

REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO 20 of 2008/2009

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF THE IMPROPER DEDUCTION OF PENSION BENEFITS OF A FORMER MEMBER OF THE SOUTH AFRICAN POLICE SERVICE AND THE IDENTIFICATION OF SYSTEMIC DEFICIENCIES IN THE PRACTICES AND PROCEDURES FOR THE RECOVERY OF DEPARTMENTAL DEBT FROM PENSION BENEFITS

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Executive Summary

The Office of the Public Protector (OPP) investigated a complaint relating to the alleged improper deduction of pension benefits of a former member of the South African Police Service (SAPS), Ms N Niemand (the Complainant).

It was found that the procedure prescribed by the Government Employees Pension Fund (GEPF) in its Procedure Manual for the recovery of a departmental debt in terms of section 21(3) of the Government Employees Pension Law, 1996 (GEP Law) from the pension benefits of the Complainant was not complied with, as the following mandatory documentation was not received by the GEPF:

- Proof that the Complainant had been informed of the total financial liabilities and debt that was claimed against her pension benefits; and
- An unequivocal admission of liability for the purposes of paragraphs 3.4.3.2 and 3.4.4.3 of the Procedure Manual; or
- A copy of a Court order or the member's approval in writing.

It was furthermore found that the decision to recover the departmental debt from the Complainant's pension benefits did not comply with the requirements of section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA) and was therefore procedurally unfair.

The Public Protector therefore recommended that the GEPF take urgent steps to ensure that the amount deducted from the pension benefit of the Complainant, referred to in this report, is paid to her, together with interest thereon at the rate prescribed in the GEP Law, calculated from the date of the deduction to date of payment.

The OPP received a number of similar complaints from other ex-public servants. Further enquiries revealed that while the GEPF rely on employer departments to comply with the required prescripts when submitting claims to GEPF for outstanding departmental debt

from pension benefits, the employer departments generally fail to advise the members in advance of their financial liabilities towards the employer and the intention to claim the departmental debt from the employee's pension benefits. In many instances the deduction of the debt occurred without the knowledge or consent of the employee or without an order of a court of law, depending on the applicable provision of the GEP Law. The GEPF further confirmed that employer departments have in the past been allowed to claim deduction of any debt, including contractual debt, such as overpaid salaries.

It is widely acknowledged that "*the legislature regards pension assets as special assets deserving of enhanced protection.*" It is therefore a source of concern that the conduct of the government agencies involved might adversely affect the pension interest of other members of the GEPF (about 1, 1 million employees) when they exit the GEPF in future.

It was found that employer departments generally fail to furnish the GEPF with sufficient information and documentation to enable it to exercise its discretion properly and independently, to determine the members' liability either in terms of the relevant provisions of the GEP Law in respect of the amount claimed from the pension benefits by the employer department. It was however, reiterated that it remained the GEPF's responsibility to ensure that the decision is taken in compliance with the requirements of the GEP Law, the GEPF Rules, the Procedure Manual, and PAJA in particular.

The current internal procedures and practices of the GEPF are falling short of some of the mandatory requirements for good administrative practice (including recognition of the right of employees to make representations directly to the GEPF before a decision is made on the deduction of the debt from their pension benefits), and that these shortcomings may amount to system-wide procedural deficiencies in the decision-making process by the GEPF in respect of claims in terms of the relevant provisions of the GEP Law.

The view is held that the policy of the GEPF as recorded in the Procedure Manual or other communications to employer departments in terms of section 7 of the GEP Law, do

not provide sufficient protection of the pension interests of members of the GEPF in terms of the set-off of debt claimed by employer departments.

It is recommended that:

- a) The GEPF take urgent steps to ensure that the amount deducted from the pension benefits of the Complainant, is paid to her, together with interest;
- b) Measures are implemented to ensure compliance by the GEPF as well as contributing employer departments with the relevant provisions of the GEP Law and the mandatory requirements for the recovery of departmental debt in terms of the Procedure Manual;
- c) The GEPF review the policy documents, including the Procedure Manual and the GEPF Rules that determine the nature, form and manner in which the employer departments are entitled to claim departmental debt from pension benefits to ensure that it meets the mandatory requirements and legal guidelines for the protection of the pension interests of members of the GEPF and the set-off of debt payable to employer departments; and
- d) The GEPF formally and adequately record its decisions in terms of the relevant provisions of the GEP Law and the reasons for allowing or refusing a claim to indicate diligent compliance with its legal obligations.

The GEPF has already indicated that it would urgently review its policy and practices in respect of the deduction of departmental debt. The OPP will monitor the progress in this regard and the implementation of the recommendations made in this report on a quarterly basis.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF THE IMPROPER DEDUCTION OF PENSION BENEFITS OF A FORMER MEMBER OF THE SOUTH AFRICAN POLICE SERVICE AND THE IDENTIFICATION OF SYSTEMIC DEFICIENCIES IN THE PRACTICES AND PROCEDURES FOR THE RECOVERY OF DEPARTMENTAL DEBT FROM PENSION BENEFITS

1. INTRODUCTION

- 1.1 This is a report in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section (8)2(b) (i) of the Public Protector Act, 1994.
- 1.2 It is submitted to the National Assembly and the Chief Executive Officer of the Government Employees Pension Fund (GEPF), as well as the National Commissioner of the South African Police Service (SAPS) and the National Commissioner of the Department of Correctional Services.
- 1.3 The report relates to an investigation into an allegation of the improper deduction of pension benefits of a former member of the SAPS. This complaint, as well as similar complaints received by the Public Protector was indicative of possible significant systemic deficiencies in the practices and procedures relating to the recovery of departmental debt from the pension benefits of members of the GEPF. The report also relates to an own initiative systemic investigation into the numerous complaints received in respect of the deduction of departmental debt from the pension benefits of employees.

2. THE COMPLAINT

- 2.1 The Complainant, Ms N Niemand, approached the Office of the Public Protector (the OPP) on 28 February 2006. She alleged that she was employed by SAPS from 27 May 1991 to 28 February 2005, when she resigned.
- 2.2 According to the Complainant, she was medically unfit to work for a period of almost two years, from August 2002 to January 2005. She submitted sick leave applications based on medical certificates on a monthly basis during the said period to the Station Commissioner at Fairlands Police Station, where she was based.
- 2.3 Once she had exhausted the 36 days sick leave cycle, she submitted an application for incapacity leave, in terms of the applicable leave policy of the SAPS.
- 2.4 She was not informed that any of her said applications were disapproved, and the SAPS continued to pay her salary during the said period.
- 2.5 When she resigned, in February 2005, she received a certificate from the Office of the Area Commissioner, confirming that she had completed and submitted all relevant documents. It also stated that there were "**no outstanding medical certificates**" in her case.
- 2.6 After her resignation, she constantly inquired into progress made relating to the payment of her pension benefits at the Office of the Area Commissioner in Johannesburg, who informed her that the SAPS wanted to conduct an audit on her leave record, but that it could not be located.

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- 2.7 The Complainant was requested by the SAPS to submit copies of the medical certificates that she had submitted and the leave audit was finalised.
- 2.8 She was subsequently informed that the majority of her applications for sick/disability leave were disapproved **after she had resigned** and that all her pension benefits were allocated towards a "departmental debt" for unpaid leave taken.
- 2.9 The Complainant alleged that the decision of the SAPS to deduct her pension benefits for what it regarded as unpaid leave was improper and caused her prejudice.

3. THE JURISDICTION AND POWERS OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

- 3.1 Section 182 (1) of the Constitution provides that:

"The Public Protector has the powers as regulated by national legislation-

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 result in any impropriety or prejudice;

to report on that conduct; and

to take appropriate remedial action."

- 3.2 In terms of section 6(4) (a) of the Public Protector Act, 1994 the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government, abuse or unjustifiable exercise of power or unfair, capricious,

discourteous or other improper conduct or undue delay by a person performing a public function.

3.3 The Public Protector may at any time prior to, during or after an investigation make any appropriate recommendation that he/she deems expedient to the public body or authority affected by it.

3.4 The complaint against the SAPS and the GEPF falls within the jurisdiction and powers of the Public Protector to investigate.

4. THE INVESTIGATION

The investigation was conducted in terms of sections 6(4) and 7 of the Public Protector Act, 1994 and comprised the following:

4.1 Consideration of the documents submitted by the Complainant;

4.2 Consultation with the Complainant;

4.3 Consultation and correspondence with officials of the SAPS;

4.4 Consideration of applicable SAPS policies;

4.5 Consideration of applicable **legislation:**

4.5.1 Constitution of the Republic of South Africa, 1996 (the Constitution)

4.5.2 The Promotion of Administrative Justice Act, 2000 (PAJA);

4.5.3 The Government Employees Pension Law, 1996 (GEP Law);

4.5.4 The Rules of the Government Employees Pension Fund (GEPF Rules); and

4.5.5 The Pension Funds Act, 1956;

4.6 Consideration of jurisprudence, including decisions of the Pension Fund Adjudicator, relevant to the matter:

4.6.1 Decisions of the Pension Fund Adjudicator

4.6.1.1 T S Ehlers Complainant and Nedcor Defined Contribution Provident Fund¹;

4.6.1.2 M. P. Mudzusi and Hospitality Industry Provident Fund²; and

4.6.1.3 Records v Barlows Pension Fund³

4.6.2 Case law

4.6.2.1 Absa Bank Limited v Hendrik Jacobus Burmeister⁴;

4.6.2.2 Government Employees Pension Fund v Naidoo and Another⁵;

4.6.2.3 Grey's Marine Hout Bay (Pty) Limited and Others v Minister of Public Works and Others⁶;

4.6.2.4 President of the Republic of South Africa and Others v South African Rugby Football Union and Others⁷;

4.6.2.5 Government Employees Pension Fund v Buitendag⁸;

4.6.2.6 Chirwa v Transnet Limited and Others⁹;

4.6.2.7 Patricia Van Schalkwyk and 48 Other Applicants v N P Mkiva (In Her Capacity As The Chief Financial Officer: The Provincial Treasury, Free State Province)¹⁰;

1 Case No: Pfa/Ec/2873/01/Nj

2 Case No: Pfa/Ga/1281/00/Km

3 (PFA/GA/821/99)

4 (647/02) [2004] ZASCA 16 (26 March 2004)

5 2006(6)SA 304 (SCA)

6 2005(6) SA 313 (SCA)

7 (CCT16/98) [1998] ZACC 21; 1999 (2) SA 14; 1999 (2) BCLR 175 (2 December 1998)

8 [2006] SCA 121 (RSA)

9 (CCT 78/06) [2007] ZACC 23 (28 November 2007)

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- 4.6.2.8 Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council And Others ¹¹;
 - 4.6.2.9 Pharmaceutical Manufacturers Association Of South Africa and Another In Re Ex Parte President Of The Republic Of South Africa And Others¹²;
 - 4.6.2.10 Pepcor Retirement Fund v Financial Services Board¹³;
 - 4.6.2.11 Moodley v Local Transitional Council of Scottburgh Umzinto North and Another ¹⁴; and
 - 4.6.2.12 Hartman v Chairman, Board for Religious Objection, and others ¹⁵

5. THE RESPONSE OF THE SAPS TO THE COMPLAINT

- 5.1 During the investigation, the SAPS indicated that the supervision of sick leave is the joint responsibility of the employer department and the employee.
- 5.2 On 05 August 2003 (when the Complainant was absent from work) Circular 3/16/1:4/9/1:9/8/1 was issued by the SAPS, the objective of which was to prevent the abuse of incapacity leave.
- 5.3 The Circular prescribed a procedure regarding temporary incapacity leave, in accordance with the "*Management Policy and Procedure on Incapacity Leave and Ill-Health Retirement for Public Service Employees*". It provided, *inter alia*, that:

"8.1 Employees are entitled to 36 working days leave in a three-year cycle. In cases where an employee exhausted all his/her sick leave and a

10 Case No. : 1570/2007 (Orange Free State Provincial Division)

11 1998 (12) BCLR 1458 (Constitutional Court); 1999 (1) SA 374 (CC)

12 2000 (3) BCLR 241 (CC)

13 2003 (6) SA 38 (SCA).

14 2000 (4) SA 524 (D)

15 1987 (1) SA 922 (O) at 927G-928B.

recommended period of absence by an medical practitioner, will exceed the available days of sick leave, an application for incapacity leave (Appendix A & B) must be submitted to his/her supervisor in advance, before the day on which the absence commences. If circumstances do not permit, the application must be submitted not later than 5 (five) days after commencement of the period of absence. An employee is personally responsible for applying for incapacity leave. In those cases where the medical condition of an employee does not allow him or her to adhere to these directions, the supervisor must assist in the application.

8.2 In cases where employees do not comply with these instructions, absence will be regarded as annual/unpaid leave.

7.2 ... Any employee or supervisor who delays the submission of any application will be held accountable and must be disciplined in terms of the Discipline Regulations of the Service."

5.4 The Complainant stated that she was never officially informed of the fact that the policy/procedure regarding incapacity leave had changed. She was on sick leave during this period. She was also never called to account by her Manager (Station Commissioner) for the fact that she was "abusing" sick/incapacity leave, or informed that the medical certificates and reports that she submitted monthly were inadequate, or that she had to submit additional documentation. The Divisional Commissioner: Personnel Services responded on these issues by stating:

"...the possible reason why Insp Niemand was allowed by her Commander to be absent with full remuneration, could not be established. No information in this

regard is on record.....No proof of steps taken by her commander ...could be found on the available records."

- 5.5 Responding to the apparent lack of management of her applications for sick/incapacity leave by the supervisor of the Complainant, Senior Superintendent P M Claassen of the Office of the Provincial Commissioner stated that:

"Insp Niemand's absenteeism was monitored consistently. She submitted medical certificates and applications for temporary incapacity leave (that) was forwarded to Head Office...the authority to approve or denied [sic] application for incapacity leave lays [sic] at Head Office."

- 5.6 The SAPS further indicated during the investigation that the reason for disapproving the Complainant's application for incapacity leave was that she mismanaged her sick leave.

- 5.7 It was conceded by the SAPS that the incapacity leave of the Complainant was *"neither approved nor disapproved on a monthly basis. The reasons are that...temporary incapacity applications are not considered on a monthly basis, but per application covering a specified period of absence."*

- 5.8 The SAPS indicated that the deduction of the pension benefits of the Complainant was authorized in terms of section "21(3) (b+c) of the Pensions Act, 1996 (Act no 21 of 1996)." This reference later appeared to be to the Government Employees Pension Law, which was promulgated by proclamation in 1996.

6. COMMON CAUSE

From the investigation, it was established that the following is not in dispute:

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- 6.1 The Complainant was absent from work for more than 500 days, prior to her resignation i.e. from 29 August 2002 to 31 December 2003 and 23 February 2004 to 4 November 2004;
 - 6.2 She was stationed at the SAPS Fairlands at the time, and submitted applications for sick leave based on medical certificates on a monthly basis to the Station Commissioner;
 - 6.3 She was never informed during her absence of 500 days that any of her applications for sick leave had not been approved. She was also not called to account by her employer department for any of the periods of sick leave taken;
 - 6.4 She was paid her monthly salary during the total period of absence;
 - 6.5 A new leave policy was introduced in the SAPS on 5 August 2003, to prevent the abuse of sick leave. The Complainant was by then already absent from work since August 2002, on the advice of a Clinical Psychologist who was treating her;
 - 6.6 After she returned to work on 5 January 2005, she was instructed to submit an application form for incapacity leave;
 - 6.7 Her incapacity leave was officially disapproved on 12 October 2005, 7 months after her resignation, and she was only informed of this decision on 6 November 2005;
 - 6.8 The periods of her absence were regarded by the SAPS as unpaid leave, calculated as leave without pay in the amount of R204 896-72;

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- 6.9 The pension benefit of the Complainant was paid out by the GEPF on 28 February 2006, and the total benefit of R150 811-90 was paid over to the SAPS as partial settlement of what was regarded as unpaid leave taken by her;
- 6.10 The Complainant was not notified of the decision of the SAPS to regard her absence from work as unpaid leave, resulting in a departmental debt, to be deducted from her pension benefits; and
- 6.11 She was also not afforded a reasonable opportunity to make representations in respect of the said decision of the SAPS and of her right of review or (if any) internal appeal.

7. THE LEGAL FRAMEWORK

7.1 Introduction: Protection of pension assets in Pension Funds registered under the Pensions Act, 1956

- 7.1.1 The lawfulness of the deduction or set-off of a debt to an employer department against a benefit payable by a pension fund has served on numerous occasions before a colleague institution, the Pension Fund Adjudicator and the Tribunal of the Pension Fund Adjudicator. The approach by the Pension Fund Adjudicator that "*the legislature regards pension assets as special assets deserving of enhanced protection*"¹⁶, is endorsed by both the Government and the Courts¹⁷. According to the Memorandum on the Objects of the Pension Funds Amendment Bill, 2007 "*the primary objective of the Amendment Bill is to enhance the protection of the pension interest of members, given that dedicated contributions towards their retirement often extend across their lifetimes, and therefore serves*

¹⁶ Fn 1 and 2 above

¹⁷ Burmeister case – Fn 4 above; *RETIREMENT FUND REFORM*, a discussion paper issued by National Treasury, December 2004,

as the most significant source of saving for most individuals in formal employment.”

7.1.2 The Pension Funds Act, 1956 provides various measures, in terms of which the pension assets of members of the Pension Funds registered under the Act are protected under different circumstances, including protection against creditors. In terms of section 37A of the Act, no benefit provided for in the rules of a registered fund, or the right to such a benefit, may be reduced, transferred, ceded, pledged, hypothecated or be liable to be attached under a judgement or order of a court of law. The effect of s 37A (1) is to establish a general rule protecting pension fund benefits from *inter alia* attachment and execution. The Pension Fund Adjudicator stressed on occasion that the object of the legislation is clearly to protect pensioners against being deprived of the source of their pensions. In terms of s 37(B) such benefits are also deemed not to form part of the assets in the insolvent estate of the person in question.

7.1.3 The protection afforded by s 37A(1) is, however, subject to a number of exceptions permitted by the Income Tax Act, 1962, the Maintenance Act, 1963, and certain provisions contained in the Pension Funds Act itself. One such exception is provided for in section 37D (1) (b) which protects the employer department’s right to recover housing loans and compensation for certain losses caused to the employer department by the wrongful conduct of the member. This provision allows for compensation in respect of damage caused to the employer department by reason of a member’s theft, dishonesty, fraud or misconduct to be deducted from the benefit payable to the member in terms of the rules of the retirement fund. However, before this amount can be recovered, the member has to:

- either admit liability to the employer department in writing, or

- a judgment has to be obtained against the member in any court.¹⁸

The Supreme Court of Appeal observed that this section, therefore, affords to an employer department a right of access to pension fund benefits which other creditors do not have. "*The rationale of the exception can only be the employer department's participation in the pension fund concerned, normally by way of employer department contributions.*"¹⁹

7.2 Protection of pension assets of members of the Government Employees Pension Fund by the Government Employees Pension Law, 1996

7.2.1 The GEP Law was promulgated by Proclamation 21 of 1996. It aimed to rationalise pension fund benefits and to replace certain pension laws relating to the pension funds to which the State contributed as employer. It also made provision for the payment of pension benefits to persons in the employment of Government.

7.2.2 Similar to the protection enjoyed by members of Pension Funds registered under the Pension Funds Act, the GEP Law contains corresponding provisions to ensure the enhanced protection of pension assets, by prohibiting *inter alia*, the deduction and attachment of a pension benefit, except under certain conditions.

7.2.3 In terms of section 21(1), no benefit or right in respect of a benefit shall be capable of being assigned or transferred or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.

18 Section 37D(1)(b) of the Pension Funds Act, 1956

19 Burmeister case- Fn 4 above

7.2.4 In the case of *Government Employees Pension Fund v Naidoo and Another*²⁰ it was held that this section seeks to protect the pension benefit against the creditors of the member.

7.2.5 Section 21(3) provides for exceptions to the general rule set out in subsection (1). It firstly, provides that any amount payable to the employer department or the pension fund by any member on the date of his/her retirement or discharge may be deducted from the benefit²¹.

7.2.6 In terms of section 21(3)(b), any amount which has been paid to a member in terms of the Law and to which he/she was not entitled, can be deducted from the benefit.

7.2.7 Section 21(3) of the GEP Law provides as follows:

"(3) Notwithstanding the provisions of subsection (1) or of any other law-

- (a) any amount which is payable to the employer department or the Fund by any member in the employment of such employer department on the date of his or her retirement or discharge, or which the employer department is liable to pay in respect of such member;*
- (b) any amount which has been paid to any member, pensioner or beneficiary in accordance with the provisions of this Law and to which such member, pensioner or beneficiary was not entitled;*
- (c) the amount of any loss which has been sustained by the employer department through theft, fraud, negligence or any misconduct on*

²⁰ Fn 5 above

²¹ Section 21(3)(a) of the GEP Law

the part of any member, pensioner or beneficiary which has been admitted by such member or pensioner in writing or has been proved in a court of law,

may be deducted from the benefit payable to such member, pensioner or beneficiary under this Law in a lump sum or in such installments as the Board may determine.”

7.3. Relevance of the Promotion of Administrative Justice Act, 2000

7.3.1 Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It also provides that national legislation must be enacted to give effect to this right.

7.3.2 “Administrative action” is defined by PAJA, as:

7.3.2.1 A decision taken, or a failure to take a decision, by

7.3.2.2 an organ of state,

7.3.2.3 when exercising power in terms of the Constitution or in terms of any legislation,

7.3.2.4 which adversely affects the rights of any person, and

7.3.2.5 which has a direct external legal effect.

7.3.3 Section 3 provides that:

“(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a)

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

- (i) adequate notice of the nature and purpose of the proposed administrative action;*
- (ii) a reasonable opportunity to make representations;*
- (iii) a clear statement of the administrative action;*
- (iv) adequate notice of any right of review or internal appeal, where applicable;*
- (v) adequate notice of the right to request reasons..."*

7.3.4 In the *Grey's Marine Hout Bay*-case²² the Supreme Court of Appeal adopted a purposeful approach to the meaning of "administrative action". It was held that:

"[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the right of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

22 Fn 6 above

[24] *Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals." (emphasis added)*

7.3.5 The Constitutional Court held in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*²³ that:

"The principal function of s 33 is to regulate conduct of public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common-law principles developed over decades..."

7.3.6 In the *Government Employees Pension Fund v Buitendag*²⁴ the Supreme Court of Appeal referred to the situation where the Board of Trustees of the GEPF exercised a discretion in terms of section 22 of the GEP Law as to which

²³ Fn 7 above

²⁴ Fn 8 above

dependants should receive the gratuity, and in what proportions. The following observations of the Court are relevant for the purposes of this discussion:

"When the Board's decision to allocate the gratuity was made, the Promotion of Administrative Justice Act 3 of 2000 had not yet come into operation. Accordingly, any rights of the children to have that decision set aside must be sought in item 23(2)(b) of Schedule 6 to the 1996 Constitution, which provided that ss 31(1) and (2) of the Constitution had to be read as follows:

'Every person has the right to –

- (a) lawful administrative action where any of their rights or interests is affected or threatened;*
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;*
- (c); and*
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'*

*The crucial phrase for present purposes is **'lawful administrative action'.**"*

(Emphasis added).

7.4 Procedure established by the Government Employees Pension Fund for the deduction of departmental debt

7.4.1 Paragraph 3.3.1 of the Procedure Manual for Interaction between Pensions Administration and Government Employer Departments (the Procedure Manual of the GEPF) provides as follows:

*"The member **must be informed** of the total financial liabilities and debt **before** an employer department representative submits the form to the Pensions Administration. Only debt according to the provision of section 21(3) and (4) of the GEPF Act, 1996, and the provision of section 3 (bis) 2 of the AIPF Act, 1 1963 (Act 41 of 1963) can be recovered from the pension benefits."*(emphasis added)

7.4.2 Paragraphs 3.4.3.2 and 3.4.4.3 of the Procedure Manual of the GEPF describe the **mandatory** documents that must be submitted to the GEPF in an application for withdrawal from the Fund. These paragraphs require *inter alia*, that:

*" If a debt amount is stated of any loss sustained by the employer department, through **theft, fraud, negligence, or any misconduct** on the part of any member, pensioner or beneficiary, and this has been admitted by the member, then a **Court Order or Member's approval in writing** is needed."* (emphasis added)

8. ANALYSIS

8.1 The Pension Fund Adjudicator reiterated on a number of occasions that the power to withhold a member's benefit can only be derived from statute or the rules of the fund.

8.2 In the matter at hand the decision by the GEPF to deduct the debt claimed by the SAPS from pension benefits of the Complainant was purportedly taken in terms of section 21(3) of the GEP Law.

8.3 The procedure prescribed by GEPF allows the recovery of a departmental debt on the following conditions:

8.3.1 The member must be **informed** (presumably in writing) of the total financial liabilities and debt that will be claimed from the pension benefits before the exit documents are submitted by the employer department to the GEPF²⁵;

8.3.2 The debt must be in respect of any loss sustained by the employer department, which must have been caused by reason of theft, fraud, negligence or misconduct by the member²⁶;

8.3.3 The member must admit (liability for) the loss as a result of theft, fraud, negligence or misconduct²⁷;

25 Paragraph 3.3.1 of the Procedure Manual *ibid*.

26 Section 21(3)(c) of the Pension Law and Paragraphs 3.4.3.2 and 3.4.4.3 of the Procedure Manual.

8.3.4 **"Then** a Court Order or Member's approval in writing is needed"²⁸ (emphasis added)

8.4 With regard to the corresponding provisions of the Pension Funds Act, 1956, the Pension Fund Adjudicator reiterated the following in the *Barlows* matter:

*"It is important to stress that section 37D (b) consists of two components. The first component may be seen as the legal component, in terms of which, the fund may deduct any amount due by a member to his employer department on the date of his retirement or on which his membership of the fund ceases in respect of damage caused to the employer department by reason of the member's theft, dishonesty, fraud or misconduct. The second component of section 37D (b) is an evidentiary one, which requires the employer department to either have a written admission of liability or a judgment obtained against the member in any court in respect of the aforesaid compensation. Thus, it is important not to confuse the two components and treat them as one legal requirement."*²⁹

8.5 The decision in the *Ehlers*-decision³⁰, sets out the requirements to be met in order for a document to constitute an unequivocal admission of liability:

- The amount must be due by the member to the employer department,
- The amount must be due on the date that the member ceased to be a member of the fund,
- The amount must be in respect of compensation payable,

²⁷ Paragraphs 3.4.3.2 and 3.4.4.3 of the Procedure Manual – "*and this has been **admitted** by the member*" (emphasis added)

²⁸ *ibid*

²⁹ Fn 3 above

³⁰ Fn1 Above

- The compensation must be in respect of any damage caused to the employer department, which must have been caused by reason of theft, fraud, dishonesty or misconduct by the member, and
- The member must have furnished a written admission of liability to the employer department in respect of the delictual damages caused to the employer department.

8.6 In the *Moodley*-case³¹ the High Court dealt with the interpretation of section 37D(b)(ii) of the Pension Funds Act, more specifically the term “misconduct”. The Court had to decide whether the misconduct the plaintiff had been convicted of in terms of his service conditions constituted misconduct as envisaged by the section. The court concluded that the meaning of the general word “misconduct” in section 37D(b)(ii) must be interpreted to mean **dishonest conduct or at least involving an element of dishonesty**. In other words, in terms of section 37D a Pension Fund may only deduct the amount for loss or damages suffered by an employer department from the pension benefits of an employee where such damages have been caused by reason of any theft, dishonesty, fraud or other misconduct involving an element of dishonesty³².

8.7 The Supreme Court of Appeal emphasised that it is furthermore necessary to bear in mind that where a statutory provision creates an exception to a rule of general application, such a provision will normally be strictly interpreted. In other words, the legislature will be presumed to have intended that **only cases clearly falling within the scope of the language used are to be excepted**. (See *Hartman v Chairman, Board for Religious Objection, and others*³³) “*This approach to statutory interpretation is particularly apposite when the rule of general*

31 Fn 14 above

32 “Practical application of section 37D(b)(ii) of the Pension Funds Act where a member has committed theft, fraud, dishonesty or misconduct”, 9 July 2001 by Leslie Primo, Legal Services and Communications, Liberty Corporate Benefits

33 Fn 15 above

*application has as its object the protection of a particular class of persons considered by the legislature to be worthy of protection, such as pensioners*³⁴.

- 8.8 Accordingly, the recovery of debt from the pension benefits of an employer department in terms of section 37D(b)(ii) is currently limited to deductions to be made in respect of a wrongdoing by the member that involves an element of dishonesty and would constitute delictual liability. Strictly speaking, contractual debt such as car loans or computer loans in respect of which the employee still owes a balance to the employer department on the date of withdrawal from the fund, do not fall within the ambit of section 37D(b)(ii). Thus, an admission of a contractual liability is not sufficient. Such debt may therefore not be deducted from the member's benefits payable in terms of the rules of the fund and must instead be recovered through other means, e.g. by the employer department instituting civil proceedings against the member³⁵.
- 8.9 While section 21(3) of the GEP Law has not been the subject of major legal scrutiny, section 37D (b) of the Pension Funds Act, 1956 has been canvassed extensively and clear principles and guidelines have been established for the recovery of debt by an employer department from the pension benefits of employees belonging to pension funds, where the state is not a contributing employer department. Consideration has to be given to the relevance of these principles and guidelines discussed, in view of the fact that the payment of pension and other benefits to persons in the employment of the Government is not regulated by the Pension Funds Act, 1956 but in terms of the GEP Law. The question is therefore whether there would be any reason to conclude that employees belonging to the GEPF are not entitled to the same protection against the unlawful deduction of pension benefits by an employer department, which is afforded to members of pension funds registered under the Pension Funds Act.

34 Burmeister- case Fn 4 above

35 Fn 3 above

In other words, does the State as employer department have greater rights to the recovery of debt from the pension benefits of its employees than employer departments in the private sector?

- 8.10 In the *Chirwa*-case³⁶ the Constitutional Court considered certain aspects of the position of public sector employees and the State as employer department vis-à-vis the position of employees and employer departments in the private sector. The Court observed that “*the LRA does not differentiate between the State and its organs as an employer department, and any other employer department. Thus, it must be concluded that the State and other employer departments should be treated in similar fashion.*”

The Court further noted that “*... there is no longer a distinction between private and public sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviation from this principle should be justified. There is no reason in principle why public sector employees should be treated differently from private sector employees and be given more rights than private sector employees.*”

- 8.11 In conclusion there is nothing to suggest that the pension assets of members of the GEPF should enjoy lesser protection against the deduction of compensation by the State as employer department, than the pension assets of employees in the private sector.

9. ADDITIONAL COMMENTS FROM THE SAPS LEGAL SERVICES

- 9.1 The SAPS was presented with the views expressed in paragraph 8 above. The Legal Services Division of the SAPS in their response stated that:

- 9.1.1 In order for an amount to be deducted from a member, pensioner or

³⁶ Fn 9 above

beneficiary's pension benefits ... the amount of any loss sustained by the employer department must, either be **"admitted"** by the member or pensioner or be **"proved in a court of law"**;

9.1.2 It is clear that the decision by any employer department to effect a deduction from the pension benefit of any member, pensioner or beneficiary in terms of Section 21(3) of the Act, constitutes an administrative action; and

9.1.3 When a decision is taken by the employer department to effect a deduction from the pension benefit of any member, pensioner or beneficiary in terms of Section 21(3) of the Act (such decision having constituted an administrative action), and it is clear that such decision will adversely affect the rights or legitimate expectations of such member, pensioner or beneficiary - in order for such decision to constitute "just administrative action" as contemplated in Section 33 of the Constitution, the employer department **must comply with the requirements stipulated in Section 3(2)(b) of the PAJA.**

10. DETAILED RESPONSE FROM THE GEPF

10.1 In its response to the Public Protector the GEPF reiterated that it is a funded, contributory and defined benefit scheme. The benefits provided by the GEPF are accordingly not determined based on the amount of contributions paid to the GEPF by the member and the employer department, increased by investment and other income, where the member carries the investment risk, as is the case with defined contribution funds but are determined as a percentage of the average of the last two years of member's final salary at termination of service, multiplied by the period of pensionable service. It follows therefore that any financial losses suffered by the GEPF deplete the pool of funds from which all the members and pensioners must be paid and which must be sufficiently funded by the State as employer.

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- 10.2 Benefits in the form of gratuities, annuities, or both gratuities and annuities are payable on the termination of service of members of the GEPF. The termination of service of members is broadly categorised as discharges, retirements, resignations and deaths. Different benefits are payable on the occurrence of the specific events.
- 10.3 When the GEPF exercises the right to make deductions from pension benefits, the GEPF has to strictly comply with the requirements of the GEP Law and also follow a fair administrative procedure.
- 10.4 When determining whether to allow a deduction from a pension benefit in accordance with a request from a participating employer department, the competing interests of the member and the participating employer department, must be evaluated.
- 10.5 On the one hand, the rights of the member include -
- 10.5.1 a constitutional right to administrative action that is lawful, reasonable and procedurally fair;
 - 10.5.2 a constitutional right to have a dispute regarding any deduction adjudicated in a court of law or independent tribunal and not to be subjected to self-help by an employer department;
 - 10.5.3 a constitutional right to a fair pension;
 - 10.5.4 protection by section 21(1) from attachment and execution by way of a general rule protecting the pension fund benefits. Its object is clearly to protect pensioners against being deprived of the source of their pension; and
 - 10.5.5 a statutory right to receive payment of the pension benefits within 60 days after the termination of service, a right that is too easily ignored and even infringed by employer departments by failing and/or refusing to complete and submit claim forms in respect of members when their services are terminated.

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- 10.6 On the other hand, the employer department's rights include a right of access to pension fund benefits which other creditors do not have in terms of section 21(3). This right of the employer department creates an exception to a rule of general application and must accordingly be strictly interpreted, in other words, the legislation will be presumed to have intended that only cases clearly falling within the scope of the language used, are to be accepted. This approach of statutory interpretation is particularly apposite when the rule of general application has as its object the protection of a particular class of persons considered by the legislature to be worthy of protection, such as pensioners.
- 10.7 The rationale of the exception has been explained as being the employer department's participation in the pension fund, normally by way of employer department's contributions. This explanation, however, does not take full account of the history of pension funds.
- 10.8 Historically, it was a mixture of social, economic and legal influences that led to the emergence of the modern-day retirement fund. A pension benefit is the money or like benefit that is paid to an employee in lieu of remuneration in order, generally, to provide for, or at least help provide for, his/ her subsistence following his/ her retirement. Originally payment of a pension was discretionary, the product of the employer department's benevolence, but today it is invariable obligatory in nature, the obligation being assumed as a condition of employment at the commencement of the service.
- 10.9 It is trite that pension funds form an integral part of the employer department/employee relationship. This is also evident from the fact that the rules of the GEPF are the result of negotiations and collective agreement between the employer department and employee organisations in the public sector.
- 10.10 Despite being interlinked, the three parties are also separate and independent from each other. A claim arising from the relationship between the member and the pension fund is not to be adjudicated between the member and the employer

department. Similarly a claim arising between the member and the employer department, is generally not a matter to be settled between the member and the pension fund.

- 10.11 In view of the nature of pension benefits, namely that it was a condition of service offered by an employer department to its employees, employer departments used to implement unilateral changes to the employment contracts of its employees. This also occurred in the public service particularly in respect of pension benefits where the pension funds were established by law and the benefits prescribed by regulation.
- 10.12 The right to access an employee's pension benefits to satisfy a debt between an employer department and employees, is accordingly a remnant of these historical practices created by employer departments and is perceived to be a form of summary execution.
- 10.13 The employer department's right to access pension benefits must accordingly also be limited to situations wherein the member's right to a fair hearing is not infringed upon and the member retains the right to dispute the validity of the employer department's claim, for example in section 21(3) (c) cases where the amount has been admitted by the member or proved in a court of law.
- 10.14 Members, pensioners and beneficiaries are protected against creditors in the following ways:
- 10.14.1 no benefit, or right to a benefit, may be attached in the hands of the GEPF, subject to a limited number of exceptions;
- 10.14.2 a benefit payable to, or received by, any member, pensioner or beneficiary, whose estate is sequestrated, shall not form part of the assets in the insolvent estate; and
- 10.14.3 The GEPF may only, in very limited circumstances, make deductions from a benefit payable to a member, pensioner, or beneficiary.

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- 10.15 According to the GEPF this provision has never been interpreted to limit the deductions authorised to situations where members retire or are discharged, but members who resign have always been included in the section. The amounts to be deducted have also not been limited in view of the wide wording of the paragraph. Employer departments have therefore in the past been allowed to claim deductions of any debt, including contractual debt, such as overpaid salaries.
- 10.16 **The GEPF indicated that it has hitherto relied on the participating employer departments to inform members of the total financial liabilities and debt before the employer department submits the claim forms to the GEPF.**
- 10.17 It was submitted by the GEPF that this policy, however, now should possibly be reviewed in view of the fact that employer departments appear to fail to inform its employees of the intended deductions prior to submitting the claim forms to the GEPF. This failure by the employer department leads to a situation where the decision taken by the GEPF to deduct debt due to the employer department from pension benefits, falls to be set aside on review by the courts, on the basis that the GEPF failed to follow a fair procedure.
- 10.18 It has also been noted with concern that in situations where the decision by the GEPF to allow a deduction is set aside on review, it will be the obligation of the GEPF to pay the member the amount that was deducted and to recover any overpayment from the employer department who received the deductions. *(Section 21(3) (b) of Proclamation 21 of 1996).*
- 10.19 This section does not limit the GEPF's right to claim amounts paid to the member, other than the eventual benefit and has never been interpreted to include such a limitation.
- 10.20 Any overpayment can be claimed, even in the situation where an allocation that

was made on the death of a member is set aside by the court on review and a different allocation is made that leads to an overpayment to some of the dependants. (*Section 21(3) (c) of Proclamation 21 of 1996*).

- 10.21 This section limits the amounts that may be claimed to losses sustained by the employer departments through theft, fraud, negligence or any misconduct on the part of any member, pensioner or beneficiary which has been admitted by such member or pensioner in writing or has been proved in a court of law.
- 10.22 Section 26 of Proclamation 21 of 1996 provides that a member has the right to payment of pension benefits within 60 days after the termination of service.
- 10.23 In practice, however, it appears that employer departments simply refuse to submit the claim forms to the GEPF in order to finalise their actions relating to possible claims against former employees. In the circumstances the GEPF rarely has knowledge of the fact that benefits have already become due and payable.
- 10.24 This is considered to be an unlawful practice employed by employer departments.

11. OBSERVATIONS

11.1 Observations on the process followed with the deduction of the departmental debt from Ms Niemand's pension benefits

- 11.1.1 There can be no doubt that the decision to deduct the pension benefits of the Complainant amounted to "administrative action" in terms of PAJA as:
- a) It was taken by National Treasury: Chief Directorate Pensions Administration which is an organ of state;
 - b) It was taken in terms of a provision of national legislation;
 - c) It adversely affected the right of the Complainant to her pension benefits; and

- d) It had an immediate consequence for the Complainant as she was deprived of a substantial amount of money that she was otherwise entitled to.

11.1.2 It is trite that the Constitution obliges the exercising of all public power to be rational, reasonable and procedurally fair and that all conduct that does not comply with this standard is unlawful. In the *Van Schalkwyk* case³⁷ the High Court emphasized, with reference to the *Fedsure Life Assurance-* case³⁸ and *Pharmaceutical Manufacturers Association -*case³⁹ confirmed the Courts' view on the principle of legality as follows:

"Consequently, not only must a functionary exercise powers/take administrative action which he is expressly authorised to take but he must also only take such action within the limits provided for in that source of authority."

11.1.3 The purpose of the provisions of section 21 of the GEP Law is to protect pension benefits against all the creditors of the member. The employer department of the member is not in a preferential position in this regard, save for the exceptions provided for in this section.

11.1.4 In the case of debt claimed by the employer department in terms of section 21(3) (c) a deduction from the pension benefit may only be made if the employer department suffered a loss as a result of theft, fraud, negligence or misconduct **and:**

- a) The member admitted liability for the loss; and
- b) The member approved the deduction from his/ her pension benefits in writing; or

³⁷ Fn 10

³⁸ Fn 11

³⁹ Fn 12

c) The liability of the member has been proven in a court of law.

11.1.5 Following the direction of the Supreme Court of Appeal or a strict interpretation of a statutory provision that creates an exception to a rule of general application, the debt that the SAPS sought to recover in terms of section 21(3) (c) cannot be extended to losses incurred in circumstances that do not imply theft, fraud, negligence or misconduct by the Complainant. Debt related to salary overpayments or sick leave or disability leave periods converted into unpaid leave are generally claimed subsequent to a decision-making process that did not necessarily allege, canvass or determine negligence or misconduct on the part of the member and which might still be the subject of a dispute between the employee and the employer department.

11.1.6 In fact, the Complainant was neither informed of the total financial liability that the SAPS wanted to set-off against her pension benefits, nor did she admit any liability for the compensation sought in respect of alleged unpaid leave, which allegedly formed the basis for the decision of the deduction, and no liability on her part was proven in a court of law.

11.1.7 It is not in dispute that the Complainant was not notified of the intention of the SAPS to seek compensation from her pension benefits and was not afforded any reasonable opportunity to make representations in connection with the intended decision, as required by PAJA.

11.1.8 The GEPF would appear to have allowed the deduction of the debt from Ms Niemand's pension benefits in terms of section 21(3) (c), despite the fact that the SAPS did not submit any information or documentation to the GEPF to suggest or allege that the loss that it had allegedly incurred in respect of the unpaid leave, was the result of theft, fraud, negligence or misconduct by the Complainant.

11.2 Observations on the general practice at the GEPF relating to the deduction of departmental debt from the pension benefits of members

11.2.1 Sometimes it is necessary for the Public Protector to go beyond the investigation of an individual complaint when a chronic and/or system-wide administrative practice appears to exist that might adversely affect a number or particular group of people or the public in general.

11.2.2 The OPP is also in receipt of a number of complaints from other ex-public servants whose exit documents from the GEPF are either being withheld by the employer department pending the recovery of departmental debt, or where the debt has already been deducted from their pension benefits. The information obtained in the preliminary enquiries and the allegations and information submitted by the complainants revealed similar patterns, namely that the employees-

- a) denied that they had been informed of their total financial liability and debt that would be claimed from the pension benefits before the exit documents were submitted by the employer department to the GEPF;
- b) did not admit liability for the loss or debt that was recovered from their pension benefits, and no court orders to this effect had been issued; and
- c) the loss allegedly sustained by the employer department, had not been caused by reason of theft, fraud, negligence or misconduct by the member;

11.3 This information and responses from the GEPF and the employer departments furthermore create the impression that employer departments were generally allowed to claim any debt, including contractual debt such as overpaid salaries, from a public servant's pension benefits upon the termination of his/ her service, even in the absence of the mandatory documents and requirements. Employer departments relied on practice notes and accounting directives from

the Office of the Accountant-General as well as from National Treasury instructing Accounting Officers to recover any debt or loss, including overpaid salaries, "***from any remuneration and/or benefits due to the employee, including pro-rata service bonus, leave gratuity, severance pay, pension benefit etc.***"⁴⁰ (emphasis added)

- 11.4 The GEPF stated clearly that it has until now relied on the employer department to advise employees of their financial liabilities and to comply with the requirements for the proper deduction of departmental debt. It is however, acknowledged that employer departments have failed to follow proper procedures in this regard, and that the practice by the State until now has amounted to summary "*execution against pension benefits*".
- 11.5 It should however, be emphasised that while the GEPF relied on the employer departments to comply with the prescribed provisions for the deduction of departmental debt, **the GEPF is ultimately responsible for the decision to recover the debt from the member's pension benefits and therefore has a duty to ensure that it acted lawfully in this regard.**
- 11.6 In the *Pepcor Retirement Fund*-case⁴¹ the Supreme Court of Appeal dealt with a submission by Counsel for the Financial Services Board that the decision of the Board was unassailable because it was taken on the facts then available to it. The Fund blamed the Provincial Government for not providing it with the full facts:
- "If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore*

40 KwaZulu-Natal Provincial Treasury: To Accounting Officers/ Chief Financial Officers: *Management Of Debtors: Practice Note Number: FM-02 of 2006*; KZN Department of Education: *Debt Management Policy*, FP10- 25 May 2001

41 Fn 13

should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, inter alia, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers (cases) requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i e on the basis of the true facts.”

11.7 In the *Buitendag*-case⁴² the Supreme Court of Appeal emphasized the fact that “*the fund (GEPF) has some 1,2 million members and 400 000 pensioners. **It is in the public interest that decisions of the Board in relation to the administration of the Fund should be properly taken on the facts material to the decision:** if that were not so, manifest injustices would go uncorrected.*” The Court also stated that if an allocation made in the absence of material facts “... *is allowed to stand, the Fund will be prejudiced. Such prejudice consists in the Board not having had an opportunity to evaluate all the facts material to its decision, with the result that **the Board’s function was compromised.***” (emphasis added)

11.8 The Supreme Court of Appeal further examined the relationship between the GEPF and the Provincial Government and their rights and obligations *inter se*⁴³. The Court emphasized the following:

11.8.1 The Board (GEPF) can require any employer department, including the Provincial Government, to provide it with information in terms of s 7(3) of the GEP Law, which provides that:

42 Fn 8 above

43 *Buitendag* -Fn 8 above

"The Board may, with a view to the effective and efficient administration of the Fund, determine the nature, form, manner in which . . . the employer department shall in respect of members in its employment, perform any act pertaining to the pension interests of members";

- 11.8.2 The information required by the Board when a gratuity is claimed, has to be set out in Form Z102A. That form has to be completed and signed on behalf of the employer department.
- 11.8.3 Since 1996 there has been a manual (now in its third edition) prepared by the GEPP and given to employer departments, which explains how the form is to be completed.
- 11.8.4 It was the duty of the Provincial Government to provide information to the GEPP in respect of persons who qualified as dependants, as defined "*... because of the provisions of s 7 of the Law and the form which the Fund required it to complete, to provide the Fund with the information required by it. The submission on its behalf – that it is only obliged to provide the Fund with such information as may appear in its files – is incorrect and most unfortunate. **An employer department is obliged to provide correct and complete information to the Fund and if this necessitates the making of inquiries, it is for the employer department to make those inquiries.** The burden this entails must not be overstated because it would be quite proper and indeed desirable for the employer department, once it has ascertained who qualify as beneficiaries, **to inform them that they could make representations and bring whatever facts they might consider relevant to the attention of the Fund directly.** Ms Scheepers said that the Fund will take into account facts brought to its attention by interested parties directly, and this is clearly a correct approach.*" (emphasis added)

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- 11.9 As stated earlier, section 21(3) (a) of the GEP Law provides for the deduction of “*any amount which is payable to the employer department or the Fund by any member in the employment of such employer department on the date of his or her **retirement or discharge***”. (own emphasis).
- 11.10 The form Z102 that the employer department submits to the GEPF when an employee exits the GEPF, requires the employer department to indicate the reason for termination of service as well as the applicable GEPF Rule in terms of which the pension benefits should be calculated. The GEPF confirmed that this is verified.
- 11.11 In terms of the GEPF Rules the benefits of members shall be calculated in terms of the measures applicable on the date of termination of service. These measures provide for, *inter alia*, the formula in terms of which the benefits should be calculated, depending on the reason for termination of service:
- 11.11.1 Rules 14.1.1 and 14.2.1 of the GEPF Rules provide for the manner in which the benefits are calculated where a member is “*discharged-*”
- (a) *on account of ill-health not occasioned by his or her own fault;*
 - (b) *owing to the abolition of his or her post or the reduction or the reorganisation or the restructuring of the activities of his or her employer department;*
 - (c) *on the grounds that his or her discharge will promote efficiency or economy or otherwise be in the interest of his or her employer department;*
 - (d) *on account of his or her incapability to carry out his or her duties efficiently excluding cases where such incapability and inefficiency result in such a person being discharged on grounds of misconduct;*
 - (e) *on the grounds that the President or the Premier of a province*

appointed him or her in terms of the provisions of an act to an office and his or her pensionable service cannot be recognised as pensionable service for the purposes of a superannuation, pension, relief or provident fund or scheme established by or under any law for the holders of such office;

- (f) as a result of injury or ill-health, not occasioned by his own fault, arising out of and in the course of his employment; or*
- (g) in terms of section 17 (4) of the Public Service Act, 1994, or in terms of section 17 (7) of the Post Office Service Act, 1974 (Act 66 of 1974),”.*

11.11.2 Rule 14.3 of the GEPF rules provides for the calculation of the benefits where a member “**retires-**

- (a) on or after his or her pension-retirement date;*
- (b) before his or her pension-retirement date in terms of the law governing his or her terms and conditions of service;*
- (c) due to the lapse of his or her service contract;*
- (d) before his or her pension-retirement date, but not on a date prior to the member attaining the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any act which regulates his or her terms and conditions of employment; or*
- (e) whilst in the education service and the member has attained the age of 50 years but not the age of 55 years: Provided that such a member has the right to retire on that date in terms of the provisions of any act which regulates his or her terms and conditions of employment’.*

11.11.3 Rule 14.4 is applicable where the member “*resigns* from his or her employer department's service **or is discharged** from his or her employer department's service because of **misconduct or ill-health occasioned by his or her**

own doing or for a reason not specifically mentioned in the rules.” (emphasis added)

11.11.4 The Rules furthermore regulate the calculation of the benefits of members who exit the Fund as a result of the death of the member or pensioner⁴⁴, and termination of service prior to his or her retirement date as a result of an initiative by his or her employer department in terms of a voluntary severance package⁴⁵.

11.12 It follows that a claim in terms of section 21(3) (a) can by virtue of the limitation in this legislation to debt owed on the date of “**retirement or discharge**”, be restricted to the situation where the termination of service is recorded by the employer department on the Z102 as “retirement” or “discharge” as intended by Rules 14.1.1, 14.2.1, 14.3 and 14.4 (as far as it relates to “discharge”).

11.13 Based on the current investigation there would appear to be sufficient indication that the perceived unlawful recovery of State owed debt by the GEPF and the employer department and institutions contributing to the GEPF, might not be limited to the individual complaints to the Public Protector. The Office is therefore concerned that the conduct of the government agencies involved might adversely affect other members of the GEPF when they exit the Fund in future.

11.14 In the *Buitendag*⁴⁶ matter the Supreme Court of Appeal highlighted the public interest in the proper administration of the Board of the GEPF. The outcome of this investigation is therefore relevant to-

44 Rules 14.5 and 14.6 of the GEPF Rules

45 Rule 14.8 of the GEPF Rules

46 Fn 8 above

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- 11.14.1 The debt management practices of 371 employer departments and institutions contributing to the GEPF;
- 11.14.2 The procedures and Rules of the GEPF for the deduction by state owed debt from members' benefits; and
- 11.14.3 The future pension interests of about 1, 1 million employees who are currently members of the GEPF.⁴⁷
- 11.15 It cannot be overemphasised that even if the current deficiencies are addressed and the processes for the deduction of departmental debt are corrected, in principle the attachment or execution of debt against any person, private or public servant, should be the exception to the rule, and not the rule, as it is currently being practised.
- 11.16 The obligations and duties of Chief Financial Officers and other officials involved in the management of debtors, debt recovery and write-off of irrecoverable debt owed by public servants are clearly regulated by the Public Finance Management Act, 1999 (PFMA), and Treasury Regulations. In terms of Section 38(1) (c) (i) of the PFMA, the Accounting Officer for a department must take effective and appropriate steps to collect all money due and owing to the department. Departments must effectively manage and control all debt, specifically those relating to their personnel. There are recovery procedures to be followed in the management of debt that do not involve the attachment of pension benefits. In terms of paragraph 11.2.1(b) of the Treasury Regulations, in cases where it is necessary and economical to enforce the recovery of a debt by means of legal steps, the services of the State Attorney, or any other attorney, may for instance, be utilised.

⁴⁷ Figures from GEPF Website: <http://www.gepf.co.za/>

12. KEY FINDINGS

12.1 In respect of Ms Niemand's complaint

- 12.1.1 The claim of the SAPS for the debt allegedly owed by the Complainant did not fall within the ambit of a loss recoverable in terms of section 21(3) (c) of the GEP Law.
- 12.1.2 The procedure prescribed by the GEPF in its Procedure Manual for the recovery of a departmental debt in terms of section 21(3) from the pension benefits of the Complainant was not complied with, as the following mandatory documentation was not received by the GEPF:
- 12.1.2.1 Proof that the Complainant had been informed of the total financial liabilities and debt that was claimed against her pension benefits;
 - 12.1.2.2 An unequivocal admission of liability for the purposes of paragraphs 3.4.3.2 and 3.4.4.3 of the Procedure Manual of the GEPF; or
 - 12.1.2.3 A copy of a Court order or the member's approval in writing.
- 12.1.3 The payment by the GEPF of the Complainant's withdrawal benefit to the SAPS was contrary to the provisions of section 21(3) of the GEP Law and the Procedure Manual of the GEPF and is therefore unlawful.
- 12.1.4 The decision of the GEPF to deduct the pension benefit of the Complainant was furthermore procedurally unfair as it did not comply with the requirements of section 3 of PAJA.

12.2 In respect of the general practice

- 12.2.1 Based on the investigation and as acknowledged by GEPF, there would appear to be sufficient indication that employer departments generally, do not comply

with the required prescripts when submitting claims to GEPF for outstanding departmental debt from pension benefits.

- 12.2.2 In particular, employer departments fail to advise employees in advance of their total financial liabilities and of their intention to claim the debt from their pension benefits.
- 12.2.3 The GEPF is not provided with the member's approval in writing or a copy of a Court order confirming liability.
- 12.2.4 Employer departments do not confine their claims to the correct provisions of the GEP Law to the extent that contractual debt and other monies would to be claimed in terms of section 21(3) (c) where the loss was not incurred as a result of theft, fraud, negligence or any misconduct on the part of the employee, and amounts payable in terms of section 21(3) (a) of the GEP Law would be claimed even if the termination of service cannot be regarded as "retirement" or "discharge" as intended by Rules 14.1.1, 14.2.1, 14.3 and 14.4 of the GEPF Rules (as far as it relates to "discharge").
- 12.2.5 The employer departments fail to furnish the GEPF with sufficient information and documentation to enable it to exercise its discretion properly and independently, to determine the members' liability either in terms of section 21(3) (a) or (c) in respect of the amount claimed from the pension benefits by the employer department.
- 12.2.6 When considering a claim for the deduction of departmental debt from pension benefits in terms of section 21(3) (a) and (c) of the GEP Law, it is the GEPF's responsibility to ensure that the decision is taken in compliance with the requirements of the GEP Law, the GEPF Rules, the Procedure Manual of the GEPF, and PAJA in particular.
- 12.2.7 There is no indication that the GEPF has taken appropriate steps to address

the general failure by employer departments to provide it with sufficient information and documentation to enable it to exercise its discretion in compliance with its own prescribed processes and practices as well as the legal requirements discussed in this report.

12.2.8 The current internal procedures and practices of the GEPF are falling short of some of the mandatory requirements for good administrative practice, including recognition of the right of employees to make representations directly to the GEPF before a decision is made on the deduction of the debt from their pension benefits (see *Buitendag* case⁴⁸), that may amount to system-wide procedural deficiencies in the decision-making process by the GEPF in respect of claims in terms of section 21(3) (a) and (c).

12.2.9 Against this background the impression is gained that the policy of the GEPF as established in the Procedure Manual of the GEPF or other communications to employer departments in terms of section 7 of the GEP Law do not provide sufficient protection of the pension interests of members of the GEPF in terms of the set-off of debt claimed by employer departments.

13. RECOMMENDATIONS

13.1 In terms of section 182(1) (c) of the Constitution, 1996 and section 6(4) (c) (ii) of the Public Protector Act, 1994, it is recommended that the GEPF:

13.1.1 Take urgent steps to ensure that the amount deducted from the pension benefit of the Complainant, referred to in this report, is paid to her, together with interest thereon at the rate prescribed in the Prescribed Rate of Interest Act, calculated from the date of the deduction to date of payment.

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- 13.1.2 Implement measures to ensure compliance by the GEPF as well as contributing employer departments with the provisions of section 21(3) of the Government Employees Pension Law, 1996 and the mandatory requirements for the recovery of departmental debt in terms of the *Procedure Manual for Interaction between Pensions Administration and Government Employer departments*;
- 13.3 Review the policy documents, including the Procedure Manual and the GEPF Rules that determine the nature, form and manner in which the employer departments are entitled to claim departmental debt from pension benefits to ensure that they meet the mandatory requirements and legal guidelines for the protection of the pension interests of members of the GEPF and the set-off of debt payable to employer departments. The GEPF must ensure that the following aspects are adequately covered in the policy:
- 13.3.1 The employer departments' responsibilities to notify the employee in advance of its financial liabilities; of the employer's intention to recover the debt from the member's pension benefits and the right of employees to make representations directly to the GEPF before a decision is made on the deduction of the debt from their pension benefits;
- 13.3.2 The duty of the employer departments to furnish the GEPF with sufficient information and documentation to duly consider a claim for the deduction of debt in terms of the provisions of the GEP Law;
- 13.3.3 Guidelines to ensure that employer departments confine their claims correctly to either section 21(3) (a) or (c) of the GEP Law in terms of the nature of the debt, the liability of the employee, and the applicable exit Rule of the GEPF Rules;
- 13.3.4 A strict regulation, in accordance with the established principles for the protection of pension benefits against creditors in general, of an employer

department's right of access to pension fund benefits which other creditors do not have in terms of section 21(3) of the GEP Law.

13.3.5 The responsibilities of the GEPF, as acknowledged in its submission during this investigation, to recognise their members' –

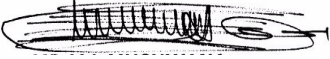
- a) constitutional right to administrative action that is lawful, reasonable and procedurally fair;
- b) constitutional right to have a dispute regarding any deduction adjudicated in a court of law or independent tribunal and not to be subjected to self-help by an employer department;
- c) constitutional right to a fair pension;
- d) protection by section 21(1) of the GEP Law from attachment and execution by way of a general rule protecting pensioners against being deprived of the source of their pension; and
- e) statutory right to receive payment of the pension benefits within 60 days after the termination of service.

13.4 Formally and adequately record its decision in terms of section 21(3)(a) and (c) and the reasons for allowing or refusing a claim to indicate that it has indeed complied with its legal obligations with due diligence.

14. MONITORING

14.1 The GEPF has already indicated that it will urgently review its policy and practices in respect of the deduction of departmental debt.

14.2 The OPP will monitor the progress in this regard and the implementation of the recommendations made in this report on a quarterly basis.



ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date:

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