable percentage of his TGP to be increased from 56,61% to the minimum of 70% as provided for in the SITA conditions of service, and that no reasons have been provided for the failure.

5.2.2.2. SITA, in turn submitted

a) (at a very late stage of the investigation) that it was only in possession of a document dated 01 September 2009 from the Complainant to Mr Beryl Bryce-Pease (at Human Resources Management) requesting an amendment of the travelling allowance and that SITA could not locate any written complaint and/or document from the Complainant (requesting an adjustment of the pensionable portion of his TGP); and

b) that it endeavoured to act in the best interest of its employees by avoiding the negative consequences that would have afflicted "the SITA employees belonging to GEPF if GEPF gave effect to the SITA's conditions of service". Despite all the good intentions on the part of SITA to ensure that all its employees enjoy the same benefits from the revised SITA conditions of service, the practical challenge in implementing the 70% pensionable percentage rule
for GEPF members was that they would have been required to top up the resultant shortfall arising from the adjustment.

5.2.2.3. The first question for determination by the Public Protector is if and when the Complainant requested an adjustment of the pensionable portion of his TGP from 56,61% to 70%, and secondly, if in the absence of such a request, SITA had any duty as a result of the amendment of its conditions of service in 2008, to review the salary structures provided for in its Total Cost to Company Remuneration Packages in respect of employees such as the Complainant.

5.2.2.4. On the first question the Complainant submitted evidence and information showing that when SITA converted its remuneration structures to Total Cost to Company Remuneration Packages in 2004, he received a letter from the General Manager: Performance and Remuneration dated 22 July 2004 advising him of his salary structure "(i)n line with the new Remuneration Philosophy and implementation of Total Cost to Company Remuneration Packages..." The letter also contained the following provision:

"Your pensionable salary is 56.61% of your Total Remuneration Package. Due to restrictions to changes in the percentage contributions which may be made to your pension by your current pension/retirement fund, this % may not be adjusted at present. This restriction may however be reviewed in the event that SITA obtains approval for the establishment of a new Retirement fund for SITA employees". (emphasis added).

5.2.2.5. The Complainant further submitted that SITA employees were informed of new conditions of service approved by the SITA Executive Committee (EXCO) on 12 February 2008, via e-mail and invitations to briefing sessions. The amendments to the conditions of service included changes to the conditions relating to the TGPs, providing inter alia, in paragraph 5.16(h) that "the pensionable percentage of the total guaranteed package can be determined by the employee between the minimum of 70% and maximum of 100%." (emphasis added).
5.2.2.6. The Complainant emphasised that no restrictions similar to the 2004 restrictions to the adjustment of the pensionable portions of their TGPs, were contained in the amended conditions of service or communicated to employees who were members of the GEPF. As a result, when the first opportunity arose in September 2009 to restructure his TGP, he exercised his options and applied for the basic salary (pensionable) component of his TGP to be set at 70%. He also committed to the proportional increase in his contributions to the GEPF from (approximately) R6 380.49 per month to R7 899.58 per month or R 94 676,11 per annum. The only change that he requested in respect of the flexible portion of his package was an amendment of the travelling allowance.

Figure 1: Complainant’s requested adjustment of his TGP dated 1 September 2009
5.2.2.7. The Complainant advised that while the traveling allowance as amended in the Package Restructuring Agreement was implemented, the rest of the agreement insofar as the adjustment of the percentage of the pensionable component of the TFGP was concerned, was ignored and not implemented. He states that “SITA either could not or would not provide an answer as to why, when questioned”.

5.2.2.8. When the SITA conditions of service were again amended in December 2011, paragraph 5.16 (h) of the 2008 SITA conditions of service were removed (for members of the GEPF), prompting the Complainant and certain other employees who were members of the GEPF to lodge a formal grievance on 3 August 2012 on the basis that the removal of the said paragraph was viewed as “an acknowledgement by SITA that:

a) Members of the GEPF should have been afforded the opportunity to increase their pensionable percentage to 70% of the TGO; AND
b) SITA was obliged to maintain an employee percentage of the total guaranteed package of at least 70%...

5.2.2.9. No action was taken by the Executive Corporate Services as per the SITA Grievance Policy and the matter was subsequently escalated to the then SITA CEO. Collective grievance meetings took place between SITA officials and the affected employees, including the Complainant. The aggrieved employees reiterated at the time that they were informed that they would have had to pay a shortfall in pension contributions to rectify the situation, which in their view should have been the responsibility of the employer “since it had failed to fulfil its obligations in ensuring that the benefit was afforded to all at the time when it became due in 2008”.

5.2.2.10. The employer representatives at the grievance meetings undertook to investigate the historical background to the matter and determine the obligations of the parties “post the 2008 conditions of service”, to engage the GEPF and to pursue “external avenues” such as the Public Protector, in trying to resolve the matter. At the meeting of 26 November 2012 it was resolved that
“...there needs to be a further investigation which should be followed by an independent audit into the whole matter. The further investigations should include the gathering of all relevant Policies since the inception of SITA as well as a work session which includes representatives of all affected GEPF members...”

5.2.2.11. At the same time, the Complainant again used the next opportunity on 1 December 2012 to apply for the basic salary (pensionable) component of his TGP to be set at 70%. He also again committed to the proportional increase in his contributions to the GEPF to R113 127,32 per annum. Again, SITA only affected an amendment to the flexible portion of his TGP (travelling allowance) and continued to deduct his pension contributions to the GEPF based on a pensionable component of 56,61% of his total TGP (amounting to approximately R 7 676.49 per month) as opposed to the contribution based on a requested pensionable component of 70% (R9 427,28 per month).

Figure 2: Complainant’s requested adjustment of his TGP dated 1 December 2012
5.2.2.12. SITA initially confirmed in response to my enquiries that it had received a number of enquiries and grievances after the 2008 change in the conditions of service of its employees.

5.2.2.13. In its last submission to me in March 2019, SITA contended that it could not locate any written complaint and/or document from the Complainant (requesting an adjustment of the pensionable portion of his TGP.) SITA stated that it was only in possession of a document dated 01September 2009 from the Complainant to an official at Human resources Management requesting an amendment of his travelling allowance.

5.2.2.14. SITA confirmed however it received a group grievance on 03 August 2012. Immediately after the receipt of the grievance, SITA Human Resources Management “thoroughly engaged all the complainants with a view to resolve the matter”.

5.2.2.15. It subsequently engaged with representatives of the GPAA with the view to “affording SITA GEPF members an option to exercise the right to restructure the pensionable portion of their remuneration package in line with the 70% benefit provision in the SITA conditions of service.”

5.2.2.16. The response from the GPAA was that they would allow SITA GEPF members to exercise this option and would adjust the benefit value “on condition that the financial implications thereof be incurred by the Employer (SITA) or the individual employees”.

5.2.2.17. According to SITA, it drew the attention of the affected employees to the “arrear cost implications” in the event that their pensionable salary was to increase to 70% of the TGP. The employees were further advised that the “retrospective and future costs will be for their account”.

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5.2.2.18. On 21 March 2011, the affected employees were advised to submit a formal request to the GPAA, routed through SITA, to request an increase in the pensionable percentage of their TGP to 70%. The cut-off date for this exercise was 31 June 2013. The employees were advised that failure to exercise this option “will render the matter finalised and no further claim may arise thereafter”.

5.2.2.19. The affected employees were reportedly not satisfied with the proposed arrangement to accept sole liability for the financial implications and their objections culminated in collective grievances, which were dealt with through internal grievance meetings, including fact finding sessions.

5.2.2.20. SITA stated that as part of an effort to resolve the grievance, it agreed to source an independent legal opinion and to commission a forensic audit on the matter. The legal opinion was obtained and shared with the employees on 29 July 2013.

5.2.2.21. In the legal opinion obtained by SITA the following observations were made and conclusions drawn:

  a) The GEPF only allowed the pensionable portion of the TGP of its members to be structured to a maximum of 60%, unless there were “special circumstances” which allowed the percentage to be adjusted to 70%;

  b) If the pensionable percentage of the TGP’s of the affected employees were 60% before their transfer to SITA, the pensionable percentage of their “new” TGP’s should be 60%;

  c) The employees cannot claim that they were not aware of the limitation to the structuring of their pensionable percentage (which applied prior to their transfer);

  d) The employees were not prejudiced because “from day one they were aware that they were contributing less than 60%” and “they pocketed the money which they should have contributed to the fund” (GEPF);
e) SITA cannot take responsibility for changing the pensionable percentage of the TGP as the employees “benefitted” from having more money in their pockets as opposed to employees who contributed 60%;

f) The GEPF was willing to change the percentage of the pensionable portion of the TGP if the employer or employees accepted liability for the shortfall;

g) The employees “simply did not want the resultant liability”; and

h) It was “inconceivable that SITA should be saddled with financial implications of such a change when the (employees) have enjoyed financial benefits of having contributed less than 60% of their pensionable salaries towards their pension fund”.

5.2.2.22. SITA submitted to the Public Protector that based on the legal advice obtained, it “considered the matter closed”.

5.2.2.23. SITA further contends that without a formal grievance from the Complainant, it will be unfair to conclude that SITA continuously failed since 2008, to adjust the pensionable portion of his total remuneration package in accordance with the benefit value of at least 70% of the TPG as determined by SITA Employment Conditions.

5.2.3. Application of the law on Issue 1 – Regarding whether or not SITA was a) obliged or b) entitled to impose restrictions to the pensionable portion of his TGP structured in the Complainant’s post 2008 Total Package Structuring Agreement(s)?

5.2.3.1. The first sub-issue deals with SITA’s contention that the continued restriction on the pensionable percentage of the TGP’s of members of the GEPF post 2008 was imposed by or adopted in terms of the rules GEPF or in consultation with the GPAA. The second sub-issue deals with SITA’s further suggestion that there was a duty on the Complainant to object or lodge a (formal) complaint/ grievance or dispute regarding the composition of his post- 2008 TGP, and that in the absence of such a complaint/ grievance or dispute, SITA was (fairly) entitled to maintain the status
quo (keeping the pensionable portion of the Complainant’s TGP unchanged at 56.6%.)

5.2.3.2. **On the first sub-issue** it is not in dispute that paragraph 5.16 (h) of the 2008 SITA conditions of service provided that the pensionable portion of the TGP could be determined by the employees between a minimum of 70% and maximum of 100%, and that the TGP “of each employee is agreed with him in conjunction with the company’s remuneration and talent management policy and is confirmed as **part of the service contract**” (Paragraph 5.16 (c)) (emphasis added).

5.2.3.3. It is further common cause that the pensionable salary of employees such as the Complainant, who were members of the GEPF, were determined at a lower percentage of their TGP’s than the 70% provided for in its conditions of service since 2008. SITA maintained that this restriction was imposed by or adopted in terms of the Rules of GEPF or in consultation with the GPAA.

5.2.3.4. In this regard I am reminded that in terms of the law, the GEPF Rules constitute the contract between the Fund and its members. The Supreme Court of Appeal emphasised that “if ambiguity or uncertainty appears it may be necessary to have regard to general principles as an aid in interpretation. If however the rules are clear and admit of no ambiguity, then they must be given effect to according to their tenor.” The principles of interpretation are these enunciated in cases such as *Bekker NO v Total South Africa (Pty) Ltd* and *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd*.

5.2.3.5. Rule 1 of the GEPF Rules describe ‘pensionable emoluments’, as “basic annual salary of a member and any other emoluments to be recognised as pensionable emoluments, after an agreement has been reached between the employer and employee organisations taking into account the actuary’s report on the

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5 1990 (3) SA 159 (T) at 170G-H
6 1974 (1) SA 641 (A) at 646B.
financial implications regarding the inclusion thereof as pensionable emoluments". (Own emphasis)

5.2.3.6. In terms of Section 1 of the GEP Law, 1996 “employer”, means-

(a) …

(i) a department or administration referred to in Schedule 1 of the Public Service Act, 1994 (Proclamation 103 of 1994), or an organisational component referred to in Schedule 2 of that Act, or any other body or institution which employs persons referred to in section 8 of that Act;

(ii) …

(iii) …

(iv) any other institution or body, determined by the Board as an employer for the purposes of this Law; and

(b) for all other purposes of this Law in relation to members in the service of the departments, administrations, organisational components, bodies and institutions referred to in paragraph (a), the Government;

5.2.3.7. Thus, from the definition of “pensionable emoluments” read together with section 1 of the GEP Law, the Board of Trustees of the GEPF is essentially bound, subject to consideration of the Actuary’s Report, to the (collective) agreement between the employer and the employee organisations, on the general conditions of service, remuneration and benefits of its members. This was confirmed in the arbitration award in the Education Labour Relations Council (ELRC) of NAPTOSA obo Willie J Engelbrecht v Department of Education and others7, where the pensionable percentage of the TGP of a member of the GEPF was reduced from 76% to 70% as a result of the ELRC Collective Agreement 1 of 2012. When the employee lodged a dispute about

7 Case No: PSES429 -16/17GP
changing the split from 70 to 76%, the Arbitrator found that he could not “interfere with the agreement reached between the parties. Further there is no evidence in any case ... that the Resolution was incorrectly interpreted and applied”.

5.2.3.8. The GEPF Investment Policy Statement confirms that members of the GEPF are primarily employees working within the National and Provincial government (including the armed forces and correctional services departments), as well as various employers “who have been admitted as participating employers where those employees were previously members of the fund and transferred to their current employment in terms of section 197 of the Labour Relations Act, 1999” (such as SITA in the matter at hand).

5.2.3.9. Section 15 of the SITA Act (discussed above) sought to preserve the rights and reasonable benefit expectations of employees transferred to SITA from participating Departments in accordance with section 197(4) of the LRA, including their pensionable emoluments in the GEPF. This is in line with the approach of the Courts in matters such as Resa Pension Fund v. Pension Fund Adjudicator & Others\(^8\) where it was held that-

“... pension rights amount to deferred pay, rather than gratuities bestowed within the benevolence of the employer, and ... members are entitled to have their investment value preserved where their employment relationship is modified as a consequence of a corporate restructuring over which they have no control.”

5.2.3.10. The interpretation of both the GEP Law and GEPF Rules, (that collective agreements can regulate certain pension matters), as well as the provisions of section 15 of the SITA Act, would suggest that the Complainant’s pension rights (sometimes referred to as a “pension promise”) have been incorporated into the

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\(^8\) 2000 (3) SA 313 (C)
contract of employment and are not governed independently of the employment contract. 9

5.2.3.11. The fact that the SITA conditions of service10 were changed in 2011 to specifically only include members of the AFRF under the provisions that employees could determine the pensionable portion of their TGP between a minimum of 70% and a maximum of 100%, serve as prima facie indication, by virtue of the maxim “unius inclusio est alterius exclusio”11 that members of the GEFP have all along been included under the 2008 conditions of service and that the employer only sought to exclude them from 2011 going forward.

5.2.3.12. If then –

a) the SITA’s 2008 conditions of service provided employees who were members of the GEFP with the opportunity to structure the pensionable portion if their TGP between 70 and 100%, and

b) the GEFP was bound to these conditions in terms of the SITA Act, GEP Law, 1996 as well as the GEFP Rules thereunder,

the question remains whether or not SITA was entitled to continue to impose the pre-2008 restrictions on the pensionable emoluments of its employees in the GEFP (until such time, as suggested by SITA – that these employees, including the Complainant lodge objections, complaints, or

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9 Damant, Graham and Jitho, Tashia, Employer Discretion and Pension Benefits: The Limitations and Obligation, 2-4 July 2003, Labour Law Conference
10 Paragraph 9.19.1(b)(iii)
11 “Expression of one thing is the exclusion of the other” See: Gentirucu AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 602E-F; Beaver Marine (Pty) Ltd v Wust 1978 (4) SA 263 (A) at 277D; South African Roads Board v Johannesburg City Council 1991 (1) SA 1 (A) at 16G; National Automobile and Allied Workers’ Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd 1994 (3) SA 15 (A) at 26G.
grievances indicating their desire to amend the composition of the pensionable percentages of their TGPs)?

5.2.3.13. SITA’s contention that the Complainant only requested an amendment of the travelling allowance in the post-2008 structuring of his TGP, is not borne from the facts at my disposal.

5.2.3.14. Paragraph 5.16.1(b) and (c) of the 2008 SITA conditions of service clearly stated that “(e)employees are remunerated on the principle of a total guaranteed package” and that the “total guaranteed package of each employee is agreed with him in conjunction with the company’s remuneration … policy and confirmed as part of the service contract”.

5.2.3.15. It follows that the process of formation of the TGP as part of the service contract between SITA and its employees therefore postulates the creation of a formal legal relationship by freely negotiated agreements between the parties.\(^\text{12}\) It is furthermore trite that in arriving at an agreement on employment terms and conditions, the employer not only have a duty to negotiate, he or she has a duty do so in good faith.\(^\text{13}\)

5.2.3.16. In the matters of *Tsika v Buffalo City Municipality* as well as *Mogothle v Premier of the Northwest Province* it was held that employers owe a general duty of fairness to employees in terms of the contract of employment. In the case of *Globindlal v Minister of Defence & others*\(^\text{14}\) the Court held “it could be argued that it was an implied term of the contract that the rights enshrined in section 23 of the Constitution, form an integral part of the contractual relationship”. This was echoed by the Supreme Court of Appeal\(^\text{15}\) when it held that-


\(^{13}\) *NUM v East Rand Gold & Uranium* 1992 (1) SA 700 (AD)

\(^{14}\) *Globindlal v Minister of Defence & others* 2010 31 ILJ 1099 NGP.

\(^{15}\) *AB and another v Pridwin Preparatory School and others (Equal Education as amicus curiae)* [2019] 1 All SA 1 (SCA)
In South Africa, the principle of sanctity of contracts, pacta sunt servanda, is one of the fundamental ideas that underpin the modern law of contract. Freedom of contract and the concept of good faith are other fundamental concepts of contract law. Authors in the field have begun to reflect on the extended definition of good faith which, they argue, include components of fairness and equity influenced by the values underpinning the Constitution, and in arriving at any agreement.

5.2.3.17. The Courts have held that even in those cases where the employer has a power to veto a pension increase derived either from the rules or other contractual arrangements between the parties, that power must be exercised in accordance with the principle of good faith. 16

5.2.3.18. It follows that SITA did not have the right to unilaterally determine the Complainant’s post-2008 Annual All-inclusive Total Package Structure Agreement, that the structure of the TGP had to be mutually agreed upon, and that the duty of good faith and fairness required SITA to preserve and protect any right to any pension benefits arising out of the TGP agreement and employment contract.

5.2.3.19. Even if SITA for any reason did not recognise the Complainant’s submission on 1 September 2009 for an amended TGP agreement, (extending beyond the mere change of a traveling allowance), it would have had to recognise the fact that the structure of the (pre-2008) TGP agreement that was in place at the time and which it purported to maintain, was not aligned to the 2008 conditions of service. SITA expressly committed itself in 2004 to a review of this restriction on the pensionable percentage of the TGP (of members of the GEPF), and yet, when the restrictions were reviewed and removed in the 2008 conditions of service, it effectively maintained the Complainant’s pensionable portion of his TGP at 56,61 %, below the prescribed minimum threshold of 70%.

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16 In Tek Corporation & Others v Lorentz 1999 (4) SA 884 (SCA)
5.2.4. Conclusion

5.2.4.1. There is no indication in the applicable legal framework, or evidence or records that the GEPF or the GPAA imposed restrictions, or had the authority to do so, in the pensionable percentages of the TGP’s of SITA employees as determined by their conditions of service and benefits, as provided for in terms of the SITA Act, the GEP Law, 1996, the GEPF Rules thereunder and any other legal provisions applicable to SITA employees.

5.2.4.2. Similarly, there is no indication that SITA was obliged or entitled to impose restrictions on the pensionable emoluments in the GEPF of its employees contrary to the pensionable percentages (70%) recognised in terms of the SITA conditions of service, or if SITA had doubts about is position as employer for the purpose of Rule 1 of the GEPF, as recognised by default in terms of the Total cost to employer dispensation applicable in the Public Service (which provided for a 70/30 or 75/25 split).

5.2.4.3. The SITA conditions of service required the Annual All-inclusive Total Package Structure of the Complainant and other employees to have been determined by mutual agreement between the employer and such employees, to be incorporated into the Complainant’s service contract and preceded by negotiations in good faith and fairness. The Annual All-inclusive Total Package Structure Agreement submitted by the Complainant on 1 September 2009, providing for an increase in the pensionable portion of his TGP in line with previous commitments by SITA and the 2008 SITA conditions of service, was only signed by the Complainant was not the subject of mutual agreement between the parties. Apart from an amendment to the flexible portion of the TGP in respect of the travelling allowance, SITA failed to engage the Complainant meaningfully and in good faith after the submission of his proposal for the structuring of his TGP in September 2009, in any negotiations on the increase of the pensionable portion of his TGP in accordance with his terms and conditions of service.
5.2.4.4. Despite the fact that it did not constitute an agreement as envisaged in the 2008 SITA conditions of service, and continued to limit the composition of the pensionable portion of the Complainant’s TGP at 56.61%, in breach of the 70% threshold prescribed by the said conditions of service, SITA unilaterally maintained and implemented the pre-2008 structure of the Complainant’s TGP.

5.3. Regarding whether the conduct of SITA in respect of the Complainant’s request to restructure his TGP to increase the benefit value of the pensionable portion of his remuneration package with the view to increase his pension benefits with the GEPF, caused the Complainant to suffer any prejudice with the calculation of the pension benefits accruing to him since 2008 to his date of retirement.

5.3.1. Common cause issues.

5.3.1.1. It is common cause that the Complainant’s pensionable emoluments in the GEPF was computed at 56.61%, while he requested that it be aligned to the SITA conditions of services which provided for a 70% pensionable percentage of his TGP.

5.3.1.2. In response to the Public Protector’s Notice in terms of section 7(9) of the Public Protector act, 1994 SITA essentially accepted that the Complainant was entitled in terms of his contract of employment, to vary his pensionable emolument, but contended that it would have been to his disadvantage because it would have required him to pay a shortfall in his pension contributions.

5.3.2. Issues in dispute

5.3.2.1. The main issue for determination is whether or not the Complainant was financially worse off than he would have been, had SITA agreed to adjust the pensionable percentage of his TGP to at least 70%.

5.3.2.2. SITA’s initial submissions to me echoed the sentiments expressed in the legal opinion that it had obtained on 18 July 2013 (which was unfortunately marred by a number of factual discrepancies). In essence SITA submitted that the
Complainant was not financially prejudiced because the 56/44 split in his TGP meant that the Complainant’s pension contributions deducted from the Complainant’s remuneration package were proportionally lower than what it would have been in case of a 70/30 split of his TGP. This in turn resulted in the non-pensionable component being proportionally higher - in other words, a higher “take home pay”, which he “pocketed” to his benefit.

5.3.2.3. SITA also reiterated that it endeavoured to act in the best interest of the employees who were members of the GEPF because changing the status quo and allowing the Complainant to structure 70% of his TGP as a pensionable percentage based on the agreement between SITA and its employees, would have required SITA or the affected employees to incur the financial burden of implementing such a condition of service and pay the shortfall arising from the shortfall.

5.3.2.4. The Complainant’s submission is that the capital value of the difference in the contribution rate on a pensionable salary of 56.61% as opposed to the higher contribution on a pensionable salary of 70% of his TGP, does not equate to the actuarial value that the higher pensionable salary would have had on the calculation of his pension benefits. In other words, if he was allowed to structure his TGP in accordance with the SITA conditions of service, his pensionable salary would have constituted 70% of his TGP as opposed to 56.61%, which would have translated into higher pension benefits.

5.3.2.5. Using the benefit calculator provided for on the GEPF website, the Public Protector team conducted an exercise to calculate both the contribution rate, as well as the estimated pension benefits based on the Complainant’s final salary computed at 56.61% of his TGP, as well as the estimated benefits if his final pensionable salary were to be computed based on 70% of his TGP. While these are naturally not expertly calculated or audited figures, the sample over the last 3 years before the Complainant’s retirement, captured in the spreadsheet enclosed below, nevertheless reveals that the increase in the actuarial value of his pension benefits if his pensionable emoluments in the GEPF were to be
computed at 70% of his TGP, are significantly higher than the amounts of the benefits “pocketed” by the Complainant as a result of contributing on a lower pensionable salary.

<table>
<thead>
<tr>
<th>Estimated greater &quot;take home&quot; pay &quot;benefitted&quot; by complainant over the last 3 years before retirement based on pensionable salary of 56.61% of TGP</th>
<th>Estimated potential additional pension benefit if pensionable salary structured at 70% (gratuity) over sample of last 3 years only</th>
<th>Estimated potential additional pension benefit if pensionable salary structured at 70% (annuity)</th>
<th>Difference: Potential loss suffered by Complainant</th>
</tr>
</thead>
<tbody>
<tr>
<td>R 124 624.84</td>
<td>R 675 876.23</td>
<td>R182 866.95</td>
<td>R858 743.18</td>
</tr>
</tbody>
</table>

5.3.2.6. At the same time the potential estimated shortfall in contributions to the GEPF that would arise if the Complainant’s pensionable emolument in the GEPF were to be computed retrospectively to 1 September 2009 (when Complainant first requested an amended TGP Structuring agreement, on the basis of 70% of his TGP, could be as follows:

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<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>R28847.47</td>
<td>R29348.575</td>
<td>R30962.756</td>
<td>R33130.14</td>
<td>R35449.249</td>
<td>R38710.579</td>
<td>R41807.432</td>
<td>R44105.84</td>
<td>R282363.04</td>
</tr>
</tbody>
</table>

5.3.2.7. The nett result is that there is prima facie indication that an adjustment of the pensionable portion of the Complainant’s TGP would have resulted in significantly higher pensionable emoluments in the GEPF compared to the
amount of pension contributions to the GEPF that the Complainant was alleged to have "saved".

5.3.3. Application of the Law

5.3.3.1. In essence, I have to consider if the conduct of SITA met the standards expected of an employer to protect and preserve the pension rights of its employees as envisaged by law.

5.3.3.2. The courts have confirmed that the right to pension benefits arise out of the employment contract and is part of the consideration that an employee receives in return for rendering his or her services "as part of the quid pro quo" as held by the Pension fund Adjudicator in Younghusband v. Decca Contractors (SA) Pension Fund and its Trustees:17

"Pension benefits are part and parcel of the costs of employing labour, they are part of the remuneration which labour receives for services rendered. They form an integral part of the industrial relations bargain."

5.3.3.3. Since the pension emoluments of the Complainant in the GEPF also fell squarely within the remuneration aspect of the Complainant's employment, it gave rise to an contractual obligation on SITA to act in good faith when exercising rights and obligations in relation to the pension benefits of the Complainant and other members of the GEPF.

5.3.3.4. Case law and current academic thinking suggests that an employee may be able to rely on the employer's contractual obligations to the employee to monitor and regulate employer conduct in relation to pension benefits within the context of a fair labour practice. Section 186(2)(a) of the LRA states:

"Unfair labour practice means any unfair act or omission that arises between an employer and employee involving- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about

17 (1999) 20 ILJ 1640 (PFA)
dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee ..." (Own emphasis)

5.3.3.5. The Courts and institutions such as the Pension Fund Adjudicator have also looked beyond contractual employment law to seek a different basis to regulate employer conduct in relation to pension matters. The most notable of these has been the fair labour practices right in the Constitution\textsuperscript{18} as well as the employer's duty of good faith\textsuperscript{19}.

5.3.3.6. It has been held that an employer who participates in a pension fund owes a duty of good faith to all employees who are members of the fund (see \textit{H v Otis (South Africa) Pension Funds and Another}\textsuperscript{20} and see also \textit{SA Beje v Private Security Sector Provident Fund and Archer Security Services}\textsuperscript{21}). In the matter of \textit{TEK Corporation Provident Fund and others v Lorentz}\textsuperscript{22} the court held that,

"The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries... The employer is not similarly burdened but owes at least a duty of good faith to the fund, its members and beneficiaries. (Compare \textit{Imperial Group Pension Trust Ltd \\& Others v Imperial Tobacco Limited \\& Others [1991] 2 All ER 597 (Ch) at 604g-606j})." (Own emphasis)

5.3.3.7. The contents of the duty of good faith in the context of pension funds were explained by the Pension Funds Adjudicator in \textit{IBM Pensioners' Action Group v IBM South Africa (Pty) Ltd \\& Another}\textsuperscript{23} as follows:

\begin{flushleft}
\textsuperscript{18} Section 23(1) of the Constitution as considered in National Education, Health and Allied Workers Union (NEHAWU) v University of Cape Town \\& other (2003) 24 ILJ 95 (CC) and National Union of Metalworkers of SA \\& others v Bader Bop (Pty) Ltd \\& another CCT 14/02 dated 13 December 2002
\textsuperscript{19} See, for example, Harris v AECI Pension \\& another [2000] 7 BPLR (PFA) and Woodroffe v Tongaat Hulett Pension Fund \\& another [2000] 4 BPLR 454 (PFA)
\textsuperscript{20} [2002] 3 BPLR 3152 (PFA) at paragraph 32
\textsuperscript{21} PFME/12591/2007/PGM-unreported
\textsuperscript{22} 1999] 4 All SA 299 (A)
\textsuperscript{23} [2000] 3 BPLR 26 (PFA)
\end{flushleft}
a) The employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employees;

b) The employer must not exercise a veto capriciously;

c) The employer must exercise its rights for the efficient running of the scheme;

d) The employer must not exercise its rights for the purpose of forcing members to give up their accrued rights;

e) The duty to act in good faith does not equate to the duty to act reasonably;

f) The employer may not announce a blanket policy of refusing to consider benefit increases – it should be willing to review its decision in changed circumstances; and

g) The employer may not use the power of winding-up, make transfers, veto amendments or discontinue contributions in a manner which forces the sacrifice of existing rights.

5.3.3.8.

As the pension contributions paid by employees as well as the employee are calculated proportionally as a percentage of the pensionable emoluments, it follows that an increase in the pensionable portion of the Complainant’s TGP, would always have led to an increase in pension funds contributions in order to fund the consequent increase in pension benefits. In fact the Complainant’s requests in 2009 and 2011 for his Annual Total all-inclusive Total Package Structuring Agreements both provided for increases in the rate of contributions to the GEPF in line with the requested adjustment in the pensionable percentage of his TGP. Writers such as Grahamth Damant24 states that-

"This is the essence of a pension benefit. It is not uncommon ... for employees to accept a lower salary in favour of higher pension benefits.

5.3.3.9. Yet, even though the Complainant was willing and entitled to increase his contributions to the GEPF proportionally to the increase in the pensionable percentage of his TGP’s to 70%, in order to gain a substantial advantage in the difference that higher pensionable emoluments in the GEPF would have made in the actuarial value of his pension benefits, SITA continued after 2008 to deny him such an opportunity.

5.3.3.10. SITA’s communications during 2004 clearly illustrated that it was aware of the fact that Complainant and other employees who were members of the GEPF were unfairly excluded from the opportunity to adjust the pensionable portion of their TGPs because of the way in which the conditions of service and the relevant pension fund Rules were structured at the time. Furthermore, SITA duly committed in writing to review the limitations after the establishment of its own retirement fund. Yet, when the SITA conditions of service were amended in 2008 to remove these limitations, SITA did not review the structure of the TGP of the Complainant and his colleagues as per its 2004 undertaking, and in fact resisted attempts by the Complainant and possibly other employees to increase the pensionable percentage of their TGPs.

5.3.3.11. In so far as SITA contended that it was unsure and/ or was of the view that it needed to engage the GEPF or the GPAA on the matter, the records of the Collective Grievance Meetings showed that it only consulted the GPAA after a collective grievance had been lodged by the Complainant and other employees in 2011. There is no evidence at my disposal to suggest that SITA had engaged or consulted the GEPF or the GPAA regarding any reservations that it might have had about the impact of the changes in its conditions of service on the pension benefits or rights of members of the GEPF- either prior to their effective date of 1 April 2008, or after 1 September 2009 when the Complainant endeavoured to increase his pensionable emoluments in the GEPF.

5.3.3.12. By the time SITA had clarified with the GPAA in 2011 that their GEPF employees were allowed to increase the pensionable percentage of their TGP’s to 70%, the retrospective implementation thereof backdated to the time when
the conditions of service were amended in 2008, or when the Complainant proposed the restructuring of his TGP in September 2009, would have resulted in a shortfall in employee/employer pension contributions based on the difference in the pensionable emoluments.

5.3.3.13. In my view this shortfall, and the adverse impact that the lower contribution rates had in the pension benefits of the Complainant and other GEPF employees of SITA, could have been avoided, had SITA acted with the necessary diligence and good faith to ensure that their GEPF employees were not unfairly excluded from the entirety of the benefits and pension rights provided for in the 2008 amendment of the SITA conditions of service. The shortfall was therefore a direct result of the delay in the implementation of the Complainant’s proposed restructuring of his TGP.

5.3.4. Conclusion

5.3.4.1. My unaudited estimates indicate that the Complainant, and possibly, other GEPF employees of SITA, suffered a substantial loss in the enhancement of their pensionable emoluments and resultant increase in the actuarial value of their pension benefits, as a result of the unwarranted limitation that SITA imposed on the pensionable percentages of their TGP’s, contrary to their conditions of service.

5.3.4.2. SITA failed to preserve and protect the pension rights and benefits of the Complainant and other GEPF employees from the date on which its conditions of service were amended in 2008 to allow and actually compel a review of the structuring of their TGPs, and more particularly from 1 September 2009 when the Complainant exercised his pension rights and attempted to access increased pension benefits by means of the prescribed Annual All-inclusive Total Package Structure Agreement.
6. FINDINGS

Having considered the evidence obtained during the investigation as against the relevant regulatory framework, I make the following findings:

6.1. Regarding whether SITA unfairly or improperly failed to comply with its obligations in terms of the SITA Act to allow the Complainant to transfer from the GEPF and become a member of the AFRF after its establishment as an approved pension – or retirement fund for the institution

6.1.1 The Complainant’s allegation that he was not allowed to transfer the actuarial value of his benefits in the GEPF when SITA established the SITA Retirement Fund (SRF) as a Defined Contribution Fund under the Alexander Forbes umbrella fund, is correct.

6.1.2 The SITA Act as well as the GEPF Rules and GEP Law only afforded the Complainant a right to transfer his actuarial interest in the GEPF to the SRF, if he was compelled, through a change in his conditions of service, or by amendment of section 15 of the SITA Act, to join the AFRF.

6.1.3 However, the Complainant had a choice whether or not he wanted to join the SRF, in terms of his conditions of service as determined in his employment contract, informed by section 15 of the SITA Act, subject to the GEP Law, 1996, and the GEP Rules.

6.1.4 As SITA therefor did not have any discretion in this regard, the allegation that it unfairly or improperly failed to comply with its statutory or contractual obligations to allow the Complainant to transfer the actuarial value of his pension benefits in the GEPF to the SRF, is unsubstantiated.

6.2. Regarding whether SITA unfairly or improperly failed to comply with the conditions of employment of the Complainant by consistently and continuously failing or refusing since at least 1 September 2009 to adjust the pensionable portion of the total remuneration package of the Complainant in accordance with the benefit value of at least 70% of the TGP as determined in the SITA Employment Conditions?
6.2.1. The allegation that SITA did not allow the Complainant to increase the pensionable percentage of his TGP (total guaranteed remuneration package) with effect from 1 September 2009 from 56.61% to the minimum of 70% provided for in the amended 2008 SITA conditions of service, is substantiated.

6.2.2. SITA’s contention that the increase in his pensionable percentage of his TGP applied for by the Complainant was subject to limitations imposed by the GPAA or GEPF is not supported by any evidence or records of instructions or communications from the GPAA, or by statutory authority in terms of the GPF Rules or the GEP Law, 1996.

6.2.3. In terms of section 15 of the SITA read with section 1 of the GEP Law and Rule 1 of the GEPF Rules, the pension rights of SITA employees were incorporated in their contract of employment and conditions of service and there is no indication that SITA employees who were members of the GEPF, were excluded from these conditions or any part thereof.

6.2.4. The evidence at the disposal of the Public Protector favours a conclusion, on a balance of probabilities, that SITA unfairly imposed restrictions on the pensionable emoluments of the Complainant in the GEPF, contrary to the pensionable percentages (70%) recognised in terms of the SITA conditions of service.

6.2.5. SITA failed to engage the Complainant meaningfully and in good faith, in line with previous commitments by SITA and as required by the 2008 SITA conditions of service, on the Annual All-inclusive Total Package Structure Agreement submitted by the Complainant on 1 September 2009, providing for an increase in the pensionable portion of his TGP.

6.2.6. Despite the fact that the post-2008 structuring of the Complainant’s TGP was not the subject of mutual agreement between the parties and incorporated in the Complainant’s service contract as prescribed by the SITA conditions of service, SITA unilaterally continued to impose the pre-2008 limitations on the composition
of the pensionable portion of the Complainant’s TGP at 56, 61% - below the 70% threshold prescribed by the said conditions of service.

6.2.7. In the process, SITA failed to comply with its obligations as envisaged in section 15 of the SITA Act and in breach of its contractual obligations in terms of the SITA contract of employment and conditions of service. SITA was in violation of the principles of a fair labour practice as envisaged in section 186(2)(b) of the LRA, section 23(1) of the Constitution and the values expected of and employer in terms of its duty of good faith towards its employees.

6.2.8. SITA’s conduct in failing to adjust the Complainant’s pensionable percentage of his TGP to the minimum of 70% provided for in the 2008 amendments to the SITA conditions of service, is therefore improper and amounts to maladministration in terms of section 182(1)(a) of the Constitution read with section 6 of the Public Protector Act, 1994.

6.3. Regarding whether the conduct of SITA in respect of the Complainant’s request to restructure his TGP to increase the benefit value of the pensionable portion of his remuneration package with the view to increase his pension benefits with the GEPF, caused the Complainant to suffer any prejudice with the calculation of the pension benefits accruing to him since 2008 to his date of retirement.

6.3.1. The allegation that the Complainant’s pensionable emoluments in the GEPF were computed at a lower pensionable salary of 56.61 % of his TGP instead of the 70% provided for in his conditions of service, is substantiated.

6.3.2. SITA’s contention that the Complainant did not suffer any prejudice because he “benefitted” from a the higher “take home” salary, having contributed less to the GEPF than he would have contributed if the pensionable percentage of his TGP was determined at 70%, is flawed.

6.3.3. SITA’s further submission that the Complainant only requested an amendment of the flexible portion of the TGP in 2009 to incorporate a change to his traveling allowance, is not borne from the facts as the Complainant’s Annual All-inclusive Total Package Structure Agreement dated 1 September 2009, clearly proposed an
adjustment of the pensionable portion of his TGP to the minimum of 70% as prescribed in the 2008 SITA Conditions of Service.

6.3.4. Even if the Complainant did not propose the requested adjustment, SITA was obliged in terms of its duty of care and good faith as employer, as well as by its contractual obligations in its amended conditions of service, to honour its 2004 commitment to review the TGP structure of those employees who were subjected to a limitation to the composition of the pensionable portion below the prescribed minimum of 70%.

6.3.5. SITA's further contention that it endeavoured to act in the best interest of the Complainant by avoiding a situation where he would have had to incur the financial liability of having to compensate the GEPF for a shortfall in contributions, is contradicted by the fact that -

a) The Complainant's 2009 restructuring request indicated his willingness to accept a proportional increase in pension contributions, and a lower "take home" salary in favour of higher pension benefits, as indicated in writing in his 2009 request for an adjustment of the pensionable portion of his TGP in line with his conditions of service;

b) The subsequent shortfall in contributions to the GEPF could have been avoided if SITA meaningfully and in good faith engaged the Complainant after 1 September 2009 with the view to reach a mutually acceptable Annual All-inclusive Total Package Structure Agreement as prescribed by the SITA conditions of service;

c) Instead SITA delayed until 2011, after the Complainant and other affected employees had lodged a collective grievance, to engage and clarify with the GPAA any reservations about the impact of its amended conditions of service of 2008 on the pensionable emoluments of its employees in the GEPF;
d) The GEPF advised that both SITA and the Complainant shared the liability for any shortfall in the pension contributions that would have emanated from a retrospective adjustment of the Complainant's pensionable emoluments.

6.3.6. If the figures were audited by SITA as per its initial undertaking, it would have confirmed in my estimation that the amounts "saved" by the Complainant on the lesser pension contributions, are substantially less than the difference higher pensionable emoluments in the GEPF would have made to the actuarial value of the Complainant's pension interests.

6.3.7. The difference between the amount "saved" on contributions and the higher actuarial value of his pension interest in the GEPF based on the potential higher pensionable emoluments (final pensionable salary based on 70% of the TGP) constitutes a significant financial prejudice suffered by the Complainant in the final calculation of his pension interests.

6.3.8. The estimated prejudice suffered by the Complainant is directly linked to the failure by SITA to comply with its duty of good faith to and its contractual obligations towards the Complainant to preserve and protect his pension rights and benefits as employee, as found above.

6.3.9. SITA's conduct therefore resulted in unlawful or improper prejudice to the Complainant as envisaged in section 16(4)(a)(v) of the Public Protector Act, 1994 and section 182(1)(a) of the Constitution 1994.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report is the following:

7.1. The Chief Executive Officer of SITA, must engage the Chief Executive Officer of the GPAA to facilitate the retrospective adjustment of the Complainant's
pensionable emoluments in the GEPF to 70% of his TGP with effect from 1 September 2009.

7.2. The Chief Executive Officer of SITA, in consultation with the Chief Executive Officer of the GPAA must commission a full audit to determine the financial shortfall in employer and employee contributions on behalf of the Complainant to the GEPF based on the retrospective adjustment of the Complainant’s pensionable emoluments in the GEPF to 70% of his TGP to 1 September 2009.

7.3. As a financial remedy to the prejudice caused to the Complainant, the SITA must contribute to the GEPF 50% of the shortfall in pension contributions needed to adjust the Complainant’s pensionable emoluments retrospectively to 1 September 2009, provided that the Complainant accepts liability for the balance of the shortfall in contributions, which may be deducted from any additional gratuity amount accruing to the Complainant.

8. MONITORING

8.1 The Chief Executive Officer of SITA must submit an action plan within 30 days of this report, indicating how the remedial action referred to in paragraph 7.1 to 7.3; and

8.2 The remedial action must be implemented within 6 months from the date of this report.