

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 30833/22

In the matter between:

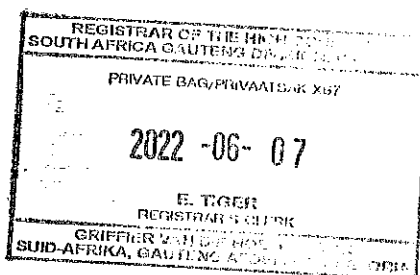
MINISTER OF FINANCE

First Applicant

NATIONAL TREASURY

Second Applicant

and



PUBLIC PROTECTOR

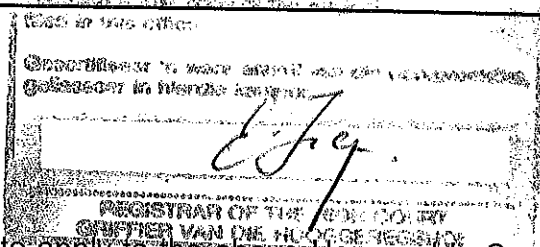
First Respondent

MZUNANI ROSEBERRY SONTOKO

Second Respondent

NOTICE OF MOTION

PART A



TAKE NOTICE THAT the applicants intend to apply to the above Honourable Court for an order in the following terms:

1. Pending the finalisation of the application contemplated in Part B of this notice of motion, it is declared that the remedial action in paragraphs 7.1.1.1 and 7.1.1.2 as well as the monitoring provision in paragraph 8.1 of the First

Respondent's Report 08 of 2022/23 in respect of her 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 Sonto (*"the Report"*) are suspended.

2. The costs of Part A are costs in the cause of Part B, if Part A is opposed, the respondents opposing it are ordered to pay the costs.
3. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **DONDO MOGAJANE** together with its annexures will be used in support of this application.

TAKE NOTICE FURTHER THAT the applicants have appointed their attorneys address mentioned hereunder, as the address at which they will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT should the respondents wish to oppose the interim relief sought in Part A above, they are required to,

1. Within 5 (five) days after receipt of this notice of motion deliver a notice of opposition to the applicants, and in such notice appoint an address within 15 kilometres of the office of the registrar, at which such person will accept notice and service of all documents, as well as such person's postal, facsimile or electronic mail addresses where available;

2. Within 10 (ten) days of notifying the applicants of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents.

TAKE NOTICE FURTHER THAT if no such notice of intention to oppose be given, the application will be made on **28 June 2022** at 10h00.

PART B

TAKE NOTICE THAT the applicants shall on a date to be arranged with the Registrar, apply for orders in the following terms:

1. The First Respondent's Report 08 of 2022/223 in respect of her 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 Sonto (*"the Report"*) is reviewed, declared invalid and set aside.
2. The First Respondent's remedial action in paragraphs 7.1.1.1 and 7.1.1.2 of the Report are reviewed, declared invalid and set aside.
 - 2.1. The First Respondent, is ordered to pay the costs of the application.
 - 2.2. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **DONDO MOGAJANE** together with its annexures will be used in support hereof.

TAKE NOTICE FURTHER THAT, in terms of Rule 53(1)(a) of the Uniform Rules of Court, the First Respondent is called upon to show cause why the relief sought should not be granted.

TAKE NOTICE FURTHER THAT, in terms of Rule 53(1)(b) of the Uniform Rules of Court, the First Respondent is required within 15 days after receipt hereof to dispatch to the Registrar of this Honourable Court the record that relates to the investigation and the Report, together with such reasons as the First Respondent is by law required to give or desire to make, and to notify the applicants attorneys of record that she has done so.

TAKE NOTICE FURTHER THAT within 10 days of receipt of the record from the Registrar, the applicants may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its notice of motion and supplement the supporting affidavit, in terms of Rule 53(4) of the Uniform Rules of Court.

TAKE NOTICE FURTHER THAT if the Respondents intend to oppose Part B of this application, they are required in terms of Rule 53(5) of the Uniform Rules of Court to:


- 1.1. within 15 days after receipt of an amended notice of motion and/or supplementary affidavit, as the case may be, deliver a notice to the applicants'

attorneys of their intention to oppose Part B of this application and, in such notice, appoint an address within 15 kilometres of the office of the registrar, at which such person will accept notice and service of all documents, as well as such person's postal, facsimile or electronic mail addresses where available; and

- 1.2. within 30 days after the expiry of the time referred to in Rule 53(4) deliver any affidavits they may desire in answer to the allegations made by the applicants.

TAKE NOTICE FURTHER THAT the applicants have appointed their attorneys address mentioned hereunder, as the address at which they will accept notice and service of all process in these proceedings.

DATED AT PRETORIA ON THIS THE 7TH DAY OF JUNE 2022.



ATTORNEY FOR THE APPLICANTS

STATE ATTORNEY
PRETORIA
SALU BUILDING
255 FRANCIS BAARD STREET
PRETORIA, 0001
Ref: 00782/2022/Z32
Tel: (012) 309 1575
Cell: 072 387 5073
Dx: 298 PRETORIA
Enq: Ms Z Zenani
E-mail: ZZenani@justice.gov.za

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

AND

TO: PUBLIC PROTECTOR

First Respondent

175 Lunnnon Street

Hillcrest Office Park

PRETORIA

0003

AND

TO: MZUNANI ROSEBERRY SONTU

Second Respondent

149 Monte Vista Boulevard

Monte Vista

GOODWOOD

WESTERN CAPE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. 30833/22

In the matter between:

MINISTER OF FINANCE

First Applicant

NATIONAL TREASURY

Second Applicant

and

PUBLIC PROTECTOR

First Respondent

MZUNANI ROSEBERRY SONTU

Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

DONDO MOGAJANE

do hereby make oath and state that:



INTRODUCTION

1. I am the Director-General of the National Treasury. I am duly authorised to depose to this affidavit and to bring this application on behalf of the Minister of Finance ("the Minister") and the National Treasury.
2. The facts to which I depose herein are within my personal knowledge and are, except where the context indicates otherwise or I expressly say so, to the best of my knowledge and belief true and correct.
3. Any legal submissions that I may make are so made on the advice of our legal representatives.

THE PARTIES

4. The first respondent is the Public Protector (*"the Public Protector"*), the Chapter Nine institution established in terms of section 181(1)(a) of the Constitution, having its principal place of business at Hillcrest Office Park, 175 Lunnon Street, Brooklyn, Pretoria.
5. The second respondent is Mr Mzunani Roseberry Sonto (*"Mr Sonto"*). Mr Sonto is cited herein because of any interest that he may hold. No relief is sought against him. For purposes of service Mr Sonto's address is 149 Monte Vista Boulevard, Monte Vista, Goodwood.



PURPOSE OF THIS APPLICATION

6. Part A of this application is for an interim interdict to suspend the operation of the remedial action in paragraphs 7.1.1.1 and 7.1.1.2 as well as the monitoring provision contained in paragraph 8.1 of the Public Protector's Report 08 of 2022/23 in respect of her 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 Sonto (*"the Report"*).
7. Part A is brought pending the review application in Part B. Part B of the application is for the review and setting aside of the Report and remedial action contained therein.
8. A copy of the Report is annexed hereto marked **"EG1"**.

JURISDICTION

9. The office of the Public Protector is located within the area of jurisdiction of the above Honourable Court. The Report and remedial action were thus made within the area of jurisdiction of this Court.

BACKGROUND FACTS

Mr Sonto's complaint

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10. On 3 May 2019, Mr Sonto lodged a complaint with the office of the Public Protector.
11. He alleged that in 2004 he was awarded a Special Pension of 5 years pensionable service in terms of the Special Pensions Act, 69 of 1996 (*"the Special Pensions Act"*) by the Special Pensions Board (*"the Board"*).
12. In 2012, he lodged an appeal with the Special Pensions Appeal Board (*"the Appeal Board"*) for the reconsideration of his pensionable years of service requesting that the Appeal Board should recognize and award him 12 years pensionable service instead of 5 years of service initially awarded by the Board.
13. The Appeal Board however dismissed his appeal and set aside the decision of the Board. I annex hereto as **"EG2"** a copy of the decision of the Appeal Board.
14. As appears from the decision, the Appeal Board found that there was no corroborating evidence that Mr Sonto joined and served the ANC/MK internally or in Lesotho. There was further no official police or court records to confirm that he stood trial for politically motivated offences. Further, that despite diligent search, his name did not appear on the official list of restricted or banned persons.

The issue identified by the Public Protector for investigation

15. The issue identified by the Public Protector for investigation was:

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"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".

The findings of the Public Protector

16. The Public Protector found that:

16.1. The Appeal Board's decision was not in accordance with relevant laws and prescripts;

16.2. The Chairperson of the Appeal Board ought to have known that Mr Sonto's vested rights would be adversely affected by the decision in that his special pension would be terminated;

16.3. Mr Sonto was not appealing or disagreeing with the decision of the Board but was merely applying for the extension of his pensionable years of service;

16.4. That the Appeal Board's decision was unlawful since the appeal was lodged more than 8 years after the Board's decision. The Appeal Board had no authority or discretion to entertain Mr Sonto's application for appeal because the Special Pensions Act, 69 of 1996 (*"the Special*



Pensions Act") provides that an appeal be lodged within a period of 60 days;

- 16.5. That the conduct of the Appeal Board constitutes improper conduct as envisaged in section 182(1) of the Constitution of the Republic of South Africa, 106 of 1996 (*"the Constitution"*) and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 23 of 1994 (*"the Public Protector Act"*).

The involvement of the Minister of Finance

17. In December 2021 I, as well as the office of the Minister of Finance, received letters from the Public Protector dated 1 December 2021 in terms of which the Public Protector provided the Minister and I with a copy of the Public Protector's section 7(9) notice. Copies of the letters are annexed hereto as **"EG3"** and **"EG4"** respectively. A copy of the section 7(9) notice is annexed hereto as **"EG5"**.
18. Since the section 7(9) notice and the remedial action that the Public Protector intended to take was directed at the Acting Chief Executive Officer of the Government Pensions Administration Agency (*"the GPAA"*), National Treasury informed the Public Protector that we had no comment in respect of the notice.

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19. On 27 February 2022, the office of the Minister of Finance received a further letter from the Public Protector dated 25 February 2022 in respect of her investigation. A copy of the letter is annexed hereto as “EG6”.
20. Although the letter refers to the letter addressed to the Minister on 1 December 2021 and the notice in terms of section 7(9) attached thereto, the Public Protector only sort to involve the Minister in the section 7(9) notice at the stage of remedial action. Neither my office nor I was ever made aware of the investigation and Mr Sonto's complaint prior to having received the letter of 1 December 2021.
21. As appears from the letter of 27 February 2022, the Public Protector states that she has “*decided to amend the appropriate remedial action*” so as to read as follows:

“22.1 *The Minister of Finance to:*

22.1.1 *Take the decision of the Appeal Board of 12 July 2017 to set aside the award of a special pension to the Complainant by the Special Pensions Board on 11 February 2004, on judicial review and to inform the Complainant accordingly, within ninety (90) days from the date of the report;*

22.1.2 *Apologise to the Complainant for the prejudice he suffered as a result of the improper conduct of the Appeal Board, within sixty (60) days from the date of the report; and*

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22.1.3 *Take the appropriate steps against the members of the Appeal Board in respect of their improper conduct in this matter, in terms of the provisions of the Special Pensions Act, 1996."*

22. As stated above, prior to this amendment, the Public Protector's remedial action was directed to the Acting Chief Executive Officer of the GPAA..

23. The Public Protector's amendment to her remedial action appears to be based on the response that she received from the Acting Chief Executive Officer of the GPAA that *"the GPAA is the administrator in respect of the Special Pensions Act, 96 of 1996 (the Act) and reports in this regard to the National Treasury"* and that the Special Pensions Appeal Board *"is appointed by the Minister of Finance as per section 8AA of the Act and thus resorts under the authority of the Minister of Finance"*. A copy of the GPAA's response is annexed hereto as **"EG7"**.

24. However, the GPAA made it clear that it cannot pronounce on the suitability or not of taking the decisions of the Appeal Board on review as it is the right of any person to do so and that it would not be proper in law to direct that the administrator be forced to initiate the review of the decision of the Appeal Board as doing so will be placing it in the shoes of the applicant/litigant and such is not proper. The GPAA further raised concern about the precedent this would be creating.

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25. On 29 April 2022 the Public Protector was provided with the response of the National Treasury, a copy of which is annexed hereto as “EG8”.

26. The Public Protector was informed that:

26.1. The Minister was not able to engage on the facts of the matter nor on the validity or otherwise of the decision taken by the Appeal Board;

26.2. The Public Protector only sort to involve the Minister at the stage of the Public Protector's remedial action and that he was never made aware of the investigation or the merits of this matter prior thereto;

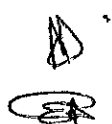
26.3. The section 7(9) notice does not address the grounds upon which the Minister can be held responsible for the conduct of the Appeal Board;

26.4. In this regard, the Appeal Board is an independent body that exercised a statutory function in terms of the Special Pensions Act and whose decisions are final;

26.5. An executive functionary can only exercise those powers conferred on them by law. Other than the powers conferred upon the Minister to appoint the Appeal Board, the Minister has no control over the decisions of the Appeal Board and cannot step into the shoes of the Appeal Board;



- 26.6. The Public Protector's reference to the unreported case of *Sello Thomas Phalama v The Minister of Finance (case no 57375/2017)* is misplaced to the extent that the Public Protector seeks to hold the Minister responsible for the decisions of the Appeal Board. In this regard I annexed the pleadings from which it is evident that the Minister was not responsible for the decision of the Appeal Board. A copy of the pleadings and order are annexed hereto as "EG9".
- 26.7. There are no grounds to conclude that solely by reason of the fact that the appeal was lodged outside the 60-day period as envisaged in section 8(1) of the Special Pensions Act that the conduct of the Appeal Board constitutes improper conduct as envisaged in section 182(1) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act. As is evident from the answering affidavit filed on behalf of the Appeal Board in the Phalama matter referred to above, the Appeal Board appears to have relied on section 8(4) of the Special Pension Act, to justify its decision to entertain the appeal outside the 60-day period. To the extent that the Appeal Board may have laboured under the same mistaken belief that section 8(4) affords them the right to consider the appeal of Mr Sonto outside the 60-day period, such action does not amount to improper conduct or maladministration.
- 26.8. The proposed remedial action holding the Minister accountable was therefore misplaced and irregular;



26.9. The Public Protector cannot direct the Minister to institute legal proceedings and commit the funds of the National Treasury for the benefit of aggrieved complainants in respect of decisions taken by the Appeal Board.

27., The Public Protector issued her final report dated 29 April 2022, the very same day that our response to the section 7(9) notice was sent to the Public Protector at approximately 16h30 in the afternoon. Her remedial orders reads as follows:

"7.1.1 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 of Mr Sonto, on judicial review and to inform Mr Sonto, within thirty (30) working days from the date of the report.

7.1.1.2 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." **GROUND OF REVIEW**

28. I respectfully submit that the Report and remedial action are liable to be reviewed and set aside on, *inter alia*, the following grounds:



- 28.1. The Public Protector acted irrationally and/or unreasonably and/or unlawfully exceeded her powers in finding that the decision of the Appeal Board was unlawful, arbitrary and unfair;
- 28.2. The Public Protector acted irrationally and/or unreasonably in finding that the conduct of the Appeal Board was improper and amounted to maladministration;
- 28.3. The Public Protector acted irrationally and/or unreasonably in issuing a directive compelling the Minister to determine appropriate steps to take the decision of the Appeal Board on judicial review.
- 28.4. The Public Protector acted irrationally and/or unreasonably in directing the Minister to apologise to Mr Sonto.
29. Each of these grounds will be considered in greater detail hereunder.

Ground 1: The Public Protector acted irrationally and/or unreasonably and/or unlawfully exceeded her powers in finding that the decision of the Appeal Board was unlawful, arbitrary and unfair

30. Section 8(8) of the Special Pensions Act provides that a decision of the Appeal Board is final.

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31. Section 29A provides that any administrative action taken in terms of the Special Pensions Act is subject to the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").
32. Both the Manager: Special Pensions Appeal as well as the Adjudicator: Special Pensions Appeal informed the Public Protector that the decision of the Appeal Board is final, that PAJA was applicable and that the decision of the Appeal Board can only be ventilated and set aside by a court of law. I annex hereto as "EG10" and "EG11" their respective responses to the Public Protector.
33. Section 6(2) of PAJA provides that:

"A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

- (i) was not authorised to do so by the empowering provision;*
- (ii) acted under a delegation of power which was not authorised by the empowering provision; or*
- (iii) was biased or reasonably suspected of bias;*

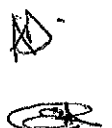
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

- (i) for a reason not authorised by the empowering provision;*



- (ii) *for an ulterior purpose or motive;*
- (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*
- (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
- (v) *in bad faith; or*
- (vi) *arbitrarily or capriciously;*
- (f) *the action itself-*
 - (i) *contravenes a law or is not authorised by the empowering provision;*
or
 - (ii) *is not rationally connected to-*
 - (aa) *the purpose for which it was taken;*
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator; or*
 - (dd) *the reasons given for it by the administrator;*
- (g) *the action concerned consists of a failure to take a decision;*
- (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
- (i) *the action is otherwise unconstitutional or unlawful.*

34. PAJA defines

34.1. A 'court' as

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(a) the Constitutional Court; or

(b) a High Court or another court of similar status; or

(c) a Magistrate's Court

34.2. A *'tribunal'* as any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of the Act.

35. The decision of the Appeal Board is final and can only be judicially reviewed and set aside by a court of law or tribunal after considering the issues placed before it by all relevant parties. This means that only a court of law can enquire into the lawfulness of a decision of the Appeal Board.

36. The cornerstone of the present Report is a finding by the Public Protector that the decision of the Appeal Board was unlawful, arbitrary and unfair. Such a finding is beyond the remit of the Public Protector. In making a finding on the legality of the decision of the Appeal Board, the Public Protector usurped the powers of a review court and exceeded the scope of her powers.

Ground 2: The Public Protector acted irrationally and/or unreasonably in finding that the conduct of the Appeal Board was improper and amounted to maladministration

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37. An incorrect or unlawful decision by the Appeal Board does not constitute improper conduct and does not amount to maladministration (which typically refers to inefficient or dishonest administration).

38. Hence, a finding by the Public Protector that the conduct of the Appeal Board was improper and amounted to maladministration is irrational in that there is no rational connection between this finding and the information before the Public Protector. Alternatively, this finding is unreasonable in that no reasonable decision-maker would have reached such a conclusion.

Ground 3: The Public Protector acted irrationally and/or unreasonably in issuing a directive compelling the Minister to determine appropriate steps to take the decision of the Appeal Board on judicial review

39. The Public Protector cannot, with respect, direct the Minister to institute legal proceedings and commit the funds of the Department to institute legal proceedings on behalf of aggrieved litigants in respect of decisions of the Appeal Board.

40. The Minister has no legal standing to take on review a decision of the Appeal Board. Furthermore, in determining "appropriate steps" as directed by the Public Protector in her remedial action, the Minister lacks the requisite authority to direct anyone to institute such an application. It is the second respondent that has the necessary *locus standi* to launch the review.

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Ground 4: The Public Protector acted irrationally and/or unreasonably in directing me to apologise to the complainant

41. The Minister played no role in the conduct complained of. Neither is the Minister responsible for the conduct of the Appeal Board. It is not clear on what basis the Minister can be directed to apologise for the conduct of the Appeal Board, which is an independent body.

Ground 5: The Public Protector's remedial action which directs that the Minister apologise to the complainant is both irrational and unreasonable.

42. The Appeal Board is an independent statutory body. There is no factual legal basis for an order directing the Minister to apologise for the conduct of the Appeal Board.

43. This remedial action is thus both irrational and unreasonable.

PART A RELIEF

44. I ask the Court to grant an interim order suspending the operation and interdicting the enforcement of the remedial action directed by the Public Protector in the report pending the final determination of Part B of this application.

45. I submit that the requirements for an interim order are met in that:



- 45.1. I have addressed the merits of the review and submit that these allegations suffice to establish a *prima facie* right;
- 45.2. There is a well-grounded fear of irreparable harm. If the Minister is forced to implement the remedial action of the Public Protector, it will entail the enforcement of an irrational and unreasonable decision. To make matters worse, the remedial action has far reaching consequences in respect of the decisions of the Appeal Board. The result is that where a complainant is unhappy about the decisions of the Appeal Board it may refer the matter to the Public Protector instead of approaching a court or tribunal as envisaged in terms of PAJA. Continuance of the alleged wrong will therefore cause irreparable harm.
- 45.3. The balance of convenience favours the granting of the interdict in that:
- 45.3.1. The Appeal Board is an independent body that exercised a statutory function in terms of the Special Pensions Act and whose decisions are final.
- 45.3.2. The Minister is unable to *"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 of Mr Sonto, on judicial review"* in circumstances where:

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- 45.3.3. It is Mr Sonto who has the necessary *locus standi* to take the decision of the Appeal Board on review; and
- 45.3.4. The funds of National Treasury cannot be committed to instituting legal proceedings on behalf of aggrieved litigants in respect of decisions of the Appeal Board.
- 45.3.5. For the above reasons, this constitutes the clearest of cases for the staying the implementation of the Report and the remedial action pending the outcome of Part B of this application.
- 45.3.6. Furthermore, paragraph 7.1.1.2 of the remedial order cannot be carried out until such time that the judicial review has been finalised and a decision is made by a court in favour of Mr Sonto. In any event, the Minister cannot be directed to apologise to Mr Sonto for the conduct of the Appeal Board which is an independent body. The Public Protector does not address the grounds upon which the Minister is responsible.
- 45.3.7. There is no harm in awaiting the outcome of the review decision versus the harm that will befall if the interdict is not granted. The balance of convenience thus favours the granting of the interdict.
- 45.4. There is simply no suitable alternative remedy available in view of the binding nature of the remedial action.



PART B RELIEF

46. There has been uncertainty in court decisions on whether the Public Protector's remedial action constitutes administrative action. In a number of matters, the High Court has held that it does. The implication of this was that PAJA applies to the decision making leading up to the remedial action in question.
47. The Supreme Court of Appeal has however concluded that the decisions taken by the Public Protector, including the remedial action, do not constitute administrative action.
48. This decision appears, says the Constitutional Court, to be at variance with a decision taken by the Constitutional Court where it implicitly endorsed the application of PAJA in the decision-making process followed by the Public Protector when she takes remedial action. As things stand however, the Constitutional Court has not yet made a definitive conclusion in this regard and the decision of the Supreme Court of Appeal is therefore binding.
49. This application is therefore brought under the principle of legality in that the public protector exceeded her powers in releasing the Report and granting the remedial action that she did. I have already set out the five grounds of review relied upon.

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50. In the alternative, in the event that this Court finds that PAJA applies, then the review of the Report and the remedial action is sought under PAJA, in particular section 6(2)(f)(ii) (relating to her having exceeded her powers); section 6(2)(h) (relating to irrationality) and section 6(a)(i) (relating to unreasonableness) thereof.

CONCLUSION

51. I submit that a case has been made out for an order as prayed for the urgent interim relief set out in Part A of the Notice of Motion to which this affidavit is attached. I will also seek relief in accordance with Part B in the ordinary course.

52. I reserve my right to amend the relief sought and supplement the papers upon receipt of the record of the decision and the reasons therefore.

WHEREFORE I respectfully pray for an order in terms of the notice of motion to which this affidavit is attached.



DONDO MOGAJANE



I certify that the deponent has acknowledged that s/he knows and understands the contents of this affidavit which was signed and sworn to before me at Pretoria on this 07 day of June 2022, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended and Government Notice No. 1648 of 19 August 1977, having been complied with.



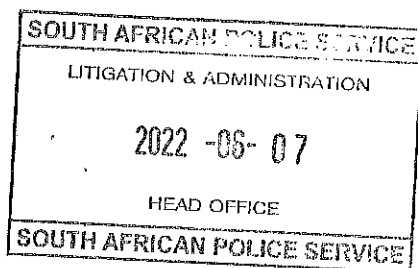
COMMISSIONER OF OATHS

Full names:

Business Address:

Designation:

Area/Office:



ELEANOR DELAINE GROENEWALD
COMMISSIONER OF OATHS
EX OFFICIO
SA POLICE SERVICE LEGAL OFFICIAL
PRESIDIA BUILDING 255 PAUL KRUGER STREET
PRETORIA





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Facebook: Public Protector South Africa

Twitter: @PublicProtector

Please quote this reference in your reply: 005152/19

Enquiries: Mr Sisa Magele
Telephone: 021 423 8644
Email: mageles@pprotect.org

Mr Dondo Mogajane
Director General of the National Treasury
Private Bag X115
Pretoria
0001

Email: Lindiwe.mathanda@treasury.gov.za
CC: DGRegistry@treasury.gov.za

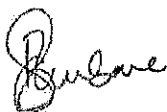
Dear Mr Mogajane

**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.**

1. Reference is hereby made to the above matter.
2. Attached hereto, please find a copy of the Public Protector's formal report in connection with an investigation into allegations of improper conduct and maladministration against the Special Pensions Appeal Board regarding the improper termination of the special pension of Mr M R Sontu.
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.
5. 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.
6. 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

Yours Sincerely,



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

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*"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*¹ 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

¹ 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 Sonto 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*.² That Court was called upon to reconsider the correctness of the principle in *Ouderkraal*.³ 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.⁴
- 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.

² 2014 (3) SA 481 (CC)

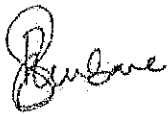
³ At para 87

⁴ 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 Santo, on judicial review and to inform Mr Santo, **within thirty (30) working days** from the date of the report;
- 7.1.1.2 Apologise in writing to Mr Santo 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

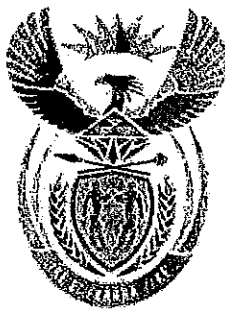
- 8.1 The Minister of Finance to report to the Public Protector on the implementation of the remedial action referred to in paragraph 7.7 above **within sixty (60) working days** from the date of the report.
- 8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement 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.



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



**NATIONAL TREASURY
REPUBLIC OF SOUTH AFRICA**

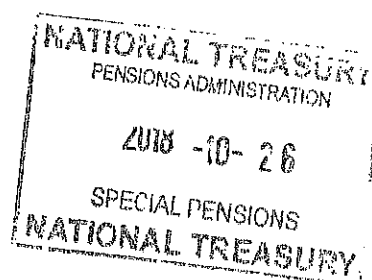
Private Bag X88, Pretoria, 001 Toll free: 080 772 3646, Fax: 012 323 8589

THE DECISION OF THE SPECIAL PENSIONS APPEAL BOARD

SP30052641

Mr M R Sonto
149 Monte Vista Boulevard
Monte Vista
GOODWOOD
7460

Email: rsonto@parliament.gov.za



INTRODUCTION

1. Mr Mzunani Roseberry Sonto appeals the decision of the Special Pensions Board (Board) given on 29 March 2004. His application was approved and he was awarded a service period of 5 years.
2. The ground for appeal is that the period originally awarded must be reconsidered and should include his years of service from 1971.

SUMMARY OF RELEVANT EVIDENCE

3. According to the Application Form, Mr Sonto:-

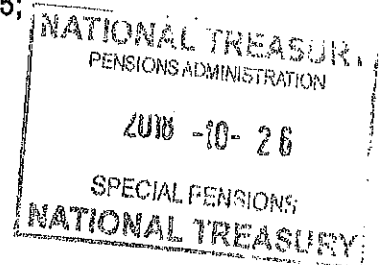
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- joined and served the African National Congress (ANC) from 1975 to 1990;
- was detained from January 1985 to December 1985 and again from January 1987 to June 1989; and
- was banned and restricted to New Crossroad from 1985 to 1989.

4. The biography added that Mr Sonto:-

- served as chairperson of Moltino Students Association from 1970 to 1971;
- joined the ANC during an underground meeting in 1975;
- identified youth with potential for military training;
- went to join Umkhonto We Sizwe (MK) in Lesotho in 1985;
- did an induction course in that country;
- was instructed to start rent boycott in New Crossroads;
- was detained for 4 months and stood trial in 1985; and
- accommodated cadres in 1986.



5. The biography submitted on appeal indicated that he:-

- left school in 1972;
- became Chairperson of Moltino Youth Organisation in 1972;
- transported, raised funds and offered military training to cadres; and
- participated in the rent boycott from 1983 to 1985.

ANALYSIS OF EVIDENCE

6. The section which applies to this application namely 1(1) (b) (i),(ii) and (iii) of the Special Pensions Act 69 of 1996 as amended (Act), reads as follows:-

"A person who made sacrifices or served the public interest in establishing a non-racial, democratic constitutional order and who is a citizen, or entitled to be a citizen, of the Republic of South Africa, has the right to a pension in terms of this Act if that person—

AD

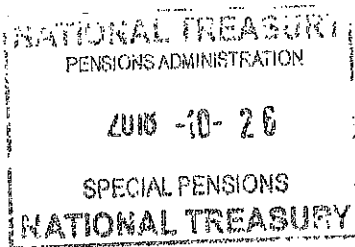
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- (a) was at least 35 years of age on the commencement date;
- (b) was prevented from providing for a pension because, for a total or combined period of at least five years prior to 2 February 1990, one or more of the following circumstances applied:

- (i) That person was engaged full-time in the service of a political organisation.

- (ii) That person was prevented from leaving a particular place or area within the Republic, or from being at a particular place or in a particular area within the Republic, as a result of an order issued in terms of a law mentioned in Schedule 1 of this Act; and

- (iii) That person was imprisoned or detained in terms of any law of for any crime mentioned in Schedule 1 to the Act, or that person was imprisoned for any offence committed with a political objective."



7. In the absence of corroborating evidence, it cannot be concluded that Mr Sonto joined and served the ANC/MK Internally or in Lesotho as alleged. There is also no evidence from the organisations to support a finding that he was ever in their full-time service during the anti-apartheid struggle. His version represents the submissions of a single witness and is simply insufficient to sustain the application.

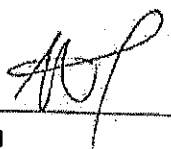
8. No official police or court records have been furnished to confirm that Mr Sonto stood trial for a politically motivated offence. Moreover, despite a diligent search, his name does not appear on the official list of restricted/banned persons across South Africa. Therefore the claim that he was ever restricted/banned or detained/imprisoned is improbable.

9. In the circumstances, Mr Sonto cannot be credited with any years of service before 2 February 1990. The application accordingly fails.

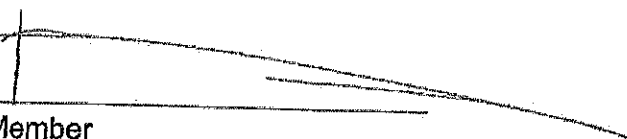
DECISION

10. The decision of the Board in awarding Mr Sonto Five (5) years of service is set aside and the appeal dismissed.


DATED at PRETORIA on 12 July 2017.



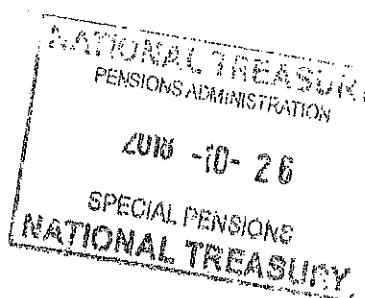
Chairperson



Member



Member





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Please quote this reference in your reply: 005152/19

Enquiries: Mr Sisa Magele
Telephone: 021 423 8644
Email: mageles@pprotect.org

Mr Dondo Mogajane
Director General of the National Treasury
Private Bag X115
Pretoria
0001

Email: Lindiwe.mathanda@treasury.gov.za
CC: DGRegistry@treasury.gov.za

Dear Mr Mogajane

**NOTICE IN TERMS OF SECTION 7(9)(a) OF THE PUBLIC PROTECTOR ACT,
1994: IN CONNECTION WITH 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.**

- 1: Reference is hereby made to the above matter.
2. Attached hereto, please find a copy of the Public Protector's section 7(9) notice in connection with an investigation into allegations of improper conduct and maladministration against the Special Pensions Appeal Board regarding the improper termination of the special pension of Mr M R Sonto.

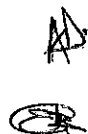
3. The Notice is issued to you for your response, in terms of section 7(9) of the Public Protector Act, 1994.

Yours sincerely,



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 01/12/2021





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Twitter: @PublicProtector

Please quote this reference in your reply: 005152/19

Enquiries: Mr Sisa Magele
Telephone: 021 423 8644
Email: mageles@pprotect.org

Mr E Godongwana MP
Minister of Finance
Private Bag X115
Pretoria
0001

Email: Mary.Marumo@treasury.gov.za

Dear Mr Godongwana

NOTICE IN TERMS OF SECTION 7(9)(a) OF THE PUBLIC PROTECTOR ACT, 1994: IN CONNECTION WITH 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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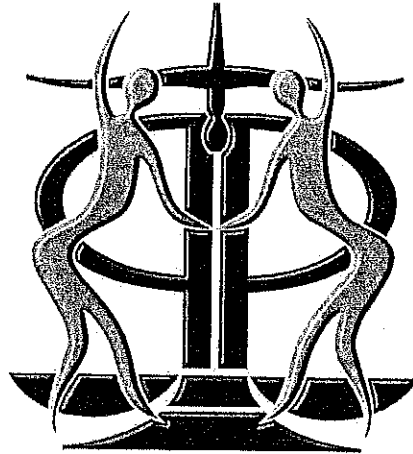
3. The Notice is issued to you for your response, in terms of section 7(9) of the Public Protector Act, 1994.

Yours sincerely,



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

NOTICE IN TERMS OF SECTION 7(9) (a) OF THE PUBLIC PROTECTOR ACT 23
OF 1994:



PUBLIC PROTECTOR
SOUTH AFRICA

NOTICE IN TERMS OF SECTION 7(9)(a) OF THE PUBLIC PROTECTOR ACT,
1994: IN CONNECTION WITH AN 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. Kindly take note that the Public Protector is in the process of finalising an investigation relating to 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 (the Complainant), a pensioner, 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.
2. The complaint was lodged on 3 May 2019. It was investigated by the Western Cape Provincial Office of the Public Protector South Africa (PPSA).
3. 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 Special Pensions Appeal Board (Appeal Board).
4. The Complainant alleged that he lodged an appeal with the Appeal Board in July 2014 for the reconsideration of his pensionable years of service, requesting that the 7 (seven) years of service which had not been taken into account by the Special Pensions Board in 2004, be added to the 5 (five) 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 (twelve) years pensionable service.
5. 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 years of pensionable service, was also set aside.
6. 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.

7. 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.
8. 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.
9. 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.
10. 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.
11. **Powers and jurisdiction of the Public Protector**
 - 11.1 The Public Protector is an independent constitutional body established in terms of section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

- 11.2 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.
- 11.3 The Public Protector Act 23 of 1994 (Public Protector Act) 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.
- 11.4 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.
- 11.5 Special Pensions are administered by the Government Pensions Administrations Agency (GPAA).
- 11.6 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.
- 11.7 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.

- 11.8 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.
- 11.9 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.
- 11.10 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"*
- 11.11 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.*

11.12 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.

11.13 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...”.

11.14 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.

11.15 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."

- 11.16 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.
- 11.17 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 marginalized persons and communities.
- 11.18 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 and not the merits of the appeal it presided over.
- 11.19 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.
- 11.20 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.
- 11.21 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.

12. 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.
13. In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*¹ 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"*.
14. Based on analysis of the complaint and the preliminary investigation that was conducted, the following issues were identified for investigation;
 - 14.1 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.
15. The Public Protector is about to conclude the investigation and based on the information and evidence obtained during the course thereof, the Public

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

Protector is now in a position to make findings. During the investigation of the issues, evidence and information was obtained indicating wrongdoing on the part of the Appeal Board, and should further evidence not be submitted negating what has already been found, the Public Protector is likely to make adverse findings against the Appeal Board and to take the appropriate remedial action.

16. The Investigation

16.1 The investigation process

16.1.1 The investigation process was conducted through correspondence with the Complainant, and the Manager: Special Pensions Appeals and the Adjudicator: Special Pensions Appeals of the GPAA, an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.

17. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.

17.1 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:

17.1.1 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 years on 11 February 2004.

- 17.1.2 On 14 February 2012 (8 years later), the Complainant appealed the decision of the Special Pensions Board, issued on 11 February 2004.
- 17.1.3 On 12 July 2017 (more than 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.
- 17.1.4 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 Sonto 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."*
- 17.1.5 The Appeal Board concluded that in the circumstances, the Complainant could not be credited with any years of service, before 2 February 1990.
- 17.1.6 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.
- 17.1.7 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

- 17.1.8 The Complainant advised the PPSA investigating 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.
- 17.1.9 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 was not invited to either produce the required information or to make his representation regarding its proposed decision.
- 17.1.10 During the investigation, the 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.
- 17.1.11 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"*.
- 17.1.12 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.

- 17.1.13 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.
- 17.1.14 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.
- 17.1.15 According to the Complainant, the Special Pensions Board approved his application for special benefits in 2004 because his application met all the requisite requirements. The Complainant said that he is baffled that the documents he submitted in support of his application were not found when his appeal was being considered.

The application of the relevant law and prescripts:

- 17.1.16 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"
- 17.1.17 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.

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

17.1.18.1 Are subject to the law;

17.1.18.2 Can exercise only those powers lawfully conferred on them;

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

17.1.18.4 Cannot take the law into their own hands; and

17.1.18.5 Cannot act mala fide, or irrationally or arbitrarily.

17.1.19 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".

17.1.20 *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".

17.1.21 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 organization.

17.1.22 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 5 years. It also seeks to compensate the surviving spouses and dependents of such persons.

17.1.23 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.

17.1.24 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.”*

17.1.25 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."*

17.1.26 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.

17.1.27 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 organization to provide information to it, regarding an applicant.

17.1.28 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 and functions to consider the Complainant's application and subsequently awarded a special pension to him on 11 February 2004.

17.1.29 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."*

17.1.30 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 8 years after the Complainant was granted a special pension by the Special Pensions Board and was only considered 5 years thereafter. The Appeal Board had no authority to condone the late application and was accordingly barred by law from considering it.

Conclusion

- 17.1.31 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.
- 17.1.32 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.
- 17.1.33 The Complainant lodged an appeal with the Appeal Board in July 2014 for the reconsideration of his pensionable years of service, requesting that the 7 (seven) years of service which had not been taken into account by the Special Pensions Board in 2004, be added to the 5 (five) 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 (twelve) years pensionable service.
- 17.1.34 The Complainant's appeal was lodged with the Appeal Board more than 8 (eight) 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.
- 17.1.35 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.

17.1.36 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 5 (five) years pensionable service to him.

17.1.37 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.

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

18 Kindly note that, section 7(9) of the Public Protector Act, 1994 provides that:

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances".

19. Having regard to the evidence and regulatory framework determining the standard that the Appeal Board should have complied with, the following adverse findings are likely to be made from the investigation:

19.1 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.

19.1.1 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.

- 19.1.2 The Chairperson of the Appeal Board ought to have known that in dismissing the Complainant's appeal and setting aside the 2004 award of 5 (five) years pensionable service, the Complainant's vested rights would be adversely affected in that his special pension would be terminated by the GPAA.
- 19.1.3 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 5 (five) years pensionable service to him.
- 19.1.4 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.
- 19.1.5 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
- 20. The appropriate remedial action that Public Protector intends taking in terms of section 182(1)(c) of the Constitution is as follows:**
- 20.1 The decision of the Appeal Board is final. The fact that the decision is unlawful does not mean that it can simply be ignored.
- 20.2 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.
- 20.3 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.² That Court was called upon to reconsider the correctness of the principle in *Ouderkraal*.³ 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.⁴

21. 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.
22. 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.

22.1 The Acting Chief Executive Officer of the GPAA to:

- 22.1.1 Take the decision of the Appeal Board of 12 July 2017 to set aside the award of a special pension to the Complainant by the Special Pensions Board on 11 February 2004, on judicial review and to inform the Complainant accordingly, within 30 days from the date of the report;

² 2014 (3) SA 481 (CC)

³ At para 87

⁴ At para 89

- 22.1.2 To apologise in writing to the Complainant for the prejudice he suffered as a result of the improper conduct of the Appeal Board, within 60 days from the date of the report.
23. You are therefore hereby afforded an opportunity in terms of section 7(9) of the Public Protector Act to respond to this notice within ten (10) business days from the date of receipt thereof, to enable the Public Protector to conclude the investigation and issue a report on the outcome thereof as soon as possible.
24. Should there be evidence or information contradicting what is referred to above, kindly forward it to the Public Protector as a matter of urgency.
25. Kindly further take note that in terms of section 7(2) of the Public Protector Act, 1994, the contents of this notice are confidential and may not be disclosed without the authorization of the Public Protector and any person that breaches the confidentiality *"... shall be guilty of an offence" which is punishable, upon conviction, with "a fine not exceeding R40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment"* as contemplated in section 11 of the Act.
26. For any further enquiries with regard hereto, kindly contact Ms Shireen Lengeveldt of the Western Cape Provincial Office of the PPSA Office who can be reached at 021 423-8644 and Shireenf@pprotect.org.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 10/11/2021

Assisted by: Shireen Lengeveldt_ Senior Investigator

Please quote this reference in your reply: 005152/19

Mr E Godongwana MP
The Minister of Finance
Private Bag X115
Pretoria
0001

Email: Mary.Marumo@treasury.gov.za

Dear Mr Godongwana

**NOTICE IN TERMS OF SECTION 7(9)(a) OF THE PUBLIC PROTECTOR ACT,
1994: IN CONNECTION WITH 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.**

1. My letter addressed to you on 1 December 2021 and the Notice in terms of section 7(9) of the Public Protector Act, 1994 that was attached thereto, refers (copy attached).
2. I have taken note from the response to the section 7(9) Notice that was received from the Acting Chief Executive Officer of the Government Pensions Administration (GPAA) that the GPAA is the administrator of the Special Pensions Act, 1996, as amended and that it reports in this regard to the National Treasury. Further, that the Special Pensions Appeal Board is appointed by the Minister of Finance in terms of section 8AA of the Special Pensions Act, 1996 and therefore resorts under the authority of the Minister of Finance.

3. Accordingly, I have decided to amend the appropriate remedial action to be taken, as indicated in paragraph 22.1 of the Notice to read as follows:

" 22.1 The Minister of Finance to:

22.1.1 Take the decision of the Appeal Board of 12 July 2017 to set aside the award of a special pension to the Complainant by the Special Pensions Board on 11 February 2004, on judicial review and to inform the Complainant accordingly, within ninety (90) days from the date of the report;

22.1.2 Apologise to the Complainant for the prejudice he suffered as a result of the improper conduct of the Appeal Board, within sixty (60) days from the date of the report; and

22.1.3 Take the appropriate steps against the members of the Appeal Board in respect of their improper conduct in this matter, in terms of the provisions of the Special Pensions Act, 1996."

4. You are therefore hereby afforded an opportunity in terms of section 7(9) of the Public Protector Act to respond to the section 7(9) Notice, as amended, within ten (10) working days from the date of receipt thereof, to enable the Public Protector to conclude the investigation and issue a report on the outcome thereof as soon as possible.
5. Should you be aware of evidence or information contradicting what is referred to above, kindly forward it to the Public Protector as a matter of urgency.
6. Kindly further take note that in terms of section 7(2) of the Public Protector Act, 1994, the contents of this notice are confidential and may not be disclosed without the authorization of the Public Protector and any person that breaches the confidentiality "... shall be guilty of an offence" which is punishable, upon conviction, with "a fine not exceeding R40 000 or to

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imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment" as contemplated in section 11 of the Act.

7. For any further enquiries with regard hereto, kindly contact Ms Shireen Lengeveldt of the Western Cape Provincial Office of the PPSA Office who can be reached at 021 423-8644 and Shireenf@pprotect.org.

Yours sincerely,



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

DATE: 25/02/2022



the gpaa

Department:
Government Pensions Administration Agency
REPUBLIC OF SOUTH AFRICA

Private Bag X63, Pretoria, 0001, 34 Hamilton Street, Arcadia, 0001, Contact Number: 012 319-1270, E-mail: Esti.dewitt@gpaa.gov.za

Adv Busisiwe Mkhwebane
Public Protector Of The Republic Of South Africa
Private Bag X677
Pretoria
0001

Attention: Ms S Lengeveldt

Dear Advocate

The above matter as well as your correspondence dated 10 November 2021 refers.

The said Notice in terms of Section 7(9) of the Public Protector Act, 1994 has been considered. We do not intend to respond to the facts of the matter as it is believed that such process has been attended to.

We note the submissions made by the Office of Public Protector and wish to respond as follows:

The GPAA is the administrator in respect of the Special Pensions Act 96 of 1996 (the Act) and reports in this regard to the National Treasury. As stated in the said Notice, an applicant has the right to appeal any decision he/she disagrees with and hence the Act provides for the appointment of an Appeal Board. The Appeal Board is appointed by the Minister of Finance as per section 8AA of the Act and thus resorts under the authority of the Minister of Finance. A decision by the Appeal Board is final.

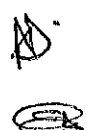
The GPAA cannot pronounce on the suitability or not of taking the decisions of the Appeal Board on review as it is the right of any person to do so. The GPAA as the administrator, however do submit that it cannot agree that it will be proper in law to direct that the GPAA, the administrator, be forced to initiate the review of the decision of the Appeal Board. Doing so will be placing the GPAA in the shoes of the applicant/litigant and such is not proper further taking into account the precedent same has the possibility of creating.

It is further submitted that the said Section 7(9) Notice is misdirected to the GPAA being the administrator when the Appeal Board is a body under authority of the Minister of Finance. The acting Chief Executive Officer has no authority, power or mandate in respect of the Appeal Board referred to above.

We trust you find the above in order.



Shahid Khan
Acting Chief Executive Officer
Date: 30 November 2021





national treasury

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REPUBLIC OF SOUTH AFRICA

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Adv Busisiwe Mkhwebane
Public Protector of South Africa
Private Bag X677
PRETORIA
0001

Dear Adv Mkhwebane

YOUR REF: 005152/19: NOTICE IN TERMS OF SECTION 7(9)(a) OF THE PUBLIC PROTECTOR ACT, 1994: IN CONNECTION WITH AN 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

The Public Protector's letter to the Minister, dated 25 February 2022 together with the notice issued in terms of section 7(9)(a) ("the Notice") of the Public Protector Act, no 23 of 1994 ("the PP Act"), refers.

1. It is noted from your letter that the Public Protector has *"decided to amend the appropriate remedial action"* in the matter under investigation, so as to read as follows:

"22.1 The Minister of Finance to:

22.1.1 Take the decision of the Appeal Board of 12 July 2017 to set aside the award of a special pension to the Complainant by the Special Pensions Board on 11 February 2004, on judicial review and to inform the Complainant accordingly, within ninety (90) days from the date of the report;

22.1.2 Apologise to the Complainant for the prejudice he suffered as a result of the improper conduct of the Appeal Board, within sixty (60) days from the date of the report; and

22.1.3 Take the appropriate steps against the members of the Appeal Board in respect of their improper conduct in this matter, in terms of the provisions of the Special Pensions Act, 1996."

AD
ER



2. This appears to be based on the response that the Public Protector received from the Acting Chief Executive Officer of the Government Pensions Administration (GPAA), *"that the GPAA is the administrator of the Special Pensions Act, 1996, as amended and that it reports in this regard to the National Treasury"* and that *"the Special Pensions Appeal Board is appointed by the Minister of Finance in terms of section 8AA of the Special Pensions Act, 1996 and therefore resorts under the authority of the Minister of Finance"*.
3. Pursuant to the above the Minister was afforded an opportunity in terms of section 7(9) of the PP Act to respond to the Notice, as amended, to enable the Public Protector to conclude the investigation and issue a report on the outcome.
4. According to the Notice:
 - 4.1. The complaint was lodged with the office of the Public Protector on 3 May 2019.
 - 4.2. The complainant alleged that in 2004 he was awarded a Special Pension (being 5 years of service) in terms of the Special Pensions Act, 69 of 1996 (*"the Special Pensions Act"*) by the Special Pensions Board (*"the Board"*).
 - 4.3. In 2012, he lodged an appeal with the Special Pensions Appeal Board (*"the Appeal Board"*) for the reconsideration of his pensionable years of service requesting that the Appeal Board should recognize and award him 12 years pensionable service instead of 5 years of service initially awarded by the Board in 2004.
 - 4.4. In July 2017, the Appeal Board found that there was no corroborating evidence that the complainant joined and served the ANC/MK internally or in Lesotho. There was further no official police or court records to confirm that he stood trial for politically motivated offences. Further, that despite diligent search, his name did not appear on the official list of restricted or banned persons.

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4.5. The Appeal Board therefore dismissed the appeal and set aside the decision of the Board in awarding the complainant the 5 years of service.

4.6. The issue identified by the Public Protector for investigation is:

"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".

4.7. As per the section 7(9) notice, 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 and not the merits of the appeal it presided over.

5. Having considered the letter and the Notice, I am advised to respond as follows:

5.1. Section 7(9) of the PP Act states as follows:

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances".

[Underlined for own emphasis]

5.2. It is clear that neither the letter nor the Notice contains any facts to support a contention that the Minister falls within the ambit of the people envisaged in the aforementioned section. The investigation is titled *"Investigation into allegations of improper conduct and maladministration against the Special Pensions Appeal Board regarding the termination of the Special pension of Mr ZR Sonto"*. Furthermore, as is aptly described in paragraph 4.7 above, the subject of the investigation relates to the conduct of the Appeal Board (own emphasis).

AD
ER



- 5.3. The factual matrix set out in the Notice clearly indicates that the Minister played no role whatsoever in the decision of the Appeal Board. The Minister is not able to engage on the facts nor the validity or otherwise of the decision taken by the Appeal Board. The Public Protector has only sort to involve the Minister at the stage of the Public Protector's remedial action. The Minister was never made aware of the investigation or the merits of this matter prior hereto.
- 5.4. The Notice does not address the role played by the Minister nor does it disclose any grounds upon which the Minister is implicated.
- 5.5. The Appeal Board is an independent body that exercised a statutory function in terms of the Special Pensions Act and whose decisions are final.
- 5.6. As stated in paragraph 17.1.18 of the Notice, an executive functionary can only exercise those powers conferred on them by law. Other than the powers conferred upon the Minister to appoint the Appeal Board, the Minister has no power over the decisions of the Appeal Board.
- 5.7. The fact that the Minister appoints the Appeal Board does not make him liable for the actions of the Appeal Board. The Minister therefore cannot simply be directed to step into the shoes of the Appeal Board.
- 5.8. In paragraph 22 of the Notice the Public Protector refers to the unreported case of *Sello Thomas Phalama v The Minister of Finance (case no 57375/2017)*. I am taking the liberty of enclosing the pleadings from which it is evident that the Minister successfully extricated himself from that matter on the basis of misjoinder.
- 5.9. Considering the above, I am advised and submit that the Notice addressed to the Minister, is misplaced.
- 5.10. In respect of the remedial action foreshadowed in the Public Protector's letter:

AD



Ad remedial action in paragraph 22.1.1 of the Public Protector's letter

- 5.10.1. The Minister is not legally competent to take on review a decision of the Appeal Board.
- 5.10.2. It is the complainant that has the necessary *locus standi* to launch the review. Besides for what is stated in paragraphs 5.2 – 5.8 above and without accepting that the Notice is issued correctly, the Minister cannot be directed to take the decision of the Appeal Board on review as to do so would usurp the Minister's right to consider the appropriateness of him taking the decision of the Appeal Board on review, especially because, in this instance the Minister was not the decision-maker who arrived at the decision taken.
- 5.10.3. Furthermore, the Public Protector cannot direct the Minister to institute legal proceedings and commit the funds of the National Treasury for the benefit of aggrieved complainants in respect of the decisions of the Appeal Board.
- 5.10.4. While it is true that the process of litigation is usually *"long drawn and complex, and most complainants cannot afford the capital outlay and time investment required for a realistic pursuit of civil remedies"*, this burden equally applies to the Government whose financial resources are as a matter of public knowledge, severely constrained. Nevertheless, there are bodies that provide legal aid to those who cannot afford their own legal representation. The intention of these bodies is to enhance justice and public confidence in the law and administration of justice.

Ad remedial action in paragraph 22.1.2 of the Public Protector's letter

- 5.10.5. Given that the Minister played no role in the conduct complained of it is not clear on what basis he can be directed to apologise for the conduct of the Appeal Board, who is an independent body.

AD
GR



Ad remedial action in paragraph 22.1.3 of the Public Protector's letter

- 5.10.6. There are no grounds to conclude that solely by reason of the fact that the appeal was lodged outside the 60-day period as envisaged in section 8(1) of the Special Pensions Act that the conduct of the Appeal Board constitutes improper conduct as envisaged in section 182(1) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the PP Act. As is evident from the answering affidavit filed on behalf of the Appeal Board in the Phalama matter referred to above, the Appeal Board appears to have relied on section 8(4) of the Special Pension Act to justify its decision to entertain the appeal outside the 60-day period. To the extent that the Appeal Board may have laboured under the same belief that section 8(4) affords them the right to consider the appeal of Mr Sonto outside the 60-day period, such action does not amount to improper conduct or maladministration.
- 5.10.7. Furthermore, individual members of the Appeal Board are indemnified by section 29B of the Special Pensions Act, which states that:
- "29B. Indemnity — No employee, consultant, contractor or agent of the designated institution or Appeal Board incurs any liability in respect of any act or omission performed in good faith under or by virtue of a provision in this Act, unless that performance was grossly negligent."*
- 5.10.8. There is no evidence suggesting bad faith or gross negligence on the part of the Appeal Board.
- 5.10.9. For the reasons stated above there is no basis upon which the Minister can take any steps against the individual members of the Appeal Board in the adjudication of this case. Even if it is found that the Appeal Board misconstrued the law, there is no evidence that the Appeal Board was *mala fide* in dealing with the complainant's appeal.



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

7 of 7

It is accordingly clear from what is stated above that there is no factual or legal basis upon which the Public Protector can issue the remedial action foreshadowed in the Notice and the Public Protector is therefore urged to reconsider the proposed remedial action as against the Minister of Finance.

Yours sincerely

LAURA MSEME

ACTING HEAD: OFFICE OF THE DIRECTOR GENERAL

DATE: 29-04-2022

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 57375/2017

PRETORIA 02 AUGUST 2019

BEFORE THE HONOURABLE MADAM JUSTICE HAUPT, AJ

In the matter between:

SELLO THOMAS PHALAMA

AND

MINISTER OF FINANCE

DIRECTOR GENERAL OF THE NATIONAL
TREASURY

SPECIAL PENSIONS APPEAL BOARD

GOVERNMENT PENSIONS ADMINISTRATION
AGENCY

SENIOR MANAGER SPECIAL PENSIONS
ADMINISTRATION

APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

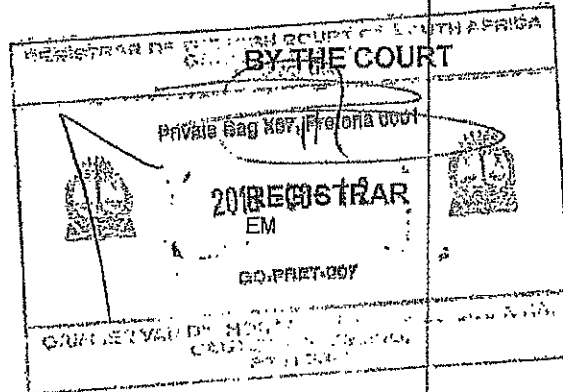
HAVING read the documents filed of record, heard counsel and considered the matter:

IT IS ORDERED THAT

1. The decision of the third respondent dated 14 February 2017 withdrawing the special pension of the applicant is hereby set aside.
2. The decision of the special pension administration dated 27 September 2010 is reinstated.
3. The third (3rd) fourth (4th) and fifth (5th) respondents jointly and severally are directed to pay all the arrear pension due to the applicant up to date of the order.
4. The third (3rd) fourth (4th) and fifth (5th) respondents jointly and severally are to pay the costs of the application.

5. The applicant is to pay the wasted costs of the first (1st) and second (2nd) respondents occasioned by the withdrawal of the application against them on 31 July 2019.

Attorney: KP SEABI & ASS.



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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 57375/17

In the matter between:-

SELLO THOMAS PHALAMA

Applicant

And

THE MINISTER OF FINANCE

1st Respondent

DIRECTOR GENERAL OF THE NATIONAL

TREASURY

2nd Respondent

SPECIAL PENSION APPEAL BOARD

3rd Respondent

GOVERNMENT PENSIONS ADMINISTRATION

AGENCY

4th Respondent

SENIOR MANAGER SPECIAL PENSIONS

ADMINISTRATION

5th Respondent

FILING SHEET

BE PLEASED TO TAKE NOTICE THAT the First and Second Respondents hereby file their Answering Affidavit.

Dated at PRETORIA this 25th day of JANUARY 2018


STATE ATTORNEY
RESPONDENTS' ATTORNEY



SALU Building
255 Thabo Sehume (Andries) Street,
cnr Francis Baard(Schoeman) Street
Private Bag X91, PRETORIA, 0001
Docex: 298, PTA
Ref: 6197/17/Z32
Ref to: MS T NHLANZI
Tel: (012) 309 - 1575
Fax: (012) 309 - 1649/50


TO: THE REGISTRAR OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

AND
TO: K.P SEABI & ASSOCIATES
APPLICANT'S ATTORNEYS
KPS Chambers
1030 Pretorius
Hatfield
Tel: 012 325 7028/9
Ref: KP252/RP/MR.SEABI
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K. P. SEABI & ASSOCIATES
TEL: (012) 325 7028/9 FAX: (012) 325 7009

2018-01-25

RECEIVED WITHOUT PREJUDICE

 12h30
25/01/2018

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 57375/17

In the matter between:-

SELLO THOMAS PHALAMA

Applicant

and

MINISTER OF FINANCE

First Respondent

**DIRECTOR-GENERAL OF THE
NATIONAL TREASURY**

Second Respondent

SPECIAL PENSIONS APPEAL BOARD

Third Respondent

**GOVERNMENT PENSIONS ADMINISTRATION
AGENCY**

Fourth Respondent

**SENIOR MANAGER: SPECIAL PENSIONS
ADMINISTRATIONS**

Fifth Respondent

FIRST AND SECOND RESPONDENTS' ANSWERING AFFIDAVIT

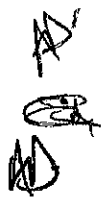
I, the undersigned,

DONDO MOGAJANE

do hereby declare under oath and state that:

AD
AD
M.G. *AD*

1. The facts deposed to herein are, save where the contrary appears from the context, within my personal knowledge and are to the best of my belief both true and correct.
2. Where I make any legal submissions in this affidavit, I do so on the advice of the first and second respondents' legal representatives and I accept such advice to be true and correct.
3. I am an adult male. I am the Director-General of the National Treasury with my office situated at the office of the National Treasury, 40 Church Square, Pretoria, Gauteng Province.
4. I depose to this affidavit in my capacity aforesaid and on behalf of the first and second respondents ("the respondents") by virtue of the fact that the issues raised herein in particular in so far as they relate to the first and second respondents are entirely within my knowledge.
5. I depose to this affidavit in opposition of the relief sought by the applicant in prayer 3 of the Notice of Motion to the extent that same is intended to affect the first and second respondents. Otherwise the respondents have no interest in the relief sought by the applicant against the other three (3) respondents. They only file this affidavit in order to put before the above Honourable Court the legal position which the respondents believe will

M.G. 

assist the above Honourable Court in arriving at a just decision in the interest of good governance.

6. Consequently, it is not my intention in this affidavit to deal with each and every allegation made by the applicant in his founding affidavit. My failure to do so, however, should not be construed as an admission thereof. Indeed every allegation that is inconsistent with what I have stated herein is denied.
7. I leave the rest of the allegations contained in applicant's founding affidavit for the attention of the third to the fifth respondents who, I believe, have got personal knowledge of the facts relating thereto.
8. I have read the applicant's Notice of Motion in this matter. As far as it can be gleaned from the Notice of Motion the applicant approaches the above Honourable Court seeking an order in the following terms:
 - 8.1. Reviewing and correcting or setting aside the decision of the third respondents dated 14th February 2017 attached to the applicant's papers as Annexure "STP1";
 - 8.2. Reinstating the decision of the Special Pensions Administration (SPA) dated 27 September 2010 given in favour of the applicant;

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M.G. AD.

- 8.3. Directing the respondents to pay all the arrear pensions due to the applicant up to date of the order;
- 8.4. Costs of the application against any respondent who opposes the application.
9. In the main, it is clear from the Notice of Motion that, the applicant seeks in these proceedings the review and setting aside of the Special Pensions Appeal Board's decision dated 14 February 2017.
10. I am advised that in the event the applicant succeeds in reviewing and setting aside the said decision the default position is that automatically the decision of the Special Pensions Administration Agency dated 27 September 2010 is revived or reinstated. This is the same relief that the applicant seeks in prayer 2 of the Notice of Motion.
11. For the reasons that appear herein below I submit that the respondents have got no direct and substantial interest in the relief sought by the applicant.
12. It is my submission to the above Honourable Court that there is a misjoinder of the first and second respondents in these proceedings.

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M.G. MD

13. To illustrate the above point I deem it expedient that I give to the above Honourable Court the legal framework applicable to special pensions including the roles, functions and responsibilities created by the Special Pensions Act 69 of 1996 which I set hereunder.

LEGAL FRAMEWORK


14. In October 1996 the legislature passed the Special Pensions Act 69 of 1996 ("the Act"). The Act was assented to by the President on 30 October 1996 and commenced operating on 1 December 1996.
15. The Act was passed in order to give effect to section 189 of the 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 preserve rules for determining the persons who are entitled to receive those pensions, to establish a special pensions board and special pensions review board and to provide for matters related thereto.
16. Section 7 of the Act provides for the administration of the Act and it provides thus:

"7 Administration of Act

A handwritten signature, possibly "M. G. AD.", with a circled "A" above it.

- (1) *The Director-General of the National Treasury is responsible for the administration of this Act.*
- (2) *The Minister may, despite subsection (1), by notice in the Gazette designate any of the following institutions to administer this Act to ensure the effective and efficient implementation thereof:*
- (a) *A national department or government component listed in the Public Service Act, 1994 (Proclamation 103 of 1994); or*
 - (b) *a public entity responsible for the administration of public pensions, listed in terms of the Public Finance Management Act, 1999 (Act 1 of 1999)."*

17. During March 2010 the President of the Republic of South Africa promulgated Proclamation 10 of 26 March 2010 in terms of which the President established the Government Pensions Administration Agency, the third respondent in these proceedings. The President also promulgated Proclamation 231 of March 2010 published in Government Gazette No. 33051 in terms of which he published the designation of the third respondent as an agency responsible for the administration of special pensions in terms of the Special Pensions Act. The designation was done by the Minister in terms of section 7(2) of the Act read with the Public Service Act, 1994.

M.G. 

18. This meant that the administration of special pensions including the payment thereof no longer resides, with effect from that date, with the office of the Director-General of the National Treasury and the Minister but resides with the Government Pensions Administration Agency, the fourth respondent herein.
19. It is for that reason that the applicant was approved by the fourth respondent, on 27 September 2017, to receive special pension for a period of 9 years. This is the decision that the applicant seeks to revive in the current proceedings after it had been terminated by the third respondent on 14 February 2017.
20. Consequently the fourth respondent is the designated institution envisaged in section 6G of the Act which has got the power to receive and to make decisions in respect of special pension applications. In fact this is accepted by the applicant in his founding affidavit paragraph 14.1.
21. Section 8 of the Act provides for a right to appeal against a designated institution's decision. It provides:

"8 Right to appeal against designated institution's decision

M.G. AD.

- (1) 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 the decision.
- (2) An appeal under subsection (1) shall take place on the date and at the place and time fixed by the Appeal Board.
- (3) The Appeal Board may for the purposes of an appeal under subsection (1)-
 - (a) summon any person who, in its opinion, may be able to give information for the purposes of the appeal or who it believes has in his or her possession or custody or under his or her control any document which has any bearing upon the decision under appeal, to appear before it at a time and place specified in the summons, to be questioned or to produce that document, and may retain for examination any document so produced;
 - (b) administer an oath to or accept an affirmation from any person called as a witness at the appeal; and
 - (c) call any person present at the appeal proceedings as a witness, and interrogate such person and require such person to produce any document in his or her possession or custody or under his or her control, and such person shall be entitled to legal representation at his or her own expense.
- (4) The procedure at the appeal shall be determined by the chairperson of the Appeal Board.

M.C. AD.

- (5) *The Appeal Board may confirm, set aside or vary the relevant decision of the designated institution.*
- (6) *A decision of a majority of the members of the Appeal Board shall be a decision of that board.*
- (7) *A decision of the Appeal Board must be in writing, and a copy thereof must be made available to the appellant and the designated institution.*
- (8) *A decision of the Appeal Board is final."*

22. Section 8AA provides for the establishment and appointment of the Appeal Board envisaged in section 8 of the Act. It provides thus:

"8AA Establishment and appointment of Appeal Board

- (1) *An Appeal Board is hereby established and must consist of three members appointed by the Minister.*
- (2) *The members referred to in subsection (1) must be competent persons, and must include at least one person that is an advocate or attorney with at least 10 years' experience in the practice of law as the chairperson.*
- (3) *A member of the Appeal Board is appointed for a period of three years and is eligible for reappointment upon expiry of the member's term of office.*
- (4) *A member of the Appeal Board may resign by giving three months' written notice to the Minister.*

177. G. AD.
AD.

- (5) The Minister may terminate the period of office of a member of the Appeal Board-
- (a) if the performance of the member is unsatisfactory; or
 - (b) if the member, either through illness or for any other reason, is unable to perform the functions of office effectively.
- (6) The Minister may terminate the period of office of all members of the Appeal Board, if the performance of the Appeal Board is unsatisfactory.
- (7) In the event of the dismissal of all the members of the Appeal Board, the Minister may appoint persons to act as caretakers until competent persons are appointed.
- (8) The Minister must appoint a temporary replacement member for an appeal, if before or during an appeal it transpires that any member of the Appeal Board-
- (a) has any direct or indirect personal interest in the outcome of that appeal; or
 - (b) will, due to illness, absence from the Republic or for any other bona fide reason, be unable to participate or continue to participate in that appeal.
- (9) A member of the Appeal Board may be paid the remuneration and allowances as the Minister may from time to time determine.
- (10) Administrative support for the Appeal Board must be provided by the designated institution.

M.C. AD.
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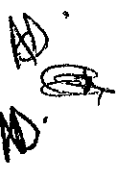
(11) *The designated institution is responsible for the expenditure of the Appeal Board."*

23. It is clear from the above provisions that an appeal against a decision of the designated institution, the fourth respondent must be dealt with by the Special Pensions Appeal Board, the third respondent, a Board established by the Minister, the first respondent.
24. The Appeal Board is an independent statutory body and a creature of the Act. It is only its members that have to be appointed by the Minister. Other than that the Minister exercises no control or decision-making powers in respect of the Board matters.
25. I have already stated hereinabove that the applicant, in the main, seeks review and setting aside of the decision of the third respondent, the Special Pensions Appeal Board.
26. The rest of the relief sought in the Notice of Motion is consequent upon the granting of the review prayer.
27. It is my submission to the above Honourable Court that even the relief sought in the Notice of Motion which the applicant, apparently, seeks as against all the respondents, including the first and second respondents, is

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only available to the applicant once the review relief succeeds and upon the default position referred to hereinabove having taken effect. It is only available against the party who, upon review, is responsible for the payment of the applicant's pensions, which in this case is the fourth respondent, the Government Pensions Administration Agency.

28. Accordingly it is my submission to the above Honourable Court that the relief sought by the applicant in prayer 3 of the Notice of Motion as against the first and second respondents is incompetent. Above all, there is no legal or factual basis why the applicant seeks this kind of relief as against the first and second respondents.
29. Consequently this application against the first and second respondents ought to be dismissed with costs.
30. Furthermore, it is my submission that there has been a misjoinder of the first and second respondents in these proceedings. The applicant was advised through correspondence by the first and second respondents that there has been a misjoinder and was specifically requested to withdraw the application as against the first and second respondents. The applicant refused to withdraw. I attach hereto marked as Annexure "DM1" a copy of a letter dated 6 September 2017 from the first and second respondents'

M.C. 


Director: Litigation and Administrative Law and refer the above Honourable Court to the contents thereof.

31. In the circumstances it is my submission to the above Honourable Court that the refusal to withdraw the application on the part of the applicant is unreasonable. It has caused the first and second respondents to incur the costs of opposing this application unnecessarily.
32. It is accordingly my submission that it may therefore please the above Honourable Court to dismiss this application with costs and such costs to be on a punitive scale as between attorney and client.

DATED AND SIGNED AT PRETORIA ON THIS 19 DAY OF JANUARY 2018.


DEPONENT

I CONFIRM that the deponent has acknowledged that he knows and understands the contents of this affidavit, that the contents thereof are true and correct, that he has no objection to taking this oath, and regards the oath to be binding on his conscience.


71589565-
COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIEDIENS
CSC
2018 -01- 19
PRETORIA WEST
SOUTH AFRICAN POLICE SERVICE



"DM1"



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Private Bag X115, Pretoria, 0001 • Enquiries: Dineo Matsheka • Tel: +27 12 315 5469 • Fax: +27 12 395 6551
Email: Dineo.Matsheka@treasury.gov.za

Our Ref. L/2017-DM

K.P. SEABI & ASSOCIATES
Protea Towers Building
Suite 713-716, Seventh Floor
246 Paul Kruger & Pretorius Streets
PRETORIA
0001

By e-mail: admin@kpseabiattorneys.co.za
Attention: Mr. Seabi

**RE: SELLO THOMAS PHALAMA // MINISTER OF FINANCE, DIRECTOR-GENERAL OF THE
NATIONAL TREASURY, SPECIAL PENSIONS APPEAL BOARD, GOVERNMENT PENSIONS
ADMINISTRATION AGENCY, SENIOR MANAGER SPECIAL PENSIONS ADMINISTRATION
GAUTENG DIVISION-PRETORIA
CASE NO: 57375
YOUR REF: KP252/RP/MR. SEABI**

Your application for review served on 18 August 2017 at the office of the State Attorney refers.

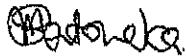
Kindly note that we have perused the contents of the notice of motion and the founding affidavit in which you seek to have the decision of the Special Pensions Appeal Board (SPAB) set aside, reinstating the decision of the Special Pensions Administration and costs.

We hereby wish to advise that the matter falls squarely within the course and scope of the Government Pensions Administration Agency (GPAA), a legal person established in terms of the Special Pensions Act, competent to sue and be sued, by virtue of the fact the Minister of Finance has in terms of section 7A(4) of the Public Service Act declared the GPAA as the institution that administers Special Pensions.

M.G. A.S.

The SPAB delivered its decision on the Applicant's appeal, which decision you seek to be set aside. We accordingly demand that the application against the Minister of Finance and the Director-General be withdrawn by the 13 September 2017, failing which we will file a notice to oppose and seek costs against you.

Yours faithfully



DINEO MATSHEKA

DIRECTOR: LITIGATION AND ADMINISTRATIVE LAW

DATE: 06 September 2017

M.G. M.
AD.

"EG 10"



the gpaa

Department:
Government Pensions Administration Agency
REPUBLIC OF SOUTH AFRICA

Postal Address: Private Bag X63, Pretoria, 0001, Physical Address: 34 Hamilton Street, Arcadia, Pretoria, Email: enquiries@gpaa.gov.za

06 March 2020

Public Protector South Africa (Western Cape Provincial Office)
Private Bag 712
Cape Town
8000

You're Ref: 7/2-005152/19

Our Ref: SP30052641

Email: MageleS@pprotector.org

Dear Mr Sisa Magele

**Re: COMPLAINT AGAINST THE SPECIAL PENSIONS APPEAL BOARD: MR
MZUNANI ROSEBERRY SONTU- ID.5301016169085. SP30052641**

Our office acknowledges receipt of your letter dated 24 October 2019.

1. Regarding paragraph 1 of your letter, the Special Pensions Board (SPB) awarded Mr Sonto 5 years' service on 29 March 2004 based on his own submissions in the Application Form without any supporting official evidence. Take notice that there are many other applications approved in this manner which have been set aside by the SPAB. (See attached decision of the SPB)
2. Attached is the decision of the Special Pensions Board (SPAB) dated 12 July 2017 setting aside the award of 5 years by the SPB and the reasons thereof for your attention.
3. Take notice that in setting aside the latter decision, the SPAB exercised its powers in terms of section 8 (5) of the Special Pensions Act 69 of

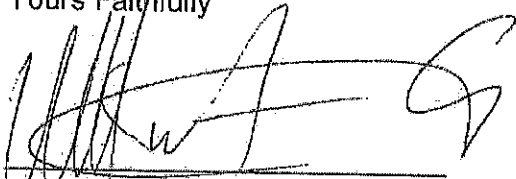
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1996 as amended. Furthermore section 8 (8) of the Act stipulates that the decision of the Appeal Board is final. Moreover section 29A of the Act stipulates that "Any administrative action taken in terms of this Act is subject to Promotion of Administrative Justice Act 3 of 2000. At this point, we have not received an application for review of the decision of the SPAB dated 12 July 2017 and we will not deal with the merits of the decision.

4. Regarding your failure to understand as highlighted in paragraph 2 of your letter, please read section 8 (1), (5), (6) and (8) of the Act. **NB.** The Act does not make provision for partial appeal and therefore the SPAB reconsiders the entire application before it during adjudication.
5. Regarding paragraph 3 of your letter, I will email you all the lists which the SPAB consult during a diligent search.

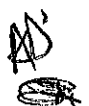
We trust that you find the above in order.

Yours Faithfully

A handwritten signature in black ink, appearing to be 'N G Kutama', written over a horizontal line.

N G Kutama

Manager: Special Pensions Appeals

A small, handwritten mark or signature in the bottom right corner of the page.



the gpaa

Department:
Government Pensions Administration Office
REPUBLIC OF SOUTH AFRICA

Postal Address: P.O. Box 770, Pretoria, 0001 Physical Address: 34 Hamilton Street, Pretoria, Email: info@gpaa.org.za

Public Protector South Africa
(Western Cape Office)
Private Bag 712
Cape Town
8000

Date: 8 October 2021

Your Ref: 7/2-005152/19

Our Ref: SP30052641

Email: MageleS@pprotector.org

Dear Mr Sisa Magele

**Re: COMPLAINT AGAINST THE SPECIAL PENSIONS APPEAL BOARD: MR
MZUNANI ROSEBERRY SONTU**

It will seem prudent to elucidate briefly the appointment and the term of office of the Special Pensions Appeal Board (SPAB). The establishment and appointment of the SPAB remains the prerogative of the Minister of Finance as stipulated in section 8AA of the Act for a term office of 3(three) years. Conversely, the Minister of Finance has delegated GPAA to administer and to ensure the effective and efficient implementation of the Act. In all the sittings of the SPAB, GPAA is represented by a secretariat (Manager: Special Pensions Appeals) whose duties, amongst others, is to assist in all administrative responsibilities.

Moreover, the SPAB is granted legal authority and unfettered powers to adjudicate on the matters of appeal by the Act. It is of paramount importance to mention that in relation to this matter at hand all internal remedies have been exhausted as prerequisite of the Act:-

our responsibility |

- a) Part 1A- section 6G - Application for Benefits;
- b) Part 2B - ss8- Administration and Appeal; and
- c) Part 2 and ss15 -28 Powers and Functions of the Designated Institution).

There is no tangible evidence of any shortcut and/or unfair procedure which have been presented by Mr Sonto in his submission. Significantly, the right to appeal the decision of the Board was communicated and legitimately exercised by Mr Sonto (Notice of Appeal dated 13 -02-2012).

However, the uncertainty/invalidity of this process and whether the administrative action is unlawful must only be ventilated in the court of law (judicial review), more appropriately, the High Court. This was affirmed in the case of the MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd (77/13) [2014]ZACC6 whereby Judge Cameron held that:

"our law does not regard an unlawful decision as a "non-decision", and that the state cannot simply ignore a decision that it considers unlawful. The decision of the Acting Superintendent-General, even if flawed, therefore remained effectual until properly set aside by a court."(Own Emphasis)

Notably, the legal opinion on Phalama v Minister of Finance case (attached) page 17[27] makes reference to an important maxim *omnia praesumuntur rite esse acta* - "all things are presumed to have been done rightly."

Finally, in terms of section 8(1) of the Act the decision of the SPAB dated 12 July 2017 is final. This means succinctly that the SPAB has discharged its office .i.e. *functus officio*. Therefore the decision is deemed to be binding and irrevocable until set aside by the competent court of law based on the circumstances of each case.

Yours Sincerely

Trust that the above is in order.



Samson Mmakola

Adjudicator: Special Pension Appeal

