REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 15862 / 2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. NO

.....
SIGNATURE **DATE:** 18 November 2021

In the matter between:

MINISTER OF FINANCE **APPLICANT**

and

PUBLIC PROTECTOR **1ST RESPONDENT**

TSHIMANGADZO THIOLOLI **2ND RESPONDENT**

MUSANDIWA RAMAVHALE **3RD RESPONDENT**

L. J. RAMBAU **4TH RESPONDENT**

DABALORIVHUWA PATRIOTIC **5TH RESPONDENT**

TSHIFHIWA SAMUEL MAKHALE **6TH RESPONDENT**

GOVERNMENT EMPLOYEES PENSION FUND **7TH RESPONDENT**

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION **8TH RESPONDENT**

JUDGMENT

MANOIM J

[1] One of the birth pangs of the new political order was how to integrate the balkanised apartheid civil service into the new democratic state with a central national structure

[2] Each self-governing territory had its own pension fund arrangements for its civil servants. These had to be integrated into a central national fund. This case concerns what happened to the pensions of civil servants from the former Venda territory, who as I will explain, were given a choice of what to do with their pensions, given the transition. Dissatisfied with how the authorities performed this task, some of the erstwhile Venda civil servants litigated in the courts with varying degrees of success. But they did not only turn to the courts for relief.

[3] Several also brought their complaints to the office of the Public Protector. This resulted in three reports from three separate Public Protectors on the subject. The first in 2002, the second in 2011 and the third in 2016. Only the remedial action required by the last two reports is the subject matter of the present litigation.

[4] The Minister of Finance brings this application, seeking a declaratory order that he has sufficiently complied with and discharged the remedial action required by the Public Protector as required in the last two reports.[1] In the alternative, the Minister seeks an order that the two reports be reviewed and set aside.

[5] The Public Protector is the only respondent to oppose this order. The second respondent filed an answering affidavit, but this opposition was later withdrawn after the second respondent passed away.

[1] For the sake of simplicity, I will refer to the applicant, who is the Minister of Finance, as the Minister from now on, and the first respondent as the Public Protector. Sometimes, given that several persons occupied these offices over the course of the history of this case, I have referred to them by name. I have also sometimes referred to the 'Ministers' and here I mean the various Ministers of Finance over the period.

[6] It is now almost 30 years since the events that gave rise to the present litigation arose in 1992. Those civil servants who were on the cusp of retirement at that time, would if still alive, be in their ninth decade. The youngest would be middle aged. Nor has there been any constancy in the office bearers of the applicant or first respondent. From the time of the first report of the Public Protector to the day on which this application was heard, there have been six different Finance Ministers and three different Public Protectors.[2]

Background

[7] The Venda pension fund was established in 1979 in terms of legislation passed by the legislature of what was then under the apartheid dispensation, a self-governing state.

[8] In 1992, once the transition to the new political dispensation had become inevitable, the Venda civil servants were given an option to either become part of the integrated centralised national pension fund, or cash out and join a private fund. The case before me relates to those civil servants who made the latter choice.

[9] According to one version of the history, the Venda government advised the civil servants that whilst the Venda pension funds were well funded, the funds of the central government, into which their pensions might be integrated, were not. For this reason, they were being given an opportunity to privatise their funds.[3]

[10] In 1992 the Venda Pension Fund had produced a document explaining to its members the implications of the choices; describing the pros and cons of each. Those electing to stay with the government pension fund would retain the status of being members of a defined benefit fund. Those choosing the private fund would lose this status and join privately run defined contribution fund. The implications of these choices was explained in this way; a defined benefit fund was a safe option, but they might get a better return from going to a private fund with the defined contribution option, albeit it entailed more risk.

---

[2] Ministers, Mboweni, Gordhan, Nene, Van Rooyen and Gigaba. On the eve of the hearing a sixth, Minister Godongwana, took office. The first public Protector was Selby Baqwa, then Thuli Madonsela and presently Busi Mkhwebane.

[3] This version is the one told by complainants to then Public Protector Baqwa.

[11] The then transitional council gave legal effect to the privatisation option by issuing a proclamation. This was known as Proclamation 2 of 1992.In the narrative of the history this is referred to as the first privatisation.

[12] The first privatisation was ill-fated. Again, according to one version of the history this was because younger members of the fund felt they were being disadvantaged by the privatisation and so they went on strike.

[13] The response was a second proclamation to rectify the complaints about the first. This is referred to as the second privatisation.

[14] With the benefit of hindsight, it turns out that those who opted for the privatisation option turned out to have made a sub-optimal choice. This option was a retirement annuity policy with Sanlam. But it had performed poorly in comparison to the option of migrating to the Government Employee's Pension Fund.

[15] Early dissatisfaction led to litigation.

[16] First the validity of both these proclamations was successfully challenged in the then Venda High Court in the matter of *Maluadz*i but its outcome has no bearing on this application.[4]

[17] But another case has proved decisive and remains germane to the issues in this application. This is *Dali and others v Government of Republic of South Africa and others,* decided in 2000 by the Supreme Court of Appeal (SCA).[5]

[18] The *Dali* case decided two issues that would later resonate through the Public Protector processes and the respective Minister's responses.

[19] The reason it has resonated is that in terms of section 182(3) of the Constitution the Public Protector *"… may not investigate court decisions."* As I discuss later this is what the Minister suggests the Public Protector has done because she has sought to investigate matters that the SCA in *Dali* has already decided.

---

[4] *Mulaudzi v Chairman, Implementation Committee* 1995 (1) A 513 (V)

[5] All South African Law Reports 7 August 2000 [2000] 3 All SA 206 (A).

[20] Two aspects of the *Dali* decision are relevant for this purpose. The first was decided in favour of the applicants, a group of Venda civil servants. From the decision it appears that there was a group of at least 48 people involved.[6]

[21] Proclamation 2 of 1992 or the first privatisation had provided that an active member could transfer funds to an investment plan. For this read a private plan. The issue turned on how the amount that they wanted to transfer was to be calculated. They were to be paid, according to the proclamation their *"... accrued benefit*" This was defined as the actuarial interest of the member in the fund as of the date the option was exercised. The *Dali* appellants were all people who had exercised this option. It all seemed in order at the time. But what followed were further proclamations (referred to in the history as the second privatisation) the effect of which was to say that for the purpose of the privatisation the funding level had been fixed at 75% of the actuarial reserves. Those who had been paid out above this were required to pay the difference back.

[22] The *Dali* group had made the repayments under protest and brought the matter to court. From the court's history it emerges that the value of the fund was set at 91% of its present value. But that quoting the court a quo, "… *calculations were for practical purposes … made on the 91% mistakenly and incorrectly when the initial payments were made*'".[7]

[23] What this comment illustrates is the chaos in calculation that has bedevilled this dispute even since then and which is relevant to some of the issues I have to decide.

[24] The SCA fortunately did not get dragged into a technical fight over the actuarial calculation and took a robust lawyerly approach. The issue was whether the *Dali* group were entitled to the present value of their accrued benefit but subject to the present level of funding of the fund or independent of the funding level of the fund. The court held in favour of the *Dali* group that it was the latter. In the words of the court:

---

[6] See paragraph 1 of the decision which refers to claims of 46 people whose claims were partially resolved in court a quo and two others whose claims were dismissed.

[7] See *Dali* supra paragraph 16.

"The finding by the judge a quo that the appellants were entitled to 100% of their accrued benefits was clearly correct. A member's interest in the fund at a given time was the present value of the benefits which he or she expected to become entitled to in respect of his or her period of service. A member's actuarial interest could not have been anything other than his or her aforesaid interest in the fund determined according to actuarial principles. That is in my view the grammatical meaning of the words "actuarial interest in the pension fund" and there is no indication to be found in Proclamation 2 of 1992 that the legislature had a different meaning in mind. According to an actuary, Prof Marx, whom the appellants called as a witness, that is also how an actuary would have interpreted the words. No evidence was tendered by the respondents to gainsay this evidence. The benefits payable in terms of the Pension Fund Act and the regulations thereto were independent of the funding level of the pension fund. It follows that a member's accrued benefit or actuarial interest in the fund was not dependent upon the funding level of the fund."[8]

[25] But the applicants in the *Dali* matter were less successful in relation to the second leg of their case. In 1996, in terms of the Interim Constitution, civil servants of the former self-governing territories' funds, and who were still members of them at the time of this Act, were entitled to become members of the Government Employees Pension Fund (GEPF). The *Dali* group wanted to be compensated for the difference between what they would have got in the public sector fund and what they got out of the private option. The court in *Dali* was quite emphatic in rejecting this:

"In any event, if appellants find themselves in a worse position than civil servants who had not elected to take part in the privatisation schemes, that is a result of their election to take part therein and not of the provisions of section 4(3) of the Government Employees Pension Law, 1996."

[26] This approach is important because decades later the Minister relies on this in relation to the question of sufficient compliance. Put bluntly the Minister's position as most recently articulated in this matter was that there was no legal basis to the claims.[9]

---

[8] Dali supra paragraph 17.

[9] See below the Minister's letter of December 2018.

[27] Another court challenge to one of the Proclamations came in the case *Dabalorivhuwa Patriotic Front v Government Employees Pension Fund.*[10] The case went on appeal to the SCA. The SCA decision does not directly concern this case but its remarks about the state of the records are relevant. The court noted that *"even if still possible"* it "*would be substantially more difficult*" *"[t]o do a valuation of the funds at this stage" "than would have been the case at the time when Proclamation 56 of 1995 was promulgated"*. This is because *"[w]witnesses are no longer available and documentary evidence, such as the working papers of the actuaries ... have been lost"*; the *"Department of Finance has no organised record of the Venda Pension Funds"; such records as might still exist maybe incomplete or inaccessible*; and *"[a]valuation at this stage, if possible, would also be much more expensive".*[11]

[28] On 1 May 1996, the Venda Pension Fund was discontinued, and its members were migrated to the Government Employee Pension Fund (GEPF) the central fund for all civil servants after the integration process had been completed.

[29] Certain of the erstwhile Venda civil servants, who had chosen the privatisation option, remained dissatisfied and so formed into groups to take up their cause. One such group followed the route of complaining to the Public Protector in terms of the Public Protector Act, 23 of 1994. The adoption of this route is the genesis of the present matter.

[30] The first complaint was made to the then Public Protector, then Selby Baqwa, by the Dabalorivhuwa Patriotic Front. They are the fifth respondent in this matter and are the same grouping that had brought the litigation to the SCA that I referred to earlier. I do not know when the complaint was lodged, but the Report is dated 9 April 2002, so one can safely assume the complaint was made some time before then.

[31] It is evident from this report that when the National Treasury was apprised of the complaint, its response was that the complaint had prescribed. The complainants countered, alleging Treasury had been unresponsive to their complaint and showed the Public Protector a string of unanswered letters. The

[10] [2005] JOL 16188(SCA)

[11] Supra, paragraph 25. The SCA upheld the regulation.

Public Protector's view was that even though the matter may have '*technically prescribed'* the Treasury should not be allowed to get away with a technicality.[12]

[32] His recommendation was that the relief in the *Dali* matter should be extended to all those who had privatised in terms of the first privatisation scheme. In other words, because the *Dali* relief was limited to the parties to that litigation, he was recommending that those who fell into the same class as the successful parties should receive like compensation; specifically, that they should be entitled to 100% of their actuarial interest. It is not clear from this report how many would benefit and what the cost of that would be.

[33] But in relation to the second privatisation, he followed the approach of the court in *Dali* in rejecting this claim. As he put it:

"With regard to the group that privatised in terms of the Second Privatisation Scheme I find that they were paid according to the funding level that was applicable to them at the time and no improper prejudice has been established in their case." [13]

[34] This conclusion becomes significant in relation to the two subsequent Public Protector reports which did not follow his approach in respect of the second privatisation.

[35] The 2000 Baqwa report is not the subject of this application, unlike the two subsequent reports. The rationale for not including the Baqwa report as the subject of the declaratory relief, is not explained in the papers.

[36] A second complaint was then made to the Public Protector on 19 November 2008. There were three complainants all of whom number amongst the respondents in this matter. Note that six-and- half years had now passed since the date of the Baqwa report. This time it was made to the new Public Protector, Advocate Thuli Madonsela.

[37] The essence of the complaint was that if it had not been for the privatisation the members of the Venda Pension Fund would today be entitled to their full defined benefits in terms of the Government Employees Pension Fund Law. Their complaint, as conveyed to the Public Protector, was that there was no good reason to deny them a full pension *"… just because they were*

[12] See paragraph 3.7 of the report.
[13] Paragraph 6.2 of the report.

during 1992 influenced to accept the privatisation scheme by the then Venda Government …. They further argue that the process was from beginning, not conducted properly and was as result defective."[14]

[38] The investigation took three year from when the complaint was lodged in November 2008 till the report was published on 8 November 2011.

[39] The Madonsela report assumed the Baqwa report's recommendation and noted as a point of criticism that this had not been implemented:

[40] *"The omission of the South African Government, and in particular the GEPF's failure, to implement the recommendations of the Public Protector in Report No. 18 of 2002 amounts to maladministration and a violation of the section 181(3) of the Constitution*." [15]

[41] But unlike her predecessor she went further to impose remedial action in respect of the second privatisation.

[42] Baqwa had relied on the *Dali* case to avoid imposing a remedy in respect of this aspect. Madonsela does not ignore this case. Indeed, her report quotes the crucial sentence from the *Dali* case concerning the second privatisation. This is the sentence that starts by saying "*In any event, if the appellants find themselves in a worse position than civil servants who had not elected to take part in the privatisation schemes*…." But this is the where the quote ends – in mid-sentence. Left out was the remaining part of the sentence which says "*… that is a result of their election to take part therein and not of the provisions of section 4(3) of the Government Employees Pension Law, 1996."* [16]

[43] This omission of the last phrase has completely distorted the meaning of the sentence. This does not seem to have been done as an exercise in brevity but rather, as the recommendations show, a belief in clinging on to the theory of unequal treatment of those who had chosen the privatisation route. But this was a theory that the SCA in *Dali* had rejected.

[44] Madonsela's recommendations were that:

---

[14] Madonsela report Case lines page 001-97, paragraph (ii).
[15] Supra 001-99 paragraph (gg)
[16] Supra 001-111 paragraph 3.17

a) The Ministers of Public Service and Administration and of Finance should appoint a task team, including members of the Government Pensions Administration in collaboration with the Public Protector to -

i) Review the implementation of the Privatisation Schemes of the former Venda Pension Fund;

ii) Consider changes to the GEP Law and Rules, to enable members who participated in the privatisation schemes the opportunity to repay the benefits received and to recalculate their pension benefits in terms of the rules regulating normal retirement; and

ii) Determine whether or not the service periods that have been bought back before the privatisation schemes of the Venda Pension Fund should be included when recalculating the benefits of the members.

b) The Government should apologise to the members of the Venda Pension Funds who suffered prejudice as a result of maladministration by the different Government institutions.

[45] Madonsela also made specific individual recommendations in relation to the three complainants, but I have left them out, because they follow the lines of the main recommendations, I have set out above.

[46] The requirement for an apology and the establishment of a committee are phrased in peremptory terms. But the other recommendations are not. Rather, they are phrased in language that seeks to exhort but does not go as far as to bind: “review the implementation”, “consider changes”, “determine whether”. In a word the Public Protector asks the Ministers to look at a solution for the plight of those who chose the privatisation route by rewinding the history, but this has the rider attached to it that it is feasible. As I understand this the Public Protector is saying if you can help them, you should. This despite the fact that in *Dali,* in the sentence the Public Protector had only half quoted, the court came to the conclusion that there was no legal basis for this.

[47] This complaint was then inherited by the current Public Protector, Advocate Busi Mkhwebane. She too wrote a report with a set of recommendations.

[48] The report states that its purpose is to get the assistance of the National Assembly to intervene to see that the recommendations contained in the Madonsela report are implemented.

[49] It also seeks to assist the National Treasury to expeditiously implement the remedial action.

[50] The report then has a section in which the recommendations from the Madonsela report are listed, and next to each one, under a heading "S*tatus*," is the comment "*implemented*" or "*not implemented*." The only one recorded as being "*implemented*" is the appointment of the task team.

[51] What this report does do is indicate that there were several meetings of the Task Team in 2016. The Task team got further information from the complainants and then reported back to their respective principals in an effort to find common ground on issues of concern. What the Public Protector then noticed was that in 2003 there had been a report by an operations unit within the GEPF which had identified a significant challenge. The Venda Pensions system was only readable by older personal computers and hence it could not be read, although it contained '*essential data.'* It was recommended (it seems she is referring here to the GEPF) that a service provider be appointed to access this information. She then records that at another meeting of the GEPF the Director General of the National Treasury had undertaken to appoint a service provider.

[52] During this time, she records that the Treasury staff were worried about creating a precedent and opening the "*floodgates*" to members of previous separate pension funds who might have hopes of similar compensation.

[53] But this part of the report is also replete with all the challenges the Task Team was facing, both in terms of ascertaining proper records of who was affected and the fact that complainants had said a number of members of the scheme had been appointed in the past decades ranging from the 1950's to 1970's but had only re-joined the Venda Pension Fund in 1993.

[54] She described that a tension developed around the information gathering exercise. The government people wanted proof that complainants

had suffered actual losses which they could quantify whilst complainants felt frustrated at not being able to furnish such proof.

[55] It also emerges from this report that a number of the members who had privatised their pensions, re-joined the Venda Pension fund in 1993 and then the GEPF after 1996. For reasons not explained in the report these retuning 'privatisers' were not credited with their full years of service and thus received a substantially reduced benefit in comparison with those who did not.

[56] The Public Protector then recommended that a firm of actuaries be appointed to scrutinise the available material and to assess the potential losses these beneficiaries experienced based on comparing their actual years of service against what she termed "periods of actual pensionable service."[17]

[57] The operative paragraph is contained in section 6.10 which states

[58] *Once the reasonable relative losses have been established, it should be possible to estimate the total amount that it would cost to facilitate the implementation or remedial action that would seek to put the complainants as close as possible to the position if they had not privatised*.[18]

[59] She also mentions that consultations were held with the complainants, and they were asked to come back with more information about how many people might be affected. She records that after several weeks the complainants came back with "11 containers, containing thousands of documents," which were subsequently delivered to the Public Protector's offices. The consolidated lists came back with approximately 7000 people.

[60] Finally, the report proposed its own formulation of steps to be taken as remedial action:

In order to ensure compliance with the Public Protectors remedial action as contained in report no 18 of 2011/12 it is imperative that-

a) the Director General: Finance and National Treasury take the necessary steps, based on a closed list of Complainants (and Information that had been sourced from the Complainants and official records that the State and the GPAA were obliged to maintain), to establish a reasonably reliable database of

[17] Report paragraph 6.9 Case Lines page 0001-182.
[18] CaseLines page 001-182

beneficiaries of the Public Protector's remedial action, and to assess the potential prejudice and losses of these beneficiaries with the aid of an Actuary, and

b) the State through National Treasury commits funds to facilitate the recalculation of pension benefits by the GPAA of those Complainants who became members of the GEPF after 1996 and/ or ad hoc compensation of those Complainants who retired prior to the amalgamation of the various pension funds, to reimburse their reasonable losses as estimated with the assistance of the Actuary; and

c) the National Assembly through the office of the Speaker of the National Assembly take steps to establish a mechanism to oversee the implementation of the Public Protector's remedial action in terms of section 182(1)(c), read with sections 43(2) and 55(2) of the Constitution.

[61] A matter of dispute in this litigation is whether this report constitutes a new report and recommendation (the Minister's view) or is a continuation of the earlier Madonsela report (the Public Protector's view). I deal with this later.

Post the Mkhwebane report

[62] After the report, the National Treasury commissioned two firms of actuaries to come up with a solution. The first, from the firm Willis Towers Watson, reported back on 16 November 2017.[19] It noted that its mandate was to assist the Treasury to meet the requirements of the Public Protector's report. The author notes all the difficulties involved and seeks an extension of the deadline by several months. Notable is an observation that the exercise is incredibly complex given the lack of information. The writer notes plaintively in one sentence "…*this was over ten years ago*."

[63] There can be little doubt that the report is a serious attempt to grapple with the problem bedevilled by the lack of proper information.

[19] case lines 001-407

[64] Eventually the report had not been completed by the time the actuaries contract period had run out and a new firm, Alexander Forbes, took over the assignment. They fared no better.

[65] In July 2018 they prepared a 36-page report. Their concluding remark is instructive of the difficulties in implementing the remedial action:

"National Treasury should determine to what extent any compensation should be made, as there is no evidence that payments and transfer values were incorrectly calculated. If they decided to make compensation, an appropriate and fair accumulation methodology to apply to the privatisation payments should be decided upon. Achieving equity between the stakeholders of this exercise is not a simple exercise, and in practice unlikely to be achievable here."

[66] Later this is conclusion is again summed up by Mr.Andre Pienaar, the Alexander Forbes actuary who was the co-author of the two actuarial reports made in May and July of 2018, in his supporting affidavit in this matter:

"I particularly confirm the conclusions summarised in the aforesaid report, including the conclusion that no evidence exists of incorrect calculations of payment and transfer values. In the light of the complexities of this case, the material amount of missing information, invalid and defective data, and the extensive time lapse since the privatisation and amalgamation, I am of the opinion that it is in practice improbable that an equitable outcome can be achieved in further attempting to implement the Public Protector's remedial action." [20]

[67] The actuaries had performed an estimate that depending on which assumption was made, the remedial action could cost anything ranging between R1.113 billion and R 6,326 billion.[21]

[68] On 22nd August 2018, the Public Protector wrote a letter to the then Minister Nhlanhla Nene, expressing concern about the length of time the process was taking to conclude. I infer from its contents that she had not yet

[20] Case Lines 001 541

[21] Founding affidavit, Case Lines 001-77 to 001-78.

received the Alexander Forbes report because no mention is made of it. She requests a further progress report within 10 days of the letter. She mentions that remedial action taken by the Public Protector is binding unless set aside by a court of law.[22] She also states that she would have no option to request Parliament's intervention in terms of section 55(2) of the Constitution.[23]

[69] She then asks for an opinion on the applicable funding levels during the privatisation, confirmation of individual cases to determine if there is a basis for a financial remedy, actuarial simulations, and benefit payment projections.

[70] But notwithstanding this exhortation from the Public Protector, for the National Treasury, the Alexander Forbes report marked the end of the road. The climax comes in a report from the then Minister Tito Mboweni dated 4 December 2018.who concludes:

"The National Treasury and the various stakeholders within government have taken great care and effort to find a reason to consider some form of compensation for the Complainants. Notwithstanding these efforts no compensation could be justified. The National Treasury is of the view that it has attempted and in a transparent manner, demonstrated its willingness to implement the Public Protector remedial action. As the outcome of the investigation process indicates, the remedial action are (sic) not implementable." [24]

[71] A breakdown in the relationship between the Treasury, the Minister and the Public Protector then ensued, with the Public Protector seeking to name and shame the department in a press conference. The dispute was eventually to lead to this current application which was commenced on 11 March 2019.

Declaratory relief and the review points

[72] Before I consider the factual issues further, two observations should be made. First, I raised at the outset with Mr. Gauntlett, who appeared for the Minister, whether deciding the main relief (whether there has been sufficient compliance) appeared at variance with the alternative relief (that the reports

[22] Case Lines 001-481.

[23] Section 55(2) requires the National Assembly to provide mechanisms to hold the executive accountable and to exercise oversight over its implementation of its authority.

[24] Case Lines 001-514

were reviewable. If the latter was true, then issue of whether there had been sufficient compliance was moot.

[73] However, I find that the two issues are inseparable in this matter, hence the need to go through the history at some length. The reason the remedial action could not be implemented was because in at least two respects material to the implementation of the remedial action, the Public Protector's actions were unlawful.

[74] Section 6(9) of the Public Protector Act states:

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

[75] The Minister argues that none of the complaints to the Public Protector were made within this two-year time limit. Of course, that on its own is not fatal, the Public Protector still retains a discretion in this regard to show special circumstances exist. But in neither of the two challenged reports (the Madonsela report and the Mkhwebane report) does the Public Protector make out a case of why there are special circumstances. The Baqwa report was the only one that attempts to do so. But that report is not subject to challenge, and it was written several years prior to that of his successors.

[76] Moreover, since Baqwa did not attempt to prise open the problem of the second privatisation the problems confronting his successors were not necessary for him to address.

[77] But these problems about the lack of data became apparent in the Madonsela report and even more so in the Mkhwebane report. Yet neither address these facts in relation to the two-year time requirement.

[78] The facts of this case justify the policy rationale behind the two-year limitation period. Not only do the memories of the complainants fade, but as in this case, data becomes irretrievable or no longer exists. The extraordinary fact that the computer systems could not be accessed as their technology was now dated, epitomised the futility of the exercise as experienced by those tasked with implementing the remedial action. Alexander Forbes stated in its

conclusion that there was a "*material amount of missing information, invalid and defective data."* The Willis Towers Watson's actuary, who was their predecessor, raised the difficulty most poignantly with the remark that the information was more than 10 years old. Nor was the problem caused by any lack of diligence on the part of the complainants who to the extent that they had information made it available.

[79] At the time of the founding affidavit the Minister had not yet had access to the records of the Public Protector. Subsequent to a Rule 53 application this was obtained, and it is mentioned in the replying affidavit. There it appears from several references, that staff of the Public Protector over the course of the investigation from 2008 to 2016 were aware of the fact that:

a. The chief investigator had raised with the complainants in August 2002 that the law might not allow them to investigate the complaint;
b. In 2008 a senior investigator writes in a memorandum *"that it is definitely not a suggestion that we revisit the matter of the second scheme."* (The Director General who deposes to the replying affidavit understands this remark to relate to the second privatisation)
c. There was no evidence that any of the pensioners had been coerced into accepting the privatisation. Indeed, an advocate De Waal had recorded that she was worried that *"most of the things said by the complainants were rumours they heard."*[25]

[80] Thus, to the extent that the case for remedial action is based on maladministration, because the government or its predecessor the Venda Government, had coerced pensioners to privatise there is no evidence in the record to establish this fact.

[81] What is then left of the case for maladministration rests on the question of unequal treatment between the privatisers and those who chose to remain on the government schemes. But the history here shows that it is the outcomes that are unequal, not the treatment. This is what the Court in *Dali* found, and nothing has been established to challenge this conclusion. Those who privatised chose to do so. The fact that in hindsight this choice may have been sub-optimal, does not justify a conclusion that they were treated unequally.

[25] See replying affidavit, paragraphs 12 – 16 .

[82] Finally, the question is whether the Ministers made its best efforts to seek some solution to the problem. Here of course it depends what solution was expected of them. The record is not always clear on this point. Was the executive willing to throw money at the problem to make it go away but only if the expenditure was not that excessive? Certainly, the actuaries modelled the possible costs of achieving equal outcomes which could be thought contrary to the stance adopted by the Minster in this litigation viz. that no equality of outcomes was legally required of them.

[83] But approaching the problem so cynically would be unfair. As Minister Mboweni explained they had to ascertain whether there was a reason for why compensation might be justified. In the end they could not find that reason.

[84] Thus, to the extent that they were able to do so, the respective Ministers have attempted to comply with the remedial action required of them. They were asked to make an effort and they did so. Certainly, since the establishment of the Task Team, one of the requirements of the Madonsela report, efforts were made to address the problem within the constraints that existed. Two sets of actuaries were appointed, public records and even those of Sanlam, the choice investment institution of the privatisers, were sought. Granted the complainants came with their crates but they proved unreliable. The conclusion that the job was not doable, a mathematical labour of Hercules, was made by two firms of private actuaries.

[85] The Public Protector disputes that a solution to pay compensation was impossible. But she is no position to do so. She had put up no facts of her own. One of the extraordinary features of this case is that the Public Protector did not file any answering papers. Instead she filed a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules raising five points of law. Unusually this Notice had several annexures of letters, media statements and parliamentary minutes attached to it. The Minister then brought an interlocutory application to set this aside as an irregular proceeding. The Minister was not successful, but Kathree-Setiloane J, who decided the matter, made it quite clear that this election by the Public Protector had consequences. A Rule 6(5)(d)(iii) notice, she held, is neither an affidavit or a pleading - the Public Protector would have to accept the

facts put up by the Ministers.[26] And lengthy facts they are given that the founding affidavit alone with its annexures runs to over 600 pages.

[86] The Public Protector offers by way of an explanation the lack of co-operation of her erstwhile predecessor. This even led to a belated suggestion that the court subpoena her to testify. But it is unclear why this should excuse the lack of an answering affidavit. The Public Protector's office has staff who work on cases as the record in this matter illustrates. Even if her predecessor had been unwilling, the factual material needed to put up an answer would have been available from the Public Protector's staff and members who served on the Task Team. The Rule 53 record suggests there was an active involvement in the investigations by the Public Protector's staff. There is no suggestion that they were no longer available to assist.

[87] The Public Protector also sought to rely on press clippings and extracts attached to the heads of argument of her legal representatives. But that is not the manner in which litigation is conducted. If one has facts, one pleads them, so ones opponent can respond.

[88] More likely the reason for not putting up papers was a tactical choice. Having made that choice, the Public Protector has to live with the facts put up by the Minister. That is the approach I have taken.

[89] Mr. Ngalwana, who appeared for the Public Protector also argued that the version offered by the actuaries should not be accepted. Actuaries he contended always work with imperfect information from which they make assumptions. There was no reason they could not build a model based on estimates from the information that had been gleaned with all its limitations. But that is a factual argument. Having put up no papers of her own the Public Protector cannot make such an argument from the Bar.

[90] The Treasury cannot pay out monies based on sentiment or expedience. If there is no proper legal basis it may not do so. The *Dali* case answered the question of alleged unequal treatment that resulted from the second

---

[26] See Paragraph 15 of her decision in this matter under the same case number which appears on Case Lines page 26-10." *Since a rule 6(5)(d)(iii) notice is neither a pleading nor an affidavit, it is impermissible for the respondent to plead facts or produce evidence in support of the law points raised, which should have been placed before the court in an answering affidavit."" In the absence of an answering affidavit dealing with the merits of the dispute, the court has a discretion to simply deal with the matter on the points of law raised and the evidence in the founding affidavit. If the respondent relies exclusively on the notice in terms of rule 6(5)(d)(iii), as the Public Protector does in this case, the allegations in the founding affidavit must be taken as established facts by the court."*

privatisation. There was no legal basis to remedy a choice taken by the complainants which turned out badly for them.

[91] It is unnecessary to approach the relief as if it was a choice between the main relief, the declaratory order, and the alternative relief of the review. The two issues are intertwined at least as far as the arguments around section 6(9) of the Public Protectors Act and section 182(3) of the Constitution are concerned. This is because the granting of declaratory relief is not a case of saying X, Y and Z had to be done, and it could be found on the facts, was done. This is a case that X, Y and Z could not be done because (i) they were required to be carried out at a time when the evidence on which it was to be based was no longer extant in a material form (tied up with the 6(9) argument) and second, largely what required of them was not a lawful obligation (section 182(3)) consequent on the *Dali* decision). But for the sake of the public interest in the matter I record that to the extent that the Ministers nevertheless carried out some part of the remedial action (e.g., forming the task team and investigating the problem extensively) that was done, to the extent that it could be reasonably expected.

The Public Protector's response to the relief sought.

(a) Peremption

[92] The Public Protector argues that the *"application has perempted."* Expressed differently, it is argued that the Minister has clearly and unconditionally acquiesced in, and decided to abide by, the remedial action of the Public Protector.

[93] The doctrine of peremption arises from the common law and is normally applied in respect of judgments. In the best-known case on the point, Innes CJ in *Dabner v South African Railways and Harbours* explained that:

"The rule with regard to peremption is well settled and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied

upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven."[27]

[94] As appears from this quote peremption is usually raised in the context of an appeal against a judgment of a court.

[95] In *President of the Republic of South African v Public Protector,* a full court of this division had to decide whether the remedial action of the Public Protector could, like a court judgment, be subject to peremption. The court held that since remedial action is binding it has all the attributes of a judgment, and so it could be subject to peremption.

[96] In that case the court held that statements by the then President that he would follow the Public Protector's remedial action to appoint a Commission of Enquiry, amounted to a peremption of his right to review the Public Protector's remedial action. The Public Protector urges that this precedent be followed in the present matter.

[97] Of course, as the *Dabner* case explains, the onus to prove peremption rests on the party alleging it.

[98] Since the Public Protector has put up no facts of her own, she relies instead on a selection of some of the correspondence and statements made to Parliament by the respective Ministers during the course of the Public Protector process. The press statements she relies on did not form part of the pleadings but were attached to the Rule 6(5)(d)(iii) notice. This means that they do not form part of the factual record and their use in this manner is highly irregular.

[99] The Public Protector also attempts to rely on correspondence that forms part of the annexures to the founding papers. The founding papers are lengthy. Whilst it is legitimate to rely on annexures from an opponent's papers to advance one's own case, it is not fair to do so when you do not put up your own affidavit to explain their context.

[100] Nevertheless, despite the fairness issue, at best what all these documents are evidence of, is that for a period the Ministers did attempt to see if the remedial action could be implemented. That as discussed, involved a major fact-finding effort regarding the second privatisation. Facts had to be

[27] 1920 AD 583 at 594.

established and ultimately, in the Minister's opinion, they could not. This puts the facts of this case in a quite different light from the Presidents' comments about establishing a commission of enquiry.

[101] Moreover, in this case the Minister had indicated during the course of the first report by Public Protector Baqwa that the matter may have prescribed.

[102] This raises the question of whether the subsequent conduct indicated an abandonment of the earlier attempt to review and thus in the language of *Dabner* an acquiescence.

[103] Here a unique point was raised by Mr. Gauntlet for the Minister. He argued that it was inappropriate to rely on peremption in the present context. Peremption as noted is typically raised in disputes between private parties. But these are not disputes between private parties. They are disputes which have public consequences. All organs of state he argued are duty bound to support one another in terms of the principles of co-operative government to be found in Chapter 3 of the Constitution. More specifically, section 41(1)(h) enjoins them to *"co-operate with one another in mutual trust and good faith by"* …" *(ii) assisting and supporting one another"* and… *"(vi) avoiding legal proceedings against one another"*.

[104] I agree with this.

[105] In terms of the Madonsela remedial action the task team was formed to *"... review the implementation of the Privatisation Schemes of the former Venda Pension Fund."* By participating in the Task team and reporting back on its progress the Ministers never unequivocally acquiesced to implementing compensation for those who privatised in terms of the second privatisation. They acquiesced in the act of 'reviewing'. But this is no more than engaging, quite properly, in an exercise of 'co-operative government'. Their caveat throughout remained premised on whether such remedial action was practicable and legally required. In the end Minster Mboweni concluded that it was neither

[106] Indeed, his conclusion may well have been a conclusion the task team might jointly have agreed upon, and hence the Public Protector might well have agreed that the remedial action had been sufficiently discharged.

[107] This expectation was not unreasonable given that the Rule 53 record shows members of the Public Protector's own staff expressed similar sentiments on the subject. The first Public Protector had decided in 2002 not to

take up the issue of the second privatisation. There could certainly have been an expectation that his successors, given the further information that they had at hand about the difficulties with the data, may have come to the same conclusion. That is why participation in the process did not amount to acquiescence in how the Public Protector might have wished its outcome to be.

[108] State functionaries would be disincentivised from first trying to implement remedial relief, if they knew that later one party to the litigation might invoke the doctrine of peremption against it. This chilling effect is an anathema to the constitutional value of co-operative government that serves a public not private interest. This also distinguishes the facts of this case from those of the *President of the RSA v Public Protector* because the nature of the remedial action is different. This is not a case of the executive saying it would carry out an act and then having agreed to, failing to do so.

[109] These facts do not meet the threshold test for acquiescence set out by Innes CJ in *Dabner* where it is stated that the conduct must be unequivocal and inconsistent with any intention to appeal (or in this case to review).

[110] I find that the application has not been perempted.

Public Protector's other points of law.

[111] In addition to the point on peremption the Public Protector has also raised four other objections.

(b) Inapplicability of PAJA and principle of legality not properly pleaded

[112] The Minister had made his case in respect of section 6(9) of the Public Protector Act, and section 183(3) of the Constitution, both under Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') and the principle of legality. This approach was prudent given the uncertainty in the case law in this regard.

[113] The Public Protector argued, based on the *Minister of Home Affairs* case, that decisions of the Public Protector were not reviewable under PAJA.[28]

[114] Since the heads were filed, the Constitutional Court has made it clear in *President of Public Protector and Others v President of the Republic of South Africa and Others,* that PAJA does apply to remedial action by the Public Protector. As the court put it:

"Recently in Minister of Home Affairs, the Supreme Court of Appeal has concluded that the decisions taken by the Public Protector, including the remedial action, do not constitute administrative action. This decision appears to be at variance with one taken by this Court in South African Reserve Bank. This Court implicitly endorsed the application of the Promotion of Administrative Justice Act (PAJA) in the decision making process followed by the Public Protector when she takes remedial action." [29]

[115] I find that PAJA applies to the review of the remedial action in this matter.

(c) Inordinate delay

[116] As explained above it is now clear that reviews in respect of the remedial relief imposed by the Public Protector are reviewable under PAJA. This means that they must be brought not later than 180 days of the date on which the applicants were informed of the administrative action.[30] In this case the first administrative action (the Madonsela report) was published in November 2011, whilst the Mkhwebane report was published on 12 December 2016. The review was launched in March 2019. Thus, if the dates of the reports are the relevant marker for determining the 180-day period, the application is substantially out of time in respect of both. The Ministers in their Notice of Motion have sought condonation for the delay relying on section 9 of PAJA which states:

9(1) The period of-

(a) 90 days referred to in section 5 may be reduced; or

---

[28] *Minister of Home Affairs v Public Protector* [2018] ZASCA 15; 2018 (3) SA 380 (SCA)

[29] *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021) paragraph 50.

[30] Section 7 of PAJA.

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

[117] I find that in this case the interests of justice do require condonation. I do so for the same reasons that I approached the question of peremption. The reason for the lateness of the review was because the Minister sought to attempt to implement the remedial action. Only once two things became apparent; (i) that the Minister would not be capable of implementing the remedial action to the extent required by the Public Protector and; (ii) that the Public Protector did not accept this, did the Minister embark on the review. If one views the time taken from this vantage point, then the delay is reasonable. Minister Mboweni wrote his letter saying they have complied, insofar as they were able to, in December 2018. The Public Protector reacted to this in public statements in February 2019. The review was then launched in March 2019. The delay and the reasons for it are in my view reasonable and hence I have granted condonation.

(d) 2016 report not dischargeable or reviewable

[118] The Public Protector argued that her report, the 2016 report labelled a Special Report, was not reviewable because it involved no new remedial action that was not already contained in the 2011 report. Thus, there was no *"reviewable or dischargeable action remedial action in the 2016 report".*[31]

[119] She argued that the purpose of her report was to do the following: (i) invoke the assistance of the National Assembly and (ii) to make it easier for the Treasury to implement the 2011 report and to provide it "guidance".

[120] But if that is all she sought to do why not just have correspondence with the parties regarding the earlier report? Instead, the Public Protector issued her own report and made recommendations which in substance amount to remedial

[31] This is how the issue was framed in heads of argument submitted by the Public Protector subsequent to the hearing . Here the Public Protector had contended that the Minister had misunderstood her argument on this point in his heads of argument.

action. As her letter of August 2018 indicated, she warned the Treasury about the Constitutional consequences of failing to implement the remedial action. There was nothing in this letter to indicate that this was a reference only to the 2011 report not her own in 2016.

[121] Nor is the any logic to this point. If it is a mere add on to the 2011 report, then if that report is susceptible to be reviewed so must this. If not, all confusion would reign as to its status. The question would remain if it fell with its predecessor or remained extant because it was not specifically reviewed?

[122] It is hard to fathom the basis for this objection and it may well be that it is raised for tactical reasons. First, because it would exonerate the Public Protector for not having justified her remedial action in 2016 in terms of section 6(9) of the Public Protector Act, and second, as a defence to the punitive costs order.

[123] This objection is rejected.

(e) Non-Joinder of the Speaker of National Assembly

[124] The Public Protector argued that the Speaker of the National Assembly should have been joined as a party. However, as argued by the Minister, even if this point was good, it was no more than a dilatory one. In its supplementary heads the Public Protector argued it was not a dilatory point as the National Assembly had indicated an interest in the matter which was at variance with that of the Minister. How the Public Protector which put up no papers can now make this contention is hard to fathom. Relying on documents clipped to heads of argument does not lay a basis for doing so. However, as the Minister points out, the point is not good in any event. A recent case has decided that the National Assembly is not a necessary party involving a review of a member of the executive.[32] It matters not even if members of Parliament might have an interest in the report. That does not amount to a legal interest to be joined in this litigation. No authority to the contrary was cited by the Public Protector. This point too must be rejected.

[32] See for instance *Equal Education and another v Minister of Basic Education and others* 2019(1) SA 421 (ECB) paragraph 15-33

Conclusion

[125] The objections to the relief sought are dismissed. The review relief is successful for the two reasons discussed. The remedial action relates to complaints concerning matters that arose in the 1992 – 4 period. That period is in excess of the limitation that the Public Protector has to entertain a complaint in terms of section 6((9) of the Public Protector Act. No special circumstances were advanced to justify doing so. On the contrary all the facts point to the fact that the subject matter was no longer capable of proper investigation by the time the reports were written even in 2002, let alone in 2012 and 2016. This renders her report *ultra vires* and hence unlawful.[33]

[126] Secondly, the subject matter of the remedial action pertains to matter that a court has definitively found not to be actionable and hence the Public Protector acted beyond her powers in seeking to impose this obligation on the executive in contravention of section 182(3) of the Constitution.[34]

Costs

[127] The Minister has sought a personal costs order against the Public Protector. There is precedent for this in other cases involving the same office bearer. The basis for this argument in the present case is the fact that the Public Protector did not file an answering affidavit to put up her version. Whilst I would agree that this is a valid point of criticism, I do not consider it amounts to the point of criticism made of the Public Protector in the other cases cited, where a personal costs award had been made against her. [35]

[128] The Public Protector did not initiate this complaint. She inherited it from her predecessors. All her predecessors had shown some sympathy to the plight of the complainants who were victims of history even if not of maladministration.

---

[33] *Gordhan and Others v Public Protector and Others* (36099/2098) [2020] ZAGPPHC 777 (17 December 2020) in particular paragraphs 39-45.

[34] Here I refer to the *Dali* case, supra.

[35] For instance, in *Gordhan* (supra) the Court held "In *the light of what is stated in the above passages, we are of the opinion that the circumstances of this application do not warrant the ordering of a personal costs order against Adv Mkhwebane. The test set out is that of bad faith and gross negligence. It does not appear in the papers before us that Adv Mkhwebane conducted these proceedings in bad faith and was grossly negligent. The facts of this matter do not support such an order, and we are, accordingly, not inclined to grant such an order* (Paragraph 238)

The factual history was complex. In any event the Madonsela report contains the same fault lines the present Public Protector's report does. It would be unfair to visit upon the present incumbent all responsibility. Moreover, there is no showing of bad faith or gross negligence. An ordinary costs order including the costs of two counsel will suffice.

ORDER

I make the following order:

1. The remedial action imposed in the Public Protector's Report 18 of 2011-2021 and Special Report 15 of 2016 to 2017 is reviewed and set aside.
2. The delay in instituting this review outside of the period of 180 days imposed by section 7 of the Promotion of Administrative Justice Act, 3 of 2000, is condoned in terms of section 9 of that Act.
3. The first respondent is liable for the costs of the applicant, including the costs of two counsel.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 18 November 2021.

Date of Hearing: 6 August 2021

Date of Order and Reasons 18 November 2021

Appearances:

Applicant: Mr. J Gauntlett S.C, with Mr F. Pelser

Instructed by the State Attorney

First respondent: Mr. V Ngalwana S.C. with Ms B.D. Lekokola

Instructed by Boqwana Burns Incorporated.