

**SPECIAL 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(2)(b)(iii) OF THE PUBLIC
PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

Accountability Integrity Responsiveness

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**REPORT NO. 15 OF 2016/2017
SPECIAL REPORT
ON THE IMPLEMENTATION OF REMEDIAL ACTION CONTAINED IN
PUBLIC PROTECTOR REPORT 18 OF 2011/2012
ON THE MALADMINISTRATION DURING THE PRIVATISATION OF
THE VENDA PENSION FUND**

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Executive Summary

“The payment of compensation is not a matter of charity but a requirement of justice to redress a wrong... There are valid arguments to be had about the scale of compensation and the way that such cases should be handled in the future, but we would be deeply concerned if the Government chose to act as judge on its own behalf by refusing to accept that maladministration took place.”¹

- (i) This is a special report issued by the Public Protector in terms of section 8(2)(b)(iii) of the Public Protector Act, 1994 with a view to seek the National Assembly’s intervention in expediting the implementation of remedial action as contained in the Public Protector Report No 18 of 2011/12, issued in 2011.
- (ii) This report seeks to assist the National Treasury to expeditiously implement Report 18 of 2011/2012 in pursuit of deliberations held with the Director General of National Treasury, Mr Lungisa Fuzile and the Minister of Finance, Honourable Mr P Gordhan, MP. Both the Minister and the Director General had raised a number of concerns regarding the implementation of the said report, which included possible floodgates and the need for clarity for the basis of some of the Public Protector’s findings.
- (iii) In Report 18 of 2011/12 the Public Protector found that government had indeed mishandled the privatisation of the Vhembe Pension Fund, to which the Complainants had belonged during the apartheid years, in a manner that constitutes maladministration as envisaged in the Public Protector Act and improper conduct as envisaged under section 182(1) of the Constitution. At that stage, the Public Protector further found that the Complainants, who are pensioners who used to be employed at various levels of the erstwhile Venda

¹ Great Britain: Parliament: House of Commons: Public Administration Select Committee The Stationery Office, 15 Dec 2008 - insurance companies - 52 pages

government, from messenger to Director General, were prejudiced by the maladministration.

- (iv) Subsequent to the release of Report 18 of 2011/12, the State Institutions involved raised a number of disputes on the narrative of the events dealt with in the Public Protector's report, as well as the assessment of the evidence on the role of the State and the actions of the Complainants. The State Institutions raised major challenges with, *inter alia*, the implementation of the Public Protector's remedial action because of the unavailability of data and records, as well as concerns about the possible opening of floodgates to similar claims.
- (v) The Public Protector engaged the State Institutions on all the issues raised, as reflected in this report. The Director General and the Public Protector eventually agreed to establish a joint Task Team with representation of officials from the Public Protector South Africa, the National Treasury and the Government Pensions Administration Agency (GPAA) formerly known as the Government Employee Pension Fund (GEPF).
- (vi) This Special Report basically:
 - (a) Confirms the original 2011 findings, which essentially held that had government not cried wolf and/or done due diligence on the viability of the privatised fund, particularly to ensure that the fund retained the defined benefit status and, that the Complainants' periods of pensionable service were not compromised, the Complainants would not have lost their pension benefits, leaving them only with Social Development grants;
 - (b) Provides guidance on how to resolve the paucity of records on the side of the state (GPAA); to verify information provided by the Complainants relating to their posts; Departments where they were employed; their appointment dates; as well as some remuneration detail;

- (c) Addresses the general concerns raised by the State Institutions, as well as specific concerns relating to the implementation of the Public Protector's remedial action, including the possibility of opening floodgates; and
- (d) Emphasises the reasons why Government needs to address the unremedied injustice highlighted in Report 18 of 2011/12, in view of the fact that the Complainants have no alternative remedy and the recent confirmation by the Supreme Court of Appeal of the Public Protector's Constitutional power to provide an effective remedy for State misconduct; and
- e) Recommends:
 - aa) a process, based on a closed list of Complainants (and information that had been sourced from the Complainants and official records that the State and the GPAA were obliged to maintain), to establish a reasonably reliable database of beneficiaries of the Public Protector's remedial action, and to assess the potential prejudice and losses of these beneficiaries with the aid of an Actuary;
 - bb) that the State through National Treasury commits funds to facilitate the recalculation of pension benefits by the GPAA of those Complainants who became members of the GEPF after 1996 and/or *ad hoc* compensation of those Complainants who retired prior to the amalgamation of the various pension funds, to reimburse their reasonable losses as estimated with the assistance of the Actuary; and
 - cc) that Parliament oversees the implementation of the Public Protector's remedial action in terms of section 182(1) (c), read with sections 43(2) and 55(2) of the Constitution.
- (vii) It is the Public Protector's sincere hope that this Special Report will resolve the impasse, thus providing necessary relief to restore the lives and dignity

of the Complainants and their colleagues, the Concerned Vhembe Pension Fund Group. It must be appreciated that the maladministration did not only deprive the Complainants of a defined benefit, but also constituted a violation of the right to social security, a contravention of section 27 of the Constitution.

- (viii) Government's attention is finally drawn to the fact that the Complainants have suffered immensely due to maladministration by the State and the wait on remedial action. Many are penniless, relying on the government's old age grants, while a number had already passed on while on the long wait for equitable social security. Immediate action is accordingly urged.

**SPECIAL REPORT ON THE IMPLEMENTATION OF REMEDIAL ACTION
CONTAINED IN THE “EQUITABLE ACCESS TO SOCIAL SECURITY REPORT”
(REPORT 18 OF 2011/2012) ON THE PRIVATISATION OF THE VENDA PENSION
FUND**

1. INTRODUCTION

- 1.1 The Public Protector issues this Special Report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(2)(b)(iii) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The Report is intended to assist the National Treasury and its’ Director General (Director General) with the implementation of Public Protector Report 18 of 2011/12 **released on 8 November 2011** (hereinafter referred to as Report 18 of 2011), and to seek the intervention of the National Assembly in terms of section 8(2)(b)(iii) of the Public Protector Act, to oversee such implementation in accordance with sections 182(1)(c), 43(2) and 55(2) of the Constitution.
- 1.3 The report follows several meetings held with the Director General and communication with the Minister of Finance (the Minister) with a view to following up on remedial action and assisting the Department of Finance with implementation concerns regarding Report 18 of 2011/12.
- 1.4 During the engagements, the Director General did not reject the findings or resolved to take Report 18 of 2011/12 on judicial review, but rather expressed some concerns including that of possible floodgates by state employees who had voluntarily opted out of the state pension fund only to find that *“the grass was indeed not greener on the other side”*. He also required clarity on some of the findings made in the report.

- 1.5. The matter was taken forward through an agreement that a joint Task Team should analyse the report and provide advice on an implementation approach that would minimise floodgates whilst optimising legality. The Task Team consisted of representatives from the Department of Public Service and Administration (DPSA), National Treasury and the Government Pensions Administration Agency (GPAA), as well as members of the Public Protector South Africa. Unfortunately, the Task Team could not reach agreement on certain issues, which lead to the Public Protector's contingent preparing a Memorandum, which formed the basis of this Special Report.
- 1.6. Having considered all issues raised by Treasury, the DPSA, the GPAA and the Minister, the Public Protector concluded that the best way forward, is that Treasury should approach Parliament with a request for funds which will provide appropriate compensation to the individuals who had been adversely affected by the events covered in Report 18 of 2011/12.

2. PUBLIC PROTECTOR REPORT 18 OF 2011/12:

"AN INVESTIGATION INTO AN ALLEGATION OF IMPROPER CONDUCT BY THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION AND THE GOVERNMENT EMPLOYEES PENSION FUND DURING THE PRIVATISATION OF THE VENDA PENSION FUND"

2.1 Background

- 2.1.1 The Complainants are pensioners who used to be employed by the erstwhile Venda Homeland Government. They approached the Public Protector as representatives of fellow pensioners who call themselves the *Vhembe Concerned Pensioners Group*. They alleged that they had suffered prejudice due to government's mishandling of their exit from the Venda Government Pension Fund, which resulted in them ending up without any pension benefits.

2.1.2 The Complainants were members of the Venda Pension Fund, a defined benefit fund, provided, regulated and administered by the Venda Government. On the advice of government that the fund was in dire financial straits, they were persuaded to withdraw from the Venda Pension Fund and join a private pension fund scheme - recommended by government, which was not a defined benefit scheme, which eventually collapsed, leaving them destitute. They also alleged that some of the members suffered double prejudice in that their contributions were under calculated.

2.2 Maladministration

2.2.1 In Report 18 of 2011/12, the Public Protector made several findings of maladministration against the South African Government in its capacity as successor in law of the institutions involved, and in respect of its subsequent inactions and failures to deal with its responsibilities after the amalgamation of the various pre-1994 government employees' pension funds. The Public Protector confirmed that due to government's maladministration, the Complainants suffered prejudice or injustice. The specific findings of maladministration were that:

2.2.1.1 *"The management of the Venda Pension Fund prior to amalgamation led to a situation where there was a different dispensation of members who participated in the First Privatisation Scheme, the Second Privatisation Scheme and members who elected not to transfer their interests of share.*

2.2.1.2 *This amounted to unequal treatment of the members of the Fund in terms of which certain members were worse off than others even though they contributed equally to the Fund.*

- 2.2.1.3 *The Venda Pension Fund, as well as the Government and its predecessors who managed the Fund prior to and directly after amalgamation, did not exercise sufficient duty of care and due diligence towards the affected members of the Venda Pension fund to ensure that their pension interests were fully protected and secured. This amounted to maladministration.*
- 2.2.1.4 *The acts of the Venda Pension Fund in relation to the calculation of the benefits of the members who privatised resulted in maladministration as the members were entitled to 100% of their accrued benefits.*
- 2.2.1.5 *The acts and omissions of the South African Government and in particular the failure by the Department of Public Service and Administration (DPSA) and the Government Employees Pension Fund (GEPF) to address the complaints from the First Privatisation Scheme and to enquire how the transfers to SANLAM were calculated for each member, constitutes maladministration.*
- 2.2.1.6 *The acts and omissions of the South African Government and in particular the failure by the DPSA and the GEPF to address the complaints of the six Complainants regarding the purchasing of pensionable service that have been bought back, constitutes maladministration.*
- 2.2.1.7 *The omission of the South African Government and in particular the GEPF's failure to implement the recommendation of the Public Protector in Report No. 18 of 2002 amounts to maladministration and a violation of section 181(3) of the Constitution."*

2.3 Prejudice and injustice

2.3.1 Section 182(1) (c) of the Constitution, requires the Public Protector to consider whether any of the findings of maladministration or improper conduct in state affairs resulted in prejudice to the individuals who made the complaints, and to take appropriate remedial action. In this respect, The Public Protector identified the following general consequences arising from the acts of maladministration:

2.3.2.1 *“The Complainants suffered prejudice when they were influenced to privatise their pension benefits as they forfeited all the benefits of a defined benefit fund such as a spouse’s pension, funeral benefits and orphans benefits as well as a medical aid subsidy after retirement.*

2.3.2.2 *The Complainants suffered prejudice when their complaints and problems were ignored by the different Government institutions which they complained to since the advent of our democracy in 1994.*

2.3.2.3 *The Complainants suffered prejudice when they had to apply for old age grants despite having accumulated numerous years of service, and they lost the status they had during their period of employment with the Government.*

2.3.2.4 *The Complainants suffered prejudice when they were influenced to privatise their pension benefits and were not properly informed on the consequences of the privatisation of their benefits.”*

2.4 Remedial action contained in Report 18 of 2011/2012:

2.4.1 The aim of the Public Protector’s remedial action was to ensure that the individuals prejudiced by the events covered in the Public Protector’s report, be restored as close as possible to the position they would have been in,

had maladministration not occurred. In the circumstances of this case, the remedial action taken in compliance with section 182(1) (c) of the Constitution in respect of the three individual Complainants were the following:

Remedial Action	Status
<p><i>The GEPF should recalculate the pension benefits of Mr T J Tshiololi as if he retired with all the years of service he was a member of the GEPF including the Venda Pension Fund, and afford him the opportunity to repay any benefits he might have received, minus the amounts repaid by him to the Venda Government.</i></p>	<p><i>Not implemented</i></p>
<p><i>The GEPF should recalculate the pension benefits of Mr M P Ramavhale as if he retired with all the years of service he was a member of the GEPF including the Venda Pension Fund and afford him the opportunity to repay any benefits he might have received, minus the amounts repaid by him to the Venda Government.</i></p>	<p><i>Not implemented</i></p>
<p><i>The DPSSA and Treasury must address the complaint of Mr L J Rambau and order a forensic audit of the list of the First Privatisation Scheme of the Venda Pension Fund to determine the correctness of the transfer amounts in respect of each member."</i></p>	<p><i>Not implemented</i></p>

2.4.2 Remedial action to be taken in compliance with section 182(1) (c) of the Constitution in respect of all members of the Venda Pension Fund were the following:

Remedial Action	Status
<p><i>“The Ministers of Public Service and Administration and of Finance should appoint a task team, including members of the Government Pensions Administration, in collaboration with the Public Protector to –</i></p>	<p>Implemented</p>
<ul style="list-style-type: none"> ● <i>Review the implementation of the Privatisations Schemes of the former Venda Pension Fund;</i> 	<p>Partially implemented</p>
<ul style="list-style-type: none"> ● <i>Consider changes to the Government Employees Pension Law, 1996 and Rules to enable members who participated in the privatisation schemes the opportunity to repay the benefits received and to recalculate their pension benefit in terms of the rules regulating normal retirement;</i> 	<p>Not implemented</p>
<ul style="list-style-type: none"> ● <i>Determine whether or not the service periods that had been bought back before the privatisation schemes of the Venda Pension Fund should be</i> 	<p>Not implemented</p>

<i>included when recalculating the benefits of the members.</i>	
<i>The Government should apologise to the members of the Venda Pension Funds who suffered prejudice as a result of maladministration by different Government institutions.”</i>	<i>Not implemented</i>

3. GOVERNMENT’S REACTION TO THE PUBLIC PROTECTOR’S REPORT

3.1 General concerns

3.1.1 In their submission the State Institutions stated that there is no evidence of “culpable misrepresentation by the State”.

3.1.1.1 Writers such as Stephen Owen accentuated the view that the Ombudsman system of oversight and accountability (such as the Public Protector) has developed in response to the shortcomings of legislative and judicial method in ensuring that individuals receive appropriate consideration and protection against adverse government action:

“A finding of administrative negligence and a recommendation ... to remedy the harm caused by it pursuant to ombudsman legislation is not necessarily based on the same findings that a court would require to establish legal liability. Ombudsman authority to recommend remedial action derives from the premise that a fair remedy with respect to administrative wrongdoing is not always available at law ... to a large extent, the office of the Ombudsman is established by legislatures in recognition of the inadequacy of the courts to deal with many injustices arising from the nature of modern bureaucracy.”

- 3.1.1.2 This is a premise that was equally fundamental to the creation of the institution of the Public Protector as an entity to remedy prejudice and impropriety caused by maladministration or improper conduct in terms of section 182(1)© of the Constitution.
- 3.1.1.3 In the absence of legal definitions of “*improper*” conduct or conduct resulting in any *impropriety or prejudice* the Public Protector has to give content to these two concepts by determining norms or standards to serve as requirements of proper and non-prejudicial administration. In the public law realm within which the Public Protector operates, the test for “*improper*” conduct is not equivalent to determining unlawfulness or wrongfulness in a delictual liability sense and “*prejudice*” does not refer to patrimonial damage envisaged in a private law of action for damages.
- 3.1.1.4 This means that every conduct in state affairs can be judged from two different, slightly overlapping and parallel systems; to determine if the organs of state and public institutions in South Africa act in accordance with the law² and from the point of view of general standards of good administration. Parties may be able to demonstrate that every applicable rule had indeed been considered but the outcome may still be unfair, which is why it may be necessary to rely on fairness in order to do justice between the parties and to look beyond the letter of the law.
- 3.1.1.5 Applying these norms and principles, the Public Protector engaged the State Institutions concerned and *inter alia*, reiterated that the erstwhile Venda Government responded to perceived risks associated, with the anticipation of a redistributive democratic government in a new political dispensation, which were, in view of the State’s position as guarantor for the funding obligations of the previous funds (and members’ benefits) as well as the anticipated amalgamated pension fund for Government employees, totally unfounded.

² Sections 7, 33 and 195 of the Constitution

3.1.1.6 The actions of the then Venda Government was in breach of its legal duty to take reasonable steps to ensure the correctness and validity of information on the perceived threats or risks to the accrued and vested pension interests of the members of the Venda Pension Fund. They failed to act fairly and proportionally in the interest of the members of the Venda Pension Fund by moving away from a defined benefit pension plan, which is the primary vehicle for providing core retirement benefits in the public sector.

3.1.1.7 In addition, the Public Protector's findings were based on a lack of or inadequate engagement between the state as regulator and the affected members on the reasons for, and implications of transferring out of a defined benefit scheme to a privatised defined contribution scheme:

- a) The Complainants were members of the Venda Pension Fund, a defined contribution fund that was provided, regulated and administered by the then Venda Government.
- b) The Venda Government promulgated legislation to create a First and Second Privatisation Scheme, which constituted an offer to members of the Venda Pension Fund to transfer out of a defined benefit scheme to a privatised defined *contribution* scheme (SANLAM).
- c) The privatisations schemes ran parallel to the normal public service pension scheme to provide members of the Venda Pension Fund with an alternative ("so-called safer") option for the preservation of their pension benefits.
- d) The privatisation schemes introduced a deviation from a defined benefit plan, which was the model proposed by the amalgamation with the RSA Pension Funds.
- e) The recorded *rationale* for this deviation and for presenting members with a pension dispensation based on a **defined**

contribution scheme, related to apparent concerns about the funding levels and assets *vis-a-vis* pension liabilities of the proposed amalgamated Public Service Pension Fund, which were not based on any actuarial or scientific assessments.

- f) A number of members of the Venda Pension Fund accepted the offer and transferred their pension interests out of the Venda Pension Fund.
- g) The transfer exercise included pre-retirement distribution options that allowed members to access a portion of their balance account or accumulations as cash payments to them.
- h) The cash incentive was not available to members who did not privatise and who remained with the Venda Pension Fund.
- i) A significant number of the members who opted out of the Venda Pension Fund and transferred their pension interests to defined contribution fund(s) in terms of the privatisation schemes, failed to preserve an adequate and secure retirement income and are financially worse off than their colleagues who remained with the Venda Pension Fund.

3.1.2 There is no evidence that Complainants were “coerced by the government to privatise their pension benefits”

3.1.2.1 The Public Protector draws on various sources, including international experience and best practice to develop suitable and proportionate remedies for Complainants whose complaints are upheld and who have suffered prejudice, injustice or hardship as a result of the same maladministration or poor service.

3.1.2.2 “Prejudice” or “injustice” are inherently a far broader concept than ‘damage’ for the purposes of delictual liability as discussed above. As a result, remedies provided by the Ombudsman institutions such as the Public

Protector, do not depend on the establishment of delictual norms such as strict causation and foreseeability and much like improper conduct and prejudice, is primarily a matter for the Public Protector to define for herself.

- 3.1.2.3 The test is not whether or not the members of the then Venda Pension Fund were forced, coerced, pressured or compelled to act to their detriment, but rather if there is a causal link between the actions of the then Government and the prejudicial position that the members of the Complainant found themselves in.
- 3.1.2.4 In responding to this concern, the Public Protector emphasised that the option presented by the then Venda Government for employees to privatise their occupational pensions and the manner in which the process was managed, was different from the scenario where employees are presented with a *bona fide* opportunity to re-invest their accrued pension benefits in a defined contribution dispensation.
- 3.1.2.5 The contribution rates are normally only reviewed after the actuarial valuation of the Fund, taking into account the funding level policy adopted by the Board of Trustees. The funding level policy would have set long term objectives for determination of the contribution rate. Once the assets and liabilities of defined benefit fund exceeded a certain range, it would either trigger additional contributions from government or consideration of benefit improvement or even a contribution holiday, depending upon whether the result is below or above the range, respectively.
- 3.1.2.6 The State Institutions who responded to the Public Protector's report are in agreement that there was no need for the privatisation schemes in order to protect the retirement income of the members of the Venda Pension Fund, as this would have been guaranteed by the (national) Government upon amalgamation.
- 3.1.2.7 To the contrary, the only party who would have benefited from changing from a defined benefit to a defined contribution scheme was the employer (the

Venda Government) because it would no longer have had to assume the market risk. In a defined **contribution** plan, the **employees** assumed the risk of investment failure because the funds were no longer insured by the government.

3.1.2.8 To present the privatisation schemes as an appropriate vehicle to safeguard their accrued pension interests against the prospects of depreciation as a result of funding level concerns would therefore have constituted a **serious, if not critical misrepresentation of the risks posed to members of the Venda Pension Fund upon amalgamation. Any risk to the potential loss of their pension benefits was adequately borne by the state as employer, because the government would have had access to any additional funds that would have been required for the amalgamated fund to meet its obligations.**

3.1.2.9 Ordinarily, an invitation or inducement (generally referred to as an “offer”) provided to a member of a registered pension scheme to change the form of their accrued defined benefit rights by, for instance transferring out of a defined benefit scheme, is by its nature regarded as an *incentive exercise*. In this case the incentive to the members of the Venda Pension Fund to privatise their pension interest was furthermore, borne out of the fact that the objective of the privatisation dispensation was purported to reduce the risks to their pension interests. Another incentive was that this exercise provided members with the opportunity to access cash for their accumulated benefits in the form of significant immediate lump sums.

3.1.2.10 In these circumstances, the evidence at the Public Protector’s disposal led her to conclude, that the state as employer did not only induce members of the Venda Pension Fund to opt out of the fund as a defined benefit fund in favour of the defined contribution plan in terms of the privatisation schemes, but actually did so by misrepresenting the risks posed to its members by the amalgamation process in favour of dispensation that reduced its own risks to the disadvantage of such members.

3.1.2.11 Finally, even if the Complainants had a choice whether or not to privatise, subsequent events and the maladministration found in respect of the conduct of the State adversely affected the employees' ability to procure a retirement benefit equivalent in nature to the benefit to which they would have been entitled had they remained with the Venda Pension Fund, and our courts have subsequently held that in such circumstances, a choice can never as a factor on its own, render such prejudice fair.³

3.1.3 The GEPF/State cannot be held accountable for "bad investments choices once members have opted out of the Fund."

3.1.3.1 In the Public Protector's engagements with the Director General and other representatives of the State Institutions concerned, she highlighted that the primary vehicle for providing core retirement benefits in the public sector is the defined benefit pension plan. Internationally, the majority of full-time public employees participate in defined benefit pension plans for the major source of employer provided retirement benefits. By comparison, only a small portion of full-time public employees participate in defined contribution retirement plans for their employer provided retirement benefit.

3.1.3.2 Employer and/or employer/employee contributions to a defined benefit pension plan are based on a formula that calculates the contributions needed to meet the defined benefit. These contributions are actuarially determined taking into consideration the employee's life expectancy and normal retirement age, possible changes to interest rates, annual retirement benefit amount, and the potential for employee turnover.⁴

3 South African Airways (Pty) Ltd v V and Another (CA9/13, C420/2006) [2014] ZALAC 27; [2014] 8 BLLR 748 (LAC); (2014) 35 ILJ 2774 (LAC) (12 June 2014)

4 "What is a Defined Benefit Pension Plan?". *Channels: Tax center*. New York Life Precision Information, LLC. 2009. <http://www.newyorklife.com/cda/0,3254,11545,00.html> Retrieved 2009-05-09

- 3.1.3.3 When markets decline, employees are not affected, but the employer may have to divert more money from current revenue into the pension plan - thereby increasing its costs at the expense of its profit. When markets rise, the employer reaps the benefit of the rising values and can reduce its pension contributions and increase its profits while the retiree continues to receive the same promised income.
- 3.1.3.4 It is generally agreed that employer-sponsored plans are a more cost-effective and efficient way to deliver retirement benefits and services to employees than individually focused retirement arrangements. Public sector entities, however, do not look at retirement benefits for their employees as just related to their role as an employer. A principal function of government is to ensure the general welfare of society. This makes the public sector uniquely concerned with the adequacy and security of public employee retirement benefits. If the core defined contribution retirement plans they sponsor fail to provide adequate and secure income during retirement, a consequence may be an increased burden on social welfare programs in the future.⁵
- 3.1.3.5 In comparison, most writers and experts agree that traditional defined contribution plan designs allow members to make poor investment decisions. Participants often are overly conservative or too aggressive in their asset allocations and fail to rebalance on a timely basis. In addition, plan sponsors often make the mistake of offering too many investment choices, which may only increase complexity and confusion for participants in the investment decision making process. Academic studies indicate that too many choices may result in poor outcomes. ***“Even with good investment decision making, individuals in defined contribution plans are still subject to investment volatility.”***

⁵ April 2008, DEFINED CONTRIBUTION PENSION PLANS IN THE PUBLIC SECTOR: A BEST PRACTICE BENCHMARK ANALYSIS, Roderick B. Crane, J.D. Director, Institutional Client Relations, Public Sector Market TIAA-CREF

3.1.3.6 Defined contribution plans define how much the sponsor and the participant can or must contribute to an individual account created for each participant. Typically, the employee makes choices about how the money should be invested and takes the risk of poor investment performance if his or her choices do not perform well.

3.1.3.7 Another threat to adequate retirement income from defined contribution plans, is the risk that members will cash-out all or large portions of their account balances when they change pension plans, as it happened in this case. This concern is justified, as many individuals, particularly younger individuals and those with smaller accumulations, do not preserve their retirement funds when they are permitted to access cash in their retirement plans.

3.2 Challenges raised by the State Institutions pertaining to the implementation of Report 18 of 2011/12 and appointment of a Task Team

3.2.1 The State Institutions raised major challenges with, *inter alia*, the implementation of the Public Protector's remedial action principally citing floodgates and the unavailability of data and records. The representations made included the following:

- a) The pension files of a large number of ex-Venda public servants were not in the possession of GPAA and could not be traced;
- b) Files that were available did not contain sufficient information on any previous pension payments made to the effected Complainants; and
- c) The GPAA was unable to verify data on the computer system used by the then Venda government, which was used to effect payments under the privatisation scheme, because of compatibility issues.

- 3.2.2 The Public Protector had extensive engagements with the Director-General of Finance on the issues raised. It was eventually resolved by agreeing to appoint a Joint Task Team to analyse Report 18 of 2011/12 and present implementation solutions which would minimise floodgates of Complainants, while also ensuring legality. The Task Team was to meet and discuss questions and concerns raised by the State Institutions involved and to prepare an implementation Memorandum to take the implementation of remedial action in Report 18 of 2011/12 forward.
- 3.2.3 The Task Team consisted of representatives from the Department of Public Service and Administration (DPSA), National Treasury and the Government Pensions Administration Agency (GPAA), as well as members of the Public Protector South Africa.
- 3.2.4 The Task Team was required to focus on the verification of the data and information presented by the Complainants and other steps that are required to proceed with implementation, and to find common ground on, amongst others-
- a) The nature and extent of challenges raised by the State institutions when determining the scope of the prejudice found by the Public Protector and to provide an appropriate remedy;
 - b) The availability of reliable data and credible records to formulate equitable responses to the position of the Complainants individually or collectively; and
 - c) The legal basis for any kind of decision or action that would constitute acceptance of liability for the financial implications of the implementation of the remedial action directed by the Public Protector.
- 3.2.5 The Task Team resolved that further information was required in addition to the information in the Public Protector's report, in order to facilitate a common understanding of the nature and extent of the injustice claimed by the Complainants. The Task Team conducted further interviews with

representatives of the Complainants; obtained further information and records, and the GPAA was tasked with conducting verifications on documents received from the Complainants.

3.2.6 After the Task team members reported back to their respective Principals, a consultative meeting was held in July 2016 between the Director General, representatives of the Complainant and the Public Protector in a final effort to find common ground on the issues of concern.

3.2.7 At the meeting it came to the Public Protector's attention that an internal memorandum was prepared by the Operations Unit within the GEPF in 2003 which identified a challenge that the Venda Pension System was only readable by older personal computers, and as computers were replaced (and upgraded) it became increasingly difficult to access essential data on the Venda Pension System. It was noted, *inter alia*, that the "information from this system is highly needed and we cannot afford losing it." It was furthermore recommended that a service provider be appointed to rewrite the Venda Pension System programme to "suite (sic) the newly developed PC's"... It was further recommended that the new system should be able to reflect –

- a) the option taken by a particular member;
- b) the Banking details or transfer particulars in case of withdrawals or transfers; and
- c) the "availability of the amount in the fund if a member indicated not to privatise or "remained silent"

3.2.8 Against this background it was clear that the GEPF Management was aware of the risks to preserve access to credible and reliable data on the members of the former Venda Pension Fund, but failed to take sufficient steps to negate and mitigate the situation.

3.2.9 At the meeting of July 2016, The Director General and the GPAA undertook to establish what happened to the 2003 proposal to appoint a service provider to rewrite the Venda Pension System in the GEPF and to verify the availability of the relevant data.

4. ACTION PLAN TO FACILITATE IMPLEMENTATION OF THE REMEDIAL ACTION

4.1 Essential elements of the action plan

4.1.1 The action plan required the State Institutions to, *inter alia*, include steps to

- a) establish a data set with the names and employee characteristics and information provided by the employer, of the employees (Complainants) who were prejudiced in the administration of the privatisation schemes and who might be eligible for the recalculation of their pension benefits in terms of the envisaged remedial action;
- b) determine the actual losses suffered by the Complainants affected by the maladministration in the form of a shortfall in actual payments made by Venda Pension Fund during the transfer of the pension benefits to Sanlam or the Complainants directly;
- c) finding mechanisms to determine losses in relative terms by comparing the actual benefits accrued by the Complainants in the combination of the privatised funds, as well as their re-joining of the GEPF, compared to the prospective benefits they would have earned if they had stayed with the GEPF (a defined benefit fund); and
- d) Ascertaining who, amongst the GPAA and National Treasury would or should be liable for the funding implications of the remedial action.

4.2 Concerns about the possible opening of floodgates:

4.2.1 The State Institutions were concerned that the payment of compensation to the Complainants in this matter might be perceived as setting a precedent leading to a flurry of similar claims from, or raising expectations of payment to

- members of pension funds which operated in the previous political dispensation in South Africa.
- 4.2.2 The remedial action in Report 18 of 2011/12 was designed to address maladministration that is demonstrably unfair and unreasonable in the specific set of circumstances of this matter. Such a provision would not open the floodgates for spurious claims because only genuine, credible Complainants identified in that report would have any chance of approval. The payments do not set a precedent to create a general expectation of a payment to any other individual or groups.
- 4.2.3 The Public Protector appreciates the challenges presented by the risks of an open-ended, unquantified process. In light of the Public Protector's mandate as envisaged in the Constitution to protect the public interests and public resources she is am mindful of the fact that the remedial action should not place an undue burden on the Fiscus. It is therefore agreed that the number of beneficiaries of the intended remedial action should be determined in order to ring-fence the financial implications thereof
- 4.2.4 At the last meeting between the Director- General and the Public Protector it was resolved that the representatives of the Complainant would consult its members to verify the number of people who are intended to be beneficiaries of the Public Protector's remedial action in Report 18 of 2011/12, and to collect all available records and documentary evidence relating to their privatisation from the Venda Pension Fund, periods of pensionable service, and retirement (for those members who have already exited the GEPPF).
- 4.2.5 The Complainant's representatives subsequently went through an exercise which lasted a number of weeks where the details of all their members were re-captured together with supporting documentation. Approximately 11 containers, containing thousands of documents, were subsequently delivered to the offices of the Public Protector. The consolidated list of complainants comprise of approximately 7000 people.

4.2.6 Our courts are no strangers to floodgates arguments and are astute to ensure that those asserting a right to lodge or submit identical claims have in fact provided a legally recognised basis for doing so. In the matters of *Van Duivenboden*⁶ and *Van Eden*⁷ the Court rejected the defendants' submission based on the floodgates argument. In the Van Eden matter the Court held that

“ -the spectre of limitless liability tend to be exaggerated, since the requirements for establishing negligence and a legally causative link provide considerable practical scope for harnessing liability within acceptable bounds.”

4.2.7 While the Public Protector understands the need to avoid adopting an approach which may be perceived as opening the floodgates, access to justice should in the Public Protector's view prevail over perception concerns. It would be manifestly unfair to deny a payment to a person which is entitled to remedial action in terms of section 182(1) (c) of the Constitution, simply because there might be others with identical complaints (who have not approached the Public Protector). In addition, the Public Protector is confident that the proposed process should be capable of controlling any possible excesses, and would be able to curb any additional claims.

4.3 Efforts of the Task Team to establish a data set of eligible employees/pensioners

4.3.1 Representatives of the State Institutions in the Task Team confirmed that the State possessed limited and incomplete records on employees affected by the privatisation schemes. It was stated that limited historic information on transactions relating to the pension benefits which occurred prior to amalgamation of the various pension funds in 1996, was available.

6 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)

7 *Van Eeden v Minister of Safety and Security* (176/01) [2002] ZASCA 132; [2002] 4 All SA 346 (SCA) (27 September 2002)

- 4.3.2 The GPAA all along maintained that the required records and information are not available, this despite written communications by the then Acting Chief Director: Pensions Administration (Department of Finance) on 9 September 1996 that the *“Department is in possession of the information of all members who privatised in 1992, and as the final authority to pay pension benefits, this Department will not accept liability for any incorrect quotations issued by personnel offices”* (emphasis added).
- 4.3.3 The Task Team held extensive interviews with representatives of the Complainants in an effort to confirm the availability or non-availability of required and needed evidence and information. The Task Team conducted further interviews with the representatives of the Complainants in October 2013, and obtained further information and records. The GPAA was then tasked with conducting verifications on documentation received from the Complainants.
- 4.3.4 The GPAA reported that the verification of data-process confirmed fundamental challenges due to incomplete documentary evidence. Even though further electronic data was obtained from the Venda Pension Fund system, the outdated format of the data was not compatible with any current software. As a result the data could not be analysed or interpreted to determine the nature and value of pension fund transactions relating to individual Complainants.
- 4.3.5 The outcome of this verification process therefore did not provide any useful information which could serve to establish common ground on areas of discord with the State Institutions.
- 4.3.6 In an effort to bridge the huge gap between unreliable data and the search for credible records, the Task Team also engaged certain private institutions involved in the privatisation scheme, including SANLAM.
- 4.3.7 Ultimately, the Task Team could not come to an agreement on a data set with the names and employee characteristics of the Complainants who were

prejudiced in the administration of the privatisation schemes and who might be eligible for the recalculation of their pension benefits in terms of the envisaged remedial action.

4.3.8 The Complainants provided a list of approximately 7000 names of all persons who came forward as employees and pensioners adversely affected by the privatisation scheme. Most of the members submitted some form of supporting documents including copies of identity documents and salary advices (indicating appointment dates) and retirement dates together with (in a few instances) retirement letters.

4.3.9 The information and documentation provided by the Complainants reflect appointment dates as far back as 1950, as well as a large number of Complainants who were appointed in the 1960's, 70's and 80's. The significance of these dates is that when these Complainants later joined the GEPF in 1996, their pensionable service was only calculated from the time they re-joined the Venda Pension Fund in 1993, thus depriving them of the benefit of a significant period of actual cumulative pensionable service from the date of appointment to date of termination of service (retirement).

4.3.10 The evidence and information that were not in the possession of most Complainants included the amounts of the benefits received by them during privatisation or alternatively, the remuneration scales of Complainants on the date of privatisation, as well as the date on which members re-joined the Venda Pension Fund.

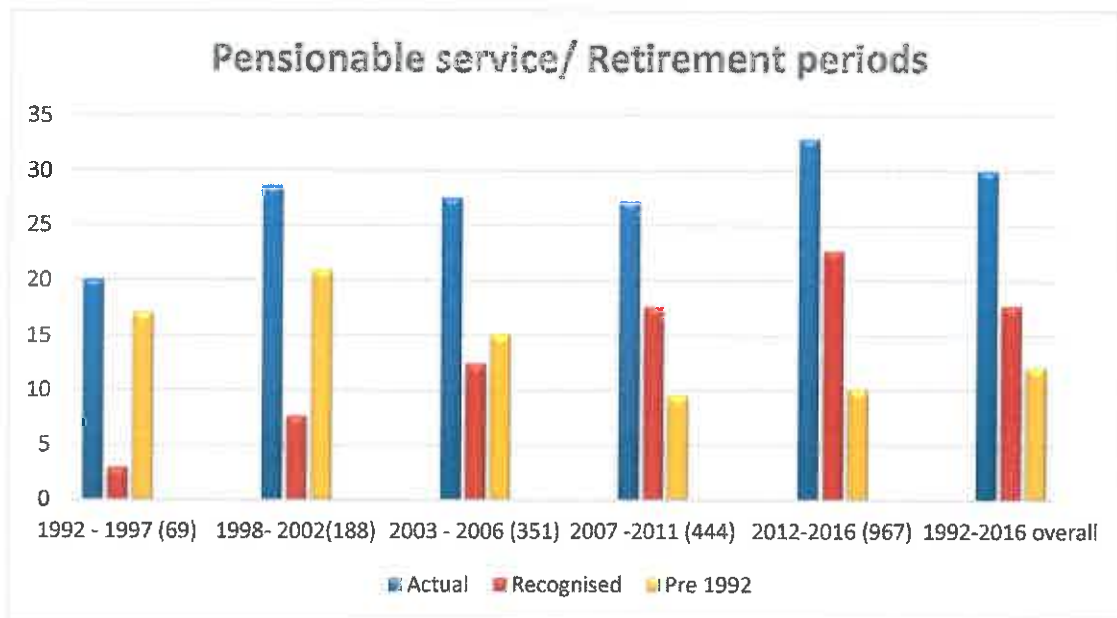
4.4 The State Institutions were not satisfied that the Complainants suffered particular losses

4.4.1 The State Institutions who participated in the Task Team remained of the view that it might only be possible to determine the nature and extent of injustice suffered by the Complainants if actual financial losses could be calculated in respect of each individual Complainant.

- 4.4.2 The State Institutions had a particular view that Complainants must show that they suffered losses in absolute terms in order to prove that they had in fact been adversely affected by the privatisation process. The approach by the State Institutions implied that the injustice claimed by the Complainants had to be quantified to determine if and how they were prejudiced when they privatised their pension benefits.
- 4.4.3 To accept the approach by the State Institution would place a burden on the Complainants to prove in actual amounts that-
- a) there was a shortfall in the payment of the pension benefits by the Venda Pension Fund, showing not only that they did not receive all the pension benefits that they were entitled to in terms of the privatisation schemes, before the GPAA would agree that the Complainants had been prejudiced and that GPAA are liable for such shortfalls; or
 - b) their combined pension benefits from what they are currently earning from their privatised funds (e.g. SANLAM), as well as the Venda Pension Fund/ GEPF, are significantly less than the benefits they would have received from the GEPF alone, had they not privatised their pension benefits.
- 4.4.4 The 1996 communication by the Acting Chief Director: Pensions Administration referred to above, confirms that the Chief Directorate Pensions Administration, which administered the GEPF at the time, was aware of the need for and the importance of maintaining records of the members who privatised in 1992.
- 4.4.5 In all probability the records referred to by the Chief Directorate Pensions Administration would or should have included information which accurately reflected the details of payments made to SANLAM, or amounts recovered from the employees.

- 4.4.6 In the absence of any reasonable explanation from the State Institutions as to what happened to the records, or why the GPAA was not obliged to obtain and retain the records in question, an approach that no remedy is available unless the amount of actual financial loss can be calculated respect of each of the 8000 potentially eligible Complainants, would place an unreasonable evidentiary and procedural burden on the Complainants. Such an approach would undermine the Public Protector's findings in Report 18 of 2011/12 and prejudice the Complainants even further.
- 4.4.7 In the Public Protector's view it would be unfair for the State Institutions to rely on their lack of records of interactions with their customers (officials and members) to reject a request to consider compensation, apparently without considering the Complainants' credibility or the consistency of the actions of a large group of Complainants with their version of what took place.
- 4.4.8 In this regard the State Institutions represented in the Task Team agreed that there never was a need for the privatisation schemes in order to protect the retirement income of the members of the Venda Pension Fund, as this would have been guaranteed by the (national) Government upon amalgamation.
- 4.4.9 The Public Protector members of the Task Team reiterated the Public Protector's view that the only party who would have benefitted from changing from a defined benefit to a defined contribution scheme was the employer (the Venda Government), because it would no longer have had to assume the market risk. In a defined contribution plan, the employees assumed the risk of investment failure because the funds were no longer insured by the government.
- 4.4.10 In the Public Protector's engagements with the Director General as well as the Accountant General, it was reiterated that the Public Protector's sense of the injustice suffered by the Complainants was informed by the reality that the projected benefits of those employees who had switched to a defined contribution fund (SANLAM) during privatisation and subsequently switched back to a defined benefit fund (the Venda Pension Fund/ GEPPF) were

adversely affected by the loss of the accumulated effect of their continued service in the Public Service. The switch caused a break in their pensionable service even though they continued to be in the employ of the State. This meant that when they were obliged to re-join the Venda Pension Fund in 1992 and ultimately the GEPF in 1996, but their pensionable service was only calculated with effect from 1992 and not from their original date of appointment. As a result their periods of pensionable service were significantly less than those of their colleagues who did not privatise. An analysis of a sample of approximately 2000 members of the Complainant who retired during the different periods shown below, illustrates the effect of the privatisation resulting in the non-recognition of the pre-1992 service as pensionable service upon retirement. On average 13 years of the total actual service are not taken into account upon retirement in the calculation of members' benefits.



4.4.11 In addition, The Public Protector also responded to the State Institutions that those Complainants, who had accessed a cash portion of their pension benefits during the privatisation period, lost a portion of their accrued pension benefits intended to mitigate the investment risks with the switch to a defined contribution fund.

4.4.12 The State Institutions “reservedly” agreed with the Public Protector’s view that the Complainants who privatised their pension benefits are worse off in relation to those colleagues who opted not to privatise and who kept their benefits with the Venda Pension Fund. Even then, they do not recognise the role that the state had played in putting them in such a position, but rather attributed the fact that the Complainants were not able to preserve an adequate and secure retirement income, to “bad investment choices”.

4.5 Determining liability for the funding implication of the remedial action.

4.5.1 The GPAA maintained that the GEPF would only be liable for compensation to the Complainants if the employees who privatised did not receive the full benefits owed to them in terms of the rules of the Venda Pension Fund and the privatisation scheme.

4.5.2 If the GEPF were to accept liability for other losses or potential losses which might have been caused by regulatory failures by the State during the administration of the privatisation schemes, these expenditures would have to be funded from member funds. GPAA was of the view that its regulatory framework and fiduciary duty precluded it from accepting additional financial obligations over and above the obligations that it or its predecessors in law might already have discharged.

4.5.3 The Public Protector agrees that the costs implied by the remedial action should not be at the expense of the members of the GEPF as the State should be held accountable for prejudice caused to the Complainants because of its regulatory failure and the consequences of maladministration by the relevant organs of state.

4.5.4 The Public Protector’s remedial action is designed to remedy a continuing injustice which arose within a regulatory framework which no longer exists and which had been the subject of complaints that could not be remedied, except by current organs of state (as successors in law or in their own capacity) having the same responsibilities in another context.

- 4.5.5 In terms of our current notion of administrative justice and efficient and effective public administration compelled by constitutional precepts, the Public Protector is unable to reconcile the idea that members of the public should continue to suffer prejudice or injustice as a result of the wrongful actions of organs of state.
- 4.5.6 When considering whether it would be appropriate to seek redress for maladministration by means of financial compensation – or any other remedy for that matter, the Public Protector’s work is governed by the current statutory regime which in the words of the supreme court of Appeal is *“intended for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation”*.⁸ That is the approach the Public Protector has followed.

5. WHY THE GOVERNMENT NEEDS TO MAKE THIS RIGHT

5.1 Un-remedied injustice

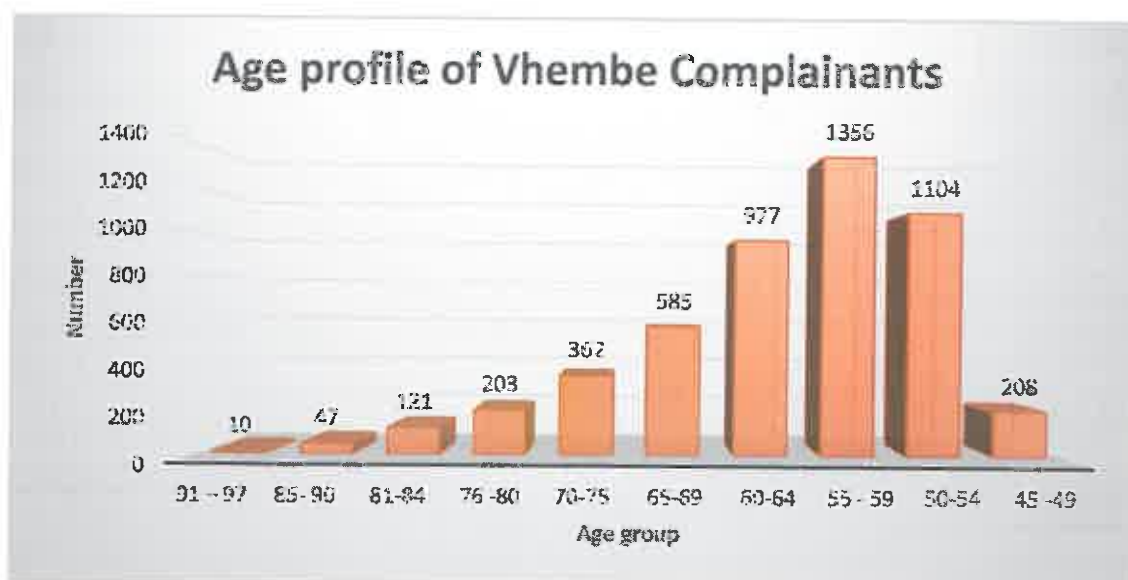
- 5.1.1 Throughout the engagement with the State Institutions (on the implementation of the Public Protector’s remedial action) the Public Protector tried to sensitise the State to the considerable distress caused by these events to many people from very diverse backgrounds, not all of whom have other sources of income. The representations the Public Protector received cited significant financial hardship.
- 5.1.2 The Public Protector has also emphasised the situations in which individual Complainants now find themselves – whether suffering reduced current income, a likely reduction in future retirement income, or uncertainty and financial instability – and the outrage felt by many at the events that precipitated these situations. Most of these share a sense of anger that government bodies did not protect them from the unfolding events.

⁸ *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015)

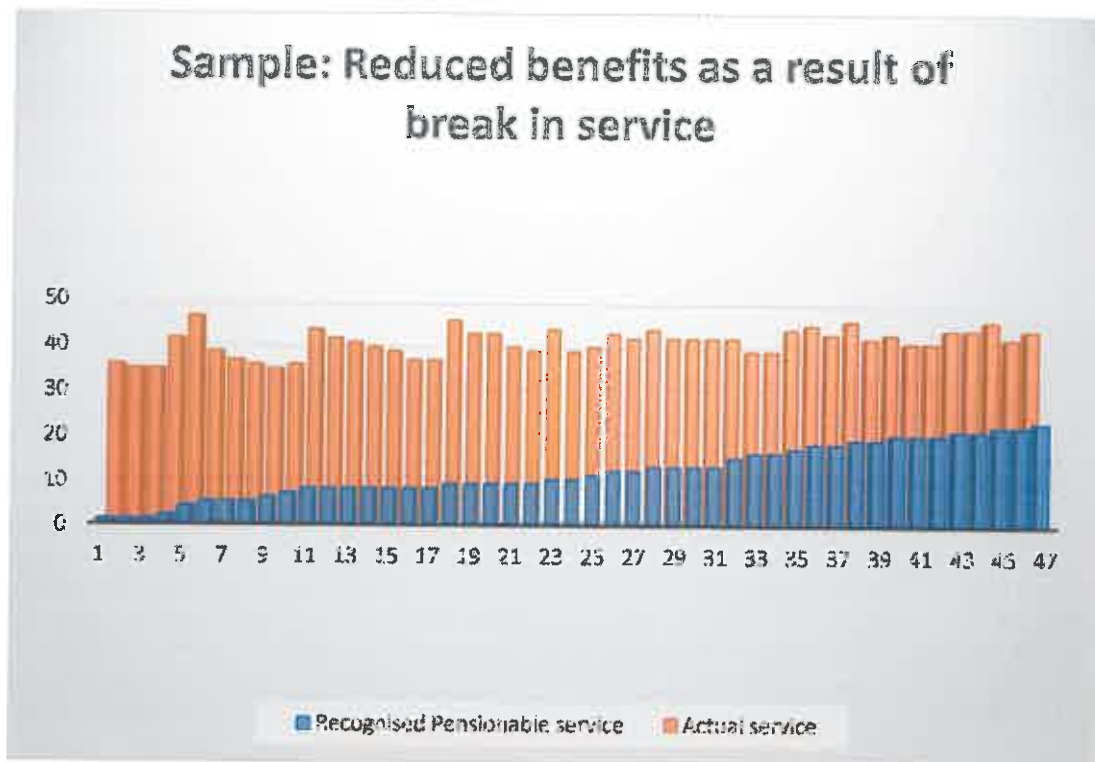
5.1.3 In the Public Protector’s mind, however, it is unclear on which basis the State would deny that a loss had been suffered, relative to what would have transpired had those individuals who privatised, remained with a defined benefit fund such as the then Venda Pension Fund and subsequently the GEPF. This is acutely evident from the personal circumstances of many of the Complainants who are currently living on or under the breadline and even have to rely on social pensions and grants to survive.

5.1.4 An age analysis of a sample of approximately 5000 members of the Complainant reflect that a number of the members are fairly senior (figure 1) and vulnerable and despite having actual service of approximately 28 years, they only managed to accumulate and average of 3 to 7 years pensionable service after having returned to the Venda Pension Fund and later the GEPF (figure 2):

5.1.5 Figure 1 : Age profile



5.1.6 Figure 2 : Reduced pension benefits



5.1.7 The Public Protector stressed that the privatisation option presented a deviation from the security of a defined benefit pension plan, which is the primary vehicle for providing core retirement benefits in the public sector, and was the model proposed for the amalgamation with the RSA Pension Funds. Information in the public domain at the time made it clear that the privatisation schemes were developed in response to perceived threats or risks to the accrued and vested pension interests of the members of the Venda Pension Fund.

5.1.8 The Public Protector reiterated the view that the Venda Pension Fund, as a defined benefit plan, used a benefit formula based on years of service and salary averages, where the employer guarantees to pay the employee at retirement a fixed monthly income for life. Under most defined benefit plans, the employer assumes the risk that pension funds will not be available. Employees assume little risk because most funds are insured by the government to a certain limit.

- 5.1.9 It is difficult to understand why the risk of any shortfall in the accrued pension benefits in the then Venda Pension Fund were transferred to the employees, as the employer should bear all the investment risks related to investing defined benefit plan assets and funding shortfalls which may arise for various reasons. Employers also bear “longevity” risk because they are generally obligated to offer defined benefits as a deferred life annuity. Longevity risk is the risk that pensioners will live longer, on average, than originally expected, increasing the time period for paying the benefit.
- 5.1.10 Since benefit payments (nominal) are often computed as the product of earnings and tenure (both of which tend to increase each year) the accrual pattern is nonlinear in rand terms (and in present value), with much of the final benefit accruing in the final years before retirement. Therefore, any changes affecting benefit payments that may occur toward the final years of work – including changes to the benefit formula, plan terminations, or an employment separation – can result in accrued benefits actually falling far short of a worker’s expectations, such as what happened in this matter.
- 5.2 No alternative remedies**
- 5.2.1 There are no alternative remedies available to the Complainants for regulatory failure. It was unreasonable to expect them to pursue the one potential alternative course of action – uncertain and costly litigation against the Government or the administrators.
- 5.2.2 The Public Protector’s Office was created to provide access to administrative justice that is free to those seeking it and there is no reason why the existence of courts should preclude the Public Protector from assisting citizens whose complaints are ones that the Public Protector can investigate. Moreover, the Public Protector is not persuaded that an alternative remedy exists in those courts to which it would have been reasonable, in these particular circumstances, to expect the Complainants to resort or to have resorted. The Public Protector is convinced that those who claim to have

suffered an injustice in consequence of maladministration are unlikely to have any legal remedy available to them.

5.3 The state's failure to keep proper records reflect continuous governance failures that must be corrected

- 5.3.1 In terms of the Public Protector's understanding the data of members of the different pension funds was carried over to the new computer system of the GEPF in 1996 when the amalgamation took place. In order to perform the functions and duties envisaged in the GEP Law, 1996, including the determination of liabilities and obligations towards members of the previous funds, and the protection of rights of members of the previous funds, the GEPF would have had to reconcile all data relating to members of the various pension funds that existed prior to 1996.
- 5.3.2 Despite the 1996 communication alluded to *supra*, that the Chief Directorate: Pensions Administration (Department of Finance) was in possession of the information of all members who privatised in 1992, the GEPF has on a number of occasions, including during engagements with the Parliamentary Portfolio Committee on Public Service and Administration, Performance Monitoring and Evaluation, conceded to challenges with data accuracy, particularly in relation to members of the former so-called TBVC pension funds.
- 5.3.3 A recent report by the Public Service Commission on its *Assessment of the management of service terminations and pension pay-outs in the Public Service* (March 2016) confirmed the impression that some of these challenges are caused by the fact that the data sets of members of previous pension funds were not properly reconciled during the amalgamation of the various pension funds in 1996.
- 5.3.4 In addition, the Public Protector has also learnt that with the amalgamation of the disparate funds as from 1996 the GEPF was aware of the problem that some of the information which was sourced from the then administrators could not be incorporated into the Pensions

Administration Software Programme (CivPen system), which was written especially for the Government Service Pension Fund of South Africa and taken over by the GEPF. In 1997, for example, data sourced from administrators of the Transkeian Government Service Pension Fund and the Ciskeian Civil Service Pension Fund were assimilated on the CivPen system, but others like the Venda Pension Fund were kept on the original Venda Pension Funds system (*Fisher, H (2006) An Assessment of the State of E-Government in South Africa - The Case of the Government Employees Pension Fund University Of Pretoria Etd, 2006*).

5.3.5 As stated earlier, as far back as in 2003, the Operations Unit within the GEPF identified that there was a risk that essential data in the old Venda Pension System was going to become increasingly difficult to access and that it was critical to appoint a service provider to rewrite the Venda Pension System programme to secure the information.

5.3.6 It is a source of concern to the Public Protector that in engagements with the state institutions concerned, and the subsequent engagements in the joint Task Team, the State neither disclosed or took responsibility for the fact that its own administration and management of records and data of members of the former Venda Pension Fund are major contributing factors to the current state of affairs. The Public Protector's concern is further that the GEPF must have been aware of the increasing risks posed by its failure to timeously address this problem, in respect of the general protection of the rights of members of the previous funds as envisaged in the GEP Law, 1996, including the verification of service dates and pensionable service periods for members of the pension funds of the former TBVC states such as the Venda Pension Fund.

5.4 Respect for the Constitution and the remedial action of the Public Protector

5.4.1 Failure to act on the injustice would lead to a loss of public confidence in, and respect for, the Constitution and this would reflect badly more generally on the

wider reputation of Parliamentary oversight of government bodies and of the protection afforded to citizens by Parliament.

- 5.4.2 In the recent matter of the *SABC v DA*⁹ the Supreme Court of Appeal emphasised that the Constitution sets high standards for the exercise of public power by State institutions and officials:

“The Constitution’s founding values include accountability, responsiveness and openness in government (s 1(d)). Section 7(2) obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 33(1) requires administrative action to be lawful, reasonable and procedurally fair. Section 41 requires all organs of State to respect and co-operate with one another and inter alia to provide effective, transparent, accountable and coherent government for the Republic as a whole’. Section 195 requires all organs of State and public officials to adhere to high standards of ethical and professional conduct.”

- 5.4.3 The Court reiterated that the purpose of the Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics and that government officials carry out their tasks effectively, fairly and without corruption or prejudice. The Court made it clear that –

“...the Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1) (c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation.”

- 5.4.4 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*¹⁰, the Constitutional Court held that the power of the Public Protector to take appropriate remedial action has legal effect and is

9 (393/2015) [2015] ZASCA 156 (8 October 2015)

10 [2016] ZACC 11

binding. Therefore, neither the President nor the National Assembly is entitled to respond to the binding remedial action taken by the Public Protector as if it is of no force or effect, unless it has been set aside through a proper judicial process.

5.4.5 The Court also made the following observations on the role of the Public Protector:

"The institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation..."

The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant...

If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect...

The power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution. Just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity...

Our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law, (such as remedial action prescribed by the Public Protector), may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help'".

5.4.6 The Court further highlighted the Constitutional obligation on the National Assembly in terms of Section 42(3) of the Constitution and section 55(2) of the Constitution read with section 8(2) (b) (iii) of the Public Protector Act, 1994 (and section 181(3) of the Constitution) to provide for an oversight mechanism "to facilitate compliance with the remedial action" of the Public Protector.

5.4.7 The Court observed, *inter alia*, that

“..the National Assembly, and by extension Parliament... bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed”

Both sections 42(3) and 55(2) do not define the strictures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given the leeway to determine how best to carry out its constitutional mandate.

That report (in terms of section 8(2) (b) (iii) of the Public Protector Act) was a high priority matter that required the urgent attention of or an intervention by the National Assembly. It ought therefore to have triggered into operation the National Assembly’s obligation to scrutinise (in terms of sec 43(2) of the Constitution) and oversee executive action and to hold the President accountable, as a member of the Executive (in terms of section 55 (2) of the Constitution)”

6. FINANCIAL COMMITMENT TO PROVIDE REDRESS FOR THE COMPLAINANTS

- 6.1 The Public Protector duly considered the submission of the State Institutions involved that no remedial action is possible without obtaining data and records of individual transactions reflecting the amount which was paid out in respect of each individually affected Complainant, as well as the personal details of each Complainant, in order to recalculate the benefits and to determine any “short fall” owed to the Complainants by the GEPF.
- 6.2 As stated earlier, the approach of the State Institutions to base remedial action on an accurate assessment of absolute loss would in the Public Protector’s view require Complainants to show what kind of loss they are suffering because the privatisation process had been handled imprudently. This caused obvious difficulties as the relevant events took place many years ago and

substantial numbers of Complainants are either ill, infirm or deceased. More importantly, the state is also no longer in possession of the relevant data and records to verify claims on an individual basis.

- 6.3 While the individual circumstances of each Complainant and other people similarly affected are key to establishing whether those people are in the category of those who have suffered relative loss, it might be a laborious exercise to try and determine relative loss at an individual level.
- 6.4 The circumstances of the Complainants and the delays over a substantial period require the remedial action to avoid placing undue burdens, whether evidential or procedural, on individual complainants wherever this is possible. The Public Protector is of the view that it would be unreasonable to expect Complainants to prove their individual cases in actual terms (what their financial position should have been in terms of the privatisation schemes), or even in relative terms (e.g. what their financial positions would have been if they did not privatise their pension benefits).
- 6.5 One of the major contributing factors to the prejudice suffered by the Complainants is the loss of the cumulative effect of their pensionable service when they re-joined the Venda Pension Fund in 1992 and the GEPF in 1996. From the sample of 2000 members of the Complainant who retired between 1992 and 2016, the average actual service period was in excess of 30 years. Again on average, the pension benefits paid to these members by the Venda Pension Fund (between 1992 and 1996) and the GEPF (after 1996) were only based on pensionable service accumulated after 1992, which on average amounted to 17 out of the average of 30 years. Members who retired before 2002, even with 47 years of actual service, did not have the minimum of 10 years pensionable service and only qualified for a gratuity and unlike their counterparts who did not privatise, did not qualify for a monthly annuity. In addition, they lost the value that an additional period of 13 years (on average) would have made to the calculation of their benefits

- 6.6 At the time when the GEPF Rules provided options for the recognition of previous and other periods of services as pensionable service (Rule 10), the matter had not yet advanced to the point where this was presented to members of the Complainant as a possible avenue to “buy back” their pensionable service prior to re-joining the Venda Pension Fund in 1992 - as a means to seek an increased pension benefit when the time comes to retire. In recent engagements with the representatives of the Complainant they confirmed that their members would offer repayment of any benefits received from the Venda Pension Fund in respect of such previous pensionable service.
- 6.6 In the Public Protector’s view the recognition of the previous pensionable service of the members who privatised and who subsequently had to re-join the Venda Pension Fund in 1992, would go a long way to address the injustice suffered by the Complainants and should present advantages to the members of the Complainant, the State and the GEPF in terms of process and funding. If the commitment is there to find viable options as stated by the Honourable Minister, these and similar avenues could be explored within the current GEPF and Treasury Structures to facilitate the intended relief sought by the Public Protector’s remedial action.
- 6.7 In principle the Public Protector agrees that the intended beneficiaries of the proposed remedial action should be a closed list of former members of the Venda Pension Fund who had privatised their pension benefits, as represented by the Complainant in this matter, the Vhembe Concerned Pensioners Group.
- 6.8 The enclosed list reflects the details of the intended beneficiaries of the Public Protector’s remedial action as provided by representatives of the Complainant. The Complainants have submitted supporting documents to validate the information provided. These documents will be made available to the National Treasury and the GPAA in an endeavour to remedy some of the gaps in the official recordkeeping by the State Institutions involved.

- 6.9 It is therefore proposed that the National Treasury engage the service of an professional, such as an Actuary, to scrutinise the available information to establish a reasonably reliable database of beneficiaries of the Public Protector's remedial action and to assess the potential prejudice and losses of these beneficiaries based on a comparison between, *inter alia*, period of actual service against periods of recognised pensionable service.
- 6.10 Once the reasonable relative losses have been established, it should be possible to estimate the total amount that it would cost to facilitate the implementation of remedial action that would seek to put the Complainants as close as possible to the position if they had not privatised.
- 6.11 As indicated earlier, the Public Protector agrees that the obligation to fund the implementation of the remedial action should not come from the coffers of the GPAA or the GEPF as this would penalise current members of the GEPF for the governance failure of the Government and one of its' predecessors in law (Venda Government). The implementation of the remedial action would therefore be reliant on National Treasury to commit funds to facilitate the recalculation of pension benefits by the GPAA of those Complainants who became members of the GEPF after 1996 and/ or *ad hoc* compensation of those Complainants who retired prior to the amalgamation of the various pension funds, to reimburse their reasonable losses as estimated with the assistance of the Actuary.

7. PROPOSED ACTION FOR IMPLEMENTATION OF REMEDIAL ACTION

- 7.1 The Complainants have already been waiting for almost twenty years and still their plight has not been addressed. Substantial numbers are advancing in years and some have already passed away. Justice further delayed will mean justice denied to even more people.

- 7.2 Government needs to address the un-remedied injustice highlighted in Report 18 of 2011/12, in view of, inter alia, the fact that the Complainants have no alternative remedy and the recent confirmation by the Constitutional Court of the Public Protector's constitutional power to provide an effective remedy for State misconduct.
- 7.3 The State as well as the National Assembly will be reminded that the Constitutional Court confirmed in no uncertain terms in the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*¹¹ that the State is not entitled to "second-guess" the remedial action of the Public Protector, unless the findings and remedial action are challenged and set aside by a court, which was of course not done in this case.
- 7.4 Having been involved in a process intended to facilitate implementation of Report 18 of 2011/12 for a number of years, it is the Public Protector's sincere hope that the special report will, with the assistance and intervention of the National Assembly, resolve the impasse, thus providing necessary relief to restore the lives and dignity of the Complainants and their colleagues, the Concerned Vhembe Pension Fund Group. It must be appreciated that the maladministration did not only deprive the Complainants of a defined benefit, but also constitutes a violation of the right to social security, a contravention of section 27 in the Constitution.
- 7.5 In order to ensure compliance with the Public Protector's remedial action as contained in Report no 18 of 2011/12 it is imperative that -
- a) the Director General: Finance and National Treasury take the necessary steps, based on a closed list of Complainants (and information that had been sourced from the Complainants and official records that the State and the GPAA were obliged to maintain), to establish a reasonably reliable database of beneficiaries

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- of the Public Protector's remedial action, and to assess the potential prejudice and losses of these beneficiaries with the aid of an Actuary;
- b) the State through National Treasury commits funds to facilitate the recalculation of pension benefits by the GPAA of those Complainants who became members of the GEPF after 1996 and/ or *ad hoc* compensation of those Complainants who retired prior to the amalgamation of the various pension funds, to reimburse their reasonable losses as estimated with the assistance of the Actuary; and
 - c) the National Assembly through the office of the Speaker of the National Assembly take steps to establish a mechanism to oversee the implementation of the Public Protector's remedial action in terms of section 182(1) (c), read with sections 43(2) and 55(2) of the Constitution.

8. MONITORING

- 8.1 The Director General: Finance to submit to the Public Protector and the Speaker of the National Assembly an action plan on the implementation of the remedial action contained in Report 18 of 2011/ 12 as outlined in this Special Report, within 6 weeks of the date of this report.
- 8.2 The Speaker of the National Assembly to report to the Public Protector within 14 days from the receipt of the action plan from the Director General: Finance on the steps taken in terms of section 55(2)(b) read with section 182(1)(c) of the

Constitution to constitute the appropriate mechanism to oversee the implementation of Report 18 of 2011/12.



**ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA**

DATE: 12/12/2016

Assisted by: Adv N van der Merwe
Adv E de Waal