



**REPORT NO: 12 OF 2022/23**

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**PUBLIC PROTECTOR'S ADVISORY REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF AN UNDUE DELAY AND MALADMINISTRATION BY THE GOVERNMENT PENSIONS ADMINISTRATION AGENCY (GPAA) TO OBTAIN THE CORRECT TAX DIRECTIVE IN RESPECT OF MR CASPER BUYAPHI MNISI**

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## **1. INTRODUCTION**

- 1.1 This is the Public Protector's advisory report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, No. 108 of 1996, (the Constitution) and published in terms of section 8(1) of the Public Protector Act, No. 23 of 1994, (the Public Protector Act).
- 1.2 The report communicates the findings on an investigation into allegations of an undue delay and maladministration by the Government Pensions Administrations Agency (GPAA) to submit the correct tax directive information to the South African Revenue Services (SARS) in respect of Mr Casper Buyaphi Mnisi (the Complainant).
- 1.3 The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate any alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action.

## **2. THE COMPLAINT**

- 2.1 The complaint was lodged with the Mpumalanga Provincial Office of the Public Protector South Africa (PPSA) in Nelspruit by Mr Buyaphi Casper Mnisi (the Complainant) on 01 February 2021.
- 2.2 In essence, the Complainant alleged, *inter alia*, the following:
  - 2.2.1 He retired from the Department of Education (the Department) in Limpopo Province in July 2019 and was accordingly paid both his lump sum and monthly pension afterwards.
  - 2.2.2 In the 2019/20 financial year, he was entitled to a salary increase which was implemented after he left the Department. As a result, the portion of the increment was not included in his pension benefit. He received payment of the

money that was in arrears from the Department through the BAS system and an instruction was sent to the GPAA to effect the increment on his monthly pension income.

- 2.2.3 The GPAA issued a request to SARS to indicate how much tax should be deducted from such benefits. Upon further enquiry, he discovered from SARS that the money he was supposed to receive could not be released because the GPAA issued incorrect tax information, resulting in the Complainant incurring arrears in respect of his tax returns. Furthermore, the GPAA also delayed in issuing the correct information.
- 2.2.4 He was advised by SARS to approach the GPAA to rectify the problem. On enquiring with the GPAA local office in Nelspruit, he was advised that the matter was being handled by the national office of the GPAA. He was unable to file his tax returns because of this outstanding issue and his lump sum payment could not be processed until the matter was resolved.
- 2.2.5 In essence, the Complainant argued that the conduct failure by the GPAA to issue the correct information to obtain a tax directive was prejudicing him as he could not submit his annual tax returns, he could not be paid his pension arrears and his monthly pension allowance had not been accordingly updated.

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

- 3.1. The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs, or in the public administration in any sphere of government.
- 3.2. Section 182(2) directs that the Public Protector has additional powers and functions as prescribed by national legislation.

- 3.3. In terms of section 6(4)(c)(ii) of the Public Protector Act, the Public Protector may, if he or she deems it advisable, refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- 3.4. Section 8 of the Public Protector Act deals with the publication of findings by the Public Protector after an investigation has been conducted. Accordingly, it reads: *The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.*
- 3.5. *Phorego (2017)* notes that there are different interpretations of the word “*recommendations*”.<sup>1</sup> In any discourse about what the legislature could have intended, it is possible that those involved might engage in a literal interpretation of the particular wording as used in a particular legal provision.<sup>2</sup>The Supreme Court Of Appeal distinguished between “*mere recommendations, which an organ of State may accept or reject*”, and binding remedial action as envisaged in section 182(1)(c) of the Constitution.<sup>3</sup>
- 3.6. *In the EFF matter*<sup>4</sup> (Nkandla judgement) the Constitutional Court stated that the remedial action taken in a particular case, will be informed by the subject-matter of the investigation and the type of findings made.

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<sup>1</sup> For example, in [www.oxforddictionaries.com](http://www.oxforddictionaries.com), the word is defined as “a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body”. Of course there are other meanings which are not important for our purposes. Furthermore, at [www.merriam-webster.com](http://www.merriam-webster.com), recommendations are defined as a “suggestion as to what should be done”.

<sup>2</sup> Powers of the Public Protector: are its findings and recommendations legally binding? *Phorego, Molefhi Solomon*. URI: <http://hdl.handle.net/2263/65709>

<sup>3</sup> *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* (393/2015) [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (8 October 2015)

<sup>4</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

3.7. Of cardinal significance about the nature, exercise and legal effect of the remedial power is the following:

“.... (f) **Only when it is appropriate and practicable** to effectively remedy or undo the complaint **would a legally binding remedial action be taken**;

(g) Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made **would a non-binding recommendation be made** or measure be taken; and

(h) Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power **is binding or not or what its legal effect is, would be a matter of interpretation** aided by context, nature and language.” (Emphasis added)

3.8. The Constitutional Court further noted that all the powers set out in section accord and are harmoniously coexistent with section 182 –

“..... referring a matter to an appropriate body or authority **or making suitable recommendations** to remedy the complaint; and resolving any complaint by ‘any other means that may be expedient in the circumstances’, are all regulatory and additional powers. And they are consistent with and flow from the constitutional power ‘to take appropriate remedial action’ and provision for ‘additional powers and functions’.” (Emphasis added)

3.9. The Constitutional Court concluded that –

“... what legal effect the appropriate remedial action has in a particular case, depends on the nature of the issues under investigation and the findings made. As common sense and section 6 of the Public Protector Act suggest, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. **And so might recommending** litigation or a referral of

*the matter to the relevant public authority or any other suitable recommendation, as the case might be. 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. (Emphasis added)*

- 3.10. However, the fact that the Public Protector may in appropriate circumstances propose a non-binding “*recommendation*” or remedy, does not mean that organs of state may accept or reject them at whim. The test is that if an organ of state were to consider the findings and proposed “*recommendations*” by the Public Protector, that decision itself must not be irrational.
- 3.11. The GPAA is an organ of state and the conduct of the institution amounts to conduct in state affairs, and as a result, the matter falls within the ambit of the Public Protector’s mandate.
- 3.12. The Public Protector’s powers and jurisdiction to investigate, report and take appropriate remedial action was not disputed by any of the parties.
- 3.13. Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
- 3.13.1 Whether the GPAA unduly delayed to issue the correct information to SARS to obtain a tax directive in respect of Mr Casper Buyaphi Mnisi and if yes, whether the conduct of the GPAA is improper and amounts to maladministration.

## **4. THE INVESTIGATION**

### **4.1 The investigation process**

- 4.1.1 The investigation was conducted in terms of section 182(1)(a), (b) and (c) of the Constitution which gives the Public Protector the power 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(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

## **4.2 Approach to the investigation**

4.2.1 The approach to the investigation included an analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

4.2.2 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1 What happened?

4.2.2.2 What should have happened?

4.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to a maladministration and improper conduct?

4.2.2.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?

4.2.2.5 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.

4.2.2.6 In this particular case, the factual enquiry principally focused on whether the GPAA unduly delayed to issue a correct tax directive.

4.2.2.7 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the GPAA to prevent improper conduct and/or maladministration as well as prejudice.

4.2.3 The investigation process commenced with a preliminary investigation in terms of section 7(1)(a) of the Public Protector Act, to determine the merits of the complaint and allegations raised, and the manner in which the matter concerned should be dealt with.

### **4.3 KEY SOURCES OF INFORMATION**

#### **4.3.1 Correspondence sent and received**

- 4.3.1.1 Copy of the complaint letter received and acknowledged on the 01 February 2021 from the Complainant;
- 4.3.1.2 Copy of acknowledgement of complaint to the Complainant dated 01 February 2021;
- 4.3.1.3 Copy of an email dated 29 March 2021, from the Public Protector to the Complainant;
- 4.3.1.4 Copy of an email dated 15 April 2021, from the Public Protector to GPAA;
- 4.3.1.5 Copy of an email dated 25 May 2021, from the Public Protector to the GPAA;
- 4.3.1.6 Copy of an email dated 09 June 2021, from the Public Protector to the GPAA;
- 4.3.1.7 Copy of an email dated 02 September 2021, from the Public Protector to the GPAA;
- 4.3.1.8 Copy of an email dated 10 September 2021, from the Public Protector to the GPAA;
- 4.3.1.9 Copy of an email dated 18 October 2021, from the Public Protector to the GPAA;
- 4.3.1.10 Copy of an email dated 22 November 2021, from the Public Protector to the GPAA;
- 4.3.1.11 Copy of an email dated 22 November 2021, from GPAA to the Public Protector;
- 4.3.1.12 Copy of the letter dated 07 December 2021, from the Public Protector to the Complainant;
- 4.3.1.13 Copy of an email dated 18 January 2022, from the Public Protector to the GPAA;
- 4.3.1.14 Copy of an email dated 18 January 2022, from GPAA to the Public Protector;

4.3.1.15 Copy of an email dated 19 January 2022, from the Complainant to the Public Protector;

4.3.1.16 Copy of an email dated 29 March 2022, from the Complainant to the Public Protector;

#### **4.3.2 Legislation and other prescripts**

4.3.2.1 The Constitution of the Republic of South Africa, 1996;

4.3.2.2 The Public Protector Act 23 of 1994.

4.3.2.3 SARS Directives, IBIR-006 Tax Directives Interface Specification, Revision Date 2021-10-13

#### **4.3.3 Case Law**

8.4.1.1 *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others (393/2015) [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (8 October 2015);;*

8.4.1.2 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016);*

### **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 GPAA unduly delayed to issue the correct information to the SARS to obtain a tax directive in respect of Mr Casper Buyaphi Mnisi and if yes, whether the conduct of the GPAA is improper and amounts to maladministration.**

#### *Common cause issues*

5.1.1 It is common cause that, on 15 August 2019 the Complainant was issued with an incorrect tax directive resulting from the information that the GPAA had provided the SARS with when they requested the tax directive from SARS and this is contained in the letter that the Complainant wrote to the GPAA dated 03 December 2020 mentioned in paragraph 5.1.5 below.

5.1.2 It is also common cause that as a result of the incorrect tax directive, the Complainant's tax returns could not be processed by the SARS and his lump sum payment as well as his annuity could not be processed and effected until a correct tax directive was issued.

Issues in dispute

5.1.3 On 15 April 2021, the investigation team raised the matter with the GPAA and followed up with Ms Miranda Smith and others regarding the matter, but no feedback was received from her.

5.1.4 A response was finally received from the GPAA on 22 November 2021 indicating that the Complainant's tax directive had been corrected. Evidence before the Public Protector in a form of an email from the GPAA addressed to the Complainant dated 22 April 2021, confirmed that the Complainant's tax directive enquiry was finalised and a tax certificate with the new directive number was issued in favour of the Complainant.

5.1.5 In a letter dated 03 December 2020, addressed to the GEPF Regional office in Nelspruit, the Complainant indicated that GPAA issued two (2) tax directives but using one (1) directive number as follows:

<b>AMOUNT(R)</b>	<b>TAX DIRECTIVE</b>
1 736 339.33	281385 29
17 610.00	281385 29

5.1.6 The Complainant added in the same letter that, the SARS has indicated to him that the tax directive for R1 736 339.33 should be withdrawn and cancelled and that tax directive for R17 610.00 should be resubmitted as that was the correct directive.

5.1.7 As already mentioned above, the GPAA only informed the Complainant in an email dated 22 April 2021 that they had finalised his tax directive enquiry as follows:

<b>Tax directive no</b>	<b>Amount</b>	<b>Status</b>
000000028138529	R 1 736 339.33	Cancelled
000000030218699	R 17 610.86	Finalised(valid)

5.1.8 The R 1 736 339.33 was the Complainant's pension benefits that had already been processed and paid out. The R 17 610.86 is the amount that became due and payable to him after he had already left the service.

5.1.9 Although the email to the Complainant was dated 22 April 2021, it was not clear as to when exactly the correction had been effected. However, on 18 January 2022 the Public Protector team asked the GPAA via email, to indicate the dates on which the incorrect and corrected tax directives were issued, respectively.

5.1.10 In its response, the GPAA indicated that the incorrect tax directive was issued on 15 August 2019 while the corrected directive was issued on 20 May 2020. However, the Complainant was only informed by the GPAA on 22 April 2021, almost a year later that, his tax directive enquiry has been finalised. The GPAA had the opportunity to provide the Complainant with the information regarding his tax directive when he raised the matter with them in December 2020 but failed to do so. The Public Protector was only informed on 22 November 2021 that the Complainant's enquiry had been resolved.

- 5.1.11 According to Tax Tim, an online Tax Assistant, it usually takes SARS two business days to issue a tax directive, unless it must be processed manually by SARS, in which case it can take a minimum of 21 business days to be issued.

*Application of the relevant law and prescripts*

**The Constitution of the Republic of South Africa, 1996**

- 5.1.12 Section 195(1) of the Constitution, 1996 provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. It requires, *inter alia*, a high standard of professional ethics and accountable public administration which is impartial, fair and transparent.
- 5.1.13 The manner in which GPAA reacted to the Public Protector enquiries was not acceptable and contrary to the spirit of section 195(1)(a) of the Constitution read with section 181(3) of the same Constitution. A high standard of professional ethics and fairness dictates that GPAA cooperate with the Public Protector when making enquiries about the complaints received. Failure to do so by the GPAA would amount to the contravention of the principles and values espoused in section 195 of the Constitution.
- 5.1.14 GPAA had an opportunity to notify the Complainant that his tax directive enquiry was finalised in May 2020 but only notified him almost a year later.

**External Guide: Guide to the Tax Directive Functionality on E-filing, Version 3 of 25-04-2022 (External Guide)**

- 5.1.15 The purpose of a tax directive is to enable SARS to instruct an employer or Fund Administrator on how to deduct employees' tax from certain lump sums payable to a taxpayer. According to clause 3 of the External Guide Employers, including a Fund Administrator, amongst others, are required to apply for tax directives in respect of any lump sum benefit payable.

5.1.16 GPAA, as the Fund Administrator has the responsibility to apply for tax directives from SARS in order that the latter can instruct on the amount to be deducted from the Complainant's pension pay-out.

**SARS Directives, IBIR-006 Tax Directives Interface Specification, Revision Date 2021-10-13**

5.1.17 Paragraph 4.2.3.12 titled "Tax Directive Simulation and/or Actual Tax Directive Request Process Flow," explains the process flow of requesting a tax directive. According to this document, the requestor and in this case the GPAA generates the tax directive request file and sends these to the SARS system. The SARS system will then process the file and once the process is complete, a directive will be granted or rejected.

5.1.18 The following definition of a tax directive confirms that it can only be issued by SARS, *"A tax directive is simply an **official instruction from SARS to the employer or fund manager to deduct tax at a set rate, determined by SARS for an individual case, and not the general income tax rates. This directive ensures employees pay a fair rate of tax on their earnings, most importantly for larger or irregular payments.**"*<sup>3</sup>

Conclusion

5.1.19 While the GPAA may have taken the necessary steps to ensure that the Complainant's tax directive enquiry was ultimately finalised and the tax certificate issued, there was however, undue delay in advising the Complainant when he made an enquiry in December 2020 that the tax directive was corrected and/or re-issued.

5.1.20 The incorrect tax directive was issued in August 2019 and the correct directive in May 2020 but the GPAA only informed the Complainant in April 2021 that the tax directive had been corrected which led to the finalisation of

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<sup>3</sup> Google search

his tax directive enquiry. Therefore, the GPAA failed or alternatively delayed to take the necessary steps to ensure that the Complainant was informed that his tax directive had been issued.

5.1.21 If the correct tax directive was issued in May 2020 (by SARS as a result of the application by GPAA) and in December 2020, the Complainant was still making enquiries, it means that the GPAA delayed in processing his tax directive enquiry, which led to the delay in processing his benefits.

5.1.22 Had the GPAA exercised due diligence and a duty of care, they would not have submitted to SARS, the information which contain two lump sums that led to the issuing of two tax directives using one directive number. The GPAA would have ensured that the correct tax directive was issued in the first instance, by providing SARS with the correct information when they applied for the tax directive and saved the Complainant from undue delays. The GPAA's conduct has caused the delay in finalising the issuing of the correct tax directive and the finalisation of the Complainant's tax directive enquiry.

5.1.23 Based on the evidence stated above, it can be concluded that although the GPAA complied with the Complainant's request to have the corrected tax directive issued, it did not fully cooperate with the Public Protector's enquiry.

## **6. RECOMMENDATIONS**

6.1 It is recommended in terms of section 6(4)(c)(ii) of the Public Protector Act, as follows:

**The Acting Chief Executive Officer of the Government Pensions Administration Agency to:-**

6.1.1 **Within sixty (60) working days** of receipt of this report, develop adequate systemic processes and procedures to enable correct information being processed to request tax directives from the SARS, which is time bound, and

put in place appropriate preventative and detective controls and systems to address the root cause and ensure that similar incidents are avoided in future.

- 6.1.2 **Within sixty (60) working days** of receipt of this report, provide a report to the Public Protector with regard to the nature of the systems and how effective it is or it would be.
7. Should there be any enquiries or responses to this correspondence, you are at liberty to approach the Provincial Representative of the Public Protector, Mr BG Sithole who is contactable on 013 752 8543/ 061 491 0412 and alternatively, per return e-mail at Botromias@pprotect.org.



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**ADV BUSISIWE MKHWEBANE**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE:** 31/05/2022

*Assisted by Mr Botromia Sithole,*  
*Provincial Representative*  
*Mpumalanga Office*