
PUBLIC PROTECTOR
SOUTH AFRICA

Report no 91 of 2019/20

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF AN UNDUE DELAY BY THE MPUMALANGA DEPARTMENT OF EDUCATION TO SUBMIT MRS R SEHALE'S PERSONNEL FILE OR EMPLOYMENT RECORDS TO THE GAUTENG DEPARTMENT OF EDUCATION
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Executive Summary

(i) This is my report 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, 23 of 1994.

(ii) This 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 a complaint lodged by Ms R Sehale (the Complainant) on 18 April 2016.

(iii) In the main, the complaint was that the Mpumalanga Department of Education (MDoE) failed to submit her personnel file or employment records to the Gauteng Department of Education when she was transferred in December 1992, as a result she was not paid her pension benefits for the period January 1978 to December 1992 when she retired in December 2014.

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

(a) Whether the MDoE unduly delayed to transfer the Complainant’s personnel file or employment record to the GDE when she was transferred to the GDE at the end of December 1992.

(b) Whether the MDoE failed to properly manage and to take care of the employment records of the Complainant, and if so, whether this amounts to maladministration; and
(c) Whether the Complainant is improperly prejudiced by the conduct of the MDoE in the circumstances.

(v) In dealing with the matter, some issues were mediated upon in line with section 6(4)(b) of the Public Protector Act. However, the main investigation was conducted through correspondence, meetings and interviews with the Complainant and the Department.

(vi) Key laws and policies taken into account to help me determine if there had been an undue delay by the MDoE to submit the Complainant’s personnel file or employment records were principally those imposing administrative standards that should have been upheld by the MDoE and/or its officials.

(vii) During the investigation process, I issued a Notice in terms of section 7(9)(a) of the Public Protector Act (Notice) to the MDoE on 09 September 2019 to afford it an opportunity to respond to my provisional findings. The MDoE was served with a Notice and were to respond before 25 September 2019 and did not respond.

(viii) Having considered the evidence uncovered during the investigation, as against the relevant regulatory framework, the complaint received as against the concomitant response by MDoE, I make the following findings:

(a) Regarding whether the MDoE unduly delayed to transfer the Complainant’s personnel file or employment record to the GDE when she was transferred to the GDE at the end of December 1992.

(aa) The allegation that the MDoE unduly delayed to transfer the Complainant’s personnel file or employment record to the GDE when she was transferred to the GDE at the end of December 1992 is substantiated.
The Complainant was an Educator employed by the former Kwa-Ndebele Department of Education, now the MDoE for the period January 1979 until she was transferred to the GDE at the end of December 1992.

The GDE requested the employment records of the Complainant on 27 February 1995, from the MDoE, however there is no evidence that the records were forwarded or submitted to the GDE in response to the request, until the Complainant approached my office for assistance.

Therefore, the actions of the MDoE amounts to undue delay envisaged in section 6(4)(a)(ii) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

Regarding whether the MDoE failed to properly manage and to take care of the employment records of the Complainant, and if so, whether this amounts to maladministration.

The allegation that the MDoE failed to properly manage and take care of employment records of the Complainant, is substantiated.

Although the MDoE eventually located and submitted the Complainant's personnel file, it however could not locate it when we raised this complaint with them. During a subpoena hearing of the Public Protector on 15 April 2019, Mr CR Mhlabane, the Deputy Director Corporate Services in the Nkangala Region of the MDoE remarked that the filing system in their department is allegedly in total disarray which has led to the non-response and submission of the relevant employment information and history of the Complainant to the GDE and Public Protector at the time, 28 years after her transfer to the GDE.
 Allegations of an undue delay by the Mpumalanga Department of Education to submit the Complainant's personnel file or employment records to the Gauteng Department of Education

(cc) The MDoE failed to locate the Complainant's personnel file for twenty six (26) years and three (3) months.

(dd) Therefore, the conduct of the MDoE amounts to maladministration in state affairs as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

(c) Regarding whether the Complainant is improperly prejudiced by the conduct of the MDoE in the circumstances.

(aa) The allegation that the Complainant was improperly prejudiced by the conduct of the MDoE, is substantiated.

(bb) Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. The MDoE failed for twenty six (26) years and three (3) months to locate the Complainant's personnel file.

(cc) Therefore, the conduct of the officials of the MDoE led to improper prejudice suffered by the Complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act and and improper conduct as envisaged in section 182(1)(a) of the Constitution.

(d) 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 undue delay and maladministration referred to in this report, is the following:

(a) The Acting Head of Department of the MDoE
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(aa) The Acting Head of Department, Mr JR Nkosi, must within fourteen (14) working days from the date of the report, issue a written apology to the Complainant, apologising for the MDoE’s undue delay to submit the Complainant’s personnel file to the GDE when the Complainant was transferred in December 1993.

(bb) The Acting Head of Department must ensure that the MDoE pays interest at the prescribed rate of interest, determined in the Prescribed Rate of Interest Act, 1975 GG 37831 July 2014 on the amount determined by the GPAA after recalculation of the Complainant’s pension benefits for period January 1979 until December 1992.

(cc) The interest payable to the Complainant must be calculated from the date of retirement, which was December 2014 to the date of payment.
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OF EDUCATION

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the
Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public
Protector Act, 23 of 1994 (Public Protector Act).

1.2. This report is submitted in terms of section 8 of the Public Protector Act
to the following people to note the outcome of this investigation:

1.2.1. Mr JR Nkosi, the Acting Head of Department of the MDoE

1.2.2. The Complainant: Ms R Sehale

1.2.3. This report relates to my investigation into allegations of an undue delay by the
Mpumalanga Department of Education to submit Ms R Sehale’s personnel file
or employment records to the Gauteng Department of Education

2. THE COMPLAINT

2.1. The complaint was lodged with me on 18 April 2016 by Ms. R Sehale (the
Complainant). The Complainant alleged that:

2.2. That she was appointed on 22 January 1979, by the then, Kwa-Ndebele
Department of Education;
2.3. That she was transferred to the GDE in 1992, after working for the Kwa-Ndebele Department of Education for 13 years;

2.4. That she worked for the GDE from January 1993, until her retirement in December 2014; and

2.5. After her retirement she claimed her pension benefits from the GPAA; and

2.6. When she received her pension benefits she realized that her pensionable period of service was only calculated from January 1993 to December 2014;

2.7. Upon realizing that the GPAA miscalculated her pension benefits, she approached the GDE (she did not provide a date of the enquiry), on which she was informed that the MDoE allegedly did not transfer her personnel file to them. As a result, GDE did not have proof of pension contributions for the period January 1979 until December 1992 that was not paid;

2.8. She alleges that she personally visited the MDoE (she could not provide a date) in an effort to have her personnel file transferred to the GDE, but was informed by the MDoE that her personnel file cannot be traced.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

"The Public Protector has power as regulated by national legislation –
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(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 national 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(a));

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 constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);

3.6.2 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);

3.6.3 The Public Protector, in appropriate circumstances, has 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);

3.6.4 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);

3.6.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords 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.

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

3.6.7 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 (para105).

3.6.8 The fact that there are 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);

3.6.9 *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 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitutes as ‘special circumstances’ depends on the merits of each case.

3.8 The MDoE is an organ of state and their conduct amounts to conduct in state affairs, as a result the complaints falls 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.

3.9 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.

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 that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration or improper conduct?

4.2.1.4 In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where he/she would have been but for the maladministration or improper conduct?

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. In this particular case, the factual enquiry principally focused on the roles played by the MDoE when it submit the Complainant's personnel file to the GDE when the Complainant was transferred in December 1992.
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 officials of the MDoE.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place him/her as close as possible to where he/she would have been had the institution concerned complied with the regulatory framework setting the applicable standards for good administration.

4.3 Notice issued in terms of section 7(9) of the Public Protector Act:

4.3.1 During the investigation process, I issued notices in terms of section 7(9)(a) of the Public Protector Act (Notice) to the MDoE on 09 September 2019 to afford it an opportunity to respond to my provisional findings. The MDoE was served with a Notice and were to respond before 25 September 2019. The MDoE did not respond to my Notice.

4.4 Based on analysis of the allegations, I identified the following issues to inform and focus this investigation:

4.4.1 Whether the MDoE unduly delayed to transfer the Complainant’s personnel file or employment record to the GDE when she was transferred to the GDE at the end of December 1992.

4.4.2 Whether the MDoE failed to properly manage and to take care of the employment records of the Complainant, and if so, whether this amounts to maladministration; and
4.4.3. Whether the Complainant is improperly prejudiced by the conduct of the MDoE in the circumstances.

4.5 The Key Sources of information

4.5.1 Documents:

4.5.1.1 Complaint form received from the Complainant dated 18 April 2016;

4.5.1.2 Document proving that the GDE requested the Complainant’s personnel file as far back as 13 April 1993, and again on 27 February 1995; and

4.5.1.3 A document serving as proof of submission of the Complainant’s personnel file to the GDE

4.5.1.4 Circular 4 of 2001 on the National Minimum Information Requirements (NMIR)

4.5.2 Interviews conducted:

4.5.2.1 Interview with the Complainant on 24 January 2017;

4.5.2.2 Meeting with Mr CR Mhlabane of MDoE on 14 March 2018; and

4.5.2.3 Meeting with Mr CR Mhlabane and Ms Pretty Zwane of MDoE on 15 April 2019.

4.5.3 Correspondence sent and received

4.5.3.1 An e-mail to MDoE dated 28 March 2017 from the Public Protector; and

4.5.3.2 An email to the GDE dated 11 July 2017; and
4.5.3.3 An e-mail to the Public Protector dated 28 July 2017, together with letters that were sent to the MDoE dated 13 April 1993 and 27 February 1995 requesting the Complainant’s personnel file; and

4.5.3.4 A follow up email to the MDoE dated 20 October 2017.

4.5.4 Legislation and other prescripts.

4.5.4.1 The Constitution of the Republic of South Africa, 1996 (The Constitution);

4.5.4.2 The Public Protector Act, 23 of 1994;

4.5.4.3 National Archives and Record Services of South Africa Act, 43 of 1996 and

4.5.4.4 Public Service Handbook, Minimum Service Delivery Standards.

4.5.4.5 Public Service Regulations, 2001

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

5.1 Whether the MDoE unduly delayed to transfer the Complainant’s personnel file or employment record to the GDE when she was transferred to the GDE at the end of December 1992.

Common cause issues

5.1.1 It is not disputed that the Complainant was an Educator employed by the former Kwa-Ndebele Department of Education, now the MDoE for the period
January 1979 until she was transferred to the GDE at the end of December 1992.

5.1.2. The GDE requested the employment records of the Complainant on 27 February 1995, from the MDoE, however there is no evidence that the records were forwarded or submitted to the GDE in response to the request, until the Complainant approached my office for assistance.

_Issues in dispute_

5.1.3. The issue for my determination is whether the MDoE unduly delayed to submit the Complainant's personnel file or employment record to the GDE, and if so, whether this amounts to maladministration.

5.1.4. The issues are mainly common cause, the MDoE acknowledged that it only traced and transferred the Complainant's file to the GDE after intervention by my office on 17 April 2019, 26 years after the Complainant was transferred to the GDE.

_Application of the relevant law_

5.1.5. Chapter 12, of the Public Service Handbook, under heading, Minimum Service Delivery Standards provides that "file of employees transferred within the Public Service must be available in the human resource records registry within one calendar month after the new employee joined the new Department".

_Conclusion_
5.1.6. From the evidence discussed above, it is evident that the MDoE failed to transfer the Complainant’s personnel file or employment records to the GDE when the Complainant was transferred in December 1992.

5.1.7. The MDoE only transferred the Complainant’s personnel file to the GDE on 17 April 2019, 26 years after the Complainant was transferred to GDE and only after intervention by my office in the matter and that the personnel file was only recently found in storage at the Regional Office of the MDoE.

5.2. Whether the MDoE failed to properly manage and to take care of the employment records of the Complainant, and if so, whether this amounts to maladministration

Common cause issues

5.2.1. It is not in dispute that the employment record of the Complainant could not be found by the MDoE when the Public Protector made enquiries as to the employment history and records of the Complainant in 2017. The non-availability of the records was also echoed during a meeting with the Public Protector by the MDoE that was held on 14 March 2018.

The issue in dispute

5.2.2. The issue for my determination is whether the failure by the MDoE to keep proper records of personnel information which is easy accessible at all times amounts to maladministration.

5.2.3. During a subpoena hearing of the Public Protector on 15 April 2019, Mr CR Mhlabane, the Deputy Director Corporate Services in the Nkangala Region of the MDoE remarked that the filing system in their department is allegedly in
total disarray which has led to the non-response and submission of the relevant employment information and history of the Complainant to the GDE and Public Protector at the time.

5.2.4. Mr Mhlabane however mentioned during the meeting held on 15 April 2019 that the MDoE has allegedly only recently appointed a service provider to assist in getting the record system and archiving of the records sorted out.

Application of the relevant law

5.2.5. Section 1 of the National Archives and Record Services of South Africa Act, 43 of 1996 (the Act) record "means recorded information regardless of form or medium".

5.2.6. Section 13(5)(a) of the Act provides that "the head of the governmental body shall, subject to any law governing the employment of personnel of the governmental body concerned and such requirements as may be prescribed, designate an official of the body to be the records manager of the body".

5.2.7. Chapter 1 Part VII H of the Public Service Regulations, 2001 provides that "a head of department shall keep a record of each employee and of each post on the approved establishment in accordance with the National Minimum Information Requirements as issued by the Minister".

5.2.8. Circular 4 of 2001 on the National Minimum Information Requirements (NMIR) was issued to heads of all departments / provincial administrators.

5.2.9. This circular deals with the National Minimum Information Requirements issued by the Minister of the Public Service and Administration in terms of regulation H of Chapter 1 of the Public Service Regulations, 2001.
5.2.10. The circular applies to all persons appointed in terms of the Public Service Act, 1994.

5.2.11. Paragraph 4 of the circular provides that:

To enable effective planning, management, and policy development, heads of department are required to collect information in the following major areas (details within each area are set out in further detail in the table below).

A. Essential biographical information for all employees,
B. Current rank and salary information for all employees,
C. Education, training and development information for all employees,
D. Career incidents within the public service
E. Disciplinary matters
F. Leave,
G. Organisational and geographical information
H. All posts on the fixed establishment

Conclusion

5.2.12. The evidence indicates that the MDoE failed to properly manage and to take care of the employment records of the Complainant.

5.3. Whether the Complainant is improperly prejudiced by the conduct of the MDoE in the circumstances.

Common cause

5.3.1. It is common cause that the Complainant was not paid her pension benefits for the period January 1979 until December 1992, because the GDE could not
provide proof of her pension contribution for this period when the Z102 of the Complainant was submitted to the GPAA.

The issue in dispute

5.3.2. The issue for my determination by the Public Protector is whether the failure by the MDoE to transfer the Complainant’s personnel file and failure to keep proper records, which should be accessible at all times, improperly prejudiced the Complainant.

Application of the relevant law

5.3.3. Rule 6 of the Government Employees Pension Law, 1996 provides that "the Board is entitled to require satisfactory proof of the right of any member, pensioner or his or her beneficiaries to any benefit and the Fund is not obliged to pay benefits to a member, pensioner or their beneficiaries until such proof has been submitted to the Board".

5.3.4. The evidence discussed above indicates that the Complainant could not, at the time of her retirement claim pension benefits for January 1979 until December 1992 because the GDE did not have documentary proof that she was contributing to a pension fund during this period.

5.3.5. The evidence further indicates that because of the undue delay by the MDoE to submit the Complainant’s personnel file to the GDE, she did not receive pension benefits for the 13 years she worked prior to her transfer to the GDE.

Conclusion

5.3.6. Due to the failure by the MDoE to the transfer of the Complainant’s personnel file or employment record to the GDE, in December 1992, the latter could not
submit proof of contribution to a pension fund by the Complainant to the GPAA for the correct calculation of her pensionable period of service.

5.3.7. As a result of the GDE’s failure to submit proof of contribution for the period of service from January 1997 until December 1992, the GPAA incorrectly calculated the Complainant’s pension benefits with the result that she did not receive the correct amount of pension benefits for the number of years of service rendered.

6. FINDINGS

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

6.1 Regarding whether the MDoE unduly delayed to transfer the Complainant’s personnel file or employment record to the GDE when she was transferred to the GDE at the end of December 1992.

6.1.1. The allegation that the MDoE unduly delayed to transfer the Complainant’s personnel file or employment record to the GDE when she was transferred to the GDE at the end of December 1992 is substantiated.

6.1.2. The Complainant was an Educator employed by the former Kwa-Ndebele Department of Education, now the MDoE for the period January 1979 until she was transferred to the GDE at the end of December 1992.

6.1.3. The GDE requested the employment records of the Complainant on 27 February 1995, from the MDoE, however there is no evidence that the records were forwarded or submitted to the GDE in response to the request, until the Complainant approached my office for assistance.
6.1.4. Therefore, the actions of the MDoE amount to undue delay envisaged in section 6(4)(a)(ii) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

6.2 Regarding whether the MDoE failed to properly manage and to take care of the employment records of the Complainant, and if so, whether this amounts to maladministration.

6.2.1 The allegation that the MDoE failed to properly manage and take care of employment records of the Complainant, is substantiated.

6.2.2 Although the MDoE eventually located and submitted the Complainant's personnel file, it however could not locate it when we raised this complaint with them. During a subpoena hearing of the Public Protector on 15 April 2019, Mr CR Mhlaba, the Deputy Director Corporate Services in the Nkangala Region of the MDoE remarked that the filing system in their department is allegedly in total disarray which has led to the non-response and submission of the relevant employment information and history of the Complainant to the GDE and Public Protector at the time, 26 years after her transfer to the GDE.

6.2.3 The MDoE failed to locate the Complainant's personnel file for twenty six (26) years and three (3) months.

6.2.4 Therefore, the conduct of the MDoE amounts to maladministration in state affairs as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

6.3 Regarding whether the Complainant is improperly prejudiced by the conduct of the MDoE in the circumstances.
6.3.1 The allegation that the Complainant was improperly prejudiced by the conduct of the MDoE, is substantiated.

6.3.2 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. The MDoE failed for twenty six (26) years and three (3) months to locate the Complainant’s personnel file.

6.3.3 Therefore, the conduct of the officials of the MDoE led to improper prejudice suffered by the Complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act and and improper conduct as envisaged in section 182(1)(a) of the Constitution.

7. REMEDIAL ACTION

7.1. 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:

7.1.1. The Acting Head of Department, Mr JR Nkosi, must within fourteen (14) working days from the date of the report, issue a written apology to the Complainant, apologising for the MDoE’s undue delay to submit the Complainant’s personnel file to the GDE when the Complainant was transferred in December 1993.

7.1.2. The Acting Head of Department must ensure that the MDoE pays interest at the prescribed rate of interest, determined in the Prescribed Rate of Interest Act, 1975 GG 37831 July 2014 on the amount determined by the GPAA after recalculation of the Complainant’s pension benefits for period January 1979 until December 1992.
7.1.3. The interest payable to the Complainant must be calculated from the date of retirement, which was December 2014 to the date of payment.

8. MONITORING

8.1. The Acting Head of Department to submit an action plan, within ten (10) working days from the date of report, indicating how the remedial actions mentioned above will be implemented.

8.2. The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 25/10/2019