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

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REPORT ON AN INVESTIGATION INTO ALLEGED UNDUE DELAY BY THE GOVERNMENT PENSIONS ADMINISTRATION AGENCY TO RESOLVE THE INCORRECT PENSIONABLE SERVICE PERIOD OF MS. S C MKHARI

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Executive Summary

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

(ii) The report relates to an investigation into allegations of undue delay by the Government Pensions Administration Agency (GPAA) and Gauteng Provincial Department of Social Development ("the Department") to resolve the Complainant's incorrect pensionable service period since July 2018.

(iii) In the main, the Complainant alleged that she has been in the employ of the Department since her appointment on 02 January 1987. The GPAA allegedly informed her that her pension benefits contributions for the first eleven (11) years (1987-August 1998) of her employment cannot be traced as the GPAA benefit statement reflected her contributions from August 1998.

(iv) In August 1998, she was transferred from Limpopo Provincial Department of Social Development to the Department and her persal number in Limpopo was 80603556 and the Department allocated a new persal number, 18728898, which she was made to understand that it was not supposed to have changed. The Limpopo Provincial Department of Social Development paid her pension contributions using a 99999999 number which the GPAA said that it cannot trace and the pension number allocated to her by the Department in 1998 is 97390915. The GPAA failed to resolve her complaint which could impact negatively on her retirement benefits.

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

(a) Whether the GPAA unduly delayed to correct the Complainant's years of her pensionable service.

(vi) A formal investigation was conducted through meetings and interviews with the Complainant and the officials from the GPAA, as well as the analysis and application of all relevant laws, policies and related prescripts.

(vii) Key laws and policies taken into account were principally those imposing administrative standards that should have been complied with by the GPAA and its officials when a complaint of undue delay to resolve the incorrect pensionable service period was reported. Those are the following:

(a) The Constitution

(b) The Public Protector Act 23 of 1994;

(c) Government Employees Pension Law 21 of 1996;

(d) Public Service Act 103 of 1994;

(e) Batho Pele Principles;

(f) *Mmileng v Government Employees Pension Fund and others [2017] JOL 39351 (GP); and*

(g) *Hangana v Government Employees Pension Fund (2608/2017) [2018] ZAECPEHC 78 (6 November 2018)*

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

(a) Regarding whether the GPAA unduly delayed to correct the Complainant's years of service:

(aa) The allegation that the GPAA unduly delayed to correct the Complainant's pensionable service period is substantiated.

(bb) The investigation revealed that the Complainant indeed contributed to the period in dispute as she managed to provide the payslip of June 1987 which reflected pension contribution. However, the GPAA rejected the Complainant's submission that she started contributing to the Fund from 1987, contending that there is missing proof of pension deductions from 1988 to August 1994, and that a full service record and/or leave records had not been provided to determine continuation of service. However, the GPAA Legal services, in response to my section 7(9)(a) notice issued to its CEO, accepted my findings and concurred that sufficient evidence has been produced to, on a balance of probabilities, accept that the Complainant was a contributing member as from 02 January 1987.

(cc) I am satisfied, based on the evidence and the case law discussed below that the Complainant has produced sufficient and direct evidence to conclude, on a balance of probabilities, that she was a contributing member of the Authorities' Service Pension Fund as from 1987. I concur with the Court in the *Mmileng* matter that to expect the Complainant to obtain proof from an employer for a period dating more than 30 years ago, in circumstances where it is not clear if accurate and correct service records were kept in the first place, or that the Complainant's service records have been duly transferred to and supplied to subsequent employer Departments, "*is to demand the impossible*". In addition, the approach by the GPAA/ GEPF to shift the responsibility to provide documentary proof onto the Complainant and the employer Department, when it failed to ensure the accuracy of its own internal records during the integration process, is not only unfair and therefore improper, but also constitutes a dereliction of its statutory ("constitutional") duties as observed by the Court in the *Hangana* matter.

(dd) The conduct of the GPAA was in violation of section 195(1) (a), (e), (f) and (g) of the Constitution, section 4, 14, and 29 of the GEP Law and Principle 7 of the *Batho Pele* Principles.

(ee) The GPAA's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

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

(a) The GPAA Chief Executive Officer must:

(aa) Within fourteen (14) days from the date of this report, issue an apology letter to the Complainant for the unduly delay to recognise her pensionable service period in dispute; and

(bb) Within thirty (30) days from the date of this report, commence the process of recognising the Complainant's pensionable service period from 02 January 1987.

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1. INTRODUCTION

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

1.2 The report is submitted in terms of section 8 of the Public Protector Act to the following people to note the outcome of my investigation and implement the remedial action:

1.2.1 The Head of Gauteng Provincial Department of Social Development; Ms T Mhlongo;

1.2.2 The Chief Executive Officer (the CEO) of the Government Pensions Administration Agency (GPAA), Mr Krishen Sukdev;

1.2.3 The Chairman of the Board of Trustees of the GPAA, Mr Joe Lesejane; and

1.2.4 The Complainant, Ms SC Mkhari.

1.3 This report relates to an investigation into allegations of an undue delay by the GPAA to resolve Ms SC Mkhari's incorrect pensionable service period since July 2018.

2. THE COMPLAINT

2.1 The complaint was lodged with my office by Ms SC Mkhari (the Complainant) on 26 July 2018, who alleged that:

2.1.1 She has been in the employ of the Department of Social Development since her appointment on 02 January 1987. The GPAA informed her that her pension benefits contributions for the first eleven (11) years (1987-August 1998) of her employment cannot be traced as the GPAA benefit statement reflected her contributions from August 1998;

2.1.2 In August 1998, she was transferred from Limpopo Provincial Department of Social Development to the Department and her persal number in Limpopo was 80603556 and the Department allocated her 18728898 as the new persal number, which she was made to understand that it was not supposed to have changed;

2.1.3 The Limpopo Provincial Department of Social Development paid her pension contributions using a 99999999 number which the GPAA said it could not trace and the pension number allocated to her by the Department in 1998 was 97390915; and

2.1.4 The GPAA failed to resolve her enquiry lodged in about 2015 which could impact negatively on her retirement benefits.

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

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 or any other appropriate alternative dispute resolution mechanism.

3.5 In the Constitutional Court, in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speaker of the National Assembly and Others (CCT143/15; CCT/15) [2016] ZACC11; 2016 (5) BCLR 618 (CC); 2016 (3) SA580 (CC) (31 March 2016),* Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the Public Protector:

3.5.1 The remedial action taken by the Public Protector has a binding effect. *"When remedial action is binding, compliance is not optional, whatever the 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)

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

3.6.1 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);

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

3.6.3 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 of their **nature, context and language,** to determine what course to follow (para 69);

3.6.4 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);

3.6.5 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the **subject-matter of investigation and the type of findings made** (para 71);

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

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

3.6.8 *"*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 (paragraph 71(e)).

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

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

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

3.7.3 There is nothing in the Public Protector Act or Ethics Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);

3.7.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):

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

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

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

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

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

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

3.13 The GPAA is an organ of state 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.

3.14 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any GPAA.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The complaint was initially classified as a matter capable of resolution by way of a conciliation process or mediation in line with section 6(4) (b) of the Public Protector Act, 1994. However, after several attempts to conciliate the matter, it was escalated into an investigation.

4.2 Approach to the investigation

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

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

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

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on whether and to what extend the GPAA unduly delayed to resolve the Complainant's incorrect years of service since July 2018.

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 or organ of state to prevent maladministration and prejudice. In this case, key reliance was placed on legislation, prescripts and policies that regulate the standard that should have been met by GPAA to ensure that it acted fairly and responsibly to ensure that the Complainant was not improperly prejudiced.

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

4.3 **Based on an analysis of the allegations, I identified the following issue to inform and focus this investigation:**

4.3.1 Whether the GPAA unduly delayed to correct the Complainant's pensionable service period.

4.4 The Key Sources of Information

4.4.1 Documents

4.4.1.1 Copy of the Complainant's complaint form and supporting documentation;

4.4.1.2 Copies of the email correspondences and supporting documents from the GPAA dated 26 March 2019; and

4.4.1.3 Copy of the email correspondence from the Complainant dated, 01 April 2019, responding or commenting to a response email from the GPAA on this matter.

4.4.2 Interviews and meetings conducted

4.4.2.1 Telephone interviews with the Complainant on 13 June 2019 and 13 November 2019; and

4.4.2.2 A virtual meeting between the Deputy Public Protector and the GPAA officials on 09 June 2020.

4.4.3 Correspondence sent and received

4.4.3.1 Copies of the email from the GPAA responding to the enquiries of the Public Protector, dated 07 and 26 March 2019;

4.4.3.2 Copies of email correspondences between the Public Protector Investigation team, the GPAA and the Complainant dated 17 October 2018; 11 February 2019; 07, 26 and 29 March 2019; and 01 April 2019; and

4.4.3.3 Copy of the section 7(9) (a) notice dated 19 March 2020 issued the GPAA CEO and the response letter from the GPAA General Manager: Legal Services dated 21 September 2020.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution;

4.4.4.2 The Public Protector Act;

4.4.4.3 Government Employees Pension Law 21 of 1996;

4.4.4.4 Public Service Act 103 of 1994; and

4.4.4.5 *Batho Pele* Principles

4.4.5 Case law:

4.4.5.1 *Mmileng v Government Employees Pension Fund and others* [2017] JOL 39351 (GP); and

4.4.5.2 *Hangana v Government Employees Pension Fund* (2608/2017) [2018] ZAECPEHC 78 (6 November 2018).

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 Regarding whether the GPAA unduly delayed to correct the Complainant's pensionable service period:

Common cause issues

5.1.1 The Complainant, who as at the date of this report was still employed by the Department, approached the GPAA around 2015 to request the estimation of her pension benefits. She was informed by the GPAA that her pension contributions for the first 11 years (1987-August 1998) of her employment could not be traced as her GPAA pension benefit statement reflects that she only contributed from August 1998.

5.1.2 It is also common cause that in August 1998, the Complainant got transferred from Limpopo to Gauteng Province and her persal number in Limpopo was 80603556 and the Department allocated a new persal number, 18728898, which she was made to understand that it was not supposed to have changed.

5.1.3 The Limpopo Department of Social Development paid her pension contributions using a 99999999 number which the GPAA indicated that it cannot trace and the pension number allocated to her by the Department in 1998 is 97390915.

Issues in dispute

5.1.4 The issue for my determination is whether the GPAA unduly delayed to correct the Complainant's pensionable service period.

5.1.5 The Complainant argued that she commenced contributing to her pension benefits at the GPAA on 02 January 1987, however, due to her transfer from the Limpopo to Gauteng Province, her records were not updated. She produced one payslip of June 1987 as evidence that she contributed to pension during the disputed period and the other evidence was for the period from September 1994.

5.1.6 According to the Complainant, her former employer (the then Gazankulu Administration) could not provide her leave or service records for the "*missing period*" as required by the GPAA. She stated that, at the time, they did not receive payslips on a monthly basis as it would sometimes be issued only when there were changes in salaries. She did not have access to service records prior to 1994 and was informed that such records were not accessible from the Persal (Gazankulu Administration only started with Persal in 1994). She further argued that when she enquired with the officials from Limpopo (ex-Gazankulu), she was told that they could not trace her information as it appears that her physical file was transferred to Gauteng Province.

5.1.7 The Complainant also argued that she had not broken or interrupted her service since she started in 1987 and served the Department for thirty two (32) years when she lodged the complaint with my office. She even received twenty (20) and thirty (30) years long service certificates in 2007 and 2017 respectively, as proof that there was no gap or missing period.

5.1.8 She further argued that as a result of the GPAA's failure to consider her pensionable service period between 1987 and August 1998, she will lose her pensionable service period of eleven (11) years when she retires.

5.1.9 My office raised the matter with the GPAA, as per a letter dated 16 October 2018 addressed to Ms Marinda Smith, and were informed that Mr Kith Moloi was assigned to deal with the matter.

5.1.10 The GPAA responded per email dated 26 March 2019 from Mr Moloi stating that the Complainant was never admitted to the GPAA on 02 January 1987. He stated that there is only one payslip for June 1987 and the next proof commenced from September 1994 up to 1998 and it is uncertain what happened between the service gaps.

5.1.11 Mr Moloi further stated that there was missing proof of pension deductions from 1988 to August 1994, and a full service record and/or leave records had not been provided to determine continuation of service, which the GPAA required. He reported that the earliest date from where the Complainant could be admitted as a member, the Authority Service Pension Fund (91 Fund), was from 01 September 1994 until such time the employer can provide the missing records.

5.1.12 On 19 March 2020, I issued a notice in terms of section 7(9)(a) of the Public Protector Act to the GPAA CEO, informing him of my intended findings. I also afforded him an opportunity to respond to my intended findings.

5.1.13 On 21 September 2020, the GPAA responded, through the General Manager: Legal Services, and conceded that they were able to trace a copy of an extract from reconciliation documentation of members incorporated into the GPAA. Further that the said reconciliation record does appear to indicate an admission of the Complainant to the GPAA as at 02 January 1987. It is evident that the transfer of the Complainant from her previous employer to Gauteng was not performed in the correct manner. However, given the submission from my office and the supporting documentation traced on the reconciliation data/record, the GPAA concurred that sufficient evidence has been produced to accept, on a balance of probabilities, that the Complainant was a contributing member from 02 January 1987.

Application of the relevant law

5.1.14 Section 195(1) (a), (e), (f) and (g) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that of a high standard of professional ethics must be promoted and maintained, people's needs must be responded, public administration must be accountable, and transparency must be fostered by providing the public with timely, accessible and accurate information.

5.1.15 It was expected of the GPAA to be accountable to the Complainant by providing her with a reasonable explanation of why her submission that she started contributing to it from 1987 was rejected as according to her she submitted enough proof that she started contributing from 1987.

5.1.16 The GPAA is a public entity responsible for the administration of the public pensions listed in terms of the Public Finance Management Act 1 of 1999. The Government Employees Pensions Fund (GEPF) is a pension fund for government employees established in terms of the Government Employees Pension Law 21 of 1996 (GEP Law). On 3 June 1994 the employees of the so-called self-governing territories, became employees of the South African government, following the

promulgation of the Public Service Act 103 of 1994 (the Public Service Act). All government staff, including temporary staff, were from 3 June 1994, regarded as employees of the government in terms of section 8(2) of the Public Service Act. In terms of section 4 of the GEP Law and its regulations, national and the provincial departments were obliged to deduct pension contributions from the employees' salaries as government employees from 19 April 1996. It is common cause that all government employees, except political office-bearers, must belong to the GEPF.

5.1.17 It was expected of the GPAA to ensure that it considers the years of service served by the Complainant in the Gazankulu Authority as at 3 June 1994, the employees of the so-called self-governing territories became employees of the new South African government, following the promulgation of the Public Service Act.

5.1.18 Section 14(1)(a) of the GEP Law provides that a previous fund shall be discontinued with effect from a date determined in respect of that fund by the Minister. Section 14(2) further provides that all assets, including any right to claim any amount, and all liabilities, including any obligation to pay any pension, related benefit or any other amount in terms of any law, of a previous fund in respect of which a date is determined under subsection (1), shall with effect from that date pass to and vest in the Fund. Section 4(3) then provides that any person who immediately before the date determined in terms of section 14(1)(a) in respect of a previous fund, is a member or pensioner of that fund, shall with effect from date be a member or pensioner of the Fund.

5.1.19 It was expected that the Complainant, as a former member of the Gazankulu Authority, became a member of the GEPF/GPAA and her years of service as a contributing member in the Gazankulu Authority should be considered by the GPAA.

5.1.20 In terms of section 29 of the GEP Law, the Board of the GEPF is empowered to make Rules ("the Rules") in relation to, *inter alia,* "*the payment of benefits from the Fund to or in respect of members on their retirement, discharge, resignation or*

death". These Rules (as amended from time to time) are contained in Schedule 1 to the GEP Law. Rule 6 of the Rules provides that the Board is entitled to require satisfactory proof of the right of any member, pensioner or his or her beneficiaries to any benefits and the Fund is not obliged to pay benefits to a member, pensioner or their beneficiaries until such proof has been submitted to the Board.

5.1.21 In this instance, the GPAA was, therefore, correct to require satisfactory proof of contributing to the Gazankulu Authority from the year 1987 to 1994 to determine whether it could include those years as pensionable benefits or decline to pay her in respect of that period.

5.1.22 However, in the matter of *Mmileng v Government Employees Pension Fund and others* [2017] JOL 39351 (GP) the Court held that the phrase "sufficient proof" must be interpreted in the context of the Rules: "*The phrase ordinarily connotes an objective standard. What would satisfy a reasonable man? The question is not whether the Board of the first respondent subjectively considered the proof to be sufficient, but whether the proof supplied would satisfy a reasonable man in the position of the Board. Inherent in the objective standard is that it is case specific. What constitutes satisfactory proof will therefore depend on the facts on each particular claim for a benefit and, in my view, will necessarily depend on what proof could reasonably be expected to be given in any particular case."*

5.1.23 In the matter of *Hangana v Government Employees Pension Fund* (2608/2017) [2018] ZAECPEHC 78 (6 November 2018) the Court found that it was incumbent upon the GEPF (GPAA) to ensure that its member is paid out the correct pension amount and to take steps to verify the correctness of information instead of shifting the burden on the employer Department or the member.

5.1.24 A payslip produced by the Complainant for 1987 showed that she was a contributing member of a "*previous fund*" as envisaged in section 4 of the GEP Law. The issue is whether or not the Complainant's pensionable service ought to include the period from 1988 to 1994. The GPAA contended that the Complainant

had not proven that she was a contributing member of the previous fund during this period and that in terms of Rule 6, it could decline to pay her in respect of this period on the basis that she has not provided satisfactory proof of this fact.

5.1.25 The Complainant alleged that, from the onset of her employment by the former Gazankulu Authority, she contributed to the relevant pension fund and pension contributions were deducted from her salary. They did not receive payslips on a monthly basis at the time as it would sometimes be issued only when there were changes in salaries. She does not have access to service records prior to 1994 and was informed that such records were not accessible from Persal as the Limpopo Administration only started with Persal in 1994.

5.1.26 In the *Mmileng* matter referred to above, the Court held that such "*direct*" evidence by a member cannot be disregarded "*simply because she has no documentary proof."* Similar to the position of the applicant in the *Mmileng* matter, the Complainant stated, and it is not disputed, that she can obtain no further proof from her current employer. Her former employer no longer exists (and has ceased to exist some two decades ago). In such circumstances, the Court found that for the GPAA to state that it will only pay the member's claim if such member can produce salary advices for the period in question "***is to demand the impossible from the applicant. No reasonable man in the position of the Board would demand this of the applicant."***

5.1.27 The Court further held that the GPAA/GEPF's "*bare*" denial of a member's pensionable service *"based only on the fact that it has no record of the applicant's membership and contributions"* presents a further difficulty in that the GPAA "*appears to accept that its internal records are not an accurate reflection of the applicant's pensionable service*." The Court specifically referred to the records of the "Previous Fund" that would have been supplied to the GEPF when its assets and liabilities and members were transferred to the GEPF in terms of section 14 (2) of the GEP Law and the member of the previous fund became a member of the GEPF in terms of section 4(3) of the GEP Law. The Court noted that it would be

pertinent to such an enquiry to establish if such records were indeed transferred from the previous fund to the GEPF, and if such records are "*decisive*" on the pensionable service of the member in question.

5.1.28 The observations of the Court in this regard are in line with the reasoning of the Court in the *Hangana* matter that the GEPF has a positive duty to ensure that it had the requisite information (and records) at hand to calculate the correct pension amounts, and not to shift the blame (and its obligations) onto the employer Department and the applicant.

5.1.29 *Batho Pele* is a South African political initiative that was first introduced by the late President Nelson Mandela's administration on October 1, 1997 to stand for the better delivery of goods and services to the public. Principle 7 of the *Batho Pele* Principles provides that if the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy, and when complaints are made, citizens should receive a sympathetic, positive response. In this matter, the GPAA should have been accountable to the Complainant and offered her an apology, a full explanation (reasons) of why her submission that she started contributing to it from 1987 was rejected as according to her she submitted enough proof that she started contributing from 1987.

Conclusion

5.1.30 Based on the evidence gathered, it can be concluded that even though the GPAA might have adhered to the legal prescripts regulating the government employees' pension, the Courts have clarified and interpreted these prescripts to protect the employees who started contributing from the previous fund, like in this matter.

6. FINDINGS

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

6.1 Regarding whether the GPAA unduly delayed to correct the Complainant's pensionable service period:

6.1.1 The allegation that the GPAA unduly delayed to correct the Complainant's pensionable service period is substantiated.

6.1.2 The investigation revealed that the Complainant indeed contributed to the period in dispute as she managed to provide the payslip of June 1987 which reflected pension contribution. However, the GPAA rejected the Complainant's submission that she started contributing to the Fund from 1987, contending that there is missing proof of pension deductions from 1988 to August 1994, and that a full service record and/or leave records had not been provided to determine continuation of service. However, the GPAA Legal services, in response to my section 7(9)(a) notice issued to its CEO, accepted my findings and concurred that sufficient evidence has been produced to, on a balance of probabilities, accept that the Complainant was a contributing member as from 02 January 1987.

6.1.3 I am satisfied, based on the evidence and the case law discussed above that the Complainant has produced sufficient and direct evidence to conclude, on a balance of probabilities, that she was a contributing member of the Authorities' Service Pension Fund as from 1987. I concur with the Court in the *Mmileng* matter that to expect the Complainant to obtain proof from an employer for a period dating more than 30 years ago, in circumstances where it is not clear if accurate and correct service records were kept in the first place, or that the Complainant's service records have been duly transferred to and supplied to subsequent employer Departments, "*is to demand the impossible*". In addition, the approach by the GPAA/ GEPF to shift the responsibility to provide documentary proof onto the Complainant and the employer Department, when it failed to ensure the accuracy of its own internal records during the integration process, is not only unfair and therefore improper, but also constitutes a dereliction of its statutory ("constitutional") duties as observed by the Court in the *Hangana* matter.

6.1.4 The conduct of the GPAA was in violation of section 195(1) (a), (e), (f) and (g) of the Constitution, section section 4, 14, and 29 of the GEP Law and Principle 7 of the *Batho Pele* Principles.

6.1.5 The GPAA's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

7. REMEDIAL ACTION

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

7.1 The GPAA Chief Executive Officer must:

7.1.1 Within fourteen (14) days from the date of this report, issue an apology letter to the Complainant for the unduly delay to recognise her pensionable service period in dispute; and

7.1.2 Within thirty (30) days from the date of this report, commence the process of recognising the Complainant's pensionable service period from 02 January 1987.

8. MONITORING

8.1 The Chief Executive Officer must, within ten (10) working days from the date of this report, provide my office with an action plan indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied with within the stated period.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 12 / 01 / 2021

Assisted by: Mr M A Mnguni
Senior Investigator: Investigations Branch/AJSD