

**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**

***Allegations of maladministration by the Government Pensions Administration
Agency with regard to the payment of death benefits to the surviving spouse***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY
THE GOVERNMENT PENSIONS ADMINISTRATION AGENCY TO PAY THE DEATH
BENEFITS TO THE SURVIVING SPOUSE, MR PETOLO EZEKIEL MAKOBE**

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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 (the Constitution), and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

- (ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration by the Government Pensions Administration Agency to pay the death benefits to the surviving spouse, Mr Petolo Ezekiel Makobe.

- (iii) On 22 February 2016, I received a complaint from Mr. Petolo Ezekiel Makobe (the Complainant) against the Government Pensions Administration Agency (the GPAA) and the South African Police Services (the SAPS) on the following allegations:-
 - (a) That on 17 January 2011, he married Ms. Freida Rabecca Makobe in terms of civil marriage in community of property. A copy of the marriage certificate was furnished as proof of marriage.

 - (b) On 29 December 2012, Ms. Freida Rabecca Makobe (the deceased) passed on whilst she was still an employee of the Department of Health at the George Mukhari Hospital (the employer) and also a member of the Government Employees Pension Fund (the GEPF), with pension number 96496334.

 - (c) During 2013, the Complainant approached the deceased's employer in order to lodge a claim for the payment of her pension benefits. To his surprise, he was informed that a claim had already been lodged by the deceased's family. Further, he was also informed of the existence of a decree of divorce between himself and the deceased, of which he was not aware of.

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- (d) The Complainant confirmed that before the death of the deceased, there was a divorce action instituted by him. However, the matter did not proceed to finality as it was struck off the roll on 05 June 2012.
- (e) Further, the complainant alleges to have approached the office of the Chief Justice¹ in the North Gauteng High Court in order to verify the issue of divorce that he was informed of by the employer. To his surprise he was informed that there were two (2) decrees of divorce purportedly issued by two different Judges on the same date. It was also confirmed that the said orders were issued fraudulently.
- (f) The Complainant further alleged that the birth certificates of children not belonging to the deceased were also used by the deceased's family in order to claim the pension benefits.
- (g) The Complainant further indicated that he approached the Master of the High Court and he was also provided with the copies of the decrees of divorce that were submitted by the deceased's family upon reporting the estate to the Master for the purposes of administering the deceased's estate.
- (h) On 02 September 2014, the Complainant approached the GPAA, with the help of LegalWise South Africa (Pty) Ltd (LegalWise) and notified them of the alleged fraudulent activities committed by the deceased's family and also made an enquiry regarding the payment of the deceased's pension benefits.
- (i) On 26 November 2014, the GPAA paid the deceased pension benefits to the beneficiaries, allegedly as per the nomination form without considering his claim

¹ The Complainant made reference to the office of the Chief Justice as per his complaint to the PPSA dated 22 February 2016.

and ignoring the information that was brought to their attention about the fraudulent activities in an email correspondence dated 02 September 2014.

- (j) Further, during 2015 he approached the Pretoria Central SAPS and reported a criminal case of fraud against Ms. Dorah Maria Buys. However, he was never provided with the progress nor outcome of the investigation.
- (k) During the investigation process and following an enquiry letter received by the GPAA from my office in relation to the complaint received from the Complainant on 22 February 2016, the GPAA conducted a forensic investigation on the matter. On 15 September 2017, the GPAA took a decision and approved the payment of pension annuities benefits to the Complainant from the date of death of the deceased. As a result, the remaining issue was the non-payment of a gratuity to the Complainant.
- (iv) Based on an analysis of the complaint, the following issues were identified and investigated:
 - (a) Whether the GPAA acted improperly by not paying the Complainant a gratuity after the death of his wife, Ms. Freida Rabecca Makobe?
 - (b) Whether the GPAA improperly failed to investigate the allegations or an email enquiry that was reported by LegalWise on behalf of the Complainant dated 02 September 2014:-
 - (c) Whether the SAPS failed to investigate the criminal case reported at Pretoria Central Police Station against Ms Dorah Maria Buys?
 - (v) The investigation process was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act and included the analysis of the documents and information obtained from the Complainant,

meetings and written communication with relevant officials of the GPAA, SAPS and the NPA, as well as the application of all relevant laws and related prescripts.

- (vi) Key laws and policies taken into account to determine whether there had been maladministration by the GPAA and the SAPS and improper prejudice to the Complainant were principally those imposing administrative standards that should have been upheld by the GPAA when processing the death benefits claim and by the SAPS when investigating the complaint lodged by the Complainant.
- (vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings: -
 - (a) Whether the GPAA acted improperly by not paying the Complainant a gratuity after the death of his wife, Ms. Freida Rabecca Makobe?**
 - (aa) The allegation that the GPAA acted improperly by not paying the Complainant a gratuity after the death of his wife, Ms. Freida Rabecca Makobe is unsubstantiated.
 - (bb) As stipulated in section 37C of the Pension Fund Act, the pension benefits does not forms part of the joint estate in cases where the marriage is dissolved by death.
 - (cc) The evidence at my disposal proves that the Complainant did not qualify to be considered as a deceased's dependent.
 - (dd) The GPAA correctly approved the payment of monthly annuities to the Complainant with effect from the date of death of the deceased because of the marriage that existed between the Complainant and the deceased at the time of death.
 - (ee) The GPAA's conduct does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(l) of the Public Protector Act.

(b) Whether the GPAA improperly failed to investigate the allegations or an email enquiry that was reported by LegalWise on behalf of the Complainant dated 02 September 2014:-

(aa) The allegation that the GPAA acted improperly by failing to investigate the allegations or email enquiry that was reported by LegalWise on behalf of the Complainant dated 02 September 2014 is substantiated.

(bb) The Client Relation Management Unit (Call Centre) failed to flag and bring to the attention of the relevant units the email enquiry dated 02 September 2014 that was submitted by LegalWise on behalf of the Complainant.

(cc) The GPAA may have very well come to a different conclusion, had an email enquiry from LegalWise reached the relevant units.

(dd) Evidence obtained by further investigation indicates that the information submitted by the deceased's next of kin and at the time relied upon by the Employees Benefits Withdrawals unit was improper.

(ee) The GPAA's conduct constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(l) of the Public Protector Act.

(c) Whether the SAPS failed to investigate the criminal case reported at Pretoria Central Police Station against Ms Dorah Maria Buys?

(aa) The allegation that the SAPS failed to investigate the criminal case reported at Pretoria Central Police Station against Ms. Dorah Maria Buys is unsubstantiated;

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- (bb) The SAPS managed to investigate the criminal case that was reported by the Complainant against Ms. Dorah Maria Buys and refer the matter to the NPA for a decision.
- (cc) Further, the SAPS did provide the Complainant with the decision or outcome received from the NPA on the matter.
- (viii) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct and maladministration not occurred, is the following: -
- (a) The GPAA Acting Chief Executive Officer to:-**
- (aa) Issue a written apology to the Complainant apologising for failing to attend to his email enquiry that was submitted by LegalWise on 02 September 2014, within thirty (30) days from the date of this report.
- (bb) Within ninety (90) days from the date of this report review the Standard Operating Procedure, to include the proper evaluation of all the complaints and/or enquiries that are raised with the Client Relation Management Unit (Call Centre) through the centralised email address and to ensure a process whereby relevant Units within GPAA would be alerted.
- (cc) Ensure that the staff are trained on the amended Standard Operation Procedure, within 30 days from the date of implementation, in order to avoid recurrence of the similar complaints.

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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, 1994 (the 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 The Acting Chief Executive Officer of the GPAA (the Acting CEO), Mr Shahid Khan;

1.2.2 The National Commissioner of the SAPS, General K J Sitole; and

1.2.3 The National Director of Public Prosecutions (NDPP) of the National Prosecuting Authority - South Africa; Adv. Shamila Batohi.

1.3. A copy of the report is also provided to the Complainant, Mr PE Makobe to inform him about the outcome of this investigation.

2. THE COMPLAINT

2.1 On 22 February 2016, I received a complaint from Mr. Petolo Ezekiel Makobe (the Complainant) against the Government Pensions Administration Agency (the GPAA) and the South African Police Services (the SAPS) on the following allegations:-

2.1.1 That on 17 January 2011, he married Ms. Freida Rabecca Makobe in terms of civil marriage in community of property. A copy of the marriage certificate was furnished as proof of marriage.

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- 2.1.2 On 29 December 2012, Ms. Freida Rabecca Makobe (the deceased) passed on whilst she was still an employee of the Department of Health at the George Mukhari Hospital (the employer) and also a member of the Government Employees Pension Fund (the GEPF), with pension number 96496334.
- 2.1.3 During 2013, the Complainant approached the deceased's employer in order to lodge a claim for the payment of her pension benefits. To his surprise, he was informed that a claim had already been lodged by the deceased's family. Further, he was also informed of the existence of a decree of divorce between himself and the deceased, of which he was not aware of.
- 2.1.4 The Complainant confirmed that before the death of the deceased, there was a divorce action instituted by him. However, the matter did not proceed to finality as it was struck off the roll on 05 June 2012.
- 2.1.5 Further, the complainant alleges to have approached the office of the Chief Justice in the North Gauteng High Court in order to verify the issue of divorce that he was informed of by the employer. To his surprise he was informed that there were two (2) decrees of divorce purportedly issued by two different Judges on the same date. It was also confirmed that the said orders were issued fraudulently.
- 2.1.6 The Complainant further alleged that the birth certificates of children not belonging to the deceased were also used by the deceased's family in order to claim the pension benefits.
- 2.1.7 The Complainant further indicated that he approached the Master of the High Court and he was also provided with the copies of the decrees of divorce that were submitted by the deceased's family upon reporting the estate to the Master for the purposes of administering the deceased's estate.

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- 2.1.8 On 02 September 2014, the Complainant approached the GPAA, with the help of LegalWise South Africa (Pty) Ltd (LegalWise) and notified them of the alleged fraudulent activities committed by the deceased's family and also made an enquiry regarding the payment of the deceased's pension benefits.
- 2.1.9 On 26 November 2014, the GPAA paid the deceased pension benefits to the beneficiaries, allegedly as per the nomination form without considering his claim and ignoring the information that was brought to their attention about the fraudulent activities in an email correspondence dated 02 September 2014.
- 2.1.10 Further, during 2015 he approached the Pretoria Central SAPS and reported a criminal case of fraud against Ms. Dorah Maria Buys. However, he was never provided with the progress nor outcome of the investigation.
- 2.1.11 During the investigation process and following an enquiry letter received by the GPAA from my office in relation to the complaint received from the Complainant on 22 February 2016, the GPAA conducted a forensic investigation on the matter. On 15 September 2017, the GPAA took a decision and approved the payment of pension annuities benefits to the Complainant from the date of death of the deceased. As a result, the remaining issue was the non-payment of a gratuity to the Complainant.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution, established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that:

“The Public Protector has the power, as regulated by national legislation:

- (a) *to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,*
- (b) *to report on that conduct ; and*
- (c) *to take appropriate remedial action”.*

3.3 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, advising the Complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 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), the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

3.5.1 *The remedial action taken by the Public Protector has a binding effect, “When the remedial action is binding, compliance is not optional, and 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. This was 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);

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- 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 is the power that is by its nature of no consequences (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) [2017] ZAGPPHC 747; 2018(2) SA 100 (GP), the court held as follows when confirming the powers of the Public Protector:
- 3.6.1 The constitutional power is curtailed in the circumstances wherein there is a 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 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):

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

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

3.6.5 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).

3.6.6 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);

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

3.7 The GPAA and the SAPS are organs of state as contemplated by the provisions of section 239 of the Constitution, and their conduct amounts to conduct in state affairs, as a result the complaint 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.

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

4. THE INVESTIGATION

4.1. Methodology

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- 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 maladministration and/or improper conduct.
 - 4.1.3. The investigation process included an exchange of correspondence with the Complainant, the GPAA, the SAPS, NPA, as well as an analysis of relevant documentations, meetings held, research conducted and the consideration and application of relevant laws, regulatory framework and jurisprudence.

4.2. Approach to the investigation

- 4.2.1. The investigation was approached using an enquiry process that seeks to find out:
 - a) What happened?
 - b) What should have happened?
 - c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?
 - d) In the event of improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where he would have been had the improper conduct and/or maladministration not taken place?
- 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 whether there was improper conduct or maladministration on the part of the GPAA in processing and paying the pension benefits of the deceased and by SAPS in investigating a criminal case of fraud that was reported to them and whether such

conduct caused prejudice to the Complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act.

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 GPAA and the SAPS to prevent improper conduct or maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improper conduct and maladministration.

4.2.5. On 04 April 2019, I issued a notice in terms of section 7(9)(a) of the Public Protector Act (section 7(9) Notice to Mr Krishen Sukdev, the then Chief Executive Officer of the GPAA, affording him an opportunity to respond to my provisional findings. The response from the GPAA is incorporated in this report.

4.2.6. Again, on 12 June 2020, I issued a supplementary notice in terms of section 7(9) to the GPAA and it was electronically sent to the GPAA on 21 July 2020. A response to my supplementary notice was received on 11 August 2020.

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

4.3.1. Whether the GPAA acted improperly by not paying the Complainant a gratuity after the death of his wife, Ms. Freida Rabecca Makobe?

4.3.2. Whether the GPAA improperly failed to investigate the allegations or an email enquiry that was reported by LegalWise on behalf of the Complainant dated 02 September 2014:-

4.3.3. Whether the SAPS failed to investigate the criminal case reported at Pretoria Central Police Station against Ms Dorah Maria Buys?

4.4. The Key Sources of Information

4.4.1. Documentation:-

- 4.4.1.1. Complaint form signed by the Complainant dated 22 February 2016;
- 4.4.1.2. Copy of the email sent by LegalWise to the GPAA dated 02 September 2014;
- 4.4.1.3. Copy of the deceased's death certificate;
- 4.4.1.4. Copy of the marriage certificate;
- 4.4.1.5. Copy of the decree of divorce dated 05 June 2012;
- 4.4.1.6. Copy of the decree of divorce dated 26 November 2012;
- 4.4.1.7. Copy of the Settlement Agreement dated 19 and 24 April 2012;
- 4.4.1.8. Email correspondence from the office of the Chief Justice of the Republic of South Africa;
- 4.4.1.9. Copy of a letter from the Master's office addressed to Ms. Dorah Maria Buys dated 20 May 2015;
- 4.4.1.10. Copy of a letter from the Master's office dated 20 May 2015, informing Ms. Dorah Maria Buys that she has been removed from office as an Executor of the deceased's estate;
- 4.4.1.11. Letter of Authority issued to the Complainant by the Master of the High Court;
- 4.4.1.12. Copy of the Complainant's affidavit dated 22 February 2016;
- 4.4.1.13. Copy of the Complainant's affidavit dated 26 April 2016;
- 4.4.1.14. Copy of the GPAA forensic investigation report dated 12 June 2017;
- 4.4.1.15. Copy of an affidavit by Tebogo Joann Valley Buys dated 22 July 2012;
- 4.4.1.16. Copy of an affidavit by Lerato Lennete Buys dated 04 July 2013;
- 4.4.1.17. Copy of an affidavit by Ms Dorah Maria Buys dated 18 June 2013;
- 4.4.1.18. Copy of the nomination form;
- 4.4.1.19. Copy of the memo from the GPAA's legal section date stamped 10 August 2017;
- 4.4.1.20. Proof of payment made to three (3) beneficiaries;
- 4.4.1.21. Copies of the case docket number (CAS 1679/08/2015);

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- 4.4.1.22. Copy of the notice of birth for Lerato Lennette Buys from the DHA dated 08 June 1994;
 - 4.4.1.23. Copy of the notice of birth for Tebogo Joann Valley Buys from the DHA dated 27 September 1998;
 - 4.4.1.24. Copy of a letter from the NPA dated 11 April 2017;
 - 4.4.1.25. Copy of the memo signed by Ms. Dikeledi Pule and Mrs. ASG Barnard dated 05 September 2019 – Distribution and/or allocation of pension benefits;
 - 4.4.1.26. Withdrawal form (Z102), duly completed by the deceased's employer;
 - 4.4.1.27. Copy of the allocation of dependant form dated 20 November 2014, from the GPAA;
 - 4.4.1.28. Sworn Statement by the Complainant dated 26 April 2016;
 - 4.4.1.29. Settlement Agreement dated 19 & 24 April 2012;
 - 4.4.1.30. Benefits Distribution Policy dated July 2014;
 - 4.4.1.31. Letter from the Department of Education for Tebogo Joann Buys dated 23 June 2014;
 - 4.4.1.32. Letter from Tshwane University of Technology dated 21 April 2014;
 - 4.4.1.33. Report by the Department of Social Development dated 18 June 2014;
 - 4.4.1.34. Letters from the City of Tshwane: Ward 73 dated 09 June 2014;
 - 4.4.1.35. Statements by the officials from the Employees Benefits dated 13 November 2019;
 - 4.4.1.36. Allocation of dependants dated 20 November 2014;
 - 4.4.1.37. Letter from the GEPF to the CFO of the Gauteng Department of Social Development dated 17 September 2013; and
 - 4.4.1.38. Client Relations Management – Call Center: Standard Operating Procedures dated 28 September 2012

4.4.2. Correspondence Sent and Received

- 4.4.2.1. Letter from PPSA to GPAA dated 08 February 2017, informing the GPAA of the investigation;
- 4.4.2.2. Email from the GPAA to the PPSA dated 18 August 2017;

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- 4.4.2.3. Email from the PPSA to the GPAA dated 07 September 2017;
 - 4.4.2.4. Email from the GPAA to the PPSA dated 25 October 2017;
 - 4.4.2.5. Letter to the National Commissioner of Police, General KJ Sitole dated 22 August 2018;
 - 4.4.2.6. Letter from the SAPS to the PPSA dated 19 November 2018;
 - 4.4.2.7. Letter to the DHA dated 12 September 2019;
 - 4.4.2.8. Email correspondence from the DHA to the PPSA dated 20 September 2019;
 - 4.4.2.9. Letter to the NPA dated 06 November 2019;
 - 4.4.2.10. Section 7(9) Notice from the PPSA to the GPAA on 15 March 2019; 04 April 2019;
 - 4.4.2.11. Letter or response to the Section 7(9) Notice from the GPAA to the PPSA date 04 April 2019;
 - 4.4.2.12. Supplementary Notice from PPSA to the GPAA dated 12 June 2020; and
 - 4.4.2.13. Letter or response to the Supplementary Notice from the GPAA to the PPSA dated 07 August 2020.

4.4.3 Meetings held:-

- 4.4.3.1 Meeting between the GPAA and the PPSA on 10 September 2019;
- 4.4.3.2 Meeting between the GPAA and the PPSA on 13 November 2019;
- 4.4.3.3 Meeting held between the NPA and the PPSA on 25 November 2019; and
- 4.4.3.4 Meeting held between the SAPS and the PPSA on 29 November 2019.

4.4.4 Legislation and other prescripts

- 4.4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
- 4.4.4.2 Public Protector Act, 23 of 1994 (Public Protector Act);
- 4.4.4.3 Matrimonial Property Act, 88 of 1984;
- 4.4.4.4 Divorce Act ,70 of 1979;
- 4.4.4.5 Pension Fund Act, 24 of 1956;
- 4.4.4.6 Government Employees Pension Law, 1996 (GEP Law);
- 4.4.4.7 Benefits Distribution Policy, dated July 2014;
- 4.4.4.8 Service Level Agreement between the Government Employees Pension Fund (the GEPF) and the GPAA;
- 4.4.4.9 Debt Collection Policy;
- 4.4.4.10 Standard Operating Procedure Unique Number: 47-AB-1.0/11/SOP002;
- 4.4.4.11 The White Paper on Transformation of Public Service Delivery, 1997 (Batho Pele Principles); and
- 4.4.4.12 The National Prosecuting Authority Act, 32 of 1998.

4.4.5 Case Law

- 4.4.3.1 *Gqwetha v Transkei Development Corporations Ltd and Others [2005] ZASCA 51, 2006 (2) SA 603 (SCA);*

4.4.3.2 *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162; and

4.4.3.3 *Karam vs Amrel Provident Fund* [2003] 9 BPLR 5098 (PFA).

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 GPAA acted improperly by not paying the Complainant a gratuity after the death of his wife, Ms. Freida Rabecca Makobe?

Common cause facts

5.1.1 It is common cause that the Complainant and Ms. Freida Rabecca Makobe (deceased) were married in community of property on 17 January 2011 and the deceased passed on 29 December 2012, whilst the marriage still subsisted.

5.1.2 It is also not in dispute that upon death of the deceased, the GPAA received a withdrawal form (Z102 form) and nomination form (W P1002 form) from the employer. In the nomination form, the deceased nominated her sister, Ms. Dorah Maria Buys and two (2) children namely Lerato Lennete Buys and Tebogo Joann Valley Buys as beneficiaries to her pension benefits.

5.1.3 It is further not in dispute that on 26 November 2014, the GPAA paid the pension benefits as follows:

5.1.3.1 Payment made to Ms. Dorah Maria Buys was R 40 812-78.

5.1.3.2 Payment made to Lerato Lennete Buys was R163 251-16.

5.1.3.3 Payment made to Tebogo Joann Valley Buys was R 204 063-96.

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- 5.1.4 It is also not in dispute that following a complaint received from the Complainant on 22 February 2016, the GPAA conducted a forensic investigation, as per a report dated 12 June 2017 that concluded as follows:
- 5.1.4.1 *“That there was an existence of a civil marriage between the deceased and the Complainant;*
- 5.1.4.2 *The decree of divorce that was submitted during application of the pension benefits was fraudulent;*
- 5.1.4.3 *The marriage that existed between the Complainant and the deceased was never dissolved by any competent court as alleged on the decree of divorce;*
- 5.1.4.4 *The criminal case that was opened against the deceased’s sister, Ms. Dorah Maria Buys regarding the fraudulent decree of divorce has been withdrawn by the court;*
- 5.1.4.5 *The nomination form submitted by the employer was found to be valid; and*
- 5.1.4.6 *That the GPAA did not suffer any financial loss due to the submission of the fraudulent decree of divorce by the deceased’s sister.*
- 5.1.4.7 *The report recommended that the GPAA’s legal section advice if the Complainant should be recognized by the GPAA as the legal spouse of the deceased and whether he is entitled to receive the pension benefits as required by the GEP Law.*
- 5.1.4.8 *The legal section was further requested to advise if the GPAA acted rightfully by distributing the funds according to the nomination form with the exclusion of the surviving spouse”.*
- 5.1.5 According to the legal opinion dated 08 August 2017 from the GPAA, it was concluded by the GPAA legal section that due to the fact that the Complainant was

separated from the deceased at the time of death and that he was not nominated as a beneficiary on the nomination form and further that gratuity has already been paid to the nominated beneficiaries, the Complainant only qualifies for annuity from the date of death of the deceased.

- 5.1.6 On 15 September 2017 the GPAA, after intervention by my office approved the payment of monthly annuity pension benefit to the Complainant.

Issues in dispute

- 5.1.7 The issue in dispute is whether the GPAA acted improperly by not also paying the Complainant the gratuity after the death of his wife, Ms. Freida Rabecca Makobe.

- 5.1.8 The Complainant stated that during 2013, he approached the employer of the deceased in order to lodge a claim for the payment of the pension benefits. To his surprise, he was informed that a claim had already been lodged by the deceased's family. Further, he was also informed of the existence of a decree of divorce between himself and the deceased, of which he was not aware of.

- 5.1.9 On 02 September 2014 with the help of LegalWise, the Complainant approached the GPAA with the following allegations and/or an enquiry:

"It is our instruction that our member's late spouse was a member of your pension fund, it is our further instruction that our member is entitled to proceeds from your fund.

We are however cautioned that there have been parties who attempted to claim benefits herein in a fraudulent manner, be advised that our member's spouse did not have any children at the time of her death.

Further hereto she was still married to our member, kindly find attached hereto copy of her death certificate as well as a copy of her marriage certificate.

Kindly advice how our member can submit a claim herein, further kindly provide us with the forms for sais purpose”.

5.1.10 On 22 February 2016, the Complainant approached my office and lodged a complaint against the GPAA for the payment of the deceased’s pension benefits. My office approached the GPAA with the allegations. In support to his allegations, the Complainant submitted the following documents:

5.1.10.1 Copy of the deceased’s death certificate;

5.1.10.2 Copy of the marriage certificate;

5.1.10.3 Copy of the decree of divorce dated 05 June 2012; and

5.1.10.4 Copy of the decree of divorce dated 26 November 2012.

5.1.11 In a response received from the GPAA dated 18 August 2017, the GPAA submitted that no gratuity was paid to the Complainant due to the fact that he was excluded from the nomination form and that he was not regarded as the deceased’s dependent.

5.1.12 Subsequent to the response received from the GPAA dated 18 August 2017, on 07 September 2017, a copy of the nomination form, a copy of the forensic investigation report and proof of payment made to the nominated beneficiaries were requested from the GPAA.

5.1.13 On 25 October 2017, the following documents were received from the GPAA:

5.1.13.1 Copy of the forensic investigation report dated 12 June 2017;

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- 5.1.13.2 Copy of the nomination form;
- 5.1.13.3 Copy of the memo from the GPAA's legal section date stamped 10 August 2017;
and
- 5.1.13.4 The proof of payments to the three (3) beneficiaries, confirming the total amounts paid to each beneficiary reflected on the table below:

Ms. D M Buys (Sister)	L L Buys (Child)	T J V Buys (Child)
R 40 812-78.	R163 251-16.	R 204 063-96.

- 5.1.14 On 15 March 2019, I issued a notice in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notice) to Mr. Krishen Sukdev, who was the Chief Executive Officer of the GPAA at the time, informing him of my adverse preliminary findings and to afford the GPAA an opportunity to respond.
- 5.1.14.1 My section 7(9) notice made reference to the fact that the Complainant was entitled to his 50% share of the deceased pension benefits as the parties were still married at the time of the deceased's death.
- 5.1.14.2 Reference was also made to section 1 of the Matrimonial Property Act, 88 of 1984, whereby it stipulates that *"joint estate means the joint estate of a husband and wife married in community of property"* and a court decision in a case of *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162, where the court held that the spouses become *"co-owners undivided and indivisible half-shares of all the assets acquired during the subsistence of the marriage. In the absence of a forfeiture of benefits or express agreement each spouse is entitled to a half share of the joint estate"*.
- 5.1.15 On 04 April 2019, a response to my section 7(9)(a) notice was received from the GPAA summarised as follows:

5.1.15.1 The GPAA confirmed that a decree of divorce was submitted to their office at the time of processing the pension benefits and after their forensic investigation on 14 June 2017, it was confirmed that a decree of divorce submitted was fraudulent. As a result, on 08 August 2017 the GPAA legal section signed off a legal opinion which recommended the payment of spousal pension to the Complainant.

5.1.15.2 The GPAA further confirmed that the deceased and the Complainant were separated or no longer staying together at the time of death. Reference was made to an affidavit signed by the Complainant dated 26 April 2016, whereby he confirmed as follows:

“I and the late member stayed together at the same place as husband and wife at Mamelodi and Erusmus respectively until in May 2011 when we separated.

After our separation, she returned to her parents’ home at Hammanskraal whilst I remained at Erusmus. During our separation I initiated a divorce but it could not proceed due to her illness. Unfortunately on 29/12/2012 she passed away and she was buried at her parental home in Hammanskraal”.

5.1.15.3 The GPAA disputed the fact that it acted improperly by distributing the gratuity in accordance with the nomination form signed by the deceased, to the exclusion of the Complainant.

5.1.15.4 The GPAA further stated that pension benefits do not form part of the joint estate, as there were no pending divorce proceedings between the parties at the time of death of the deceased, as the divorce action that was instituted by the Complainant was not finalised by the court but was struck off the roll on 05 June 2012.

5.1.15.5 The GPAA went further and made reference to a case of *Karam vs Amrel Provident Fund* [2003] 9 BPLR 5098 (PFA), where the Board took a decision to exclude the deceased’s son from the list of beneficiaries in the nomination form because the

Board's investigations had revealed that the deceased's son was estranged from his mother during her life time. As a result, the Adjudicator agreed with the decision of the Board to exclude the son.

5.1.15.6 The GPAA further submitted that the decision taken to follow the nomination form was correct, as considerations were taken by the responsible officials that the Complainant and the deceased were separated at the time of death and further that the deceased had exercised her right by excluding the Complainant from her list of beneficiaries who were entitled to receive her gratuity.

5.1.15.7 The GPAA also made reference to the Rules of the GEP Law, which gives the Board a discretion to decide as to who must receive / be paid gratuity.

5.1.16 On 20 August 2019, I issued two (2) subpoenas to Dr Renosi Mokate, the Chairperson of the GEPF Board of Trustees and Mr Krishen Sukdev, the then Chief Executive Officer of the GPAA, for them to appear on 10 September 2019.

5.1.17 On 10 September 2019, Mr Lawrence Mofolo, the Senior Manager: Legal attended the meeting representing the GPAA. During the meeting, Mr. Mofolo submitted the following documents:

5.1.17.1 Copy of the memo dated 05 September 2019 signed by Ms. Dikeledi Pule and Ms. ASG Barnard from the Employees Benefits Withdrawals Unit summarised as follows:

5.1.17.1.1 That the following exit documents of the deceased were received by the GPAA on 21 October 2014 from the employer:

- 1) Z102, duly completed by the deceased's employer;
- 2) Certified identity copies, birth certificates and bank forms for all nominees;
- 3) WP1002 - Nomination form, completed and signed by the deceased;
- 4) Affidavits from the children and sister of the deceased;

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- 5) Decree of divorce and a settlement agreement; and
 - 6) Letter of authority and identity document of the executor.

5.1.17.1.2 During the subpoena hearing, Mr Mofolo submitted that due to the fact that there was a decree of divorce on the received documents, the documents were referred to the GPAA's legal section for further attention, as required by the applicable internal processes. Thereafter, the documents were referred to the Employees Benefits Withdrawals Unit for the processing of payments to the nominated beneficiaries.

5.1.17.1.3 As a result, the benefits were processed and paid into the bank accounts of the two (2) major beneficiaries and the minor beneficiary's benefits were paid into the Guardian's Fund in Pretoria.

5.1.17.1.4 The memo further stipulates that the Complainant was not nominated as per the nomination form. As a result, no allocation was awarded to him when gratuity was paid out.

5.1.17.1.5 The memo also made reference was also made to an affidavit signed by the deceased's sister, whereby she stated that *"she took full responsibility to bury her sister and that her sister was not staying with the husband and that the husband did no approach the family in order to assist with the burial costs"*.

5.1.18 The GPAA during the meeting submitted that the Complainant was excluded from receiving gratuity on the basis that he was no longer a dependent of the deceased, even though the civil marriage between the Complainant and the deceased was still in existence at the time of the death of the deceased.

5.1.19 Accordingly, the Complainant only qualified to receive monthly pension (annuity), by virtue of the fact that the marriage relationship between the Complainant and the deceased was not dissolved by any competent court at the time of death of the deceased.

Application of the relevant legal framework

Matrimonial Property Act 88 of 1984

5.1.20 Marriages in the Republic of South Africa (the RSA) are regulated by the Matrimonial Property Act, 88 of 1984 as amended. As it is not in dispute that the Complainant was married in community of property to the deceased and that at the time when the deceased passed on, their marriage was still in existence. Accordingly, the marriage was regulated by chapter 3 of the Matrimonial Property Act (Marriages in community of Property).

5.1.20.1 It must be noted that marriages can only be dissolved by two (2) ways i.e. by either divorce or death of a spouse.

Divorce Act 70 of 1979

5.1.21 If the parties decides to end their marriage by way of divorce, then Divorce Act 70 of 1979 will be applicable. Section 7 (7) (a) stipulates that “*in the determination of the matrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets*”.

5.1.21.1 Section 1 (1) of the Divorce Act defines pension interest in relation to a party to a divorce action “*as the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have terminated on the date of the divorce on account of his resignation from his/her office*”.

5.1.21.2 Further, section 1 of the Government Employees Pension Law, 1996 (GEP Law) defines pension interest as “*interest in relation to a member of the Fund who is a party to an action for divorce or for the dissolution of a customary marriage, means*

the benefits to which that member would have been entitled in terms of the rules of the Fund if the member's membership of the Fund were to be terminated on the date of the divorce or the dissolution of a customary marriage on account of the member's resignation from the service of the employer”.

5.1.21.3 Section 24A (1) of the GEP Law states that *“the Board shall direct the Fund to reduce a member's pension interest by any amount assigned from the member's pension interest to the member's former spouse in terms of a decree of divorce granted under section 7 (8) (a) of the Divorce Act, 1979 (Act 70 of 1979), or a decree for the dissolution of a customary marriage”.*

5.1.21.4 It must therefore be noted that under the above circumstances, the pension benefits will be regarded as part of the joint estate in line with the Matrimonial Property Act and the Divorce Act.

Pension Fund Act 24 of 1956

5.1.22 Should it happens that any spouse to a marriage in community of property dies, 37C of the Pension Fund Act under the heading: Disposition of pension benefits upon death of member will be applicable. This section stipulates that (1) ***“Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:***

(a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants”.

5.1.23 Consequently, the Pension Fund Act takes precedents and the section is qualified by the sentence that “**Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund.**” With indicates that the Pension Fund Act takes precedents over the Matrimonial Property Act and the Divorce Act. Therefore, I interpret section 37C of the Pension Funds Act to mean that the pension benefits of the deceased member will not form part of the joint estate.

5.1.24 It must further be noted that in terms of clause 8.1 of the Benefits Distribution Policy of 2014, the GPAA is required by law to consider and pay pension gratuity only to the nominees and/or the dependents of the deceased.

Government Employees Pension Law, 1996 (GEP Law)

5.1.25 Section 1 of the GEP Law defines annuity to mean “*an amount which is paid annually*” and gratuity to mean “*a single amount benefit payable in terms of this Law*”.

5.1.26 Rule 14.5.3 of the Government Employees Pension Fund stipulates that if a member dies, depending on the member’s period of pensionable service and period of service, annuity must be paid to the surviving spouse. Meaning that the surviving spouse will qualify to receive a spousal pension which is equal to half of the annuity and the supplementary amount which the member would have received if discharged for different reasons.

Conclusion

5.1.27 Based on the determination of dependency, the Complainant was found to only qualify to receive annuity on the ground of the marriage that existed between him and the deceased.

5.1.28 The Complainant was not considered to receive a pension gratuity because he was not considered to be a deceased's dependent and or a nominee of the deceased.

5.2 Whether the GPAA improperly failed to investigate the allegations or an email enquiry that was reported by LegalWise on behalf of the Complainant dated 02 September 2014:-

Common cause

5.2.1 It is not in dispute that on 02 September 2014, an email correspondence was sent to the GPAA by LegalWise on behalf of the Complainant. The email was cautioning the GPAA of the alleged fraudulent activities committed by the deceased's family / next of kin. On the same email, the Complainant confirmed that the deceased did not have any children at the time of her death.

5.2.2 The email was also lodging a claim for the payment of the deceased's pension benefits. The email was directed to "enquiries@gpaa.gov.za".

5.2.3 It is also not in dispute that the email address in question belongs to the GPAA.

Issues in dispute

5.2.4 The issue for my determination is whether the GPAA failed to investigate the allegations or an email enquiry that was reported by LegalWise on behalf of the Complainant dated 02 September 2014.

5.2.5 The Complainant alleged that the GPAA on 26 November 2014, paid out the deceased pension benefits without considering or investigating the issue of the deceased not having children at the time of her death and further ignoring the information that was brought to their attention by LegalWise.

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- 5.2.6 In support to his allegations, the Complainant submitted the following documents:
- 5.2.6.1 Copy of the email correspondence from LegalWise to the GPAA dated 02 September 2012;
 - 5.2.6.2 Email correspondence from the office of the Chief Justice of the Republic of South Africa;
 - 5.2.6.3 Copy of a letter from the Master's office addressed to Ms. Dorah Maria Buys dated 20 May 2015, wherein she was being informed of the intention to withdraw the letter of Authority that was granted to her, under estate file number 3600/2013, as it was issued based on the fraudulent decree of divorce;
 - 5.2.6.4 Copy of a letter from the Master's office dated 20 May 2015, informing Ms. Dorah Maria Buys that she has been removed as an Executor of the deceased's estate;
 - 5.2.6.5 Letter of Authority issued to the Complainant by the Master of the High Court dated 22 June 2015; and
 - 5.2.6.6 Copy of the Complainant's affidavit dated 22 February 2016.
- 5.2.7 Subsequent to an email enquiry that was sent by my office to the GPAA on 08 February 2017. On 25 October 2017, the GPAA submitted the following documents:
- 5.2.7.1 Copy of an affidavit by Tebogo Joann Valley Buys dated 22 July 2012, wherein she was stating that she is the biological daughter of the late Freida Rabecca Buys;
 - 5.2.7.2 Copy of an affidavit by Lerato Lennete Buys dated 04 July 2013, wherein she was stating that she is the biological daughter of the late Freida Rabecca Buys;

- 5.2.7.3 Copy of an affidavit dated 18 June 2013, wherein Ms. Dorah Maria Buys was stating that she is the biological sister of the late Freida Rabecca Buys;
- 5.2.7.4 Copy of the nomination form;
- 5.2.7.5 Copy of the memo from the GPAA's legal section date stamped 10 August 2017; and
- 5.2.7.6 The proof of payments to the three (3) beneficiaries, confirming the total amounts paid to each beneficiary reflected on the table below:

Ms. D M Buys (Sister)	L L Buys (Child)	T J V Buys (Child)
R 40 812-78.	R163 251-16.	R 204 063-96.

- 5.2.8 The GPAA further confirmed to have paid the pension gratuity in line with the nomination form signed by the deceased, as stipulated in section 22(1) and (2) of the Government Employees Pension Law, 1996 (GEP Law).

Allocation of pension benefits as per the nomination form:

Ms. D M Buys (Sister)	L L Buys (Child)	T J V Buys (Child)
40%	30%	30%

- 5.2.9 On 10 September 2019, Mr Lawrence Mofolo also submitted the following documents:
- 5.2.9.1 Copies of the Benefits Distribution Policy and the Service Level Agreement between the GEPF and the GPAA, whereby the GEPF Board of Trustees delegated the powers in relation to the distribution of gratuities payable upon the death of a

member to the CEO were submitted. Further, the CEO delegated the same powers to the Employees Benefits Withdrawals Unit.

5.2.9.2 Copy of the deceased's file. Upon perusal of the submitted evidence, the following information were noted:-

5.2.9.2.1 That the nomination form that the GPAA relied upon to pay the gratuity was undated;

5.2.9.2.2 In one of the documents (allocation of dependant form) dated 20 November 2014, a note was written stating that "*the nomination form was overruled due to it not being dated and that the deceased had two (2) children*";

5.2.9.2.3 The affidavit by Ms Dorah Maria Buys dated 18 June 2014, confirming that she is the foster parent to Lerato Lennette Buys and Tebogo Joann Valley Buys.

5.2.9.2.4 The affidavit by Ms. Dorah Maria Buys date stamped 30 July 2014, confirming that she is the legal guardian of Tebogo Joann Valley Buys, the deceased's child;

5.2.9.2.5 The affidavits by Tebogo Joann Valley and Lerato Lennette Buys, confirming that they are the deceased's biological children;

5.2.9.2.6 A copy of the Psycho Social Report dated 20 June 2014 from the Department of Social Development.

- i. The purpose of the Psycho Social Report was to assess and outline the home circumstances report of Ms Dorah Maria Buys and to conclude her suitability to can care for the children, i.e Lerato Buys and Tebogo Buys who lost their biological mother on 29 December 2012.
- ii. The following conclusion was made in the report "*that Ms Dorah Maria Buys must be assisted accordingly for the best interest of the children concerned. She is*

willing to take care of her nieces and already have a good relationship with them. She is kin to care and provide for the children concerned”.

- 5.2.9.2.7 A copy of the Letter of Authority issued to Dorah Maria Buys, reflecting an amount of R26 297-00;
- 5.2.9.2.8 A copy of the Settlement Agreement dated 19 and 24 April 2012 respectively.
- 5.2.10 On 12 September 2019, my office approached the Department of Home Affairs (the DHA) for further information on the matter, as there were allegations that the children who were paid pension gratuity are not the deceased’s children but that of Ms. Dorah Maria Buys.
- 5.2.11 On 20 September 2019, a report was received from the DHA confirming that the children are not the deceased’s children but that of Ms. Dorah Maria Buys. Copies of the notice of birth for Lerato Lennette Buys and Tebogo Joann Valley Buys were furnished to my office as proof that Ms. Dorah Maria Buys is the biological mother to the children.
- 5.2.12 The DHA further confirmed that the “divorce” between the Complainant and the deceased was also reported and registered on the system, as per the decree of divorce dated 26 November 2012. It must be noted that the said decree of divorce is the one that was confirmed by both the court and the GPAA forensic investigation to be fraudulent.
- 5.2.13 On 21 October 2019, I issued five (5) subpoenas addressed to the officials within the GPAA: Employees Benefits Withdrawals Unit, who were responsible for the processing of the deceased’s pension benefits claim, to appear before me on 13 November 2019 and explain the role they each played on the matter. The officials were Ms ASG Barnard, Ms Dikeledi Pule, Ms Tsimele Mapule Orica, Mr Cedric Mogale and Ms Ontlametse Mirriam Taunyane.

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- 5.2.14 On 13 November 2019, a meeting was held between my office and the GPAA officials. During the meeting, the process followed and the role each employee played on the claim was explained from the time the documents were received from the employer, to the processor, approver and the payment stage. Statements by all the role players in the processing of the claim were also submitted dated 13 November 2019. Below is a summary of what transpired during the meeting:
- 5.2.14.1 During the meeting, the issue of an enquiry that was submitted by LegalWise on behalf of the Complainant was brought to the attention of the GPAA Employees Benefits Withdrawal unit team. In response, the GPAA team confirmed that the email address is indeed correct and that it belongs to the GPAA. The team further stated that the email correspondence was never brought to their (Employees Benefits Withdrawal unit's) attention at the time of processing the claim until finalisation / payment date being 26 November 2014.
- 5.2.14.2 The team failed to respond and or furnish my office with any evidential proof confirming that the enquiry raised by LegalWise was investigated and the outcome thereof was also communicated to the Complainant or to LegalWise.
- 5.2.14.3 The team further submitted that the unit receive lots of claims from the various employers across the country for processing and that 10% of the received claims are for death benefits.
- 5.2.14.4 During the meeting, the GPAA's team reneged from the response submitted to my office dated 18 August 2017, memo dated 05 September 2019 together with the response to the section 7(9) notice dated 04 April 2019 that payments of the pension benefits were done in line with the nomination form. In contrast, the GPAA Employees Benefits Withdrawal unit team stated that the nomination form was overruled due to the fact that it was not dated.

5.2.14.5 Accordingly, the Employees Benefits Withdrawals unit exercised their discretion by deciding as to who are the deceased's dependents entitled to receive pension gratuity, based on the affidavits by Ms Dorah Maria Buys, Lerato Lennette Buys and Tebogo Joann Valley Buys, a report from the Gauteng Department of Social Development and further decided on the percentages for each identified dependent.

5.2.14.6 The percentages were allocated based on the dependency, for example, the evidence confirming that Ms Lerato Lennette Buys was a student at the Tshwane University of Technology and Tebogo Joann Valley Buys, the last born child was allocated more percentages because she was still a minor at the time in grade 10. Accordingly, the team still considered the same nominated beneficiaries but allocated the percentages on their own discretion. The team from the GPAA further confirmed that the claim for the payment of the pension gratuity was processed on face value of the documents received from the employer.

5.2.14.7 Ms Dorah Maria Buys was considered as a dependent based on the affidavits that she submitted stating that she took full responsibility to bury the deceased and acted as guardian to the children.

5.2.14.8 Below are the names of the identified beneficiaries together with how the percentages were allocated by the Employees Benefits Withdrawals Unit:

Ms. D M Buys (Sister)	L L Buys (Child)	T J V Buys (Child)
10%	40%	50%

5.2.14.9 During the meeting, my team communicated the evidence discovered from the DHA whereby it was confirmed that Ms. Dorah Maria Buys is the biological mother of the two (2) children (Lerato Lennette Buys and Tebogo Joann Valley Buys) and not of the deceased.

5.2.14.10 The GPAA team confirmed that the children were paid or considered under the impression that they were the deceased's children as the affidavits indicated confirming that they are the deceased's children.

5.2.14.11 The GPAA also explained the process that is currently in place when recovering pension benefits that have been found to have been erroneously paid to incorrect beneficiaries, i.e:

5.2.14.11.1 Firstly, a criminal case must be opened with the SAPS;

5.2.14.11.2 The implicated person must have been convicted / found guilty by a court of law;

5.2.14.11.3 Thereafter, the GPAA will be in a position to institute a civil action to recover the money from the person who received the money fraudulently (fraudulent debt).

Supplementary Notice and the response from the GPAA

5.2.15 On 12 June 2020, I issued a Supplementary Notice in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notice) to the then Chief Executive Officer, Mr. Krishen Sukdev, informing him of my adverse preliminary findings and to afford the GPAA an opportunity to respond.

5.2.16 The GPAA responded to my Supplementary Notice as per the letter dated 07 August 2020 but received by my office on 11 August 2020 as follows:

5.2.17 The GPAA reiterated the submission made by the Employees Benefits Withdrawals Unit officials that the email dated 02 September 2014 was never drawn to the attention of the team that processed the payment in this matter. The GPAA further stated that the pension benefits were processed and finalized in accordance with the information at hand.

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- 5.2.18 The GPAA argued that LegalWise supposedly opted to send an email purportedly of importance to a general enquiries email address into which numerous emails are received on a daily basis.
- 5.2.19 Reference was again made to a case of JP Karam v Amrel Provident Fund and the GPAA concluded by stating that the Complainant is not entitled to the deceased's pension benefits as he did not look after the deceased irrespective of whether the email correspondence sent by LegalWise was received or considered. The GPAA further submitted that the fact that the deceased's sister falsely represented her children as those of the deceased becomes mute as she could have been the sole beneficiary in the absence of the children.
- 5.2.20 Based on the submission by the GPAA, nothing was presented to me regarding the alleged failure by the GPAA to investigate the complaint that was reported by LegalWise on behalf of the Complainant dated 02 September 2014.
- 5.2.21 The GPAA further did not comment nor make any submission about my findings and conclusions relating to this issue.

Application of the relevant legal framework

- 5.2.22 Section 195 (1) of the Constitution, provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including, *inter alia*, the promotion and maintenance of a high standard of professional ethics and ensuring that public "services are provided impartially, fairly, equitably and without bias", as per section 195(1)(d). In addition, section 195(1)(f) requires that public administration must be accountable.

Government Employees Pension Law, 1996 (GEP Law)

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- 5.2.23 Section 22 (1) of the GEP Law states that *“If a gratuity is payable on the death of any member to the dependants of such a member or to his or her estate, that member may, on the applicable form of the Fund and subject to the prescribed conditions, notify the Board of his or her wish that the said gratuity be paid on his or her death to the beneficiaries mentioned in that form and be divided among such beneficiaries in the proportion mentioned in that form”*.
- 5.2.24 Section 22(2) of the Act further stipulates that *“Notwithstanding anything to the contrary in any law contained, the Board may on the death of a member who so notified the Board pay at its discretion the gratuity concerned in accordance with the member’s wish”*.
- 5.2.25 Rule 14.5.1 provides that *“if a member with less than 10 years pensionable service dies, a gratuity shall be **paid to his or her beneficiaries or to his or her estate if there is no beneficiary** equal to the greater of the member's actuarial interest and his or her final salary.*
- 5.2.26 14.5.2 *If a member with at least 10 years pensionable service dies, a gratuity shall be paid to his or her beneficiaries or to his or her estate if there is no beneficiary which is equal to the sum of the gratuity and five times the annuity which would have been payable to him or her in terms of rules 14.2.1 (a) and (b) respectively, if he or she had retired for a reason referred to in rule 14.1.1 (a) on the day of his or her death”*.
- 5.2.27 Rule 14.5.9 of the GEP Law further stipulates that *“if a gratuity referred to in rules 14.5.1 and 14.5.2 is payable to two or more beneficiaries, **such gratuity shall be paid to any such beneficiaries and in such proportions as the Board may determine”**.*
- 5.2.28 In terms of clause 6.1 of the Benefits Distribution Policy, dated July 2014, *the Board delegated the GPAA all the functions and duties in relation to the investigation of*

death and the distribution of gratuities payable upon the death of a member or pensioner of the GEPP.

5.2.29 Further, clause 6.2 states that the functions delegated to the GPAA shall include, but not limited to:

6.2.1 *“Receiving information from the employers, unions, colleagues and the next of kin of the deceased members and pensioners;*

6.2.2 *Verifying the deaths;*

6.2.3 *Conducting necessary investigations and identify the dependents and nominees who should be considered in the distribution of the gratuity;*

6.2.4 *Making a decision regarding how the gratuity should be apportioned between various dependents and nominees; and*

6.2.5 *Making decision regarding how the apportioned to the dependents and nominees should be paid to them”.*

5.2.30 A copy of the Standard Operating Procedure (SOP) Unique Number: 47-AB-1.0/11/SOP002 was obtained from the GPAA, whereby it clearly explain that the main purpose of the Client Relation Management (Call Centre) is to function effectively and efficiently through operational procedures and workflow and that its operational objective is to provide tangible improvements in service to business units and sections in order to improve service delivery.

5.2.31 A policy was also developed in order to set out the principles for the distribution of the gratuity benefits due to the beneficiaries of a deceased member or pensioner, as per the discretion provided to the Board in terms of section 22 of the GEP Law and Rule 14.5.9.

5.2.32 Clause 5 of the Benefits Distribution Policy dated July 2014 stipulates as follows:

5.1 *The same statutory and common law duties that apply to the GEPF and the Board shall also apply to the GPAA when it distributes gratuities payable in terms of the GEP Law and the Rules of the GEPF.*

5.2 *The GPAA and its employees must act with good care, diligent and good faith.*

5.3 *When they exercise discretion in the distribution of the gratuity, the GPAA and its employees must exercise it lawfully and reasonably.*

5.4 *The GPAA and its employees must act lawfully at all times and ensure that the entire distribution process complies with the law”.*

5.2.33 The Board has delegated the powers to the GPAA and the said delegated powers are delegated to a unit within the GPAA known as the Employees Benefits Withdrawal Unit.

Conclusion

5.2.34 Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that the Client Relation Management Unit (Call Centre) failed to attend to an email enquiry that was sent by LegalWise on behalf of the Complainant on 02 September 2014 and also failed to provide any reasons thereto.

5.2.35 The Employees Benefits Withdrawals Unit as delegated by the Benefits Distribution Policy, exercised the discretion by identifying the deceased's dependents based on the bona fide evidence that were submitted by the deceased's next of kin.

5.2.36 Upon perusal of the SOP, I have noted that the SOP only covers the complaints or enquiries that are received telephonically and nothing is being said regarding the enquiries that are received via a centralized email, i.e enquiries@gpaa.gov.za. Further, the SOP was last updated during 2012.

5.3 Whether the SAPS failed to investigate the criminal case reported at Pretoria Central Police Station against Ms Dorah Maria Buys?

Common cause

5.3.1 It is common cause that during 2015, the Complainant reported a criminal case of fraud at Pretoria Central SAPS against Ms. Dorah Maria Buys and case docket number (CAS 1679/08/2015) was registered with the SAPS.

Issues in dispute

5.3.2 The issue for my determination is whether the SAPS failed to investigate the criminal case that was reported at Pretoria Central Police Station against Ms Dorah Maria Buys and further to provide the Complainant with the outcome thereof.

5.3.3 The Complainant alleged that upon reporting the criminal case with the SAPS, he was never provided with the progress nor outcome of the investigation.

5.3.4 In a letter dated 19 November 2018, the SAPS informed the investigation team that the investigation into a complaint that was reported by the Complainant was conducted and concluded on 16 January 2017.

5.3.5 The SAPS further confirmed that a case docket was submitted to the National Prosecuting Authority (the NPA) for decision on the matter.

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- 5.3.6 On 11 April 2017, the case docket was returned from the NPA with correspondence advising that the NPA declined to prosecute on the matter.
- 5.3.7 Upon receipt of such correspondence, the Complainant was informed of the NPA's decision by the SAPS. However, the Complainant was not pleased with the outcome and/or the decision by the NPA. As a result, he was advised to approach the NPA with representations on the matter.
- 5.3.8 A copy of the NPA decision was also addressed to the Complainant by the NPA, informing him that there were no reasonable prospects of a successful prosecution on his matter, hence the matter did not proceed before the court of law.
- 5.3.9 The investigation team also met with Advocate. P Nkuna (Senior State Advocate) from the NPA. The purpose of the meeting was to request the NPA to explain the process that must be followed in the event that new evidence is discovered. Taking into account the fact that the matter was previously brought to the attention of the NPA for a decision.
- 5.3.9.1 Adv. Nkuna explained that the process to be followed if new evidence is discovered, is to first contact the SAPS or the investigation officer from the SAPS and hand over the alleged new evidence on the matter.
- 5.3.9.2 The responsible officer will then be required to re-submit a representation to the NPA to reconsider the decision that was previously taken on the matter.
- 5.3.10 On 29 November 2019, a meeting was held with Warrant Officer Masemola. A copy of the case docket was also submitted to the investigation team.

5.3.10.1 Upon perusal of the docket, it was noticed that copies of the affidavits by Ms. Dorah Maria Buys, Lerato Lennette Buys and Tebogo Joann Valley Buys were not filed as evidence in the case docket.

Application of the relevant law

5.3.11 In terms of the Constitution Act 1996 section 205(3) reads *“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law”*.

5.3.12 Section 2 of the National Prosecuting Authority Act 1998 (the NPA Act) establishes the NPA as the single National Prosecuting Authority in line with section 179 of the Constitution.

5.3.13 Section 20 of the NPA Act sets out the powers of the NPA in so far as it relates to instituting and conducting criminal proceedings on behalf of the State and section 20(1)(c) specifically empowers the NPA to discontinue criminal proceedings.

5.3.14 It is clear that the SAPS thus had a duty to investigate the complaint that the Complainant reported against Ms. Dorah Maria Buys as mandated in terms of section 205(3) the Constitution.

5.3.15 From the evidence at my disposal, this function was fulfilled by the SAPS in that the matter was investigated and referred to the NPA for a decision as required.

5.3.16 Further, the NPA did execute its mandate by deciding on the matter based on the evidence that was presented at the time by the SAPS.

5.3.17 As a result, a decision was taken by the NPA and the Complainant was informed of the decision taken and the reasons thereof.

Conclusion

5.3.18 Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that:

5.3.18.1 The SAPS did investigate the complaint that was reported by the Complainant and further referred the case docket to the NPA for a decision on the matter as outlined in terms of the applicable legislation.

6. FINDINGS

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the GPAA and the SAPS, I find as follows: -

6.1 Whether the GPAA acted improperly by not paying the Complainant a gratuity after the death of his wife, Ms. Freida Rabecca Makobe?

6.1.1 The allegation that the GPAA acted improperly by not paying the Complainant a gratuity after the death of his wife, Ms. Freida Rabecca Makobe is unsubstantiated.

6.1.2 As stipulated in section 37C of the Pension Fund Act, the pension benefits does not forms part of the joint estate in cases where the marriage is dissolved by death.

6.1.3 The evidence at my disposal proves that the Complainant did not qualify to be considered as a deceased's dependent.

6.1.4 The GPAA correctly approved the payment of monthly annuities to the Complainant with effect from the date of death of the deceased because of the marriage that existed between the Complainant and the deceased at the time of death.

6.1.5 The GPAA's conduct does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(I) of the Public Protector Act.

6.2 Regarding whether the GPAA improperly failed to investigate the allegations or an email enquiry that was reported by LegalWise on behalf of the Complainant dated 02 September 2014:-

6.2.1 The allegation that the GPAA acted improperly by failing to investigate the allegations or an email enquiry that was reported by Legalwise on behalf of the Complainant dated 02 September 2014 is substantiated.

6.2.2 The Client Relation Management Unit (Call Centre) failed to flag and bring to the attention of the relevant units the email enquiry dated 02 September 2014 that was submitted by LegalWise on behalf of the Complainant.

6.2.3 The GPAA may have very well come to a different conclusion, had an email enquiry from LegalWise reached the relevant units.

6.2.4 Evidence obtained by further investigation indicates that the information submitted by the deceased's next of kin and at the time relied upon by the Employees Benefits Withdrawals unit was improper.

6.2.5 The GPAA's conduct constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(I) of the Public Protector Act.

6.3 Whether the SAPS failed to investigate the criminal case reported at Pretoria Central Police Station against Ms Dorah Maria Buys?

6.3.1 The allegation that the SAPS failed to investigate the criminal case reported at Pretoria Central Police Station against Ms. Dorah Maria Buys is unsubstantiated;

6.3.2 The SAPS managed to investigate the criminal case that was reported by the Complainant against Ms. Dorah Maria Buys and refer the matter to the NPA for a decision.

6.3.3 Further, the SAPS did provide the Complainant with the decision or outcome received from the NPA on the matter.

7. REMEDIAL ACTION

The appropriate remedial action I am taking in terms of section 182(1) (c) of the Constitution, with the view to placing the Complainant as close as possible to where he would have been had the improper conduct and maladministration not occurred, is the following:

7.1 The GPAA Acting Chief Executive Officer to:-

7.1.1 Issue a written apology to the Complainant apologising for failing to attend to his email enquiry that was submitted by LegalWise on 02 September 2014, within thirty (30) days from the date of this report.

7.1.2 Within ninety (90) days from the date of this report review the Standard Operating Procedure, to include the proper evaluation of all the complaints and/or enquiries that are raised with the Client Relation Management Unit (Call Centre) through the

centralised email address and to ensure a process whereby relevant Units within GPAA would be alerted.

7.1.3 Ensure that the staff are trained on the amended Standard Operation Procedure, within 30 days from the date of implementation, in order to avoid recurrence of the similar complaints.

8. MONITORING

8.1 In monitoring the implementation of the remedial action as stipulated in paragraph 7.1.1 to 7.1.3 of this report, the Acting CEO of the GPAA is further required to submit to the Public Protector an implementation plan indicating how the aforementioned remedial action will be implemented within 30 working days from the date of issuing the report.

8.2 In line with the Constitutional Court Judgement 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 [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding, unless set aside by a Court order.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 04 / 02 /2021

Assisted by: Ms A Sombhani & Adv J Raubenheimer: Investigations Head Office.