

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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“Allegations of Maladministration relating to the failure by the University of Limpopo to deduct and pay the employer- and employee’s pension contribution in respect of Mr FM Mogoba.”

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION RELATING TO THE FAILURE BY THE UNIVERSITY OF LIMPOPO TO DEDUCT AND PAY THE EMPLOYER- AND EMPLOYEE’S PENSION CONTRIBUTION IN RESPECT OF MR FM MOGOBA

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Executive Summary

- (i)** This is a report of the Office of 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 23 of 1994 (the Public Protector Act).
- (ii)** The report communicates the findings and appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution following an investigation into allegations of undue delay relating to the failure by the University of Limpopo (the University) to deduct and pay the employer- and employee's pension contribution in respect of Mr FM Mogoba (Mr Mogoba).
- (iii)** On 18 April 2018, the office of the Public Protector received a complaint from a former employee of the University, Mr FM Mogoba (the Complainant), who requested the office to investigate allegations of undue delay relating to the failure by the University to deduct and pay the employer- and employee's pension contribution.
- (iv)** In the main, the Complainant alleged that:
 - (aa) He was dismissed by the University on 06 December 1996, and he referred a case of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (the CCMA), which ruled in his favour and ordered the University to reinstate him;
 - (bb) The University referred the case to the Labour Court for review against the decision of the CCMA. The University was (on 02 July 2000), ordered to reinstate the Complainant with full benefits;
 - (cc) The University only paid him his basic salary, housing and car allowance benefits for the period between 06 December 1996 and July 2001;

- (dd) Pursuant to the Labour Court decision, all benefits were paid to him except the employer's pension contribution. The outstanding employer's contribution is for the period between December 1996 and July 2001;
 - (ee) He later approached the University demanding payment of the outstanding benefits due to him, but it was all in vain until his early retirement in January 2003;
 - (ff) Further, that the University refused to pay him the employer's pension contribution, and was only willing to do so if he pays over his own pension to the Provident Fund; and
 - (gg) That the Complainant engaged the University regarding payment of the outstanding employer's contributions and even referred the case to the Labour Court around 2012, but due to financial constraints he was forced to abandon the Labour Court process.
- (v)** On analysis of the complaint, the following issues were identified and investigated:
- (aa) Whether the University failed to deduct and pay the employer- and employee's pension contributions into the provident fund? and
 - (bb) Whether the Complainant suffered prejudice as a result of the alleged failure by the University to deduct and pay the employer- and employee's pension contributions into the provident fund?
- (vi)** The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. The investigation process commenced with a preliminary investigation which included interviews and meetings with the Complainant and officials from the University; correspondence with the University; an analysis of the relevant documentation and consideration and application of the relevant laws and regulatory framework.

- (vii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the University and prejudice caused to the Complainant were principally those imposing administrative standards that should have been complied with by the University when administering the pension fund of the Complainant.
- (viii) On 15 December 2020, the office issued a Notice in terms of section 7(9)(a) of the Public Protector Act 1994 (Notice) to, amongst others, the Vice Chancellor and Principal of the University, Professor NM Mokgalong (Prof. Mokgalong), to enable him to respond within thirty (30) working days of receipt thereof.
- (ix) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, the following findings are made:
- (a) **Regarding whether the University failed to deduct and pay the employer- and employee's pension contributions into the provident fund:**
- (aa) The allegation that the University failed to deduct and pay the employer- and employee's pension contribution into the provident fund, is substantiated.
- (bb) It was the duty of the University to calculate, deduct and pay over both the employer- and the employee's pension contributions into the provident fund, but it failed to do so.
- (cc) The conduct of the University was in contravention of section 13A of the Pension Fund Act 24 of 1956 and the Revised Rules of the University of the North Retirement Fund.

- (dd) The conduct also constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act 23 of 1994.
- (b) Regarding whether the Complainant suffered prejudice as a result of the failure by the University to deduct and pay the employer- and employee's pension contribution into the provident fund**
- (aa) The allegation that the Complainant suffered prejudice as a result of the failure by the University to deduct and pay the employer- and employee's pension contribution into the provident fund, is substantiated.
- (bb) The University was ordered by the Labour Court to pay the Complainant all his outstanding benefits retrospectively, but it only paid certain benefits excluding the employer- and employee's pension contribution, for the period between December 1996 and July 2001.
- (cc) The Complainant is a pensioner and has no other source of income. The failure by the University to calculate and pay over the employer- and employee's pension contribution, caused prejudice to the Complainant.
- (dd) The inability of the Complainant to pay the employee's portion of the contribution to the provident fund does not exonerate the University of its obligation to pay the employer's portion of the contribution or to propose anything less than the actual employer contribution as per its offer of settlement dated 04 April 2019.
- (ee) The conduct of the University also constituted improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

- (x) The appropriate remedial action that the office of the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:**
- (aa) The Complainant must pay over his employee's pension contribution in the amount of R40 748.80 into the University's main bank account within thirty (30) days of the date of this report, as per the agreement reached at the meeting held with the Office of the Public Protector on 3 March 2021.
 - (bb) The University must re-calculate the employer's pension contribution and pay over both the employer- and employees contributions to the fund within sixty (60) days of the date of this report.

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION
RELATING TO THE FAILURE BY THE UNIVERSITY OF LIMPOPO TO DEDUCT AND
PAY THE EMPLOYER- AND EMPLOYEE'S PENSION CONTRIBUTION IN RESPECT OF
MR FM MOGOBA**

1. INTRODUCTION

- 1.1. This is a report of the Office of 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 23 of 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to following people to note the outcome of the investigation:
 - 1.2.1 The Vice Chancellor and Principal for the University of Limpopo, Professor NM Mokgalong;
 - 1.2.2 The Chairperson of the University Council, Mr P Nefolovhodwe; and
 - 1.2.3 A copy of the report is also provided to the Complainant, to inform him of the outcome of the investigation and the remedial action taken.
- 1.3 The report relates to an investigation into allegations of undue delay relating to the failure by the University of Limpopo (the University) to deduct and pay the employer- and employee's pension contribution in respect of Mr FM Mogoba.

2. THE COMPLAINT

2.1 On 18 April 2018, the Limpopo Provincial office of the Public Protector received a complaint from a former employee of the University, Mr FM Mogoba (the Complainant), who requested the office of the Public Protector to investigate allegations of undue delay relating to the failure by the University to deduct and pay the employer- and employee's pension contribution.

2.2 The Complainant alleged the following:

2.2.1 That he was dismissed by the University on 06 December 1996, and he referred a case of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (the CCMA), which ruled in his favour and ordered the University to reinstate him;

2.2.2 That the University referred the case to the Labour Court for review against the decision of the CCMA, but that the University was on 02 July 2000, ordered to reinstate the Complainant with full benefits;

2.2.3 That the University only paid him his basic salary, housing and car allowance benefits for the period between 06 December 1996 and July 2001;

2.2.4 That pursuant to the Labour Court decision, all benefits were paid to him except the employer's pension contribution. The outstanding employer's contribution is for the period between December 1996 and July 2001;

2.2.5 That he later approached the University demanding the payment of the outstanding benefits due to him, but it was all in vain until his early retirement in January 2003;

2.2.6 Further, that the University refused to pay him the employer's pension contribution but was only willing to do so if he pays over his own pension to the Provident Fund;

2.2.7 That the Complainant engaged the University regarding payment of the outstanding employer's pension contributions and even referred the case to the Labour Court around 2012, but due to financial constraints he was forced to abandon the Labour Court process.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The mandate of the Public Protector

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

3.1.2 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”.*

3.1.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.1.4 The Public Protector's powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power on the Public Protector to resolve disputes through conciliation, mediation, negotiation or any other appropriate

dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purposes of an investigation.

3.1.5 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* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect¹. The Constitutional Court further held that: “*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences*”².

3.1.6 The court further stated that:

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

3.1.6.2 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 (paragraph 67);

3.1.6.3 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 (paragraph 68);

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

² Supra at para [73].

- 3.1.6.4 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 (paragraph 69);
- 3.1.6.5 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 (paragraph 70);
- 3.1.6.6 The Public Protector’s powers 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 the investigation and the type of findings made (paragraph 71);
- 3.1.6.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));
- 3.1.6.8 The Public Protector has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.1.6.9 “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)).

- 3.1.7 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 when confirming the powers of the Public Protector:
- 3.1.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);
- 3.1.7.2 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, (paragraphs 85 and 152);
- 3.1.7.3 There is nothing in the Public Protector 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 (paragraphs 91 and 92);
- 3.1.7.4 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 (paragraphs 100 and 101);
- (a) Conduct an investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 3.1.7.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (Paragraph 104);
- 3.1.7.6 The primary role of the Public Protector is that of an investigator and not an adjudicator. The role is not to supplant the role and function of the court (Paragraph 105).

- 3.1.7.7 The fact that there is no firm findings on the wrongdoing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108);
- 3.1.7.8 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112);
- 3.1.8 To this end, it should be noted that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature³. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its adjudicative and judicial nature. The office of the Public Protector is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and prejudice⁴. It is therefore trite that the decisions of the Public Protector are administrative actions⁵.
- 3.1.9 The University is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector's mandate.⁶
- 3.1.10 The jurisdiction of the Office of the Public Protector was not disputed by any of the parties in this matter.

³ *Sedumo et al vs Rustenburg Platinum Mines Limited et al*, 2008(2) SA 24 (CC) at 235.

⁴ Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa 1996(4) SA744 (CC) at 16.

⁵ *Minister of Home Affairs et al vs Public Protector et al* 2017(2) SA 597 (GP).

⁶ In the Constitutional court case of CCT 100/17 Niekara Harrielall v University of KwaZulu-Natal [2017] ZACC 38

3.1.11 Section 6(9) of the Public Protector Act, 1994 provides that:

“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned”.

3.1.12 In the case between **South African Bureau of Standards v The Public Protector**, the North Gauteng High Court 34290/15Â) [2019] ZAGPPHC 101 (27 March 2019) the court held that-

“As with most claims and complaints, there is for good reason, time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving.”

3.1.13 As supplementary jurisprudence in respect of the issue of “special circumstances” it is clear that in the case between **Gordhan v Public Protector and Others [2020] ZAGPPHC 777** (17 December 2020) the North Gauteng High Court held that-

“In view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint.”

3.1.14 Therefore, regarding the exercise of the 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 was taken into account to exercise the discretion favourably to accept this complaint, include the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether this office would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether a refusal to investigate perpetuates the violation of section 195 of Constitution; whether any remedial action will redress the imbalances of the past. What constitutes '*special circumstances*' depends on the merits of each case. In this instance, the special circumstances that this office took into account was the fact that the Complainant is a pensioner and has no other source of income; the Complainant has exhausted all his legal remedies by seeking justice from the Labour Court in order to correct the actions or inactions of the University but abandoned the legal process due to financial constraints; and the Complainant is still continuing to suffer prejudice as a result of the conduct of the University.

- 3.1.15 Admittedly, in terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported does not, in itself, bar the Public Protector from investigating. Instead, it is mainly the interest of justice that dictates whether it should be investigated or not. In this case, it is in the interest of justice to investigate and establish how the University failed to pay the employer and employee's pension contributions into the provident fund and to ensure that such incident does not occur in future.

3.1.16 Since the incident or matter concerned occurred more than two years¹¹⁷ prior to the reporting of the matter to the Public Protector, he/ she has exercised his/ her discretion in terms of section 6(9) of the Act to entertain the complaint based on the following special circumstances¹¹⁸ as envisaged in Rule 10(1) of the Public Protector Rules-

“(a) The Complainant provided sufficient and compelling information with prima facie evidence of alleged or suspect improper or prejudicial conduct;

(b) The nature of the complaint and grievance reveals the possibility of un-remedied prejudice or injustice...”

3.1.17 In the circumstances the Complainant provided sufficient information with prima facie evidence of alleged or suspect improper or prejudicial conduct by the University. It also follows that, the nature of the complaint and grievance reveals the possibility of un-remedied prejudice or injustice suffered by the Complainant as a result of the conduct of University.

3.1.18 On 15 December 2020, the office of the Public Protector issued a Notice in terms of section 7(9)(a) of the Public Protector Act 1994, to amongst others, the Vice Chancellor and Principal of the University, Professor NM Mokgalong, to enable him to respond within thirty (30) working days of receipt thereof.

⁷ ¹¹¹ If applicable

⁸ ¹²¹ As actually recorded and captured by the Assessor (COO/ EM/ PR) who exercised the delegated discretion on behalf of the PP – vide *Minister of Home Affairs v The Public Protector* (308/2017) **[2018] ZASCA 15** (15 March 2018

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives the office the power 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; to report on that conduct; and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

4.1.2 The Public Protector Act confers on this office 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 office the authority to resolve a matter through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The investigation was conducted by way of correspondence, meetings and interviews with the Complainant and the relevant University officials, analysis of the relevant documentation and consideration and application of the relevant laws, and regulatory framework.

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:

- (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 amounts to maladministration or other improper conduct?
 - (d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to place the Complainant as close as possible to where he/she would have been but for the maladministration or improper conduct?
- 4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal³ (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.
- 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 or complied with by the University to prevent maladministration and prejudice.
- 4.2.4 The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the University complied with the regulatory framework setting the applicable standards for good administration.
- 4.3 On analysis of the complaint, the following issues were considered and investigated:**
- 4.3.1 Whether the University failed to deduct and pay the employer- and employee's pension contributions into the provident fund?

4.3.2 Whether the Complainant suffered prejudice as a result of the alleged failure by the University to deduct and pay the employer and employee's pension contributions into the provident fund?

4.4 The key sources of information

4.4.1 Documents

- 4.4.1.1 A copy of the Memorandum (the Memo) from Mr MF Mogoba to the Acting Executive Director Human Resource Department, Mr MF Mabelebele (Mr Mabelebele) dated 21 January 2002.
- 4.4.1.2 A copy of the Inter-departmental Memo from Mr Mabelebele to Mr MF Mogoba dated 30 April 2002.
- 4.4.1.3 A copy of the Memo from Mr Mogoba to Mr Mabelebele dated 06 May 2002.
- 4.4.1.4 A copy of the Inter-departmental Memo from Mr Mabelebele to Mr Mogoba dated 05 June 2002.
- 4.4.1.5 A copy of the letter from the University addressed to Mr Mogoba dated 02 July 2001.
- 4.4.1.6 A copy of the Court Judgement dated 02 July 2000.
- 4.4.1.7 A copy of the Appeal to the Labour Court by the University dated 25 August 2000.
- 4.4.1.8 A copy of the Revised Rules of the University of the North Retirement Fund (RRUNRF)

4.4.2 Correspondence sent and received

- 4.4.2.1 A letter of enquiry from this office to the Vice Chancellor and Principal, Prof. Mokgalong dated 17 July 2018.
- 4.4.2.2 A letter of response from Prof. Mokgalong to the Complainant containing a settlement proposal dated 04 April 2019.
- 4.4.2.3 A letter from this office to Prof. Mokgalong containing a copy of the revised offer from the Complainant dated 20 May 2019.
- 4.4.2.4 A copy of the letter from Prof. Mokgalong to this office declining the revised offer of settlement dated 27 November 2019.
- 4.4.2.5 A copy of the email from this office to the Chief Director Human Resource Department, Mr JK Moloto requesting copies of the relevant rules and policies governing the Alexander Forbes Pension Fund dated 02 June 2020.
- 4.4.2.6 A copy of section 7(9)(a) Notice signed on 14 December 2020 addressed to Prof. Mokgalong.

4.4.3 Legislation and other prescripts

- 4.4.3.1 The Constitution of the Republic of South Africa, 108 of 1996 (the Constitution);
- 4.4.3.2 The Public Protector Act, 23 of 1994 (PPA);
- 4.4.3.3 The Pension Fund Act, 24 of 1956 (PFA);
- 4.4.3.4 The Revised Rules of the University of the North Retirement Fund (RRUNR).

4.4.4 Case Law

- 4.4.4.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).
- 4.4.4.2 *President of the Republic of South Africa v Office of the Public Protector and Others* Case [2017] ZAGPPHC 747.
- 4.4.4.3 *Public Protector vs Mail and Guardian* 2011(4) SA 420 (SCA).
- 4.4.4.4 *South African Bureau of Standards v The Public Protector, the North Gauteng High Court 34290/15Â* [2019] ZAGPPHC 101 (27 March 2019)
- 4.4.4.5 *Gordhan v Public Protector and Others* [2020] ZAGPPHC 777 (17 December 2020)

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 University failed to deduct and pay the employer and employee's pension contributions into the provident fund:

Common cause issues

- 5.1.1 The Complainant was employed by the University until his dismissal on 06 December 1996. He was a member of the Government Employees Provident fund (GEPF)

- 5.1.2 The Complainant referred a case of unfair dismissal to the CCMA which ruled in his favour and the CCMA ordered the University to reinstate him.
- 5.1.3 The University referred the case to the Labour Court for review against the decision of the CCMA. The Labour Court confirmed the decision of the CCMA on 02 July 2000 and ordered the University to reinstate the Complainant with full benefits.
- 5.1.4 The Labour Court on 02 July 2000 under Case no. J1105/97 by Landman J held that:
“... the application to review and set aside the award is dismissed. In the premises the award dated 14 September 1997 is made an order of court and the university is ordered to reinstate Mr F M Mogoba retrospectively to the date of his dismissal on 06 December 1996. Any dispute regarding the calculation of the retrospective benefits may be enrolled, on notice, in this court for decision”.
- 5.1.5 The University sought leave to appeal the judgement granted on 02 July 2000, however the leave to appeal was dismissed by the Labour Court with costs.
- 5.1.6 Upon his reinstatement in August 2001, the University paid the Complainant all the benefits due to him except the employer’s pension contribution, for the period between December 1996 and July 2001.
- 5.1.7 The Complainant retired in January 2003 and was paid the pension fund benefits from the time of his reinstatement in August 2001 up to January 2003.
- 5.1.8 The University calculated the reinstatement of pension benefits for the period 06 December 1996 to July 2001 as follows:

Employer’s pension contribution – R111 977.56

Complainant’s pension contribution – R40 748.40

5.1.9 The University offered “*without prejudice*” the payment of Seventy Thousands Seven Hundred Eighteen Rand and Eighteen Cents (R70 718.81) as a full and final settlement between itself and the Complainant on 04 April 2019, which would have been the employer’s pension contribution, which the Complainant rejected.

Issues in dispute

5.1.10 The Complainant submitted that the University did not deduct and pay his employer- and employee’s pension contribution into the provident fund for the period from 06 December 1996 when he was dismissed until 31 July 2001, when he was reinstated.

5.1.11 The matter was raised with the University on 17 July 2018. The Vice-Chancellor and Principal, Prof. Mokgalong, responded in a letter dated 04 April 2019. The letter contained a settlement proposal between the University and the Complainant indicating the following:

“Kindly note that after a careful consideration taking into account the history of the matter and the time lapse since the dispute arose between the parties. The University of Limpopo has arrived at a decision to propose a settlement in the amount of R70 718.81(SEVENTY THOUSANDS SEVEN HUNDRED EIGHTEEN RANDS AND EIGHTEEN CENTS) as a full and final settlement between itself and Mr Moses Fekile Mogoba. This proposed payment must not be construed as an admission of guilt on the part of the University of Limpopo.

Furthermore if the proposed settlement is not acceptable to Mr Moses Fekile Mogoba, the University of Limpopo reserves all rights it may have in law with regards to this matter.”

5.1.12 The Complainant rejected the offer presented by the University and requested the Office of the Public Protector to make a counter offer on his behalf in the amount of R111 977.56, being the calculated employer’s contribution for the period 06

December 1996 to 31 July 2001 in terms of the Inter-Departmental Memorandum from the former Acting Executive Director Human Resources Department, Mr MF Mabelebele, addressed to the Complainant dated 30 April 2002.

5.1.13 The University rejected the counter-offer in a letter dated 27 November 2019 by indicating the following:

“It has always been the University’s position that the employer contributions to the retirement fund and medical scheme cannot be paid to the employee, as per the relevant policies and rules governing the membership to both the fund and the scheme. These contributions must be paid directly to the fund and the scheme, provided the employee pays over his/her contribution accordingly.

In a meeting held between the University, Mr Mogoba and the office of the Public Protector, Mr Mogoba alleged that the reason he never requested the University to deduct the employee’s contribution from the lump-sum amount that was paid to him so that the total amount, together with that of the employer’s contribution, could be paid over to the fund and the scheme, was because the University never advised him accordingly.

At the conclusion of the meeting the University was requested to go back in order to locate and submit written evidence showing that indeed Mr Mogoba was ever informed of the need for him to make his own contributions available to enable the employer to pay over its contributions to the fund and the scheme.

The inter-Departmental Memorandum between Mr MF Mogoba and the Acting Executive Director Human Resources Department, Mr Mabelebele, dated 30 April 2002, which was attached to your letter dated 20/05/2019, serves as written evidence that, contrary to what Mr Mogoba stated in the meeting held at your offices.

Surely this written evidence as was sought from the University changes the manner in which the University thought this matter could be settled. The foremost issue before the office of the Public Protector was whether the employer has indeed informed the employee of his duty to make contributions to the scheme and the fund.

The University has solemnly and sincerely acted with the true dictates of its conscience in dealing with the matter. In sum, the University considers the matter to be settled.” (sic)

5.1.14 The Complainant argued that he could not pay his portion of the pension contribution into the provident fund because it was the duty of the University to deduct the pension contribution and pay same over to the provident fund.

5.1.15 In response to the section 7(9) Notice, Prof. Mokgalong rejected the Complainant’s allegation that the University failed to deduct and pay the employer- and employee’s pension contribution into the provident fund and indicated in a letter dated 03 February 2021 as follows:

“It is common cause that the employer did pay the employee monies which were due to be paid over to the Retirement Fund of the University at the time in an attempt to correct the situation and comply with Rule 4.2 of the Fund, which provides “each member’s contribution shall be deducted by the employer from his salary or wages and paid to the fund, provided that while a member is in receipt of benefits from the Disability arrangements his contributions to the Fund shall be paid from the benefit paid from the Disability arrangements”.

The employer did inform the employee, in writing, of his obligation to pay his contribution over to the Fund, so as to enable the employer (the University) to also pay its part of the contribution (see Annexure ULM 1). It should be recorded that the employee indeed received the said written communication but did not respond to it.

At the time that the above communication was forwarded to him, the employee was still in the employ of the University, holding the position of Executive Manager: Logistics, which put him in the position of custodian of the rules, regulations and policies of the University and there is no doubt that he should have understood the communication better.

It follows, quite evidently, that the University could not pay the employer's contribution, to the employee.

It should be noted, too, that the purpose of Section 7(9) of the Public Protector Act 1994, is to give a person-or entity-an opportunity to be heard, if it appears that such a person-entity-would be implicated in any act of transgression. It goes without saying that at the point of issuing this Section 7(9) Notice, the Public Protector is not in a position to determine to which to which side the scale of justice would tilt.

It follows that the wording of Paragraph 8 of the Section & (9) Notice is unfortunate, particularly, "I am likely to make adverse findings against the University". This is deeply concerning at this point in the investigation. It may be mentioned that the inference to be drawn from the wording cited above is not the most encouraging with regard to objectivity as should be deduced from the provisions of Section 7(9) of the Public Protector Act 1994.

In sum, the University did all it could, given the circumstances; unfortunately, the employee did not contribute in the least to remedy the defect, as he ignored the written communication notifying him of the necessity to pay his portion of the contribution to the Fund."

5.1.16 It should be noted that the Complainant was paid his employee contribution only upon his reinstatement in August 2001. The University failed to deduct the employee- and employer's pension contributions for the period 06 December 1996 until 31 July 2001 and to pay that into the fund when the Complainant was reinstated.

- 5.1.17 It is not disputed that the Complainant was informed by the University in writing of his obligation to pay his contribution over to the provident fund to enable the University to also pay its part of the contribution.
- 5.1.18 In an effort to have an amicable resolution to the matter, a meeting was held on 03 March 2021 with the Complainant regarding his outstanding pension contributions which the University mistakenly paid over to him directly upon his reinstatement, instead of deducting and paying it over to the fund.
- 5.1.19 The Complainant agreed at this meeting with the Office of the Public Protector to pay over the employee's contribution into the University's bank account to enable it to pay over both the employee- and employer's contributions to the fund.
- 5.1.20 On 09 March 2021, a meeting was arranged and held with the Vice-Chancellor, Prof Mokgalong to inform him of the latest developments regarding the Complainant's decision in para 5.1.19 *supra* and to get the version and undertaking of the University on the latest developments.
- 5.1.21 The Vice-Chancellor indicated that the University is amenable to receiving the employees' pension contribution and pay over both the employee- and employer's pension contributions to the fund upon receipt of the employee's portion.

Application of the relevant law

- 5.1.22 Section 23(1) of the Constitution states that everyone has the right to fair labour practice.
- 5.1.23 The Constitution places a responsibility on the University to ensure that the Employees are treated fairly and that any administrative action taken against any employee should be procedurally fair, lawful and reasonable.

5.1.24 Section 13A (1) of the (Pension Fund Act 24 of 1956 (PFA) provides the following:

- “(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-*
- (a) Any contribution which in terms of the rules of the fund, is to be deducted from the members remuneration; and*
 - (b) Any contribution for which the employer is liable in terms of those rules”*

5.1.25 Rule 4(1) of the Revised Rules of the University of the North Retirement Fund⁹ (RRUNRF) provides the following:

“Each member in service shall contribute to the fund at a rate of 7.5 per cent of his Fund salary. Each member’s contribution shall be deducted by his Employer from his salary or wages and paid to the Fund; Provided that while a Member is in receipt of benefits from the disability arrangement his contributions to the Fund shall be paid from the benefit paid from the Disability arrangement.”

5.1.26 Upon his reinstatement, it was expected of the University to exercise due diligence in paying the Complainant all his benefits by first calculating, deducting and paying over both the employer- and employee’s pension contributions into the provident fund. Instead, the University paid the employee’s pension contribution over to the Complainant directly and also neglected to pay over the employer contribution to the fund.

Conclusion

5.1.27 Based on the evidence gathered, it is concluded that the University failed to deduct and pay the employer- and employee’s pension contributions into the provident fund upon his reinstatement.

⁹ RRUNRF- 01 December 2006.

5.2. Regarding whether the Complainant suffered prejudice as a result of the failure by the University to deduct and pay the employer- and employee's pension contribution into the provident fund

Common cause issues

- 5.2.1 It is common cause that the Complainant was a member of the GEPF prior to dismissal in December 1996.
- 5.2.2 The GEPF paid the Complainant's pension benefits out to him upon his exit from the fund, whilst the Complainant referred the case to the CCMA challenging the dismissal.
- 5.2.3 The Complainant referred the case of unfair dismissal to the CCMA which ruled in his favour and ordered the University to reinstate him. The University applied for a review of the decision of the CCMA, but the Labour Court confirmed the decision of the CCMA in July 2000 and ordered the University to reinstate the Complainant with full benefits.
- 5.2.4 The University only reinstated the Complainant on 1 August 2001 after a further period of 12 (twelve) months. Upon his reinstatement, the University had already switched from the GEPF to Alexander Forbes Provident Fund. The Complainant then joined the Provident Fund on 01 August 2001.
- 5.2.5 The University failed to contribute both the employer- and the employee's pension contributions from 06 December 1996 until 31 July 2001, being the period when the Complainant was challenging his unfair dismissal.
- 5.2.6 The Complainant brought a court action against the University around 2012 in order to compel the University to pay the said contribution, but the matter was never concluded.

Issues in dispute

- 5.2.7 The Complainant argued that it was the duty of the University to deduct his pension contribution and pay same over to the provident fund.
- 5.2.8 The University argued that the employer contributions to the provident fund could not be paid to the employee, as per the relevant policies and rules governing the membership to both the fund and the scheme. The contributions should be paid directly to the fund and the scheme, provided the employee pays over his/her contribution accordingly.

Application of the relevant law

- 5.2.9 Section 13A (1) (c) and (d) of the Pension Fund Act provides the following:

“(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely:

- (a) Any contribution which in terms of the rules of the fund, is to be deducted from the members remuneration; and*
- (b) Any contribution for which the employer is liable in terms of those rules”*

- 5.2.10 Rule 4(1) of the RRUNRF provides the following:

“Each member in service shall contribute to the fund at a rate of 7.5 per cent of his Fund salary. Each member’s contribution shall be deducted by his Employer from his salary or wages and paid to the Fund; Provided that while a Member is in receipt of benefits from the disability arrangement his contributions to the Fund shall be paid from the benefit paid from the Disability arrangement.”

5.2.11 It was expected of the University to exercise due diligence in paying the Complainant all his benefits by first calculating, deducting and paying over both the employer- and employee's pension contributions into the provident fund, before paying out any benefits to him.

Conclusion

5.2.12 Based on the evidence gathered, it is concluded that the University failed to calculate, deduct and pay over both the employer- and employee's pension contributions into the provident fund.

5.2.13 The University paid over the employee's contribution to the Complainant instead of the provident fund and the Complainant initially refused to pay back his employee's pension contribution to the University.

6. FINDINGS

Having regard to the evidence, and the regulatory framework setting the standard that should have been upheld by the University and the impact on the Complainant, the office of the Public Protector therefore makes the following findings:

6.1 Regarding whether the University failed to deduct and pay the employer- and employee's pension contributions into the provident fund:

6.1.1 The allegation that the University failed to deduct and pay the employer- and employee's pension contribution into the provident fund, is substantiated.

6.1.2 It was the duty of the University to calculate, deduct and pay over both the employer- and employee's pension contributions into the provident fund, which it failed to do.

6.1.3 The conduct of the University was in contravention of section 13A of the PFA and Rule 4(1) of the RRUNRF.

6.1.4 The conduct of the University also constitutes improper conduct as envisaged in Section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

6.2 Regarding whether the Complainant suffered prejudice as a result of the failure by the University to deduct and pay the employer- and employee's pension contribution to the provident fund

6.2.1 The allegation that the Complainant suffered prejudice as a result of the failure by the University to deduct and pay the employer- and employee's pension contribution to the provident fund, is substantiated.

6.2.2 The University was ordered by the Labour Court to pay the Complainant all his outstanding benefits retrospectively, but it only paid certain benefits except both the employer- and employee's pension contribution, for the period between December 1996 and July 2001.

6.2.3 The Complainant is a pensioner and has no other source of income. The failure by the University to calculate and pay over both the employer and employee's pension contribution, caused prejudice to the Complainant.

6.2.4 The conduct of the University also constituted improper conduct as envisaged in section 182(1) of the Constitution and undue delay as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that the office is taking in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

7.1.1 The Complainant must pay over the employee's pension contribution in the amount of R40 748.80 into the University's main bank account within thirty (30) days of the date of this report, as per the agreement reached at the meeting with the Office of the Public Protector on 3 March 2021.

7.1.2 The University must re-calculate the employer's pension contribution and pay over both the employer- and employees contributions to the fund within sixty (60) days of the date of this report.

8. MONITORING


8.1 The Office of the Public Protector will require the Vice Chancellor and Principal, Prof. Mokgalong to submit an implementation plan to this office within fifteen (15) working days from the date of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 The submission of the Implementation Plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



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

DATE: 31 / March / 2021



Assisted by Adv. M Matimolane

Provincial Representative: Limpopo Province