

**Please quote this reference in your reply: 7/2-005152/19 WC**

**Enquiries: Mr Sisa Magele**  
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Mr M R Sonto

Email : [roseberrysonto@gmail.com](mailto:roseberrysonto@gmail.com)

Dear Mr Sonto

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER  
CONDUCT AND MALADMINISTRATION AGAINST THE SPECIAL PENSIONS  
APPEAL BOARD REGARDING THE TERMINATION OF THE SPECIAL PENSION  
OF MR M R SONTTO.**

1. Reference is hereby made to the above matter.
2. Attached hereto, please find a copy of the Public Protector's final report on an investigation into allegations of improper conduct improper conduct and maladministration by the Special Pensions Appeals Board (Appeal Board) with regard to the termination of your special pension in 2017.
3. The report is referenced, Report Number: 08 of 2022/23.
4. The report is issued in terms of section 182 of the Constitution read with section 8 of the Public Protector Act, 1994.

1. Your attention is specifically directed to the remedial action contained in paragraph 7 of the report as well as the monitoring of remedial action as contained in paragraph 8 of the report.
2. For any further enquiries with regard hereto, your office is at liberty to approach my Personal Assistant Mr Ephraim Kabinde who is contactable on 012 366 7108 and alternatively, per return e-mail at [ephraimk@pprotect.org](mailto:ephraimk@pprotect.org).

Yours Sincerely,



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

**Date:** 29/04/2022

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(2)(b) OF  
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND  
SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**REPORT NUMBER: 08 OF 2022/23**

**ISBN NUMBER: 978-1-998969-10-4**

*“Allegations of improper conduct and maladministration by the Special Pensions  
Appeal Board”*

**REPORT OF AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER  
CONDUCT AND MALADMINISTRATION AGAINST THE SPECIAL PENSIONS  
APPEAL BOARD REGARDING THE TERMINATION OF THE SPECIAL PENSION  
OF MR M R SONTU**

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## EXECUTIVE SUMMARY

- (i) This is a report 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, 1994 (the Public Protector Act).
- (ii) The report relates to an investigation into allegations of improper conduct and maladministration by the Special Pensions Appeals Board (Appeal Board) with regard to the termination of the special pension of Mr Mzunani Roseberry Sonto (Complainant), a pensioner, a former member of Mkhonto We sizwe (MK), the Military Wing of the African National Congress (ANC) and former member of the National Assembly, from 2010-2014.
- (iii) The complainant was lodged at the Western Cape Provincial office of the Public Protector SA on 3 May 2019.
- (iv) In the main, the Complainant alleged that in 2004 he was awarded a Special Pension in terms of the Special Pensions Act, 1996 by the Special Pensions Board, and duly received a pension, until it was set aside in July 2017 by the Appeal Board.
- (v) He lodged an appeal with the Appeal Board in July 2014 for the reconsideration of his pensionable years of service, requesting that the seven (7) years of service which had not been taken into account by the Special Pensions Board in 2004, be added to the five (5) years of service the Board awarded to him in 2004. Hence, the Complainant requested that the Appeal Board should recognize and award to him 12 years' pensionable service.
- (vi) According to the Complainant, he submitted the required appeal application and annexures to support his application on or about 14 February 2012 to the Appeal Board. In July 2017, he received a letter, dated 27 July 2017, from the Appeal Board, advising him of the rejection of his appeal – in addition, the letter indicated that the 2004 decision of the Board, awarding him five (5) years of pensionable service, was also set aside.

- (vii) The Complainant alleged that some of the reasons for the cancellation of his pension were a lack of corroborating evidence that he had joined and served the ANC/MK internally or in Lesotho; or that he was ever in their full-time service during the Anti-Apartheid struggle, as well as a lack of official police or court records furnished by him to confirm that he stood trial for politically motivated offences or that he was ever detained or banned.
- (viii) The Complainant alleged that the Appeal Board therefore concluded that it was improbable that he was ever restricted or banned, detained or imprisoned. The Complainant asserts that in coming to this conclusion, the Appeal Board had chosen to ignore press photographs and articles from the time describing him as a UDF leader and detainee.
- (ix) The Complainant furnished the Public Protector South Africa (PPSA) investigation team with records from the Goodwood Correctional Centre, indicating that in the 1980s he was arrested for politically motivated offences. He also submitted articles of the *Cape Times* and other media houses, dating back from the 1980's.
- (x) According to the Complainant, although it has a duty to do so, the Appeal Board failed to question witnesses who would confirm the facts of his service, and also declined offers of testimony from those imprisoned with him, such as the former Minister of Finance, Mr Trevor Manuel.
- (xi) The Complainant therefore alleged that the decision of the Appeal Board to cancel his Special Pension was irrational, arbitrary and unfair as the evidence he submitted to the Appeal Board refutes the basis on which it decided to cancel his Special Pension.
- (xii) **ISSUES IDENTIFIED AND INVESTIGATED**
- (xiii) **Based on the analysis of the complainant, the following issues were considered and investigated;**

**(a) Whether the decision of the Appeal Board in setting aside the Complainant's Special Pension was not in accordance with the relevant laws and prescripts and if so, whether its conduct was improper and constitutes maladministration.**

(xiv) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Complainant and the GPAA, an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.

(xv) The investigation process included an exchange of correspondence and an analysis of all relevant documents and application of all relevant laws, policies and related prescripts

(xvi) Key laws and prescripts taken into account to determine if there had been maladministration or improper conduct by the Special Pensions Appeal Board regarding the termination of the special pension of Mr Sonto are the following: -

**(a) The Constitution of the Republic of South Africa Act 108 of 1996;**

**(b) The Public Protector Act No 23 of 1994;**

**(c) The Promotion of the Administrative Justice Act No 3 of 2000;**

**(d) The Special Pension Act No 69 of 1996, as amended**

(xvii) Having regard to the evidence and regulatory framework determining the standard that the Appeal Board should have complied with, the following findings are made:

**(a) Regarding whether the decision of the Appeal Board in setting aside the Complainant's Special Pension was not in**

**accordance with the relevant laws and prescripts and if so, whether its conduct was improper and constitutes maladministration.**

- (aa) The allegation that the decision of the Appeal Board in setting aside the Complainant's Special Pension was not in accordance with the relevant laws and prescripts is substantiated.
  - (bb) The Chairperson of the Appeal Board ought to have known that in dismissing the Complainant's appeal and setting aside the 2004 award of five (5) years pensionable service, the Complainant's vested rights would be adversely affected in that his special pension would be terminated by the GPAA.
  - (cc) The Complainant was not appealing or disagreeing with the decision of the Appeal Board, he was merely applying for the extension of his pensionable years of service from 1971 to 1990, whereas the Board had decided to award only five (5) years pensionable service to him.
  - (dd) The Appeal was lodged more than 8 years instead of within 60 days, as provided by the Special Pensions Act, as amended. The Appeal Board had no authority or discretion to entertain the Complainant's application for appeal. The decision of the Appeal Board was accordingly unlawful.
  - (ee) The conduct of the Appeal Board accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (xviii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:



**(a) The Minister of Finance to:**

- (aa) Determine appropriate steps to take the decision of the Appeal Board of 12 July 2017, setting aside the Special Pension's Board 11 February 2004 award of a special pension to Mr Sonto, on judicial review and to inform Mr Sonto accordingly, **within thirty (30) working days** from the date of the report; and
- (bb) Apologise in writing to Mr Sonto for the prejudice he suffered as a result of the improper conduct of the Appeal Board, **within sixty (60) working days** from the date of the report.

**REPORT OF ON INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION AGAINST THE SPECIAL PENSIONS APPEAL BOARD REGARDING THE TERMINATION OF THE SPECIAL PENSION OF MR Z R SONTU.**

**1. INTRODUCTION**

- 1.1 This is a report 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, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) and section 8(3) of the Public Protector Act to the following persons to note the outcome of the investigation and to implement the remedial action, where applicable:
  - 1.2.1 The Minister of Finance, Mr Enoch Godongwana, MP;
  - 1.2.2 The Director General of the National Treasury, Mr Dondo Mogajane.
  - 1.2.3 The Acting Chief Executive Officer of the Government Pensions Administration Agency (GPAA), Mr S Khan.
- 1.3 A copy of the report is also provided to Mr Mzunani Roseberry Sonto, who lodged the complaint.
- 1.4 The report relates to an investigation into allegations of improper conduct and maladministration against the Appeal Board regarding the termination of the special pension of Mr Z R Sonto.

## **2. COMPLAINT**

- 2.1 The complaint was lodged on 3 May 2019. It was investigated by the Western Cape Provincial Office of the Public Protector South Africa (PPSA).
- 2.2 In the main, the Complainant alleged that in 2004 he was awarded a Special Pension in terms of the Special Pensions Act, 1996 by the Special Pensions Board, and duly received a pension, until it was set aside in July 2017 by the Appeal Board.
- 2.3 He lodged an appeal with the Appeal Board in July 2014 for the reconsideration of his pensionable years of service, requesting that the seven (7) years of service which had not been taken into account by the Special Pensions Board in 2004, be added to the five (5) years of service the Board awarded to him in 2004. Hence, the Complainant requested that the Appeal Board should recognize and award to him 12 years' pensionable service.
- 2.4 According to the Complainant, he submitted the required appeal application and annexures to support his application on or about 14 February 2012 to the Appeal Board. In July 2017, he received a letter, dated 27 July 2017, from the Appeal Board, advising him of the rejection of his appeal – in addition, the letter indicated that the 2004 decision of the Board, awarding him five (5) years of pensionable service, was also set aside.
- 2.5 The Complainant alleged that some of the reasons for the cancellation of his pension were a lack of corroborating evidence that he had joined and served the ANC/MK internally or in Lesotho; or that he was ever in their full-time service during the Anti-Apartheid struggle, as well as a lack of official police or court records furnished by him to confirm that he stood trial for politically motivated offences or that he was ever detained or banned.
- 2.6 The Complainant alleged that the Appeal Board therefore concluded that it was improbable that he was ever restricted or banned, detained or imprisoned. The Complainant asserts that in coming to this conclusion, the Appeal Board

had chosen to ignore press photographs and articles from the time describing him as a UDF leader and detainee.

- 2.7 The Complainant furnished the Public Protector South Africa (PPSA) investigation team with records from the Goodwood Correctional Centre, indicating that in the 1980s he was arrested for politically motivated offences. He also submitted articles of the *Cape Times* and other media houses, dating back from the 1980's.
- 2.8 According to the Complainant, although it has a duty to do so, the Appeal Board failed to question witnesses who would confirm the facts of his service, and also declined offers of testimony from those imprisoned with him, such as the former Minister of Finance, Mr Trevor Manuel.
- 2.9 The Complainant therefore alleged that the decision of the Appeal Board to cancel his Special Pension was irrational, arbitrary and unfair as the evidence he submitted to the Appeal Board refutes the basis on which it decided to cancel his Special Pension.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1 The Public Protector is an independent constitutional body established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that the Public Protector has the power 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 take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed by legislation.

- 3.3 The Public Protector mandates the Public Protector to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.4 Section 7(1) of the Special Pensions Act provides that the Director General of the National Treasury is responsible for the administration of the Act.
- 3.5 Special Pensions are administered by the GPAA.
- 3.6 The Manager: Special Pensions Appeals of the GPAA, Mr N G Kutama, in his response to the complaint dated 25 November 2019, disputed that the Public Protector has jurisdiction to investigate the decision of the Appeal Board, on the basis that the decisions of the Special Pensions Board and the Appeal Board constitute administrative action as defined in Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It was contended that if the Complainant is aggrieved by the decision of the Appeal Board, he may consider having it reviewed by the High Court, in terms of section 6(1) of the PAJA.
- 3.7 It was further stated that the Public Protector does not have jurisdiction and is not deemed to be a competent court or tribunal which have powers to judicially review administrative action, in terms of section 6(1) of the PAJA.
- 3.8 The contention of the Manager: Special Pensions Appeals regarding the jurisdiction of the Public Protector, particularly his reliance on the PAJA, to exclude said jurisdiction, is misdirected. Section 182 of the Constitution provides that the Public Protector has the power, as regulated by national legislation to **investigate any conduct** in state affairs or in the public administration in any sphere of government that is alleged to be improper or result in impropriety or prejudice.

3.9 Section 182(3) of the Constitution provides that the Public Protector may not investigate court decisions. The Appeal Board is not a “court” as envisaged by section 166 of the Constitution.

3.10 In regard to whether the Appeal Board is an organ of state, section 239 of the Constitution defines an organ of state as:

- “(a) any department of state or administration in the national, provincial or local sphere of government; or*
- (b) any other functionary or institution-*
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
  - (ii) exercising a public power or performing a public function in terms of any legislation”*

3.11 The Preamble of the Special Pensions Act, Act 69 of 1996, as amended (Special Pensions Act), provides that its purpose is:

*“To give effect to section 189 of the Interim Constitution; to provide for special pensions to be paid to persons who made sacrifices or served the public interest in the cause of establishing a democratic constitutional order; to prescribe rules for determining the persons who are entitled to receive those pensions; to establish a Special Pensions Board and a Special Pensions Review Board; and to provide for related matters.*

3.12 The Appeal Board is a body which exercises powers and performs functions in terms of the Constitution and the Special Pensions Act and is therefore an organ of state, as defined by Section 239 of the Constitution.

3.13 In addition, the Manager: Special Pensions Appeals has also confirmed that a decision of the Appeal Board amounts to administrative action as defined in section 1 of the PAJA, namely:

**“administrative action”** means any decision taken, or any failure to take

a

decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...”.

3.14 In light of the aforesaid, it cannot be disputed that, by virtue of the Appeal Board exercising a public power and performing a public function within the national sphere of government, in terms of the Constitution and national legislation, the Public Protector has the jurisdiction to investigate the decision of the Appeal Board and to take remedial action, if appropriate.

3.15 In regard to the remedy available to the Complainant, in the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 CC, the Constitutional Court in a unanimous judgment written by Chief Justice Mogoeng, stated, *inter alia* that:

*“Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector.”*

- 3.16 The process of litigation is long drawn and complex, and most complainants cannot afford the capital outlay and time investment required for a realistic pursuit of civil remedies.
- 3.17 On the other hand, the free service, flexible and simple processes with which the Public Protector is equipped in terms of the Public Protector Act, in comparison, enhance access to justice, primarily to poor and marginalised persons and communities.
- 3.18 The subject of the investigation relates to the conduct of the Appeal Board in setting aside the 5 years of pensionable years of service awarded to the complainant by the Special Pension Board in 2004, not the merits of the appeal it presided over.
- 3.19 It is therefore maintained, as made clear in the *EFF judgment* referred to above, that the Public Protector is a constitutionally mandated alternative body to our courts of law that the architects of our Constitution endowed complainants with, who are aggrieved by decisions of organs of state and who cannot afford to secure the service of lawyers.
- 3.20 It is on the aforesaid grounds that that the argument advanced by the Manager: Special Pensions Appeals, to oust the jurisdiction of the Public Protector to investigate this complaint, cannot be sustained.
- 3.21 It is therefore determined that the complaint relates to the alleged improper conduct of the Appeal Board, an organ of state as defined in Section 239 of the Constitution. By the Manager: Special Pensions Appeals' own admission; its conduct amounts to conduct in state affairs, and therefore falls within the jurisdiction and power of the Public Protector to investigate.
- 3.22 The investigation is conducted in terms of Section 182 of the Constitution of the Republic of South Africa, 1996 (Constitution) which gives the Public Protector the powers to investigate alleged or suspected improper or



prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of Section 6(4) of the Public the Public Protector Act, which regulates the manner in which the powers conferred by Section 182 of the Constitution may be exercised in respect of government at any level.

- 3.23 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*<sup>1</sup> the Constitutional Court per Mogoeng CJ held further that the remedial action taken by the Public Protector has a binding effect. 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”*.
- 3.24 In the above-mentioned matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others*, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:
- 3.24.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 3.24.2 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 (para 67);
- 3.24.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints. It is 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

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

constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.24.4 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 (para 69);

3.24.5 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 (para 70);

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

3.24.7 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 power that is by its nature of no consequence(para 71(a));

3.24.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d)); and "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e)).

3.25 In the matter of *the President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December

2017), the court held as follows, when confirming the powers of the Public Protector:

- 3.25.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);
- 3.25.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);
- 3.25.3 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 ( paragraph 100 and 101);
  - (a) Conduct an investigation
  - (b) Report on that conduct; and
  - (c) To take appropriate remedial action
- 3.25.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (paragraph 104);
- 3.25.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105);
- 3.25.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct; and prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).

## **4. THE INVESTIGATION**

### **4.1 Methodology**

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

### **4.2 Approach to the investigation**

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.2 What happened?

4.2.3 What should have happened?

4.2.4 Is there discrepancy between what happened and what should have happened, if so, does that deviation amount maladministration?

4.2.5 In the event of improper conduct or maladministration, what would it take to remedy the wrong or, where appropriate, to place the complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration?

4.2.6 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the decision of the Appeal Board in setting aside the Complainant's special pension was not in accordance with the relevant laws

and prescripts and if so, whether its conduct was improper and constitutes maladministration.

4.2.7 The enquiry regarding what should have happened, focuses on the legal standard or framework that should have been adhered to by the Appeal Board in setting aside the complainant's special pension and dismissing his appeal.

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

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

4.3.1 Whether the decision of the Appeal Board in setting aside the Complainant's special pension was not in accordance with the relevant laws and prescripts and if so, whether its conduct was improper and constitutes maladministration.

#### 4.4 **KEY SOURCES OF INFORMATION**

##### 4.4.1 **Documents and e-mail correspondence**

4.4.1.1 Letter from Government Employees Pension Administration Agency (GPAA) dated 27 July 2017, informing the Complainant of the termination of his Special Pension.

4.4.1.2 Decision of the Special Pension Appeal Board dated, 12 July 2017.

4.4.1.3 Complainant's letter of appeal to the Special Pensions Appeal Board dated, 23 October 2018.

4.4.1.4 Letter from the National Treasury, dated 29 March 2004, advising the complainant of the acceptance of his application for special pension.

4.4.1.5 Letter from the Manager of Special Pensions Appeals at Government Pension Administration Agency to the Public Protector South Africa (PPSA) dated, 28 June 2019.

- 4.4.1.6 Consultation notes with Complainant dated, 28 August 2019.
- 4.4.1.7 Letter from Manager of Special Pensions Appeals at the GPAA to the PPSA, dated, 25 November 2019.
- 4.4.1.8 E-mail correspondence from the PPSA to the GPAA, dated 20 January 2020.
- 4.4.1.9 E-mail correspondence from the PPSA to the GPAA, dated 09 December 2019.
- 4.4.1.10 E-mail correspondence from the PPSA to the GPAA, dated 03 March 2020.
- 4.4.1.11 Letter from the Manager of Special Pensions Appeal at GPAA, to the PPSA dated 06 March 2020.

#### **4.4.2 Legislation and other prescripts**

- 4.4.2.1 The Constitution of the Republic of South Africa Act 108 of 1996.
- 4.4.2.2 The Public Protector Act No 23 of 1994.
- 4.4.2.3 The Promotion of the Administrative Justice Act No 3 of 2000.
- 4.4.2.4 The Special Pension Act No 69 of 1996, as amended.

#### **4.4.3 Jurisprudence considered**

- 4.4.3.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016]ZACC 11;2016(3) SA 580(CC).
- 4.4.3.2 *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).
- 4.4.3.3 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).
- 4.4.3.4 *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

4.4.3.5 *Ouderkraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA).*

4.4.3.6 *The MEC for Health, Eastern Cape v Kirland Investments 2014 (3) SA 481 (CC).*

4.4.3.7 *Sello Thomas Phalama v Minister of Finance (Case No: 57375/2017) (unreported)*

**4.4.4 Notice issued in terms of Section 7(9) of the Public Protector Act.**

4.4.4.1 A Notice was issued in terms of section 7(9) of the Public Protector Act to the Minister of Finance, the Director General of the National Treasury, and the Acting Chief Executive Officer of the GPAA on 10 November 2021.

4.4.4.2 The Acting Head of the Office of the Director General of the National Treasury responded on 21 January 2021 and the Acting Chief Executive Officer of the GPAA on 30 November 2021.

**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 decision of the Appeal Board in setting aside the Complainant's special pension was not in accordance with the relevant legislation and prescripts and if so, whether its conduct was improper and constitutes maladministration.**

Common Cause issues or undisputed facts:

- 5.1.1 The Complainant applied for a Special Pension in terms of Section 1(1)(b)(i) and (iii) of the Special Pensions Act, on 18 July 2001. His application was approved by the Special Pensions Board and he was awarded a pensionable service period of five (5) years, on 11 February 2004.
- 5.1.2 On 14 February 2012 eight (8) years later, the Complainant appealed the decision of the Special Pensions Board, issued on 11 February 2004.
- 5.1.3 On 12 July 2017 (more than five (5) years after the appeal was lodged) the Appeal Board issued a decision to dismiss the Complainant's appeal, and that the 2004 decision of the Special Pensions Board to award to him five years of pensionable service was set aside.
- 5.1.4 According to the decision of the Appeal Board, his appeal was dismissed because there was "...no evidence from organisations to support a finding that he was ever in their full-time service during the anti-apartheid struggle..." and there was also "...no official police or court records" to confirm that he stood trial for a politically motivated offence; and that "despite a diligent search, his name does not appear on the official list of restricted/banned persons across South Africa". The Appeals Board found that: "In the absence of corroborating evidence, it cannot be concluded that Mr Santo joined and served the ANC/MK internally or in Lesotho as alleged. His version represents the submissions of a single witness and is simply insufficient to sustain the application."
- 5.1.5 The Appeal Board concluded that in the circumstances, the Complainant could not be credited with any years of service, before 2 February 1990.
- 5.1.6 On 27 July 2017, the GPAA gave the Complainant written notice that it had terminated his special pension benefit as a result of the decision of Appeal Board.
- 5.1.7 On 26 October 2018 the Complainant submitted a response to the dismissal of his appeal to the GPAA, together with documentary proof of his



incarceration, a list of names of people he was detained with and who could corroborate that he served in the ANC, as well as press clippings in support of his application. In the submission he requested that the decision of the Appeal Board should be reversed. However, no further action was taken.

Issues in dispute

- 5.1.8 The Complainant advised the PPSA investigation team that when he lodged his appeal in 2012 he wanted the Appeal Board to reconsider his years of service as from 1971 and not to set aside the five years that he was already credited for.
- 5.1.9 The Complainant contended that the decision of the Appeal Board in setting aside his five years of pensionable service was irrational, unfair and arbitrary, because he was not advised that his application for a Special Pension would be considered afresh and he was not invited to either produce the required information or to make representations regarding its proposed decision.
- 5.1.10 During the investigation, the PPSA investigation team wrote a follow up inquiry to the Manager: Special Pensions Appeals on 28 October 2019 to inquire about the basis on which the Special Pensions Board awarded five years of pensionable service to the Complainant in 2004.
- 5.1.11 The Manager: Special Pensions Appeals responded on 25 November 2019, that the Board *"took a decision based on the evidence before it at the time"*.
- 5.1.12 Consequently, the PPSA investigation team requested copies of the Complainant's file from the GPAA, with the objective of ascertaining the basis upon which the Special Pensions Board credited him with five years of pensionable service in 2004. Upon receipt and perusal of the file there was no

decision of the Board, no record of interviews of witnesses or proof indicating that there was any investigation conducted at all by the Board.

- 5.1.13 Thereafter, the PPSA investigation team again contacted the Manager: Special Pensions Appeals to find out about the lack of any information or documentation indicating that there was any investigation or interview of witnesses conducted by the Board, whereupon the Manager advised that there are a quite a lot of files with nothing in them.
- 5.1.14 During a meeting with the Complainant on 28 August 2019, in response to the contents of the letter received from the Manager: Special Pensions Appeals on 26 June 2019, the Complainant maintained that he disputed the version advanced that in his application for a Special Pension to the Special Pensions Board, he failed to submit affidavits from his referees corroborating his version that he served the ANC internally in Lesotho or that he was ever arrested. The Complainant further advised that he was telephonically informed by the Special Pensions Board that all his referees were interviewed, including the former Minister of Finance, Mr Trevor Manuel.
- 5.1.15 According to the Complainant, the Special Pensions Board approved his application for special benefits in 2004 because his application met all the prescribed requirements. The Complainant stated that he was baffled that the documents he submitted in support of his application were not found when his appeal was being considered.
- 5.1.16 In response to the section 7(9) Notice, the Acting Head of the Office of the Director General of the National Treasury stated that it has no comment.
- 5.1.17 In his response to the section 7(9) Notice, the Acting Chief Executive Officer of the GPAA in essence, stated that the GPAA do not wish to respond to the facts of the matter. However, he confirmed that the GPAA is the administrator of the Special Pensions Act and reports to the National Treasury. Further, that the Appeal Board is appointed by the Minister of Finance and that the GPAA

would therefore not be in a position to initiate review proceedings against the Appeal Board.

The application of the relevant law and prescripts:

5.1.18 Section 1(1)(c) of the Constitution states that the Republic of South Africa is one sovereign, democratic state founded on values, such as the supremacy of the Constitution and the rule of law”

5.1.19 In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at paragraphs 56-57 the Constitutional Court emphasized the importance of section 1(c) in the constitutional order of South African law and has derived from it the constitutional principle of legality.

5.1.20 In terms of the well-established principle of legality, all executive and legislative organs of state:

5.1.20.1 Are subject to the law;

5.1.20.2 Can exercise only those powers lawfully conferred on them;

5.1.20.3 Cannot exercise those powers for purposes other than those for which they were conferred;

5.1.20.4 Cannot take the law into their own hands; and

5.1.20.5 Cannot act mala fide, or irrationally or arbitrarily.

5.1.21 Section 33(1) of the Constitution of South Africa, Act 108 of 1996 (Constitution), states that;

*“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.*

- 5.1.22 *In Pharmaceutical Manufacturers Association of South Africa and Another: In re ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) the Constitutional Court stated that:

*"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.*

*...*

*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective test".*

- 5.1.23 The Special Pensions Act was enacted to give effect to Section 189 of the Interim Constitution, which stipulated that provision shall be made by an Act of Parliament for the payment of special pensions by the national government to persons (or their dependents) who made sacrifices or who served the public interest in the establishment of a democratic constitutional order. The provision included members of any armed or military force not established by or under any law and which is under the authority and control of, or associated with and promotes the objectives of a political organisation.

- 5.1.24 The purpose of the Special Pensions Act is to compensate those who were involved in the liberation struggle and who, on that account, lost the opportunity to provide for a pension before 2 February 1990 for a period of at least five (5) years. It also seeks to compensate the surviving spouses and dependents of such persons.

- 5.1.25 The Special Pensions Act has been amended several times. A significant amendment to the Act of 1996 was the establishment of the Appeal Board, in terms of the Special Pensions Amendment Act of 2008 as an appeal body to adjudicate over appeals from people who disagree with the decision of the Board.

5.1.26 In terms of section 6(1) of the Special Pensions Act, applicants for benefits must:

- “(a) complete an application form as set out in Schedule 2;*
- (b) have a Commissioner of Oaths certify on the application form that the applicant swore or affirmed that the information contained in that form is correct; and*
- (c) submit the application form to the Board on or before the closing date.”*

5.1.27 In terms of section 7 of the Special Pensions Act, the Board must:

- “(a) consider applications for benefits submitted to it in terms of this Act;*
- (b) determine whether an applicant referred to in section 1 qualifies as a pensioner;*
- ...*
- (f) determine the benefit payable to each beneficiary;*
- (g) report its findings to the Minister and to the applicant; and*
- (h) inform the applicant in plain language of the right to appeal against the Board's decision, and include in that advice the form prescribed in Schedule 2 for requesting a review of the decision.”*

5.1.28 It is the function of the Special Pensions Board in terms of sections 6 and 7 of the Special Pensions Act to consider applications for special pension and to make a determination on whether or not to approve the application for a special pension.

5.1.29 In terms of section 24(2) and Section 25 of the Special Pensions Act the Board, by exercising their statutory powers of investigation, may require any person to appear before it to answer questions or request any person or political organisation to provide information to it, regarding an applicant.

5.1.30 In this matter, although it is unclear whether and how the Special Pensions Board exercised its powers in terms of section 24 and 25, to obtain information

relating to the Complainant's application, it is not disputed that the Special Pensions Board exercised its statutory powers to consider the Complainant's application and subsequently awarded a special pension to him on, 11 February 2004.

5.1.31 Section 8(1), as amended, stipulates that *"any applicant who disagrees with any decision of the designated institution may appeal that decision by sending a written notice in the form determined by the designated institution to the Appeal Board within 60 days of the date of decision."*

5.1.32 The Special Pensions Amendment Act, 2008 removed the discretion that the Appeal Board previously had to condone any application for appeal after the period of 60 days. In this case, the appeal was lodged eight (8) years after the Complainant was granted a special pension by the Special Pensions Board and was only considered five (5) years thereafter. The Appeal Board had no authority to condone the late application and was accordingly barred by law from considering it.

### Conclusion

5.1.33 The Appeal Board is an administrative body, which exercises its powers and functions in terms of the Constitution and the Special Pensions Act, as amended. Its decisions amount to administrative action as defined in section 1 of the PAJA.

5.1.34 In terms of section 8(1) the Appeal Board is tasked with presiding over appeals in respect of Special Pension applications from applicants who disagree with the decision of the Board. An appeal must be lodged within 60 days from the date of the Special Pensions Board's decision.

5.1.35 The Complainant lodged an appeal with the Appeal Board in July 2014 for the reconsideration of his pensionable years of service, requesting that the seven (7) years of service which had not been taken into account by the Special Pensions Board in 2004, be added to the five (5) years of service the Board

awarded to him in 2004. Hence, the Complainant requested that the Appeal Board should recognise and award to him 12 years pensionable service.

5.1.36 The Complainant's appeal was lodged with the Appeal Board more than eight (8) years after the Special Pensions Board issued its decision in 2004. The Appeal was therefore considerably late compared to the 60 (sixty) days' timeframe stipulated in the Special Pensions Act.

5.1.37 The Appeal Board had no authority or discretion to condone late appeals, therefore it could not have lawfully taken a decision to terminate the complainant's special pension. In so doing it acted *ultra vires* the Special Pensions Act, as amended.

5.1.38 As stated above, the Complainant was not appealing or disagreeing with the decision of the Special Pensions Board, he was merely applying for the extension of his pensionable years of service from 1971 to 1990, whereas the Board had decided to award only five (5) years pensionable service to him.

5.1.39 In light of the aforesaid it is concluded that the decision of the Appeal Board, in entertaining the complainant's appeal and to set aside the Complainant's years of pensionable service, was unlawful, arbitrary and unfair.

5.1.40 The conduct of the Appeal Board in terminating the Complainant's Special Pension was accordingly improper and amounts to maladministration.

## **6 FINDINGS**

6.1. Having regard to the evidence and regulatory framework determining the standard that the Appeal Board should have complied with, the following findings are made:

**6.1.1 Regarding whether the decision of the Appeal Board in setting aside the Complainant's Special Pension was not in accordance with the relevant**

**laws and prescripts and if so, whether its conduct was improper and constitutes maladministration.**

- 6.1.1.1 The allegation that the decision of the Appeal Board in setting aside the Complainant's special pension was not in accordance with the relevant laws and prescripts is substantiated.
- 6.1.1.2 The Chairperson of the Appeal Board ought to have known that in dismissing the Complainant's appeal and setting aside the 2004 award of five (5) years pensionable service, the Complainant's vested rights would be adversely affected in that his special pension would be terminated by the GPAA.
- 6.1.1.3 The Complainant was not appealing or disagreeing with the decision of the Appeal Board, he was merely applying for the extension of his pensionable years of service from 1971 to 1990, whereas the Board had decided to award only five (5) years pensionable service to him.
- 6.1.1.4 The Appeal was lodged more than eight (8) years instead of within 60 days, as provided by the Special Pensions Act, as amended. The Appeal Board had no authority or discretion to entertain the Complainant's application for appeal. The decision of the Appeal Board was therefore unlawful.
- 6.1.1.5 The conduct of the Appeal Board accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.



## 7. REMEDIAL ACTION

- 7.1. The decision of the Appeal Board is final. The fact that the decision is unlawful does not mean that it can simply be ignored.
- 7.2. In the case of *Ouderkraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 SCA, the Supreme Court of Appeal authoritatively ruled that until an administrative decision is set aside by a Court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.
- 7.3. The principle enunciated in the *Ouderkraal* case was confirmed by the Constitutional Court in the case of *The MEC for Health, Eastern Cape v Kirland Investments*.<sup>2</sup> That Court was called upon to reconsider the correctness of the principle in *Ouderkraal*.<sup>3</sup> The Court rejected this invitation and found that if public officials or administrators can, without recourse to legal proceedings, be allowed to disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, this would be a licence to self-help. It would be inviting officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The Court found that this would spawn confusion and conflict to the detriment of the administration and the public and that it would undermine the Court's supervision of the administration.<sup>4</sup>
- 7.4. Consequently, it is not open to the GPAA to simply ignore the decision of the Appeal Board and to reinstate the Complainant's special pension. A proper review application has to be brought to firstly review the decision to set aside the special pension award of the Special Pensions Review Board and to reinstate the Complainant's special pension. The court will have to decide on whether the delay by the GPAA to lodge the application for review transcends the prejudice suffered by the Complainant since 2017.

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<sup>2</sup> 2014 (3) SA 481 (CC)

<sup>3</sup> At para 87

<sup>4</sup> At para 89

- 7.5. In its response to the complaint, the GPAA referred to the unreported case of *Sello Thomas Phalama v Minister of Finance (Case No: 57375/2017)* in which the facts were similar to this matter. In this case the High Court reviewed and set aside the decision of the Appeal Board to set aside the applicants special pension and his original pension award was reinstated.
- 7.6. According to the Government Employees Pension Law, 1996, the Government Employees Pension Fund that is administered by the GPAA, falls under the authority of the Minister of Finance.
- 7.7. **The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is as follows:**
- 7.7.1 The Minister of Finance to:**
- 7.1.1.1 Determine appropriate steps to take the decision of the Appeal Board of 12 July 2017, setting aside the Special Pension's Board 11 February 2004 award of a special pension to Mr Sontu, on judicial review and to inform Mr Sontu, **within thirty (30) working days** from the date of the report;
- 7.1.1.2 Apologise in writing to Mr Sontu for the prejudice he suffered as a result of the improper conduct of the Appeal Board, **within sixty (60) working days** from the date of the report.

## 8. MONITORING

- 8.1 The Minister of Finance to report to the Public Protector on the implementation of the remedial action referred to in paragraph 7.7 above **within sixty (60) working days** from the date of the report.
- 8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of *Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others [2016]ZACC 11*, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Minister of Finance he obtains an Interim Interdict or Court Order directing otherwise.



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**ADV BUSISIWE MKHWEBANE**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE: 29/04/2022**

*Assisted by: Mr Sisa Magele-Investigator*

*Western Cape Provincial Office*